The Anatomical and Pathological Constitution

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THE ANATOMY AND PATHOLOGY OF THE CONSTITUTION

FIRST I must, not from custom, but from obligation, pay tribute to my predecessor, Professor Saunders, whose tenure of this chair was all too short, but, in the time he had, he added distinction to it. I never knew him save by repute. In that he stood high. He was a man of whom his contemporaries could say that he bore a vast stock of learning lightly, and who earned respect equally from my generation, even from those who did not readily accord it to their elders; to him they gave it not only as a scholar, but as a man of quiet charm and kindness of spirit. He will, too, be long remembered by his students as a teacher, always ready to help and who made learning an easy task: as a scholar, and teacher, his name will endure both in his own country and in America.

Next I must turn to my other purpose. An inaugural lecture is inevitably something of an ordeal, and the fact that the adjective is apt does not help. It merely means that the lecture comes at a time when a hammer or screwdriver is as often in the lecturer's hand as his pen. For the lawyer there are particular difficulties. He lacks the ready texts of his brethren of divinity and classics. He cannot as can his brethren of the physical sciences hold forth on the wonderful things to come, nor even, like those of the social and moral sciences, seek to show how those wonderful things may be used to achieve an earthly paradise rather than Armageddon. He must deal with a subject which in general repute shares the characteristics of Coleridge's frightful fiend and the Delphic Mysteries; yet a subject

1 Being the text of an inaugural lecture delivered in the University of Edinburgh on October 13, 1954.
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with many branches of which members of his audience are familiar. Thus beset he must nevertheless steer between technicality and platitude.

On this occasion a theme was suggested by the cumulation of the titles of the three chairs to which appointments were announced at the same time, for it is with the structure and ills of the constitution that any course on constitutional law must be concerned. The cumulation of stipends could be equally felicitous, but that is beyond my powers. I must content myself with certain aspects of those studies which seem important today, and to be of concern to lawyers.

It is, however, in this branch of law that non-lawyers are perhaps most at home. Clearly the constitution moulds and reflects national character and is so much a part of ordinary life that its main principles and institutions are obvious to all. A chance issue of the day's paper evoked directly or indirectly memories of Sommersett's case or Knight v. Wedderburn, according to its jurisdiction of origin. Equally in its literature the subject is not a lawyer's peculiar. Latterly much has been written by those who are not lawyers by trade, but statesmen or politicians, as you will, whose long experience in working the constitution entitles their views to respect. For, just as indirectly does the whole community by its habits and actions mould the constitution, so more directly is it moulded by Ministers and administrators. The degree to which the boards of nationalised industries are answerable to Parliament is not finally settled by the Acts setting up these boards, but by the activity or restraint of individual Members of Parliament, by the inclination of individual Ministers, by the working of the Clerks at the Table, and above all it will be settled by the way in which the proposed Select Committee

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2 (1772) 90 St.Tr. 1.
3 (1778) Mor. 1454. Other matters dealt with at length, and which could fall under this head, included the place and purpose of private bill legislation and the legal and financial position of the New Town Corporations. See The Times or The Scotsman of August 2, 1954.
5 Morrison, op. cit., 960-961.
on Nationalised Industries 'sets about its task. So too does the constitutional position of civil servants depend upon the actions of Ministers in Parliament rather than on any rules of law.'

These are but current and relatively trivial illustrations of the consequences of our form of constitution, but they emphasise that constitutional law is not solely the concern of lawyers. Indeed while all law may be regarded as the handmaid of other arts and sciences that is particularly true of constitutional law. It is not the function of the constitutional lawyer to originate policies, but rather to provide the means whereby the ideas of others may be carried out and fitted into existing ways and institutions. Some thirty years ago Sir William Holdsworth gave little scope to the constitutional lawyer. "In our own times," he said, "the influence of lawyers is less direct. Their work consists partly in the maintenance of tried and tested constitutional principles against the criticisms of visionary, and often imperfectly educated, political theorists, and partly in giving practical shape to projects of reform by supplying a ballast of common sense and a spirit of compromise which is not afraid to be illogical"—a saying which might have been regarded as controversial in that college whence I come, particularly if you remember its full title. If then the constitutional lawyer is not an originator and has no exclusive right to pronounce on the constitution, it may well be asked what is the function of constitutional law in the universities and especially in the curriculum of law students? That question is particularly pertinent if it be remembered that cases of constitutional significance arise but rarely in practice.

To that question there are I think a number of sound answers. The first and most general is provided by the

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7 See the Debate on July 20, 1954, and particularly the speech of Sir Maxwell Fyfe (Hansard, Vol. 530, col. 1284). The value of strong ministerial support is commented on by Prof. K. C. Wheare, The Civil Service in the Constitution, 29-30.
8 The Creighton Lecture 1924, reprinted in Essays in Law and History, at p. 72.
nature of our constitution. Just as with the Homeric or any other great national saga, traditional legends are handed on for the edification of new generations, so with us in the absence of any self-contained constitutional document it is right that each generation of lawyers should be made familiar with the achievements of their predecessors and with the courage and spirit of those whose place they inherit. It is as well that the part played by ordinary lawyers should be emphasised. The courage of Lord President Seton in Bruce v. Hamilton, the collective courage of the judges in Cavendish’s case, or the brusque answers of Coke have their rightful place, though sometimes these heroes were not heroic. But there must also be remembered the ordinary practitioners who had sufficient respect for principle to take risks in its defence. That respect will only be acquired through a familiarity with our institutions and their development which will show that fundamental liberties, as we know them, are not in the order of nature, and do not perpetuate themselves without effort on our part. The battles of Lord President Seton were repeated in the Claim of Right, those of Cavendish’s case in the Case of Prohibitions, and even in recent months The Times has had to resume articles, though of somewhat muted tone, of the sort which once earned it the title of the Thunderer, and the late Lord Asquith had to say that public policy in law “is not the same thing as the policy of the government whatever its complexion.”

That respect is all the more important because of the rarity of constitutional cases. When they arise they must be recognised for what they are, and that is not always easy. The sums involved are often small. It is not always the

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9 See the article “Kings versus the Court of Session” by Lord Cooper, The Juridical Review (1946), Vol. LVIII, 83.
10 (1587) 1 And. 152.
11 (1607) 19 Co.Rep. 63.
14 In Sammut v. Strickland [1938] A.C. 678 it was 2s. 9d., in Bowles v. Bank of England [1913] 1 Ch. 87 effectively something under a pound. It is true that
most endearing characters who are involved. For every Hampden or Melville there will be found a Wilkes. If such cases are to be fought lawyers must be found sufficiently imbued with principle to undertake them, and if Holdsworth’s purpose is to be achieved studies of structure of the constitution must lead back to principles. The anatomy with which the student is concerned is an anatomy of principle.

Thus even on Holdsworth’s basis there is good reason for pursuing constitutional studies. That justification is however as important for ordinary citizens and for those who are to enter the public service as it is for the law student. For the latter there are special reasons. There is a tendency for the law student to be too much a lawyer, too logical, and too narrow, for there is a mathematical fascination in bandying cases, in the pursuit of which the interests of the client are lost sight of. It was of this that Baron Hume spoke when he warned them against “too great fondness for speculative notions” or “the debauchery of metaphysical speculation” and when he emphasised that “The law, under which this or any other nation lives, was not constructed by metaphysicians. It is the assemblage of those customs and regulations which mankind, according to the state of society they are in, feel to be just or find to be convenient.” It is because of familiarity with the actual working of the constitution that the student can most readily perceive through its analysis the limits of law itself, the limits of logic in its development, and the need for law to be fitted to the current requirements of society. He will constantly be reminded in the words of Holmes J. that “Constitutions are intended to preserve practical and substantial rights, not to maintain theories.” He will learn

neither Mr. Bowles, nor, earlier, Mr. Bradlaugh, would willingly have abandoned litigation but men of their ardour are not common.

15 See letter of Sir E. Bridges addressed to the Civil Service quoted in The Times, September 7, 1954.
16 Lectures, p. 6 (Stair Society Edition).
that there is room for ambiguity, so that things may work themselves out,

19 even for an Act which says in one section that certain territory is not part of Her Majesty's Dominions, and in a following one that nevertheless such territory is not a foreign country—legislation of course which deals with Ireland.20 It might also be added that there are peculiar advantages in both teaching and learning in a capital city, for teachers no less than students are prone to those "speculative notions," and the close contact which is there possible with those who actually work the constitution is a necessary and welcome corrective.21

This practical element is perhaps worth further emphasis. We have spoken of the legendary character of the constitution and of familiarity with the past but the lawyer must remember another warning by Holmes: "We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws on the present." 22

For just as there is, reputedly, a tendency for soldiers to start each war by fighting the battles of the last, so, most certainly, there is a tendency for lawyers to continue to fight battles that have long since been concluded, or were perhaps merely part of a mock war. If we speak of the steps by which the power of Parliament, freedom of speech, and the like, were won so as to keep memories fresh we have in one sense done enough. In another we have not. Were the constitutional combatants of the past alive today they would neither continue the same wars they used to wage nor would they stop fighting.

19 Thus in Dicey and Rait, Thoughts on the Scottish Union, at p. 192, it is suggested that the ambiguity in Art. XIX of the Treaty of Union was intentional.

So too a Money Bill under the Parliament Act, 1911, finally resolves itself into what the Speaker for the time being says is one.

20 The Ireland Act, 1949, ss. 1 and 2.

21 Compare the plea for an understanding of the Parliamentary Draftsmen's task by Sir Granville Bam (1951) J.S.P.T.L., at p. 457.

22 Collected Papers, "The Path of the Law," at p. 195. Compare Maitland's remark "What the lawyer wants is authority, and the newer the better; what the historian wants is evidence, and the older the better,"—"Why the History of English Law is not written," Collected Papers I, 491, and that of Professor Plucknett "Once the professor of law embarks upon history he has become a historian, for legal history is not law, but history," 67 L.Q.R. 190.
Effectively the power of the State is no doubt greater now than ever before. That is inevitable. Not merely has the complexity of society grown so that greater regulation cannot be avoided, but the scientists have made it possible for us to regulate in ways, and in areas, effectively closed to our ancestors. Not merely have communications improved, but advances in statistical methods, economic speculation, and the like extend the possibility and the temptation to control. Much of this control we bring upon ourselves. Though we may profess objections to it we desire the things which make control inevitable. If the country desires a National Health Service it must put up with a considerable administrative organisation which will rub shoulders with individuals, and even tread on their toes. Of one aspect of this development it has been said "If our people prefer to live the carefree life of a South Sea Islander happy in his lack of wants they can enjoy the benefit of low rates. But if, as seems to be the case, they prefer to live their crowded anxiety-ridden lives in the neon-lighted chromium plated cities of western civilisation, they must be prepared to pay for it in, among other evils, high rates." High rates are one product, the growth of opportunities for maladministration or for heedless or unthinking infractions of personal liberty is another. The problems of individual liberty are as important today as they were in the seventeenth century, but they are of a different order. Increasingly they are concerned with property and livelihood. For we have not made government perfect by making it theoretically responsible. Indeed once government is in the hands of responsible Ministers rather than an autocratic king there is some tendency for its claims to

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24 Address by Lord Greenhill to the Institute of Municipal Treasurers and Accountants, "Do Rates Matter?"

absolutism to be greater, since it is assumed that the safety valve of responsibility will prevent unhappy consequences. It may well do so in major cases, but it is doubtful if it is sufficiently effective in all. Because of pressure on its time there are limits to the ability of Parliament to redress individual grievances.26 The operation of the courts, and therefore of lawyers, remains of cardinal importance. But the lawyer can play his part best if he fights the right battles. It is useless to cry out against the existence of delegated legislation or administrative adjudication. That battle is lost, if indeed it was ever worth fighting at all. What he must concern himself with is the limits and methods of their regulation. Certainly he cannot stand by and content himself with the maintenance of "tried and tested principles" unless those principles are to be understood in a much wider sense than I suspect Holdsworth intended. He must concern himself with the expansion of the application of old principles in the broadest sense, and with the development of new methods in law for their defence.

Indeed all reasons so far given for the study of constitutional law are secondary compared to this. Perhaps the real answer to our question, and to Holdsworth, was given a few years later by General Smuts saying "In many if not in most European countries the standard of human freedom has already fallen far below that of the nineteenth century. Perhaps I do not exaggerate when I say that of what we call liberty in its full meaning, freedom of thought, speech, action and self-expression, there is today less than there has been during the last two thousand years." 27 Yet Smuts spoke at the beginning of that chain of events which led to the revolutionary changes between 1939-46. While Holdsworth would urge us to study the anatomy of the

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26 As to the influence of this theoretical responsibility see Cassels J. in Healey v. Min. of Health [1954] 2 All E.R. 580 or Pollock School v. Glasgow T.C., 1946 S.C. 373. Indeed Disraeli went so far as to say—speaking of the great constitutional combatants—"But all their heroic labours will prove worse than fruitless if the divine right of kings is to be succeeded by the divine right of the House of Commons," A Vindication of the English Constitution.

27 In his Rectorial Address to the University of St. Andrews, October 17, 1934.
constitution so that its principles are clearly observed, Smuts would urge us to move on and concentrate on its pathology.

A warning should however be given. In one sense it is a mistake to speak of a crisis in regard to old principles, and to cry that the constitution is in danger. That cry has been raised in the past on occasions varying from any of the Reform Acts, through the National Insurance Act of 1911 to the first Contagious Diseases Acts. The truth is that it is of the nature of our constitution to live in danger. The pre-1832 constitution was in mortal danger, and died. Nor would we want to resurrect it. What has to be ensured is that in changing constitutional forms the effective operation of old principles is preserved and fresh applications are made. Thus there seems, despite protests, no great cause for alarm in the disappearance of a great deal of the freedom of Members of Parliament in the House itself. It may well be immaterial, or even have advantages, if, as appears to be the case, equally effective means are found for the private Member to make his views felt.

How then is the constitutional lawyer to deal with the problems arising from the present cycle of change. In the first place he must constantly avoid being content with appearances, and seek reality. There traditional studies may help. We have already spoken of the legendary character of the constitution, and the adjective is apt. For his studies will show him that things were often not in fact what they were reputed to be. One of the traditional ways of advancement used by both the Scottish and English Parliaments was to claim as undoubted and long-established rights, privileges which they tentatively hoped to enjoy in the future, and at times the claim is now read as fact. So too Dicey has shown that the effective right of freedom of

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30 The recent debates on the issues of judicial salaries, payments to M.P.s and television show this power. The advantages are to be found in the stability of governments.
speech is a more recent creation than legend would have us believe.\textsuperscript{31} An awareness of the existence of past legends may put the student on his guard for present ones—for certain branches of constitutional law are like the English mortgage, little but a living lie. It is important that we should analyse our institutions carefully in order to ascertain the purposes they were intended to serve, the extent to which they do so in fact, and their relationship with principle. The formal description of the Privy Council or of the Board of Trade scarcely corresponds with reality, but little harm is done,\textsuperscript{32} and it is probably good that the office of Lord President of the Council should have become available for a government odd-job man. But in other cases it is necessary to go behind the appearances and find what the institution is and does if dangers are to be avoided. Such studies as that of the \textit{Place of Parliament in the Legislative Process},\textsuperscript{33} though they may sound frivolous, are in fact essential. It is equally necessary that the real nature and character of local authorities should be examined if we are to be satisfied that current legislation is not in fact radically altering their character or, if it is, whether the alteration is for the good.

For, unless the nature and purpose of institutions are examined it may well be that they will get wrongly treated in law. Thus we find it asserted, as a result of the Stevenage case,\textsuperscript{34} that the law relating to Ministerial Inquiries has been radically altered. This seems true only if we neglect the fact that the phrase “Local Inquiry” has become a modern commonplace description of institutions essentially different. The purpose of the inquiry there was limited.\textsuperscript{35} It was designed for the information of the Minister and so that those affected should know that their views had been

\textsuperscript{31} \textit{Law and Opinion in England}, Lect. VI.
\textsuperscript{32} Thus, when asked whether the curious nominal composition of the Board of Trade should not be amended, Mr. Thorneycroft replied (\textit{Hansard}, Vol. 510, col. 1999), “I have found that it works very well with a quorum of one and I should not like to disturb the arrangement.”
\textsuperscript{33} J. A. G. Griffith, 14 M.L.R. 279, 425.
\textsuperscript{34} \textit{Franklin v. Min. of Town and Country Planning} [1948] A.C. 87.
\textsuperscript{35} \textit{Per Lord Thankerton} [1948] A.C. at 106.
ventilated. It was as the then Attorney-General said an opportunity for "letting off steam" or as Queen Victoria more formally said, "a means of giving confidence that Her Majesty's Government is not actuated by rapacity." Such informative inquiries are radically different from the appellate forms which appear under the Housing Acts or under the Town and Country Planning Acts and it will be a misfortune if the chance similarity of name unduly limits the utility of one form, or is allowed to weaken the safeguards which have been developed for the other, for it is as important to preserve ministerial responsibility in the first case as to ensure the pursuit of proper aims in the other. In the same way it will be a misfortune if the word "licence" acquires a purely administrative significance.

These examples emphasise that it is only by examining the purpose of any institution that its proper treatment in law will be achieved. Equally the real value of an institution only becomes apparent by observing its operation. We are concerned about the mass of delegated legislation. But we may be told all is well, there is a Statutory Instruments Act which provides for publication; and does not parent legislation normally provide for laying Instruments before Parliament? Doubtless these provisions are good but publication does not in practice convey certain knowledge to interested parties, and is in itself no protection against the making of Instruments likely to cause hardship. As to

36 Letters, First Series, at p. 503. A letter to Sir C. Wood in connection with the annexation of Indian provinces—in that case Buhassir.

37 That there is some weakening of general principle appears from Nakkuda Ali (supra). The importance of preserving Ministerial responsibility was emphasised by the comments on the Report of the Consultative Council on Local Health Administration, 1922 (Cmd. 1113), which had proposed arrangements infringing the concept of Ministerial responsibility. The distinctions between various types of inquiry are however emphasised in Magistrates of Ayr v. Lord Advocate, 1950 S.C. 102, 1950 S.L.T. 257.

38 See Nakkuda Ali (supra) and cases like R. v. Metropolitan Commissioner of Police, ex p. Parker [1953] 1 W.L.R. 1150, in England. This concept of a licence as purely administrative neglects the analogy of other forms, e.g., of liquor licensing, or the licensing of slaughterhouses, where strong protections are given to the holder, e.g., compensation for revocation. It is perhaps attributable to the more widespread use of the word in the operation of war-time controls.
laying, such a provision was in the Fire Services (Emergency Provisions) Act, 1941, and was inserted because of Ministerial concern for individuals. Yet the same Minister had later to seek an indemnity Act because the orders were not laid. That was a case of honest error, of abundant good faith, yet it was never discovered by anyone save those who made the slip.\(^{39}\) The Psalmist’s maxim “Put not your trust in princes” might well today be transcribed, “Put not your trust in forms of words.”

This distrust of words is of importance since there is sometimes a tendency, especially at times such as these, to rely on a well turned but ambiguous phrase. Such phrases may give an illusion of safety, without them the obvious insecurity of a principle may stimulate its defence. If, in seeking to “promote the general welfare and ensure the blessings of liberty” you decree “nor shall any property be taken without due process of law” you may have achieved little beyond a fine phrase and a fortune for lawyers. Moreover such formulations may be misleading by their very breadth.\(^{40}\) If you decree that “the obligation of contracts shall not be impaired” or that “no private property shall be taken for public use without just compensation,” you may create a false sense of security, since there will be found a vast range of interferences with contracts or property which are neither “impairment” nor “taking” as those words have been interpreted, though by the light of nature they might be thought to be so. No doubt at times such phrases can have value to individuals. Recently they benefited a road haulier in Northern Ireland,\(^{41}\) but as a general rule a study of our constitutional development shows that present dangers are better met by the

\(^{39}\) For an account see Morrison: \textit{op. cit.}, p. 322. Since this lecture was delivered a more surprising example has arisen under the Wireless Telegraphy Act, 1904.

\(^{40}\) See, \textit{e.g.}, as to the difficulties of ascertaining whether or not there has been an infraction of guarantees, Govindan Selappah Kodakan Pillai v. Bunchi Banda Mudanayake [1963] A.C. 514. Similarly the recent “segregation case.” \textit{Bolling v. Sharpe} (1954) 347 U.S. 497, shows that the absence of formal guarantees may not materially diminish the protection of the individual.

\(^{41}\) \textit{Ulster Transport Authority v. James Brown and Sons Ltd.} [1953] N.I. 79. It seems doubtful if by U.S. standards there was in fact a taking in that case.
development of institutions and habits of mind than by formal pronunciations. There is probably greater protection for the individual in the Select Committee on Statutory Instruments than in the relevant rules of law.\textsuperscript{42}

That digression emphasises that we should analyse the words we use in much the same way as our institutions. Phrases like the rule of law can indeed become more "incantations than ideas" and here too there is a need to "rid our minds of cant," as Lord Cooper has recently put it.\textsuperscript{43} Wide claims to privileges are advanced on the ground of prerogative or because service is Crown service, words which suggest a strong personal link with the Sovereign and tend to create obstacles to the examination in the courts of government activities. It seems possible that the use of such phrases may obscure our view of what really is involved, and appearances may again be deceptive.\textsuperscript{44} While here it is maintained that Crown service necessarily involves an unfettered right of dismissal, it is to be observed in the White Paper dealing with the Oversea Civil Service\textsuperscript{45} that strict and enforceable conditions of service are regarded as essential. One wonders why the home gander should be treated differently from the overseas goose, and it seems possible that the use of the word "prerogative" and the like have obscured the consideration of the proper justification for, and limits of, special rules governing public service, and caused unnecessary differences in the treatment of its various parts.

That governments require special privileges cannot be

\textsuperscript{42} There are many other illustrations. Thus the present satisfactory position of the Comptroller and Auditor General inclines to this process, rather than to the legislation establishing the office. See his evidence before the Select Committee on Nationalised Industries, 1953 (H.C. 235).

\textsuperscript{43} Public Administration, Vol. XXXII, at p. 167. The former phrase is Lord Radcliffe's in his Reith Lectures, The Problem of Power. The familiarity to which reference has been made is often an obstacle to this process of analysis.

\textsuperscript{44} Compare Denman C.J. speaking of Parliamentary Privilege, "The old textbook writers, indeed, affirm the law and custom of parliament, although a part of the lex terrae, to be ab omnibus quassita, a multis ignorata. This and other phrases, repeated in the law books, have thrown a kind of mystery over the subject, which has kept aloof the application of reason and common sense."

\textsuperscript{45} Reorganisation of the Colonial Service (H.M.S.O. 1954, Col. 206).
denied. Thus it was, that after the American Revolution many of the so-called Royal Prerogatives were taken over automatically by the states, both as to internal 46 and external affairs.47 These examples suggest that many of the so-called prerogatives should be examined in a severely practical light rather than as a survival of older ideas of kingship. If so looked at, their proper scope can be more readily perceived. Indeed it may be that in the organisation of the central government the inter-relation of prerogative and statute requires much closer examination. The distinction made between the two sources of power both in the Crown Suits (Scotland) Act, 1857, and in the Ministers of the Crown (Transfer of Functions) Act, 1946, is one that may have influence when questions of governmental privileges are under discussion.48 That governments, if they are to perform their functions properly, must enjoy special privileges cannot be denied. But claims to privilege can outrun justification and proper limits will be found only by an examination of both purposes and origins.49

Here again this University is admirably situated for the purpose. The claims of governmental privileges are not identical north and south of the Tweed,50 though there is perhaps some tendency when legislation is contemplated to

46 McCulloch v. Maryland (1819) 4 Wheat. 316, the right to charter corporations.
47 See e.g., U.S. v. Curtiss Wright Export Corp. (1936) 299 U.S. 304.
48 Thus while it is recognised that statutory powers may exclude prerogative ones, Att.-Gen. v. De Keyser's Royal Hotel Ltd. [1920] A.C. 508, and full effect is given to this in smaller things, as in Re Mitchell (decd.) [1964] Ch. 525 (as to the nature of the Crown's right of succession), this distinction between statutory and prerogative functions is not always drawn. It was however in Theodore v. Duncan [1919] A.C. 696, 706.
49 Thus it appears absurd that the privileges of the Crown should result in individual financial benefit, as was the case in Bank voor Handel en Scheepvaart v. Administrator of Hungarian Property [1954] A.C. 584.
choose the larger as the universal.\textsuperscript{51} It is because of the differences between the two systems that it is easiest to examine the validity of claims that certain privileges are essential.

Indeed, it is in examining purposes that comparative law can play its greatest part and supplement the processes of analysis. Here, as in other branches of learning, time and space are but alternative methods of measurement. The institutions and rules of 500 years ago or less have no greater relevance to our modern institutions than those which are 5,000 miles away. The happenings in Canberra, Ottawa, or, for that matter, Tennessee, may be more important to us than those at the beginning of the nineteenth century. In Canberra we can watch the development of forms of Cabinet selection which might have had superficial attraction, but having watched can reject.\textsuperscript{52} We can also watch, and perhaps use, experiments in Cabinet devolution.\textsuperscript{53} In Ottawa we can watch the development of an international undertaking in the St. Lawrence, or, in Tennessee, the development of the legal relations of one of the greatest public corporations.

I do not for a moment suggest that institutions of others can be imported, though even that, as Lord Haldane showed, can sometimes be done, but comparative studies can serve two major purposes. You can watch the practical development of lines of thought and see if they are fruitful. If they are not, you save time in experiment. If they are, you can take and mould the idea to native conditions. For if constitutions are to keep pace with a rapidly developing society experiments in constitutional machinery must be made. Yet there is a limit to domestic experiment. At some time, as I have recently been reminded, the furniture must come

\textsuperscript{51} Thus in the Crown Proceedings Act, 1947, the possibility of obtaining an interdict against the Crown went, injunctions not having run in England save in rare cases.

\textsuperscript{52} See Rt. Hon. C. R. Attlee, \textit{As it Happened}, at p. 156, on the rejection of the method of Cabinet selection by a party caucus.

\textsuperscript{53} See \textit{The Times} of July 15 and 17, 1954, discussing the Committee system of the Australian Cabinet.
to rest, even if it is not quite right. It is then all the more important that we should profit if we can by the experiments of others.

Secondly you can see more clearly what you are trying to do with your institutions. When Australians argue whether the Crown is one or several, whether the Crown in title of the Commonwealth can bind the Crown in title of the State of Victoria, or what is the relationship of either to the Crown in title of the United Kingdom there is something for us in the arguments. Such questions may be relevant here, not only in our relationships with Northern Ireland, but also, more generally, since our ideas of what we mean by the Crown will be clarified, and principles governing the relationship of various parts of government to each other may become apparent.

Just as it has been seen that the arguments in the Stevenage case only re-echo those between Queen Victoria and her Governor-General of India, so also there is continuity in space. Our problems are not purely local, and a study of the experience of others may help us to see them and their solutions more readily.

