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LAW IN A RESTLESS SOCIETY

Extracts of an address delivered by Lord Devlin to a meeting of Justice, *the British section of the International Commission of Jurists.*

I think the truth of the matter is that every age is restless in some area or on some particular subject. Outside it there is general calm, the calm that most human beings prefer, with all the concentration upon one particular aspect of life about which the rising generation becomes restless and affects society as a whole, and at present the area of restlessness is, one might call it, freedom in behaviour, spear-headed by sexual freedom. The revolt is against the Victorian virtues as the Victorians liked to think of them, and vices as we like to think of them. The Victorian virtue of reticence would now be called prudery. The virtue of continence would be called repression, and self-discipline would be either sadism or masochism or a mixture of both, I am not quite sure what!

Go back a thousand years and you would find that the preoccupations of society were quite different. After all, if you had a firm belief in heaven or hell and you firmly believed that you were going to one or the other place for all eternity, you tended to concentrate your mind on different aspects from those that appeal to this society and consequently you will find theological restlessness and differences creating disturbances which to us are as incomprehensible now as perhaps the twenty-first century may find our absorption in modes of personal behaviour.

I think one has to accept it that every society is restless, restless in a particular area, and what then is the relation of the law to that particular area? How does the law deal, or how should it attempt to deal, with restlessness? Well, I will not propound the view that in an area which is more restless than usual the law should be more cautious than usual rather than the reverse. For the strength of law in a democratic society depends upon consensus. Physical enforcement should be confined to the weak and careless who do not really mean to break the law, or to what one hopes would be a tiny majority who reject the consensus, but in a democratic society the law "to be made to work" has to be a reflection, a formulation would be a better word, of that consensus, and since the tendency of most men is to hold fast to the values they have, the entry into the consensus or the exit out of the consensus can never be made easier. Restlessness, of its nature, creates froth and it is not out of froth that the law is made. I do not mean that the law is to be entirely oblivious to changes. I mean merely that it has to wait for them. The law must follow the consensus in morals and customs but it must be in the rear of the movement, its function being to occupy the ground once it is consolidated. It is for the legislator, it seems to me, to decide when the time has come to consolidate new ideas into the consensus and likewise to expel the old because the decision, the right estimation of what that time is, is essentially part of the area of politics.

So I would regret a decision like the celebrated *Shaw* case which has recently been reaffirmed in the House of Lords, I am not talking about the reaffirmation because that introduced a lot of different considerations. It might be thought a little irresponsible on the part of the House of Lords if they changed our minds on an everyday case as to the original decision: to me it was

wrong because it was taking a decision which was essentially a political decision and it was putting it out of politics into the hands of the judiciary.

The function of the judiciary, is I think to administer law, not to make it. Of course, in the act of administration, it is sometimes very difficult to avoid some manufacture, but it should be at the back of the mind of the Judge that what he is doing is administering and not making; but because the judiciary is the voice of the law, its role is generally thought to be much more important than, in fact, it is. I think it is just worth exploring that point. Some of the misconceptions about that are something for which the judiciary is itself to blame. It has never thoroughly disentangled itself from its old role when Judges were servants of the Crown, and men therefore who took that place were servants of the Crown as well as Judges. They were, if one goes right back, almost the equivalent of ministers. If one goes much less further than that, say to the seventeenth century, they were then still separate, though not entirely separate. They still had their political implications which have survived in the Lord Chancellor, but more than that, they did think of themselves as being there to enforce the law. The judiciary today still regards itself as being responsible for law and order. I do not think it is, and I do not think it will really be doing its job as it should be, so long as it thinks it is.

I think that law and order is a very unfortunate conjunction of words because they signify for this purpsoe two things that are quite different. The Judges are responsible for the maintenance of the law; the executive is responsible for the maintenance of order. Order may spring from the law, but law and order coupled like that, as if one body or one person had to enforce both, gives a wholly misleading idea of what the Judges ought to be doing The consequence of it is that I am not sure that even now, certainly not in the last century, they are regarded by the country at large as being in the criminal law wholly and reliably independent. They are still thought to some extent to be naturally on the side of the prosecution when their true function is to take the law as they find it and to see that it is absolutely fair, both to the state and to the individual.

You get an illustration of that in the recent controversy that there was over thirty-year sentences and life sentences. The impression that emerged was that the judiciary was being hard and the executive was being soft and in particular when the judiciary resorted to manoeuvres like the thirty-year sentence so as to prevent the executive from doing what, rightly or wrongly, it wanted to do. This seemed to me to be putting the judiciary into a wholly false light. It is for them to say what the law is. It is for them to pass the appropriate sentence. but in the matters that belong to the executive in its enforcement, it is for the executive to decide. Controversies or conflicts of this sort usually get avoided quite happily, and it did in this case, but it had the makings of a very difficult and disagreeable controversy, because the judiciary were over-stepping into the realm of the executive, and becoming more executive-minded than the executive, to use the celebrated phrase.

Coming back to *Shaw's* case; it seems to me quite wrong for the Judges to think that they are responsible for the moral health of the community in some way; they are not at all. The law, of course, should be so laid down as to give effect to those moral ideas which are part of the consensus, but having taken the law, they are no more responsible for moral health than a medical officer of health is, or santiary inspector. Equally, they take the law and it is their business to see that it is properly applied. There is another side to the coin to this and it comes closer to the ideas and difficulties of restlessness. There is a phrase that is much in use just now; I have read it in a number of cases, and that is the law is the instrument of social purpose. I do not believe that either. If one said to anyone that proclaims this that the law is the instrument of moral purpose he would say, "disgraceful; you must be an upholder of *Shaw's* case". What is the difference? The law is not the instrument, and I stress the word instrument, of any purpose whatsoever. The law is the framework; it is the framework which society ordains to give effect to its purposes and its ideas. I do not, of course, mean for a moment that if it is the purpose of Parliament or the Government to abolish poverty, that that is not a good purpose and that you do not use the law to create a framework of taxation or whatever else it may be in which you may be able to give effect to that purpose. So I would say, in precisely the same way, that the law can and should be used to give effect to those moral ideas that form part of the consensus. I said can and should; I rather say can. When it comes to being used, I have grave doubts as to how effective it could be, but that it can be used to set up the framework for moral purpose as well as for social purpose I would certainly maintain. It is the word instrument that I tend to object to because it carries with it those sort of connotations that it is part of the law to be active, rather than merely to express the framework of formulation.

I do not believe in dynamic law either and I I do not believe anyone really believes in dynamic law, unless the dynamo happens to be propelling the machine in the direction they happen to want it to go. If it is, they are in favour of the dynamo; if it is not, and it is going in the opposite direction, they do not like it at all. Once you get Judges, for example, deciding for themselves to be dynamic, what happens? They cease, they must cease, to be the impartial arbiters of what the law is saying in any particular case or, at lesat suspected of having ceased.

I cannot see, therefore, that once you have this situation, there is any logical pause before you get to the totalitarian state, to the idea of dynamism as imposing the Nazi revolution, or whatever else the revolution may be, to people's Courts and the Judges having it as their business to see that what are sometimes called revolutionary ideas are given full effect.

I do not see any logical stopping point. In this country we do not usually let things go to the point of a logical stop but it is important that we should at least realise it, that once you accept that idea, there is nothing left in logic to stop it before the Judges are simply being the hand-maidens of the executive.

The common law is no longer the right medium, it seems to me, for carrying out either social or moral purposes. Both should be left to statute to create the framework within which society can express and achieve its ends and its purposes. Of course, if statutes were always as clear as crystal, and their makers were as far-sighted as only a divinity could be, then Judges would not be lawmakers at all. But, of course, statutes are not like that; they are inevitably in points defective and therefore the Judges have, from time to time, to amplify the law, but when they do so, I think they should be as careful of the consensus as the law itself must be.

