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ATTEMPTING THE IMPOSSIBLE

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The subject that has come to be known as attempting the impossible has so many entrances and exits that it is not easy to know where to start. The Red Queen's advice to Alice — "Start at the beginning, go on till you reach the end and then stop" — was admirable, but the Queen assumed, as no doubt royals are entitled to do, that order can be imposed on all things. But with this subject, even if some of us think that we know where to start, no one knows where or when to stop. Back in 1985 Professor Glanville Williams wrote an article called "Attempting the Impossible — The Last Round?" (135 NLJ 337). He must have been joking of course. He knows as well as the rest of us that there is no way that this matter is going to be settled over 15 rounds. The old prize-fighting rules are applicable. It's bare knuckles all the way and no victory until the opponent is battered into subjection.

The problem stated

So where to start? I am going to start more or less at the beginning and I am going to go through it more or less chronologically. I will inevitably repeat things that I have said before and things that others have said as well. I do therefore apologise for boring you by repeating what others have had to say. Moreover, I am going to assume that there is at least one student here who (a) has never heard of the problem before; (b) couldn't care less about it; and (c) is here only under duress **per minas.** It is the uncommitted ear that I seek to attract for I do not think that the committed (and of course I am one of those) can be winkled out from their entrenched positions.

My beginning is the Great Case of **Lady Eldons's French Lace.** In truth there was no such case and whether the story is true or apochryphal is not known to me. The tale was discovered, or invented, by Francis Wharton (**Criminal Law**, 10th edn, at 186n, 1912), a prolific American writer on criminal law and much else besides. His account runs as follows -

> "Lady Eldon, when travelling with her husband on the Continent, bought what she supposed to be a quantity of French Lace, which she hid, concealing it from Lord Eldon, in one of the pockets of the coach. The package was brought to light by a custom officer at Dover. The lace turned out to be an English manufactured article, of little value, but of course not subject to duty. Lady Eldon had bought it at a price vastly above its value, believing it to be genuine, intending to smuggle it into England."

The question then posed by Wharton was whether Lady Eldon was guilty of an attempt to smuggle French lace. The question now is whether Lady Eldon is guilty of an attempt by virtue of the Criminal Attempts Act 1981.

It will be immediately appreciated that Lady Eldon could not then, and cannot now, be convicted of smuggling. I say it will be immediately appreciated but it is fundamentally important to appreciate that. She no doubt thought that she had

committed the offence, she no doubt intended to commit the offence, but she did not commit the offence. If a defendant is charged in some such terms as that he imported **dutiable goods** intending to avoid paying the relevant duty, the prosecutor cannot prove his case by proving that the defendant imported **non-dutiable** goods believing them to be dutiable. Eventhough i am addressing myself to the student who is ignorant of the problem of impossibility, i have to assume a modicum of knowledge of criminal law and i am going to assume that he knows as well as I do that if the actus reus of a crime is expressed to be A + B + C, the prosecutor fails to prove his case if he proves A + B + D, and however close D may be to C. On a charge of murder, for example, the prosecutor must prove that the defendant killed a human being under the Queen's Peace within a year and a day. He cannot substantiate that charge by proving that the defendant killed an oran utang though he is really quite a close relative of ours, nor by showing that the death took place one year, one day, and one second after the act causing death. So far as actus reus is concerned there is no question of "near enough". The prosecutor must precisely prove each element in the crime.

This, as I think, is what the principle of legality requires. We do not make criminals of people for their evil intentions. Nor do we make criminals of them for their evil acts. We make criminals of them only if the evil acts they, with the relevant mens rea, bring about are defined by common law or statute to constitute the elements of a crime.

So in Lady Eldon's case no issue arose then as to whether she could, and no issue arises now as to whether she can, be convicted of smuggling French lace. She could not and she cannot. The issue then becomes whether she could, or can, be convicted of attempting to smuggle French lace.

Pausing there, I may have misstated the issue in a significant particular. Statutes of this sort (the relevant Act is now the Customs & Excise Management Act 1979) do not in terms make it an offence to import, with intent to evade duty, French lace or Japanese cameras or Jamaican rum. The offence is, with intent to avoid the duty, to import a dutiable article and what these articles are will be found in various other statutes, regulations and orders. Lady Eldon would not be charged with imparting French lace but would be charged with importing a dutiable article (to wit, French lace) with intent to avoid the duty. This may strike you as a distinction without a difference but i will want to make something of it.

Wharton mentioned Lady Eldon's case only in a footnote and he shortly commented, "Here was an attempt to smuggle, though the object was not one susceptible of being smuggled." This must go down as the most pregnant footnote in the history of the criminal law. By it he touched off an argument which seems to strike on a raw nerve. No footnote can have provoked the wealth of comment that this one has done. To the extent that Professor Glanville Williams has observed that, "The whole doctrine of impossibility is a misdirection of effort, and should be abolished as it has been in some other jurisdictions ...." But since saying that, he has not shrunk from writing at least two further articles. i have written three, this is the fourth and neither of us shows any obvious signs of exhaustion. Neither of us seems deterred by the fact that the crowd has gone home, or taken to watching snooker or, in sheer desperation, is now supporting Tranmere Rovers. Glanville Williams and I are locked in the ultimate combat. It is victory or Death.

But, as i said, my aim is to catch the ear of the uncommited listener. To set the scene it may be helpful to instance some of the cases that have actually arisen or have been

supposed by commentators -

(1) A intends to burgle certain premises but the police have been tipped off and the premises are surrounded. A is arrested as he is about to enter the premises.

(2) B, equipped with a bent hairpin, tries to secure entry to the Bank of England. He tires for several minutes to open the door but, realising it is hopeless, he gives up.

(3) C, intending to rape X, makes to assault her. X is the all-England karate champion and has a black belt for judo. She makes mincemeat of C.

(4) D tries to steal from another's pocket but the pocket is empty.

(5) E, intending to kill his wife, stabs her as, to his belief, she lies in bed. The wife, apprised of E's intention, had prudently gone to her mother's and had left a bolster beneath the bedclothes.

(6) F intends to set fire to his employer's factory. When he arrives at the factory he discovers that a fire has been accidently started which has burned it to the ground.

(7) G purchases goods at an abnormally low price and in other circumstances that convince him that the goods are stolen. G is mistaken and the goods are not stolen.

(8) H, paid £1000 by Y to take a suitcase through the customs, is convinced from the circumstances that the suitcase contains prohibited drugs. He is mistaken; the suitcase contains only Y's laundry.

(9) J has intercourse with Z believing her to be 15. Z is in fact 51 but looks uncommonly young for her age.

Superficially all these cases look the same in the sense that all the defendents have not achieved quite what they had in mind. And in another sense they are all alike in that all nine defendants set out with the intention of committing a crime. All accordingly, have mens rea. There may thus seem a case for treating them all the same. Each with mens rea has embarked on a course of conduct which each thought would result in the commission of a crime. Why on earth treat them differently?

But it is at this point that the lawyers get at the problem and there are few things worse for a self-respecting problem than to have the lawyers gnaw at it. Except, perhaps, to have philosophers gnaw at it. Lawyers are great worriers and, always bent on making a fast buck, they have got to think of something.

The nine examples I have used may **look** the same but they are capable of being analysed in different ways. There is, for instance, a possible distinction between cases (1) - (3) and cases (4) - (6). In cases (1) - (3) the defendant might just be successful. A might slip through the police cordon, B might just pick the lock with the hairpin, C

might by some fluke overpower X. In cases (4) - (6), however, there is no way that the defendant will ever achieve success. D can stick his hand into that pocket from now till doomsday and he will still get nothing from it. E may reduce the bolster to shreds but it will not harm a hair of his wife's head. So far as F is concerned there is no combustible material left.

We might then say that cases (1) - (3) are cases of relative impossibility while cases (4) - (6) are cases of absolute impossibility. So can an argument be hung on this? That may strike some of you as a bit daft but hang on a minute. Don't go to sleep. There may be something in this.

So what about cases (7) - (9)? Are they different again? Well, they might be said to differ in one respect. It is this. No doubt the defendants in cases (1) - (6) would say that they had all failed. A has failed to burgle the premises, C has failed to have intercourse without consent, and so on. But is this true of G, H and J? Would G's wife on hearing that G had acquired a video recorder for less than £100 which was worth more than £300 say, "You stupid old cow. Can I never rely on you to get things right?" Would H say "What a pity the suitcase did not contain heroin. I would much rather have earned my £1,000 for doing something illegal?" Such cases as these are sometimes called cases of legal impossibility.

J's case might be slightly different. His initial reaction would surely be to say that he had enjoyed himself but what would his reaction be on learning that the "girl" was not 15 but 51? He might be as odd as a £3 note. Some people are, you know. He derives his pleasure only from seducing under-age girls and now he learns that he has been conned. He might say that he would never have intercourse with Z again, however fetching she looks in a gym-slip while G will buy another non-stolen recorder tomorrow at a knock down price, and while H will willingly carry suitcases containing laundry through the customs for the rest of his life provided he is paid £1,000 a throw.

Apropos of the illustrations I have given, I have thus far tried to show that certain distinctions can be drawn. But when you try to think about it pretty well any case can be distinguished from another. One murder case may be distinguished from another on the grounds that the defendant in one case had black hair while in the other the defendant had brown. You do not have to be a lawyer to appreciate that no distinction ought to be drawn between black-haired and brown-haired killers. What we are looking for is legally relevant distinctions which brings me to consider the position at common law.

The position at common law

One of the troubles about saying what is (or, in this case, was) the position at common law is that one never **knows** what is, or was, the position at common law. All one can say is that the courts said this at a given date but that they might say (or might have said) something else at a later date. The law is a moving picture and in saying what we think it is (as opposed to what we think it ought to be) we merely take a snapshot, a still from the moving film.

So all we can say about the position at common law is that it was said by the courts to be such and such. That it was said by the House of Lords (in **Haughton v Smith** (1975) AC 474) to be such and such might thought to be definitive except for the fact that the House may now overrule its own decisions and it is at least possible that in the fullness

of time the House of Lords would have said that it was wrong. After all, **Haughton v Smith** was not without its critics so let me remind you what it was about.

A considerable quantity of corned beef had been stolen in Liverpool. Some days later the suspicions of the police were aroused by a hopelessly overloaded van travelling south, its axles grinding against the carriageway, spewing out tins of corned beef in every direction. They stopped the van, ascertained that it did indeed carry the stolen corned beef which was being taken to a well known stolen corned beef handler in the deep south. They decided to set a trap for the handler. They removed a ton-and-a-half of corned beef from the van to make room for some burly police officers and then the van was allowed to continue on its way to catch the handler in flagrante delicto. Unfortunately the prosecutor conceded (their Lordships thought he should not have done so) that the corned beef no longer constituted stolen goods because they had been restored to lawful custody and it was on the basis that the goods were no longer stolen that the case was considered.

Evidently the handler, one Roger Smith, could not be convicted of handling. That offence requires a handling of **stolen** goods and once it appears that the goods are not stolen that is an end to the matter. The relevant law (s.22 of the Theft Act 1967) makes it an offence to handle stolen goods which means stolen at the time of the handling. The actus reus cannot be proved by proving that the goods had the character of stolen goods only yesterday, or an hour or two ago, or only seconds past. So Roger Smith was charged with attempting to handle stolen goods — after all, he had tried his best, hadn't he? He was convicted but his conviction was unanimously quashed by the Court of Appeal and its decision was unanimously affirmed by the House of Lords.

To me the key possage (and you can of course accuse me of simply selecting the passage with which I happen to agree) appears in Lord Hailsham's speech when he said this —

> "In my view, it is plain that, in order to constitute the offence of handling, the goods specified in the particulars of the offence must not only believed to be stolen, but actually continue to be stolen at the moment of handling. Once this is accepted as the true construction of the the section, I do not think that it is possible to convert a completed act of handling, which is not itself criminal because it was not the handling of stolen goods, into a criminal offence by the simple device of charging an attempt to handle stolen goods on the ground that at the time of the handling the accused falsely believed them still to be stolen. In my opinion, this would be for the courts to manufacture a new criminal offence not authorised by the legislature."

Having said that I think this analysis hit the nail firmly on the head, I then find myself saying that Lord Hailsham's analysis of another aspect of the law of attempt missed the nail by such a clear margin that his thumb, even a dozen years on from the decision in **Haughton v Smith**, ought still to be heavily bandaged. He, and in this he was supported by their lordships generally, went on to say that while a charge of attempt could be supported in cases of relative impossibility (cases (1) - (3)), it could not be supported in cases of absolute impossibility (cases (4) - (6)). This, quite frankly, was to enter banana land. It meant that the man who placed his hand in another's pocket intending to deprive him of his property was not guilty of attempted theft though it is plain as a pikestaff that dishonestly appropriating other people's

property is a crime; and that, being a crime, it may be attempted. Moreover any distinction between relative and absolute impossibility would have even the philosopher gasping for breath. Are we to say that when the defendent fires at a tree stump believing it to be his enemy that he is guilty of an attempt if his enemy is only a few yards away looking for mushrooms but not if his enemy is in Scotland hunting for deer. Is the line to be drawn when his enemy is 10 yards away, 100 or 1000?

The Law Commission's proposals

It was clear that something would have to be done. The law relating to attempts was already on the agenda of the Law Commission (a **Working Paper** was published by it in 1973, **Inchoate Offences, Conspiracy, Attempt and Incitement**, W.P. No. 50) and its Report, together with a draft Criminal Attempts Bill was published in 1980 (**Attempt, & Impossibility in relation to Attempt, Conspiracy and Incitement**, Law Com No. 102).

The law reformer is concerned not so much with what the law **is** but with what it **ought** to be. Assuming that Parliament will accept what he says then the sky's the limit. He might, for instance, abolish the law of attempts altogether or enlarge it to suit his purpose. What the Law Commission did in relation to the issue of impossibility was to go for the broader view. It would eliminate both limbs of **Haughton v Smith** so that in each of the cases and examples I have so far mentioned, whether categorised as instances of relative impossibility, absolute impossibility or legal impossibility, all would result in conviction for attempt. This was recommended not for the sake of simplicity but from the Law Commission's conviction that it did not make sense to distinguish between the cases such as D's (the picker of the empty pocket) and cases such as G's (the handler of the non-stolen goods). Both have mens rea, both have done acts which are more than preparatory to the realisation of their intent, so on what basis could we distinguish between them?

The Government was at first not happy with this proposal. I say "the Government" but it will be understood that this is a reference to that select band in the Government who had the faintest idea of what the problem was about. The Home Secretary had his misgivings. He said this (HC Col 997, cols 25, 26):

> "But I have found myself coming back each time to the following considerations. I am not convinced that it is right to use the laws of attempt to extend criminal offences so as to cover behaviour which it is far from certain that Parliament intended to be covered when those offences were drawn up. For example, the offence of handling stolen goods requires that there should be stolen goods. Parliament has not said that there would be an offence of handling if o person mistakenly believed that they were stolen goods."

You might think that in this arcane debate few Members of Parliament had the faintest idea what was going on but at least one, it was Mr Roy Hattersley speaking for the Opposition, thought (HC Vol 997, col 28) that it was "obvious" that there could be no conviction in cases such as those as the would-be handler of non-stolen goods.

My colleague, Professor J C Smith, was, I think, like minded at that time. He would have preferred to retain the distinction between so-called factual and legal impossibility but he was converted to the Law Commission's view by what he considered to be the impossibility of drafting a statute which would draw a distinction

between the two. Mind, he was not the only one. Certain academics, having got the wind of the Government's intentions to alter the Law Commission's Bill so as to restore the legal/factual distinction, wrote a letter to **The Times** saying that it would, in effect, be disastrous to alter the Law Commission's proposals. I was one of the signatories to that letter.

There has never been such a flurry of activity in Whitehall as there was that morning when Ministers read the correspondence columns of **The Times**. The wonder of it is that the Government did not fall. Happily the Opposition did not press for an emergency debate to force home their advantage. The Government was saved but the price it had to pay was to kow-tow to the Law Commission's proposals.

As is the habit with Government, this was done grudgingly and the Law Commission's draft was re-cast in certain particulars. In the view of some this was to cause unwanted trouble; in my view it did not make a scrap of difference.

The position under the Criminal Attempts Act

So there we were. Some of us may have felt a little regretful that we had been deprived of a problem with which we teased generations of law students but this was a small price to pay for a general simplification of the law.

I doubt whether I would ever have given the matter another thought except that some months later I found myself teaching in the US of A where of course many states still retain the common laws of attempt. The discussion, as I was delighted to note, confused American students as much as it confused English and as a hands-across-the-ocean gesture of goodwill I thought to close it by telling them how the Criminal Attempts Act 1981 had forever rid their English counterparts of grappling with the problem. In the result I did not because I concluded that it had not.

I have written elsewhere to say why not and what I wish to do here is to put my argument in summary form and add a gloss to it.

It is fundamental to the argument that cases of the sort I have given in examples (7)-(9) are not problems of impossibility in attempt; they are problems concerning the principle of legality.

The principle of legality, as I have indicated, ordains that if a man is charged with the commission of a crime involving proof of elements A, B and C he cannot be convicted of that crime by proving A, B and D though D is only a whisker away from C. This is accepted on all hands and hence it is accepted that in cases (7)-(9) G cannot be convicted of the completed offence of handling, nor H of the completed offence of importing prohibited drugs, nor J of the completed offence of intercourse with a girl under 16.

It is said, however, that the Criminal Attempts Act enables each to be convicted of an attempt. But how? What the Act does is to make it clear in what circumstances an attempt is constituted; it does not enlarge the range of offences which may be attempted. It was and remains an offence to handle stolen goods, to import prohibited drugs, to have intercourse with a girl under 16 **and** all three may be attempted **and** impossibility is not a defence to any of them. But it was not before the Act came into force an offence to handle non-stolen goods believed to be stolen, to

import non-prohibited goods believed to be prohibited, to have intercourse with a girl over 16 believing her to be under 16, and for the life of me I cannot see how the Act has altered the **substantive** law to make offences of such conduct. If the Act has had this effect then I would accept that such offences may be attempted and that impossibility would be no defence.

Let me put it another way. In the passage cited above from **Haughton v Smith** Lord Hailsham says, and he must surely be right, that there is (he was speaking in 1975 but the observation must be equally valid in 1986) no offence of handling non-stolen goods believing them to be stolen. Nor, he says, can such an offence be manufactured by charging an attempt. If the position has changed it can only be because there is some manufacturing agency hidden in the interstices of the Criminal Attempts Act which has deleted from s. 22 of the Theft Act 1967 the requirement for proof that the goods were stolen. Will someone tell me where it is?

Developments since the Criminal Attempts Act

Since the Act was passed there have been three sightings of the so-called legal impossibility bird. Since sightings of this bird are as rare as sightings of the Himalayan yeti, to get three within a twelvemonth is most unusual. I put it down to a theory (which I will develop in another lecture) that cases, like corporation 'buses, come in convoys. The first was **Anderton v Ryan** ((1985) 1 All ER 355) where the defendant brought a video-recorder at a knock-down price and in other circumstances which convinced her that it was stolen. The prosecution, however, was unable to prove that it was stolen. The second was **Shivpuri** ((1985) 1 All ER 143) in which the defendant, for a payment of £1000, brought a package which he thought contained heroin through customs. The package turned out to contain dried vegatable matter. The third was **Tulloch** ((1986) Crim LR 50) where the defendant sold what he thought was a 'smiley-face' (i.e. a slip of paper impregnated with LSD) to a customer (unluckily for him his customer was a police officer) but the paper was not so impregnated.

In the first of these cases the House of Lords held that Mrs Ryan could not be convicted of an attempt to handle stolen goods. Of the two speeches in support of this result, one, that of Lord Roskill, proceeds on the basis that the drafting of the Criminal Attempts Act was defective and had failed to achieve its acknowledged purpose of making such conduct criminal. Lord Roskill was bold enough to essay a draft which would have made such conduct criminal. In my view he failed as lamentably in that as did the Criminal Attempts Act and the Law Commission's draft.