Yet care must be taken; outside the Commonwealth such study is not always easy, superficial resemblances may conceal fundamental differences, and the attractiveness of the novel and strange must not be allowed to impair native virtues. Thus it must be remembered that we have always aimed at practical efficiency not neatness, and above all we have been prepared to take risks. We have not attempted the formulation, and special protection, of fundamental liberties and the same spirit has been reflected in our whole administration. Risks could be taken because while there was a willingness to confer broad powers there was also the confident expectation that if those powers were misused or

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54 Most recently in Commonwealth v. Bogle (1963) 96 A.L.J. 589. The cases there discussed show the long history and conflicting decisions on this controversy.
55 Thus at the same time that we were indemnifying Mr. Niall Macpherson, M.P., who had taken office under an Australian public board, in South Africa it was asserted with confidence that in an analogous situation no such action was necessary, The Scotsman, August 18, 1964.
abused then heads would roll. True they now roll in a modified way. We do not impeach, we simply expel to the political wilderness. I emphasise this principle for three reasons, first, that it is not a universal one, but is typical of those domestic virtues to which I have referred, and secondly because it is one which an analysis of our own recent experiments shows may easily be impaired. Its proper application requires that responsibility must be clearly fixed, and there are signs that we could easily drift into a situation where the interplay of Ministry, nationalised industry, and local authority, is such that responsibility for action or inaction cannot clearly be laid at anyone’s door. Twice in recent weeks this danger, and the value of this principle, have been emphasised. Once, in the Crichel Down Enquiry and once in connection with the same Ministry by the Select Committee on Estimates, a coincidence which demonstrates that here as elsewhere sound constitutional and sound administrative practice march hand in hand. The cause of some present ills may be found to lie in the neglect of a principle which our anatomical studies might have disclosed.

There is a third reason for emphasising this principle. The protection of the individual inevitably involves the control of the administration, but it must not be forgotten that government must be carried on, and be carried on with energy. Nor should our civil servants be chained as if they were wild dogs. It would indeed be unfilial of me to suggest that. Not merely must our institutions be analysed so that the appropriate degree of control can be imposed, but also it seems important that the methods of control

55 Cmd. 9176. See also Cmd. 9220, the Report of the Committee to consider whether certain civil servants should be transferred to other duties.
57 In the same way much of the criticism of the Stevenage and similar inquiries could be overcome by a greater willingness to show the Ministerial case. That course would also make the inquiry more efficient from the point of view of the Ministry by disclosing further considerations and facts. Compare the remarks of Sir Colin Campbell in his Report on the Gatwick Inquiry, Cmd. 9215.
should be examined in the light of this principle. The methods of interdict, declaration, or prerogative order, may be both too drastic and too ineffectual. Too drastic because they involve such a degree of judicial intervention in the administrative process that they will only be resorted to in extreme cases. Too ineffectual because annulment of an order is often inadequate protection for the individual who may by it have been injured in his livelihood. These methods of control should, perhaps, be supplemented by a power to award compensation somewhat in the same way as the Chancery Division was, in 1858, given the power to award damages in lieu of injunction.

This concern with new methods leads to my final question. Analysis of principles and institutions can lead to a true understanding of them, and of the causes of present dangers. But the lawyer must move on from anatomy and pathology to cures. It is proper for him to ask whether our law at present adequately protects private rights, and if not to suggest remedies. Changes in the forms of governmental activities mean that public bodies are brought into much closer and more varied contact with individuals. Thus it is asserted in England, and demonstrated in Scotland, that the existence of the National Health Service has altered the legal relationship of hospitals and their staffs. In these circumstances it is proper to ask whether we are right in rejecting specific rules of public law governing the relationship of individuals to public authorities.

One particular problem can emphasise this. Increasingly there is a tendency to ask the man from the Ministry what the position is. Does this work need a licence? Does that want planning permission? Ought I to pay contributions at this rate, or that? The practice finds official

59 Compare the difficulties in the way of the award of damages in England in Bonsor v. Musicians' Union [1954] Ch. 479 and see note 25, supra.
60 The Chancery Amendment Act.
encouragement in the explanatory note to Statutory Instruments.62

It is a practice which is harmless if the advice given is right, but if it is wrong, can the citizen be penalised for the illegality which he has unwittingly committed? The answer given by the House of Lords is that the advice must be neglected and the true law must take effect.63 This is a hard answer but one dictated by the need to maintain fundamental principles. Unless that answer is given the position of the courts as the arbiters of law is gravely prejudiced. Nevertheless it is an answer which can cause great hardship. A merchant agrees to buy surplus steel from the Collector of Customs, and after he has agreed to resell is told that the steel, though it was not known at the time, was in fact Admiralty property and as such the Collector had no authority to deal with it. The contract is ultra vires and therefore no remedy can be given founded upon it.64

The representation of authority which did not exist in law cannot be made binding as we have just seen. There can be no remedy against the Collector himself, because there is supposedly a rule that a servant of the Crown cannot be held liable for breach of warranty of authority.65 There can be no remedy against the Collector’s superior founded upon a “holding out” under ordinary principles of agency because the principal is the Crown and each servant of the Crown is in direct relationship with it and is not the servant or agent of his official superior.66 The Crown is a corporation sole 67

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62 Though compare the conventional warning in the Ministry of Housing and Local Government pamphlet on the Local Government Superannuation (Benefits) Regs., 1954, that opinions expressed should not be regarded "as authoritative pronouncements by the Minister."


64 Att.-Gen. for Ceylon v. A. D. Silva [1953] 2 W.L.R. 1186. The same principle is involved in Mackay and Esslemont v. Lord Advocate, 1937 S.C. 860, 1937 S.L.T. 577, in the proposition that the letters of appointment there were illegal.

65 Dunn v. MacDonald [1897] 1 Q.B. 555, an English case, the supposed result of which is accepted as applicable to Scotland: see Gloag on Contract, 2nd ed., 160; Fraser, Constitutional Law, 2nd ed., 171.


67 Whether the Crown is such in Scotland has been doubted: see Prof. D. M. Walker, "The Legal Theory of the State" (1953) Juridical Review, Vol. LXV,
and as such only capable of acting through servants and incapable of any holding out itself. All this, which results in the denial of any remedy, has the beauty of logic and the ugliness of injustice.

The situation could be met in a variety of ways. We could challenge the rule that a Crown servant is not liable for breach of warranty of authority. That course would probably result in the government standing behind the individual servant and justice might be done. It is however a course of action which is uncertain and inconvenient, and revives many of the difficulties which we have only just got rid of by the Crown Proceedings Act. It might be possible to avoid the inconvenience of the Crown as a corporation and to say that a servant who is sufficiently high in the hierarchy can be identified with the Crown and so be capable of holding out. Similar steps have been taken in other fields. But, it is a course which the courts are reluctant to take, and, even if taken, only leads back to the original difficulty. Just as the inferior servant cannot give himself power when in law he has none, neither can the superior servant nor even the Crown itself. It was for the subjection of the Crown to law that our ancestors fought in the courts, and in the field.

The arguments are not exhausted, though my audience may be. The limitation of power may not be absolute, but conditional. Here it could be said that, applying the ordinary rules of agency, if the facts on which authority depended were purely within the knowledge of the public body then that body should be held bound, even though it had in truth exceeded its authority. The analogy is however false. In the case of public bodies a much stronger public policy requires that limits imposed by the legislature...
should be maintained. Again it could be said that many of these limitations could be treated as directory only, and not mandatory. That is however a very uncertain distinction.71 Finally there are difficulties of determining whether the representations involved in these cases are of law or fact.

I have pursued this labyrinthine course not to weary you, but to show that when we deal with public authorities analogies from private law do not produce justice. Governments cannot be treated as larger and more interfering Lever Bros. or I.C.I. They are different in purpose, different in kind, and should often be subject to different rules of law. Thus here it is possible that relief could be found through monetary compensation regarding the acts of the official as a "faute de service"72 for which the administration is liable to compensate. The force of the legal limitations can be maintained by denying the validity of the contract; and conceivably the effectiveness of those limitations could be reinforced by the application of administrative sanctions akin to the powers of surcharge in regard to local authorities, which are capable of great pliability. In that way can public policy be enforced without injury to the individual, but any such solution involves considerable departure from the rules of private law, and a considerable extension of theories of compensation. But here, as in the case of judicial control of administrative decisions, it may be that by some such way a flexible and adequate means of control could be found.

Indeed a general study of the scope of compensation for consequences of government action seems likely to be profitable. It is a question that arises in a variety of ways. The present discussions of compensation for subsidence and for compulsory acquisition are further illustrations. It may be that we are too ready to expect uncompensated sacrifices by individuals for the good of the community, especially if those individuals are not ourselves. Admittedly there is

71 See Griffith and Street, Principles of Administrative Law, 106-7.
72 This phrase should not be taken as implying that there is such responsibility in France.
also a present danger that we may be led into an unreasonable expectation that every calamity that overtakes us in life should be paid for by someone else, but even when allowance is made for that there seems a good case for examining, both as to rights and remedies, the rules of law which govern the relationship of the State and the individual outside the traditional fields of civil liberties.

It is because the harmonious regulation of that relationship has always been the province of constitutional law that such an examination is not out of place in this field. In seeking the proper protection of the individual here we are doing in other fields what our ancestors did in their establishment of basic freedoms. Clearly however in these other fields a close acquaintance with the rules of private law is also necessary. Of the lawyer, and the law student, can more therefore be expected than of his lay brethren; and unless a course of constitutional law can engender in some students at least an enduring interest in such problems it has failed in its purpose. For the relationship between man and the State was not finally settled in 1688 nor in 1832; it was not fixed for all time by the Claim of Right, or the Bill of Rights. Nor have the relationships of part and whole in the machinery of government necessarily assumed their final shape. The lawyer has as much to contribute today as ever he had in the days of our ancestors.

I have roamed far and wide in an attempt to show the sort of problems which seem to me to face the constitutional lawyer in universities. I have asked more questions than I have answered. But, if an Episcopal metaphor may be risked so close to St. Giles', that is the privilege of the curate in his first sermon. It is for the Bishop, or perhaps on this occasion for the Dean, to content himself with pronouncing Nunc Dimittis.

J. D. B. Mitchell.
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REFLECTIONS ON LAW AND ORDERS

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LAW AND ORDERS first appeared in 1945, at a time when there was some prospect of a return to normal—indeed it was the first legal book which your reviewer bought when it once more looked possible that he might return to the law. It was something of a "tract for the times." Emergency legislation had flourished, delegated legislation had proliferated, the habit of obedience to orders had become ingrained, and regulation had existed for so long that it was all the more readily accepted. Sir Carleton Kemp Allen’s book appeared as a sharp reminder that power too little regulated and too readily accepted could be dangerous. The impression which the book made was due not merely to the timeliness of its appearance, but also to the vigour of the author’s style. The views were clear and argued with force.

Now a second edition appears at a time when the "normal," to which some of the readers of the first cast back their minds, has not returned. The power of the executive has not greatly diminished; indeed, after the first edition appeared both the Supplies and Services (Transitional Powers) Act, 1945, and the Supplies and Services (Extended Purposes) Act, 1947, found their way on to the Statute-book. To the pre-war warnings of a Lord Chief Justice could have been added those of a post-war Lord President. Franklyn v. Minister of Town and Country Planning, or Pollok School Co., Ltd. v. Glasgow Town Clerk, could be read by some as re-emphasising many of

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1 Law and Orders (Second Edition), 1956. By Sir Carleton Kemp Allen Q.C. London: Stevens & Sons, Ltd. 474 and (Index and Tables) 14 and 8 pp. £2 2s. Od.


the fears expressed by the author. From the former case he concludes that administrators appear now to be incapable of bias "unless it can be proved (which is virtually impossible) that they are either corrupt, or feeble-minded, or utterly irresponsible." Passages in the judgments in the latter case could be said to tend to the same conclusion, which is still further reinforced by Smith v. East Elloe R. D. C. which was too late to be included in the book. The unreasonable exercise of powers could have been as well illustrated by Macleod v. Mackenzie as by any of the war-time cases which are set out in the book.

These references could be used to show that the situation has changed little in the past twelve years, just as the quotation indicates that the nature of the author's attack has remained unaltered. It should not be thought, however, that the new edition is simply the old slightly refurbished. Much, which related to war-time conditions, has disappeared and has been replaced by more recent material. Crichel Down is there, even The Economist's Parkinson's Law, on the multiplication of offices, finds its place, as does the Hoover Commission (from the U.S.A.) on the organisation of government. Allowance is made for intervening events which run counter to the triumph of bureaucracy, for the work of the Scrutiny Committee on Statutory Instruments, or for the Crown Proceedings Act, 1947. Happily, in this extensive process of rewriting the book has lost none of its vigour. It was perhaps that vigour which, as the author asserts in his preface, made some regard the first edition as something of a political polemic. Certainly that description is not and was not deserved, though equally certainly the author writes with burning conviction and pleads hard for a case. It will, however, be a sad day when all law books make safe and dull reading, and it would be a mistake if the concentration on the more purple patches leads any reader to neglect the solid and close legal argument that

\[6\] 1947 J.C. 103, S.L.T. 335. Lord Cooper's opinion in that case deserves reading as well for its elegance as for its reasonableness. The case is not referred to, although it is one which would have appealed to the author.
there is around such cases as *Simmonds v. Newell*.

The new edition, as much as the old, deserves careful attention; and it must be remembered that the scope of the book is broader than the title suggests. It is no mere book on delegated legislation, but a survey of administrative activity, its dangers and controls.

Yet when that is said it remains to be determined whether a good case has been made out, or indeed whether the right case has been made. These questions have added point since the author ends by recommending an administrative Court of Appeal in the shape of the Administrative Division of the High Court (of England) envisaged in the Liberties of the Subject Bill, 1954, which would have a very extensive power to review administrative decisions whether or not founded on an inquiry. He also recommends a review of parliamentary procedure to ensure effective control over delegated legislation. The substance of the indictment remains what it was in 1945—"Sub-law grows in range and vigour" on the one side, and on the side of administrative adjudication "the march of events has defeated the resources of the common law." Neither a simple nor a general answer can be given to these questions. Particularly on administrative adjudication the situation may not prove to be the same in Scotland as it is in England, and any answer depends, perhaps, on personal and non-legal views. Yet the attempt to give answers is worth while at the present time.

There is of course substance in the indictment, though that admission does not involve the acceptance of the indictment as proved or of the suggested remedies. There are times when the case, as made in the book, is pressed hard. It is said (at p. 135): "A considerable number of civil servants—in the opinion of some, too many—are authorised to sign as delegates of Ministers." The impression left by such a sentence is not fully counterbalanced by the later quotation, in a different context, from the Select Committee
on Delegated Legislation, which found that "The approval of the Minister must be obtained for every important instrument, most and certainly all the more important instruments are signed by the Minister." To this quotation the author does not give great weight. Yet, its importance is enhanced when the evidence of Sir Frank Newsam before that Committee is borne in mind. One answer will make the point. "(Mr. John Edwards) 'I want to ask you a point on that. In the case of these bye-laws which, according to the Memorandum, are formed by the Secretary of State himself, need he confirm them? Is that not a job that can be done by the Parliamentary Under Secretary or by senior officials of the Department?' (Sir Frank Newsam) 'I would not like to enter into that. In fact we never ask whether it could be done by anybody else. When Parliament says it is to be done by the Secretary of State, and it is in the legislative field, we think that it should be done by the Secretary of State, who has to take the responsibility. Also it facilitates proof. If the Secretary of State has signed the bye-law presumably he has read it and applied his mind to it. So that for two reasons it has never occurred to us that anybody else could do it. Secondly as a matter of the Ministry's convenience it is obviously desirable.'"

The last sentence is perhaps arguable, but the earlier parts of the answer depict no civil service greedy of the power of signing. Indeed, Sir David Milne underlined the same point. Speaking of Scottish administration, where there are obvious practical difficulties, he said, when asked whether ministerial approval was obtained if there was no ministerial signature, "His [the Secretary of State's] approval is obtained to the provisions before they are signed. In those cases they are signed by an officer such as an Under Secretary or an officer of equivalent rank, with two exceptions" (the exceptions

8 Minutes of Evidence, Select Committee on Delegated Legislation, H.C.P. (1952-53), 310-311, Q. 938—clearly if this attitude is adopted to the confirmation of by-laws, the making of delegated legislation itself is not likely to be more lightly treated.

8a Ibid., Q. 480. The same witness also demonstrated the greater use of the staff of the Scottish Law Officers as an additional safeguard.
referred to the limited powers of the Fisheries Secretary and the Senior Assistant-Secretary of the Department of Agriculture).

On such evidence the inferior civil servant busily signing away does not exist. Nor does the civil service take its legislative functions lightly. Again, Sir Frank Newsam said, when speaking of positive and negative resolutions, “I think there is such a respect for liberty even in these days that when the matter at issue involves the liberty of the subject, or encroaches on people’s rights, I do not think any department would dare to suggest a negative resolution.”

This morality on the part of the civil service creates its own problems. The Minister could be overwhelmed and, granted a society in which general conditions of life and thought have necessitated so much legislation, it is arguable that the power of signature is too narrowly confined, and not too broadly granted.

In the same way other shots at delegated legislation do not always hit the mark squarely. Some of the supposed faults of delegated legislation are faults of legislation in general. Delegated legislation may at times be difficult to trace, but it is hardly more so than private legislation, which may affect the innocent individual just as much. The itinerant vendor of logs who crosses the unmarked boundaries of the City of Manchester is unlikely to remember that he has come within the scope of section 38 of the Manchester Corporation Act, 1954. Again, the problem of intelligibility is a real one, but often it is no more serious in delegated legislation than elsewhere. The

9 Of course there are exceptions, mainly due to pressure of work, see, e.g., Minutes Q. 1051 (Ministry of Food) or Q. 1265 (Board of Trade).


11 Nor is the creditor of a professor in a Scottish university likely to know that any arrears due by the professor to the Churches’ Widows Fund have under the Churches and Universities (Scotland) Widows’ and Orphans’ Fund Order Confirmation Act, 1954, absolute priority over all other debts; nor will creditors be likely to know that annuities under that Act or under a similar Order Confirmation Act of 1955 governing the Writers to the Signet Widows’ Fund are both absolutely protected from creditors. All these Acts are of course private. Probably, too, those most likely to offend against the Protection of Birds Act, 1954, are those least likely to know they are doing so.
schedules to the Administration of Estates Act, 1925, were amended, without specific reference, by sections 91 and 115 of the Companies Act, 1947, which were preserved and amended by the Companies Act, 1948 (16th Sched.), and which themselves amended the Bankruptcy Act, 1914, which was incorporated in the Administration of Estates Act, 1925. Legislation by reference is an inconvenient and ugly device wherever it is used, yet it can be defended on the ground of legal tightness. Lawyers may seek, and courts may find, significance in slight changes of wording which are often inescapable in the process of redrafting to incorporate amendments, and it must be remembered that in many of the fields governed by delegated legislation there are as many people looking for a loophole as there are looking for one in a Finance Act. Forms of draftsmanship are often the consequences of the methods and rules of judicial interpretation. The defence cannot of course be absolute. No one can defend the device when the result is that the mysteries of a statutory instrument baffle its sponsors.\(^\text{11a}\)

Indeed, the general problem of clarity is a major one. It is easy to say that in creating an offence the instrument should be abundantly clear. Statutes are often no more successful than statutory instruments. The apparent clarity of the definition of stealing in the Larceny Act, 1916 (s. 1), merely conceals its real obscurity.\(^\text{12}\) The intricacies of superannuation regulations are at least no worse than those of income tax legislation. The fault lies not with the draftsman, but with the subject-matter. Intelligibility is a relative matter. What is important is that the instrument should be clear to those who are most concerned with it and account must now be taken of the changed nature of law.

\(^\text{11a}\) See, e.g., the debate on the Police (Superannuation) Regulations in H.L.Deb. (1952), Vol. 179, cols. 825–826.

\(^\text{12}\) The difficulty is common to all attempts at precise formulation of general principles; the method of incorporation of the doctrine of diminished responsibility into the law of England in the Homicide Act, 1957, s. 2, demonstrates this difficulty: see, e.g., R. v. Dunbar, The Times, July 6, 1957; [1957] 3 W.L.R. 330. That case, and the case reported with it, also demonstrate the point made on consolidation.
In the nineteenth century law was predominantly made for lawyers. No lawyer complained, with great heat, of the unintelligibility of Conveyancing Acts. Indeed, measures which reduce general intelligibility are welcomed. There is little complaint because lawyers work the legislation and lawyers know their own language. Today, most legislation is not made for lawyers. It is made for the egg-farmer, the chemist, the engineer, and what matters is that it should be intelligible to the technician, not the lawyer. The regulations made under the Heating Appliances (Fireguards) Act, 1952, involving, as they do, references to British Standard Specifications and excursions into solid geometry, are certainly not readily appreciated by the lawyer, yet doubtless they provide clear working standards for the designer of fire-guards. Thus the criticism that consultation in the preparation of statutory instruments does not produce clarity may often be beside the point. Often the object of consultation is to secure efficiency, and efficiency for the purposes of the technicians may well be incompatible with clarity for the layman (with whom must be ranked the lawyer in this context).

There is, perhaps, in the criticisms of intelligibility some element of lament for a world that cannot return. Those regrets also influence views on "controls." No doubt it is easy to agree with Sir Carleton Kemp Allen that "Far too much emphasis can be laid on the incompetence of Parliament to deal with the technical. A very great deal and perhaps the majority of legislation is of a technical character, and has always been so." Yet agreement with the words does not always include agreement on the meaning to be given to them. Technicality has, as has been suggested,
changed in its character. Debates such as that on the regulations governing margarine standards do not, on the whole, show Parliament at its best, even though the Minister concerned was technically qualified in a way that is rarely the case. The avoidance of delegation is often no happier in results. Reliance on parliamentary controls can be carried too far, particularly since they are not always used for what might be thought to be their primary purpose. Indeed, that reliance can itself be dangerous. The under-estimation of the real limits of those methods of control creates a false sense of security. Concentration upon parliamentary methods of control may not only increase present difficulties of parliamentary time and labour, but also may hinder the development of alternative forms of control. The limitations imposed upon the Scrutiny Committee by its own terms of reference could have a more general application. Parliament is perhaps best at preventing an abuse of power, and then as a last resort. The right use of power is often best controlled elsewhere. While no one would commend as a general model the elaboration and expense which have preceded the report on the egg-marketing scheme, yet the proper development of ancillary control

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17 H.C Deb., Vol. 529, cols. 181-195. See too Mr. Iain Macleod introducing the National Health Service (Superannuation) Regulations, 1955, "It is said that however complicated the subject there is always at least one person in the House who understands it... I put forward these regulations with some confidence as proof to the contrary." H.C. Deb., Vol. 544, col. 881.

18 See, e.g., the Debates on the Report and Third Reading stages of the Town and Country Planning Bill, 1954. H.L. Deb., Vol. 189, particularly cols. 1467 and 1493-1509. That measure was one which, on the whole, attempted to contain all the necessary provisions, but the avoidance of delegated legislation was not notably happy in result.

19 On this matter also there is inconsistency in Law and Orders. At p. 146 it is asserted that Prayers are not used as an obstructionist device; pp. 187-188 give examples of their use as such. Apart from their use in political warfare these debates are, like those on the Estimates, often used for general purposes not the primary one. Thus the debate on the White Fish Authority General Levy (Amendment) Confirmatory Order, 1956, was really used to debate the decline of Hull as a port.

19a Nor is the high degree of formalisation of the rule-making process as in the American Federal Administrative Procedure Act always desirable or successful, see "The American Administrative Procedure Act" by Professor Louis L. Jaffe, Public Law, Vol. 1, p. 218.
devices such as the inquiry and of consultation is nevertheless desirable. That development is unlikely to come about if such devices are regarded as a usurpation of parliamentary functions, or if the present practical limits to parliamentary control are not fully recognised. New difficulties call for new solutions. At present, many such devices are less openly and freely used than need be, because of this concern for existing methods of parliamentary control; yet the more open use might increase the acceptability of legislation, and allay suspicion. Correspondingly, if the real limits of parliamentary control were emphasised other methods could be made more effective.

In short, it is perhaps time that we should accept the respectability of, and necessity for, delegation, seeking to live with it rather than to fight against it. Toleration need not of course amount to an uncritical acceptance. Legislation in its original as in its delegated form has uses and dangers, and the latter must be recognised. It does not, however, follow that the safeguards in the case of the delegated form need be the same, or be operated in the same forum, as those to which we are accustomed in the case of the parent legislation. The acceptance of delegated legislation might well mean that we must seek to cultivate other safeguards operated elsewhere.

It is in regard to some methods of control that differences appear between Scotland and England, which

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20 Thus it could remove doubts in the minds of Members (and of the public) like those expressed by Mr. John Edwards; referring to the instruments to be made under a Local Government Superannuation Bill, he said “It is quite impossible to discuss [the subject] without all the papers in the negotiations”: H.C. Papers (1952–53), 310–311, Q. 694.

21 Thus, for example, the degree of judicial scrutiny of delegated legislation may be strongly influenced by the fact of whether or not the order in question is subject to parliamentary scrutiny: see, e.g., Glasgow Insurance Committee v. Scottish Insurance Commissioners, 1915 S.C. 504, 1 S.L.T. 217, per Lord Johnston; yet in view of the realities of parliamentary scrutiny it seems that the courts should not be unduly reticent in exercising their powers merely because the alternative scrutiny exists. Here it may be added that there is much more realism in Amour v. Scottish Milk Marketing Board, 1938 S.C. 465, S.L.T. 247, than in Rowell v. Pratt [1936] 2 K.B. 298, the principles of which were followed in Marshall v. Scottish Milk Marketing Board, 1956 S.C.(H.L.) 87, S.L.T. 162. The recognition of the “public” part played by such bodies in legislative activity is to be found in Amour but is glossed over by the House of Lords.
affect the acceptance of parts of the views expressed in *Law and Orders*. As an example of detail, confirmation of by-laws by a sheriff rather than by a Ministry can be a substantial advantage, but there are also differences of principle. It may be that it is only the accidental incidence of litigation which has in Scotland settled, in a restricted sense, the meaning of the phrase "as if enacted in the Act," whereas in England the issue is open with a balance of dicta in favour of that narrow view. That distinction could, however, also be the consequence of a slightly different approach. There is perhaps a greater readiness on the part of the courts to retain and use power. In *Brierley v. Phillips* it was clear that Lord Goddard C.J. strongly disliked the order before him. He condemned (at p. 543) "orders . . . which are couched in language open to all sorts of meanings . . . so that the persons to whom they apply cannot know whether they are acting legally or not unless possibly they get counsel’s opinion or at least a solicitor’s advice." Similar views were expressed, on a different order, by Lord Cooper in *Morrison v. Ross Taylor*. Yet a difference of emphasis is apparent. The accused escaped in the first case by a process of interpretation and by the finding of a technical flaw in the summons. In the second the High Court of Justiciary held (by a majority) that a relevant charge could not be drawn at all under the order in question, and thus in effect struck down the order.

What are perhaps slight differences in that context become much greater when the treatment of administrative tribunals is considered. *Law and Orders* re-emphasises the

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22 See, e.g., the use of knowledge of the locality in *Burgh of Dunblane-Pets.*, 1947 S.L.T.(Sh.Ct.) 27; here allowance must also be made for the considerations referred to in note 44, infra.


25 1948 J.C. 74 at 78, S.L.T. 257. Although this case has been overruled in *Marshall v. Clark*, 1957 J.C. 68, 1958 S.L.T. 19, this only concerns the particular result of *Morrison v. Ross-Taylor*, it does not affect the general approach, see per the Lord Justice-Clerk (Thomson) at p. 76.
limitations and difficulties of English law on that subject. "The forms of action we have buried, but they still rule us from their graves," wrote Maitland when discussing private law. In English administrative law the forms of action still rule with the direct force of the living. The prerogative orders are in many respects designed for specific purposes. The necessity of being able to classify a decision as judicial or as quasi-judicial before certiorari will lie is an obvious example, but other orders are similarly affected.