The judicial mentality has to be in the rear of change or it would not secure that connection between the law and the consensus which is vital to the proper operation of the law.

Much of the criticism of the law, I think, in the end comes out of the fact that the law by its nature is not as restless as the critics.

BILLS BEFORE PARLIAMENT

Admiralty
Air Services Licensing Amendment
Appropriation
Broadcasting Authority Amendment
Commonwealth Games Boycott Indemnity
Companies Amendment
Counties Amendment
Crimes Amendment
Department of Social Welfare Amendment
Domestic Purposes Benefit
Door to Door Sales Amendment
Explosives Amendment
Imprest Supply
Judicature Amendment
Licensing Amendment
Licensing Trusts Amendment
Maori Purposes
Marine Pollution
Ministry of Transport Amendment
Municipal Corporations Amendment
Municipal Corporations Amendment (No. 2)
National Roads Amendment
New Zealand Day
New Zealand Export-Import Corporation
Niue Amendment
Overseas Investment
Recreation and Sport
Rent Appeal
Reserve Bank of New Zealand Amendment
Sale of Liquor Amendment
Sales Tax Bill
Social Security Amendment
State Services Amendment
Summary Proceedings Amendment
Syndicates
Transport Amendment
University of Albany Amendment
Wool Marketing Corporation Amendment

STATUTES ENACTED

Imprest Supply
Moneylenders Amendment
Post Office Amendment
Rates Rebate
Trade and Industry Amendment
Trustee Savings Banks Amendment

REGULATIONS

Regulations Gazetted 7 to 21 June 1973 are as follows:

Agricultural Chemicals Regulations 1968, Amendment No. 3 (S.R. 1973/148)
Cremation Regulations 1973 (S.R. 1973/154)
Customs Tariff Amendment Order (No. 9) 1973 (S.R. 1973/149)
First Aid (Factories) Regulations 1966, Amendment No. 1 (S.R. 1973/155)
Freshwater Fish Farming Regulations 1972, Amendment No. 1 (S.R. 1973/147)
Milk Regulations 1973 (S.R. 1973/150)
New Zealand-Australia Free Trade Agreement Order 1973 (S.R. 1973/156)
Public Service Regulations 1964, Amendment No. 6 (S.R. 1973/151)
Rent Review Regulations 1972, Amendment No. 1 (S.R. 1973/152)
Stabilisation of Prices Regulations 1972, Amendment No. 4 (S.R. 1973/153)
Timber Preservation Regulations 1955, Amendment No. 4 (S.R. 1973/157)

SUMMARY OF RECENT LAW

DESTITUTE PERSONS—JURISDICTION OF COURT

Warrant to arrest absconder—Duty of Magistrate to satisfy himself there was "reasonable cause to believe" person about to leave New Zealand to avoid maintenance payments—Domestic Proceedings Act 1968, s 109. Practice—Absconding debtors—Duty of Magistrate on issuing warrant to arrest. This was a motion to quash a warrant to arrest an "absconder" issued by a Magistrate pursuant to s. 109 of the Domestic Proceedings Act 1968, and orders made subsequent to the arrest. An applicant under s. 109 (1) has to satisfy the Magistrate that there is reasonable cause to believe a person is about to leave New Zealand, and in doing so intends to avoid payment of maintenance. *Held,* 1. The Magistrate has to act judicially and the assertion of the applicant that there is "reasonable cause" or because the applicant claims to hold such belief is not sufficient. (*Seven Seas Publishing Pty Ltd* v. *Sullivan* [1968] N.Z.L.R. 663, referred to.) 2. The Magistrate himself has to be satisfied that there is "reasonable cause to believe". (*Bowden* v. *Box* [1916] G.L.R. 443, referred to.) 3. Not only must there be a bona fide belief, but also there must in fact exist reasonable grounds for such belief. (*Robb* v. *Smith* [1959] N.Z.L.R. 114, followed.) 4. After an absconder has been lawfully arrested the onus is on him to show cause why an order should not be made under s. 109 (3) of the Domestic Proceedings Act 1968. *Fry* v. *Wilson and Another* (Supreme Court, Wellington. 21, 24 November 1972. Roper J.).

GAMING AND WAGERING—LOTTERIES

"Jackpot" sweeptake not a lottery within s. 44 of Gaming Act 1908—Recovery of prizes—A claim for a share in "jackpot" winnings paid to one member of syndicate of not unenforceable—Gaming Act 1908, ss. 69, 70 and 71. The plaintiff claimed a share of a winning entry by a syndicate organized by the defendant in a jackpot as a member of that syndicate. It was held that he was not a member but a defence was raised that even if he were a member his action was barred by ss. 69, 70 and 71 of the Gaming Act 1908. *Held,* 1. The "jackpot" sweepstake was not a lottery within the meaning of s. 44 of the Gaming Act 1908. (*McComish* v. *Alty* [1955] N.Z.L.R. 172, followed.) 2. Section 69 of the Gaming Act 1908 applies only to moneys won under contracts of gaming and does not apply to actions by a successful party to recover sums paid to his agent by the loser. (*Bridger* v. *Savage* (1885) 15 Q.B.D. 363, applied. *Hill* v. *Wiliam Hill (Park Lane Ltd.)* [1949] A.C. 530; [1949] 2 All E.R. 452, distinguished.) 3. Section 70 of the Gaming Act 1908 only applies to actions between a party to the wager and the stakeholder. (*Johnston* v. *George* [1927] N.Z.L.R. 490, 505; [1927] G.L.R. 286, 288-289, followed. *Official Assignee* v. *Totalizator Agency Board* [1960] N.Z.L.R. 1064, 1082, and *Sharp* v. *Morrison* [1921] N.Z.L.R. 254, 257; [1921] G.L.R. 90, 92, not followed.) 4. Section 71 of the Gaming Act 1908 only applies where money is won on a race and is not paid to the winner. (*Mitchell* v. *Beck* (1913) 32 N.Z.L.R. 1279; 16 G.L.R. 114, applied. *Bhana* v. *Barriball* (Supreme Court, Christchurch. 14, 15, 24 November 1972. Wilson J.).

INCOME TAX—INTERPRETATION

Family trust for benefit of children—Paddocks leased annually to trustees by father at full rent—Father paid salary to manage and cultivate—Seed purchased and products sold by trustees—No income "derived" by father—Land and Income Tax Act, 1954 s. 108. The objector carried on the business of farming. M created a trust with an initial capital of £5 for the benefit of the objector's issue by a deed dated 29 June 1964, the trustees being the objector's wife and a trustee company. In each year the objector granted a lease at a full rental of various areas of his farm to the trustees. In each year the objector was employed by the trustees to cultivate, sow crops and manage the leased areas at the usual rates charged by agricultural contractors, the seed and manure etc. being paid for by the trustees. The trustees paid a contractor to harvest the crops, arranged for the sale of crops, and received the proceeds of sale. The net income of the trust was applied in each year for the benefit of the objector's children. The objector and the trustees in each year returned for income tax purposes the income respectively received by them. The Commissioner in each year assessed the objector on the total net income received by him and the trustees respectively on the basis that the transactions between the objector and the trustees were void pursuant to s. 108. The objector contended that as he was not a party to the trust deed that the deed was not annihilated by s. 108, and that if s. 108 did apply the avoidance of any of the transactions did not create any liability for income tax on the part of the objector. *Held,* 1. Although the effect of s. 108 of the Land and Income Tax Act 1954 is that transactions are treated as never having happened, that in itself does not make any income arising therefrom the income of the taxpayer unless in carrying out the arrangement moneys come into his hands which the Commissioner is entitled to treat as income derived by him. (*Newton* v. *Commisioner of Taxation* [1958] AC 450, 467-468; [1958] 2 All E.R. 759, applied.) 2. There is no provision in s. 108 that the taxpayers shall be deemed to derive the income which he would have derived but for the transaction avoided by that section. (*Mangin* v. *Commisioner of Inland Revenue* [1971] N.Z.L.R. 591; [1971] A.C. 739, applied.) 3. No moneys are income "derived" by a taxpayer unless they are in fact paid to or received by him or are already due or receivable or are deemed to be income by virtue of s. 92. (*Mangin's* case (supra), applied.) 4. Only contracts, agreements or arrangements to which the taxpayer is a party are rendered void by s. 108. (*Wisheart, Macnab and Kidd* v. *Commissioner of Inland Revenue* [1972] N.Z.L.R. 319, 327, 332, 334, followed. *Udy* v. *Commisioner of Inland Revenue* [1972] N.Z.L.R. 714, not followed.) 5. In order that income should be derived within s. 92 it must be shown that the income in question has been dealt with in the taxpayer's interest or on his behalf in one of the ways specified in the section "or otherwise". 6. The income of the trust was dealt with in the interests of the children or on their behalf, and none of it was dealt with directly or immediately in the objector's interest or on his behalf. Objection upheld. *Gerard* v. *Commissioner of Inland Revenue* (Supreme Court,