The other, that of Lord Bridge, was much nearer the mark. While I would have liked to see in it overt reference to the principle of legality there is at least implicit recognition of it. He saw that conviction Mrs Ryan involved saying that a person might commit a crime where the mind alone was guilty where that act was innocent. For Parliament to do this would require "the clearest expressed language".

Academically, the decision was not well received. Professor J C Smith began his commentary on the case ((1985) Crim LR 503) by saying -

> "The House of Lords has done it again. Confusion and uncertainty have been substituted for the orderly and simple solution of this long-standing problem intended by Parliament."

And in another part of the forest Professor Glanville Williams weighed in ((1985) 135 NLJ 502) with an article entitled: "The Lords Achieve the Logically Impossible". I do not know how far their lordships read and are influenced by academic opinion but, if they do, they could be left in no doubt that the clear balance of academic opinion was that **Anderton v Ryan** was a disaster second only to the sinking of the **Titanic.**

Within a matter of months the problem was once more before a differently composed House of Lords in **Shivpuri.** While it might be thought **Shivpuri** would inexorably follow the same track as **Anderton v Ryan**, it soon became clear even to the casual observer trying to complete **The Times** crossword that **Anderton v Ryan** was up for grabs.

Is Shivpuri distinguishable from Anderton v Ryan?

At an early stage in the argument in **Shivpuri**, Lord Hailsham began to adumbate a distinction between **Shivpuri** and **Anderton v Ryan**. In this he had been anticipated by Professor Smith but if the Lord Chancellor had been influenced by Professor Smith's thinking, he gave not the slightest hint of it. The argument runs that Mrs Ryan's achievement of her purpose or objective, which was to get a video-recorder at a knock-down price, was not dependent on the recorder being stolen. She was motivated only by the consideration that it was cheap, not by the consideration that it was stolen. The subsequently acquired knowledge that it was not stolen would not cause her any distress. She had got what she wanted in acquiring a cheap recorder.

Mr Shivpuri, on the other hand, had failed to get what he wanted because his purpose was to import heroin and in this he entirely failed. **Tulloch**, on this view, is even clearer. Mr Tulloch wanted to supply the customer with a 'smiley face', not a plain slip of paper. He, it may be said, completely failed in this purpose. His customer, far from going on the expected trip, was left ruminating hopelessly on a strip of cardboard.

The argument is, in my respectful opinion, bogus. It depends on how purpose is defined. To say that Mrs Ryan's purpose could be achieved by buying a non-stolen recorder at a knock-down price is about as sensible as saying that Fagin's purpose could be achieved by having the Artful Dodger, whom Fagin has carefully trained to steal, bring back non-stolen goods. No doubt Fagin does not care whether the goods the Dodger brings back are stolen or not so long as he gets them at no cost. But are we really to say that it is not Fagin's purpose to handle stolen goods? He gets the goods for free only because they are stolen.

And it is clear that Mr Shivpuri failed in his purpose? Might not his career be defined as getting £1,000 for bringing a package through customs? So long as he gets his £1,000, it must be a matter of indifference to him what the package contains and he would no doubt be delighted to learn that it contains nothing more sinister than dried vegetable matter.

According to the purpose argument (see the commentary at (1986) Crim LR 52) Mr Tulloch could not, having bought what he thought were 'smiley-faces' from his supplier, be committed of attempting to possess a controlled drug since he had failed in his purpose. The paper, not being impregnated with LSD, was useless to him. But he can be convicted of attempting to supply a controlled drug when he in turn sells it because he now suceeds in his purpose, that purpose being to get £1.50 from his customers in return for the supposed 'smiley-face'! Can you imagine him telling an irate customer, "Well, it was never my purpose to sell you a 'smiley-face! I was only

interested in the money." He'd get his face bashed in for saying that, and that's for sure.

Mistake of law and mistake of fact

When Mrs Ryan bought the recorder evidently she thought it was stolen and she admitted this to the police. In mistakenly thinking that the recorder was stolen, had she made a mistake of law or of fact? And does it matter?

In an earlier article I referred to a case called **Millward** ((1985) 1 All ER 859) and you may be relieved to know that it has nothing whatever to do with attempts. The case was concerned with perjury which requires, inter alia, proof that the defendant made a statement "material" in the proceedings. The Court of Appeal held that materiality was to be decided as a question of law by the judge. I have no quarrel with that and I do not suppose anyone else has. It follows that the defendant may properly be convicted of perjury though he thinks the statement immaterial. Such a defendant has made a mistake at law and a mistake of law is generally no defence.

But what if the problem is inverted? Suppose that the defendant believes the statement to be material which is ruled to be immaterial. Clear as day of course that the defendant cannot be convicted of perjury but may he be convicted of attempt?

Obviously not in my view and in this I can claim the support of Professor Smith. In his commentary on **Anderton v Ryan** ((1985) Crim LR 505) he said this -

> "If a person's mistake is one of criminal law and no more, then there can be no question of his being convicted of an attempt. For example, D knows that E has taken P's car without his consent intending to return it at the end of the day. D, believing that the car is, because of these facts 'stolen', receives it from E. He is not guilty of attempting to handle stolen goods. This is a case where not only are the **facts** such that the commission of the offence is impossible but one where the **law** is such that it is impossible.

This, I think, is an important concession. It means that the defendant cannot be convicted of attempted perjury where he mistakenly thinks that the statement is material when in law it is not; nor of attempting to drive a cycle while drunk when he mistakenly thinks the vehicle to be a cycle when in law it is a mechanically propelled vehicle; nor of attempting to carry weapons in a public place when he mistakenly believes that the place is public when in law it is not.

Professor Williams also appears to concede this ((1985) 135 NJL 505). He said of a hypothetical illustration of mine (which was on all fours with the one given by Professor Smith) that "obviously" the defendant ought not to be guilty of attempted handling.

But Professor Smith does not regard (and nor would Professor Williams) the mistakes made by Messrs. Ryan, Shivpuri and Tulloch as mistakes of law. All of them simply made mistakes of fact. I take issue with this. Professor Smith's receiver of the car is not guilty of attempt because, knowing **all** the facts relating to the car he has drawn the wrong **legal** conclusion that it was a stolen car. Mrs Ryan's apparently differs in that she did not know all the facts relating to the video. She did not know how her supplier

came by it. All she knew was that it was offered her by a man she did not know, who declined to give his name and at an abnormally low price. From these facts she drew the conclusion that it was stolen. Professor Smith sees this as a mistake of fact but it seems to me to be one of law because from certain facts she has attached, however mistakenly, a legal label to the goods. Whether goods are or are not stolen (or dutiable or prohibitied) cannot be determined as a matter of fact but can only be attached as a legal conclusion drawn from such facts as are available.

Take a very simple case. I say, "This is my watch." This might look like a statement of fact but is it? Suppose you ask me what leads me to say that I would answer that I bought it in good faith at the going market price from a reputable dealer so the transaction gave every sign of conferring a good title on me. What I am now doing is to infer from certain facts that ownership (a legal not a factual concept if ever there was one) was conferred on me. Of course things may not have been as I thought. The watch may have been part of a stolen consignment which were being fenced by the dealer but this does not alter the matter. From the facts as they appeared to me I have drawn a legal conclusion about its ownership; that **in law** the watch belongs to me and not to you.

Conversely if from the suspicious circumstances of the purchase I draw the conclusion that the goods are stolen I similarly make a statement about ownership; I may not know by whom it is owned but it is not owned by me. Why? Well, because it has the legal character of being a stolen watch and (subject to exceptions not relevant here) I cannot acquire a title to stolen goods.

Put it yet another way. By factual tests it can be determined whether an article is a typewriter or a wordprocessor, whether lace is English or French, whether a substance is heroin or dried vegetble matter. But no **factual** test will tell us whether the typewriter is stolen, whether lace is dutiable, or whether the substance is prohibited

Conclusions

The question remains whether the Ryans, Shivpuris and Tullochs of this world should be convicted of a crime and, if so, how is this to be done.

In practice the problem is most likely to arise (and even here only infrequently) in cases where the defendant deals in what he mistakenly believes to be stolen goods or mistakenly believes to be prohibited drugs. There are of course many other cases where in theory it might arise (e.g. the man who has intercourse with a girl believing her to be under age, the man who sets fire to his own house believing it to be another's) but they occur so rarely that if is doubtful whether provision needs to be made for them.

It is the simplest thing in the world to provide for the would-be handler of stolen goods or the would-be dealer in prohibited drugs. We simply alter the relevant crimes to make it an offence to handle goods (whether stolen or not) knowing or believing them to be stolen, or to deal in goods (whether prohibited or not) known or believed to be prohibited drugs. This seems to me a very tidy solution since the would-be handler or dealer could be convicted of the full offence without the attendant difficulties of regarding his **completed** conduct as an attempt. It would then of course be possible to attempt to handle non-stolen goods and, equally of course, impossibility would not be a defence.

But to approach this problem from the attempts end is fraught with difficulty. Neither the Law Commission's draft nor the Criminal Attempts Act has, in my view, solved the problem nor is the draft Criminal Code Bill any more successful. I own that cl. 54(1) of the Bill has two merits. One is that it applies, as the present law does not, a uniform rule relating to impossibility applicable to all the inchoate crimes (viz incitement, conspiracy and attempt). The other is that the provision has the merits of brevity and simplicity -

> "A person may be guilty of incitement, conspiracy or attempt to commit an offence though the commission of the offence is impossible, if it would be possible in the circumstances which he believes or hopes exist or will exist at the relevant time."

The provision deals with the problem of impossibility with beautiful economy but does not affect the problem of legality. The reference to "offence" in the sub-section is, it would clearly appear, any offence triable in England and Wales. **Caedit questio.** If handling non-stolen goods is not an offence (and it is not) how does it become one by the device of charging an attempt?

Now here's a funny thing. In relation to the law of arrest, self-defence and using force in the prevention of crime, the codifiers, with some reluctance but with a view to achieving consistency with the law as it had already been declared (Criminal Law Act 1967, s. 3, re-enacted by Police & Criminal Evidence Act 1984, s. 24), recommend the abolition of the "Dadson principle". The effect is that a defendant (whether a police officer or citizen) commits no offence where though at the time of its use he did not know of circumstances which might justify it, it subsequently turns out that, unknown to him, there did exist circumstances justifying the force. The following dramatic example is given (Law Com No. 143, Sched 1, 47(i)) -

> "D shoots P who is about to attack him with a knife. If this action is necessary and reasonable to prevent P killing or causing serious injury to D, D commits no offence even though he is unaware that P is armed with a knife, or is about to attack."

Personally, I think it is a regrettable decision to confer immunity on D in this situation, but, no matter, I must accept that this is what the Code will do. D cannot be convicted of murder which was most assuredly what he thought he was committing for he callously killed P without a shred of justification being present **to his mind.** D must be the luckiest man in legal history but before he congratulates himself on his luck, let me suggest that on the "intended" effect of cl. 54(1) (or on the "intended" effect of the Criminal Attempts Act) he may be convicted of an attempt.

D will say this is crazy (and so would I of course). He will say: "The law has just been changed to say I do not commit murder in this situation, so how do you get round that by charging an attempt?" The answer, it could be said, is that, if would have been possible for him to commit murder if the circumstances had been as he believed them to be because in that event he would not have had a shred of justification for killing P. In other words, what we gave you (D) with the left hand (cl. 47) we are taking away with the right (cl. 54)

If D's case is to be distinguished from **Ryan, Shivpuri, Tulloch,** this can be done only on the grounds that there is a distinction between matters which go to the definition of a **particular** offence (e.g. the killing of a human being etc in murder; the handling of

stolen goods in handling) and matters of **general** defence or exculpation. A distinction between elements whose **presence** must be proved and elements whose **absence** must be proved. If so, neither the Criminal Attempts Act nor cl. 54 of the draft Code even remotely hints of such a distinction. There is no distinction. If D1 kills a man who is not under the Queen's Peace he is not guilty of murder; and D2 is not guilty of murder where he kills in self-defence. If D2 is not to be guilty of an attempt where he is mistakenly believes that there is no circumstances constituting self-defence, must it not follow that D1 is not guilty of attempt where he mistakenly believes his victim to be under the Queen's Peace.

It may be that the view is taken that, apropos of illustration 47(i), D would be guilty of an attempt. Evidently D has mens rea and since he has in fact killed P no one can seriously argue that his acts are not more than merely preparatory. But if D is guilty of an attempted murder, why go to all the bother of making it **the law** that he is not guilty of murder.

In my view there is no problem. Once cl. 48 ordains that D is not guilty of murder, it follows, as the night follows the day, that in pursuing a course of conduct that cannot result in liability for murder, he cannot (**pace** cl. 54) be guilty of attempted murder.

To provide for the problem in a general way would, as I have indicated, be horrendously difficult. I am certainly not going to attempt any draft. What I do think is that if it be sought to bring such cases as cases (7)-(9) within the reach of the criminal law, then the best line of approach lies in making, **not** attempts, but **completed** offences of the conduct in question. This seems to me the logical approach because if everything had been as supposed in **Ryan, Shivpuri** and **Tulloch** so that the defendants would respectively have been guilty of handling stolen goods, dealing in a prohibited substance, and supplying a controlled drug.

Why has this logical approach not been taken? The answer to me is plain. It is because there is an instintive realisation that this cannot be done with a facts-as-believed-to-be approach. On this approach **new** offences would inevitably have to be created so what has to be altered is the **law**, not the **facts**. If that is so, how is this obstacle to be circumvented by the simple device of charging an attempt? The effect of the Criminal Attempts Act, if others are to be believed, is that certain conduct may be pursued to completion without amounting to a crime under the law but becomes criminal under, **and only under**, the guise of an attempt. To punish such conduct (and I own that such conduct may be regarded as immoral or socially dangerous) is to punish a man for his thoughts alone without reference to the cardinal principle that no man is to be convicted of crime unless he brings about, or has taken a step more than merely preparatory to bringing about, what is, or would be, the actus reus of a common law or statutory offence. This has always been the law of England. I believe it still is and I hope it will continue to be so.

A postscript. If I read the Indian signs correctly the House of Lords in **Shivpuri** will by a majority either overrule or distinguish **Anderton v Ryan.** Either would be bad but of the two I would express a preference for the former even though the latter has for me the attraction that I can cantinue to set mind-bending problems on attempts in the criminal law examination paper. If they do overrule **Ryan** I have no doubt but that the academic bunting will be brought forth from the broom cupboards, all-night parties will be held in barristers' chambers, and the Law Society's Gazette will be distributed free at street corners. I shall quietly drown my sorrows in drink. And then I shall return to the attack.

*** This is the text of the annual Trent Law Journal lecture delivered on 12 March 1986.**

The House of Lords gave judgement in their **Shivpuri** case mentioned in the text on 15 May 1986. The case of **Anderton v Ryan** was overruled.

RIGHTS, RESPONSIBILITIES AND RACE RELATIONS

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INTRODUCTION

Two recent cases célèbres, **Honeyford v Bradford Metropolitan Council(1)** and **Wheeler v Leicester City Council(2)**, have demonstrated the reluctance of English judges to concern themselves either with fundamental issues of constitutional rights and duties,(**3**), or with the often vital factual context within which their decisions will have effect.(**4**). This article will consider briefly the immediate, perhaps rather unsurprising, legal effect of these decisions and then go on to consider the wider issues which the judges balked at.

THE HONEYFORD CASE

THE FACTS

Mr Ray Honeyford was headmaster of Drummond Middle School, Bradford. The Asian community in Bradford is approximately 50,000, over 10% of the city's population, and one third of the school population. The vast majority come from Kashmir in Pakistan and are Muslim by religion.(**5**). After the disturbances of 1981(**6**) (which had not touched Bradford directly) the City Council adopted a race relations policy with all party support. In particular, the Director of Eduction laid down guidelines setting out the Council's multi-racial education objectives, which included the statement that headteachers should lead by positive example and not express racialist views or appear to endorse such views.

In 1984 and 1985 Mr Honeyford wrote a series of articles attacking in strong terms the "current educational orthodoxies connected with race".(**7**). These appeared not only in the usually relatively obscure pages of the Salisbury Review, a journal of right wing political thought, but also in the Times Educational Supplement and in the Bradford Telegraph and Argus.(**8**). However, the article which received the most publicity was one of his Salisbury Review articles, "Education and Race - an Alternative View". In this he strongly attacked what he described as the "race relations lobby" which he claimed was extremely powerful in the state education service. He deplored the use of the term "racism", which he claimed confused the allegedly vital distinction between prejudice (i.e. in thought) and discrimination (i.e. in action). He lambasted other supposed distortions, such as the use of the term "black" to include all "non-white" people, and the House of Lords' ruling that Sikhs comprise an ethnic group(**9**). He went on to criticise the increasing use of "mother-tongue teaching" in schools, whereby some instruction at least, is conducted in the child's home language, in the belief that this is essential if the child is to develop a proper understanding of those concepts vital to all later learning including the learning of English(**10**). This, he claimed, merely confuses the child.

Honeyford went on to "give the facts" as he saw them. He criticised the practise of Asian families sending children back to the sub-continent during term time as a privilege denied to other groups. The real roots of black educational failure were to be found in West Indian Family structure and "basically political" radical teachers.

Meanwhile, he claimed white children comprised an "ethnic minority" in a growing number of inner-city schools but were not shown any corresponding concern for their educational "disadvantage".

These views were bound to cause controversy. Few local educational authorities have in fact implemented multi-racial education policies that go far beyond the exposition of some very simple facts about "other" cultures, such as religion, diet etc.(**11**). While Honeyford is certainly correct to point out that the term "racism" is both vague and emotive its use in at least more academic literature is increasingly confined to the combination of prejudiced attitudes and the power, wittingly or unwittingly, to treat another detrimentally on that account(**12**). Honeyford's view of the **Mandla** case, besides showing a belief in the authority of dictionaries which vastly belittles the problems of statutory interpretation, ignores the guidelines actually laid down by the majority of the Lords as to the meaning of "ethnic group" and the fact that the majority did not support the criticisms of the Commission for Racial Equality in the Court of Appeal. Similarly, while a reasoned, if not necessarily convincing, case has been made recently for not providing "mother-tongue teaching" in state schools at least, by the Swann Report, Honeyford greatly oversimplifies a topic on which not enough empirical work has yet been done(**13**).

Likewise, Honeyford's complaint of poor attendance by Asian children conflicts with the widely held stereotype of the hard-working Asian child strongly pressed by his family to succeed(**14**) and, of course, overlooks the common practice of the majority community taking children on holiday during term time. As for identifying the "roots of black educational failure", while Swann confirms that West Indian childrens' examination results tend to be poorer than Asian childrens', the only definite statement in the report as to the causes of these differences is that there are no genetically based differences in intelligence that would explain the results. While some members of the black communities have blamed the prejudiced stereotyping of some teachers, Swann thought that the poorer living conditions of the black communities on average(**15**) was just as likely to be involved, though they stressed there was no single cause. Finally, the belief that white children's education suffers when they are in the minority overlooks the compensating effects of generally better material conditions and is contradicted by a recent study(**16**).

Honeyford's article was not only of poor intellectual quality. It was also offensive to many in the black communities. He refers to West Indian music as "ear-splitting cacophany" and to the "hysterical political temperament of the Indian sub-continent". He suggests that educational ambition is absent in the majority of West Indian homes (despite research evidence to the opposite)(**17**) and that a "disproportionate number" of such homes are fatherless. As a result of the reaction by parents and local organisations, a Parents' Action Committee was formed. Demonstrations, a petition and a school strike by 70% of the children followed(**18**). The Director of Education's office responded with letters warning teachers that if what they said affected parental confidence they should reflect on the wisdom of such a stance(**19**), followed by an inspection of Mr Honeyford's running of the school and finally with disciplinary proceedings against Mr Honeyford. On hearing the Council's complaint, however, the school governors recommended he be reinstated(**20**). Mr Honeyford then, supported by the National Union of Head Teachers, applied for declarations that the disciplinary proceedings had been exhausted by the governors' recommendation and an injunction against the Council reviewing the "decision" of the governors.