The boundaries of alternative remedies are not clear. Difficulties arise in part because forms of action originally intended for one purpose are distorted to achieve a somewhat different one, and as a result the emphasis tends to be upon form rather than substance. In Scotland, in contrast, there is in a sense a complete formlessness. General actions for an interdict or declarator or for reduction will serve a multitude of purposes. The real issue of legal power and of good faith is the concern of the court rather than the nature of decision. A decision of the sheriff, albeit an administrative one, is as much subject to reduction as a judicial act. The contrast in the practical result of these procedural differences is most marked in cases such as R. v. Central Professional Committee for Opticians, ex p. Brown, and Hayman v. Lord Advocate. Both cases were concerned with the registration of ophthalmic opticians under the National Health Service Acts, and the regulations

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26 Forms of Action at Common Law, p. 2.
28 Thus the availability of a declaration in lieu of certiorari is discretionary and has also certain procedural differences which may affect rights in important ways.
28a Thus in R. v. Minister of Agriculture, ex p. Benney [1955] 2 Q.B. 140 at 166 Denning L.J. (as he then was) declared that the courts were taking technicalities because they could not deal with substance.
28b After the Union there was, too, a refusal to adopt the English rules of certiorari: see, e.g., Guthrie v. Cowan, Dec. 10, 1807, F.C. Lord-Belhaven in his celebrated speech before the Union had said, "I think I see our learned judges laying aside their Practiques and Decisions, studying the Common Law of England, gravelled with certioraries, Nisi Prius . . . ." etc. Here, as elsewhere, his prophesies have been happily falsified.
29 Stirling v. Hutcheon (1874) 1 R. 935.
made thereunder; in both a disappointed applicant complained of his treatment by the professional committees responsible for advising the Ministers concerned. In the former case the Lord Chief Justice said of the committee at p. 521: "Under the regulations the committee are not to sit and hold a judicial or semi-judicial inquiry . . . in preparing themselves to give advice, they can seek what information they like and in any way they like." In the latter, although Lord Cooper analysed the function of the committee, finding, at p. 630, that "the practically effective decision . . . is thus the decision of the professional committee," he did not proceed to classify its actions as judicial or not; indeed Lord Keith's admission, at p. 636, of the possibility of delegation of functions could be regarded as inconsistent with a classification of the body as being judicial. Upon that finding, of the practical effect of the committee's decision, Lord Cooper held that allegations "had been deprived of their livelihood without reason assigned and without the opportunity of being heard" were relevant. In the one case the concern is with practical effects, in the other with questions of classification, with the result that in the one the possibility of a remedy is admitted, in the other it is denied.

This difference of approach and consequential differences in result are observable elsewhere. In R. v. Metropolitan Police Commissioner, ex p. Parker the classification of an act as administrative leads to the denial of any remedy by way of judicial review. In Ex p. Fry the same result follows from the classification of procedures as being disciplinary. Yet in Lockhart v. Irving the proceedings in question were those of a disciplinary inquiry. In substance a Chief Constable was to hold a disciplinary inquiry into charges which, although directly affecting other members of the force, also obliquely involved his own conduct. Two main reasons led Lord Robertson to grant an

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34 1936 S.L.T. 567.
interdict against the continuation of the inquiry. "In my opinion," he said, at p. 569, "it is not only against justice to the officers and men concerned, but also against the public interest, that such investigation should proceed." The intervention of the court is founded here upon grounds of general principle irrespective of the particular classification of the tribunal. The procedure was plainly wrong in principle and therefore would be interdicted. The general principle was expressed by Lord President Inglis when he said "although we are precluded from reviewing the proceedings of the Presbytery, either on matters of substance or matters of form, if it can be made out to our satisfaction that some serious violation of the ordinary rules of procedure common to all courts of competent jurisdiction has occurred whereby injustice or inequity has resulted, then we may be entitled to interpose for the purpose of setting the matter right." 35 In carrying out this principle the Court of Session have been much more concerned with the questions of injustice and of impropriety than with retaining any narrow definition of a court. It was on the grounds of oppression that the court was prepared to control the decision of a School Board dismissing a master for fault, 36 which might be regarded as a judicial proceeding, but the obligation to hear all parties interested was also enforced where the proceedings were of an administrative nature. 37

There is indeed a long history of the control of inferior bodies in cases where for the purposes of control the court has not been concerned with the classification of proceedings

35 Walker v. Presbytery of Arbroath (1876) 3 R. 498 at 504 (reversed on grounds not affecting this principle (1876) 4 R. (H.L.) 1). "Inequity" could cover much, see, e.g., Dawson v. Allardyce, Feb. 18, 1809, F.C.

36 Marshall v. School Board Ardrossan (1879) 7 R. 359. Or earlier see Hastie v. Campbell (1769) Mor. 13132 or Kempt v. Magistrates of Irvine, Mor. 13136.

37 School Board of Lochgilphead v. School Board of S. Knapdale (1877) 4 R. 389. There is no attempt to classify the decision of the Board of Education; Lord President Inglis simply affirms as a general principle: "Whatever may be the construction of the 9th section of the statute in other respects I am of opinion that in questions of the kind now before us, in which two parishes have adverse interests, the Board of Education are not within the powers conferred by this section if they determine the question without having both parishes represented." (at p. 391). Earlier see the case of the Messengers of Edinburgh, Elchies, tit. "Jurisdiction," No. 31.
but has nevertheless been concerned with right conduct. Throughout the cases not only do the forms of action merge but the grounds of decision do so too. The observance or otherwise of rules of natural justice and the like is held to affect legal power, and so all cases tend to be decided upon loose grounds of *ultra vires.* This is perhaps inevitable since there is running through the cases the theme that this control by the Court of Session must exist in order that wrongs may be righted, and such a conception is inconsistent with governing control primarily by the classification of the decision. The blending of questions of competency and merits, to which Lord President Hope refers in Ramsay’s case, is one of the consequences of such an approach, yet in itself it has the merit of giving flexibility to the law. It cannot be said that this judicial/administrative distinction has played no part. It can affect questions of expenses, it can affect the forum, or the mode of

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38 See, e.g., *Calder v. Learmonth* (1881) 9 S. 343. The decision of turnpike trustees to close a road had to be supported by proper procedures even though like decisions were firmly classed as ministerial rather than judicial in other contexts: *Love v. Lang* (1872) 10 M. 782 (a question of expenses in such a closure order); or see *Lewars v. Earl of Haddington* (1725) Mor. 7461.


40 This theme can be found often: see, e.g., Kames, *Historical Law Tracts,* at p. 298, “No defect in the constitution of a State deserves greater reproach than the giving licence to wrong without affording redress. Upon this account, it is the province, one should imagine, of the sovereign and supreme court, to redress wrongs of every kind where a peculiar remedy is not provided. Under the cognisance of the privy council in Scotland came many injuries, which, by the abdication of that court, are left without any peculiar remedy; and the court of session have with reluctance been obliged to listen to complaints of various kinds that belonged properly to the privy council while it had a being. A new branch of jurisdiction has thus sprung up in the court of session which daily increasing by new matter will probably in time produce a general maxim.” Lord Kames then proceeded to discuss instances of this judicial control of administrative acts; or see Lord Succoth in Ramsay’s case (supra, n. 39). For later examples see *Ross v. Findlater* (1836) 4 S. 514 at 522, per Lord Pitmilly, or *Angus v. Jeffrey,* 1803 S.C. 400, 1 S.L.T. 84, per Lord Justice-Clerk Macdonald. For a clear early use of the power, see *Collins v. High Judge of the High Court of Admiralty* (1781) Mor. 7451.

control and on occasion the decision. At times, too, the classification of an act as administrative has meant that higher standards have been enforced. Thus the function of a sheriff in confirming alterations of burgh boundaries being administrative, he could not confirm simply on the grounds of no opposition but had to satisfy himself that the alteration was desirable. Yet although in these cases classification is important, on the whole it cannot be said that classification has played the major part that it has in England.

It is not here possible to examine exhaustively the topic of judicial review. Enough has been said to indicate that a somewhat different approach and different methods can materially affect the situation, and that the picture given in Law and Orders is not necessarily as true throughout the United Kingdom as it may be in England. These differences in background and result should be borne in mind. They can affect the acceptance of cases such as Smith v. East Elloe R. D. C. as laying down general law. They certainly enable more flexibility in judicial control. Classification as judicial may induce too great rigidity, just as a different classification may, as has been shown, allow too much freedom. Under a more flexible procedure rules can be more accurately fitted to particular cases. The delegation of authority envisaged in Hayman v. Lord Advocate, and some of the procedures which were regarded as permissible in Moore v. Clyde Pilotage Authority become possible even though under the English cases they might be incompatible with the performance of judicial functions.


44 Lindsay v. Magistrates of Leith (1937) 94 R. 867.

45 Thus Lord Kinnear's statement in Moss's Empires v. Assessor of Glasgow, 1917 S.C.(H.L.) 1, 1916 S.L.T. 215, is purely general: "Whenever any inferior tribunal or any administrative body has exceeded the powers conferred upon it by statute to the prejudice of the subject the jurisdiction of the court to set aside is not open to doubt." This statement is also widened by the view often taken of what is excess of power.

46 1956 A.C. 706.


Correspondingly the limits to the review of administrative acts have been determined by practical considerations. While these concessions to convenience can be made, they are made without concession of essentials. Thus it was the violation of rules of good conduct which was important in the particular case which caused the reduction of the decision of the appeal tribunal in *Barrs v. British Wool Marketing Board,* even though under the English rules that tribunal was free from restraint as discharging administrative functions. Perhaps even more important is an ability to regulate procedure in order to achieve another end, the real effectiveness of an inquiry. In *Franklin v. Minister of Town and Country Planning* Lord Thankerton’s determination of the nature of the public inquiry under the New Towns Act is well enough known. His conclusion, at p. 102, that “I am of opinion that no judicial duty is laid on the respondent in discharge of these statutory duties” (in relation to the inquiry) led him to assert, at p. 108, that “In such a case the only ground of challenge must be either that the respondent did not in fact consider the report and objections... or that his mind was so foreclosed that he gave no genuine consideration to them,” and also to reject the contention that the inquiry was bad because no evidence was led by the Minister. Yet, in *Magistrates of Ayr v. Lord Advocate,* where in essence the situation was similar, Lord Birnam found the inquiry wanting precisely because no evidence was led by the Secretary of State; without such evidence he found that the tribunal could not properly achieve its end, and he could not conceive that it was intended to be a mere echo of the general policy of the Secretary of State. Here once again the purpose of the

48a e.g., in *Guthrie v. Miller* (1837) 5 S. 711—as to lighting streets.
49 1957 S.C. 72, S.L.T. 153. It is true that here both the Lord President and Lord Sorn refer to the tribunal as a quasi-judicial one, or as performing judicial functions. The reason for so doing was to maintain the public credit of the tribunal in question and to achieve fairness to the parties. Once again it was a consideration of the consequences of decisions taken to individuals and to the public at large which opened up the way to judicial review.
50 See the case of *Re Merricks,* Q.B.D., Oct. 9, 1950 (unreported), referred to in argument in *Barrs.*
52 1950 S.C. 102, S.L.T. 257.
tribunal is the primary consideration and rules enforcing judicial control are designed to assist that purpose; they are not derived from a classification of the tribunal’s action.

It may also be observed that in that case there was provision for a degree of independence of the person holding the inquiry. There was none in the New Towns Act, 1946, and the point was not taken that the inquiry was conducted by an Inspector of the Ministry of Town and Country Planning. Indeed, in view of the trend of English cases no such point could have been taken. In contrast it may however be noted that section 26 of the Agricultural Holdings (Scotland) Act, 1949, making provision for a hearing on confirmation of a notice to quit, also made no provision for a neutral person; yet in University of Edinburgh v. Craik Lord Cooper himself raised the point that the Secretary of State had an oblique interest in the effectiveness of the notice to quit which was there in question, and added at p. 195: “I feel it my duty to say for the guidance of those concerned in any future cases of this kind that the inquiry in this case should have been taken by a wholly independent person, and then the utilisation of officials of the Department for the purpose in hand might well have led to a challenge of the proceedings. There are cases under other statutes and orders in which the infringement of the principle I have mentioned [that a man should not be a judge in his own cause] has been specifically authorised. But in this instance Parliament has left to the Minister a free hand in the selection of the person to be appointed and the choice in fact made in this case was, in my opinion, an unfortunate one.” Here once again a different approach is noticeable, with the result that the freedom left by Parliament may be cut down in Parliament House, and the impression is left that judicial control is not always as weak in Scotland as it appears in Law and Orders.

Yet even if that impression be true, the large questions which provoked the writing of Law and Orders remain. They are those of the control of a modern State with its

manifold activities. It may well be that in considering parliamentary or judicial controls discussion is focused on only a part of the real problem. At best judicial control is post hoc; it may itself be whittled away by undue respect for other institutions,\textsuperscript{54} or if too strong it may bring its own difficulties, by leading the courts too far into the field of policy. The issue of judicial reticence is important, not only in the field of expression which Professor Sutherland has recently so ably discussed, but also in the field of substance. The growth of judicial control inevitably leads the courts into fields of policy just as procedural due process has, in the United States, led to substantive due process,\textsuperscript{55} and the decision as to how great the incursion should be is not an easy one.\textsuperscript{56} There are many who welcome the wider powers confirmed in Glasgow Corporation v. Central Land Board,\textsuperscript{57} who are equally glad that in practice they will not be called upon to show the nice judgment which the exercise of those powers will entail. Apart from these questions judicial control is, if it may respectfully be thus described, something of a blunt instrument. It is often too cumbersome and too expensive to help in small cases of injustice or where the cost of litigation cannot be easily borne. It may be, too, that present procedural rules are not always as well suited to this type of litigation as to that between private parties. On the other hand, parliamentary and other preliminary safeguards have disadvantages and difficulties some of which have already been discussed. Whatever forms are developed they must of necessity be limited in scope, and if too rigid could well inhibit the necessary vitality of government. Moreover, no safeguards are incapable of evasion and all will tend to be regulated by the general morality of the society and governmental machinery in which they operate.

\textsuperscript{54} Some instances of this have already been given (ante, n. 21); more recently the interpretation of what is a Parliamentary thing in Harper v. Secretary of State for the Home Department [1955] Ch. 236 might have surprised Holt C.J. and the House of Lords in Ashby v. White (1703) 2 Ed.Raym. 936.

\textsuperscript{55} A process of evolution which in due course produced warnings such as those of Mr. Justice Stone in U.S. v. Butler, 297 U.S. 1, 87: "The courts are not the only agency of government that must be assumed to have capacity to govern."

\textsuperscript{56} This difficulty may again be surmounted empirically, see "How much is Much too Much?" 19 M.L.R. 212.

\textsuperscript{57} 1956 S.C.(H.L.) 1, S.L.T. 41.
In view of these difficulties it is possible that attention should be concentrated at least as much on the training of administrators as on methods of controlling them. The shortage of scientists may be acute but it is probable that the shortage of able and fit administrators is as grave and can have as serious consequences for the community as the former. The society in which the scientist can work effectively is largely dependent on the administrators. There are perhaps rather more difficulties in overcoming the latter shortage simply because the essential training of the public administrator is not in knowledge but in character. The failings in the matter of Crichel Down were essentially moral failings and arose from a disregard of those standards of conduct towards individual citizens which were formerly taken for granted in the public service. It is in this training that the law schools can play a greater part. The study of law remains essentially a liberal and humane one because of the nature of the problems with which law is concerned. The respect for the individual which is essential to the good administrator can today perhaps be most easily gained through legal studies. The question “Who is my neighbour?” is one of constant importance to the lawyer. It has been posed most famously in the field of reparation, yet it is as important in what are apparently technical fields. The concept of obligations to fellow citizens had produced much of the jurisdiction of the Dean of Guild long before Town and Country Planning Acts were upon the Statute-books.

It is obvious that throughout all the branches of public law the problem of reconciling the claims of the public and the rights of the individual is of constant importance. In private law also it is often necessary to balance the rights of one against the interests of the many. At a certain point the rights of minority shareholders become dominant and

56 See 90th Report of Civil Service Commissioners, 1956-57, which on this matter repeats earlier warnings. See also report of the Franks’ Committee (Cmd. 218), § 405: “We wish to emphasise that, whatever our recommendations under either part of our terms of reference may be, nothing can make up for a wrong approach to administrative activity by the administration’s servants.”

59 See, e.g., the emphasis on this aspect in Hume’s Lectures, Vol. III, pp. 213 et seq.
claim protection. Problems of error, mistake or misrepre-
sentation conceal within themselves moral issues just as
much as does the problem of the scope of the duty of care.
Their solution has required the balancing of the interests of
the mercantile community in general against those of a par-
ticular owner. It cannot be said that such problems underlie all legal issues, yet the list of occasions when they
do arise could grow long and their occurrence is sufficiently
frequent for the lawyer to be impressed by this conflict of
claims between the community and the individual and yet
not to lose sight of the fact that each individual is the pos-
sessor of particular rights, whose claims need practical
solution. The advantage of the law lies then in the fact
that its study is more concrete than pure philosophic
studies, yet it is also more moral than some other of the
social sciences—to the economist the "neighbour" may
merely be that firm which goes to the wall. Indeed, there
ought, too, to be found in legal studies an insistence upon
that which is right, rather than on that which is convenient.
For would-be administrators, legal studies have, then, the
advantage of involving steady consideration from many
points of view of the principles and problems which underlie
the whole discussion in Law and Orders. It may be that
today the law schools in the universities may serve the needs
of the community as much by the training they can give to
administrators as they do by producing practising lawyers
as keen to protect the individual as is Sir Carleton Kemp
Allen. That other training may indeed be oblique and not
specific. It could be merely the result of constant contact
with that greatness which periodically, but remarkably
often, makes itself apparent in the law reports. The achieve-
ment of this other purpose would impose no great burden
on the law schools for, far from being incompatible, these
two purposes in legal education are, in fact, only different
aspects of the same broad purpose—the proper study of
law.

J. D. B. Mitchell.
THE SCOPE OF JUDICIAL REVIEW

SHERIFF MIDDLETON, in a very kindly comment on my notes on the Franks Report, doubts whether the courts in Scotland have the power to review a decision of an administrative tribunal akin to the power to review where an error of law appears on the face of the record (which is sometimes available by means of the order of certiorari in England). I had suggested that such a power exists, though not eo nomine. Since the question is of some importance I am tempted to essay some justification of my assertion.

In the first place it will be as well to clarify the issue. The phrase "error of law on the face of the record" has come into prominence in recent years in connection with the order of certiorari as a result of R. v. Northumberland Compensation Tribunal, ex p. Shaw, where it was demonstrated that the order would lie where an inferior court, acting within its jurisdiction, had erred by deciding the merits of the case upon a wrong principle of law, and this wrong principle was apparent on the face of the record—the order was a "speaking" or reasoned order. In the particular case the order disclosed that the compensation due to a local government officer, on the termination of his employment as a result of the coming of the National Health Service, had been calculated on the wrong principles. In other words, the fault is not a jurisdictional one but one of a misconception of the law governing the merits which is apparent. The question of the existence of this power has not become an academic one as a result of the Tribunals and Inquiries Act, 1958; if anything it has gained in importance. It is true that section 9 somewhat extends the possibility of any person who is dissatisfied on a point of law with the decisions of certain tribunals either appealing to the Court of Session or requiring the tribunal to state a case for the opinion of that court. To that extent the need for an action of reduction is diminished, although the tribunals concerned are limited. On the other hand section 12 requires (subject to exceptions which do not here concern us) any tribunal specified in the First Schedule to the Act to give reasons for a decision, if so requested. The object here was to increase the scope for certiorari in England (since in modern times before the Act "speaking orders" were exceptional), and the present question clearly affects the consequences of the section in Scotland. Unless the disputed jurisdiction exists the statement of reasons is, in law, immaterial, although in practice it may, or may not, induce the parties to accept a particular decision with better
It seems desirable in this discussion to distinguish tribunals from arbiters. The former are creations of general law, and their jurisdiction is founded upon compulsion, not consent. The arbiter's jurisdiction is founded on, and defined by, the agreement of the parties. There are thus good theoretical grounds for differences in the kind and degree of control exercised by the courts over the two groups. There are, moreover, good historical reasons for this differentiation. The scope of review of arbitration awards was declared by the Act of Regulations, 1695, limiting the grounds of reduction to corruption, bribery or falsehood, and this has thenceforth, despite later statutory interventions, dominated the discussion. The problem of the control of administrative tribunals is, in one sense, also of long standing; in 1688 the court of session was enforcing the rules of natural justice upon such bodies. Yet its history is substantially different and, even at this early stage, the two problems were not linked. A fresh start in relation to judicial review was, in effect, made after the Union. Lord Kames commented, in a passage which I have quoted elsewhere but which deserves repetition, "it is the province, one should imagine, of the sovereign and supreme court, to redress wrongs of every kind, where a peculiar remedy is not provided. Under the cognisance of the privy council in Scotland came many injuries, which, by the abolition of that court, are left without any peculiar remedy; and the court of session have with reluctance been forced to listen to complaints of various kinds, that belonged properly to the privy council while it had a being. A new branch of jurisdiction has thus sprung up in the court of session, which, daily increasing by new matter, will probably in time produce a general maxim. That it is the province of this court to redress all wrongs for which no other remedy is provided." This generality of the jurisdiction underlies all the cases in this field and there is an echo of Lord Kames in the words of Lord Justice-Clerk MacDonald, "Now I think it cannot be disputed that the supreme court is open to every citizen who complains of a wrong done in an inferior court." It would be wrong to suggest that the course from the prophecy of principle by Lord Kames to the assumption of principle by Lord Justice-Clerk MacDonald was smooth, continuous or clear. All that is suggested is that the principle of control did get established, though its limits need examination. Lord Kames himself drew attention to the vagaries of the court, contrasting the refusal to interfere in MacKenzie v. Freeholders of the Shire of Cromarty (1758), with a readiness to interfere in Malcolm v. Commissioners of Supply for the Stewartry of Kirkudbright (1757). At this stage it is worth noticing that, when the general question of the jurisdiction of the Court of Session to review proceedings of Commissioners of Supply was in issue, it was conceded that the jurisdiction existed even where the proceedings were not intrinsically null, the grounds being:

1. 1959 Juridical Review, 158. There is, of course, excluded any consideration of the special jurisdiction under the Court of Exchequer Act, 1856, s. 17, which, in Exchequer causes would still enable the Court of Session to do whatever certiorari could do, at least as that writ existed in 18— 18— 18— 1826.
3. The contractual element is particularly strongly stressed in Holmes Oil Co., Ltd. v. Pumpherton Oil Co., Ltd. [1891] 18 R. (H.L.) 52, which, as Lord Sinclaire later said, was a case of as wrong a determination by an arbitrator as might well be. Contrast the remarks of the Lord President (Clyde) on the operation of consent as to an inferior tribunal in McCallum v. Arthur, 1955 S.C. 185; S.L.T. 194.
4. East of Rossborough v. A Minister (1883) Mor. 1929.
6. Jeffreys v. Anger, [1869] S.C. 490; 491; 1899, 1 S.L.T. 84. See too Collins v. Judge of High Court of Admiralty, Mor. 7451, "The Lords considered the case as affording an example of a wrong to which no ordinary remedy could be applied, but for which their supreme jurisdiction authorised them to provide an extra-ordinary one"—or Ross v. Findlater (1882) 4 S. 592, where Lord Pitmably speaks of the general powers which must exist somewhere to redress a wrong.
apparently, that the refusal of a remedy would be to deny public rights.

Thus from the start it appears that the cases ran upon somewhat different lines from the arbitration cases. For these reasons, of principle and history, it is thought that cases such as Mitchell v. Cable (upon which reliance was made) do not necessarily govern. Nor can Robson v. Menzies rule, for review of proceedings in the Small Debt Court was very narrowly confined by statute in words which, as Lord Dunedin there pointed out, were very close to those of the Act of Regulations. It is true that the distinction has not always been made. Words akin to the admission of the privilege of an arbiter going wrong on the merits are, for example, to be found in Heritors of Corstorphine v. Ramsay, where Lord Succoth observed, "Though therefore the presbytery, in its judgments is beyond appeal, yet they must obey the statute. If then they exceed their powers, or refuse to give effect to those entrusted to them there must be a remedy somewhere." This can be construed as indicating merely a power to control on grounds of jurisdiction, and later cases could support this view. Despite these cases there seems, in principle, to be a distinction between the control of tribunals and the control of arbiters, and, in practice, over the whole range of cases the two groups have gone different ways, as will be apparent from some of those later cited.

The difficulty is that a decision which is contrary to law can be regarded as being ultra vires, and that, as Lord President Hope said in the Heritors of Corstorphine Case, "In all questions pleas of competency come to be much blended with questions of merit." Undoubtedly the general power which Lord Kames desired, and which Lord Justice-Clerk MacDonald appears to admit, could, if too freely used, be an embarrassment, not a safeguard, since it would thwart the whole intention underlying the establishment of administrative tribunals. The necessary limitation of review has not always been obtained by purely logical processes, and one result, it is thought, has been an over-emphasis of the jurisdictional aspect, even where control was really being exercised over substance. It must readily be admitted that a substantial number of citations could be produced to show that the Court of Session would only interfere where there was a defect of jurisdiction and not a mere error in reaching a conclusion. To those already referred to could be added Simpson v. Harley—"It is said, however, that there has been an excess of power. But what does the alleged excess amount to? To nothing more than that the judge has put an erroneous construction on the statute. Now, assuming that he has done so, that is merely an error of judgment, not an excess of power." The weight of such cases, however, needs examination. In some what was being attempted was a review on the facts; in others the remarks are obiter because it is clear that the tribunal was in fact doing what it was supposed to do. In still more of the cases the statutory background must be borne in mind. Often the "finality" provisions in relation to the inferior tribunal are strict, and while they do not entirely exclude the possibility of review they clearly have a limiting effect. These cases, then, may be regarded as either irrelevant to general principle, being dependent upon particular statutes, or else, to the extent that the limiting provision is relied upon, as suggesting that the power to review might exist apart from that provision.

Against all these cases must be put another range,
Against all these cases must be put another range. There is a substantial number of older cases in which the court did exercise a power to review for error, in relation to such bodies as courts-martial, Commissioners of Supply, or local authorities. Three of these are notable. In *Patullo v. Sir William Maxwell* 14 the court undertook to review a decision of the commissioners under the comprehending Act (although in an earlier case 17 it had declined such jurisdiction) and it is reported that “The Court in general were of opinion that, although bills of this kind ought not to be passed except where very good and sufficient reasons are shown, yet that power of reviewing the sentence of the commissioners arising from their inherent and constitutional jurisdiction was not excluded by the statute.” It is true that the case could be regarded as going solely to jurisdiction, not merits; but this does not seem to have been the attitude of the court. 18 The second case is clearer. In *The Countess of Loudoun v. The Trustees of the Highroads of Ayrshire* 19 the precise point was taken, the analogy with the English writ of certiorari drawn, and the report continues: “The court was of opinion . . . that a right to review, in case of the smallest excess of power, was essential and was not excluded by the words of the Act. It could not be supposed (it was observed) that the trustees or justices were meant to be themselves the sole and exclusive judges of their own powers, or that such a jurisdiction, which might even be held in some measure unconstitutional, was intended to be given. In this way the question of competency came to be blended with the question of merits; and with respect to this last 20 the court was clear that the trustees had done wrong in shutting up a road as a by-road which had, by a judgment of the Supreme Court, been found a public and useful road to the county.” The third, *Chivas v. Duke of Gordon*, 21 in which review was refused, is equally interesting.