Christchurch. 18 September; 11 October 1972. Wilson J.).

INSURANCE—PERSONAL INSURANCE

Life insurance—Conditions in the policy and avoidance—Condition that policy "null and void" on non-payment of premiums construed as "voidable" at election of insurer—Contract valid until insurer exercises right of avoidance. The defendant denied liability to pay out on a life assurance policy on the death of the assured. The policy contained a condition that if the assured elected to pay the premiums on a monthly instead of an annual basis the policy would become null and void in the first two years if any premium remained unpaid at the end of one calendar month after its due date. The first premium was due on 1 September 1970 and the assured died on 11 May 1971. At the date of her death premiums due on 1 April 1971 and 1 May 1971 had not been paid. The defendant sent the insured reminders that the premium remittance had not been received in March and April, but these notices did not suggest that the policy was in jeopardy. *Held,* 1. Notwithstanding the condition that the policy would become null and void when a premium remains unpaid for one calendar month, the policy becomes not void but voidable at the election of the insurer. (*Newbon* v. *City Mutual Life Assurance Society Ltd.* (1935) 52 C.L.R. 723, and *Smith* v. *Associated Dominion Assurance Society Pty Ltd. (In Liquidation)* [1956] 95 C.L.R. 381, followed. *Frank* v. *Sun Life Assurance Co of Canada* (1893) 20 Ont.A.R. 564 (C.A.); (1894) 23 Can.S.C.R. 152 n (S.C.), not followed.) 2. Until the insurer exercises its right of avoidance the contract is valid. (*Newbon's* case (supra), referred to. *McGeachie* v. *North American Life Assurance Co* (1893) 20 Ont.A.R. 187, doubted. *Boynton* v. *Monarch Life Insurance Company of New Zealand Limited* (Supreme Court, Auckland. 8 May; 18 August 1972. McMullin J.).

TRANSPORT AND TRANSPORT LICENSING—DRIVING WHILE UNDER THE INFLUENCE OF DRUG OR DRINK

Defendant taken to hospital as result of accident—Blood sample taken—Defendant not asked to consent—Defendant's consent unnecessary—Transport Act 1962, ss. 58(1)(a), 58B(1), 58D(2), (5) and (6). The defendant was charged under s. 58(1)(a) of the Transport Act 1962 with driving a motorcar with an excess of alcohol in her blood. The defendant was taken to hospital as a result of an accident which she had had in her motorcar. A blood sample was taken at the hospital pursuant to s. 58D(2). The defendant was not asked to consent to the taking of the sample. Under s. 58(1)(a) it is an offence to drive a motor vehicle while the proportion of alcohol in the blood as ascertained from an anlysis *for which the driver subsequently permits a specimen of blood to be taken* under s. 58B exceeds 100 milligrammes of alcohol per 100 millilitres of blood. *Held,* 1. Section 58D(2) of the Transport Act 1962 enables a blood specimen to be taken without the consent of the person concerned. 2. Subsections (5) and (6) of s. 58D enable a specimen taken under s. 58D(2) to become the same as one taken under s. 58B(1), and available for any of the offences specified in s. 58A(1) and thus for an offence against s. 58(1)(a). *Police* v. *Burkin* (Supreme Court, Napier. 10, 27 November 1972. Perry J.).

THE COURT OF VERDERERS AND EPPING FOREST

A hundred years ago a curious and anachronistic court of law met at the Castle Hotel, Woodford—the Court of Verderers for Epping Forest. The Corporation of London was both alarmed and intrigued by the re-emergence of a Court that everyone believed to be obsolete, but the recent episodes involving the ecclesiastical Court of Arches persuaded them that these strange Courts were not dreamed up by Gilbert and Sullivan, and the Corporation sent a strong body of observers, including the City Solicitor.

The Court of Verderers had not met since 1848, and that had been a formality. That it was summoned in 1871 was due to great concern about the enclosure of Epping Forest. The rich landowners of the area were appropriating portions of the forest for their own use, the principal offenders being Robert West, lord of the manor of Theydon-Bois, who had taken 400 acres, and the Rev. J. Whittaker Maitland, lord of the manor at Loughton, who had, in eight years, enclosed 1,000 acres, 300 of which he had sold. There were 121 other offenders metaphorically in the dock. including the Bishop of Salisbury, and the brewers, Ind. Coope.

A Court of "attachment" was called, whereat all forest officers were summoned to attend, "as well as such of the freeholders as might have complaints to make in regard to trespass on the rights of the Queen and all her Majesty's subjects, both rich and poor, within this ancient Royal forest, who were there to be heard in open Court as heretofore". The forest officers, bemused and anxious, made their way to the Castle Hotel, and this anxiety was not relieved when the list of master keepers, purlieu rangers, and underkeepers was called. All the master keepers had long since died, and their posts had not been filled, and no one quite knew what a purlieu ranger was. As for the underkeepers on the list, only one remained, Robert Runding, a very old man, and he appraoched the table of the

Court of Verderers, composed of an alderman and several local worthies, to a chorus of laughter.

Running confirmed that Epping Forest was gradually being enclosed, naming the lord of the manor of Woodford as a prime culprit. As the lord of the manor of Woodford was a Q.C. it was speedily observed that the matter might not end in the Court of Verderers. Running also noted that the rights of the commoners were being eroded by the wave of enclosures, that they were unable to graze their cattle in the forest as guaranteed by ancient custom. There were also only five brace of deer left in the forest; the inference was that the lords of the manor had not only enclosed land contrary to forest law but had also impinged on the Queen's prerogative (though there is no record of Queen Victoria ever having the slightest inclination to hunt in Epping Forest).

On the surface it might appear that Robert West, lord of the manor of Theydon-Bois, and the Rev. Whittaker Maitland, lord of the manor of Loughton, had a strong case to answer. They were not helped by the fact that the concept of the forest had almost theological overtone Manwood's *Ireatise of the Forest Laws* (4th edn. 1717) distinguishes a forest as "the highest franchise of princely pleasure" from the inferior chase, park and warren—named in order of importance. An offender in the chase was punished by common law; an offender in the forest was punished by forest law.

But what distinguished a forest from a chase, or from a park? Simply the kind of beasts that inhabited them. The forest animals ("the five wild beasts of venery") were the hart, the hind, the hare, the boar and the wolf. The beasts of the chase were the buck, the doe, the fox, the marten, and the roe. The warren included birds in its allowance—hare, coney, pheasant and partridge. As for the park, it was technically an enclosed chase.