THE JUDGMENT

In the High Court, Simon Brown J. found for Mr Honeyford. He held that the Council could not review the governors' "decision" since the disciplinary code envisaged two safeguards for a head teacher, firstly that he could not be dismissed unless both the governors and assistant director of education recommended dismissal and, secondly, that to construe the recommendation of the governors as a "decision" which the assistant director would then have to review under the school's Articles of Government prior to advising the Council on their action would be to make the assistant director a judge in his own cause(**21**).

However, in the Court of Appeal the appeals of the assistant director and the Council were allowed. Both Dillon and Mustill LJJ. went out of their way to stress that they were not in any way concerned with the merits or otherwise of the complaints of Mr Honeyford. All their Lordships stressed that Simon Brown J. had paid too little regard to the fact that Mr Honeyford's service contract and the school's Articles of Government had to be read in the light of the Education Act 1944 which, amazingly, had not been mentioned at first instance. Lawton and Mustill LJJ. stated that under the statute and the Articles the governors' functions were almost entirely advisory so that their recommendation should not be taken as having a decisive effect(**22**). Further, both the service contract and Articles intended the assistant director should be a judge in his own cause(**23**) since otherwise the Council might not be able to stop any breach of statutory duty to which the governors might have agreed.

Dillon LJ., however, dissented on the interpretation of this aspect of the conditions of service. He thought that while it was "natural" to construe the duty to review the governors' findings as applying to a recommendation to reinstate as well as a recommendation to dismiss, this point was overridden by the fact that he could find no indication in the conditions of service that either the Council or the unions had conidered the use of the Council's residual power to dismiss in the absence of any governors' meeting. He agreed that the appeal should be allowed, however, since there was equally nothing in the Articles to limit the use of the residual power to where there had been no governors' meeting or to exclude it where there had been a governors' recommendation to reinstate a head teacher.

THE IMPLICATIONS

There seems little doubt that the Court of Appeal's decision was legally correct, although there is not much authority directly in point. S.24(1) of the Education Act 1944 provides that the "appointment of teachers shall, save in so far as may be otherwise provided by the articles of government ... be under the control of the local education authority, and no teacher shall be dismissed except by the authority" Taylor and Saunders comment that this "appears to give the authority power to require dismissal ... on any ground ... and is not limited ... to educational grounds"(**24**). The cases quoted by Barrell, which do not appear from the fairly brief I.R.L.R report to have been cited to the Court of Appeal, show that the Council's powers are essentially determined by the Articles(**25**). Thus in **Curtis v Manchester City Council**(**26**) an injunction was granted against the Council proceeding with a disciplinary inquiry, no governors having been appointed. Slade J. said that it was at least arguable that the Articles meant that there had always to be a recommendation from the governors before the Council could dismiss, even though the authority could always disregard the recommendation. In **Winder v Cambridge County**

Council(27) the authority had, under the Articles, given exclusive power to dimiss to another body, and the court would not imply a concurrent pawer in the Council when they could easily have expressly provided one. (The latter case seems to strain the meaning of s.24(1) and the general rule against sub-delegation to the limit).

Further, Dillon L J's approach to interpreting the conditions of service, seeking to give effect to the true intentions of the contracting parties, goes against the usual, objective approach(**28**), though his stance does have its supporters(**29**). Finally, there is clear authority that the general rule against bias can be overridden by statute, even where the result is to legalise what has been described as "institutional" bias(**30**).

This particular incident has now been brought to a close. The Court of Appeal refused leave to appeal. Rather than petition the House of Lords for leave Mr Honeyford accepted early retirement and a settlement reported to be worth £161,900(**31**). However, speculation as to the wider implications of the case continue. The case is consistent with an increasing sympathy by the courts with administrators' claims as to the importance of "managerial considerations", as witnessed most recently in the education context in the court's upholding the contractually binding nature of certain staff covering arrangments(**32**). The National Association of Head Teachers has warned that head teachers may lose the confidence of parents and governors by refusing to make a statement disagreeing with the education authority. On the other hand, it must be pointed out that the respective views of the majority of parents and governors, and of the education authority, will vary from area to area, and behind the NAHT's claim it is easy to discern the traditional claim to the autonomy of the head teacher, which may easily become a lack of accountablility to anyone. To regard the head teacher merely as any other employee, is of course equally unrealistic, but the question of to whom the head teacher should be accountable is a very difficult one. The education authority can claim to be elected, but often in practice by a fairly small proportion of the electorate. Many governorships are in practice political appointments and pupil governorships are to be abolished by the current Education Bill. The increased powers to be given to parents by the same measure are likely to be disproportionately used by a minority of middle-class parents.

Mr Honeyford himself has regarded the affair as essentially being concerned with freedom of speech(**34**). The media have particularly followed this line in commenting on what they have portrayed as a similar case, that of Mr Jonathan Savery. Mr Savery, an English teacher at the Avon Multi-cultural Centre, was subjected to disciplinary proceedings by Avon education authority after he opposed proposals by a group of black staff at the Centre that it should be restructed to have a black head, a black majority on the management committee and an all black staff. In particular, Savery had written an article in the Salisbury Review(**35**) in which he had likened the ideas of anti-racism to witchcraft, attacked the view that teachers were to blame for ony under-achievement by certain ethnic groups and described Mr Honeyford's case as "tragic". In the event, Avon found the article was not racist, though, unsatisfactorily, the panel said some might think it was. Further, while evenly divided on the question of whether writing the article was such professional misconduct as to warrant formal disciplinary sanctions, they felt it would be difficult for him to remain at the Centre.

The Savery case surely is not the same as Mr Honeyford's case. The article, while superficial, inaccurate(**36**) and discourteous, was aimed at a sub-group of people working in the race-relations field, and while it no doubt rests on a view of multi-racial

education that is regarded as misconceived in some quarters, it does not criticise aspects of ethnic minority cultures and people as Honeyford's article does. It can only be regarded as racist by accepting the view that any critic of anti-racism must per se be racist, and such an over-simplification would deprive the concept of racism of any explanatory power(**37**). Secondly, Avon's equivocal findings, while leaving Mr Savery's future position unsatisfactorily unclear, are probably an accurate description of his position at the Centre: probably he will find it very difficult to work again with colleagues whose support he has totally lost. We might say, with Dworkin, that even if Savery had a right in the strong sense to write the article, it was the wrong thing to do(**38**). ie. he may be criticised, but should not have been stopped, from doing it.

But do teachers in the position of Mr Honeyford and Mr Savery have a strong sense right to publish views critical of their employers' policies? There is, of course no positive right of freedom of expression in English domestic law, merely a partial absence of prohibition of free expression(**39**). There is such a right under the European Convention on Human Rights but Article 10 expressly provides exceptions for, inter alia, the safeguarding of confidential information and the safety of the state. Such requirements are also to be found in our domestic law, so that for example, employees of government contractors can be dismissed pursuant to undertakings given by them if they disclose information without permission, even if such disclosure is arguably in the public interest in publicising a waste of public funds(**40**). Similarly, s2 of the Official Secrets Act 1911 goes far beyond what protection of the security of the state would require. It was, therefore, hypocritical for the Prime Minister to show her support for Mr Honeyford by inviting him to lunch(**41**) while supporting her prosecution of Clive Ponting and Sarah Tisdall and opposing demands for freedom of information legislation for central (though not, inconsistently, local) government.

Nevertheless, there is a strong moral argument for freedom of speech, such that limitations of it need justification(**42**). As Article 10 of the European Convention reminds us, the exercise of the right carries with it duties and responsibilities, and accordingly exceptions may be allowed also for the prevention of disorder or crime and for the protection of the reputation or the rights of others. The first of these two exceptions may justify restricting the utterances of a teacher in an extreme case where to use the American phrase, there is a "clear and present danger" of unrest(**43**). This may perhaps have been the case in Bradford but surely not in Avon. The second exception, however, is the better justification for the offence of incitement to racial hatred(**44**) and is reflected in the concept of defamation of a racial group recognised by U.S., but not English, law. Again, the education authority could surely have relied on this second exception in Mr Honeyford's case but surely not, in the absence of defamation of the particular colleagues in the centre offended by the article, in Mr Savery's case.

THE WHEELER CASE

This case will already be familiar to students of Administrative Law. A similar analysis of the Court of Appeal judgement has already been performed by T R S Allan(**45**). Accordingly, discussion here will be kept brief.

THE FACTS

It will be recalled that Leicester City Council, relying on its powers under the Open

Spaces Act 1906, the Public Health Acts and, in particular, the Race Relations Act 1976, s.71, had banned Leicester Football Club from using its recreation grounds for rugby matches for 12 months after it had received the Club's response to a list of questions put by the Council as to the proposed rugby tour of South Africa, for which three members of the club had been selected. At first instance Forbes J had refused to grant the Club certiorari to quash the ban, a declaration that it was unlawful and an injunction against enforcing it. Section 71 of the Race Relations Act 1976 imposes a duty on every local authority "to make appropriate arrangements with a view to securing that their various functions are carried out with due regard to the need .... (b) to promote .... good relations between persons of different racial groups." Forbes J held that this was not only concerned with the Council's internal workings, but applied generally to their statutory functions. The view that the ban could serve to promote good race relations in Leicester could not be regard as perverse within the "**Wednesbury**" sense of unreasonable use of statutory power(**46**).

The majority of the Court of Appeal dismissed the club's appeal. Ackner L J stated that s.71 "imposes an obligation on the local authority, when it considers discharging any of its functions which might have a race relations content, to do so in such a manner as would tend to promote good relations between persons of different racial groups ....The Council were fully entitled in exercising their discretionary powers ... to have regard to the purposes expressed in s.71." While the club's refusal publicly to endorse the Council's views that the tour should not take place may have been entirely reasonable, the club's decision to give outward manifestation of their disapproval of the club's action, having regard to the fact that it was in line with the Gleneagles agreement and strong local opinion, could not be regarded as perverse.

This view seems implicitly to accept that s.71 may operate as a limitation on the club's freedom of speech; it may also be the case that Ackner L J did not feel that withdrawal of recreation ground facilities for a year could amount to a sanction seriously invading such a right; after all, the club might well have found other facilities. Judges have not yet struck down use of contractual clauses to further central government policy(**47**). This is made more explicit, if not discussed at length, in the judgement of Sir George Waller. He held that discouraging members of the club from going on the tour was not an interference with the right to express an opinion, and even if it was, the statute would have to be enforced.

Browne-Wilkinson L J, however, dissented on the ground that the general words of s.71 did not clearly authorise interference with the immunity from interference with expression which was the true analysis of the "right of free speech" in English law(**48**). In relation to general discretionary powers such as those over open spaces, Parliament would not generally be assumed to have contemplated that such discretion would be exercised by taking into account the views of those affected by the exercise of the discretion. S.71 made no difference since the 1976 Act was concerned with discriminatory actions not opinions or their expression; refusal to allow a park to be used by a club guilty of discrimination might well be completely lawful and reasonable.

Mr Allan has praised this dissenting judgement as a welcome re-assertion by the judges of the importance of constitutional principle(**49**). However, the House of Lords, while allowing the club's appeal, did not entirely support the analysis of Browne-Wilkinson L J. While accepting that the Council could properly have regard to the interests of race relations, their Lordships found for the club on administrative law

rother than constitutional law grounds. In essence, the club had acted unreasonably in the "Wednesbury" sense. Lord Roskill held that "In a field where other views can equally legitimately be held, persuasion, however powerful, must not be allowed to cross the line where it moves into the field of illegitimate pressure coupled with the threat of sanctions."(**50**) This seems to be an application of "gross unreasonableness", i.e. conduct so unreasonable no reasonable authority would act in this way. Similarly, Lord Templeman stressed that the Council intentionally punished the club though it had done no legal wrong, and this was an improper purpose not authorised by open spaces or any other legislation(**51**). Lord Roskill added that submitting questions to the club, making it clear that only one answer was acceptable, was also a procedural impropriety within the categorisation of the grounds for judicial review laid down by Lord Diplock in the G.C.H.Q case(**52**).

IMPLICATIONS

The vagaries of the "Wednesbury" formula, and the past lack of enthusiasm of judges for the race relations legislation, make the Lord's decision unsurprising, particularly given the perhaps rather tenuous perceived connexion between apartheid in South Africa and race relations in Leicester(**53**). However, some criticisms of the decision are called for.

Firstly, the Lords' route to their decision was unsatisfactory. Allan has pointed out that Lord Roskill's use of "procedural impropriety" really amounted to quashing the decision on its merits as a matter of substantive unreasonableness. Though the grounds of review are fluid, they should not be regarded as interchangeable. Further, the constitutional issue was avoided; even if, on the facts, freedom of speech was not invaded, as Ackner L J (and I) argue, this should at least have been made clear.

Secondly, their Lordships gave limited weight to s.71, even though it imposes a statutory duty on local authorities. This makes even more doubtful what real value the section has. While, in theory, mandamus may lie, the C.R.E. has pointed out that s.71 is so vaguely phrased it may be legally unenforceable against an authority that has done little but give some consideration to what are its appropriate arrangements. Wheeler shows it may not even be of use as a defence. This adds force to the C.R.E.'s proposal that the section should be replaced by the duties now placed on the C.R.E. itself by s.43(a) and (b) (viz. "to work towards the elimination of discrimination and to promote equality of opportunity and good relations between persons of different racial groups generally.") These duties should be extended to public bodies generally, and all such bodies should also have to supply regular information as to their performance of these duties(**54**). These proposals are powerful, but the resource implications that would follow if they were properly implimented may well be enough to prevent them being accepted by government(**55**).

CONCLUSION

The Honeyford and Wheeler cases illustrate acutely the clashes of individual and group rights, responsibilities and the broader public interest. Try as they can to avoid such issues the judges cannot always escape and, arguably, they should not try to do so(**56**). Law students reading such cases simply in the law reports without some knowledge of the background are liable to receive a totally inadequate picture of the real controversies to which the work of the lawyer is in may respects peripheral(**57**).

When the artificialities of the legal process become decisive, as here, the result is so often an evasion of the real moral, social and political issues. Academics who are aware of these realities, however, at times give insufficient weight to responsibilities as opposed to rights. It is submitted that the authorities in these two cases were lawfully and justifiably carrying out their statutory responsibilities.

POSTSCRIPT

Since the above was written the High Court has decided **McGoldrick v Brent London Borough Council(58)**. Here, the Council had suspended Miss McGoldrick, the headmistress of an infant school, after she had allegedly told a Council officer on the telephone that she wanted no more coloured teachers in her school. She maintained she had said she wanted no more unqualified teachers. The school governors unanimously decided that there was no evidence to substantiate the allegation, and that she should be reinstated. The Council, however, after a meeting of which Miss McGoldrick was not informed, decided to have a full rehearing of the matter. Roch J granted Miss McGoldrick a declaration that the governors' findings of fact were binding on the Council. The statute contemplated only a single hearing of the facts, which might be by the Council or, as here, by the Governors. This distinguishes the case from **Honeyford**, where the facts were not in dispute, and the court decided the governors' **recommendations** could be reviewed by the Council. In McGoldrick's case, however, any such review which came to a conclusion different from the governors would be liable to be quashed as ultra vires for no evidence(**59**) Further evidence on the facts would probably not be admissible(**60**).

It appears that the Council intend to appeal. Meanwhile the Statutory of State has asked the Council to reinstate Miss McGoldrick(**61**) given her record as a supporter of multiracial education policies and the support for her from both white and black parents, it would seem that the case can only damage the development of multiracial education policies. The Council, it seems, in this case were too enthusiastic in carrying out their statutory responsibilities.

Notes

(1) (1986) IRLR 32.

(2) (1985) 3 WLR 335.

(3) See e.g. H W R Wade, Constitutional Fundamentals (1983), Lard Denning, The Discipline of Law (1979), Lasok D, Fundamental Duties (1983). Fundamental Rights (1973).

(4) See e.g. the writings of the American Realists extracted in Lord Lloyd Introduction to Jurisprudence (5th edition 1985) and of their English supporter William Twining (e.g. Karl Llewellyn and the Realist Movement).

(5) G Morris, A Hussain, T G Aura, Critical Social Policy, Issue 12, Spring 1895 p.69 and the 1981 Census figures summarised in 1985 Race and Immigration pp.10-14.

(6) See Lord Scarman, The Scarman Report Penguin 1984.

(7) The Salisbury Review, Winter 1984, p.30.

(8) O Foster-Carter, Critical Social Policy, Issue 12, Spring 1985 p.74.

(9) Mandla v Dowell Lee (**1983**) 2 WLR 620.

(10) See the review of the literature in S M Poulter, English Law and Ethnic Minority Customs (1985), pp.172-181.

(11) Troyna B and Williams J, Racism, Education and the State: The Racialisation of Education Policy (1985).

(12) See e.g. J Rex, Race and Ethnicity (1986), Ch.6 and G Morgan, the Analysis of Race: Conceptual Problems and Policy Implications, New Community vol XII, No.2, Summer 1985, p.285.

(13) Education For All: Report of the Committee of Inquiry into the Education of Children from Ethnic Minority Groups, Chairman Lord Swann, Cmnd 9453 (1985).

(14) See Trayna, B, 'Swann's Song': the origins, ideology and implications of Education for All J. Education Policy 1986 vol 1 No.2 pp171-181 at p.177.

(15) C Brown, Black and White Britain: the Third P.S.I. Report (1984).

(16) Times Educational Supplement, 11.10.85.

(17) M Eggleston, The Educationol and Vocational Experience of 15-18 year old Young People of Minority Ethnic Groups, Centre for Research in Ethnic Relations, Warwick, (1985).

(18) O Foster-Carter, op. cit. n.8 above.

(19) ibid.

(20) (**1986**) I.R.L.R. 34 at para 17.

(21) ibid at paro 21.

(22) See the increased powers to be given to governors by the Education Bill 1986.

(23) (1986) I.R.L.R. 35 para 23-24 (Lawton L.J.).

(24) G Taylor, J B Saunders, The Law of Education, 8th. edition, 1976 and 1st. supplement 1980. The passage does not appear in the current (much less informative) 9th. edition edited by Lleil and Saunders (1984).

(25) G J Barrell, Teachers and the Law, 5th. edition 1978, p.65.

(26) The Times 27.5.76.

(27) The Times 24.5.77.

(28) See e.g. G Treitel, The Law of Contract 6th. edition 1983, p.156.

(29) E.g. Lord Denning. See The Discipline of Law (1979) Part I Ch.4. I am debted to Robert Bradgate on this point and (28) above.

(30) **Jeffs v New Zealand Diary Production Board** (1967) 1 A.C.551.

(31) 1986 Race and Immigration, p.4.

(32) **Sim v Rotherham M.B.C.** The Times 30.5.86. See also **R. v Deputy Governor of Camp Hill Prison, ex p. King** (1984) 3 All ER 897.

(33) 1986 Race and Immigration p.5.

(34) ibid.

(35) The Times 23.5.86; Anti-Racism as Witchcraft, The Salisbury Review, July 1985, p.41.

(36) E.g. the Community Relations Commission was described as the Commission for Racial Equality and the Swann Report was said to blame teachers for any ethnic minority under-achievement, when it specifically condemned the fallacy of the "single factor" approach to explaining differences in achievement.

(37) See references cited at n.12 above.

(38) R Dworkin, Taking Rights Seriously (1977) p.188.

(39) S Bailey, D Harris, B Jones, Cases and Materials on Civl Liberties, 2nd edition, 1985 pp.577-8.

(40) **Thomley v Aircraft Research Association**, 11.5.77, E.A.T. 669/76, 8.