8 (1849) 10 D. 1297.
9 1913 S.C.(J.) 90; 2 S.L.T. 90; see too for an earlier illustration of this same limitation *Sempill v. Alexander*, Jan. 19, 1810, F.C.
10 March 10, 1819, F.C.
11 *Don Bros., Buist & Co., Ltd.* v. *Scottish Insurance Commissioners*, 1913 S.C. 607; 1 S.L.T. 291, where the Lord President (Dunedin) relied (at p. 612) on the analogy of an arbitration. Any appeal to the courts was, however, held to be excluded by the statute in question: thus the case does not affect the issue of the general principle now in dispute. That analogy was also relied on by Lord Loreburn in *Board of Education v. Rice* [1911] A.C. 179, 182, in a passage adopted in *Bennet v. Scottish Board of Health*, 1921 S.C. 773, 776; 2 S.L.T. 95, and in *M’Ewen’s Trustees v. Church of Scotland General Trustees*, 1940 S.L.T. 367, 369.
12 (1880) 8 S. 971, 979; for other cases see the following notes.
13 e.g., *Lord Advocate v. Stowe School Board* (1870) 7 R. 369.
14 e.g., *Bennet v. Scottish Board of Health*, 1921 S.C. 773; 2 S.L.T. 95.
15 *Robson v. Menzies*, 1913 S.C.(J.) 90; 2 S.L.T. 90, or *Wilson v. Leith Walk Trustees* (1831) 9 S. 725. Where the clause is not so strong, as in *Milne and Co. v. Aberdeen District Committee* (1890) 2 F. 220, like statements are to be found, but are not compelling. In that case it was said that finality must refer to matters both of fact and law, but it was clear on examination that the decision sought to be reviewed was one which was properly taken in all respects.
16 June 25, 1779, F.C.
17 *Poole and Marshall v. Stewart*, Aug. 9, 1778, F.C.
18 It could be said to be concerned, in modern terminology, with jurisdictional facts; those however come so close to merits that they are at times indistinguishable.
19 May 29, 1799, F.C.
20 Italics supplied.
21 July 11, 1804, F.C.
"It was conceived on the one hand that the Supreme Court was bound to give redress in every case where a lieutenant had exceeded the powers committed to them, or proceeded in opposition to the Act of Parliament, and therefore it was absolutely necessary to inquire into the merits of this case whether the jurisdiction of the court by means of advocation over suspension was excluded. . . But the majority of their lordships could not get over the express and direct terms—in which advocation and suspension are excluded by the statute." This report suggests that there was unanimity in the fundamental jurisdiction; it was only lacking in the effect of the statute.

In later cases the two forms of review for *ultra vires* and for wrongful use of power appear to have been both recognised. The distinction is made in *Campbell v. Brown* 22 by the Lord Chancellor "cases were cited at the Bar and mentioned in the printed papers now on your lordship's table, in which the Court of Session has exercised a superintending authority over inferior jurisdictions when they have been guilty of an excess of their jurisdiction, or have acted inconsistently with the authority with which they were invested." Even if the latter phrase was intended to cover defects of procedure,23 yet that was not so in *Pryde v. Heritors of the Kirk Session of Ceres*,24 where even Lord Cockburn denying review in this particular case yet would have admitted it where an error of law had been made (which (at p. 557) he distinguishes from wrongful proceedings). What Lord Cockburn was opposed to was a review of the facts, assuming that for the rest the proceedings were regular.25 The case is notable since on the one hand it is an example of the general controlling jurisdiction of which Lord Kames spoke (Lord Cockburn in his *Journal* speaks of it as being in effect an assumption of jurisdiction) and on the other as illustrating the difficulty of distinguishing a review on the factual merits as distinct from a review on legal principle.26 The case does not stand alone. Others can be added in which, if the relevant principles had been misconstrued by the inferior tribunal, review was granted.27

It was, however, this difficulty of distinguishing law and factual merits which became more obvious during the nineteenth century. Attempts were made to thrust the whole business of various new administrative agencies upon the court, so that Lord Justice-Clerk Boyle cried out: "We cannot be called on to fix whether there is to be a lamp at this point and a watchman at that."28 Despite that cry the Lord Justice-Clerk upheld a jurisdiction to review in case of flagrant excess of power or deviation from the statute, and did exercise the power of interpreting the statute for police commissioners whose decisions were expressed to be final. In that case it is true that Lord Alloway declared that "the great distinction is that when this Court has no previous jurisdiction, it requires express terms to exclude [review]. But when there is no previous and radical jurisdiction, and the inferior jurisdiction is created by statute, the question comes to be determined on this ground: 'Have the parties intrusted with powers exceeded them?'"—a phrase which could limit the review to jurisdictional faults. That phraseology is, however, simpler than the issues; it echoes words of Erskine29 which on the face of them would limit control to *ultra vires*, yet, if Lord Ivory's notes are read, it is clear that the words must be given a wider interpretation, and the same is true of phrases such as those of Lord Alloway. The flagrant abuse, of which he speaks, becomes the unreasonable decision of modern phraseology, and his excess of power tends to cover more than might be suspected.
It appears, then, that while the possibility of review for error was recognised so too were the dangers of that course and, in seeking to limit review within reasonable bounds, too much emphasis may later have been placed upon the jurisdictional limitation as a convenient devise to attain a desired end. Such a formulation had obvious advantages over limitations which depended upon whether the violation was flagrant, or a minor one, but it has obscured, it is thought, the full scope of the power to review. Yet even later in the nineteenth century the full scope is apparent. Robb v. School Board of Logielmond is a good example. The school board could, on certain grounds, refuse a retiring allowance to a parish schoolmaster, and one was refused. In the first instance the court directed the board to give reasons for their refusal. Having got the reasons the Lord President (Inglis) said: "The Board are entitled to take into account the grounds on which the dismissal had taken place in deciding whether they would grant a retiring allowance. The ground stated, if well founded, will prevent him having a right to a retiring allowance." In other words, the court first secured the completion of the record and was then prepared to pass on the validity of the principles which it showed had been operative, but did not go into the factual situation. This is in essence a review for error of law on the record. In another case the same Lord President appears to concede a like power. "It may be doubted whether it does not appear on the face of this deliverance that the Board of Education failed to apply their minds to the real question before them . . . and proceeded to a decision on some view of expediency or mero arbitrio." It is true that he regarded that as a narrow and critical view on which to strike down the decision, and chose to do that upon broader grounds; yet the jurisdiction to review on the first ground—the principles of the decision—is admitted.

22 (1829) 3 W. & S. 441, 446.
23 See the proceedings in the Inner House (1825) 4 S. 174.
24 (1843) 5 D. 552.
25 This attitude is reflected in his comments in the case and on the Poor Law in Scotland in general—see Cockburn's Journal, Vol. II, p. 1, and his later comments on the advantages of the interposition of the commissioners on such matters of fact—Journal, II, p. 257.
26 See, particularly, Lord Cockburn (1848) 5 D. at 558.
28 Guthrie v. Miller (1827) 5 S. 711; a similar sort of fear moved the court in Inray v. Deputy Lieutenant of Inverness, Mar. 2, 1811, F.C. (a case of refusal to review for many motives—failure to exhaust other remedies, a finality charge, but above all, this fear of the court becoming immersed in the business of the inferior body).
29 Institutes, I.11.7.
30 (1875) 2 R. 698; and see Morison v. Glenshiel School Board (1875) 2 R. 715, particularly at 715.
31 Lochgilphead School Board v. S. Knapdale School Board (1877) 4 R. 389.
The emphasis on control of jurisdictional faults is aided too by the number of such cases, and by the fact that in the great majority of cases this ground alone provides an adequate safeguard. The existence of essential jurisdictional facts, and the interpretation of the relevant statutory framework can be controlled,22 patent illegalities can be prevented,22 procedure can be corrected22 and motives reviewed.22 Few cases arise where any other jurisdiction is required, partly because these heads themselves have received so wide an interpretation. The phraseology of Caledonian Railway Co. v. Ogilvy29 may at times look to jurisdiction yet the court was there performing essentially the same function as that in the Northumberland case. Even so, outside such cases there remains a readiness to insist that the inferior tribunal should apply their mind to the real issue as it is conceived to be by the superior court.33 Thus, while disclaiming any right to act as a court of appeal, Lord Birnham in Magistrates of Ayr v. Lord Advocate38 was nevertheless prepared to consider the principles upon which a Commissioner had formulated his report after a local inquiry, and then to conclude that the inquiry had been conducted upon the wrong lines. Similarly, Lord Cooper was prepared to consider whether a committee, acting within its jurisdiction, had yet "acted illegally by applying their minds to the wrong question and thus, in effect acting ultra fines compromissi." In substance what the court was doing in Hayman v. Lord Advocate39 (from which the quotation is taken) was to control the tribunal in relation to the interpretation of the tests upon which that body was to decide the issues entrusted to it.

In such cases it appears that essentially the court is doing just what was done in the Northumberland case and in R. v. Medical Appeal Tribunal,40 and is continuing to exercise power which, it is thought, is long established though not always clearly expressed. On the one hand the jurisdiction cases have been extended, so that their scope is broader than the classification suggests. On the other hand the "error" cases are often couched in language like that of the jurisdiction cases so that their separate existence is not emphasised. This phraseology, too, is of long standing. "If," runs the report in Lord Prestongrange v. Justices of Haddington,41 "they exceed their bounds and find that to be an abuse which in reality is no abuse they so far assume a jurisdiction which they have not and their proceedings must be null." Thus the court was forced to try the legal essence of the complaint in order to determine jurisdiction. Perhaps this confusion of jurisdiction and merits is inevitable. In so far as "merits" depend upon the interpretation of the statutory principles to be applied by a tribunal, questions involving them are too closely interwoven with questions of jurisdiction to be satisfactorily separated. This inherent confusion of issues is reflected in the confusion of language found in some of the cases, but it also means that, if one form of review—as to jurisdiction—is accepted and founded upon general principle, then it leads almost inevitably to the other form of review. Such it seems is one possible interpretation of the history of these cases.
Admittedly the scope of review has fluctuated, and some of the earlier cases occurred at a time when the Court of Session would interfere more readily and more extensively than it would now. Yet despite this fluctuation there is also continuity, although the power which emerges is a restrained one. Some of the influences working towards restraint have been noticed. In more modern times these remain operative, and to them has been added a reticence over statutory interpretation. Provided that the interpretation put upon its powers by the inferior tribunal is a reasonable one the court will, it seems, be reluctant to interfere. Moreover, the power as it emerges in Scotland is not, it seems, the same as that exercised by the Queen's Bench Division through certiorari, although there is a general similarity. Because of differences in legal system and general background there is perhaps in the Scottish system a greater pliability, and less technicality, for despite reform that dependent of certiorari continues to suffer from rigidity and procedural limitations which make it a less efficient instrument of justice than it might be. Though the generality and lack of technicality which work to the advantage of the forms of review in Scots law, also contribute something to the uncertainties of scope which have been discussed. But the full scope of the power of review, under Scots law which has here been urged, although it must be restrained (as Sheriff Middleton rightly emphasises) can in certain cases be necessary in order to ensure that justice shall be done. To accept jurisdictional review and to deny review for error on the face of the record is to assert that patent injustice may be remedied; covert injustice will not be. That situation appeared to the writer to lack logic and to be inconsistent with the origins and basic principles of the whole of this jurisdiction in Scotland, and reading the cases in that light they do not, with respect, appear to make acceptance of that situation inevitable.

J. D. B. Mitchell.

33 Lord Advocate v. Police Commissioners for Perth (1939) 8 M. 244.
38 1953 S.C. 102, 110; S.L.T. 257, 262.
40 [1957] 2 Q.B. 584.
41 [1766] Mor. 780.
42 M'Bueno Trustees v. Church of Scotland General Trustees, 1940 S.L.T. 357, 360.
43 It may even be that the power is somewhat wider, extending to cases where, although the "record" does not show the error, yet the conclusion reached is such that it is only explicable on grounds of error. Such a power may, on occasion, be necessary because of the limits of the "record" of the inferior tribunal, and it was such a power which was apparently exercised in Robb v. School Board of Logieslalmond (note 20, supra).
ROYAL PREROGATIVE
IN SCOTLAND

By

J. D. B. MITCHELL

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THE ROYAL PREROGATIVE IN MODERN SCOTS LAW

J. D. B. MITCHELL

JURISTIC VIEWS

One historian has commented that “certainly the last charge that will be brought against the Scotch is that of superstitious attachment to their princes.”¹ It is worth considering how far this attitude is reflected in the law, for it is an attitude which is, on the whole, in contrast to that adopted in England. The contrast is pointed by the events of 1688, when, in legal form, the Scots were less gentle to James VII than were the English to James II. It is true that in England excessive claims for prerogative were rejected, yet, even in Blackstone's definition of the prerogative—“that special pre-eminence which the king hath over and above all other persons and out of the ordinary course of common law”²—there remains something of the awe of majesty. In later years this awe has been perpetuated in what may be regarded as, at times, excessive deference to the executive. The realism which Maitland urged³ has been rejected for a continued use of “the Crown” as a governing concept in law. The Crown Proceedings Act, 1947, was a long time in reaching the Statute-book, the continuation until then of the remedy by petition of right, and the sharp cleavage between the Crown and other public authorities, all owe something to this concern with “the Crown,” and in all these there are marks of continuance of this awe in relation to it to which reference has been made. With this attitude may be contrasted the treatment of the Crown in the courts in Scotland as far back as the sixteenth century. In 1545 the Lords of Council allowed actions against the king⁴ following on an Act of Sederunt of 1542 granting to these dispossessed by the king or his officers authority to call “the Kingis grace Comptroller and advocat to here them reponit to their possessionis as thai had of

¹ Professor Mitchell is Professor of Constitutional Law in the University of Edinburgh.
² Buckle, History of Civilization in England (1873) Vol. III, 2. True he was at this point concerned with the “sale” of Charles I (the price being, he said, the only good thing the Scots received from that monarch), yet the comment is also a general one. Similar assertions can be found in Hill Burton, History of Scotland, iii, 388.
³ Commentaries, I. 232.
⁴ Constitutional History, 418.

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before." Differences of treatment in the courts of the two jurisdictions are in more modern times evidenced by cases such as The Creditors of James Burnet v. Murray,\(^6\) denying to the Crown any preference for revenue debts in respect of land; the then existing contrast between the two jurisdictions being well brought out in argument.

It must be admitted that many of the authorities on this matter are old, some reaching back into periods in which it is difficult to state with certainty what was the law. It must be admitted too, that in recent years, for a variety of reasons, differences have tended to disappear, or to be glossed over. A major influence in this process has undoubtedly been the belief that, with the union of the kingdoms, the rules of prerogative must be the same over the whole United Kingdom.\(^7\) Yet as a result of Glasgow Corporation v. Central Land Board,\(^8\) an investigation of the rules governing the prerogative in Scotland has ceased to be a purely academic exercise. Past theoretical differences have become capable of having present practical consequences. That case not only demonstrated that in one way, at least, the law of Scotland is less kindly disposed to claims of Crown privilege than is the law of England; it also, for the first time, contained clear statements from the House of Lords that the rules governing prerogative need not be identical in both jurisdictions.\(^9\) The practical consequences of this view can be realised if it is remembered that, for example, it was the supposed necessity for uniformity which led Lord Anderson to give a restricted interpretation to the apparently general words of the Crown Suits (Scotland) Act, 1857, s. 1,\(^10\) when a more liberal interpretation probably agreed better with past history.

It is relatively easy to pick upon particular contrasting rules or instances where differences appear. It is much more difficult to be certain what are, or were, the general rules. On the most general plane, the principles of the Declaration of Arbroath\(^11\) can be contrasted with such Acts as the Black Acts of 1584\(^12\) or that of 1606

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\(^5\) *Register of Acts and Decreats*, I. 178. The late Sir Randall Philip has admirably demonstrated the greater readiness of the courts in Scotland to receive suits against the Crown—"The Crown as Litigant in Scotland" *40 Juridical Review*, 238.

\(^6\) (1754) M. 7876.

\(^7\) Notably Macgregor v. Lord Advocate, 1921 S.C. 847. Granted the convenience of uniformity, it is not clear why on the whole the choice of rule in cases of doubt should be from the jurisdiction where the rules are more generous to prerogative claims. Cf. Lord Cooper in MacCormick v. Lord Advocate, 1953 S.C. 396 at 411.

\(^8\) 1956 S.C. (H.L.) 1.

\(^9\) Ibid., 16.

\(^10\) Macgregor v. Lord Advocate, 1921 S.C. 847 at 848. The statute itself was really only concerned with procedure, not substantive rights: Smith v. Lord Advocate 1932 S.L.T. 374, 378.

\(^11\) Now most easily accessible in Lord Cooper's Selected Papers, 324 et seq.

\(^12\) A.P.S., III, 292.
Anent the Kingis Majestis Prerogative or of 1685 For the Security of the Officers of State.  

The broad justification of absolutism in Sir George Mackenzie's *Jus Regium* was an answer to the limited views put forward in Buchanan's *De Jure Regni Apud Scotos*. Such works must, too, be regarded rather as political tracts than as expositions of accepted legal theories, and the difficulty of finding clear expressions of legal views is enhanced by the reticence of the institutional writers, and others, on matters of public law. Remarks on prerogative are mainly found in the midst of passages dealing with other matters. Thus Craig, founding upon the statute of 1597 c. 281, asserts that taxation can only be levied with the consent of "the people and the estates," but this passage occurs in his general treatment of the patrimony of the Crown. In their *Institutes*, Stair and Erskine confine themselves to particular rules and do not formulate general principles. Stair did, apparently, write upon prerogative but the work does not now exist. Sir John Nisbet, wrote safe generalities—"So that as the Sea does not go beyond the Shoar when the sea is most full, So the Prerogative and *Plenitudo Potestatis* does never go beyond the law which is a great *Littus*, and Boundary of just Power"—yet he was also prepared to support, in effect, the dispensing power. 

Sir James Steuart, in his *Answers to Dirleton's Doubts*, was equally cautious. "The Author [viz., Sir John Nisbet] thinks justly that the prerogative should keep within the boundary of law... but to define its extent is too delicate a point to be further insisted upon." Bankton, though he purports to cover public law as fully as private law, contents himself in his general discussion of prerogative to rules solely dependent upon English precedents and writings, and is the least reliable of the institutional writers. 

There is, too, a lack of consistency. The fine declarations of judicial independence by Lord President Seton are matched by the expressions of subservience of Lord Advocate Hope. This inconsistency exists equally between theory and practice both in political matters and in others more strictly legal. The claims by Parliament to control officers, or the declarations of war and peace, and the like, are countered by the factual subservience of Parliament and its control through the Lords of Articles. The ruling that the

12 A.P.S., IV, I,81 and A.P.S., VIII, 484.  
13 *Jus Feudale*, I,16.  
14 See his *Apology* published 1690.  
15 *Dirleton's Doubts* voce Prerogative.  
16 Steuart's *Answers to Dirleton's Doubts* voce Prerogative.  
17 Inst., Bk. IV, Tit. I, § 4 and particularly as to statutes, see IV, 1.4 (44).  
18 Bruce *v.* Hamilton (1599). See "The King versus the Court of Session" by Lord Cooper, 58 *Juridical Review*, 83.  
19 Major Practicks, V, 1, § 13 (Stair Society ed.). Further, Craig asserted it was a privilege of the royal sceptre that the king might judge in his own causes. *Jus Feudale*, III,1,12.
courts should take no heed of any privy writings from the king."21
are balanced by the fact that the king would himself sit and act in
court and by the continued appointment of Extra-Ordinary Lords of
Session. Differences of history have meant that the general issues
of prerogative did not come before the courts in Scotland in the
same way and at the same time as they did in England, and the
conflicts of opinion were resolved by other means and in other
places.22 Yet the circumstances of the monarchy, including its
financial weakness, together with the long tradition of formal
assertions of the limited character of the monarchy make the statements
of the limited view of prerogative more acceptable as embodying the
predominant opinion.23 Certainly that view was expressed by
Montrose even when he was advancing the cause of the Crown,24 and
by Stair. "As to the matter of Civil Government," wrote the latter,
"since I was capable to consider the same: I have been ever
persuaded that it was both against the Interest and Duty of Kings
to use Arbitrary Government, that both King and Subjects had their
titles and rights by Law, and that an equal ballance of Prerogative
and Liberty was necessary for the happiness of a Commonwealth." 25
It is clear from the rest of the Apology that in Stair's view this
balance was to be kept by the courts.

21 Baron v. Earl of Morton (1533) M. 7319, Earl of Morton v. Lord Fleming (1569)
M. 7325.
22 Thus the equivalent authority to the Case of Proclamations is only found
23 Thus, writing of dispensations from taking the Test, Sir John Lauder of Fountain-
hall wrote in 1685 "which seemed a downright derogation to the Act of
Parliament in 1685 and not in the King's power; for Sir George Lockhart said,
Whatever that dispensation might operate to secure them for all proceedings,
yet if they acted after it they incurred and contracted a new guilt." (Fountain-
hall's Historical Notices, Vol. II, 676.) Though the dispensations might have to
be accepted in fact, their legality was not accepted.
24 See letter of Montrose, Memorials of Montrose, Vol. II, p. 43. "There is a
fair and justifiable way for subjects to procure a moderate government, incumbent
to them in duty which is to endeavour the security of religion and just liberty . . .
'Coun,' it may be demanded, 'how shall the people's just liberties be preserved
if they be not known, and how known if they be not determined to be such?'
It is answered the laws contain them and the Parliaments may advise new laws,
and "The King's prerogative and the subjects' privilege are so far from incom-
patibility that one can never stand unless supported by the other." Here is
the idea of a monarchy limited by law and of a balance of prerogative and liberty
which recurs in Stair.
25 Stair's Apology. This idea of balance occurs again. Writing of the projected
terms of the Claim of Rights he says: "The terms of perfecting the King's right
seem harsh, implying that the Convention had a superiority of jurisdiction,
whereas the solid ground is, that the King having violated the constitution of
the kingdom in both its sacred and civil rights, the convention, as representing
the body politicid did declar, that seeing he had violent his part of the mutuall
engagements, they wer frite of ther pairt, for they could not fall on the on pairt
without freedome to the other to liberat themselves, and seeing the violations were
so high as to refuse, reject and renounce th government of the kingdom accord-
ing to its trow constitution, and to assume a despotick and arbitrary government,
neither he nor any come of him after that could have any title to reigne." Letter
to Lord Melville, April 9, 1689. The Leven and Melville Papers, 1689-1691, p. 8.
On the more detailed level there were, of course, particular prerogatives notably those of feudal origin. The rule that the Court of Session alone had jurisdiction over actions involving the king, although later explained on the ground that any other rule would be inconsistent with the dignity of the Crown, was not a rule which was peculiar to the Crown. The same privilege was shared by the Senators and all other members of the College of Justice. The Crown did have privileges in litigation, particular privileges as a superior (though a distinction was drawn between the annexed lands and those falling to the king by ordinary acquisition, wherein, said Stair, “the King utitur jure communi,”) and other similar rights by common law, some of which were explicable on a feudal basis, others on a basis of practical necessity. Other rights were conferred by statute, notably the enduring one that the king cannot be prejudiced by the neglect of his officers. Yet there were surprising limitations upon the king’s rights. Positive prescription was early held, under statute, to operate against the Crown, and negative prescription was much later also held to operate thus. The rights of the Crown as a creditor were limited, in particular revenue debts had no priority over other debts in regard to heritable property, though there was some considerable improvement in the position of the Crown in these last matters as a result of the Union legislation. That legislation, as will become apparent, played a significant part in the adaptation of ancient prerogative rights to modern State purposes. It is, however, arguable that the effect of this legislation has been greater than its terms warrant, the essential provisions in this

28 Who also enjoyed an immunity from taxation like that of the Crown. Indeed their immunity could at times be said to be more clearly recognised than was that of the Crown.
29 Stair, IV, 2, 5.
31 Such as the automatic vesting of land in the king as ultimus haeres.
32 Statute 1600, c. 14, A.P.S., IV, 231.
33 Deans of the Chapel Royal v. Johnstone (1867) 5 M. 414. Approved (1869) 7 M. (H.L.) 19. Earlier there were considerable doubts, see the argument in Ersk. III, 7 37, and see the debate in Crawford v. Sir Thomas Kennedy (1695) M. 7866. As to positive prescription see Earl of Leven v. Balfour (1711) M. 10930.
34 Sir Henry Wardlaw v. Dick (1620) M. 7871, and for the influence of the Union here see Commissioners of Excise v. Creditors of Earl of Southesk (1724) M. 7873.
35 See particularly Burnet v. Murray (1754) M. 7873. The rejection of the argument here for priority for the Crown claims (based on statutes of Henry VIII) because the English rules were only imported in Exchequer causes is particularly important in view of later developments. Lord Kames in his note to this case (Sel. Dec. 86) is not clear why the king should have any priority in execution against personal estate.
36 Ogilvie v. Wingate (1791) M. 7884.
connection being found in the Act of Union, ss. 18 and 19, and in the Act of 1707 establishing the new court of Exchequer.

In the main, then, the old rules were, as was only to be expected, related to feudal prerogatives. What is of interest today is to know how far these have been translated into special privileges of a modern central government. The process by which the rule of Crown immunity from taxation has developed provides a convenient starting point for an examination of the emergence of such modern prerogative rules. In this case the development appears most clearly, and once having occurred had widespread consequences, even where the causes which produced it would not themselves have operated directly.

With regard to taxation there were old exemptions for the Crown, but their causes were purely practical. The idea that the king should live "off his own" retained its hold in Scotland much longer than it did in England. Taxation was thus for long merely regarded as a supplement to the king's own revenues. It would, therefore, have defeated the purpose of taxation if it had been extended to the king's lands. Indeed, until 1597, the feuars of the king's lands were themselves exempt, on the theory that by the payment of their feu duties to the king they were already making their appropriate contribution to the national exchequer. When, however, the Church lands were annexed to the Crown there would, under the then system of taxation, have been a consequential increase of burden on the other contributors—burghs and barons. Hence the Act of 1587 (c. 112) first stabilised the position, and that of 1594 (c. 233) provided for the taxation of temporal lands and finally the Act of 1597 (c. 281) taxed the Crown Lands held by subjects. This line of statutes was held, in Bruce v. Veitch, to import that the king was liable to tax save where an immunity was specifically conferred by a particular statute, or where the tax was personal. The Lord Justice-Clerk (Hope) however drew a distinction. "The original lands of the King, the casualties due to him as universal superior, and the feu duties due

37 s. 18 providing that "the laws concerning excises . . . shall be the same in Scotland from and after the Union as in England." s. 19 envisaging a Court of Exchequer "having the same power and authority as the Court of Exchequer in England." It should though be noted that laws affecting private right were particularly preserved by the Act of Union. Is a prerogative claim which particularly affects an individual a matter of public or private right?

38 By the Exchequer Court (Scotland) Act, 1707 (6 Ann. c. 26), it was provided that the Court of Exchequer in Scotland "shall and may act and do and proceed therein and thereupon in every respect whatsoever as by law, or as the Court of Exchequer in England, by the constitution, course or practice of or in the said court, hath been or is enabled or hath used or practised to do, in like cases in England." Earl v. Vast (1822) 1 Sh.App. 229, criticised in the Glasgow case, is an example of the improper extension of these provisions.