In mid-Victorian Epping Forest, the suburbs of London stealthily encroaching, the boar and the wolf were notable by their absence, the harts and hinds could be numbered on the fingers of one hand. Hurt unquestionably was done to vert and venison (*in virdi et venatione*), if only on account of trees being toppled for charcoal. Had the offenders put in a case for down-grading the forest then one could have sympathised.

Did they have a case to answer? Were these lords of the manor behaving in an overbearing, obnoxious manner, criminally appropriating trees of the forest? Hardly, for the strange thing about all this was that they had bought the land, and the lord of the manor had sold some of his to the Wanstead Board of Health, the solicitors of which one would have thought should have made a more thorough search.

The ownership of the land might be in anyone, but the rights of the proprietor were limited by the laws made for the protection of the monarch's wild beasts. In other words, the Court of Verderers were telling owners what they should be doing with their own property, acting as an early edition of the Ministry of Environment or an officious rural district council.

In Victorian England property was sacrosanct, and the indignation of the lords of the manor, hauled over the coals on account of hart, hind, hare, boar and wolf, was not mitigated by the knowledge of what could happen to them if the Court of Verderers had teeth. Upon the revival of the forest laws during the reign of Charles I, when the royal forests of Essex were enlarged to provide him with revenue, the fourth Earl of Southampton had been all but ruined, Lord Salisbury had been fined £20,000 and Lord Westmoreland £19,000.

The Court of Verderers heard the evidence, and decided to meet again in a month. When they did it was decided to forget the whole business, as the Corporation of London was taking up the cudgels on behalf of the dispossessed, the rustics wishing to graze theoretical cattle in the forest. On November 10, 1874, the Master of the Rolls stopped the enclosures by the lords of the manor, memorial trees were planted by the Duke and Duchess of Connaught in 1880, and in 1882 Epping Forest was dedicated to the use of the people by Queen Victoria.

The Court of Verderers may have been archaic, but it clearly had friends in high places. Would the matter have been decided with such expedition had it not been brought to their notice? One rather doubts it. RONALD PEARSALL in the *Justice of the Peace.*

Bewitched Bothered and Bewildered—"On the way to her Hastings Concert, Miss Stephenson became stranded when her transport broke down. She arrived at the theatre in a borrowed vegetable truck. Just as she began to play, the leg of the piano fell off." *The Dominion.*

Going Solo—"I believe that the day of the sole practitioner who attempts to provide an all-round legal service must be numbered. This is happening, or has happened, in the accounting field and the numbers of solo practitioners is reducing quite significantly:" Lomond Seel.

THE CONSTRUCTIVE TRUST—A TRUST IN THE FULL INSTITUTIONAL FORM OR MERELY AN EQUITABLE REMEDY

The express private trust and charitable trust are institutions. On the other hand, however, the constructive trust and the resulting trust are equitable remedies which depend largely upon the operation of law. The generic term implied trust is unfortunately one of imprecise meaning. It can be used either to mean an express private trust where the intention of the settlor is not as explicit as elsewhere, or as a generic term covering the constructive and the resulting trust, in which cases the trust is implied by operation of law. It is submitted that the second meaning is the more appropriate, and henceforth it is proposed to use the term implied that as a generic term covering both constructive and resulting trust and indicating those types of trust which are produced by the application of the general equitable duty imposed by operation of law to the law of trusts.

The constructive trust, which is the first main species of implied trust, was according to the traditional English authorities an institution in the same way as an express private trust is, and having all the attributes of an express private trust. Keeton for example defines a constructive trust thus: "Wherever a person clothed with a fiduciary character avails himself of it to obtain some personal advantage, such a person becomes constructive trustee of all the profits." But according to the American authorities a constructive trust is not a substantive concept at all, but merely a remedy. Scott for example in (1955) 71 L.Q.R. 41 writes, "There is the same relation between an express trust and a constructive trust that there is between a contract and a quasi contractual obligation." There have been two recent suggestions that the American concept of the constructive trust should be applied to English law. Maudsley writing in (1959) 75 L.Q.R. 234 suggests that it is possible to distinguish between the constructive trust and the constructive quasi trust, the former being an institution and the latter a remedy. Waters in *The Constructive Trust* (1964) attempts to take this further and to treat all constructive trusts in English law as merely remedies, though he is obliged to discuss secret trusts under a separate heading. It is submitted that, as the term constructive trust is used at present, there is really a varying spectrum of constructive trusts, some of which are close to being institutions, whilst others are merely remedies. Thus, as the term constructive trust is used at present, it is unsatisfactory, and obscures the true distinction which is between trusts depending upon the intention of the settlor, and trusts depending upon the operation of law. It is therefore submitted that the term constructive trust should be redefined, so as to exclude from it such concepts as secret trusts and mutual wills. The American view will then be accurate for the new redefined constructive trust concept. Moreover, it may then be possible to go one step further, and treat this redefined constructive trust as an instance of a general equitable duty imposed by operation of law.

In attempting to show that as redefined the constructive trust is a remedy and also an instance of a general equitable duty imposed by operation of law, it is proposed to set out the arguments in favour of treating it as an institution in a series of propositions and to attempt to answer them.

(i) If the trustee's duty is merely to transfer property to his beneficiary, then the constructive trust can be treated as a remedy. If the trustee's duty is to hold property for the beneficiary upon the terms of a trust tnen it is necessary to treat it as an institution. We can treat it as a remedy if we can explain two English cases. In *Keech* v. *Sandford* (1726) Sel. Cas. Ch. 61, 25 E.R. 223, L.C. in many respects the classic case, a trustee who renewed a lease in his own name was held to be constructive trustee for the infant in whose name it had originally been held. Yet the property could not be conveyed to an infant, so in this respect the trust must have been an institution. In *Bannister* v. *Bannister* [1948] 2 All E.R. 133 when a widow had been induced to sell a house on the promise that she would be allowed to live in it rent free, the purchaser was held to be constructive trustee for her for life and then for himself. Yet he could not convey the property to her, because she had only a life interest; and this suggests that the trust was an institution. But it is submitted that we can explain these cases: the rule that an infant cannot take a conveyance of property is a rule of statute and not of equity; the widow could have been treated as entitled to occupy the

house under an estoppel licence rather than under a constructive trust.

(ii) If the "beneficiary" under a constructive trust can

(i) Assign his rights,

(ii) Claim priority in a bankruptcy,

(iii) Claim not only money due to him but also interest on it,

(iv) Claim even though a personal remedy would be barred under the Statute of Limitations,

(v) Claim at the moment when the breach of the trustees' duty is committed without having to wait for an order from the Court that he should disgorge his profits, then the constructive trust has the attributes of an institution. If the beneficiary can do none of these things, then the constructive trust is merely a remedy. Here there is a dispute among the American authorities. Pound writing in 33 L.Q.R. suggested that the American constructive trust was an institution because the beneficiary could claim priority in a bankruptcy. Likewise Scott himself suggests that the beneficiary can claim at the moment when the breach of duty is committed and need not wait for the pronouncement of the Court. But Scott is at odds with Bogert (*a*) who argues that the beneficiary cannot claim until the moment when the Court pronounces that there shall be a constructive trust. Furthermore, it is submitted that, even if the contrust does have some of the attributes of an institution, this does not mean that it is in fact an institution.

(iii) If the case of the trustee profiting from his office were to be treated as the only constructive trust situation, then it might be said that the existence of a constructive trust depends upon a pre-existing fiduciary relationship. It would be analogous to the rule in the law of agency, that agency of necessity only arises from a pre-existing fiduciary relationship. But this would not explain the case of a stranger intermeddling in a trust, or of a person profiting from a fraud or crime where there is no pre-existing fiduciary relationship between trustee and beneficiary. It is therefore submitted that the existence of a prior fiduciary relationship is not a pre-condition of relief, but that there is a general rule that no-one is allowed to retain a dishonest profit.