(41) 1985 Race and Immigration p.

(42) E Barendt, Freedom of Speech (1985) Ch.1. and see the Lingens case (European Court of Human Rights) 8.7.86.

(43) See Dworkin, op. cit. n.38, at pp.197-204.

(44) Barendt, op. cit. n.42, p.

(45) (1985) MLR 448, (1986) MLR 121.

(46) **Associated Provincial Picture Houses v Wednesbury Corporation** (1947) 2 All ER 680 per Lord Greene MR.

(47) But see T Daintith, Government Contracts — a New Prerogative? 1979 CLP 31.

(48) (1985) 2 ALl ER at 158.

(49) (1985) MLR at 449.

(50) (1985) 3 WLR at 341. See also Goring v British Actors Equity Association, The Times. 5 August 1986. Equity's apartheid was unlawful as ultra vires union rules, not being for the purpose of promoting members interests.

(51) Ibid. at 344.

(52) **C.C.S.U. v Minister for the Civil Service** (1985) AC 374.

(53) For the view that current discrimination is the result of past colonialism see J Rex, S Tomlinson, Colonial Immigrants in a British City (1979) esp. Ch.1 and 9. Cf. M Banton, Promoting Racial Harmony (1985).

(54) The Race Relations Act 1976 — Proposals for Change, C.R.E. 1985. On the use of s.71 generally see K Young in J Beynon ed. Scarman and After (1984) esp. pp.223-227 and H Ousely, The System. (no date) pp 1-3

(55) Conference on the C.R.E. proposals, Leicester University, 13 February 1986.

(56) Dworkin, op. cit. n.38 Ch.5.

(57) For the Marxist view that law is merely a superstructural appendoge to the relations of economic production see e.g. Lord Lloyd, Introduction to Jurisprudence, 5th edition Ch.10.

(58) The Times, 24 October 1986.

(59) **Coleen v MHLG** (1971) 1WLR 433.

(60) Because intra vires divisions of fact are generally final: Re 56 Denton Road, Twickenham (1953) Ch.51.

(61) See n.58 above.

INHERITANCE AND THE IN VITRO FERTILISATION CHILD

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The Report of the Committee of Inquiry into Human Fertilisation and Embrology(**1**) (the Warnock Report) attracted much attention from medics, lawyers and the media on its publication in 1984. Two years later, little progress has been made towards solving the legal and ethical problems examined by the Committee, and few of its recommendations have been incorporated in legislation giving them statutory force. Researchers in the field of In Vitro fertilisation have not been so dilatory however, with the result that developments in embrology have outstripped the deliberations of the committee.

One of the areas of difficulty highlighted by the Warnock report concerns the effects which the freezing of human semen, eggs and embryos could have on the law relating to inheritance and succession. Advances in cryotechnology have enabled scientists to freeze living cells in liquid nitrogen at minus 196° Celsius and later to thaw them out without damage to the organism. The technique of freezing and storing semen has been used for many years and is of particular value in cases where a man has to undergo surgery or chemotherapy which may render him infertile. In 1983, an Australian team of researchers(**2**) succeeded in fertilising a human egg and freezing the resulting embryo. Since then, a small number of pregnancies and live births have resulted from embryos frozen in this way.(**3**) The final breakthrough came in 1986 when another Australian team(**4**) mastered the technique of freezing human ova, thawing and fertilising them and replanting them in the mother, resulting in the birth of twins.(**5**)

The prospect of such developments caused the members of the Warnock Committee to note that "serious legal complications may well arise in relation to inheritance and the use of disposal of frozen semen eggs and embryos"(**6**). The complications foreseen here could well relate to the rights of a child conceived posthumously, using the technique of artifical insemination with semen frozen before the death of the man concerned. There is also the possibility that a frozen embryo could be stored indefinitely - 600 years according to one estimate - then implanted into a 'surrogate' mother who would give birth long after the genetic parents had died. Apart from the moral and ethical propriety of such a hypothesis, questions arise as to whether children born in such circumstances could successfully pursue claims upon the estates of their deceased parents. Prima facie at least such claims would appear to infringe the rules against both perpetuities and accumulations. Although the existing law fails to answer such questions, as these issues were never previously contemplated by the legislators or the judiciary, an attempt can be made to examine both the concepts involved, and the solutions proposed so far.

The first steps must be to establish the legal status of a child produced by the use of one or more modern reproductive techniques. Is the child legitimate or illegitimate? The Law Commission, in its Working Paper on Illegitimacy(**7**), examined the common law definition of legitimacy which states that a person is legitimate only if his parents are validly married to each other

i) when he is born or
ii) when he is conceived.

Thus where a married woman is artifically inseminated with sperm from her husband (AIH), the husband is the child's father both genetically and legally, and the child is legitimate. However, where a morried woman is artificially inseminated with sperm from a third party donor, (AID), the chiid will be illegitimate because the womon is not married to the donor at the relevant time.

This classification of the chiid as illegitimate, though iogical according to the definition given above, seems inappropriate where AID is conducted with the consent of the husband af the mother, and he is willing to treat the resulting child as his own.(**8**) In 1976, Maryiyn Mayo put forword a cogent argument, distinguishing the case of the AID child from that of any other iliegitimate chiid.(**9**) As she pointed out, fhe technique of AI was not contemplated when the common iaw and statutory rules as to illegitimacy were formuiated, and the resulting chiid does not fit within fhe existing legal concepts. Similariy, Lord Kilbrandon has commented that to iabel such o child iilegitimate is a misuse of ianguage.(**10**)

A number of proposals have emerged from various sources to try and remedy this situation. The Law Commission(**11**) suggested that where o married woman has received AID freatment with her husband's consent then the husband, rather than the donor, should for ali legai purposes be regarded os the father of the resulting chiid. Statufory provision would be necessary to create a presumption that the husband had consented to the AID procedure, uniess the husband couid prove otherwise.

The Centrai Ethicai Committee of the British Medicai Association reached a similar conclusion in 1979, favouring legitimotion of the AID child where the husband had consented in writing fo the treatmenf of his wife.(**12**) More recently, the members of fhe Warnock Committee were unanimous in fheir recommendation that the AID child should be treated as the iegitimofe child of the mother and her husband where bofh had consented to the treatmenf.(**13**) Agoin, the husband's consenf would be presumed uniess rebutted, although this point couid be resoived if a statutory requirement existed for proper consent forms to be compieted by fhe parties. One potentiai anomaiy resulting from this approach, however, concerns the proposal that the semen donor should be declared to have no parentoi rights or duties in the AID chiid. if AID was then provided to an unmarried woman, or to a woman whose husband did not consent, this would produce a legaily fatherless child.

The AID chiid would, though, in most cases, have the same sfatus as the iegitimate child; but what of the AIH chiid born posthumously? if is not uncommon for a married man who discovers that he is suffering from a disease which is fatai or which may render him infertiie, to have semen stored for the future treatmenf of his wife. As semen can be stored without deterioration for a number of years, fhe wife may not decide fo make use of it untii her husband's death.(**14**) The Law Commission presumed that, since at the time of insemination the door would no ionger be the mother's husband, the case would be treated as one of AID of a single woman, and the chiid would be iiiegitimate. The Warnock Report commented unfavourably on the use of AIH by a widow, venturing the opinion that "this may give rise to profound psychoiogical problems for the chiid ond the mother" quite apart from iegai problems of inheritance.(**15**) it remains to be seen to what extent the posthumous use of AIH will be permitted by hospital ethicai committees.

In reiation to the status of the AID chiid, there remains the probiem of the registration of such births. S.2 Births and Deaths Registration Act 1953 requires particuiars of every child born to be given to the Registrar, inciuding the name of the father of the chiid. In

the case of the AID child, the couple will probably give the husband's name, the name of the donor (the genetic father) being unknown, yet to do so constitutes an offence under s.4 Perjury Act 1911. However, as registration is a purely administrative procedure, no investigations are normally made, and the information given is accepted unless it is patently untrue. The British Medical Association Working Group on In Vitro Fertilisation commented that "such registrations appear to be condoned as part of the present social scene" but that "the law should be changed so as to dispel any ambiguity of the legal status of a child born as a result of AID."(**16**) If the recommendations referred to above in relation to the status of the child are implemented, then it follows that the husband of the mother will be registered as the father of the AID child on production of a form of consent to the Registrar.

The inheritance rights of a child born by the use of reproductive technology, can now be considered, firstly where an attempt has been made to provide for the child either by lifetime gift or by will, and secondly where the child relies on the inheritance (Provision for Family and Dependants) Act 1975, or on the statutory trusts contained in the Administration of Estates Act 1925.

As a result of s.15 Family Law Reform Act 1969, any gift by will or settlement which confers a benefit on the settlor's "children" will prima facie benefit illegitimate children as well as legitimate, thus enabling the AID child to share in any such gift. However, acute problems may arise as a result of the techniques of freezing gametes and embryos, since this raises the possibility of a child being born many years after the death of its natural father. (Indeed if a frozen embryo were to be implanted in the womb of a surrogate, the resulting birth could occur years after the death of both genetic parents). Any attempts by the genetic parents to make financial provision for such a future child would encounter the awesome spectre of the Rule against Perpetuities and Accumulations. It has been suggested that straightforward dispositions previously thought unobjectionable for perpetuities could now be invalidated by the Rule in its traditional form.(**17**)

The effect of the rule (designed to prevent property being settled for an inordinate number of years) is described by Gray(**18**) as being that "no interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest." However, the rule was developed in the firm belief that there was no possibility of procreation after death. This belief is no longer valid since the advent of cryobiology, and the validity of many gifts if rendered doubtful as a result. Two examples follow by way of illustration of the common law rules, the effect of the Perpetuities and Accumulations Act 1964 being examined later in the article.

Example 1

A settlor makes a gift "to the first child of X to attain the age of 21". Under the common law rules this would be a valid gift. X would be the life in being, and it would be assumed that any child of X would reach the age of 21 (if at all) within the perpetuity period of X's life plus 21 years. However, the cardinal rule when considering the perpetuity rule is that possibilities, not probabilities govern the outcome of the case. Therefore if there is the slightest possibility that the perpetuity period may be exceeded, the gift is void. Thus if X makes a sperm bank donation, which his wife uses after X's death, it is possible that the resulting child will attain the age of 21 outside the perpetuity period, rendering the gift invalid according to common law rules.

Similar problems arise with regard to class gifts.

Example 2

A Testator leaves property "to the children of A". If when the testator dies, A has living children, the 'class closing' rules(**19**) operate to restrict the effect of the gift to those children only and the gift is valid. However if A has no children living at the testator's death, the cisss closing rules do not apply, and children whenever born could be potential beneficiaries. But if A was then to make a sperm bank donation, resulting in a birth outside the perpetuity period, such a class gift would fail.

The difficulties created in this area by the new technology do not end there. It is necessary to examine both the Rule against Perpetuities, and the **Andrews v Partington** class closing rules in the light of advances in the techniques of in vitro fertilisation. In applying the perpetuity rule, the courts have long accepted that a child en ventre sa mere at the beginning of the perpetuity period can be treated as a life in being for the purposes of the rule (though not for every legal purpose).(**20**) Similarly, a child en ventre sa mère has been treated as 'born' for the purpose of including him in a class of beneficiaries under the class closing rules, where the effect would be to confer a direct benefit on the child.(**21**) Is an embryo "en ventre sa éprouvette" (test-tube)(**22**) to be treated in the same way as a child en ventre sa mère? (A question of particular importance, in view of the fact that a child en ventre sa mère is included in the terms "child" and "issue" for the purpose of inheritance on intestacy under the statutory trusts contained in s.47 Administration of Estates Act 1925.) Is an embryo created and stored in vitro a "life in being"?

Such questions lead into the disparate areas of science and theology, and so far neither discipline has solved the problem of the status of the embryo created by in vitro fertilisation. According to some scientists, the embryo derives its humanity "only after having established normal unity with its human mother" and before this stage the in vitro embryo is merely a "laboratory artefact".(**23**) The opposing view is offered by the LIFE (Save the Unborn child) organisation which asserts that "the newly fertilised human zygote or embryo is a real living human being".(**24**) In law, the attitude taken towards the newly united sperm and ovumn has yet to be tested with regard to the in vitro embryo. However, the legal view of the naturally conceived foetus varies according to context. Russell J in **re Stern deceased**(**25**) stated that where the perpetuity rule is concerned "conception is treated as equivalent to birth". Conversely, the foetus in utero is not given the full status of a human being by the civil law or the criminal law, as regards injury to it.(**26**)

A recent intervention by Parliament in the sphere of succession law has made it all the more important that these difficulties be resolved by legislation. S.19 Administration of Justice Act 1982 has substituted a new section 33 in the Wills Act of 1837, with the result that where a testator leaves property to a child who predeceases the testator, any issue of that child living at the testator's death can take the gift which his or their deceased parent would have received. For these purposes s.33(4)(b) states that "a person conceived before the Testator's death and born living thereafter is to be taken to have been living at the Testator's death". Although undoubtedly intended to refer to children en ventre sa mere, this definition seems capable of including an embryo stored at the time of the testator's death, then reimplanted and born many years later.

A solution to many of these problems may, of course, be provided by the Perpetuities

and Accumulations Act 1964. In instruments taking effect after 15 July 1964, where a disposition would have been invalid at common law (as in Examples 1 and 2 above) it is now possible to "wait and see" whether such a gift would actually contravene the rule against perpetuities. Rather than being void because it **might** vest outside the perpetuity period, the gift is now void only if it **must** so vest, giving the opportunity to treat the gift as valid until proved otherwise. Yet the 1964 Act is not a "panacea for all ills": when read in the light of scientific discovery it gives rise to the same complications as are inherent in the common law rules discussed above.

For example, where the "wait and see" provisions of the Act are used, the perpetuity period is to be determined only be reference to the lives of those individuals described in Section 3(5)(a) and (b) of the Perpetuities and Accumulations Act 1964 who are "in being and ascertainable at the commencement of the perpetuity period"(**27**) S.15 of the Act defines individuals "in being" as those "living or en ventre sa mère". Thus, once again the dilemma arises as to whether to classify an embryo created and maintained in vitro as a living being. Interestingly, the Act also raises statutory presumptions in respect of the ability of human beings to procreate. By section 2(1)(a), a male is presumed to be able to father a child from the age of 14 years whilst a female is presumed to be capable of child bearing between the ages of 12 and 55. Both presumptions are rebuttable. Section 2(4) states that references to 'having a child' can include not only begetting or giving birth to a child but also "adoption legitimation or other means". The enigmatic phrase "or other means" could today mean by the use of a surrogate mother carrying a frozen and thawed out embryo, although it is doubtful whether this was the intention of Parliament when the legislation was enacted!

One further factor which compounds these dilemmas is contained in the Inheritance (Provision for Family and Dependants) Act 1975. This Act enables the Court to order financial provision out of the net estate of a deceased person in favour of specified applicants, if those applicants can show that "the disposition of the deceased's estate effected by his will or the law relating to intestacy or the combination of his will and that law is not such as to make reasonable financial provision for the applicant"(**28**) Two particular categories of applicant under the Act are of relevance here, the first being "a child of the deceased": if the child believes that he has not received the share to which he was entitled from his parent's estate, he has the opportunity to apply for a Court Order to this effect, which may then result in a payment of money to the child, out of the estate.(**29**)

Under s.25 of the Act, "child" includes an illegitimate child, and a child en ventre sa mere at the death of the deceased. Does this mean that a child born as a result of AID could have a claim on the estate of its genetic father? Whilst in practical terms this is unlikely, given the anonymity normally afforded to sperm donors it is certainly not beyond the realms of possibility. Would the term 'child en ventre sa mere' here include an embryo created in vitro? It is quite possible that a married couple might donate gametes which are brought together to achieve fusion of the cells, and then stored until the wife's uterus reaches the optimum conditions for implantation. If the husband were to die in the meantime without having any opportunity to provide for the child by will, surely the resulting child ought to be eligible for a share in its father's estate, either under the statutory trusts contained in the Administration of Estates Act 1925, or under the IPFDA 1975.

The second category of applicant of relevance here is described in s.1(1)(d) IPFDA 1975 as "any person (not being a child of the deceased) who in the course of any

marriage to which the deceased was at any time a party was treated by the deceased as a child of the family in relation to that marriage." This subsection would appear to include the situation where an infertile husband consents to the insemination of his wife with donor sperm. If a child is born as a result of AID and the husband tests that child as his own, then the child could obtain financial provision under the Act from the estate of the husband after his death, despite the child's illegitimacy. If, however, the hypothesis is extended to include a situation where the husband dies whilst the wife is pregnant with an AID child, or even whilst the child is in embryoic form as a result of in vitro fertilisation, a different result ensues.

The concept of a "child of the family" emanates from family law, being recently considered in, for example, **Re M, a minor(30)** where Ormrod LJ stated that the words are "ordinary words each of which carries to an ordinary person, a fairly clear meaning." The test there appears to be whether any ordinary person, examining the evidence, would assume that the child was treated as a child of the family. In the context of an embryo in vitro, it would probably be difficult for a lay person to say how such a being could be treated as a child of the family. This is borne out by the decision in the case of **A v A(31)**, where the phrase 'child of the family' was under consideration as it appeared in s.3 of the Matrimonial Proceedings and Property Act 1970. Bagnall J came to the conclusion that an unborn child of the family, as "treatment" involves behaviour towards the child when born. He stated "One can only behave towards a child if the child is living and capable of being perceived by one or more of the senses. A foetus, however viable, cannat be so perceived". If the ratio of this case remains good law (and it is not without its critics(**32**)) then a fortiori an embryo in vitro is unlikely to be seen as a living entity capable of being treated as a child of the family. The result may be to disentitle a child, whose existence was desired and consented to by the husband, from a share in the husband's estate.

When the problems of the status of the AID/AIH/IVF child are added to the complexities of the rule against perpetuities and the pragmatic approach of the Inheritance (Provision for Family and Dependants) Act 1975, it is small wonder that the Warnock Committee apparently felt unequal to the task of making detailed recommendations in this area. Its suggestions were that "legislation should be introduced to provide that any child born by AIH who was not in utero at the date of death of its father shall be disregarded for the purpases of succession to and inheritance from the latter."(**33**) A similar recommendation wos made in respect of a child born following in vitro fertilisation using an embryo which was frozen and implanted at a later date. If such a child were not in utero at the date of its father's death, it too would be ignored for the purposes of inheritance and succession.(**34**)

Whilst these suggestions may provide pratical and convenient solutions to many of the problems discussed in this article, it is to be hoped that there may yet be other, more equitable alternatives. Certainly some form of statutory regulation is essential in this area, in view of the potential problems which could be faces by the courts in the relatively near future. The difficulty is that the law moves notoriously slowly, and science already has such a head start.

It would probably be fruitless to suggest that the scientists impose a voluntary moratorium in their endeavours whilst the law catches up, and therefore the answer may be for an immediate Act of Parliament to introduce modest regulations, and then for ammendments to be made as individual cases arise, and scientific techniques develop. The present state of uncertainty should not be allowed to continue for too long: indeed, as has been said "Sperm bank problems are already

with us, and it is simply luck that a decision has not already been requested of a court."(**35**)

Notes

(1) Cmnd 9314.

(2) Under the leadership of Prof Carl Wood at Queen Victoria Medical Centre, Melbourne, Australia.

(3) P Singer and D Wells, "Reproduction Revolution" 1984.

(4) Under the leadership of Dr Chris Chen at the Flinders Medical Centre, Adelaide, Australia.

(5) The Times 5.7.86.

(6) Warnock Report Para 10.4.

(7) PWP 74, 1979 Para 2.1.

(8) Guidelines issued by the Royal College of Obstetricians and Gynaecologists require that AID should only be performed on married women, with the husband's consent.

J K Mason and R McCall Smith, "Law and Medical Ethics." 1983.