39 Thus the number and relative importance of cases involving the rules of law designed to prevent the squandering of the royal resources are an indication of this, e.g. Officers of State v. Lord Dunglas (1838) 1 D. 300.

40 F.C., November 28, 1810.
by his vassals in his own lands never had been assessed . . . but when lands are once taxed in the hands of a vassal, if the sovereign acquires them utitur jure communi and the tax remains; third parties must not be hurt by acquisition of the King.” In this statement there is a reflection of old reasoning as far as original Crown lands are concerned, but as to acquired lands the fact of acquisition by the Crown conferred no immunity, and there is no sign of modern doctrines. The Lord Justice-Clerk added a further reason for subjecting the land to taxation—that the naval yard, the taxation of which was in question, was held of a subject superior “The property is vested (for behoof of the Crown) in trustees who are sub-vassals and must pay like any other proprietors.” These principles were accepted and applied in Commissioners for the Affairs of Barracks v. Milroy,41 though their application was governed by the idea of the avoidance of increasing the burden on other proprietors. Thus, in Principal Officers of Ordnance v. Heritors of the Kirk Session of North Leith,42 land upon which Leith Fort was built was held liable for poor’s rates, having been acquired from a subject, yet improvements by building upon the land did not increase its value for rating purposes. The reason for this being that the improvements were for the public service. Once again the fact of Crown ownership or occupation was not regarded as significant, though it is true that some hesitation was expressed by the Lord Justice-Clerk (Boyle) and by Lord Glenlee on the ground that the tax might be regarded as a personal tax. Even that hesitation, which does involve some special consideration for the Crown (though it also involves a denial of any absolute immunity), could not, however, be used as a foundation for the application of the modern doctrines of prerogative which are related to the activities of the non-personal Crown. Certainly the opinion of Lord Pitmilly that “the Crown must be liable like any other heritor” affords a poor foundation upon which to build prerogative doctrines.

DEVELOPMENT OF CROWN IMMUNITY

It is clear from the element of compromise in the final decree in the last case that the doubts or hesitations of some of the judges had some effect. Subsequently43 this immunity of improvements was taken as an indication of a general immunity of the Crown, even though the earlier case could not, as a whole, support that broad principle, nor, strictly, could the partial immunity do so. By that time, however, a substantial change had occurred, largely as a

41 F.C., November 21, 1815.
42 (1825) 4 S. 89.
43 Advocate-General v. Oliver (1852) 14 D. 356.
result of Advocate-General v. Garrioch. The tax involved in that case was the prison assessment. A strong case could be made for levying it on Crown property, since the statute imposing it (2 & 3 Vict. c. 42, s. 44) provided that it should be levied "along with the land tax and in like manner therewith," and Crown lands bore the land tax. Yet the Crown was held not liable to pay. Lord Murray (who had been of counsel for the successful collector in Bruce v. Veitch) asserted bluntly that "the Crown is not liable to pay taxes, either in respect of property or anything else." The principle upon which immunity was based was that taxes are paid for the better support of the Crown and it would be "inconsistent to take money from the Crown to be paid to the Crown." Little fault can be found with that as a common-sense principle, but it will not explain immunity from local taxation. Nor does it, perhaps, express the reasoning upon which the English rule of immunity is based.

Bruce v. Veitch was distinguished in various ways: that the property in that case was held by trustees who were subvassals, that the decision was a novelty, and that it was simply wrong in law. One part of the process of distinguishing is, however, important. Garrioch was in Exchequer. This fact was emphasised by Lord Murray saying: "If this court has jurisdiction, the Act of Parliament constituting the Court [viz., the Act of 1707 referred to above] lays it down that it is to decide according to the law of England." Bruce v. Veitch was in the Court of Session. It is true that in Garrioch Lord Murray and Lord Ivory doubted whether there was any difference between the two systems of law in this matter. Yet it seems these differences did exist, and have been emphasised in other cases. The forum, and hence the governing system of law, should therefore be remembered when general conclusions are drawn from this case.

The immediate result of Garrioch was a refusal by the Crown to pay the police assessment in respect of the General Post Office in Edinburgh, which had up till then been paid. Although the resultant litigation was in Exchequer, the principles propounded were expressed as being entirely general. "It is," said Lord Jeffrey, "the general, constitutional, and prerogative right of the Crown, as maintained by an unvarying course of decisions, to be exempt from liability.

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44 (1850) 12 D. 447.  
46 As to this, see particularly Madras Electricity Supply Co., Ltd. v. Boardland [1955] A.C. 667 and Bank voor Handel en Scheepvaart N. V. v. Administrator of Hungarian Property [1954] A.C. 584. The English rule has been justified on a variety of grounds, some relating purely to rules of statutory interpretation, others involving the assertion that the rule involves an independent prerogative which is itself justified in a variety of ways.  
47 Advocate-General v. Commissioner of Police for the City of Edinburgh (1850) 12 D. 456. Though reported in 1850, Garrioch had been decided in 1845.
for all taxes imposed by statute.” Perhaps the word “unvarying” was not a happy one in view of the state of the authorities, but apart from that this statement marks a new departure. As the immunity slowly becomes more certain, its basis also changes. It is now prerogative, no longer that it would be merely sensible to grant immunity from taxation to the body which would receive the tax, and the beneficiary of the immunity is simply the Crown. The idea of “public use,” which had earlier played its part, also disappears. It was this change of basis which made inevitable the rejection of the argument that there was no immunity because this was merely a local tax. In one other respect this case is notable. The Post Office was not listed in the Act as having immunity, whereas barracks and other Crown property were. The argument that this omission meant, therefore, that the Post Office was taxable was countered by the extension of the rule that the Crown is not to be prejudiced by the default of its servants to cover the acts of the parliamentary draftsmen; an extension which met that particular argument, but which could have curious consequences in the general field of constitutional law if it were to gain general acceptance.

**General Immunity**

From this start the doctrines of prerogative have grown. Once claims to freedom from taxation of all kinds had been admitted, prerogative was extended to include general immunity from statute. This process may be a reversal of the English developments. There, on one theory at least, freedom from taxation arose because of the doctrine that statutes did not affect Crown rights. In Scotland the development appears to have been the opposite; the effect becomes the cause. Once again the first full acceptance of the doctrine as to statutes came in the Court of Exchequer, and came about from much the same causes. There are references in argument in some of the old cases to the doctrine that the Crown was not bound by statute unless clearly expressed to be so. Yet the doctrine is not to be found as the determining principle in any case, and decisions are by implication opposed to it, and it has been accepted that the doctrine

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49 Such an extension is unjustifiable. The growth of that rule itself is a good example of the development of prerogative rules during the nineteenth century. Its narrow statutory origin has been overlooked until it comes to be often regarded as a general common law principle. For some account of this development see “Some Aspects of the Royal Prerogative” by H. R. Buchanan, 35 Juridical Review 49.

formed no part of pre-Union Scots law. The major case in its acceptance after the Union is, perhaps, *Pool v. Irving.* Pool had been imprisoned for non-payment of game duty. He petitioned for aliment under the Act of Grace, 1696. The case was heard before a full court. Seven of the judges, founding upon *Roy v. Young and Wilson,* were of opinion that the Court of Session had no jurisdiction in the circumstances to order liberation for non-payment of aliment—to do so would be to interfere in an Exchequer process. They did, however, add, but clearly *obiter,* that they doubted "whether Crown debtors can be comprehended under the terms of the Act of Grace, which contains no words whatever that include the interests of the Crown, or of the officers of its revenue." In these doubts there is manifest the suggestion of the general doctrine that statutes do not bind the Crown. Yet the whole case goes very little way to support that principle. Lord Meadowbank and Lord Corehouse were careful only to join the majority on the final ground of no jurisdiction. Lord Moncrieff denied that "after the Act [of Grace] was passed the Crown debtors stood in any different situation from other debtors," adding "no authority to show that they had not the benefit of the Act had been produced." When the case was resumed in the First Division Lord Gillies and Lord Balgray declared their concurrence with Lord Moncrieff, Lord Craigie found an exclusive jurisdiction in the Court of Exchequer, and the Lord President indicated that in his opinion the Act of Grace did apply to the Crown. The case is then no strong authority for the proposition that statutes do not bind the Crown, no majority of the judges can be found in favour of that proposition and, indeed, the general tenor of the case is against it. The authority of the case for any proposition is further weakened by the fact that after all views had been expressed it was found that Pool had been liberated and no decision was therefore given. Despite these uncertainties, and the fact that, though a post-Union case, it dealt with a pre-Union statute, the general assertions on Crown immunity did have effect.

That effect was enhanced when finally a similar case did reach the Exchequer—*Advocate-General v. Magistrates of Inverness.* There, the Act of Grace, being a pre-Union statute, was held applicable

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51 Advocate-General v. Magistrates of Inverness (1856) 18 D. 366.
52 (1831) 10 S. 152.
53 F.C., February 17, 1824. This case raised similar issues. In it the court was of opinion that the matter was clearly one for Exchequer, but the suggestion was that the Act of Grace should be there applied for the benefit of Crown debtors.
54 It is noticeable that in an earlier case the Court of Session had no difficulty in holding the Crown liable for the maintenance of a criminal lunatic, but in the House of Lords the Crown was relieved of the burden, though the reasons are not clear: Officers of State v. Commissioners of Supply of Wigtonshire (1830) 4 W. & S. 43.
55 (1856) 18 D. 366.
to the Crown, but it was also accepted that "the Crown likewise maintained that it is a part of the Royal Prerogative that a statute imposing a tax or burden is not held to affect the rights of the Crown, unless this immunity be taken away in express terms in the Act imposing the tax or burden, and it appears to be true that the prerogative of the Crown does now include such a privilege." 58 The reception of the principle was attributed to the fact that the immunity "Belonged to the Crown of England prior to the Union; and like the other laws existing in England at that time regarding the levying of taxes it became part of the prerogative of the Crown of the United Kingdom." The link between immunity from statutory provisions and the new charter of the Court of Exchequer by the Act of 1707 is made clear.

These cases, like Lord Advocate v. Lang,57 were not clear cases of taxation, though sufficiently close to be influenced by tax doctrines. They form the means, therefore, by which Crown immunity gained general acceptance. The doctrine was admitted as one having application outside the field of taxation in Somerville v. Lord Advocate,58 but, although accepted, was not warmly welcomed. Lord Kyllachy considered that the doctrine could only apply to ancient prerogatives, and that it could not apply in the case of lands held not jure coronae but on ordinary tenure.59 Lord Kincairney (who dissented) suggested similar limitations and affirmed that the provisions of the Act in question, being for the public benefit, bound the Crown. Lord Kinnear likewise distinguished the ancient lands and prerogatives of the Crown from other rights, saying of land acquired from a subject: "The general rule of law with reference to such property is perfectly well settled—that the Sovereign, when he acquires any right from a subject, can be in no better case than his author and so is liable to the same burdens which affected the property in his author's hands." This attitude has persisted 60 and finds perhaps its clearest exposition in the well-known passage in the opinion of Lord President Dunedin in Magistrates of Edinburgh v. Lord Advocate.61 The views of Lord Dunedin have been specifically rejected by the Privy Council as

56 Per Lord Curriehill at p. 372.
57 (1866) 5 M. 84.
58 (1893) 20 R. 1050.
59 Of the consulted judges four concurred in this opinion.
60 See particularly Schulze v. Steele (1890) 17 R.(J.) 47 at 53, per the Lord Justice-Clerk.
61 1912 S.C. 1085 at 1091—particularly the sentence: "While I do not doubt that there are certain provisions by which the Crown never would be bound—such, for instance as the provisions of a taxing statute or certain enactments with penal clauses adjoined . . . yet when you come to a set of provisions in a statute having for its object the benefit of the public generally, there is not an antecedent unlikelihood that the Crown will consent to be bound, and this I think would be so in the case of negotiations which are meant to apply to all land in the city, and where the Crown's property is not property held jure coronae."
expressing the true view of the law in England. Here then is a clear case for the possible application of the principle of diversity expressed in the Central Land Board case. The limits to the doctrine of Crown immunity from statute indicated by Lord Dunedin are founded upon a substantial line of authority, as well as being consonant with the general approach in Scots law, and have practical advantages from the point of view of the community at large. Just as was the case in Glasgow Corporation v. Central Land Board, the balance of convenience inclines to the Scottish rule. In view then of the manner and causes of the reception of the doctrine into Scots law, there seems to be no reason for the further reception of the broader doctrine, and the authority of Magistrates of Edinburgh v. Lord Advocate should be regarded as undiminished. If this be so, then there may also be further indirect consequences, for example, upon the doctrine that the interpretation by the House of Lords of a United Kingdom statute is binding upon the courts of both jurisdictions.

**Effect of the English Doctrine**

In the case of these two major doctrines, which have a connected history, it is then true to assert that the development of prerogative rules in Scotland was largely due to the peculiar circumstances of one court—the Court of Exchequer. Nevertheless the emergence of these two doctrines and their similarity to the English rules have had repercussions elsewhere. The tendency has at times been to assimilate all prerogative rules. Thus in Lord Advocate v. Galbraith Lord Cullen declared that the legislation of Anne had the effect of "extending to Scotland the royal prerogatives generally according to the law of England in relation to all proceedings for the recovery of Crown revenue." Against this view Lord President Strathclyde protested strongly. He regarded it as inconceivable that the whole prerogative doctrines of English law could be imported almost by a side-wind in the manner suggested. Once again there can be indirect, but significant, consequences flowing from these differences. Ancient prerogative rules are now usually of practical importance

62 Province of Bombay v. Municipal Corporation of Bombay [1947] A.C. 58 at 64. It should be noted that at one stage the English doctrine was similar to that expressed by Lord Dunedin. See Street, Governmental Liability, 43 et seq.
63 Though the case is not entirely clear, Burnett v. Barclay, 1955 J. 37 appears to have been decided upon this view.
64 (1910) 47 S.L.R. 529. The priority obtained by the Crown in Campbell v. Edinburgh Parish Council, 1911 S.C. 280, was a statutory one.
65 Admiralty Commissioners v. Blair's Trustee, 1916 S.C. 247 at 266. See also Lord Johnston (at p. 260): "the higher prerogative right of England had no existence in Scotland prior to the Union, and ... the Act of 6 Anne, c. 26, did not introduce into Scotland anything but the English prerogative process based upon the Act of 33 Henry VIII."
simply because they have been translated or twisted into rules which assist the purposes of a modern government, even when those purposes and that government are very far from anything which was contemplated at the time when the rules originated. Nevertheless in the present context the question of the former existence of an ancient rule can be important. On Lord Dunedin’s view of the effect of statutes upon the Crown the existence of an ancient prerogative right is critical in determining the scope of statutes. Thus the foundation of the judgments in Re Pratt 66 is the existence of a general priority of the Crown which was cut down by the Bankruptcy Acts. The latter had, therefore, to be interpreted so as to trench as little upon the prerogative as possible. If this priority be lacking as an original prerogative then the interpretation of the statute could clearly differ in the different jurisdictions. Thus, even in revenue matters, on the view taken by Lord President Strathclyde the limitation on the privileges accorded to the Crown by the old rules may still be important, an importance which would be heightened if Lord Dunedin’s view on the effect of statutes be still accepted.

In revenue matters, or those akin to them, the major cause of unification of prerogative rules was then statutory. Elsewhere the causes have been different. On occasion there has been no clear Scottish rule and the considerable number of antecedent English cases at the time when one arose in Scotland has made it convenient to adopt the rule that had emerged from these cases. Thus, there are few clear old cases upon the status of Crown servants. Those that there are do not suggest that they were to be regarded as being in a peculiar position because of their employer. Crown grants to offices appear to have been examined in the same way, and to have been subjected to the same rules as other public offices. 67 The incidents of offices are similar whether Crown offices or not. 68 The concern was with the group of “public offices.” 69 Indeed, on the abolition of a Crown office, the claim of the former incumbent for compensation was only rejected because he had not shown that his office was ad vitam aut culpam. 70 The action for compensation from the Crown was not, as such, ruled incompetent. The issue

66 [1951] Ch. 225.
67 Kennedy v. Cuming (1711) Robertson’s Appeals 19, involving the contest between two claimants to the office of Conservator of Campvere, and involving an examination by the courts of the validity of the grounds for the dismissal of one claimant. Compare cases such as Thomson v. City of Edinburgh (1665) M. 13090 where a town clerk appointed ad vitam was dismissable for fault, or Simpson v. Tod (1824) 3 S. 150 where the court was willing to control the dismissal of a town clerk even though appointed at pleasure.
68 Thus the arguments about delegation etc., in Hog v. Ker (1681) M. 13106 are not marked by the fact that this was a Crown office under the Great Seal.
69 See the emphasis on munera publica in Hastie v. M’Murtrie (1888) 16 R. 715 at 732.
70 Hay v. Officers of State (1832) 11 S. 196.
whether royal grants, pensions and the like were adjudgable and available to creditors tended to be decided in the same way and on the same principles as those involving other pensions. Indeed, often a civil law origin was sought.  

It is true that in this context Stair particularises the needs of the king's "special service," but the generality of the relevant principles was emphasised by Erskine.  

More recently the generality has tended to disappear, and there has been a concentration upon Crown service. Thus, while Lord Constable, the Lord Ordinary, in *Mulvenna v. The Admiralty* speaks predominantly of public office, yet in the First Division the emphasis is on Crown service, and new foundations for the rule are sought in the field of prerogative, some of which could be justified in English law though of much less strength (to say the least) in Scots law. Here, though, the process of adoption of the English rule has not been uniform even in modern times.  

This special treatment of Crown servants came about not merely as a result of the understandable desire for uniformity throughout a service which is evident in *Mulvenna*, but also partly as a result of a singularly weak case. Some thirty years after he had taken his discharge from the Army one disgruntled soldier raised an action seeking redress on numerous grounds, some of which were clearly irrelevant. Of his whole claim the Lord Justice-Clerk said "If ever there was a case in which *mora* should bar the claim that case is the present." Upon a variety of opinions expressed in that case, supported by a remark of Lord Kyllachy that "The Crown cannot be liable or sued for damages in respect of the 'Torts'—the wrongful acts of its officers," in an action which was really barred by the Public Authorities Protection Act, 1893, a considerable structure was built. These two cases were treated as authority for the proposition that the king can do no wrong, a doctrine which arrived late, had but a weak foundation, and was received with little enthusiasm

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71 e.g., *Richardson v. Sir William Grant* (1683) where a royal pension was not arrestandable as being a *stipendium militiae*: Harcarse Tit. Arrestment, and see particularly *Brodie v. Campbell* (1715) M. 709. This inclination applied outside this particular context. Thus the privileges of members of Parliament were ascribed to their being *absentes reipublicae causa*: Grant v. Earl of Sutherland, (1708) M. 8563 or see M.Sup. IV, 719. See also on the equivalent to *The Case of Saltpetre*, Hume-Lectures, Vol. III, 205.

72 II, 5, § 18.

73 III, 6, § 7—the privilege extended to many, even to University professors, *Laidlaw v. Wylie*, M.App. *voce* Arrestment, No. 4.

74 1936 S.C. 842.

75 e.g., the citation by Lord Ashmore (at p. 861) from *Queen v. Lords Commissioners of the Treasury*, L.R. 7 Q.B. 387, which fairly reflects English law but did not express a principle clearly established in Scotland.

76 *Cameron v. Lord Advocate*, 1951 S.C. 165.

77 *Smith v. Lord Advocate* (1897) 25 R. 112.

78 *Wilson v. 1st Edinburgh City Royal Garrison Artillery Volunteers* (1904) 7 F. 168.

in Scots law.\textsuperscript{60} It was in fact a doctrine which fitted naturally into the general background of litigation against the Crown in England, but in Scotland had something of an alien air. The circumstances of the creation of the Court of Session tended, as compared with the gradual growth from the Council of the English Courts, to give to the Court of Session in modern times a greater authority in respect of the Crown. Although remarks can be found that the Sovereign cannot be impleaded without his consent yet the comment of Lord M'Laren is, on the whole, a safer guide. "If it be the law of England," he said,\textsuperscript{81} "that the Sovereign cannot be convened through his officers in Court, it is probably a just observation that English sources are not a safe guide to the decision of the point which we are considering. I do not think that it was ever doubted in Scotland that the Crown might be called as a defender in a proper action, either through the Officers of State collectively or through the King's Advocate." This attitude was marked not merely by the possibility of raising actions but also by the remedies which could be given. An interdict has been made against the Secretary of State,\textsuperscript{82} and, granted an established duty, it has been said that a decree could be granted against the Crown to ensure performance of that duty.\textsuperscript{83} In procedural matters, while the Crown has certain established privileges, new claims have been watched with care.\textsuperscript{84}

There is thus in matters of detail, as well as in relation to the broad rules, evidence of a reluctance to concede claims to prerogative rights. This reluctance is to some extent reflected in the operation of the rules. That the privilege of the Crown should not protect a Crown servant who uses Crown property for his own purposes is obvious enough.\textsuperscript{85} In civil matters the courts have on the whole been slow to grant immunities. \textit{Clerk v. Dumfries Commissioners of Supply} \textsuperscript{86} is an illustration (now overruled) of this reluctance. There is equally the contrast between \textit{Glasgow Court Houses Commissioners...
v. Glasgow Parish Council⁸⁷ and the recent litigation involving the custodian of enemy property.⁸⁸ In the former the Commissioners though regarded as “absolutely bare trustees for the Crown” were not immune from owners’ rates in respect of portions of buildings owned by them which were let, even though the rents accrued for the benefit of the Treasury. Yet on the test of what is “Crown income” as laid down by Lord Asquith in the latter case,⁸⁹ the buildings must surely have been entitled to immunity.

THE DOCTRINES CONTRASTED

It can then be asserted with some confidence that the approach to questions of prerogative has been different in Scotland. Those differences have been obscured by a series of cases in which the critical point was the peculiarity of the law administered in Exchequer, a peculiarity which has not always been observed. The second major cause of the adoption of English rules has been the desire for uniformity. Here once again there has been some readiness to concede too great a scope to the Act of Union. That Act did not unify even public law, it merely purported to place public law more readily at the disposal of Parliament than private law. Questions involving the practical application of prerogative claims sit uneasily on the border between these two groups of law, which the Act made no attempt to define. It is certainly not possible to regard that Act as compelling uniformity though clearly the circumstances which resulted from it would tend to induce that result. Even though there has been in fact this unifying process, albeit that there was no legal compulsion to that end, yet lingering marks of the different approach remain. There runs through the cases, and has never entirely disappeared, an inclination to separate the personal “crown” from the governmental “crown,”⁹⁰ and to limit prerogative claims where possible to the former. Equally there has been an enduring insistence upon the obligations of the Crown, and upon the fact that certain rights existed not for the benefit of the Crown, and hence that the Crown’s dealings in those rights must be restricted in the interest of

⁸⁷ 1913 S.C. 194.
⁸⁹ [1954] A.C. at 632. The contrast is not easy to draw since the commissioners had perhaps an uncertain position between the Crown servants properly so called and those in consimili casu discussed in the most recent case.
⁹⁰ This division is apparent in Bruce v. Veitch (supra). It is evident in Lord Dunedin’s remarks on the scope of statutes and in cases like Schulze v. Steele (supra).
the public. The process of absorption has also been slowed by many things; the differences in general constitutional history and of the history of the courts in particular have played their part. So, too, have forms of government. The board system tended to insulate Scottish government from the central government. Though the Board of Education might be in form part of the Privy Council, in law it would be treated merely as one more statutory body. That attitude could affect the extension of Crown privileges to new bodies. In such matters differences between the jurisdictions may amount to no more than differences in emphasis and degree. They can nevertheless be important, and it remains to be seen what effect the remarks of the House of Lords, denying the need for uniformity, will have in this context. Often there are obvious practical advantages in uniformity. Yet granted the existence of separate courts and of separate systems of law, both of which were preserved by the Union legislation and which make differences inevitable, there can also be advantages to be derived from diversity. It cannot be denied that the English rules relating to the Crown, while no doubt advantageous to governments, can, at times, work hardship to citizens. The continued existence of a parallel system of law which is less liberal to the Crown, yet which does not unduly impede governmental processes, could then be an advantage to both jurisdictions. The attention drawn to this situation by the House of Lords should not pass unnoticed. The full exploration of the significance of those remarks can only be carried out in practice. All that has here been attempted is an indication that differences are genuine, deep-rooted, and of potential importance, and an indication of the ways in which further exploration may be possible.

91 This is most marked in the case of regalia—see e.g., Lord Normand in Marquis of Bute v. McKirdy, 1937 S.C. 93, but it is also evident elsewhere, see e.g., King's Printers v. Buchan (1826) 4 S. 559 per Lord Balgray. "In every community there must be certain rights vested in the First Magistrate which are not so much for the benefit of himself as of the public... They are rights which it is his duty to exercise equally as much as the subject is bound to give obedience to the law," a remark which in itself indicates how both kings and subjects are to be regarded as under the law.

92 See, e.g., Macfarlane v. Mochrum School Board and Others (1875) 3 R. 88 at 98. "The Board of Education seemed to contend, in the argument which was addressed to us, that they stand in a peculiarly protected position here as being in effect a department of government. It appears to me that there can be no distinction of persons as regards matters of this kind."

93 Particularly in cases such as Moffat Hydropathic Co., Ltd. v. Lord Advocate, 1918 (2) S.L.T. 220.

94 Most recently see Nottingham Area No. 1, Hospital Management Committee v. Owen, The Times, October 17, 1957.
THE FLEXIBLE CONSTITUTION

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"The British Constitution is a flexible unwritten constitution of a unitary state." Some such general description of our constitutional framework has become habitual, yet almost each adjective is as doubtful as it is commonplace. Admittedly "unitary" or "federal" are not precise words, but the use of the adjective "unitary" has tended to obscure certain difficulties. If it is not known whether central and apparently unified institutions are really one or several,¹ or, if what are admittedly unified central institutions are subjected to different rules ² in different parts of the area for which they exist, it is at least arguable that unitary is being used in a specialised sense. The "specialism" in the case of the adjective unwritten is also evident; to a greater extent than is sometimes believed unwritten merely means that the Constitution appeared after the manner of *Pickwick Papers* rather than that of *Gone with the Wind*, a process which often has the same sort of effect upon the role which institutions have in, or are given by, later legislation as the manner of the appearance of the *Papers* had upon the character of Mr. Pickwick. The misleading or specialised use of these adjectives is, however, well enough known. It is rather with the flexible character of the Constitution that the present article is concerned.

That our constitutional law or constitutional thinking remains flexible in certain branches cannot be denied. Such post-war developments in the Commonwealth as the acceptance of republics, the changed position *inter se* of the United Kingdom and the former dominions, are obvious enough, and a sentence at the end of a report

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¹ The character of the House of Lords as a court is not clear. It may be a United Kingdom, English or Scottish court or a court for Northern Ireland; see T. B. Smith, *Judicial Precedent in Scots Law*, 49. It may be as a result of *I.R.C. v. City of Glasgow Police Athletic Association*, 1953 S.C. (H.L.) 13 and *Glasgow Corporation v. Central Land Board*, 1955 S.C. (H.L.) 1, that the House on its civil side may be either a United Kingdom court or not, according to subject-matter before it. Compare 1956 S.C. (H.L.) at 16 and 1953 S.C. (H.L.) at 22 and 29. On its criminal side, save in relation to treason it cannot operate as a United Kingdom court. An admittedly United Kingdom body can be uncertain whether the rules governing disqualification are United Kingdom rules or not: Report of Select Committee on Elections 1955 (H.C.P. 35).