(iv) If secret trusts and mutual wills were to be treated as species of constructive trust, then it would have to be said that a constructive trust is an institution depending upon the intention of the settlor to create a trust. The difficulty of the secret trust and the mutual will is that in both cases there is an intention on the part of the settlor, albeit imperfectly expressed, that a trust should be created. However, secret trusts and mutual wills have long been treated as distinct from the constructive trust in the strict sense, and it is submitted that they should be excluded from the constructive trust concept, which may then be treated as merely a remedy.

(v) If the constructive trust when used to circumvent the doctrine of privity of contract is a constructive trust in the true sense, then it is a further argument that the constructive trust is a remedy and not an institution. The history of this particular aspect of the constructive trust may be briefly traced. In *Lloyds* v. *Harper* (1880) 16 Ch. D. 290 the constructive trust was used to render Lloyds trustees of the benefit of a promise made by a father to guarantee his son's debts to those insuring with his son. In *Affreteurs Reunis S.A.* v. *Walford* [1919] A.C. 801 the constructive trust was used to hold the shipowners trustees of the shipping agent's commission. The doctrine fell into disfavour in *Vandepitte* v. *Preferred Accident Insurance Corp.* [1933] A.C. 70 when it was held that a car owner was not trustee of the benefits of an insurance policy for the benefit of a third party driver. It was similarly disapproved of in *Re Schebsman* [1944] Ch. 83, *Re Miller's Agreement* [1947] Ch. 615, and *Green* v. *Russell* [1959] 2 Q.B. 226. In *Tomlinson* v. *Hepburn* (*b*) however it has recently found favour again, when the Court held a lorry owner constructive trustee of the benefits of an insurance policy for the owner of goods which were stolen while being carried on the lorry. However, the constructive trust used in this context cannot be a trust in the strict sense because:

(i) there is no trust property,

(ii) there is no intention to create a trust,

(iii) the beneficiary is allowed to sue and not the trustee,

(iv) the measure of damages is not the loss to the trust property but the injury to the plaintiff. Thus on balance it is submitted that the arguments favour the view that a constructive trust is a remedy and not an institution.

(vi) If the constructive trust is a remedy, it might be treated as part of a greater concept of institution. An example of this approach is *Goff and Jones' The law of Restitution* (1966). The arguments for and against this approach revolve around the question whether English law needs a concept of restitution. The most important effect of a doctrine of restitution is that it breaks down the barriers between equity and

(*a*) *Trusts and Trustees*, 1st Ed., 1935.

(*b*) [1966] 1 Q.B. 21.

the common law. It is submitted that this is the correct approach, but that restitution is itself merely part of a general equitable relationship depending upon the operation of law.

Thus there are really two types of equitable relationship:

(i) An equitable institution depending upon the intention of the parties: this includes express private trusts, legal and equitable mortgages, agency created by express agreement, and the relationship between a company director and his company.

(ii) An equitable remedy depending upon the operation of law: this includes the constructive trust, the resulting trust, the American concept of restitution, the English quasi contract, and agency created by operation of law under the doctrines of estoppel and of agency of necessity. It may be submitted that this is also the basis of the collateral contract, and that there is greater similarity between the constructive trust and collateral contract, than there is between the collateral contract and the contract proper.

D. R. PALING.

THE UTILITY OF JUDICIAL HOMILIES

Judges and Magistrates deliver homilies (*a*) when sentencing offenders. What effect do such utterances have? The Court of Appeal has given extraordinarily little guidance on the value and the manner of delivering homilies and those who have written about the subject are sceptical of their utility. Thus Cavenagh, in a really excellent discussion of the many problems that may be created by the pronouncement of sentence, reports that offenders sentenced to an approved school when interviewed at a remand home shortly afterwards were often unable to recall anything other than the pronouncement of the approved school order. My own very limited experience of talking to them suggests that at any date up to three weeks after conviction imprisoned offenders can recall some of the homily the Judge directed at them, but that if none was delivered they do not recall for certain that none was. Even if offenders can recall homilies when asked to do so, this does not mean either that they do have them in mind at other times or that the homilies have any effect on their behaviour when they do recall them.

My experience suggests that offenders recall homilies better when they regard the sentiments expressed in them as untrue or unjust, as demonstrated by Blum and Wheeler, and that first offenders are less likely to remember homilies than others, a difference which may be explained by the greater anxiety felt by them on the occasion of their appearance in Court. If this is so it means that those who recall the homily best are those who are least likely to benefit from it, while those who are most likely to be moved by suasion have greatest difficulty in recalling it. Both Cavenagh and Roper suggest that the emotional experiences engendered by an appearance in Court make it extremely unlikely that homilies will have anything but a negative effect, if indeed they have any effect at all. Roper, in discussing the period of "mourning" (usually short) which generally follows conviction, writes:

> . . . in the mourning period there may be a desire to be left alone and contact may be difficult. It is an important period for it is then that the resolve either to continue crime or abandon it may be made. It is often wise to do very little during this period except to show a general sense of sympathy and it is quite essential to avoid any kind of moralising. Moralising at this time of sorrow is more than usually unacceptable and may effectually turn the tide against reformation; the same is true of public rebukes used by Judges at the time of sentence.

Walker, and Martin and Webster, seem to be sceptical of the utility of homilies for the purpose of influencing the sentenced offender's conduct and Davies reports that even where a prisoner was ready to acknowledge the truth of condemnation directed at him by a Judge this was done in a matter-of-fact way. He found no evidence that the homily had made the prisoners feel guilty about the condemned offence.

Certainly the Court setting is unlikely to provide a satisfactory learning situation, and perhaps it is the feeling that this is so that led to the suggestion that, instead of delivering a homily publicly, Magistrates might take the

(*a*) "Homily" is defined as "any words used by a sentencer in sentencing that are not strictly necessary, either to inform the offender of his sentence or to fulfil any statutory requirement of explaining to him what the sentence involves."

offender aside, perhaps into their retiring room, for a heart-to-heart talk. It is even suggested that this might obviate the need for a sentence at all. I see no reason why this might not be effective with some Magistrates and some offenders, but I doubt whether we can identify either, and in view of the difficulties some Magistrates in the Juvenile Courts seem to have in distinguishing condescension from informality I would be hesitant about trying it.

Perhaps the answer to this particular proposal and to the scepticism so far discussed is that homilies are directed not so much at the offender as at the public. Public interests would be unjustifiably sacrificed if homilies were to be reserved for private conferences between Judges and offenders. Certainly Green, discussing the behaviour of Judges in America. emphasises that the reasons given publicly by a Judge for his decisions may not be those which in fact determine those decisions, although the fact that the Judges he studied were publicly elected officers may explain this. Martin and Webster are ready to admit that homilies may have an effect as general deterrents. So is Walker, but more for the sake of argument than anything else, and I find the analogies he uses to support the argument too far removed from the sentencing process to be convincing.

To summarise this discussion I would conclude that homilies are probably of no advantage either to the offender or the public, and although they may do some good for the sentencer, they should not be delivered since in some cases they cause resentment in the offender, which aggravates the problem of reforming or deterring him. I consider the problem of whether or not sentencers should give reasons for their decisions to be a distinct one, and that the advantages for the legal system as a whole and for offenders in particular in requiring the statement of reasons in some cases at least outweigh any ill effects that may arise from this. If any ill effects were feared they might be mitigated by avoiding a public statement of the reasons in favour of their reduction to writing to be given to the offender a little time after sentence.