(9) The Legal Status of the AID child in Australia (1976) 50 ALJ 562 by Marylyn Mayo, then senior lecturer at the University of North Queensland Australia.

(10) Chairman of CIBA Foundation Symposium 17 - Law and Ethics of AID and Embryo Transfer. 1972 Associated Scientific Publishers Amsterdam.

(11) PWP 74 19789 Para 10.9.

(12) Reported in British Medical Journal vol 286 p.1594.

(13) Cmnd 9314 Para 4.17.

(14) For a recent example of this in Britain see the Guardian newspaper 25 September 1985: A Veitch "Is there life after death?"

(15) Para 4.4.

(16) BMA Working Group chaired by Prof J P Quilliam reported in British Medical Journal vol 286 14 May 1983.

(17) By Carolyn Sappideen, then lecturer at the University of Sydney Australia: Life after death - Sperm Banks, Wills and Perpetuities (1979) 53 ALJ 311.

(18) Gray on Perpetuities, quoted in Cheshire and Burn, "Modern Law of Real Property", 1982.

(19) **Andrews v Partington** (**1791**) 3 Bro CC 401; 29 ER 610.

(20) See the comments of Vaughan Williams LJ in the case of **In re Wilmer's Trusts** (1903) 2 Ch 411.

(21) **Elliott v Jalcey** (1935) AC 209.

(22) Phrase coined by B M Dickens, "Medico-Legal Aspects of Family Law".

(23) J Mason & R McColl Smith, "Law and Medical Ethics."

(24) LIFE submission to the Warnock Committee February 1983.

(25) (1962) Ch 732 at 737.

(26) But note the developments in the Congenital Disabilities (Civil Liability) Act 1976.

(27) S.3(4) Perpetuities and Accumulations Act 1964.

(28) S.1(1) Inheritance (Provision for Family and Dependants) Act 1975.

(29) S.2 Inheritance (Provision for Family and Dependants) Act 1975.

(30) (1980) Fam Law 184.

(31) (1974) Fam 6, and see dicta of Bagnall J at page 15.

(32) See J G Miller, "Family Property and Financial Provision", page 345.

(33) Warnock Report, Para 10.9.

(34) Warnock Report, Para 10.15.

(35) By Angela Roddey, resident Legal Counsel at Yale - New Haven Medical Center, in Legal Issues in Pediatrics and Adolescent Medicine" 1985.

2. THE LAW ON CORPORAL PUNISHMENT

2.1 NISTORY

Corporal punishment for the correction of scholars has long been in use. It was recorded over 3000 years ago when 'schaolmasters' used the birch as punishment on such scholars as Homer (**15**) and Horace (**16**). Therefore from the earliest days of schooling the cane, or similar instrument, has been inseparable from discipline. Even Henry VI when appointing a tutor for himself gave him a licence 'reasonably to chastise us from time to time'. (**17**)

In 1669 due to the prevalent brutal floggings occurring 'The Childrens Petition' (**18**) was taken to Parliament. It deplored the fact that men who had no qualifications other than Latin and Greek had "the liberty to use such a kind of discipline over us", (**19**) sometimes to the extent of encouraging sadism. It argued that if a schoolmaster "is not able to awe and keep a compony af youth in obedience, without violence and stripes (he) should judge himself no more fit for that function than if he had no skill in Latin and Greek", (**20**) sa should not have chosen such a profession. Although admitting such a punishment may be necessary and in certain cases inevitable it argued that the punishment should not be exercised in anger but after "a solemn kind of judicature". (**21**)

This attempt at reform was followed in 1698 by 'Lex Farcia' (**22**) which reiterated the above arguments, which had little effect. The only Member of Parliament to enquire about such floggings was dissuaded from action by Dr Busby, Head of Westminster School, who was one of the most notorious floggers of the time. Infact in those days beatings were so rife in schools such "as Westminster, Eton and Paul's that masters had been arraigned at the bar for the death of boys ... (children being) ready to drown themselves rather than go to such masters", (**23**) this olso being the case in the Dame schools (**24**) of the day. The author was indignant that "teachers should be allowed to wield such absolute power, when in truth theirs is only a subordinate power derived from the natural power of the parents" (although it has been argued that such power was not derivative but independent of the parent) demanding it be abolished or at least controlled for certain ages of pupils, the weapon used, and the number of 'stripes'. This again came to nothing, although some considered the topic important and in 1863 Viscount Raynham tried to introduce the 'Corporal Punishment in Schools Bill' (**25**) which was thrown out as being unnecessary and ridiculous before its second reading. (**26**)

Feelings ran to such height amongst the school populace at the end of the Eighteenth Century that riots occurred "Discipline, judged by modern standards was intolerable ... constant floggings could maintain some semblance of obedience for a time, then the suppressed discantent would break out in open mutiny", at Winchester and Rugby "these rebellions reached such dimensions that the military had to be called in". (**27**) Flogging was used for all offences except the most trivial, in 1830 "being performed on the noked back by the headmaster himself, who is always a gentleman of great abilities and acquirements and sometimes of high dignity in the Church". (**28**)

2.2 COHTROLS: THE DEVELOPMEHT OF THE EDUCATION AUTHORITIES POWERS

It was not until 1870, in the Elementary Education Act, which made primary education

compulsory, that the way was opened for regulation and control of corporal punishment. This was through the creation of 'School Boards' giving them powers of management and maintenance of schools, subject to compliance with the Department of Education regulations. In the beginning, as was natural having no other example, the new schools followed the methods of the existing public schools until 1871 when Professor T H Huxley moved the first reforms in the London school boards that:

(i) all school floggings should be recorded in a book kept for that purpose;

(ii) pupil teachers, and later assistant teachers were prohibited from administering them;

(iii) the head teacher was directly responsible.

These were followed by further reforms in 1885 until in 1910 there existed an almost comprehensive list of regulations. (**29**) However these were only enforceable in the London Boards not having to be followed elsewhere; thus the various Boards had different rules. In 1956, though under Administrative Memorandum no. 531 it was decided that all schools must enter into a book, which was kept for that purpose, all cases of corporal punishment, the headmaster being responsible for its completeness and accuracy. Nowadays most Local Education Authorities (**30**) have relatively the same rules governing them. Thus it was held in **R v Manchester City Council ex parte Fulford** (**31**) most Local Authorities are unable to abolish corporal punishment in the schools under their authority. The court decided this because the articles of government created by the Local Authority in pursuance of s.17 Education Act 1944 gave the power to determine the educational character of the school and its place in the local educational system. However, the same articles gave governors power over the general direction of the conduct of the school, subject to the headmaster or mistress controlling internal organisation, management and discipline (which would be the same interpretation of the section that most Authorities would use). From this it was clear to the court that a decision to abolish was one that affected the general conduct of the school, thus being for the governors not the Authority, in conjunction with the head teachers, to decide. However if rules are made against its use then, as in **Hall v Cheshire County Council**, (**32**) the Local Authority have full power to take disciplinary proceedings against a teacher who breaches such rules, even if they were laid down by the headmaster not themselves. This is so even where the blow was light, where the teacher had been forbidden to punish in such a manner, and though the parents of the child themselves have no recourse against the teacher, the blow being moderate and reasonable. Therefore they may now have power over the teachers use of corporal punishment, subject to the judicial interpretation of the courts.

2.3 THE COMMON LAW

I) The right to administer corporal punishment

It appears from the history of corporal punishment that teachers have long had an inherent right to punish pupils. In ancient common law "if a schoolmaster corrects his scholar, or o master his servant, or a parent his child and by struggling (it) dies, this is only per infortunam" (**33**) and in deciding guilt for murder or manslaughter, though

exceeding the "bounds of moderation the court will pay a tender regard to the nature of the provocation", (**34**) from which the schoolmaster's right seems equal to, not derivative from the parents even to the point that the court sympathises with both.

However, the role of the teacher in common law is that of a porental substitute i.e. in loco parentis. In **William v Eady** (**35**) where injury was caused to a pupil through the schoolmasters negligence, the court found that he "was bound to take such care of his boys as a careful father would and there could be no better definition of the duty of a schoolmaster", this illustrating that he was in the place of a father having the fathers rights and duties. Also Collins J (**36**) states that it was clear that a father has a right to inflict reasonable corporal punishment on his son. It is equally the law and is in accordance with very ancient practice that "he may delegate this right to a schoolmaster". Whether it has been so delegated depends on the relationship of care and control over the child entrusted by the parent and, assumed by the person receiving it. This delegation was assumed automatically in **Fitzgerald v Northcote**(**37**) where "the master of a school has the same authority over the scholars as the parents would have, and, therefore, may impose reasonable restraints upon their person either by prevention or punishment of disorderly conduct" continuing that "when the parent places a child with a schoolmaster he delegates to him all his own authority so far as it is necessary for the welfare of the child". (**35**)

A problem then arises as to whether the parent can withdraw this delegated loco parentis, authority from the teacher. In section 1 of the Children and Young Persons Act 1933 (**39**) Parliament endorsed the courts' view that a teacher had authority to chastise, making it unlawful to assault, ill-treat, neglect, abandon or expose in any manner likely to cause harm to or injury to the health of any child. It preserved, however, the right of the "parent, teacher or other person having lawful control or charge of a child to administer punishment to him". (**40**) Since the 1944 Education Act it could be argued that teachers possess this power in their own right. Under s.36(**41**) it is the duty of every parent to send their child to school or see that it receives efficient training and under s.39 (**42**) if parents do not comply they will be guilty of an offence unless the child had "leave" or "was prevented from attending by reason of... any unavoidable cause". (**43**) It was held that in **Happe v Lay** (**44**) where a boy refused corporal punishment (as his parents had strong views against such things) and was duly suspended for refusing school discipline, his father thus being charged under s.39, that there was no defence to this section for refusal to send a child because he was liable to be caned. Cumming-Bruce LJ stated that "the refusal of a father to send his child to school to be subjected to ... reasonable and moderate ... discipline cannot possibly constitute ... a good reason to keep the child away" under s.39(2). This was followed in **Jarman v Mid-Glamorgan Education Authority,** (**45**) where a mother was convicted of the same offence, again for refusing to let her son be caned, it having been argued that s.39(1) was not an absolute offence. However the court decided it was, as in **Crump v Gilmore** (**46**) Lord Parker LCJ stated "s.39(1) is creating an absolute offence" in the sense that it need not be shown that the parents had knowledge of the childs absence or neglected to ensure she attended to be guilty. Also, in **Spiers v Warrington Corporation** (**47**), Lord Goddard stated that "they thought ... that it was simply a question whether the parents had a reasonable ground for doing what they did ... that is not the question. (It) is: was the headmistress (in refusing) to allow the girl to come to school in this way acting within her rights? We hold that she was not only within her rights, but that it was her duty, and that the parent, knowing the child would not be admitted ... committed an offence". It could not even constitute unavoidable cause as Lord Goddard (**45**) had stated that it must affect the child and "must be read in the present context as meaning something in

the nature of an emergency" which a parental opinion cannot amount to.

It therefore appears that parents have no option but to comply even though s.76 (**49**) declares that parental wishes are borne in mind. As in **Wood v London Borough of Ealing** (**50**) the court interpreted s.76 as applying to curriculum and such things as religious education and co-education, however not deciding whether it is applied to questions of corporal punishment.

This right to punish, delegated or automatic, "extends not to the head teacher only, but to the responsible teachers who have charge of the classes" provided "it was such as was usual in the school and such as the parent of the child might expect that it would receive if the child did wrong". (**51**) In **Mansell v Griffin** (**52**) the teacher was under school rules, prohibited from administering it, although neither the parent nor the teacher knew this. The court held that "an assistant teacher has authority to inflict corporal punishment on a pupil ... the fact that by regulations of the school, assistant teachers are forbidden to inflict (it) will not itself render the assistant teacher liable in any action by the pupil for assualt" whether she knew or did not know of the regulation. However, the teacher would still be liable to the discipline of the Education Authority for breaching school rules. (**53**)

The headmaster can further delegate this power to prefects or monitors who would not normally be so entitled. As in **Re Basingstoke School** (**54**) if the prefect is duly authorised by the headmaster "there was nothing in itself unreasonable, or necessarily illegal in the infliction of punishment by prefects ... although there is a duty on the headmaster to ensure the penalties are reasonable and moderate".

The headmaster even has the power to cane a pupil for an offence done whilst out of school. In **Cleary v Booth** (**55**), where a boy was caned for assualting another on the way to school, Collins J said "the purpose with which the parental authority is delegated to the schoolmaster, who is entrusted with the bringing up and discipline of a child must to some extent include authority over a child while he is outside the four walls"

Unless this was so, grave consequences would ensue, as the child would be unable to obtain immediate remedy from the schoolmaster but would have to "go before the magistrates to enforce a remedy". But "Parliament clearly contemplates that the duties of the master to his pupil are not limited to teaching" so the parents must have contemplated such authority when delegating the power. This was extended further in **R v Newport (Salop) Justices ex parte Wright** (**56**), through the schools outhority to make and enforce rules, to cover punishment for a breach of rules which a parent has authorised, in this case, smoking in public. Lord Hewitt justified this as "any parent who sends a child to school, is presumed to give the teacher authority to make reasonable regulations and to administer ... corporal punishment for the breach" This has been followed in several cases, in one the court even awarded the headmaster damages "to safeguard him and other headmasters against such proceedings and to mark the courts disinclination to entertain similar proceedings". (**57**)

2.3.2 The duty of care

The right to punish is accompanied by the requirement that it be "reasonable and moderate" punishment. This was first stated in **R v Hopley**(**58**), where a schoolmaster

caned a pupil to death (having asked the parents permission to punish the boy) (**59**) that he "may for the purposes of correcting what is evil in the child inflict reasonable and moderate corporal punishment". Although if administered "for the gratification of passion or rage or if it be immoderate or excessive in its nature or degree beyond the childs power of endurance, or with an instrument unfitted for the purposes ... calculated to cause harm to life or limb; in all such cases punishment is excessive ... the violence unlawful" as even a parent cannot authorise such punishment, However, the only official statement of what is regarded as moderate and reasonable is under the Home Office (**60**) rules for approved schools which does not bind the courts or Education Authorities. In **Hutt v Governors of Halleybury College** (**61**) they were thought to be to "act honestly ..., there must be a cause which a reasonable father believes justifies punishment."

It is for the court, in individual cases to decide what actions come within these rules which they have construed widely. They have decided that if the child is incapable of appreciating the reason for the correction (**62**) it could never be reasonable. Although if death results it may still be moderate, in cases where the child is extra sensitive and the teacher does not realise (**63**) this, even though this seems to contradict the general criminal law principle of taking your victim as you find him. In **R v Woods** (**64**) the court held that where a slight blow caused death where it would not on a normal person, "if it was an 'unlawful blow' the person would take the risk of condition in which the person is in" Thus if it had been lawful, through having authority to punish as a teacher does, he would not have been guilty. Also, in **R v Byrd** (**65**) a headmaster was convicted of assault occasioning actual bodily harm due to inflicting several unusual chastisements, for example, making the pupil run barefoot through nettles then throwing him in the pool. However the appeal court reduced his sentence arguing that he was not "evil and sadistic", as the trial judge said, rather "a man who in moments of impotance would go futher than he should". Thus the courts do seem to be lenient, as stated by Hale, (**66**) towards the teacher even stating that where a child makes no complaint and any bruising causes no inconvenience to him then it was reasonable punishment. (**67**) Recently, where a girl was caned six times for not paying attention to lessons and adopting an attitude of defiance, the court decided such punishment was reasonable as parents must expect discipline in schools to be maintained, (**68**) even if the child is mistakenly punished. (**69**)

The courts have even held it reasonable when a whole class was punished arguing that it is done in the interests of discipline, (**70**) and even going so far as to allow the teacher to do so with an unauthorised instrument, (**71**) adding in **R v Jeffs** (**72**) that there was nothing discreditable in a young teacher finding after a long day, with a class of 38 children, that it had become a little hard to tolerate it when they become disorderly. However, they are quite strict about where a child can be hit: in **R v Reid**(**73**) a punch in the jaw was thought never to be justifiable; and in **R v Fildes** (**74**), where a woman teacher boxed a boy on the ear causing him to go deaf, it was held that although the blow was moderate it could never be reasonable because this was not the sort of punishment parents "might expect that the child would receive at school in these days". This implies that acceptable punishment is determined according to a sliding scale of standards set by society and the expectation of parents at the time. Thus, as corporal punishment becomes less acceptable, the courts may become more strict in the interpretation of reasonableness. In **Gardner v Bygraves** (**75**) they even decided that caning on the hand was unreasonable as it was "attended by risk of serious injury", although, this decision was overruled on appeal.

However, in **R v Higgitt (76)**, where a teacher was kicked in the stomach and called abusive names when he caught a pupil smoking, resulting in the teacher hitting the pupil on the jaw, Ackner J recognised that "the law does not require a teacher to have the patience of a saint". He considered that as "nothing has happened to the boy, although he could be brought before a juvenile court and receive a wide range of penalties, yet a schoolmaster of exemplary character and an able, efficient and conscientious teacher has been brought before the court. That is why I say we live in very strange times". This seems to indicate that courts are in fact construing 'reasonable' quite widely, however, this could be because in this case the teacher was actually assaulted by the pupil. If there had been no such assault the narrower approach of **R v Reid (77)** would most probably have been followed.

The most recent innovation in this area has been the award to a teenage pupil badly assaulted by a Nottinghamshire teacher from the Criminal Injuries Compensation Board. The boy was given an interim award of £200 but the final amount is anticipated to run into thousands. **(78)** The award is the first of its kind and was heralded as a victory by STOPP.

2.4 CONCLUSION

Therefore, it appears that, the teacher has a very wide power to punish pupils which, although it is supposed to be delegated from the parent, cannot be forbidden by the parent. The only limits on it being that it is administered in a reasonable and moderate amount and manner, for example not on the head. Even school regulations cannot affect this right, only affecting internal discipline of the teacher for breach of a school rule.

It seems, then, that regardless of opinions on the abolition of corporal punishment and "not withstanding the decision in the Campbell and Cosans case **(79)** in the European Court, the court will uphold the teachers right to punish. Until such time as the Government implement the European Court decision by legislation as it is bound by international obligation to do.

3. THE EUROPEAN CONVENTION ON HUMAN RIGHTS (80)

3.1 INTRODUCTION

There have been several decisions **(81)** made by The European Commission, **(82)** and the Court **(83)** on Human Rights on corporal punishment under this Convention, which if implemented by the United Kingdom would cause a fundamental change in out present laws. **(84)**

The Convention **(85)** and most of the subsequent eight protocols **(86)** have been ratified **(87)** by the United Kingdom who also recognised the competence of the Commission and Court. **(88)** Therefore anyone whose rights have been violated by a State, **(89)** and who are victims **(90)** of such, may apply to the Commission **(91)** to decide on admissibility and investigate the claim. After this, if no friendly settlement is reached, **(92)** the case is referred to the Committee of Ministers **(93)** for a decision. **(94)** Unless, within three months **(95)** of referral to the Committee, the Commission or State concerned **(96)** (although never the individuals who have no locus standi in the Court) decide it should be sent to the Court for the final

decision.(**97**) This decision is binding on the parties and also applicable to "cases concerning the interpretation and application of the Convention". (**98**) The Court having the added power to "afford just satisfaction to the injured party" such as compensation if there is no, or only partial reparation by the violating State. (**99**)

However, there is no indication as to how decisions should be implemented so it differs with various states. (**100**) It has been suggested that the Convention should be enacted, but, the Government assumed that our domestic law already dealt with the provisions adequately so it was not necessary. (**101**) There can be no direct reliance on the decisions, though, there is only "a presumption that our municipal law will be consistent with our international obligations. (**102**) Thus, though it is no appeal court (**103**) its decisions are expected to be, (**104**) and in fact always are, observed as a matter of international obligation under international not domestic law, which is a means of comparing and criticising a States laws, (**105**) against an international code of rights, so enabling defects to be identified and corrected.