² The modern examples of the differences of Crown rights can be matched by older ones on a lesser scale of importance—see, e.g., *Henderson v. Scott* (1793) M. 1072.

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that “Their lordships will therefore report to the Head of the Federation of Malaya as their opinion that this appeal ought to be dismissed,” excites little interest. This flexibility remains in “Commonwealth” matters outside this particular field of relationship. The argument that the doctrine of ministerial responsibility may have to be applied in a modified form as a result of developments or proposed developments within the Commonwealth, has substance. There are obvious difficulties in maintaining the doctrine against a United Kingdom Minister with full vigour up to the eve of “Independence Day” and at midnight simply transferring responsibility. Thus flexibility in the application of a rule outside the United Kingdom, which in its purely internal aspects may have acquired greater fixity or certainty, may still be claimed. This remaining flexibility may well be attributed to the fact that no clear “ideal” of the Commonwealth has ever been established. The “ideal” as far as there is one can only be expressed in terms of very general political aspirations, and not in rules which have even that minimum of precision which is necessary for the formulation of rules of law. Moreover concern remains with what is to come, rather than with what has been. Thus the settlement brought about by the events from the Imperial Conference of 1926 to the Statute of Westminster, 1931, did not have the effect of imposing any pattern of thought; events remained in control. That settlement was fortunate in that, apart from certain practical rules of convenience, it was a compromise which pointed clearly in no specific direction. The inherent ambiguities in the Balfour Report which were emphasised by Dr. Latham were put more forcibly by Mr. Hughes. These ambiguities had not been resolved before the events of 1939–45 led to the abandonment (in part at least) of one of the few rules which Dr. Latham had isolated as fundamental law of the Commonwealth, and no generally accepted rationalisation of events themselves has as yet emerged, which could be said to be, or embody, the legal conception of idea of the Commonwealth, and which by its existence might inhibit constant adaptations of institutions and ideas.

That there are risks in such a state of affairs is obvious. The vagueness of the political conception of the Commonwealth can

3 Sajan Singh v. Sardara Ali [1960] I All E.R. 269. This was written before the note in 76 L.Q.R. (1960) 332, had appeared.
4 Even though it may lead to a somewhat confused situation; see, e.g., 607 H.C. Deb. (55.), col. 248 et seq.
5 The Law and the Commonwealth, Sect. II.
7 The Law and the Commonwealth, p. 583. In other respects too those of us who had learnt the fundamental rules of the Commonwealth in the few years before 1939 had to unlearn them in 1946 and thereafter.
become such that the conception becomes valueless. There are though equal dangers when a pattern of ideas about the "ideal" shape of constitutional arrangements has become set. Internally it is possible that this situation is developing. Most obviously there is an ideal Cabinet both in size and operation to which it is hoped, or expected, that modern Cabinets will approximate. To the dangers and difficulties of this situation Mr. Amery has drawn attention. The difficulties in relation to the Cabinet are familiar enough and are, in any event, probably the inevitable consequence of certain other fixed patterns of thought; they are not therefore of immediate concern here, save as an illustration of one cause and one consequence of that loss of flexibility. Paradoxically that loss may well come as a result of taking what is recent as being traditional and so sacrosanct. The opposition to a Cabinet secretariat and to Cabinet minutes was to a large extent based upon tradition; yet the tradition which was looked to was recent, the older tradition, at least as to minutes, was neglected or forgotten, and has only recently been re-emphasised. The consequence of the loss of flexibility (which may be due to this shortness of perspective) is the obvious one, that a machine designed for one purpose is being used for quite different purposes without any real adjustment. This result is all the more likely if a tradition is simply accepted and its origins are not looked at. The machinery of government as it had developed at the end of the nineteenth century and the beginning of this was the result of steady growth during a period in which the nature of government activity was relatively stable, and as a result machinery was well adapted for its purpose. The perfecting of governmental machinery unfortunately coincided with a fundamental change in the nature of governmental activity which Dicey saw and regretted, and which Maitland had earlier seen, perhaps with less regret. In that instance it was an unhappy chance of history that a climax of one development should coincide with the start of another. While the Cabinet affords a good illustration of this, it does not stand alone. At the time when one system of boards had demonstrated the weakness of that form of government, a fresh system was just being created, and again shortness of perspective or narrowness.

8 Thoughts on the Constitution, p. 86.
9 Aspinall, Cabinet Council, p. 194.
10 Law and Opinion, particularly the introduction to the Second Edition.
11 Constitutional History, p. 417 et seq.
12 While the Gilmour Committee was reporting "In our view a fundamental objection to the Board system lies in the division of responsibility which it implies or suggests; it seeks to combine ministerial responsibility with an assurance of some measure of independence to the Boards. Yet it is clear that however the powers of Boards may be defined the ultimate responsibility must constitutionally rest with the Minister "—(Cmd. 5563, § 18), the process of developing another set of Boards, to which the same "fundamental objection" could be
of consideration did not allow the history of one to influence the development of the other.

Yet essentially the rigidity comes not from a pattern of institutions, but from a pattern of ideas. In particular two groups of ideas which dominate in this way are those which are concerned with the nature of constitutional law, and public law generally, and with the place and role of Parliament. Constitutional law has tended (except as to theories of sovereignty and the like) to stand outside the general stream of jurisprudence. A partial explanation of this may be that the application of some theories, for example some of those of Kelsen, is happier in relation to constitutional law than it is in relation to other branches of law. However explicable, this separation is noticeable in two ways. On the one hand the analysis of rights and duties tends to be carried out within the framework of private law relationships and the results are applied in the public law field, even though sometimes they are not wholly convincing or satisfactory in result when thus applied. On the other hand constitutional law tends to be the home of jurisprudential lost causes. Vestiges of natural law theories remain in that field long after those theories have ceased to be important in other fields. The concentration of jurisprudential theory upon private law relationships is both natural and understandable, granted the interest of the problems which there arise, and granted the circumstance that in constitutional law the influence of facts (rather than theory) is felt more strongly. It is all the more understandable since the idea that public law can only be separated for convenience of study, and has no real separate existence, has ruled for so long. Granted that assumption, there is no need to study the institutions of public law with the same intensity as those of private law. A theory evolved in one context can be applied in the other. That concentration taken, was starting in the London Passenger Transport Bill, 1931; see the comments of Lord Morrison, Government and Parliament, p. 255. The Report of the Select Committee on Nationalised Industries (1957) H.C. Papers 304, §§ 10 to 14 is here relevant.

13 Thus events such as those of 1688 could be most easily explained or accounted for in terms of law by an application of his theories, which have also their application to continuing institutions; compare Professor Beinart—"Sovereignty and the Law," Tydskrif vir Hedendaagse Romeins Hollandse Reg, 1952.


15 Consider the rules governing the interpretation of taxing statutes and statutes infringing individual liberties, rules which are founded upon conceptions of "natural law" rights to life, liberty and property.
may be understandable, but it does not follow that it is advantageous in result, particularly if it means that ideas in the field of public law tend to be underdeveloped or static. Fundamentally, however, it is probable that the separateness or distinctiveness of constitutional law and public law generally is not so much attributable to relative underdevelopment because of this chance concentration upon private law, but rather is due to major differences between the two types of law, which have remained insufficiently noticed because of that concentration. It is not so much that public law has, from a theoretical point of view, been looked upon as something of a backwater as that lack of development has caused what is really a separate stream to be regarded, from that point of view, as merely a backwater. Whatever the explanation it is probable that greater attention to the analysis of the relationships of public authorities inter se and with private individuals would be profitable.

Be that as it may in connexion with more detailed rules of law, in connexion with more general theories this "separateness" or isolation brings both gains and losses. The survival of natural law theories may be beneficial, as tending to preserve liberties. The continued emphasis on some other theories is not necessarily so, in so far as it involves a too ready acceptance of traditional theories. Thus, the use of the idea of a sanction as a distinguishing mark of law clearly had its influence upon Dicey's distinction between law and convention.\(^\text{16}\) This has often been commented on in that context,\(^\text{17}\) but the influence of the Austinian conception is much wider. The limitation of the role of the courts in "enforcement" is, or ought to be, apparent over the whole field of public law, and a failure to observe or to allow for it has had, and continues to have, important general consequences which have not been fully recognised, partly because discussion of the nature of constitutional law, where it exists, has tended to centre around the problems of convention, but chiefly because of this habit of regarding public law, at most, as an appendix to private law.

The discussion in the context of convention has, however, emphasised the importance of the meaning of the linked words "court" and "enforcement." Each word in the field of public law tends to have special meanings. Leaving on one side administrative tribunals there are various other courts of a specialised nature and with specialised functions. In matters which fall to be dealt with by them not only the

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16 *Law of the Constitution* (10th ed.), p. 24. There is also a temptation to see a reflection of Austin's terminology in Dicey's alternative name for convention—"constitutional morality."

forum for enforcement, but also the scope and methods of enforcement, show differences from what has become familiar in the traditional judicial system. The Public Accounts Committee should be regarded as a court policing the Appropriation Act, and its power of "surcharge" could be as real as that of the district auditor, even if it is more rarely used.\(^{18}\) The financial "courts" of this type are familiar enough in both local and central government. In local government the parallel is obvious where the district auditor operates; it is not so obvious, nor is the system so effective, where either there are borough auditors in England or auditors appointed by the Secretary of State under Part X of the Local Government (Scotland) Act, 1947. Such persons cannot as easily attain a position akin to that of the Comptroller and Auditor General as can a district auditor. Although it is true that differences of history and of the character of the bodies dealt with have tended to make district auditors somewhat narrower in outlook than the Comptroller and Auditor General, nevertheless there is a kinship in systems and result. In both cases it is through these systems that many legislative provisions are policed. In regard to the central government it is indeed probable that such is the only method, no individual having a title to sue, if he founds his claim (as often he must) simply upon the Appropriation Act.\(^{19}\)

It may well be true of the financial provisions of public bodies, other than local authorities, that for like reasons they will normally escape the control of the ordinary courts. Certainly, in regard to local authorities it is these extrajudicial methods which are the most effective. Even though there may exist other possibilities of challenge, these possibilities are rarely used, and are inappropriate to any consistent review.\(^{20}\) In addition, so long as review is centred on the ordinary courts difficulties abound. It may still be possible to accept, as a formulation of law, the principle enunciated by Lord President Inglis in Nichol v. Magistrates of Aberdeen—"It is in the jurisdiction of this court to interfere and control the proceedings of a municipal council upon sufficient ground—upon the ground either that there is plain excess of power on the part of the council, or upon the ground that what they are proceeding to do is plainly against the interests of

\(^{18}\) See *Epitome of Reports from P.A.C.*, pp. 605–607 and 633, and for the Committee acting as a judge between departments, p. 337.

\(^{19}\) Duties under that Act being regarded as owed to the Crown or to Parliament: *R. v. Lords Commissioners of the Treasury* (1872) L.R. 7 Q.B. 387. The policing can be done, albeit somewhat inefficiently, by the P.A.C.; see Sixth Report 1955–56 and Special Report 1956–57 (H.C. Paper 75).

\(^{20}\) Cases such as *Prescott v. Birmingham Corporation* [1955] Ch. 210, or *Graham v. Glasgow Corporation*, 1936 S.C. 108, arise only where a particular matter has become one of acute political controversy, or else some sectional economic interest is adversely affected. The relatively minor matters in which ordinary unorganised citizens might reasonably be interested tend not to be pursued.
the community which they represent; but where there is no excess of legal power it certainly requires a very strong case to interfere with the discretion which the law vests in the municipal council in the first instance.” 21 Yet, what would now be regarded as “a very strong case” is an even stronger one than that which would have been accepted in 1870.22 So far as discretionary powers are concerned (which are increasingly those which matter) the courts have come more and more to restrain themselves and to rely on the check provided by administrative devices. These are urged upon courts,23 and at times accepted,24 irrespective of their effectiveness.

This is not entirely a modern habit, though its consequences are the greater because of modern developments. There has been a development of an attitude of mind, summed up in such phrases as—

“When by-laws are passed by elected representatives of the people, chosen because of their fitness to serve in that capacity, such persons may be trusted to understand the requirements of the public even better than judges.” 25 There has also grown a reliance upon, or deference to, expertise, particularly that to be found in public departments.26 This reliance has become still more noticeable in later cases, and the effect of such developments is enhanced by developments in other rules of law which have become more rigid and formalistic. The older cases on the liability of superior and inferior servants of the Post Office turn as much upon the existence of internal checks upon the probity of such servants as upon any idea of Crown service.27 The latter ideas only become dominant in Bainbridge v. P.M.G.,28 and

21 (1870) 9 M. 306 at 308, a formulation which, in Lord Deas’ understanding of it (at p. 311), implied the same sort of jurisdiction as that which, in England, was described by Lord Greene in Associated Picture Theatres, Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223, 233–234.

22 Compare, for example, Blair v. Smith, 1924 J.C. 24 when the majority of the court was sceptical about the necessary foundation for a condition imposed on granting a licence, yet would not sustain a challenge to it, or Sutherland v. Wick (1905) 7 P. 574.


25 Aldred v. Miller, 1925 J.C. 21, 25, per Lord Justice-Clerk Alness.

26 Such reliance was influential in moving the court to uphold a conviction in Somerville v. Longmuir, 1932 J.C. 55, despite doubts as to the validity of the regulations under which it was obtained. The substance of these doubts were brought out in Somerville v. Lord Advocate, 1933 S.L.T. 48, in which, upon proper examination, the same regulations were held invalid.

27 See Farrier v. Elder and Scott, F.C. June 21, 1799, and Whitfield v. Lord Despencer (1778) 2 Comp. 754. There was also present the reliance upon a concept of a “fund,” later generally rejected in Mersey Docks and Harbour Board v. Gibbs (1866) L.R. 1 H.L. 111, and which had earlier been rejected in Scotland, see Virtue v. Police Commissioners of Alloa (1873) 1 R. 285.

28 [1906] 1 K.B. 187, largely as a result of Raleigh v. Goschen [1898] 1 Ch. 73.
thereafter operate with rigidity, the rules losing any flexibility which they might have had in their earlier form. Similarly, old roots can be found for the modern conception of the effect of the Appropriation Act.\textsuperscript{29} Such rules were necessary unless the whole business of administration was to be transferred into the courts. So it was said "No member of the community has a title to call the respondents to account generally for their maladministration of the common good of the burgh. The respondents are not answerable for their administration of the burgh property, as if they were trustees for the community. Except in so far as its actings may interfere with the personal uses which an inhabitant is entitled to make of the burgh property, the corporation is only accountable to the Crown for its administration of that property."\textsuperscript{30} This argument remains sound, even when questions of administration are no longer limited to those related to funds or property.\textsuperscript{31} The strict limitations inherent in the rules when first adopted and which were then appropriate may not be so in changed conditions. Moreover the soundness of the arguments is, very largely, dependent on the inappropriateness of the forum. That inappropriateness is felt to exist as a result of a general climate of opinion about the nature of the courts—their neutrality and hence their aloofness in all matters tinged with public policy, and also as a result of their techniques. These techniques limit the effectiveness of the courts either because matters in dispute are not susceptible of proof by the accepted methods, or because the accepted methods if rigorously applied in the field of public affairs cause difficulty. The decision of a company is simply that, and, in litigation, it is reasonable that the whole process by which it was made should, if necessary, be exposed. In relation to public authorities the situation is not always similar. The relationship of officials to the council of a local authority is not always the same as that of servants of a company to the board of directors.\textsuperscript{32} In the field of public law there abound difficulties akin

\textsuperscript{29} Stewart v. Bothwell (1742) M. 7337, an attempt by tradesmen to secure payment out of appropriated moneys for work done. The action was held incompetent—"The remedy with respect to the present officers of the mint was thought to be none other than application to the Treasury, that being the court to which only they were to account." Contrast Craigie v. Hepburn, F.C. Dec. 22, 1807.

\textsuperscript{30} Grahame v. Magistrates of Kirkcaldy (1882) 9 R.(H.L.) 91 at 96, per Lord Watson. See, too, Conn v. Magistrates of Renfrew (1906) 8 F. 505. Erskine's explanation was (Inst. LIV.23) that "maladministration of borough revenues is to be considered rather as a matter of public government than the subject of a popular action in a court of law."


\textsuperscript{32} See, e.g., Robert Baird, Ltd. v. Glasgow Corporation, 1935 S.C.(H.L.) 21, 26-27, per Lord Tomlin. Apart from structure the nature of the work affords some justification for departure from normal rules, even if rules such as those carried to an extreme in Duncan v. Cambell Laird and Co., Ltd. [1942] A.C. 624 be not accepted in their entirety.
to those which prevented any effective use being made of the "public interest" element of Nordenfelt v. Maxim Nordenfelt 33 until the emergence of the Restrictive Practices Court which made possible the development of new procedures and techniques. Further the traditional methods of enforcement are often inapt and cannot easily be effectively adjusted.34

Again, these difficulties are familiar. They spring from the concentration upon enforcement in the ordinary courts. In those courts remedies are often hard to find because rules which were once flexible (and rational in their foundation) have become rigid (and irrational in their application), and because those courts have come to accept a limited role. To some extent the two matters are related, the increasing rigidity being a method of obtaining limitation, but to some extent they are independent of each other. That concentration and the difficulties which have resulted from it have led to the belief that all that "law" can do is done within these narrow bounds. Anything more must be left to administrative regulation, and so it follows that beyond the narrow confines of what can be entrusted to the courts, and within which they are prepared to work, all is discretionary. Indeed the area of "law" is really delimited by the second qualification, and the limits thus set, are, for the reasons already given, distinctly narrower than those which would be set by the first qualification. The consequences of this extend far beyond problems of the remedies of individuals. In the first place, the bodies which are in truth "courts," but which because of this concentration are not recognised as such, are looked upon with disfavour. Above all they are either not developed or are not developed systematically. In the second place there is an effect upon the whole administrative machinery of the state. Controls of law and of administrative policy are vested in the same hands, and become indistinguishable. This simply increases the forces which in any event tend towards centralisation, since the same body or central department has the power to decide what can be done, as well as what should be done. It is true that in the case of local government audits an overt recognition is given to that,35 but this need not be so, and it is undesirable that it should be so. Yet modern statutes, read in the light of the present legal situation, cause this situation to arise more and more frequently.

34 Thus in Pride of Derby and Derbyshire Angling Association, Ltd. v. British Celanese, Ltd. and Orrs. [1953] Ch. 149, 181. Lord Evershed M.R., after pounding sound Dicean doctrine of equality before the law, and mentioning difficulties, adds "So the practice is adopted in the case of local authorities of granting injunctions, and then suspending them for a time, long or short." See, too, Att.-Gen. v. Colchester Corporation [1952] Ch. 86.
35 Local Government Act, 1933, s. 229; Local Government (Scotland) Act, 1947, s. 202.
There is uncertainty about what is a general direction to a nationalised industry. An eventual decision as to what is such a direction will be taken by the Minister giving the direction, and such a decision will be practically unchallengeable save in Parliament, where the argument will not, in essence, be directed to the legal situation. Whereas in other cases a statute, once it has reached the Statute Book, has an independent life, to a great extent it has not where the statute operates in the field of public law. While there can be advantages in that situation there are more serious disadvantages, some of which have been mentioned.

It remains true that in some ways the machinery of government is necessarily one. Without the harmony which can come from this element of unity the general aims of government are not likely to be realised. That consideration is one which can also tell heavily against the use of the ordinary courts. It is one which has played a part in the development of the present situation, and which can matter. There is in the ordinary processes of litigation the appearance of conflict. The lawyer may well recognise that, in particular cases, the appearance is false. The ordinary member of the public will not, and here he is important. The spectacle of different branches of the administration apparently at loggerheads and in open conflict is not one which is likely to increase the esteem of the whole machinery. Issues such as those involved in *Newcastle-under-Lyme Corporation v. Wolstanton Ltd.*, while they may have some jurisprudential interest, will increasingly decide (in substance) whether certain losses are to be borne by the public as taxpayers or as ratepayers, and again, to decide such matters the machinery of the ordinary courts is not always appropriate and is generally expensive. Nor is an admixture of administrative and judicial procedures in different bodies always likely to be satisfactory. Such provisions as those in section 16 (a) of the Housing and Town Development (Scotland) Act, 1957, either render the intervention of the court automatic, or make the preliminary proceedings valueless; the result is likely to be unsatisfactory in either event, since the difficulties which face an ordinary court remain.

Thus it is that insistence upon the “ordinary” courts produces a situation in which those courts are less and less ready to intervene,

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36 Report of select Committee on Nationalised Industries, 1958 (H.C. 187–I) Q. 65 (Sir John Maud) and the Report of the same Committee in 1957 (H.C. 304) QQ. 600–609 (Sir John Cunningham) and Q. 295 (Mr. Thomas Johnston), and see Apps. 5 and 10 to that Report.
37 [1947] Ch. 427.
38 Cf. Coal-Mining (Subsidence) Act, 1957, s. 5.
39 Compare earlier cases such as *Board of Supervision v. Local Authority of Montrose* (1872) 11 M. 170, or *Board of Supervision v. Local Authority of Lochmaben* (1893) 20 R. 434 in which the courts were placed in a like position.
and from many points of view this reluctance can be justified. Further, even when the courts are prepared to make some concessions to the necessities of public law the heritage of private law, which must there be felt strongly, is such that proper and independent development of these concessions is necessarily impeded.\textsuperscript{40} The parallel with the situation in regard to monopolies before the creation of the Restrictive Practices Court is obvious.\textsuperscript{41} Because of this inadequacy controls both of law and of policy tend, in practice, to be more and more administrative. That process forces a centralisation which in itself may not be desirable, but it may also lead to obscuring lines of responsibility.

Practical dependence is concealed by a facade of legal independence, a concealment which may even be perpetuated in modern legislation.\textsuperscript{42} The disadvantages of this process are emphasised when consideration is given to the second aspect of constitutional rigidity, to which reference has been made. At this point it is sufficient to notice that while the disadvantages of the present situation are recognised, amelioration is sought merely through other administrative devices, notably the "Ombudsman" (sometimes thinly allied to existing judicial machinery\textsuperscript{43}) for general administrative purposes, or such bodies as the Council on Tribunals for other purposes. At best such solutions can afford partial answers to part of the problem. They may be able to do something to calm discontented individuals. Even that cannot be foretold with certainty. Differences in the size of a country, as well as in the whole pattern of constitutional development and thought, render prophecies founded upon experience elsewhere uncertain. Those differences can be more significant than they appear to be at first sight, and it is probable that the problem of judicial review is not even the same in Scotland as it is in England. Hence it does not follow that because an administrative device has been successful,

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\item \textsuperscript{40} See Commissioners of Crown Lands v. Page [1960] 2 All E.R. 726. Questions of the relationship of the Commissioners of Crown Lands to other governmental instrumentalities, which were not fully argued there, are simply obscured by use of the umbrella term "the Crown." Problems in relation to such interferences with leases cannot be rationally dealt with if a line of cases dealing with the entirely different conditions of "evictions" by private landlords is taken as a starting point. While the case holds out some hope of a proper development the hope is likely to be frustrated. Compare Magor & St. Mellons R.D.C. v. Newport Corporation [1951] 2 All E.R. 839.
\item \textsuperscript{41} The weary length of the litigation which started as British Oxygen Co., Ltd. v. S.W. Scotland Electricity Board, 1955 S.C. 440, and which has twice reached the House of Lords before coming to trial on the substance of the dispute, together with the conflicts of opinion in the House of Lords on the second occasion in British Oxygen Gases, Ltd. v. South of Scotland Electricity Board, 1959 S.L.T. 181, point the moral. See, too, "Economic Issues in the Courts," 1959 S.L.T. 213.
\item \textsuperscript{42} Consider the Report of the Scottish Local Government Law Consolidation Committee (Cmd. 8993) and clause 4 (2) of the draft Bill prepared by the Committee (Cmd. 9435) and the subsequent Government Explanatory Memorandum (Cmd. 9435) which preceded the Police (Scotland) Act, 1956.
\item \textsuperscript{43} "The Ombudsman in Britain," by L. J. Blom-Cooper, ante, pp. 145, 150.
\end{itemize}
within its appropriate sphere, elsewhere it will be so here. More importantly, what is the appropriate sphere of such bodies must remain limited. Institutions such as those envisaged in the discussions of parliamentary commissioners and the like could not in any event deal with the many legal problems of administrative law which do exist in relation to both institutions and individuals. Even many of the problems related to the latter, who are primarily thought of in this connection, would escape the control of an Ombudsman, but above all the problems to which a modern state gives rise are not to be dealt with by methods which look so much to the individual case, and not to the generalised standards of law. The problem is not of finding solutions in cases of occasional administrative bungling, it is of finding a means of development of a proper corpus of law to deal with the machinery of a modern state. While administrative devices can be partially successful in solving the first and lesser problem, they can do nothing to provide a solution for the second and fundamental problem. Even in relation to the first, administrative remedies are likely to prove inadequate where what is required to do justice is not merely the rectification of a decision but some element of compensation for loss which has resulted from wrongful administrative activity or inactivity. The tardy rectification is an empty victory satisfying the conscience but not the pocket. A judgment can satisfy both.

What is necessary is to pick up the rejected stone—control through a court. That stone was rejected because of the difficulties with which the ordinary courts found themselves faced, and which have already been elaborated, and because past experience of an administrative court was not, to say the least, always happy. The Privy Council in Scotland often deserved the abuse directed at it. Yet it could be a court in the sense with which we are now concerned. It could, and did, regulate the relationship of administrative bodies 44; it could be, and was, a court wherein life, liberty and property could be protected against administrative abuse 45; abuse of public power was one of the recognised heads of its jurisdiction.46 The advantage of such a body lies in its intimate knowledge of administrative machinery and procedures, and in the greater possibility of procedural changes which can facilitate the process of control, and the results obtained from such a

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45 Forrester v. Forbes (supra), Register of the Privy Council of Scotland (Third Series) Vol. XIII. Act in favour of Peter Bruce, p. 427, or in favour of John McHeron, p. 554. Many other illustrations could be found.

46 Ersk. Inst. 1.iii.9: Kames, Elucidations 228.
body can be more forceful than any obtained by purely administrative means. If a Ministry of Education promulgates an unhappily worded circular, a judicial declaration of the limits of ministerial powers of intervention has greater force than a parliamentary reply and is all the more valuable if it can be obtained without cost.\(^{47}\) It is certainly more durable. It is by such means that the degree of ministerial control can be regulated even in that most difficult field of finance.\(^{48}\) Indeed it is one of the major advantages of such controls that, in the hands of properly constituted courts, legal controls go beyond legality and thus achieve not merely all that could be achieved by administrative controls but more also.\(^{49}\) By such means can some of the dicta in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*\(^{50}\) have real life, and a happier balance be struck between charitableness to, and watchfulness of, the administration. Reality here matters above all, and is not always capable of attainment by administrative methods. The activities of the Council on Tribunals may simply result in establishing "safe" methods of reaching certain results, being concerned with standardising and regulating procedures and not with substance.\(^{51}\) As far as individuals are concerned their discontents, where they exist and have substance, are likely to be founded upon a muddled mixture of law and unhappy administration. The provision of an inadequate administrative remedy to supplement an inadequate curial one is not, in such cases, enough.