Another reason for opposing homilies is the simple dangers that are sometimes not avoided in delivering them. Before delivering a homily a sentencer should be reasonably sure that the homily is couched in terms which make it intelligible to those to whom it is addressed. Perusal of a collection of homilies made by law students, mainly in Magistrates' Courts, suggests that homilies are examples of "restricted" linguistic codes in operation but, despite this, it is doubtful if a sentencer always makes himself plain to the offender, even when he is attempting to make allowances for the different linguistic styles of his and the offender's social class. Perhaps the best example of what appeared to me to be a bad mistake of this sort occurred in a local Juvenile Court where a boy of about 12 was being put on probation. The chairman of the bench explained to the boy that the probation officer would be his "guide, philosopher and friend". Even the best educated offender of 12 might have wondered how a philosopher could help him out of his predicament. Of course a sentencer might argue that his homilies are not only intended for the offender but for the press and the public in the Court. The problem, however, remains the same, especially as those in the public gallery often seem to be the companions or relatives of the offenders and so presumably likely to have the same impression of the proceedings as the offenders.

On occasions a sentencer seems to get an *idee fixe* which then reappears in his handling of successive cases. The impression created on those who are in Court throughout, among whom may be the offender, is not likely to be good. In a recent study it was noticeable that defendants often passed the time they had to wait before their case was called by watching proceedings from the public gallery. On one day the chairman of the bench began successive homilies by telling the offenders involved that they presented problems to the Court and that the Court found it extremely difficult to know what to do with them. Another constantly repeated introduction to the pronouncement of sentence was that the Court had listened *carefully* to all that had been said. These may seem minor points but there is a danger that such repetition may diminish the credibility of what is being asserted. Perhaps the most disastrous example of an *idee fixe* finding repeated expression in a homily, concerned a series of cases, involving different defendants, of taking and driving away motor scooters. The chairman obviously concluded, when considering the first case, that the offence was to be explained by the offender's desire to impress his girl friend. There was some evidence of this since the girl friend was present when the offence was committed. The offender was admonished and told that it was silly to show off in this way. Similar advice was given to the next defendant. The next defendant was also given the same advice despite the fact that there had been no evidence that he was in female company at all when the offence was committed.

Of other techniques used in imposing sentence it might be asked whether the choice of these

techniques makes any difference to the effectiveness of the homily. For example, to relieve an offender's anxiety a sentencer may inform him first of the sentence, presumably in the hope that the homily that follows will be more effectively taken to heart. The sentencing of a young student nurse who had shoplifted to get food for her illegitimate baby began:

> Let me say right away, to help you [*i.e.*, put you out of your misery (the nurse was in a highly nervous and tearful state)] we are going to give you an absolute discharge . . . [The defending solicitor was then complimented for his handling of the case] . . . We want to talk to you for a moment or two to get you to understand that you have far more friends than you think. Don't be frightened. Your worst enemies are your own fears . . .

On the other hand, a sentencer may not inform the offender of the sentence until the end of the homily, a tactic which seems to be popular when the sentencer intends to impose a sentence which he appears to think is lenient or which he appears to fear the offender might think lenient, like probation, for example. In such a case the announcement of the sentence is sometimes preceded by a homily which seems to be designed to make the offender think that he is about to be severely sentenced. An elaboration of this tactic also seems to be favoured when, for example, one of the two joint defendants is going to have a suspended sentence activated or to be sentenced for breach of probation or a conditional discharge. If the other defendant is going to be given one of these sentences, the first is dramatically sentenced and then his plight is used to demonstrate the reality of the threat that lies behind such sentences. Whether such tactics have the effect they are intended to have must remain an open question: STEPHEN WHITE in the *Justice of the Peace.*

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THE VALUE OF DISCONTENT

The Presidential Address delivered by John L. Farris to the 54th Convention of the Canadian Bar Association.

I have chosen as the subject of my remarks " the value of discontent". The times in which we live are characterised by a challenge of old established standards, institutions, customs and canons of morality. Personally, I do not find this challenge disturbing. It seems to me quite legitimate that all institutions, all beliefs, all systems, should be called upon to justify their continuance. To the extent that they fail to do so they should be changed, modified or abolished. The discontent that haunts mankind is a powerful stimulus for the betterment of human relations and the ordering of human behaviour.

Today, I wish to direct your attention to three of the areas of the administration of justice in respect of which there is justifiable discontent.

First, I wish to repeat what I have said on other occasions, that the adversary system of resolving disputes needs re-examination. The concept that a Judge should settle disputes only on the basis of such evidence as the contestants choose to present without regard to the rights of third parties not directly or immediately involved, is, I suggest, of doubtful validity.

The weakness of this method has been recognised when applied to matrimonial dis-

putes. Surely the rights of children cannot be adequately secured in a bitter fight between warring parents.

Again, in the field of labour law, where the adversary system has been developed into one of its highest forms, we see the organisation of employees into fighting groups and the contest between labour and management is resolved without regard to the rights of the public.

There are two other areas of the law where, it seems to me, that the adversary system has failed to resolve the problems that face society. The first is in the field of criminal law and method of dealing with violent behaviour. Oliver Wendell Holmes, some 75 years ago, said, "What have we better than a blind guess to show that the criminal law in its present form does more good than harm."

I suggest that this statement is just as true today as it was 75 years ago. I need quote no statistics. Judicial notice can be taken that violent criminal behaviour is not being controlled by our present system of criminal justice, nor is there any reason to believe that under present procedures results are going to get any better.

It may be that our whole concept of responsibility in the field of criminal law has no sound basis and that our method of treating violent criminal behaviour primarily as a sociological problem is a misconception.

There are developments in the field of medicine that suggest that a generation from now our present methods will seem not much of an improvement over trial by battle or trial by ordeal.

For example, a recent study entitled "Violence and the Brain" by Drs Mark and Irvine, Professors at the Harvard Medical School, has found that violence is often rooted in structural or functional impairment of the emotional regions of man's brain. There are in the United States 15,000,000 persons afflicted with obvious or hidden brain disease and presumably a similar proportion in Canada.

Acquired or inherited abnormalities of brain structure or function, in the view of these doctors, leads to repeated violent conduct by an appreciable percentage of these people. Neurologists (not psychiatrists) are now beginning to locate specific portions of the brain which serve as triggers and brakes for violent action. In many cases this emotional brain disease apparently can be controlled by medication. Further it may not be long before a tele-metered device is perfected that will enable the doctors, stationed at considerable distances from their patients, to record and stimulate points within their patients' brains. It has already been done to a limited degree. What I am talking about is not science fiction—it is fact.

In the light of this, our present methods of trying to control violent criminal behaviour by education, by passing laws, by our present system of trial, incarceration and parole seem grossly unrealistic. All this shows the futility of thinking that laws or lawyers and Judges alone can solve the problems of human be-behaviour. It will be necessary to have many disciplines participating in the process of ordering human relations.

There is then a justifiable discontent with our system of criminal justice, and this discontent will trigger radical and, at present, unthought of techniques. These in turn will present new problems in the balance between the rights of the community and the rights of the individual.

The second area in which it seems to me the adversary system does not accomplish what is required is in the field of corporation law. The commercial world, and indeed the public as a whole, should be discontended with the lack of analysis by lawyers and Judges of the role of the corporation in modern society. The adversary method is not one which will result in such an analysis ever being made.

The large corporation, as it has developed in recent years, ranks in importance next only to Government in the institutions that profoundly affect the lives of all of us. In many cases, the ownership of the large corporations is widely diversified. With some companies, no one shareholder owns as much as 2 percent of the stock. This results in vast powers being exercised by management. Lord Wilberforce, and others, have emphasised the need of determining in whose interest should the undertaking be managed—in the interest of the shareholders, in the interests of the workers, in the interests of the customers. Can it be seriously believed that the adversary system, proceeding as it does on an *ad hoc* and individual legalistic basis, will be adequate to decide between the competing claims of shareholders, workers and the public? Professor Gower has said that "it has become almost an accepted dogma that management holds a duty to the four parties to industry—Labour, Capital, Management and the Community—a dogma which is repeated indiscriminately in the speeches of right-wing company chairmen and left-wing politicians, but there is little evidence that public sentiment has yet crystallised into law."