The only recourse under the Convention, if it is not followed, is to require the State to withdraw (**106**) from the European Community in the hope that such drastic action would persuade the State to reconsider.

3.2 ECHR: CASES ON CORPORAL PUHISHMENT

The first case brought to the European Court concerning corporal punishment, **Tyrer v UK** (**107**), was considered under Article 3, (**108**) that "no one shall be subjected to torture or inhuman punishment or treatment", after having applied Article 25 to determine whether the parties were victims under the Convention.

It concerned the judicial birching of a 15 year old in the Isle of Man (**109**) and the Court decided that judicial corporal punishment, being institutionalised, although not constituting torture or inhuman punishment did constitute degrading treatment. This they interpreted as applying to where the punishment inflicted led to humiliation and debasement on a level exceeding that ordinarily inherent in the punishment as "it would be absurd to hold ... judicial punishment ... by reason of its usual and almost inevitable element of humiliation is degrading ... indeed Article 3 ... implies there is a distinction between such punishment and punishment in general".(**110**) To assess whether it reaches this level depends "on all the circumstances of the case and in particular on the nature and context ... and the manner and method of execution" (**111**) the effect on the individual being important. Corporal punishment which inflicted on unacceptable degree of pain would fall foul of inhuman treatment or torture but if it did not then it would be degrading only if there were aggravating features.

It would seem that the Court came to this conclusion not because of the aggravating features but due to two factors: the inherently degrading nature of institutionalised violence; and European standards. It was because of this attitude, that the higher level of humiliation was automatically attained not due to "other circumstances of the punishment, but the punishment itself", (**112**) that Judge Fitzmaurice, United Kingdom's member, dissented.

The Court felt that the institutionalisation aggravated the offence, which implies that as caning in schools is not institutionalised it cannot be degrading which conflicts with their apparent opinion that any corporal punishment is intrinsically

degrading.(**113**) This was formulated by Judge Fitxmaurice from the courts pronouncements that "the very nature of judicial corporal punishment us that it involves ... inflicting physical punishment on another" and being treated as "an object in the power of the authorities (which) constitutes an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and personal integrity". (**114**) This indicated that it was not the violence, the compulsory element or the indignity involved but "the 'corporality' of the punishment which automatically caused it to stand on an unprecedented level." (**115**)

The Court considered that this institutionalised character was made worse "by the whole aura of official procedure attending the punishment" and "by the fact that those inflicting it were total strangers to the offender." This is difficult to justify, as recognised by Judge Fitzmaurice, because it implies that informal punishment having no rules and regulations would be preferable and surely "a birching on the bare buttocks by a school teacher known to the subject (would) be just as offensive?" (**116**) Judge Fitzmaurice thought "neither punishment (as long as administered in private) can be considered inherently degroding where a juvenile is concerned unless other factors over and above the beating as such are involved. The state is in a certain sense in loco parentis in such a situation". (**117**) These possible circumstances being: that it might entail adverse psychological effects due to the mental anguish of anticipating and receiving the violence to be inflicted, (**118**) however, if such effect could be established and they "were appreciable ... there might be a case for calling (it) inhuman" (**119**) not degrading; and that it was on the bare buttocks, but this was thought by the court to be merely aggravating to some extent, not amounting to a determining factor. Thus it would have been degrading regardless of these. That there was a deterrent effect and that it was not publicised did not reduce the degradation as the court considered the victim could still be degraded in his own eyes.

As regards the second factor of European opinion the court admitted that it could not by be "influenced by the developments and commonly accepted standards in the penal policy of the Member States", (**120**) judicial corporal punishment having been abandoned throughout Europe, although as Judge Fitzmaurice argued the "fact that modern opinion regards corporal punishment as an undesirable" nor morally wrong or distasteful "form of punishment does not automatically turn it into a degrading one". (**121**)

Thus it would seem that any corporal punishment may subsequently be considered degrading and contrary to Article 3, so absolutely prohibited, even if only the recipient considered himself degraded. (**122**) It is possible to argue that corporal punishment in schools would be equally degrading, even though it was not 'institutionalised', as a judicial punishment. The court considered "the Convention is a living instrument which must be interpreted in the light of present day conditions" it being universally considered by the rest of Europe that 'caning' is morally and physically wrong and also unnecessary in practice.

The only other case decided, on corporal punishment in schools is **Campbell and Cosans v UK** (**123**) brought under both Article 2 of Protocol 1 and Article 3. It concerned two pupils, from separate Scottish schools, who refused to submit to corporal punishment and so were suspended until they would. They never returned to school and their parents were charged under s.39 of the Education Act 1944. (**124**)

Under Article 3 the Court considered that "if sufficiently real and immediate a mere threat of conduct prohibited by Article 3 may itself be in conflict with this provision" (**125**) However, they decided that although "the system of corporal punishment can cause a certain degree of apprehension" (**126**) this did not amount to degrading treatment or torture, (**127**) measured on an objective standard. (**128**) So they were not degraded in their own eyes, nor were they "solely by the reason of the risk of being subjected thereto humiliated or debased in the eyes of others to the requisite degree" (**129**) this being "humiliation or debasement attaining a minimum level of severity to be assessed with regard to the circumstances of the case". (**130**)

On Article 2 of Protocol 1 the court separated the first and second sentences. Under the latter they held there was a violation as they considered that "education of children is the whole process whereby ... adults endeavaur to transmit their beliefs, culture and values to the young", (**131**) and it seemed artificial to separate discipline from this. In **Kjeldsen Busk Modsen and Pedersen v Denmark** (**132**) it was held that Article 2 implied only a duty to convey information and knowledge "in an objective, critical and pluralistic manner". (**133**) This forbade indoctrination against parental convictions and "that is the limit that must not be exceeded", this was relied upon in the dissenting opinion of Sir Vincent Evans, the United Kingdom judge. The Court, however, concluded that Article 2 had a broader scope than this, in dicta in that case concerning only the content of the instruction, as the same case decided that a State when exercising its functions of organisation and financing of public education (**134**) and each and every sphere of teaching was bound by it. So it could be extended to the supervision of education systems generally, thus discipline.

They then decided that 'philosophical conviction' denoted "such convictions as are worthy of respect in a democratic society (**135**) and are not incompatible with human dignity" (**136**) although they must not conflict with the Article 2 right to education. Therefore under this definition a strongly held view on corporal punishment could be a philosophical conviction and as such the United Kingdom is in violation of the Convention. Sir Evans however argued that philosophical convictian, as made clear in drafting, meant "to protect the rights of parents against the use of educational institutions ... for the ideological indoctrination of children" (**137**) and "such matters as the use of corporal punishment are as much outside the intended scope as ... linguistic preferences" (**138**) seen in the **Belgian Linguistics Case.** (**139**) If it was widened to cover the views of parents opposed to corporal punishment how could it be applied to "exclude from its scope all manner of strongly held views". (**140**) He put forward the example of a parental conviction that independent schools should be abolished, however, this would not raise any serious problem as such parents would be unable to show they were victims of a violation, as required by Article 25. (**141**) Other such convictions may pose more problems, for example those against mixed or multi-racial schools although any action taken on these may contravene Article 14 as 'discrimination on any ground such as sex or race'. So such views being convictions would seem to cause confusion and difficulty as, as pointed out in the **Kjeldsen** (**142**) case, practically every subject in education bears same philosophical or religious weight.

The argument that deeply held views on physical integrity or inviolability of the human person, should not be relegated to the status of 'mere' views or opinions is hard to reject. (**143**) The State could instead attempt to satisfy all parental convictions but this would prove difficult and expensive, but, the reservation, under Article 64, that Article 2 was accepted only so far as it was "compatible with the provision of efficient instruction and the avoidance of unreasonable public expenditure" (**144**) clearly

limits the remedies that could be enforced under the Convention. It was held that parental convictions against carporal punishment were not compatible with the reservation so some remedy had to be found. These solutions were suggested:

(i) dual system of caning and non-caning schools, which it was admitted was incompatible,

(ii) separate classes, or

(iii) an exemption system.

Sir Evans argued that the last would have "harmful consequences both for the upbringing of the individual and for harmonious relations within the group". (**145**)

With regard to the former sentence, "no person shall be denied the right to education", they decided that there was again a violation as the boys were suspended because of their parents convictions against 'caning' which led to them missing school. Their return could only have been possible if their parents had forgone their convictions which the State was obliged to respect, therefore as the rights conflict there must be a violation.

It is clear that, whatever the previous decisions and the statements in the travaux preparatoire to Article 2, philosophical convictions do include such things as corporal punishment (although how much further the court is prepared to go is uncertain). As such it is clear that they are following the liberal construction in **Tyrer** (**146**) of interpreting the convention in conformity with the opinions of the rest of Europe, since the rest of Europe do not practice such punishment. They did not go so far as to demand abolition, though, to comply with this decision under its international treaty obligations, the Government must pass legislation ensuring it is unlawful

(i) for teachers to cane children contrary to their parents wishes, and

(ii) for schools to suspend children who refuse to be caned.

The question now is whether the court in future cases will decide that not only is it contrary to Article 2 but that it is also contrary to Article 3, under which there is a need for serious humiliation. (**147**) Controversy was caused in **Tyrer** by the finding that this principle was satisfied by 'judicial birching'. Secondly there is the qualification of degrading treatment in his own eyes, such that the State cannot be condemned for an action the 'victim' finds degrading because of his unreasonable attitudes or sensitive nature. (**148**) However, they considered judicial corporal punishment was inherently degrading and it is not such a big step to make all types of corporal punishment so.

3.3 OUTSTANDING CASES

There are now thirty three further applications on corporal punishment in schools from the United Kingdom, at various stages in the proceedings, some under Article 3 but the majority under Article 2 of Protocol 1. An example is **Brock v UK** (**149**) where the Commission held that the parents had not shown their views to be of sufficient cogency and seriousness to amount to philosophical convictions, moreover that

they did not bring these objections to the attention of the school authorities. This restrictive view of **Campbell and Cosans** was followed by the Commission in application number **9146/80 v UK (150)** which impiles that they are willing to limit the extent of Article 2.

Even with this restriction several cases have been declared admissible under Article 2, after applying the **Brock case**, as the applicants had brought their objectians to the attention af the competent damestic authorities. **(151)** In **9119/80 v UK, (152)** they noted that as the boy had not been punished there was no evidence that "the generai use of corporal punishment in his school adversely affected him" so compiaint under Articie 3 was manifestly unfounded.

However, two cases have been held admissible under both Article 2 and Article 3. In **7907/77 v UK (153)** the Government tried to argue that Article 26 had not been complied with, the applicants not having used all the available domestic remedies, so Article 3 could not be applied. On "considering the situtation in domestic law and the ... praspect of success", though the Commission concluded that they did not have to use the remedies as those available were not capable of redressing their complaints. **(154)** In the second case, **9471/80 v UK (155)** they aiso succeeded under Articie 13 in that there was no effective remedy. The Gavernment argued that the civil law remedy of assault was enough, but, this raised difficulties in the law so it was deciared admissible.

When these two cases reach the Court they may weli change our domestic law. If they hold Article 3 vialated and there is na sufficient remedy under Article 13 this would amount to a serious breach of the convention. So, uniess corporal punishment were abolished, or regulated so as not to create adverse effects due to the knowiedge it was to be used (which would be difficuit if nat impossible to obtain), the United Kingdom may be subjected to Article 8 of the Statute of Europe and be asked to withdraw or be expeiled.

4. REACTION TO THE EUROPEAN COURT ON HUMAN RIGHTS

4.1 PARLIAMENT'S ALTERNATIVES

In the three years since the European courts decision that there was a breach af parents philosophical convictions against corporal punishment, there has been no legislative remedy, even though the optians availiable to Parliament were ciear: **(156)**

(i) to abolish corporal punishment, which would automatically ensure these convictions against it were respected. However, it would then be against the apinians af those parents in favour of it.

(ii) to establish a dual system of caning and non-caning schoals, this though, would lead to enormous practical difficulties in duplicating schools as well as vast expense.

(iii) to create an exemption system enabiing those parents with philosophicai convictions against 'caning' **(157)** to exempt their children, ieaving the schooi the alternative of administering it to others.

This last option has three possible approaches (**158**)

(a) to leave the initiative of exemption to the parent objecting to 'caning'. Therefore the onus would be on the parents to make the judgment, however, this would mean that teachers would be allowed to cane from absence of contrary authority, or

(b) to leave it to the parents not to object, which would then solve the problem of absent authority. Unfortunately this imposes the responsibility on those who were content to leave it to the schools discretion, as well as depriving the school of its use if the records are lost, or

(c) to seek a formal response from all parents thus, according to the Government, giving the best results as absence of a response could be identified and followed up. This, though, incurs the administrative problems of both the above approaches.

4.2 THE EDUCATION (CORPORAL PUNISHMENT) BILL 1984

The Government eventually decided on an exemption system where every parent would be required to reply. As they preferred "to leave the decisions concerning ... (it) to those closest to the child and with responsibility for his or her well being" (**159**) such as the parents and teachers. Those pupils whose parents did not opt-out of 'caning' were then to be recorded in a register by the school which would be consulted before any pupil was caned, the pupils not on the register having to be punished by some other method." (**160**) This was eventually withdrawn for reconsideration after the Lords, by a four vote majority, amended it to an abolition Bill. (**161**)

5. CONCLUSION

It may appear from this chapter, and the other sources investigated, as if the abolition of corporal punishment is the answer to all the problems. It must be noted, though, that even some schools who have abolished realise that in some situations, where detentions and referrals prove effective, "recourse to the cane ... would have proved an answer", (**162**) and many schools have excellent discipline even though they still use the cane. (**163**) Also, most parents and marginally more teachers still favour its use, as well as many organisations.

Up to now, it has been for the individual headmasters or Local Authorities to decide whether to abolish, and, as there is no pressure on them to do so, they have been able to consider the various methods and apply the most suitable in the situation. (**164**) They may change though as the Government's Bill was withdrawn because many favoured abolition to its proposed system, and any other Bill apart from that of abolition is to unlikely comply with the European Human Rights decision as well as Parliament's demands. (**165**) So in the long run it looks as though corporal punishment will be nationally abolished despite the present Government's reluctance to do so and the fact that most parents favour its use. Hopefully, though, if it is implemented the Government will follow the previous examples of abolition, especially that by the Scottish Education Authority, (**166**) and allow schools time to adapt, otherwise the only result it will have is chaos. (**167**)

Notes

(1) This article consists of extracts from a dissertation submitted as part of the requirements for an LLB Honours degree (C.N.A.A.) of Trent Polytechnic in 1986.

(2) See Blacks Law Dictionary, 5th Edition "any kind of punishment of, or inflicted on, the body."

(3) See Education (Corporal Punishment) Bill 1984 which was withdrawn for reconsideration after the 2nd reading in the House of Lords, infra.

(4) Offences Against the Person Act 1861 s.47

(5) Such as actual or grievious bodily harm.

(6) Infra.

(7) Infra, **Powys v Mansfield** (1837) My and Car 359 'A person is in loca parentis towards an infant when he assumes towards the infant the moral obligation of making such provision for him as a father would be duty bound to make.

(8) R B Wright: Discipline or Corporal Punishment: Indianapolis Public Schools, (1969) Education vol 90 p67-71.

(9) Eg, the abolition of corporal punishment in prisons and reform centres.

(10) There is no way of telling whether this is so as most Education Authorities do not publish their punishment book figures.

(11) This includes schools who although they never physically use the cane keep it as a threat, as the final resort.

(12) See, 'The Violent 81%' by STOPP.

(13) Infra.

(14) Stated in 'Spare the Rod' by J Ritchie and J Ritchie.

(15) Greek poet author of the Iliad and the Odyssey.

(16) Greek historian: see Ancient Education and Today, C B Castle.

(17) See J W Adamson, A Short History of Education.

(18) See 'The Childrens Petition of 1669 and its sequel' by C B Freeman.

(19) Childrens Petition p.5.

(20) Childrens Petition p.59.

(21) This has been disputed by some, as it is thought better to get the punishment over at the time of the offence.

(22) 'Lex Forcia - being a sensible address to the Parliament for an Act to remedy' see C B Freeman.

(23) Lex Forcia p.15

(24) Dame Schools: a school for young children and girls.

(25) Hansard 3rd series volume 193, column 169. p.65.

(26) Attempts were also made in the House of Lords 1867-8, 1868-9 and 1870 by the Marquess of Townsend but two proposals were withdrawn and the other failed to get a second reading: see Hansard 3rd series volumes 197,202..

(27) See R L Alder, Secondary Education in the 19th Century.

(28) From Edinburgh Review 1830: see J W Adamson, A Short History of Education.

(29) These being:-

(i) head teachers should try to keep it to o minimum.

(ii) it was only to be inflicted for grave moral offences or after other methods had been tried.

(iii) the heads were responsible for all punishment but were able to delegate the power.

(iv) irregular, cruel or excessive punishment could lead to dismissal unless due to severe provocation.

(v) care must be had to delicate children.

(vi) mistresses only should inflict it on girls in mixed schools.

(vii) blows with the hand, boxing the ears and other irregular methods were strongly forbidden.

(viii) all corporal punishment must be recorded.

(ix) the punishment book is to be inspected at each managers meeting.

(x) infants may be corporally punished but only on the hands.

(30) Which developed from the Local School Boards.

(31) 81 LGR 292.

(32) EAT 536/83 27th September 1984.

(33) Hales Pleas of the Crown.

(34) Hales Pleas of the Crown.

(35) (1893) 10 TLR 41 (CA) - statement by Lord Esher.

(36) **Cleary v Booth** (1893) 1 QB 465.

(37) (1865) 4 F and F 650.

(38) Also **Price v Williams** (1888) Willis J "The parent surrenders for the time being a part of his otherwise exclusive right to direct and control the child and certainly undertakes that the master shall, so far as his actions are concerned, be at liberty to enforce with regard to his son the rules of the school, or to put it at its lowest such rules as are known and consented to by him ... the very nature of school life imports such an obligation on the part of the parent"

(39) Re-enacting The Prevention of Cruelty to Children Act 1904: children and Young Persons Act 1933 s.1 "if any person who has obtained the age of 16 years and has the custody, charge or care of any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons or exposes him or causes or procures him to be assaulted, ill-treated, neglected, abandoned or exposed in o manner likley to cause harm or injury to health, that person shall be guilty of a misdemeanour and shall be liable.

(40) **S.(17), "Nothing in this section shall be construed as affecting the right of any parent, teacher or other person having lawful control or charge of a child or young person to administer punishment to him".**

(41) Education Act 1944 s.36 "It shall be the duty of every parent of every child of compulsory school age to cause him to receive efficient full-time education suitable for his age, ability and aptitude, either by regular attendance at school or otherwise".

(42) S.39(1) "If any child of compulsory school age who is a registered pupil at a school fails to attend regularly thereat, the parent of the child shall be guilty of an offence against this section".

(43) S.39(2) "In any proceedings for an offence against this section in respect of a child who is not a boarder at the school at which he is a registered pupil, the child shall not be deemed to have failed to attend regularly at the school by reason of his absence therefrom with leave or, (a) at any time when he was prevented from attending by reason of sickness or any unavoidable cause ..."

(44) (1977) 76 LGR 313.

(45) The Times 11th February (1985).

(46) (1969) 68 LGR 56.

(47) (1954) 1 QB 161.

(48) **Jenkins v Nowells** (1949) 2 KB 218.

(49) S.76 Education Act 1944 " In the exercise and performance of all powers and duties conferred and imposed on them by this Act the (Secretary of State) and local education authorities shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure pupils are to be educated in accordance with the wishes of their parents".

(50) (1967) Ch 364.

(51) **Mansell v Griffin** (1908) 1 KB 160 Philimore J: see also **Scargie v Lawrie** (1883) 10 R (Ct of Sess) 610.