\(^{47}\) *Syndicat autonome du personnel enseignant des Facultés de Droit*, C.E. Jan. 4, 1957, R.D.P. 676. In his note M. Waline comments: "Le Conseil d'Etat a été charitable pour l'administration," yet despite this charity, limits of intervention in academic affairs were indicated with an enduring firmness which would be entirely absent from an "explanatory" parliamentary answer, even if that adopted an interpretation similar to that given by the Conseil.

\(^{48}\) *Rommel*, C.E. Jan. 8, 1954, R.D.P. 797. Though the note of M. Waline (R.D.P. 1954, 789) emphasises that the existence of a single general administrative jurisdiction at the side of the ordinary general civil jurisdiction may not always produce a satisfactory solution, but it emphasises even more the need for some form of curial control as well as control by administrative devices, and shows how that court properly composed can be bold in dealing with intricate problems, without being hostile to the administration.

\(^{49}\) M. Waline in his comments upon *Legros*, C.E. June 20, 1952, in R.D.P. 1953 at 727 emphasised the emergence and force of a concept of "moralité administrative" as distinct from one of simple legality, a concept which emerges in "la règle, non écrite, non légale, obligeant l'administration à se mettre dans les meilleures conditions pour apprécier au mieux ce que demande l'intérêt public." This it can do because the diverse elements in its composition, each of which appeals differently to the different parties before it, so that a position of respect is built up, after the manner of the growth of the office of Comptroller and Auditor-General.

\(^{50}\) [1940] 1 K.B. 223.

Even more important such remedies do little or nothing to cure the defects within the administrative machine itself. It is only if some external body can intervene that present compulsions to centralisation can be checked, and that bodies which are created by law with some degree of autonomy will enjoy that autonomy in fact. With the increased scope of government activity the maintenance of the autonomy of the public bodies which are not created as parts of the departments of the central government is important. Within the field covered by the departments properly so called there is such a flood of problems already in existence that a barrier against any increase by a spate of problems from elsewhere becomes all the more important. To impede the central government from stretching out into the field of other public authorities and at the same time to force these other authorities to exercise their powers of their own volition, is important even if only from the standpoint of administrative efficiency. That barrier and that compulsion cannot be administrative, the pressures are too strong for any administrative device to be effective, nor can they be found in the ordinary courts, since there forms of action, procedural rules and habits of thought are inapt for this purpose. The aloofness of those courts, which is one of their merits, is here a disadvantage. It is only if the court has an intimate acquaintance with the administration that there can be found the blend of concern for administrative morality and charitableness to the administration which is so often needed in this field. Without that acquaintance charity is likely to be excessive and the regulation of morality to become a matter of form only, or else only to have practical effect in those extreme cases which are unlikely to arise.\textsuperscript{52} It is moreover only in such courts that the problems of working out new rules in relation to such matters as title to sue are likely to be solved. Without such courts the detailed heritage is likely to be too powerful to allow easy adjustment of old rules to new patterns, and such adjustment is much needed.

Thus on the one hand our general constitutional arrangements are upset by adherence to the dogma of "the ordinary law in the ordinary courts," and instead of abandoning that dogma we seek to remove some of the resulting disadvantages to the community by partial remedies which can be reconciled with it. It is possible that those remedies might be adequate as far as individuals are concerned,

\textsuperscript{52} Consider the opinions expressed in \textit{Earl Fitzwilliam's Wentworth Estates, Ltd. v. Minister of Housing and Local Government} [1952] A.C. 362 in its various stages on the theme of improper administrative motive as a ground for attacking a decision. The nice balance which is evident in \textit{Adams v. Secretary of State for Scotland}, 1958 S.L.T. 258 is not often evident, and cannot be in modern times. Consider too the distinction drawn in \textit{Gateshead Union v. Durham County Council} [1917] 1 Ch. 146, 160.
though not universally so. What they will not do is to do anything to redress the general unbalance in constitutional machinery. That results in part from the dogma just referred to, but to it another contributes even more. That other dogma is the belief in the omnicompetence of Parliament. Proper respect for Parliament has led to too great concentration upon parliamentary controls. At the same time proper respect for parliamentary traditions makes any adjustment of the parliamentary machinery difficult. "I am also a little anxious about how this would spread with other Select Committees of the House because there the work, you see, has not entailed the bringing in of outside commercial staff. It has usually depended upon the excellent Clerks of the House, for example, the Estimates Committee, and I think we want to be very careful. We are on the edge of an innovation here which we want to watch very carefully before we actually undertake it." Such was the response of Mr. Butler as Leader of the House to the suggestion that the Select Committee on Nationalised Industries might receive help from outside. That answer could be regarded as itself traditional, since nine years elapsed from the report of the Select Committee on Public Monies in 1857 to the Exchequer and Audit Departments Act, 1866. What is arguable is whether that traditional attitude, which has become more pronounced in this century, is helpful in present conditions. It is doubtful if, today, the speed of gentle evolution from horseless carriage to motor-car is an acceptable speed in the development of constitutional machinery. That example of an attitude of mind does not stand alone in this context.

This rigidity in the conduct of Parliament is all the more important because of the general attitude to Parliament. It has been given, and has steadily taken, an increasingly prominent place in the constitutional scene. That prominence is marked in many ways. The general attitude of the Court of Appeal in Harper v. Home Secretary is in marked contrast to the older privilege cases, or to more recent cases on the effect of "laying" in relation to delegated legislation. It may

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53 Special Report from the Select Committee on Nationalised Industries, 1959, H.C. 276, Q. 263. When the suggestion was made that the real innovation was the injection of this business into the House, he added (Q. 264) "I think you are treading upon new ground, and as Leader of the House I do not want to let our old traditions go too easily."

54 The last Report from the Select Committee on Procedure, 1959, H.C. 92, and its reception (617 H.C.Deb. 33-186) are similarly marked by the same attitude, and many other instances could be found.

55 [1955] Ch. 238.

56 Holt C.J. would, it seems likely, have held that the interpretation of the Schedule of the House of Commons (Redistribution of Seats) Act, 1949, was as much a matter for the courts as the interpretation of borough charters in Ashby v. White (1703) 2 Ld.Raym. 938. Compare [1955] Ch. at p. 251.

be that the courts on occasion, but not uniformly, give unrealistic weight to formulae which apparently reserve a final decision to Parliament, even though it is known that in the overwhelming majority of cases that decision is a formality.\footnote{Compare \textit{Some Problems of the Constitution} by G. Marshall and G. C. Moodie, pp. 93 \textit{et seq.}, and Lord Cooper's article "Administrative Justice" in 32 \textit{Public Administration}, 165. In this context the difficulty is made obvious by R. v. Dorset Sessions Appeal Committee, \textit{Ex p. Weymouth Corporation} [1960] 2 \textit{All E.R.} 470. Whatever Parliament "means" by the phrase "person aggrieved" it is probably not what the courts say it means. Of this the courts are aware, but the past sits too heavily upon them.} Such formulae do, however, cause difficulty. Either they are treated as meaningless, or they are taken at their face (and misleading) value. Their existence is due both to this reluctance to alter parliamentary forms and to the growing reluctance to allow power to exist or to be controlled elsewhere than in Parliament. While it is true that respect for Parliament tends to make parliamentary institutions rigid, it also tends, both in parliamentary and other minds to a weakening of other institutions in favour of, or in deference to, Parliament, and to Parliament in a particular way. Legislative experiment comes to be looked upon as the business of Government and of Parliament in its political capacity. Thus, bold experimentation, or merely experimentation, in private legislation is looked at askance.\footnote{See the Report of the Joint Committee on the Promotion of Private Bills, 1959, H.C., p. 262, particularly s. 34, and consider the preliminary parliamentary history of the Public Vehicles (Travel Concession) Act, 1955; see 537 H.C.D. 757 and the evidence given before the Joint Committee on Private Bill Procedure 1954-55, H.C.P. 139.} Again this attitude is reflected in, or aided by, the attitude of the courts.\footnote{Prescott \textit{v. Birmingham Corporation} [1955] Ch. 210. The provisions there in question do not differ greatly from such sections as the Bristol Corporation Act, 1950, s. 32, dealing with social rehabilitation. In the light of the general social legislation the arguments successfully adduced against the Birmingham Corporation Bill, 1954, would equally strike at such provisions.} Even when it is found that, for perfectly sound reasons, effective decision has been removed from Parliament, protests are heard.\footnote{545 H.C.Deb. col. 41 \textit{et seq.}} The list of illustrations of this concentration upon or in Parliament could grow long—recent privilege cases, the arguments about the "Fourteen-day rule," and others spring to mind. All this may be in part an overflow from the conception of the legislative supremacy of Parliament. The idea (true or false) that Parliament can legislate on anything gets translated into an idea that Parliament must therefore do everything, and do it in the ordinary "political" way. Other of our related constitutional ideas assist this trend; added force being given to them because of their merits in other ways. Ministerial responsibility is one such idea.\footnote{5\textit{3} See, e.g., \textit{Debate} on the Report of the Franks Committee. 206 H.L.Deb., col. 579. If alternative arrangements do exist there is great pressure to force them into the normal pattern; see the debate on the \textit{Radcliffe Report} 614 H.C.Deb. col. 574 \textit{et seq.}} Having discovered a
remedy or remedial institution which works we tend, out of respect for what it has done in the past, to make it universal.

The consequences of this attitude affect detailed rules. Provided that a parliamentary safeguard has been produced or that Parliament has been satisfied we assume that nothing more is required. The satisfaction of Parliament about the disclosure of documents, or about wire-tapping is taken to be the end of the matter, or indeed as the authorisation of particular procedures even though their legal standing should remain (as in the second instance) questionable. Such matters could be important, but perhaps even more important is the resulting imbalance in constitutional machinery. That imbalance means, on the one side, that other devices cannot really develop. So long as the concern is with the parliamentary control (in traditional ways) of nationalised industries there is little hope of consumer councils, consultative committees and the like growing into effective devices. If they so grow it could only be at the expense of what Parliament would regard as its proper sphere of activity. So instead of trying to foster innovations the attempt is made to stick as closely as possible to tradition. Equally there is as a result, on the other side, a steady, indeed an almost inescapable, pressure to centralisation. All must report to Parliament, the Parliamentary Commissioner must, it is suggested, there report in the hope no doubt that there all remedies will be found. Yet the cries of pressure on parliamentary time will be raised in the next breath, even if in what may be a different context.

The doctrine of the sovereignty of Parliament covers in its effects much more than the legislative field. The doctrine was, however, one steadily developed, to meet circumstances in Parliament and in the country which were changing partly, but not entirely, as a result of the processes starting with the Reform Act of 1832. It was a doctrine suited to particular conditions. It does not follow that it is suited to all conditions. Nor is it a doctrine so ancient or sacred that it should be regarded as beyond examination in the light of its expanding practical consequences. Until both the dogma of parliamentary control and the dogma of control by the ordinary courts are looked upon

not now be created, and may look forward to an uneasy future since they are aberrations from the accepted standard.

64 The history of the Council for Wales and Monmouthshire is here relevant. See particularly Cmnd. 631 and Cmnd. 334 and 613 H.C.Deb. col. 196. The difficulties which arose were inevitable, granted the present attitude, so too was the attitude of the Prime Minister. Whether necessary adherence to a traditional pattern is always desirable, is however arguable in the general context of constitutional development, quite apart from any particular issues which are raised by this episode.
not as sacred and inviolable doctrines but as doctrines or suppositions upon which could be built appropriate machinery for one generation, there is little hope of building machinery suited to the needs of public law in a new and different generation. Just as the detailed rules of public law were flexible at the beginning of the nineteenth century, while courts fumbled for solutions, but have now hardened into principles which are rigidly applied in changed circumstances whether appropriate or not, so the general rules of the constitution and especially those related to Parliament have hardened.\textsuperscript{65} Ideas about Parliament in its internal operation have ceased to be flexible, and they are carried into practice whether the results are good or ill, because proper admiration has turned into unreflecting adulation.

A constitution unduly dominated by one institution is unlikely to work satisfactorily, and in moments of stress acknowledgment of and emphasis on this can be found expressed in that other dominant body of a somewhat different type.\textsuperscript{66} The major adjustments in law and government which were required to meet the needs of the Industrial Revolution were as much the result of courts as of Parliament.\textsuperscript{67} A concentration on one or the other would have been inadequate. Today the revolution has been somewhat different. It has been one in the nature of the state, but that dualism remains important, even though courts in their traditional form cannot play the same part for the reasons which have been suggested. Nevertheless the role of law, and thus of courts, remains important. The theoretical distinction between control of policy and control of legality is not one which can in practice be drawn with any precision. The present obsession with the ordinary courts means that control of legality is confined within the narrowest limits so that it is in truth often merely superficial. Granted this, then the other obsession with a body which, at best, is only fitted to control of policy means that either that body is stretching out to control of legality (as in some of the instances given), for which it is quite unsuited, or that a proper control of legality, in any real sense, in relation to many of the problems to which a modern state gives rise does not exist. There is a need for an effective body which can operate on the disputable border-line of policy and law. That body cannot be an administrative one, since, in modern times, it will merely be forced into the present inadequate pattern. It must then

\textsuperscript{65} Advocates for further hardening may be found, see, e.g., the insistence on the formulation of a rule to govern all contingencies in Some Problems of the Constitution by G. Marshall and G. C. Moodie, Chap. III, p. 61 et seq.

\textsuperscript{66} Such remarks as those of Mr. Justice Stone in \textit{U.S. v. Butler}, 297 U.S. 1, 87 (1936) that "Courts are not the only agency of government that must be assumed to have capacity to govern," which can be matched by many similar ones, can be applied to other agencies of government.

\textsuperscript{67} A matter strongly re-emphasised in \textit{Judge and Jurist in the Reign of Queen Victoria} by C. H. S. Filoot.
be some form of curial body. Only such a body will have the
strength and independence to break the pattern and establish itself, as
has the Restrictive Practices Court. It cannot, any more than that
court be entirely "ordinary." It must be capable of advancing into
the field of administrative morality, and to do that must be composed
and operate in ways which may be regarded as novel. They will only
be so regarded if one's eyes are focused entirely upon traditional
courts, but they need not be so regarded if one enlarges one's vision
to embrace both the administrative courts, truly so called, which do
exist and the specialties of public law, which equally exist but which
are not always recognised because of a like concentration upon a
narrow and often irrelevant field of judicial review, dominated in
England by the prerogative orders and, by infection, similarly limited
elsewhere. The real problems of modern administrative law are not
to be found in that field, or, if they are, their solution is not to be
there found. The creation of such a body can only come about if
flexibility remains a characteristic of our constitution, and if we are
prepared to look afresh at Parliament and the courts without making
the assumptions that all answers can be found in the one or that the
other must have a certain shape and character. Present needs will
not be met by creating an odd Parliamentary Commissioner here,
or an odd Council there. What is needed is a genuine place for admin¬
istrative law and administrative lawyers. By creating a proper forum
and conditions for their work the imbalance in the Constitution can
be arrested and the real problems be attacked. Thus experiment upon
the lines of new courts appears to be the most hopeful way of helping
both law and the shape of the governmental machine. Proper balance
and flexibility go hand in hand in the physical and constitutional
worlds. Traditional institutions deserve respect, but they will only
be rightly regarded if it is remembered that the men who made them
were creators even when they posed as laudatores temporis acti. Nor
were they ever inhibited by their pose from experiment to secure
necessary adjustments of constitutional machinery to meet changing
needs. The pose may have become an unfortunate reality in their
successors.
THE OMBUDSMAN FALLACY

J. D. B. MITCHELL

It is one of the paradoxes of the present time that the neo-Diceans, from whose pens the phrase “Rule of Law” flows with such smooth and frequent regularity, abandon controls by law in favour of administrative controls with such apparent ease. This paradox shines out in the report The Citizen and the Administration. Essentially the criticism of that Report lies in this, that the Report recommends a reform which might do a little good. It is, though, a reform which neglects fundamental causes of the present malaise, and is dangerous, in that if adopted it is likely to postpone essential major remedies indefinitely. A half measure, albeit in the right direction, can be more dangerous than immobility in the present congested state of government, since the glow of self-satisfaction resulting from the consideration of such merits as the half measure may have obstructs an appreciation of its limitations, and at the same time the half measure provides a perfect excuse for continuing inertia.

That said, bias (or possible causes of bias) should be disclosed, for the word “impartial” rings in the Report like a Greek chorus. In the course of an ordinary, unenterprising, non-aggressive life the writer has played a part in getting, with relative ease through “administrative” appeals, a telephone box (which while socially desirable for a very small community, could only be uneconomic) on a Highland road, a halt sign at a semi-dangerous corner in a city, a variety of grants to students in whose favour regulations were bent to meet particular needs. On two occasions when, thinking principle at stake, he wrote to government departments in heat, he received courteous explanations, apologies, and rectification where needed. There have been defeats. Commissioners of Inland Revenue remain obdurate, offering an opportunity to go before an independent tribunal, but knowing well that that game is not worth the candle. On the other hand the unchallengeable discretions of tailors, furniture removers, and plumbers have never yielded so satisfactorily to blandishments, indeed slaters have driven the writer to seek precedents in Holland rather than Denmark. This is not simply a matter of bias. To keep a sense of proportion we should, when discussing the supply of telephones by the Post Office, remember among other things the supply of bread by bakers (who rarely supply at economic prices the sort of loaf many

* The author is Professor of Constitutional Law in the University of Edinburgh.
would like) and even the publisher who has had his inexorable house-style. Mass production of goods or services has inescapably some inconveniences for some individuals, but in practice mass production of services by government is already, from this point of view, much more fenced about by protective devices than is mass production by industry.

The main proposals in the Report are (1) that the Council on Tribunals should survey areas of discretion where tribunals and the like do not now exist, and see where they could be introduced, (2) that a General Tribunal should be established to watch over decisions for which specialised tribunals cannot be created, (3) that a Parliamentary Commissioner be created to deal with complaints of maladministration. All of these are to operate in the field of discretionary decisions by government bodies which are not now covered by tribunals. Details relating to these proposals appear in Miss Pedersen's comment, together with criticisms, and there is no need to traverse that ground again. What should be looked at, for Miss Pedersen with the reticence of courtesy could not do so, is the strength of the case made out, the objections in principle to the proposals, and the facile rejection of alternatives. It is only if this is done against the background of Miss Pedersen's informed comment that the value of the Report can be judged.

If one judged strength by the specific "hard luck" cases recorded as typical the case is at best not-proven. The newsagent-tobacconist who lost in the race for a telephone to farmers is unconvincing without a great deal more evidence. Assume that the farmers relied on artificial insemination rather than more traditional methods for breeding and allow for the biology of cows, consider the location of the farm and the need to get the vet to the beast which has swallowed a piece of wire. On a hundred likely hypotheses the priority given by the Post Office was right, and unreasonableness was on the part of the complainant, unless it be also (unreasonably) assumed that the supply of telephones is limitless. Before accepting the assertion that "There is no doubt that investigations carried out by the procedure of an ad hoc inquiry under the Tribunals of Inquiry (Evidence) Act, 1921, are conducted impartially and with thoroughness and fairness" the reader had best read Mr. Harald Leslie's closing speech in the Waters Inquiry on fairness to the investigated, a fairness which should also have its place in the scheme of things. Before accepting at its face value the appeal to the sheriff in relation to attendance at particular schools, the reader should look at cases such as McLeman v. Moray and Nairn Joint C.C.¹ to see the narrow limits within which the sheriff

The Ombudsman Fallacy

The evolution of the regulatory powers under the Factories Acts marks both the stages of their learning, and also the steady evolution of ministerial will intervene, and remember that it is improbable that any tribunal will have the intimate local knowledge which the sheriff can command. Again the attack on the value of the Parliamentary Answer, because it is prepared in the department (para. 82), can be debated. A civil servant is likely to get his department into worse trouble by concealing unpleasant facts from his Minister, than by revealing the whole story. The strength of the case on a factual basis may require close examination, but whatever it may be, it must be admitted that cases of maladministration arise, stupid or wrong decisions are taken. Even when that is admitted or even if the factual case were taken at its face value, the questions remain. Has the right remedy been chosen? Is the cure worse than the evil? Thus one turns to principle.

In the first place there is no easy distinction (which the Report tacitly assumes) between decisions which involve policy and those which do not. The point is admirably made by Miss Pedersen, but should be emphasised. In an imperfect world the supply of marginal benefits under the National Health Service is not simply an individual matter. The availability of those benefits depends on the availability of money. That depends on how much the government is prepared to allocate to the Service as a whole and what allocations are made within the Service. Budgets and priorities are inescapable (some of the troubles of the Service spring perhaps from areas where these cannot well operate). The "individual" cases should therefore be argued on principles of allocation, and that argument is not appropriate to a tribunal. Indeed our grandparents learnt in the nineteenth century that government cannot be put out to arbitration. The evolution of the regulatory powers under the Factories Acts marks both the stages of their learning, and also the steady evolution of ministerial

2 If one went into detail, on the other side, one could cite the revaluation in the city of Edinburgh, an enterprise which increased the total of the valuation roll by 43.3 per cent, and was thus not likely to be popular. The number of subjects revalued was 183,478. Out of the 1,806 appeals so far listed 81 have been successful (a figure which must be taken as high because there is reason to believe that a number of these successes may subsequently be overturned). Accepting the figure, and assuming that the trend is typical of what is likely to happen in relation to all appeals lodged, it will mean that just over 0.1 per cent. of the administrative decisions will have been demonstrated to be wrong. That figure is itself probably about twice what it should be since in a large number of "successful" appeals the appellant has got no greater reduction than the City Assessor was prepared to make after an administrative "appeal" or discussion. The true figure is probably about 0.05 per cent. and this is an area of decision where uncertainty is great and the incentive to challenge high. The City Assessor, while knowing his job, is no genius; he is merely typical of the sort of person who ought to be, and so often is, in the public service.

Alternatively one could cite, in relation to the remission of customs duty (which is referred to in the Report, para. 46, and for which a tribunal is proposed), a large undertaking which is frequently involved in that question, and which could not produce any examples of unreasonableness over a period of five years (though it could give examples of helpfulness from Customs authorities). Admittedly one swallow does not make a summer, but one man's swallow is as probative as the next man's.
responsibility. If that history be regarded as too old, the same moral is pointed by Herbert Storing and Peter Self in “The Birch in the Cupboard”8 in one field and in another by Daniel Mandelker on “Planning Appeals and the Adjudication of Policy.”4 It is at this point, as Miss Pedersen remarks, that there is the deepest clash with constitutional theory. The clash may not matter; what does matter is the fact that the proposal, while purporting to be a safeguard, would, if adopted, involve an erosion of responsibility, and afford to Ministers a convenient escape route—a Minister may well indeed rejoice at the possibility of transferring an unpleasant duty, but the duty is properly his and he should, under our system, answer for it. If the tribunal follows ministerial policy he should be responsible; if it departs from that policy his position is made impossible, and in this area of discretionary decisions we are concerned with an area in which departmental policy properly exists. The immediate source of confusion is probably the Franks Committee and that part of its Report which argued that tribunals and inquiries are part of a process of adjudication and not of administration, and thus perpetuated in a different guise the old and fruitless administrative-quasi-judicial dispute. This passage creates the impression of a clear dividing line where none exists. The present Report then attempts to draw this line at a point well clear of the disputable lands, in territory where it is clearly inappropriate. To move in one step by the use of the word “tribunal” from claims to National Assistance Benefits to the siting of parts of hospitals (para. 38) requires seven-league boots, but it is a step which is here taken with misleading ease, neglecting even the distinctions drawn in the Franks Report itself.

Those objections apply to the specialised tribunals which are to be set up (and no estimate of their number is given). They apply with even greater force to the General Tribunal which is by definition a maid of all work. The incidence of complaints coupled with the breadth of its jurisdiction will be such that it can hardly be expected to have, in any particular case, the necessary familiarity with the principles and issues which are involved.

The proposal for the creation of the Office of the Parliamentary Commissioner does not to the same extent clash with the principles hitherto discussed. Modifications of the Scandinavian practices are proposed to fit that office into the scheme of Parliamentary responsibility, possibly to the prejudice of the office. Other objections may however be raised. The Comptroller and Auditor-General, even in his widest fields of activity, operates in a context in which an audit (whether broad or narrow) is accepted. Moreover he is in truth in

no way an adversary, but rather an ally of departments. The analogy between his office and that of the Parliamentary Commissioner is not, then, as close at it seems, for the latter would *ex hypothesi* be investigating a charge against the Department. Investigation is his job, and that being so two answers of Sir Geoffrey Heyworth (as he was then), given in evidence to the Select Committee on Nationalised Industries⁵ should be remembered. "Any form of detailed control seems to me to carry with it the certainty of mediocrity or less" (Q. 689). "We never use the word 'investigating' inside our own concern. People would fall off their chairs if they heard it. People would get shot for using it, because of the alarm and despondency it would cause" (Q. 739). The complexity of modern government inevitably makes its processes slow. It is then all the more important that the effect of controls should be watched. Governments exist to act, and to act on a scale which requires high abilities from their staffs. The number of people looking over their shoulder may well affect the speed of action, and certainly is likely to affect civil servants’ readiness to act. Even more certainly will that number affect those who will be recruited. The man of ability and ambition will go where he can act in a worthwhile matter with relative freedom. Today there are many such opportunities where he can also enjoy the same degree of security as the civil servant, a security which might otherwise be a countervailing attraction. The needs of the service, which are the needs of the community, have their place in the scheme of things, and the satisfaction of every individual can be bought at too high a price.

All these criticisms may in the end of the day be regarded as minor and technical, because of two major considerations. The first is that the wrong problem is being attacked as the main objective. What is lacking in our society is any proper system of public law. The absence of any remedy in cases such as *Southend-on-Sea Corporation v. Hodgson*,⁶ where the innocent citizen is entirely misled by the public authority and is left entirely without redress, where regulations which to a judge "seem to me to purport to lay down mutually binding terms of employment between the Crown and the employee, to which the assent of the employee has to be obtained" and yet which in the end of the day afford not one crumb of comfort to that employee,⁷ where a public body discharging a most important function could boldly report that in obeying a Minister’s behests it had simply disregarded an obligation imposed upon it by statute,⁸ such circumstances to name only a few modern diverse examples show how the fundamentals of a proper regulatory system by law is entirely lacking.

These examples show more grievous hardship or danger than any of the cases of so called maladministration here produced. It is they which should cause the shade of Dicey to stalk the land, but they will be left without a remedy even if the whole of this Report were adopted. Dr. Goodhart once attacked deficiencies of the law of negligence under the title “Dangerous things and the Sedan Chair.” In the field of public law the law is even more antiquated, and the situation even more serious because of the inadequacies of the law where it does exist, and the vastness of the areas which it does not touch. It is not merely that there is grave injustice to individuals, it is as much that forms are entirely inapt for modern purposes. Parliament debates the letting of contracts for fuel supplies at airports, but no hope of a satisfactory solution exists until such contracts are recognised for what they are—administrative contracts, or else some such device as the American renegotiation is adopted and such devices in themselves imply a proper system of public law. This instance has particular relevance to the present discussion. Here is a matter raised in a Select Committee (in part at least) as a result of the activities of an official of the type now proposed. Yet though the situation gives rise to numerous possibilities of injustice to the contractor or injustice to the public at large (both on a significant scale) no remedy is in sight. Remedies are to be found through law, not administrative palliatives.