There are many decisions in respect of corporation law that have until very recently been regarded as cornerstones, but now have come to

be recognised as disastrous. Time does not permit me to discuss in this connection *Saloman and Saloman*, but let me refer to *Percival and Wright* decided in 1902 when a Chancery Judge held that the directors of a company owed no fiduciary duty as regards confidential information to the shareholders. In this case shareholders wrote to the officers of a company offering their shares at a stated price. The Chairman of the Board accepted their offer without disclosing that the Board of Directors were negotiating with an outsider for the sale of the entire undertaking of the company at a price considerably in excess of the price the shareholders were willing to accept. The shareholders, of course, had no knowledge of the negotiations. It was held that the sale could not be set aside because the directors owed no fiduciary duty in respect of confidential information. Until five years ago this was law. It reflected the attitude of the business world and, indeed, perhaps of the public at large at the time.

Professor Loss of Harvard Law School has reported an exchange that took palace in 1900 between a member of a Congressional Commission investigating and recommending legislation in respect of business, and the President of the American Sugar Refining Company:

Q. You think then that when a corporation is chartered by the state, offers stock to the public and is one in which the public is interested, that the public has no right to know whatever what its earning power is or to subject them to any inspection whatever that the people may not buy this stock blindly?

A. Yes, that is my theory. Let the buyer beware. That covers the whole business. You cannot wet nurse people from the time they are born until the time they die. They have to wade in and get stuck and that is the way men are educated and cultivated.

Of course, the Insider legislation that has been passed in Canada during the last five years removes the effect of the decision in *Percival and Wright*, but for over 60 years this was the guidance that our legal system gave to the commercial world as to the standard of acceptable morality. What reason is there to think that similar decisions resulting from the adversary system may not be made in the future?

Again, it seems clear, that in the future one can expect that attempts will be made to use the corporation as an instrument of social policy. This has already occurred in the United States where a shareholder known as the Medical Committee for Human Rights, which had been left shares in the Dow Chemical Corporation, sought to prevent that company from selling napalm for use in Vietnam. Also, legal proceedings have been taken against General Motors with a view to "making General Motors responsible". One can expect that in the future shareholders who object to the use of company assets in such manner as to result in environmental pollution are going to be confronting the Courts with problems "that would cross a rabbi's eyes". Is the adversary system one that will enable the Courts to resolve these difficulties in an informed and effective way?

It may well be that in the decision making process, in appropriate cases, the Courts should have assistance available on an organised basis from scientists, economists, business and labour leaders, the academic community—indeed all who have something of value to contribute. This is an area that cries for immediate research.

I have been speaking so far of justifiable discontent. Discontent that is irrational or based on jealousies is a destructive force in the life of mankind. An example of the discontent that we should reject is a discontent that is reflected by the B. F. Skinner school of behaviourism, whose thesis is that freedom and dignity are outmoded and illusory psychological concepts. The argument that they must be replaced by pseudo-scientific notions of environmental control may appeal to the technocrats and dictators but it revolts the humanists, the libertarians and all who believe in the soul of man.

Another form of discontent that we reject is reflected by the school of social theorists that believes in the omnipotence of the state and who, through state control, would destroy the independence of the legal profession and jeopardise the independence of our Judges.

And of course we reject the discontent of those who have vested interest in chaos.

On the other side of the coin, there are many aspects of modern life and of our professional life with which we should be content and which should satisfy the most demanding aspirations. You do, of course, understand the difference between being satisfied and being content.

During the last year I have criss-crossed Canada and met with a significant proportion of our 14,000 members. I have had discussions with numerous lawyers and Judges in England, in France, and in the United States. With the spirit of independence, with the spirit of concern, with the determination to improve the administration of justice that characterises the lawyers of the western world, I am both satisfied and content. It was their discontent and their leadership that led to the establishment of the

law reform Commissions, and indeed, that pioneered most of the improvements in recent times.

So much remains to be done. The results we seek will not be achieved without tremendous expense of human labour and human spirit. The progress may be slow but it can be certain. If the leaders of the organised Bar are men of vision, and if we will remember, "T'is looking down that makes you dizzy", we will harness the forces of discontent and fulfill our obligations in the service of mankind.

POLLUTING—AN INSTANT TORT

At 12.52 p.m. on Thursday, 30 March 1972 s. 2 of the Deposit of Poisonous Waste Act 1972 became, it is strongly suggested, the United Kingdom National and All-Comers' record holder as the fastest tort to finish the distance. It had started from the stable of the Lord Chancellor at about 7.40 p.m. the previous Tuesday, less than 42 hours earlier, and received about five minutes' discussion in the Upper House on its way. As such it rivals the two recent Northern Ireland Acts.

On the face of it. the Act is short, clear and a very useful addition to the statute book. Nevertheless, some points of doubt do arise about this little piece of legislation. The tort that emerges, in s. 2, is one of absolute liability resting in content somewhere between *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330 and nuisance, and occupiers' liability. Civil liability rests upon the establishment of a breach of the penal provision in s. 1. This provides that it is an offence to deposit, or cause or permit to be deposited, on land, which includes lakes and the sea-shore, any poisonous, noxious or polluting wastes such that the presence of the waste is liable to give rise to an "environmental hazard"; that is if the manner or quantity of deposit subjects humans or animals to material risk of injury, or threatens any water supply.

Although liability is absolute, account may be taken in deciding if a risk is "material", of any measures taken to minimise the risk. However, merely putting the waste in containers is not by itself to exclude any risk. Further, account must be taken of the possibility of anyone tampering with the waste. If damage of any sort is caused in the above way, the depositer is liable, and in addition his employer and any other person causing the deposit will be directly liable, and the occupier of land may also be liable for permitting the deposit. The only conclusive answer to action under the section is to prove that the depositing was done under express approval or authority of some statute, and the Act contains a system of licensing to this end. In addition, anyone sued will have a defence if he proves that he acted on instructions or relied on information given to him by others, and did not know, and had no reason to know, that it would be an offence to deposit the waste. The same defence is also open to those sued for "causing or permitting", and they may also prove in defence that all reasonable steps were taken to insure no offence was committed. It is difficult to see how, under the two-pronged attack of the Act, both defences could be available at the same time, thus ensuring direct or vicarious liability in the employer.

It is possible that the Act, unintentionally it would seem, goes beyond this. On one interpretation, civil liability will also lie on the individual officers of a corporate employer. Section 6 contains a provision, increasingly common in criminal legislation, whereby if an offence has been committed by a company with the consent or connivance of, or because of the neglect of, a director or other officer of the company. or purporting to act as such, then he, as well as the company, is liable of the offence and *"liable to be proceeded against accordingly"*. The intention of this clause, in its original context, was purely to widen the scope of the penal section, and make the threat of imprisonment a genuine one. But when the Bill was amended in the Lords by the addition of what is now s. 2, no alteration was made limiting s. 6. The civil provision is worded so that, as is usual, the civil liability depends on a person acting "so as to commit a contravention of s. 1 (1)". It would therefore seem that the words "proceeded against accordingly", which in their context as enacted are clearly ambiguous, are wide enough to cover civil as well as criminal proceedings.

If this interpretation is accepted, the Act represents a new departure in lifting the veil. Civil liability can of course be established where officers are directly implicated as primary parties to a tort. and thus could be liable in general where they order or procure a commission of a tort. But here the liability is based

on neglect, an omission, as well as commission. This would also allow any argument based on *ultra vires* to be side-stepped.