(52) (1908) 1 KB 160.

(53) See **Hall v Cheshire County Council** (1984): see Chapter 2.2.

(54) (1877) 14 JP 118.

(55) (1893) 1 QB 465.

(56) (1929) 2 KB 416.

(57) See **Walsh v Bolwell** The Times 23rd August (1966).

(58) (1860) 2 F and F 202; Cockburn, J.

(59) Thus the power to punish was directly delegated by express permission not merely assumed.

(60) See Approved Schools Rules 1933 no's 35 and 36.

(61) (1888) 4 TLR 633; Field J.

(62) See **R v Griffin** (1869) 11 Cox 402; as a child will not learn from its mistakes if it does not understand what it has done wrong.

(63) See **R v Cheeseman** (1836) 7 C and P 4: and **Mansell v Griffin** (1908) 1 KB 160.

(64) (1921) 85 JP 272.

(65) (1968) CLR 278.

(66) Hales Pleas of the Crown, see Chapter 2.3(a).

(67) See **Ridley v Little,** The Times 26th May (1960).

(68) See **R v Gilchrist**, The Times 11th July (1961).

(69) See **M'Shane v Paton** (1922) JC 26.

(70) See **R v Dennis,** The Times 18th November (1954).

(71) See **Hazell v Jeffs** The Times 11th January (1955) where a blackboard ruler was used to punish a class, when the authorised instrument was solely the cane.

(72) The Times 11th January (1955).

(73) The Times 16th June (1961).

(74) (1938) 3 All ER 517.

(75) See **Gardner v Bygrave** (1889) 53 JP 743.

(76) The Times Educational Supplement 24th March (1972).

(77) The Times 16th June (1961).

(78) The Times Wednesday 12 March, 1986.

(79) See **Jarman v Mid Glamorgan Education Authority,** The Times 11th February (1985): and infra.

(80) ETS No 5 UKTS 70 (1950) Cmnd 8969 in force 1953.

(81) Eg **Campbell and Cosans v UK** (1982) 4 EHRR 293; see infra.

(82) European Commission on Human Rights.

(83) European Court on Human Rights.

(84) According to our constitutional practices enactment is the only method of giving them force of law.

(85) Developed in response to World War II violations of human rights and reflecting the Statute of Europe (UKTS 11 1949 Cmnd 7778/87 UNTS 103) where States agreed to "accept the principles of the rule of law and enjoyment of all persons within its jurisdiction of human rights", in Article 3, under threat of being asked to withdraw or be expelled from the European Community if they did not comply, in Article 8.

(86) Protocols 1, 2, 3 and 5 have been ratified but not protocol 4, nor are they likely to ratify 6 although they are considering ratifying protocols 7 and 8. However, a reservation has been placed on Article 2 of Protocal 1.

(87) The Convention was rotified in 1951 and the various protocala after.

(88) This was the first recognised in UKTS (1966) Cmnd 2894 on a renewable term basis; last renewal wos 11 october 1984 for 5 years.

(89) State means any public body answerable to the Government and may include any individual for which it is responsible.

(90) Article 13(1).

(91) If its competence has been recognised under Article 25(1).

(92) Article 28(b), see also Article 47.

(93) Which is a governmental body of representatives from all the Member States.

(94) The decision being based on a report on the findings and opinions of the Commission and must be by two third majority.

(95) Article 32.

(96) Articles 46 to 48.

(97) If the Court's competence is recognised, Article 48, the decision is final, Article 52, although not binding on other states.

(98) Article 45.

(99) Article 50.

(100) Eg, in France the Convention law is placed higher thon their domestic law but lower than their Constitution, the only indication on how to implement is in Article 57.

(101) See A Arnvill, Making the European Convention Work, (1984) PL 378.

(102) **A-G v BBC** (1981) AC 303 at 354.

(103) **Sunday Times Case** ECHR Report Series A no 30.

(104) Article 53, the Members also agreed to observe the provisions and "ensure thot the domestic legislotion is compotible with the convention and ... to make any necessary adjustments to this end" **De Becker v Belgium** 2 YBECHR 234 (1962).

(105) See P T Muchlinski, Improving the Proctection of Human Rights (1984) MLR 240.

(106) Article 8 Statute of Europe: see the **Greek Case** 12 YBECHR (1969), 186, during which Greece opted out of De European Economic Community before it could be requested to, due to allegations of torture.

(107) **Tyrer v UK** (1978) 2 ECHR 1.

(108) See P J Duffy, Article 3 of the European Convention on Human Rights (1983) 32 ICLQ 316.

(109) This offence would now no longer be brought to the European Court or Commission

as the jurisdiction over the Isle of Man.

(110) **Tyrer v UK** para 30.

(111) **Para 30.**

(112) Para 8, dissenting judgement of Judge Fitzmaurice.

(113) See G Zellick, Corporal Punishment in the Isle of Man (1978) 27 ICLQ, 665.

(114) **Tyrer v UK** para 33.

(115) Para 8, dissent and para 33.

(116) See G Zellick, 27 ICLQ 665 at 668.

(117) **Tyrer v UK** para 9(I), dissent.

(118) Para 33.

(119) Para 9(III), dissent.

(120) Para 31.

(121) Paro 11, dissent.

(122) Para 31.

(123) **Campbell and Cosans v UK** (1982) 4 ECRR 293.

(124) Supra.

(125) **Campbell and Cosans v UK,** para 26.

(126) Para 26.

(127) It must be remembered that no punishment was actually inflicted.

(128) "A threat directed to an exceptionally insensitive person may have no significant effect on him but nevertheless be incontrovertibly degrading; and conversely, an exceptionally sensitive parson might be deeply affected by a threat that could be described as degrading only be a distortation of the ordinory meaning." **Campbell and Cosans v UK.**

(129) **Campbell and Cosans,** para 29.

(130) **Tyrer v UK** para 32.

(131) **Campbell and Cosans,** para 33.

(132) 1976 EHRR 711.

(133) **Kjeldsen Busk Madsen and Pederson v Denmark,** para 50.

(134) Para 50.

(135) Defined in **Young, James and Webster v UK** (1981) 4 EHRR 57 para 63 as "individual interests (being) ... on occasion subordinate to those of a group, democracy does not simply mean that the views of the majority must always prevail a balance must be

achieved which ensures fair and proper treatment of minorities and avoids any abuse of a dominant position"

(136) **Campbell and Cosans v Uk** para 36.

(137) Para 4, dissenting judgement of Sir Vincent Evans.

(138) Para 5.

(139) 1968 1 EHRR 252.

(140) **Campbell and Cosans v UK** para 5, dissent.

(141) See J Lonby, Rights of Education under the Europen Convention on Human Rights (1983) 46 MLR 345.

(142) **Kjeldsen Busk Madsen and Pederson v Denmark** (1976).

(143) See Ghandi, Spare the Rod; Corporal Punishment in Schools and the European Convention on Human Rights (1984) 33 ICLQ 488.

(144) **Campbell and Cosans v UK,** paro 37.

(145) Para 7, dissent.

(146) **Tyrer v UK** (1978).

(147) As in **Iceland v UK** (1978) 2 EHRR 25 paras 163, 167 and 181.

(148) As in **McFeely v Uk** (1980) 3 EHRR 161.

(149) Application no 8566/79 v UK (1983) 5 EHRR 265.

(150) Application no 9146/80 v UK (1985)May LSG 1247.

(151) Application no 9114/80 v UK (1984) 7 EHRR 462.

(152) Application no 9196809 v UK (1985) May LSG 1247.

(153) Application no 7907/77 v UK (1979) 4 D and R 210.

(154) 7907/77 v UK.

(155) Application no 9471/80 v UK (1984) 7 EHRR 450.

(156) Hansard (HC) 25 Jonuary (1984) Education Corporal Punishment Bill column 38; or Campbell and Cosans v UK, Sir Vincent Evans; Corporal Punishment in Schools: a consultative document, DES.

(157) 'Caning' means corporal punishment which does include other methods of physical punishment.

(158) See Corporal Punishment in Schools: a consultative document.

(159) Baroness Cox, also similar statement in Hansard (HL) 4th July (1985) column 134.

(160) See, for further details, The Education (Corporol Punishment) Bill; HMSO £2.25.

(161) See Honsard (HL) 4th July (1985); or The Times 5th July.

(162) See W S Bunnell, Abolishing Corporal Punishment.

(163) Such as Archbishops' Secondary School, Canterbury where A Hogarth, Headmaster, still uses the cane; see A Hogarth The Philosophy of the Cane, The Telegraph 18 July (1985) although whether it is effective depends on the type of pupils and frequency of its use.

(164) See Scottish Council for Research and Education Report, Making the Change: or W S Bunnell, Abolishing Corporal Punishment.

(165) The views of the various political parties being: Labour - "The Labour party calls upon all Labour controlled authorities to abolish corporal punishment in their schools. All Labour groups to campaign for its abolition in county elections and the Labour Party to have as a firm promise in the next manifesto that a new Labour Government would abolish corporal punishment in our schools" Labour Party Conference 1980; Liberal, SDP - "calls for the immediate abolition of corporal punishment in schools", Liberal Party Council; Conservative - generally do not support abolition.

(166) See Scottish Council for Research and Education Report, making the Change.

(167) As seen in Leicester where the Local Education Authority abolished corporal punishment with no real thought as to the consequences and little prior organisation. As a result the schools' discipline systems suffered greatly.

PREVIOUS CONVICTIONS IN THE LAW OF EVIDENCE

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The law on criminal evidence could hardly be recommended as a model of clarity and coherence in which Court decisions represent the consistent application of well defined rules and principles. On occasions, there may well be good reason for a less than slavish adherence to stare decisis but too often the suspicion is that the Courts are muddled in their approach to the problems. This is a serious charge against the Courts but it can be justified at least in relation to one important area of criminal evidence - the admissibility and use of previous convictions. The case of **Powell** (**1**) illustrates not only this issue but also highlights another disturbing aspect, which may be increasing, of appeals in criminal cases.

Until 1898, an accused person was not generally competent to give evidence in his own behalf. The Criminal Evidence Act of that year changed the law but did not, in doing so, treat the accused in the same way as any other witness. This was understandable, since, at common law, a witness has a privilege to refuse to answer a question if the answer would expose him to criminal proceedings and the accused could not be given such a privilege; s.1(e) is the result. Obversely, an ordinary witness can be cross-examined as to his character including his disposition as shown by ony previous convictions. It was felt that such "open" cross-examination would severely prejudice an accused. Hence s.1(f) of the Act, the so-called "compromise-position", whereby an accused is protected from cross-examination as to his previous convictions unless and until, in general, he throws away the statutory shield either by making implications against prosecution witness, or by giving evidence against another accused charged on the same proceedings (**2**) or by giving or calling evidence of his own good character.

Even so, cross-examination of the accused as to his convictions is not automatic and can only be pursued by the prosecution if leave is given by the trial judge.

The section does not, in terms, confer any such discretion on the trial judge and is not mentioned in some of the earlier cases. The principal authority is the House of Lords decision in **Selvey v DPP** (**3**) in which

> "the prosecution launched a full-scale argument against the existence of any discretion to prevent cross-examination once the conditions prescribed by s.1(f)(ii) of the statute had been satisfied." (**4**)

Viscount Dilhorne concluded that it was far too late to consider that no discretion existed. It may be nated that this is a judicial discretion to exclude admissible evidence and is, presumably, based on the overall duty of a trial judge to ensure a fair trial. It was referred to by Lord Fraser in **Sang** (**5**) as an underlying discretionary power and it is not without interest to speculate on its source. Perhaps as Professor Hart observed, in a similar context, all that succeeds in, such cases, is success. The trial court judges assert their authority in a number of cases over a period and, before too lang, those same judges, now in the Appeal Courts, assert that it is far too late to deny the existence of the claimed right or discretion. On such deep foundations are judicial empires built!

With the issue of the existence of the discretion settled, the House in **Selvey** also considered the manner in which it should be exercised. The answer, in general terms, is either that it is necessary to weigh the damage to the prosecution case, caused by the attack on its withesses, against the prejudice caused to the accused by the reveiation of his convictions; or that it is proper that a jury should know that, if an accused represents himself as being of good character, that he is nat necessarily entitled to that character. (**6**)

The problem is that this explanation of how to exercise the discretion may raise more difficulties than it solves. In **Watts** (**7**), the accused was convicted of indecent assault on a woman. Watts having made imputations against their witnesses, the prosecution was allowed to prove that he had similar convictions for offences against his nieces. The judgment of the Court of Appeal refers to an attempt by prosecuting counsel at trial to bring in the underlying facts of those convictions, a course prevented by the trial judge and not further directly considered by the Court of Appeal.

This is a crucial distinction. Cross-examination of an accused under s.1 (f) covers only his previous convictions (and possibly not all of thase). Although the Courts have flirted with it, (**8**) what is quite clearly not permitted is the factual evidence of the accused conduct on which those convictions were based. (**9**)

On this issue, the trial judge in **Watts** was surely acting well within the authorities and the conventional academic wisdom, since the facts would be admissible only if they passed the test of admissibility as laid down by the House of Lords in **Boardman.** (**10**) in this event, they would be admissible as part of the prosecution case, irrespective of whether the accused had given evidence.

Lord Lane considered the "standard discretian" given by the trial judge to the effect that the jury must not use their knowledge of the accused's convictions as evidence of his guilt but only that, when he made allegations against the police of fabrication of evidence, he was not a man of unblemished character. However, his Lordship then appeared to traverse this when he added

> "they (the jury) were warned that such evidence was not to be taken as making it more likely that he was guilty of the offence charge, which it seems it plainly did, but only as affecting his credibility which it almost certainly did not."

Although this statement may lay claim to be logically more defensible than is the present low (**11**), it would also reverse that law as embodied in the standard discretion. In any event, the ratio of the case appears to be that any "probative value" the convictions may have was more than outweighed by their prejudicial effect and that the jury could hardly be expected to perform the "intellectual aerobatics" which the standard discretion requires. it is difficult to know why the expressian "probative value" is used in this context. The previous convictions are supposed to go to credit only and are not to be used as evidence of guilt. Of what would they then be probative?

Intellectual aerobatics are inevitable when, as in **Watts**, the present charges and the previous convictions are either for the same offence or of a similar type. In **Selvey**, where D was charged with burglary, the trial judge ruled, following what he said was an imputation of blackmail by the accused against a prosecution witness, that the prosecution could cross-examine Selvey on his record as to prior homosexual

offences but **not** on his convictions for dishonesty.

Such aerobatics seemed too much for Lord Lane himself in the Court of Appeal in **Powell** where he adopted a rather different approach to that he had taken in Watts. Powell was charged with "brothel-keeping" and he both (a) attacked the police evidence as lies; and (b) put his own character in issue to show that he had no reason to take money from prostitutes. He had previous convictions for similar offences and the crown was permitted to prove them expressly because of (b) though not because of (a). On appeal against conviction, the Court held that the judge was correct on (b) but should also have held for cross-examination under (a).

Lord Lane placed considerable emphasis on the 'fit for tat" argument but appeared also to hold that there was no principle that previous convictions of a similar nature must be concealed from the jury. In this respect, his Lordship relied expressly on **Selvey** - the source of the standard direction - and rejected dicta in **Maxwell** (**12**) which argue for concealment of previous convictions if there is a real possibility that a jury might be misled by them.

What conclusions can be drawn? In the first place, it appears possible that the judges may have lost faith in the standard direction. The seriousness of this should not be under-estimated since it is crucial to a fair trial that a jury be instructed on the use which they can make of particular evidence. (**13**) It has been argued that the present position of the accused (the "compromise") should be changed either to complete protection (no cross-examination on previous convictions) or to treating him as an ordinary witness. (**14**) Any change is not likely to be towards the former position and the latter would continue to involve the standard direction. It must be hoped that the appellate courts are soon able to give guidance to the lower courts on how to explain this crucial issue to the jury.

In the second place, any encouragement to "selective" cross-examination of the accused whereby the trial judge instructs the prosecution on which convictions he is willing to allow to be proved, seems to run counter to the law on the "indivisibility" of the accused's character. If D puts his character in issue, then it is his whole character. In **Winfield** (**15**), it was said, obiter, that the accused's convictions for dishonesty were receivable on a charge of rape. Is this principle of indivisibility limited to the situation when the accused puts his own character in issue and inapplicable to the situation where he attacks prosecution witnesses? If so, why? Does it not fall foul of the "tit for tat" principle articulated by Channel J in **Preston** which seems to depend on the jury being informed of the whole character? In this respect, Lord Lane's views in **Powell** seem to be in accord with authority.

Third, there is cause for concern when a modern House of Lords decision which is clearly referable to an appeal is neither cited in argument nor even mentioned by the Court when giving judgment. (**16**) According to Lord Lane in **Powell**, this was what happened in **Watts**, when **Selvey** was conspicuous by its absence. Mr Watts was, perhaps, a fortunate man.

Notes

(1) (1986) 82 Cr App R 115; (1986) 1 All ER 193.

(2) Criminal Evidence Act 1898 s.1(f)(iii) as amended by the Criminal Evidence Act 1979, s.1(1).

(3) (1970) AC 304.

(4) Cross on Evidence (Ed. Tapper) Vi th Edition, 172.

(5) (1979) 2 All ER 1222; 1239.

(6) Channel J in **Preston** (1909) 1 KB 568, 575.

(7) (1983) 77 Cr App R 126.

(8) **Duncalf** 1979 2 All ER 1116; **France** (1979) Crim L Rev 48 a case referred to by Lord Lane In **Watts** where he described the text of the report of **France** as "corrupt .... there are a number of obvious misprints and mistakes."

(9) This problem is well illustroted by **Inder** (1978) 67 Cr App R 143 where neither the accused's previous convictions nor the evidence of the complainant witnesses passed the test. In Lord Widgery's graphic phrase, the accused's acts were merely "the stock in trade of the seducer of small boys."

(10) (1975) AC 421.

(11) ie, If it is conceded that sex offenders are no more likely than anyane else to tell lies.

(12) (1935) AC 309.

(13) No one argues, for example, that because it may be difficult to explain to a jury why a recent complaint cannot corroborote a witness' evidence of a sexual assault, the distinction should be blurred or treated as non-existent.

(14) Criminal Law Revision Committee, Xi th Report 1972.

(15) (1939) 4 All ER 164 CCA.

(16) Nor is this an isoloted instance. In **Spencer & Other** 1985 80 Cr App R 264, 275 May LJ is reported as saying that " ... had this Court in **Bagshaw** (1984) 78 Cr App R 163 had the benefit of full argument and especially had the decision in **Beck's case** (1982) 74 Cr App R 221 been drawn fo its attention, it might well have reached a different conclusion." Can it be that barristers and Lords Justices of Appeal do nat study judgments of the Appeal Courts any longer? Isn't that their job?

SIR ALAN PATRICK HERBERT*: THE MAN AND HIS CONTRIBUTION TO ENGLISH LAW AND LITERATURE.

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This article is divided into two main sections, the first being an outline of the subject's life, activities and achievements, and the second setting out selected quotations from the "misleading cases". (**1**) It concludes with a brief bibliography.

The usual conscious introduction of either the lawyer or the layman to the works of Sir Alan Herbert is thraugh his "misleading cases", either as originally published in the pages of Punch, as collected works, or on television, whether in England ar abroad. The lawyer is usually aware of APH's struggle to promote change in the divorce law, best illustrated in his navel "Haly Deadlock" which portrayed the efforts of a well meaning, honest but badly matched couple to surmount the obstacles of the law and to make new lives. The Queen's Proctor (**2**) who seeks to block their path is a prominent character in this book. The Matrimonial Causes Act. 1937 marked the success of APH and his supporters, and the story af the campaign is told in "The Ayes have it"

Thus it is evident that our subject was a talented and witty writer, well able to communicate at many different levels. At one level the "misleading cases" are mere humour, at a slightly deeper level it can be appreciated that a point is being made, even though it's true significance may not be fully appreciated; this in itself could lead the interested layman to inform himself further. To the lawyer these cases strike many chords: at the time when they were written many of them revealed the absurdities, anachronisms and shartcomings of the law while at the same time asserting the overall quality of the English Legal System and particularly of the Judiciary and other officials and professionals. Reading the cases today is a fascinating exercise in modern legal history, allowing one to note those crusades which have been won, thase which are still being fought and those which perhaps can never be entirely won, but must be pursued rather than forgotten. In the last category may be placed the fight against the disdain of the motarised society for the rights of the pedestrian, and that against the unwarranted powers af officialdom whether high or low.