The section will also have repercussions on common law liability. It states that it is "without prejudice" to existing remedies, but in the case of one, the rule in *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330, it will represent just another nail in the coffin. But the full effects of the interaction cannot be considered until the width of the section is clarified. Section 1 is drawn in very wide terms. Will it cover a cemetery owner whose gardeners, when trimming a yew tree, throw the branches into an adjoining field containing cows? And will it cover the owner of a factory, where the chimney of his boiler house emits dangerous acid smuts, as happened in *Halsey* v. *Esso Petroleum* [1961] 2 All E.R. 145? In the latter case the waste is certainly noxious and poisonous and, as the recent incident over Rio Tinto Zinc lead smelter at Avonmouth showed, there may well be material risk of injury to human and animal health. Further, there is a deposit, albeit by natural agencies. Could this be covered by "causing or permitting" the deposit? There is nothing in the Act specifically to the contrary.

The provisions of s. 3 show that the intention is to stop the widespread and indiscriminate dumping of large quantities of cyanides and other noxious industrial waste. But the only limitation on the meaning of "waste" is the bracketed words "whether solid, semi-solid or liquid", and this would cover both smuts and yew trees. The problem of smuts is already dealt with, at the penal level, by the Alkali Etc., Works Act 1906, a piece of legal machinery as antiquated as a factory of similar date would be, and, in urgent need of replacement. If the 1972 Act is read as wide as its wide-sweeping terms would seem to allow, the replacement may partially have occurred.

Certainly partial replacement of *Rylands* v. *Fletcher* has occurred, although without the prior consideration of the general principle of the utility of absolute liability at common law called for by the Law Commission in its report on Dangerous Things and Activities (*Law Com.* No. 32). Although its scope is limited by the necessity to prove material risks to humans, animals or water supplies, once this is present liability is for "any damage" including, it would seem, Mrs Halsey's laundry. Gone is the doubt as to whether personal injuries are covered, the need to prove escape, the uncertainty of what is meant by "non-natural use", and the distinction in liability between occupier and contractor. If there is an offence against the Act, it is clearly the preferable form of action. If the deposit is sanctioned by this Act, then the defence to the common law action on the basis of statutory authority is wider still.

Another effect of the Act will be the further strengthening of the arguments of those who urge the cessation of the Courts' role in creating civil liability for breach of statutory duty. It is to be welcomed that Lord Hailsham is now applying in his legislative capacity the principles he has recognised in his judicial capacity (see his judgment in *F. E. Callow* (*Engineers*) *Ltd.* v. *Johnson* [1970] 3 All E.R. 639, 641-2), that it is for Parliament and not the Courts to act in this area. Now that Parliament has shown itself willing to assume the mantle, it is clearly time for the Courts to doff it. Parliament's efforts in this Act are to be welcomed. but it is hoped that future efforts in this area will proceed from considerations of basic principle, and will not attempt to challenge this Act's speed record. DAVID W. WILLIAMS in *The New Law Journal.*

HUMAN RIGHTS IN CAMBODIA

At a time when Khmer (Cambodia) is going through one of the most difficult periods of its history, one would have like to be able to say that the image it offers the world is that of a country profoundly attached to the principles of the Rule of Law. This would have greatly enhanced its international prestige and made more credible its claim to be defending democratic liberties. Unfortunately, the reverse is true, and over the last few months there has been a rapid deterioration in the situation as regards respect for the fundamental values underlying the concept of the Rule of Law.

The proclamation of a State of National Danger and the introduction of martial law had already conferred on the Executive powers which were exceptionally far-reaching, even in the light of the grave political and military crisis through which the country was passing. Then, on 18 October 1971, a special decree suspended the most important constitutional liberties and on 4 December of the same year a new decree, with

retroactive effect as from the month of June of that year, further aggravated the situation by making any anti-government demonstration a punishable offence and by empowering the police to carry out at will searches, arrests and unlimited detention. These decrees were drawn up and brought into force by the Head of State without the approval of Parliament, which had previously been dissolved.

It was also by a decree—which, it may be added, was unconstitutional—that on 18 October 1971 the Head of State arbitrarily decided that the Parliament should become a Constituent Assembly. Equally arbitrarily, the Constituent Assembly was soon dissolved without having completed its task; the Members of Parliament were placed under house arrest, theoretically for their own safety, and the Parliament buildings are still closed and guarded by the army. In other words, those who should be speaking for the people have been reduced to total silence.

Finally, on 10 March 1972 the Head of State, Cheng Heng, abdicated in favour of Field-Marshal Lon Nol. The notion of abdication is in itself difficult to reconcile with that of a republic; it is even more difficult to conceive of a legal justification, under any type of regime, for the transfer of power simply on the basis of the will of the holder, unless the holder considers that power as his private property, to be used or abused at will and without rendering accounts to anyone. At any rate, Field-Marshal Lon Nol seized power and proclaimed himself President. In other words, this President, who holds in his hands the reins of absolute power, has been invested with that power by no authorised person or body; and, if we accept the principle laid down in Article 21 of the Universal Declaration of Human Rights that "the will of the people shall be the basis of the authority of government", we are bound to recognise that the authority of Lon Nol has no basis and is unquestionably illegally exercised.

This determination to ensure the continuance of a presidential dictatorship is reflected in the new draft Constitution, drawn up at the request of the government by a 16-member committee appointed by itself after the Constitutent Assembly had been dissolved and the 120 articles it had already drafted had been annulled, probably as being too liberal.

For instance, it is the President who will, by decree, lay down the procedures for his own election. Again, it is he who will lay down the procedures for parliamentary elections; he who will appoint the six members of the Constitutional Court thanks to which he will be able to invalidate or confirm the presidential or legislative elections, advance or set aside political friends or enemies, and lend a semblance of legality to all the acts of those in power. It is he who will appoint his "heir", in the person of the Vice-President. And, finally, it is he who will have the power to ban any legally constituted political party he considers superfluous, in order to reach a bi-partite system. In short, the President will have absolute control over the machinery of State, and be free to use it as he will and to eliminate for as long as it suits his purposes any opposition or divergence of opinion.

It is not true that the campaign which preceded the referendum on the Constitution allowed any freedom of expression. The arrests that were made of people found guilty, or even suspected, of having criticised the government in power are an indication of the general atmosphere of intimidation which prevailed. At the same time, the disturbances in the University and the brutality with which they were repressed are an indication both of the anxiety felt by intellectuals in face of the totalitarian tendencies of the present regime and the disarray of a regime which is no longer guided or sustained by the principles of the Rule of Law. It can only be hoped that the country will return to sounder principles before it is too late—*Comment by the International Commission of Jurists.*

Peeping Nippons—To give a semblance of sunshine to Tokyoites living in the shadows of high-rise apartments, the Tokyo Metropolitan Government has come up with an ingenious idea: Why not reflect sunlight to them with large mirrors? In Japan where the weather is humid and central heating is still a luxury, whether a home receives ample sunshine is a critically important question for most people.

There has been endless litigation against apartment builders in Japan's big cities from residents claiming they are being deprived of their "rights to receive sunshine" by high-rise apartments. There are no Japanese laws involving such rights and no precedent-setting Court decisions have been made in law suits.

The present plans of the Metropolitan Government calls for installation of mirrors to divert sunshine to homes in the shadow of public apartment buildings. A mirror, 1.5 by 3.6 metres, is to be erected on the roof of such a building, with auxiliary mirrors located on the roof and the ground. Officials expect the mirrors will divert 93 percent of the sunshine to the homes in the shadow. Goto Kogaku Co. in suburban Fuchu has developed the mirrors in co-operation with the Metropolitan Government.