Any notion that the above represents the totality of APH's contributions to law, to literature or to society is a grass underestimate of his achievements. Sir Alan was a man of autstanding intellect and enthusiasm with an enormous capacity to enjoy his own life, but at the same time to seek to enhance the lives of others, whether at the obvious level of providing entertainment, or at the more profound one of seeking to improve the society in which he lived. Pethaps few layers appreciate that he made his living throughout his entire life from writing, and that he wrote works of fiction and non-fiction related to every aspect of his life and interests. Even fewer, particularly among younger readers, will know he was a successful writer of lyrics for musical comedy, and was the author af a number of well-known sangs. In the Cambridge Bibliography of English Literature his place is among the poets, rather than among the novelists or the thinkers. He has one poem in the Oxford Book of Twentieth Century Verse; on the subject af the roles of Britain, Russia and the United States in the Second World War.

* 1890-1971, Knighted in 1945, Companion of Honour 1970; hereinafter referred to as APH or Sir Alan.

However, the writer has already sought to prevent any impression that APH did nothing but write. He qualified as a barrister but never practised; he served in both world wars; in the first in the navy, initially in the ranks but later obtaining a commission; in the second war he served as a petty officer patrolling the Thames; he was member of Parliament for the University of Oxford; and was chairman or president of many societies and organisations reflecting his interests, notably in writing, culture, sailing and navigation.

APH was born of solid upper middle class stock but of an artistic and literary inclination; his father was an Irish Catholic and a civil servant and his mother was descended from a long line of Anglican bishops. Sent to boarding school at the age of eight, he was a fervent advocate of that system. He excelled at Winchester, both academically and on the sports field. In his autobiography, he recalls being one of eight or nine cellists and describes himself as capable of tremolo but not of twiddly bits. This caused no difficulty until an influenza epidemic reduced the cellists to two, and ultimately to APH alone playing a solo from the 'Marriage of Figaro', when his relative shortcomings were revealed.

At New College Oxford between 1910 and 1914, APH gained a second class honours degree in classics, and a first class in law. He was active in the Union until he saw the chance of the first in law, and concentrated his attentions upon attaining it.

Shortly after enlisting in the navy, dressed in bell-bottoms, APH married Gwendolen Harriet Quilter, and quips that the initials on her luggage always assured them of instant respect during the war.

It seems that Sir Alan exerted great influence in almost every sphere of activity in which he chose to involve himself, and led countless campaigns to protect the legitimate interests involved; for example against copyright deposit of new books, particularly directed at deposit in Dublin, which he felt seemed illogical after independence, and at the totally non-selective approach adopted by the deposit libraries.

For most of his life Sir Alan and his family lived in a house at Chiswick Mall on the Thames. It was therefore not surprising that he furthered his interest in boats, and developed a great love of that river. As his interest and competence grew so did the size of his craft. While a member of Parliament he relished his right to tie up his boat outside the House. He was also an advocate of the need for the Thames Barrage. This aspect of his life and work was recognised when he became a Thames conservator, and also President of the British Waterways Board. One of his major campaigns in this sphere was in opposition to the metrication of nautical miles and charts because of the inconsistencies, complexities and dangers to which he thought this must inevitably lead.

APH gives the strong impression of having been a very practical man, who moved with the times. He stated that topicality is one of the great attractions of the law, the answers to old problems sometimes emerging on the day of 'Schools' (examinations). He sought to ensure that the law should not stultify, and that problems should be solved. He was a great advocate of the value of education, feeling how much he had derived from his own; he hoped that others might benefit equally. He advocated one latin lesson a week for all older school children, not in order to learn the language itself, but for the insights that would thereby be obtained into the English and foreign languages. As a believer in straightforward, good, clear, plain English, he campaigned in a number of articles against jargon and officialese; the "misleading

cases" poke fun at the unhelpful latin tags much beloved of lawyers, in spite of the author's own high regard for the classics.

Elected as member of parliament for the University of Oxford in 1935, by a system based on proportional representation, APH was a staunch advocate of that system, and very proud of the fact that he was an independent member. As such, he was always greatly concerned to preserve the rights of beck-benchers and independents. At the same time, he is critical in his usual fashion of hypocrisy and humbug. Several "misleading cases" are concerned with the strange rule whereby the Houses of Parliament provide alcoholic refreshment at any hour, while the less fortunate public must restrain themselves until the hour arrives at which, under the licensing laws (which APH abhorred) they might refresh themselves. In 1950 the University seats were abolished, and Sir Alan disappeared from Parliament with them. In "Twentieth Century Authors" edited by Kunitz and published by the HW Wilson Company of New York (1942), it is said that while APH called himself 'a crusted Tory', he actually had a passion for justice, and not the slightest compunction in fighting for it. He is described as a modern Don Quixote. His book "Independent Member", published in 1950, provides vivid insights into his life and work as a member.

Turning now to a lesser known aspect of his life, musical commedy, APH produced the lyrics for nineteen musical works including fifteen full length revues; perhaps the most famous being "Bless the Bride"; others included "La Vie Parisiènne" and "Home and Beauty". Two very well-known songs which we owe to him are "A nice cup of tea" and "Girls were made to love and kiss". It is clear from his autobiography what pleasure he derived from his contact with the actors, musicians and backers involved. It was only the arrival of American musical comedy and the cinema which brought his successful career in this context to a close. It is his connection with the theatre which made him such a staunch critic of Entertainment Tax, unique as being charged on gross receipts.

One of the greatest achievements in his life, and perhaps the one that he valued above all else, was his election as President of the Society of Authors in 1967. He records with great pride the eminence of his predecessors, Tennyson, Meredith, Hardy, JM Barrie and John Masefield. His election was no doubt a tribute to at least two factors, the quality and variety of his own writing, and his campaigns to obtain justice for authors over income tax assessments, public-lending right, purchase tax on books and copyright deposit. He also became chairman of the British Copyright Council, and vice-president of the Performing Rights Society. It is well known that copyright law is one of the most complex, most misunderstood and least understood areas of law. A regular contributor to Punch from 1910, in 1924 he became a member of staff, and thereafter attended the weekly dinners at which policy and contributions were discussed.

Sir Alan himself was very proud of what he felt his writing, and particularly "Holy Deadlock" and the "misleading cases" achieved in helping to rationalise, change and modernise the law. The cases have been quoted in the United States Supreme Court, and in a serious American law book. (4) This is hardly surprising as they read exceeding convincingly, and the foothotes are a mixture of the genuine and fictional bemusingly but amusingly interspersed. In "Uncommon Law" at p.81 Fairway K v Fairway, T M, and Baxter (King's Proctor showing cause) (1929). "In this case the successful petition for a decree nisi had obstinately retained her virtue for five of the six statutory months, which for greater security, she passed in a monastical institution, Constable Boot however, disguised as a St Bernard dog, obtained admission to the

nunnery and ultimately to her affections". At p.305 there are two genuine references to Salmond on Tort.

At p.160 in "Uncommon Law" Rex v Strauss (1928) 9 Cr. App, R 91: "A bailiff acting for the Inland Revenue was struck and killed with a book of sermons while removing a wireless set belonging to the accused, and two rabbits, the property of a favourite daughter. The defence was that distress for income-tax was a gross provocation comparable to the discovery of a wife in the arms of another (See Rex v Maddy, 1 Ventris, 158), ..."

"Wedderburn" is recorded in various foot-notes as having written on witches, wagers, wharfage, water-courses, wine, women and women-jurors. "Strauss" wrote on savage ways, ecclesiastical dignitaries, the law of boating, the way of life and times of King John and on sea-terms and sea-ways!

Many of these cases have now been seen on television in far-flung areas of the globe; it is with particular relish that APH reports that he likes to think of them providing entertainment on the banks of the Zambesi and describes them as frolics in jurisprudence but also sometimes essays in reform.

During his lifetime Sir Alan met many famous people from all walks of life, largely of course because of the breadth of his own interests and the level at which they were pursued. His autobiography mentions among many others, Churchill, HG Wells, Belloc, Barrie, Shaw, Sargent, Arnold Bennett, Kipling, Galsworthy, Baldwin, the Astors and Sir Robert Menzies. He records that after accompanying Montgomery to Europe at the end of the Second World War, he returned with a bottle of brandy, Montgomery having kindly written a letter to ensure that he should have no trouble getting his prize through customs. Unfortunately the customs officer kept the letter, and APH laments in his autobiography that "some damned customs officer has the finest authograph of an FM (Field Marshall) that ever existed".

Having attempted a birds-eye view of APH, the remainder of this article will be devoted to a look at his writing as exemplified in the 'misleading cases'.

First of all a description of the "reasonable man" from "**Fardell v Potts**" ... "He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound; who neither star-gazes nor is lost in meditation when approaching trap doors ....; who records in every case upon the counterfoils of cheques such ample details as are desirable, scrupulously substitutes the word 'Order' for the word 'Bearer', crosses the instrument a/c Payee only', and registers the package in which it is despatched, who never mounts a moving omnibus and does not alight from any car whilst the train is in motion, who investigates exhaustively the bona fides of every medicant before distributing alms, and will inform himself of the history and habits of a dog before administering a caress; who believes no gossip, nor repeats, without firm basis for believing it to be true; ... who never from one year's end to another makes an excessive demand upon his wife, his neighbours, his servants, his ox, or his ass; ... who never swears, gambles or loses his temper; who uses nothing except in moderation; ... Devoid, in short, of any human weakness, with not one single saving vice, sans prejudice, procrastination, ill-nature, avarice, and absence of mind, as careful for his own safety as he is for that of others, this excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow citizens to order their lives after his own example."

In the same case 'the Master of the Rolls" comes to the conclusian that there is no creature known to the law as the reasonable woman. ".... it has been urged for the appellant and my own researches incline me to agree, that in all that mass of authorities which bears upan this branch of the law there is no single mention of a reasonable woman. It was ably insisted before us that such an ommission, extending over a century and more of judicial pronouncements, must be something more than a coincidence, that among the innumerable tributes to the reasonable man there might be expected at least some passing reference to a reasonable person of the opposite sex; that no such reference is found, for the simple reason that no such being is contemplated in the law; that legally at least there is no such reasonable woman and that theretore in this case the learned judge shouid have directed the jury that, while there was evidence an which they might find that the defendent had not come up to the standard of a resonable man, her conduct was only what was to be expected of a woman, as such."

The next example makes fun of jargon, technically and legal procedure and is taken from "Rex v Haddock: Is it a Free Country". "Lord Chief Justice: This is in substance an appeal by an appellant in statu quo against a decision of the West London Half-Sessions, canfirming a conviction by the Magistrates of South Hammersmith sitting in Petty Court some four or five years ago. The ancillary proceedings have included two hearings in sessu and an appeal rampant on the case, as a result of which the record was ordered to be torn up and the evidence reprinted backwards ad legem, ... With these transactions however the Court need not concern itself...

The present issue is one of comparative simplicity. That is to say that the facts of the case are intelligible to the least instructed layman, and the only persons utterly at sea are those connected with the law. But factum clarum, ius nebulosum, or 'clearer the facts, the more dubious the law'."

This is the celebrated case where the Court of Criminal Appeal held that Mr Haddock much have committed some criminal offence in jumping off Hammersmith Bridge. In the immortal words of "Lord Light: People must not do such things for fun. We are not here for fun. There is no reference to fun in any Act of Parliament. If anything is said in this Court to encourage a belief that Englishmen are entitled to jump off bridges for their own entertainment the next thing to go will be the Constitution. For these reasons, therefore, I have come to the conclusion that this appeal must fail. It is not for me to say what offence the appellant has committed, but I am satisfied that he has committed some offence, for which he has been most properly punished."

Justices Mudd and Adder concurred in upholding the conviction, but on more specific grounds; the former that the appellant had polluted a water-course under the Public Health Act 1875 and the latter that the appellant had attempted to pull down a bridge, under the Malicious Damage Act 1861.

In the case of 'Trott v Tulip', "Mr Justice Wool" was asked to decide whether the description "highbrow" when applied to an author was libellous, and hears witnesses including one "Vines" "....The witness, Vines, for example, a major, was crystal clear. The genus highbrow, in his view, has many species, but all are vile. Moreover (which is unusual) he has seen these monsters in the flesh. They are banded together, he assured us, in secret or semi-secret societies, which have no other purpose than the performance of indecent plays in the evening ot the Lord's Day; they are distinguished in the males by long hair, Malacca canes, and curls, and in the females by tortoiseshell glasses, spanish shawls and shapeless Oriental

garments; they have no cantact with the life of people, are incapable of cricket, unacqualnted with golf, are wholly without patriotism or decent feeling, and openly praise the so-called artisitc works of unknown French and Italian palnters whose moral character, it is to be feared, is too often as dubious as their own. This witness gave his evidence in a manly and straightforword way, and to my mind it is convincing. The picture which he drew of the observances af these creatures is so revolting that no lady or gentleman of right feeling could well submit to be named without some effort to secure such protections as the law affords. And i am satlsfied that on this point at least the plaintiff has made good her case." A footnote to the case appears "The jury faund for the plaintiff, but awarded damages of one farthing only. This case was heard in 1927, and it may be that a jury would find a different verdict today. Mr Aldous Huxley, for exampie, is known to glary in the appellation 'highbrow', and states a reasoned case in favour of being one."

The cose 'Which is the Liberal Party?' involved a testatrix who left one million pounds 'to the liberal party'. A number of claimants came forward. "Mr Justice Tooth" of the Probate Division gave judgment. "...It has been proved in evidence before me that there ore five main Liberal Parties and the relations between them are such that no one of these parties will willingly share a taxi with any other, while each of them has at least one offshoot which is accustomed to foam at the mouth when the parent body is mentioned. ... nearly all the plaintiffs have confessed that they have been guilty from time to time of legislation, or proposals for legislation, of which the main purpose was to make people do something which they did not wish to do, or prevent people from doing something which they did wish to do. Few of them could point to an item in their legislative programmes which had any other purpose, and with the single exception of Mr Haddock, they have no legislation to suggest of which the purpose is to allow people to do something which they cannot do already. ... On these grounds, therefore, Mr Haddock has argued that these plaintiffs have not the idea of liberty in the forefront of their political equipment, and do not therefore deserve the name of Liberal os the testatrix understood it. ... I have decided therefore that Mr Haddock alone of these plaintiffs has made good his claim and an order will be made accordingly."

Marriage was held to be a lottery and therefore illegal in Marrowfat v Marrowfat. "In all matrimonial transactions, the element of skill is negligible and the element of chance predominates. This brings all marriages into the category of gaming ... and therefore I hold that the Court cannot according to the law assist or relieve the victims of these orrangements, whether by way of restitution, separation, or divorce. Therefore it will be idle for married parties to bring their grievancies before us, and in shart, this court will never sit again.

It is not without a pang that I this pronounce the death sentence of Divorce, which has meant so much to so many in thus Court. To those learned counsel who have made a good thing out of it I offer my sincere condolences,.... We shali all have to do the best we can with the limited and tedious business which arises from Probate and Admiralty."

Sir Alan was a staunch advocate of direct appeals from the High Court to the House of Lords in appropriate cases. Board of Inland Revenue v Haddock "Why is the House of Lords?" deals with this "The point at issue is whether the appellents are entitled under the Land Tax Clauses of the Finance Act 1931 to enter upon the window-box of the respondent, Mr Albert Haddock, and there remain for the purposes of measurement and ossessment on the negiect or default of the respondent to supply particulars of

his window-box upon the Land (Expropriation) Tax Form Q/73198. We are asked to say that the learned High Court Judges who last considered this case were in error, and that the lay magistrates whose order they reversed were right. Whatever our decision, it is certain that an indignant appeal against it will be directed to the supreme tribunal, the House of Lords, since the resources of the Crown are as inexhaustible as its impudence, and the blood of Mr Haddock is evidently up. The institution of one Court of Appeal may be considered a reasonable precaution; but two suggest panic ... The moral, I think, is clear. A doctor may be wrong and he will admit it, but he does not assume he will be wrong ... it follows from this that (every difficult or doubtful case) should be certified at an early stage as one that can be usefully considered only by the House of Lords, and to that House it should be at once referred...

For all these reasons we recommend that either this Court or the House of Lords (as a Court of Appeal) be abolished; or, in the alternative, that the House of Lords retain its appellate functions as a specialist body for the settlement of questions of exceptional difficulty, such cases to be referred to them upon the order of a High Court judge."

Finally, a description of the office and functions of the King's Proctor from Pale v Pale and Hume (The King's Proctor Showing Cause). "The King's Proctor is, I believe, an officer peculiar to the county of England. At any rate, he is not considered necessary in Scotland, a county which is not especially celebrated for laxity of morals. His main function in the region of divorce is to detect, report to the Court, and to discourage, collusion. In England, as I have said, the presumption is that all the parties to a divorce suit are lying; and therefore we employ a special spy to catch them out, dignify him with the name of His Majesty, and think that we are more moral than our neighbours. Ha! ... It is, I think, extraordinary that the anonymous letter despised by every decent citizen, frequently the cause of a criminal charge, the supreme expression of cowardice and spleen, should be the principal agent that sets a department of State, or officer of Justice, in motion. ... More discredit is done to the State by the manner of detection than to the lovers by the thing detected; the remedy, in short, is worse than the disease. In happier times I should have said that these methods were un-English; but alas I cannot say that now. For this race, which once was proud of its openess and honest dealing, is lending itself to official trickery, spying and deceit in matters affecting the personal lives of the people - to the disguised inspector, the hired informer and the agent provocateur. 'Peeping Tom' may still receive the execration of the people, but he is now an honoured servant of the State; and the King's Proctor (poor man) is the King of Peeping Toms.

There might be something to be said for having an expensive officer attached to the Divorce Court whose business it was to reconcile the parties and try to keep a failing marriage genuinely in being. The Canon Law was at least consistent, for while rejecting the possibility of divorce, it did all that it could to prevent a separation. Our law too often promotes separation while hindering divorce. The King's Proctor's office, instead of being a kind of helpful Unofficial Uncle, is purely vindictive in relation to the parties and useless in relation to the institution of marriage."

For a summary of Sir Alan's legislative aims and achievements, readers are referred to his autobiography. He might be regarded as having had a few strange ideas, for example a ten day week and his support for the Kelvin scale of temperature measurement which ran from 0 - 1273 degrees. However, his arguments always had a logical basis. In 1958 he was awarded a doctorate in civil laws of Oxford University in recognition of his contribution to the law. He was described in Kunitz as looking a bit

like a sporting man about town, but as having behind this bonhomie and humour, a serious and logical mind, and also as being one of the greatest after-dinner speakers alive, bubbling over with wit. For many years APH was the President of the Black Lion Skittles Club.

To the writer, he was a most fascinating individual of great interest as a man and as a lawyer, his works providing both a respite from the more traditional study of the law, but at the same time a stimulation to pursue it with a heightened capacity to question, reflect and analyse.

Notes

(1) All the extracts in this article are from cases appearing in the collected volume of cases published in 1935 under the title 'Uncammon Law'.

(2) See infra.

(3) "Less Nonsense"

(4) 'Rex v Haddock', is it a Free Country?' quoted in 'The Lawyers'. The index of references to that work includes "Rex v Haddock CCA miscellaneous law, Criminal Law (31) 1927."

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