It is here that the real weakness lies, and since the Report concerns itself primarily with the wrong question it is inevitable that it should also come up with the wrong answer, even in its chosen field. One might almost add that it does so for the wrong reasons. It rejects any consideration of a solution through something akin to a Conseil d’Etat. It does so because the Franks Committee “did not propose any major reconstruction of the English system of administrative tribunals and their relationship to the ordinary courts.” What in fact the Franks Report did was to reject (para. 121) a general administrative appeal tribunal (of a somewhat ambiguous character but embracing the sort of body now proposed) and to reject (para. 125) an Administrative Division of the High Court as beyond the terms of reference. Thereafter debate was essentially centred on the Franks proposals. The merits of a proper administrative jurisdiction and the deficiencies of the body of public law which lie at the heart of the matter have never been fully and formally debated. Even were that not so, and the passage on this matter were unchallengeable, the fact that the government in 1958 went one way should not, in an objective

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9 See 650 H.C. Deb., cols. 694, 658. Indeed, many passages in the whole debate which started at col. 637 should provoke thought about the effectiveness of the mechanism.
study, preclude consideration of what was then rejected, unless one assumes that it is a sound maxim that, if someone has only just turned down what is or may be the wrong road no effort should be made to get him back on the right road.

The point may be simply illustrated. As a random sample the volume for 1960 of the *Revue du Droit Public* was taken; again as a random sample certain notes and reports were looked at. What emerges is that in *Kitten*\(^{10}\) and in a variety of other instances the *Conseil* was giving force and substance to a statutory obligation of an administrative body to take advice (a matter which has not yet been satisfactorily dealt with here); in *Demoiselle Segrettin*\(^{11}\) the *Conseil* was dealing with the difficult problem of medical fault and faults of hospital administration; in *Chambre syndicale des médecins de la Seine*\(^{12}\) the problem was that of the legitimacy of doctors on the staff of public hospitals charging fees to their private patients treated there, and the solution demonstrates how subtly a balance may be struck between the needs of a service and the interests of individual doctors, and how pliable may be a control by law as distinct from one by administrative means; in *S.A.R.L. Le Monde*\(^{13}\) the *Conseil* is in a vital field dealing with a question of fundamental liberties because it can do so better than other courts and it does so with great force and logic; in *Doublet*\(^{14}\) and the Note by M. Waline that most difficult problem of administrative inactivity is dealt with. All this is done with authority; it is done, as far as the citizen is concerned, cheaply. Even so short a range of examples demonstrates how traditional problems and those of the new form of state can be effectively dealt with by a proper court which can produce a remedy effective in the particular case. It can safeguard alike the essential interests both of the individual and of the public service without fear of ministerial veto and, which is just as important, without the clamour which in our practice attaches so frequently to the administrative and political remedies. In effect there is a great and flexible machine capable of doing not merely what the authors of the report want done, but beyond that what is also sorely needed. Yet all this is dismissed without consideration. The rejection is all the more surprising since the merits of the *Conseil* lie as much in procedure as in remedies, for it is adjectival law which makes shadows of our remedies in public law and there are difficulties of a like kind even in the present proposals. All this body of effective remedies is rejected out of hand in the present report for an administrative device incapable of ordaining compensation, and over which Ministers are to have a right of veto.

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11 C.E. July 15, 1959.  
13 C.E. June 24, 1960.  
Perhaps this rejection is in part due to our reluctance to admit that what was excellent for one purpose may not be excellent in changed conditions. An Ombudsman who works for five million people is assumed to work for fifty million just as well. A Parliament which could contend with a nineteenth-century government is assumed to be equally capable of doing so with a twentieth-century one. Yet the manner in which the report blows hot and cold on the value of Parliamentary questions shows this is not so, even if other observations did not make this clear beyond doubt. We have arrived at a complete confusion of law and policy, and, as Miss Pedersen shows confusion is to become worse confounded. Moreover it does not as yet appear that seeking a solution along the lines of a Conseil is so inconsistent with principle, or so possibly injurious to efficiency as the reforms proposed. Parliament is not a court in this sense, nor should ministers be judges of law. The latter should properly be subjected to both political and judicial controls. By strengthening the latter in a manner not inconsistent with administrative efficiency Parliament would in fact be helped to perform its proper tasks in the first respect more efficiently. The Conseil has in a variety of ways insisted on and preserved the dynamism of the administration. It is not the investigator. It is in truth the judge which neither deters nor alienates the administrators but yet enforces standards of law and of administrative morality. That strengthening could to a great extent eradicate the causes of the modern malaise about maladministration, and thus even in the chosen field achieve broader effects than the Ombudsman, and at the same time do much more elsewhere.

In that direction some hope might lie. Certainly the possibility demands much closer study before alternatives are adopted. Perhaps Justice, now that Miss Pedersen has emphasised that one of the praised institutions does in fact work in this direction, may pursue the matter. It is to be greatly feared that any adoption of an Ombudsman would foreclose such an investigation, which makes one regard this proposal as dangerous, for until that investigation is made the full facts are not presented for judgment.

To say all that is not to say that there is not room for some form of Inspector-General—Ombudsman—call him what you will. Few, and certainly not the writer, would claim that present arrangements are perfect, or nearly so. History has left anomalies. Things are submitted to tribunals which should not be; things are not submitted which should be. Here is a constant need to survey and adapt the machinery of government. Efficiency in a narrow sense may be watched over by O. and M. Divisions and similar devices, but
efficiency in the sense of securing the sort of administrative machine which will achieve the greatest collaboration from the administered cannot be guarded thus. Nor can it be done because of the pressure of events by the official Head of the Civil Service himself. It could be done in his office and should be. This is the proper task of an Inspector-General of Administration. It is one, curiously and paradoxically, which this report proposes should be entrusted to the Council on Tribunals. That body because of its interest, because of its necessary exclusion from the administration, is certainly inappropriate to fulfil the task. If it be thought that government morality has sunk to so low a level that it is necessary for such an Inspector-General to be given tenure ad vitam aut culpam so that he may speak his mind, by all means let it be so, or, more probably, if it be thought that such tenure would comfort the ordinary citizens then most certainly let it be so. It is in this direction that rightly Professor Davis sees major potential improvements. The questions he poses do need a machine, if not to answer them, at least to consider them coldly and continuously and to report.

Such a proposal does involve a continuous readiness to examine machinery whether traditional or new-found. The revolution of this century makes essential at least one such examination and makes desirable a continuity in that process. We are at a stage when patching will no longer suffice. We are too at a stage when we want a return to law, even if it be to modern and efficient law. At such a time of crisis half measures are indeed dangerous. While at first sight those advocated in this report may seem attractive, it is suggested that on closer and fuller examination the advantages may well be illusory and are less than could be gained by other means. The attractions will be most strong for the ordinary citizen who feels bewildered by the modern state. No doubt for him the acceptance of the proposals might do some little good, but it would be a pity if in his confusion he were misled by not having all the alternatives before him. In the long run he is likely to be better served by other means which would also improve the general administrative health of the state.

The situation is in truth such that there should be a return to first principles, and a review based upon them. Such principles include the place of law as well as the place of Parliament in a modern society. A balancing, after hard thought, of the interests of the administration (which are our collective interests) and of our interest as individuals is needed. It is not enough to run after the first attractive nostrum that is proposed. Professor Giraud criticising some aspects of the teaching of public law in France remarks\(^\text{15}\): “C'est qu'en effet

\(^{15}\) R.D.P. 1961, 269.
l'opportunisme, . . . éloigné de l'objectivité scientifique. Il fait prendre pour indestructible un régime traditionnel vermoulu ou bien il fait prendre une nouveauté éphémère pour le commencement d'un ordre nouveau.” That text could serve for a sermon in this jurisdiction also.
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JURISPRUDENCE RÉCENTE
RELATIVE AUX
CONTRATS ADMINISTRATIFS
EN GRANDE-BRETAGNE

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Les guerres et les rumeurs de guerre présentent incidentement des avantages pour les juristes. Les crises qu’elles provoquent dans la direction des affaires peuvent accélérer le développement de certaines branches du droit et peuvent, en les mettant en valeur, attirer l’attention sur l’état d’autres branches. En Angleterre, ce furent dans une large mesure les litiges issus de la guerre qui provoquèrent le développement et la réforme de la doctrine de la Frustration dans les contrats (doctrine qui doit également beaucoup à la crise sociale provoquée par l’ajournement du couronnement d’Édouard VII). Les conséquences de la guerre n’ont-elles pas, dans une large mesure, provoqué le développement de la doctrine quelque peu analogue de l’imprévision ?

Le juriste sacrificerait naturellement avec joie ces bénéfices incidents pour son système si les guerres pouvaient cesser, cette relation n’étant soulignée que parce qu’une fois de plus, une crise internationale a projeté plus de lumière sur l’état du droit public en Grande-Bretagne. Les événements de Suez d’octobre 1956 provoquèrent, entre autres choses, le rationnement du pétrole ; de plus, pour réduire la consommation, le pétrole fut soumis à une taxe additionnelle par l’Hydro-carbon Oil Duties (Temporary Increase) Act, 1956. La réduction des ventes, de même que le long transit par le Cap, signifiaient que les coûts de distribution allaient augmenter également et, par conséquent, les compagnies pétrolières augmentèrent le prix de base du pétrole. Il est évident que dans beaucoup de contrats les frais de transports jouent un rôle important et la question se posait donc de savoir si un ajustement pouvait être fait pour ces coûts accrues. En janvier 1957, une circulaire

montre que l’action administrative gracieuse peut ne pas toujours aboutir à un résultat équitable, et d’autres affaires l’ont démontré également.

D’anciennes décisions avaient énoncé l’affirmation générale selon laquelle une autorité publique ne pouvait jamais accepter des obligations contractuelles qui pourraient interférer avec leurs pouvoirs et leurs obligations réglementaires (5). Bien qu’une telle règle soit d’utilité manifeste, elle est aussi largement formulée impraticable à l’époque actuelle alors que le nombre des autorités publiques et le champ de leurs activités ont considérablement augmenté. Dans l’affaire The British Transport Commission v. Westmorland County Council (7), la Chambre des Lords a limité l’application du principe, tout en en confirmant l’existence. Une ancienne compagnie de chemins de fer (dont les droits et obligations avaient été transférés à la Commission des Transports par la nationalisation) avait été primitivement contrainte de construire des ponts sur la voie pour la commodité des propriétaires dont les terrains étaient traversés par la ligne. Par la suite, le public commença à utiliser le pont comme partie d’un sentier et demanda qu’un droit public de passage sur le pont fût consacré. Cette prétention fut contestée par la Commission pour le motif que l’affectation du sentier à l’usage du public (base d’une prétention fondée sur la prescription) serait irrégulière (ultra vires) en raison du principe en cause. La compagnie de chemins de fer avait le pouvoir statutaire de suspendre l’utilisation du pont dans certaines circonstances et (ce qui ne s’était pas produit), il fut avancé qu’une telle consécration d’un droit de passage serait incompatible avec une telle suspension ; ainsi l’obligation de maintenir le pont comme partie d’un sentier empêcherait la Commission de remplir ses attributions statutaires. Il était évident que, bien qu’en apparence la capacité contractuelle des autorités publiques ne fût pas engagée, elle l’était en fait. La commission soutenait qu’elle ne pouvait pas valablement contracter des obligations qui pourraient, en certaines circonstances, faire obstacle à ses objectifs statutaires. La Chambre des Lords rejeta ce point de vue. L’incompatibilité qui invaliderait un contrat devrait, selon les Lords, naître de circonstances raisonnablement prévisibles et non de circonstances fortuites. De plus, pour être

(6) Cf., par exemple, Ayr Harbour Trustees v. Oswald (1883), 8 App., Cas. 623 ; Paterson v. Provost of St. Andrews (1881), 6 App., Cas. 833 et les autres « cases » discutés dans Mitchell, The Contracts of Public Authorities, Ch. III.

(7) [1968], A. C., 126.
cause d’invalidation, l’incompatibilité doit affecter l’exécution « adéquate et efficiente » des obligations statutaires. Ainsi, il est évident que pour affecter un contrat conclu par une autorité publique, l’interférence avec de telles obligations doit être substantielle. La décision étend ainsi le droit du co-contractant et impose des conditions plus rigoureuses aux autorités publiques qui cherchaient à dénoncer des accords gênants mais apparentemment obligatoires. Le fait même qu’une telle affaire se produise souligne peut-être le besoin de limiter la règle originelle et d’augmenter, pour décider de son application, le rôle des tribunaux. En ce qui concerne les faits relatés, il est évident que c’était une charge pour la Commission de transport, mais, en raison de l’importance de cet organisme, il apparaît cependant que cette charge était légère. Néanmoins, la décision laisse beaucoup de questions sans réponse. Par exemple, la date à laquelle la validité du « contrat » doit être déterminée n’est pas claire. Pouvait-il y avoir une incompatibilité originelle dans l’espèce discutée ou celle-ci était-elle apparue à une date ultérieure ? Dans ce dernier cas, la position du co-contractant et les solutions qui lui sont offertes ne sont pas nettes.

Au moins dans de telles hypothèses constate-t-on que le caractère « public » d’une partie à un accord peut avoir ses effets sur cet accord, alors même que ces effets ne sont pas entièrement certains, et on peut considérer que de telles affaires marquent l’apparition d’une théorie plus cohérente des contrats publics ou administratifs. Une telle tendance n’est cependant pas constante. Glasgow Corporation v. Western Heritable Investment Co. est un exemple d’une tendance opposée. La construction de logements à bon marché destinés aux ouvriers est habituellement assurée par les autorités locales. Cependant, dans le passé, des sociétés de construction privées ont été encouragées, en application de la politique gouvernementale, à assurer, au moyen de subventions, cette construction. En contrepartie de la subvention, le constructeur devait accepter certaines conditions, destinées à s’assurer que la politique était mise en œuvre, et que les maisons ainsi construites étaient aussi convenables que si elles avaient été érigées par une autorité locale. Dans ce cas particulier, les constructeurs recevaient une subvention de 13 livres 10 shillings par an pour chacune des 6.000 maisons construites entre 1926 et 1933, bien que la subvention ait pu

(8) [1956], A. C., 670.
(9) Pour cette affaire, cf. Housing (Financial Provisions), Act, 1924, S 3 (2), the governing statute.
CHRONIQUE ADMINISTRATIVE ÉTRANGÈRE

(n° 4, 1957) fut envoyée à toutes les autorités locales d'Écosse par le Department of Health for Scotland (Département sous le contrôle du Secrétaire d'État pour l'Écosse) compétent en cette matière. Une circulaire analogue fut envoyée aux autorités d'Angleterre et du Pays de Galles par le Minister of Housing and Local Government. Ces circulaires informaient, pour leur gouverne, les autorités locales, que le Secrétaire d'État était disposé, pour les contrats qui le concernaient, à faire un paiement ex gratia au contractant là où il apparaissait que, par suite d'un accroissement des coûts, en raison des circonstances, le contractant avait subi une perte extracontractuelle « overall loss on the contract » (distincte d'une perte de profit) et supporté un préjudice illégitime. La suggestion était claire pour les autorités locales qui devaient adopter la même règle.

La ressemblance de cette décision, quant à ses effets, avec la doctrine de l'imprévision, est nette. La différence principale l'est aussi. Cette compensation a été accordée au contractant comme une faveur. Il n'y avait aucune possibilité pour le contractant de faire appel à un tribunal pour faire valoir sa requête. Sans doute cette décision du Secrétaire d'État, en ce qui concerne les contrats de son propre Département, était-elle inspirée par les mêmes motifs de justice, de nécessité administrative et de commodité qui ont contribué à l'évolution de la règle française. Sans doute aussi peut-on croire au sentiment de « moralité administrative » qui a incité les Services centraux à adopter cette attitude. Cependant l'accent mis sur le caractère ex gratia du paiement montre clairement la différence entre le droit public français et le droit public anglais. Beaucoup de solutions, notamment dans le domaine du droit public, qui, en France, sont consacrées par le droit ne peuvent être obtenues en Grande-Bretagne que par l'action administrative gracieuse. Le résultat pratique peut souvent ne pas être aussi différent que la différence de méthode le suggère, simplement en raison du sens élevé de la moralité administrative qui existe généralement au sein du British Civil Service. Il existe cependant des cas où on se demande si une protection plus grande ne serait pas nécessaire.

Il est remarquable que dans une affaire récente les tribunaux aient fait quelques pas dans la voie d'un contrôle plus étendu de certaines décisions administratives. Dans l'affaire Glasgow Corporation v. The Central Land Board (2), la Chambre des Lords a décidé que, selon le droit écossais, à la différence du droit anglais, une décision d'un ministère selon laquelle certains documents ne devaient pas être divulgués dans

(2) [1956], S. C. (H. L.), 1.
un procès, pour le motif que leur production serait contraire à l’intérêt public, ne lait pas les tribunaux de façon décisive. La portée de cette décision est toutefois incertaine. Il est évident que la place dominante du Parlement a une influence sur les décisions judiciaires. La frontière entre «la politique» et «la légalité» n’est pas claire et on place une grande confiance dans le contrôle parlementaire de l’administration (3), une confiance qui, parfois, provoque la réticence des tribunaux (4). Ce contrôle parlementaire, bien qu’il ait ses mérites, n’est pas toujours satisfaisant dans certains cas particuliers, ainsi que quelques affaires récentes relatives aux contrats administratifs l’ont montré.

En l’absence d’une notion autonome de contrat administratif, les difficultés apparaissent vite. La rigidité du droit commun du contrat, qui peut être convenable et avantageuse en ce qui concerne les conventions entre les personnes privées, peut très bien être inadéquate et présenter des désavantages lorsqu’elle est appliquée aux contrats des autorités publiques. Ainsi, dans l’affaire Sir Lindsay Parkinson and Co. Ltd. v. Commissioners of Works (5), le préjudice subi par le contractant put seulement être évité grâce à une technique dont la construction pouvait, en elle-même, provoquer des difficultés. Ce fut cependant seulement par l’utilisation de cette technique que les tribunaux furent capables d’empêcher qu’une clause permettant à l’administration de demander un travail supplémentaire à un co-contractant dans un contrat de travaux publics fût utilisée pour lui imposer une charge entièrement imprévue, qui aurait été disproportionnée à la rémunération équitable. Bien qu’on puisse parfois s’évader de la rigidité des règles contractuelles ordinaires au moyen du type d’arrangement administratif qui a déjà été mentionné, l’affaire Lindsay Parkinson elle-même

(3) Le contrôle parlementaire peut aussi être relatif à la légalité. Ainsi, le Select Committee on Public Accounts de la Chambre des Communes peut être le moyen effectif d’assurer la légalité de la dépense des fonds publics. Cf. le rapport spécial du Committee, 1956-1957 (H. C. P., 1956-1957, 75 (1)).

(4) La déclaration de Lord Sorn dans Griffin v. Lord Advocate, 1950, S. C. 448 : « La Couronne est responsable envers le Parlement, mais je doute qu’elle soit responsable envers le citoyen » est une des nombreuses déclarations soulignant que le respect des dispositions légales générales, et notamment de celles relatives à l’affectation de sommes à la dépense du gouvernement, peut seulement être imposé par l’action parlementaire et non par les tribunaux. Dans cette affaire, la requête était présentée par un fonctionnaire qui réclamait un paiement arriéré.

(5) [1949], 2 K. B., 532. Le contrat était relatif à la construction d’immeubles pour le gouvernement et avait été substantiellement affecté par le programme de réarmement de 1938-1939.
« en ce que la partie subventionnée ne pouvait pas, en droit, intenter un procès » (13). Affirmer que cette alternative n’est pas satisfaisante n’est pas du tout jeter un doute sur la méthode selon laquelle la Commission déterminait dans les cas particuliers quelles sommes étaient dues. C’est essentiellement affirmer qu’en général un tel pouvoir discrétionnaire apparemment incontrôlé n’est pas souhaitable.

Cette affaire met en valeur l’inconvénient majeur de l’état actuel du droit en Angleterre. L’absence de fluidité des contrats administratifs signifie que l’administration tend à accorder des recours ou à régler sa conduite par des méthodes administratives ou discrétionnaires. Quant au contractant, il a tendance à chercher sa propre protection dans la rigidité du contrat. Le succès des prétentions de l’un ou de l’autre peut très bien, comme les affaires relatées l’ont montré, ne pas contribuer au bon état du droit. On s’en rendra compte à l’occasion d’une affaire plus récente, Triefus and Co. Ltd. v. The Post Office (14). Deux paquets contenant des diamants d’une valeur de plus de 20.000 livres avaient été perdus par la poste sur la route de la Nouvelle-Zélande. Les expéditeurs essayèrent de réclamer une indemnité pour leur perte sur la base d’un contrat avec le Post Office. Cette prétention fut rejetée en vertu d’anciennes décisions et de règlements récents. D’après ces derniers aucune relation contractuelle n’était créée par l’acceptation de paquets postaux recommandés. Ces règlements prévoayaient également un pouvoir discrétionnaire en vertu duquel on devait payer une somme limitée pour compensation de la perte et soulignaient que « la décision du Postmaster General sur tous les litiges s’élevant entre lui et quelque personne réclamant une indemnité en raison d’une perte ou d’un dommage... était définitive et sans appel ». Ainsi, l’administration s’assure la liberté d’action qui lui est nécessaire, mais par des moyens qui rendent compréhensible que des tentatives soient faites par les particuliers pour chercher la protection de droits contractuels même là où, comme dans cette affaire, il y avait peu d’espoir de réussir, et où, en fait, la rigidité d’un contrat ordinaire ne devait pas trouver place.

Il ne s’ensuit cependant pas que cette situation doive durer. Dans une des anciennes décisions (15) auxquelles s’est référé le Triefus Case Lord Mansfield a fermement rejeté (16) toute analogie entre le Postmaster General et un transporteur ordinaire. Les besoins et les condi-

(13) [1956], i, W. L. R., at 15.
(14) [1957], 2, Q. B., 352.
(16) 2, Cwp., p. 764-768.
tions d'un service public, soulignait-il, sont fondamentalement différents de ceux d'un transporteur privé. Bien que trop peu d'importance ait été donné dans le passé de telles conceptions qui cherchaient à modifier les règles de droit en vigueur, de telles considérations ont finalement eu un effet. Le principe lui-même fut réaffirmé par Lord Justice Parker dans le Trifus Case. « Il est évident », disait-il (17), « que le Postmaster est dans une position tout à fait différente de celle d'une personne privée. Il est responsable envers la Couronne du fonctionnement d'un service public qui se trouve être un monopole. Le prix payé par le public constitue un revenu de l'État. » Dans d'autres affaires récentes, de telles considérations ont influencé les solutions (18). Les tribunaux se sont montrés également favorables à un contrôle des charges des entreprises nationalisées dans une voie qui à la fois rendrait justice au consommateur et prendrait également en considération les nécessités de l'industrie (19). Une telle attitude pourrait remédier aux difficultés actuelles. Cependant en elle-même cette solution présente des difficultés. Ni la procédure ni les solutions ne sont actuellement bien adaptées aux particularités des contrats des autorités administratives. Il reste à se demander si les difficultés provoquées par l'état actuel du droit, unies à la conscience d'un besoin qui se reflète dans des déclarations telles que celle de L. J. Parker, vont amener la modification nécessaire. Hier, la doctrine des contrats administratifs n'était pas encore développée en France et les pressions des conditions modernes peuvent très bien amener une évolution similaire ici, à un rythme plus rapide.

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(17) [1957], 2, Q. B., 367.
(18) Par exemple, à propos de la réglementation concernant les propriétaires de bacs travaillant en vertu d'une concession de la Couronne, dans Attorney-General v. Colchester Corporation [1955], 2 Q. B., 207.
(19) British Oxygen Co. Ltd. v. South West Scotland Electricity Board, notamment dans le compte rendu de l'Inner House (Formation de la Court of session écossaise), 1955, S. L. J., 306. La décision de l'Inner House fut confirmée par la Chambre des Lords [1956], 1, W. L. R., 1069, [1956], 3 All E. R., 199, bien que cette matière ne la concernât pas pleinement. Cf. aussi How Much is Much too Much, in 19, M. L. R., 211 (1956).
The Execution of Judgements Against the Property of the Government and of Public Services

by

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THE EXECUTION OF JUDGMENTS AGAINST THE PROPERTY OF THE GOVERNMENT AND OF PUBLIC SERVICES

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1. GENERAL

Under both English and Scots law a sharp distinction must be drawn between the Crown and other agencies of government. Proceedings against the former, which may broadly be equated with the Central Government, are now governed principally by the Crown Proceedings Act, 1947. That statute, whilst in general it increased the ability of an individual to bring an action against the Crown, retained or imposed some limitations upon the type of action which may be brought and upon the remedies available against the Crown. It has the advantage that it forms a substantial code. Governmental agencies and public services which are not classified in law as the Crown, or as being Crown Servants, are outside the scope of the Act of 1947, and regulations affecting them must be sought in a range of cases and statutes. There is thus considerable importance to be attached to the classification of any governmental body, since this classification may affect both the possibility of raising an action and the remedy available. The tests by which this classification is made are not, in practice, clear in all cases, but the detailed discussion of this matter would range beyond the title of this paper. In general, it seems that the test applied in the absence of a clear statutory provision will be one of the degree of control of the public authority by a Minister of the Crown (Tamlin v. Hannaford [1950] 1 K.B. 18; Bank voor Handel en Scheepvaart v. Administrator of Hungarian Property [1954] A.C. 584; Glasgow Corporation v. Central Land Board 1956 S.C. (H.L.) 1). In general, too, the public corporations of the type commonly called commercial will
not it seems be entitled to the privileges of the Crown (Tamlin v. Hannaford (supra) is itself an example of this tendency), whereas corporations of the social service type may more readily be regarded as “servants” of the Crown (e.g., The National Assistance Board, and as to hospital boards see Nottingham Regional Hospital Board v. Owen [1957] 3 All E.R. 358). In more recent statutes specific provision on this matter has often been made, see, e.g., Electricity Act, 1957, s. 38, declaring that the Electricity Council and Boards do not have “Crown” status, the Television Act, 1954, s. 1 (12) declaring that the Independent Television Authority does not exercise functions on behalf of the Crown, or the Atomic Energy Authority Act, 1954, s. 6(5) which, apart from certain specific exceptions not affecting this issue, provides that the Atomic Energy Authority shall not be entitled to the privileges of the Crown.1

1 See generally J. A. G. Griffith, and H. Street.—Principles of Administrative Law (2nd Edn.); Glanville Williams, Crown Proceedings; H. Street, Governmental Liability.

2. THE CROWN

At common law no execution could issue against the Crown and this rule has been left untouched by the Crown Proceedings Act, 1947. That Act provides that when an order is made by any court against the Crown for payment of a sum of money, then the proper officer of the court shall deliver up a certificate to that effect to the other party affected (s. 25 (1)), and on delivery of the order to the person acting as solicitor for the Crown, or to the Department concerned, the Department incurs a duty to pay the sum stated (s. 25 (3)). This statutory obligation is not, it seems, itself capable of enforcement in the Courts. S. 2(2) of the Crown Proceedings Act only imposes liability for breach of statutory duty upon the Crown where the statutory provision in question is binding upon other persons as well as the Crown, and this condition is clearly not fulfilled in the case of s. 25 (3) of the Crown Proceedings Act. That Act further provides that, apart from this statutory procedure of certificate “no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Crown of any such money or costs” due under an order of the Court.

Property in the possession of the Crown but payable to some other person may however under s. 27 of the
Crown Proceedings Act (and see R.S.C. O.41C. rr. 2 and 3) in substance be attached by a third party where such property would be capable of attachment in the hands of a private person, subject to the exceptions of:

(a) any wages or salary payable to an officer of the Crown as such,
(b) any money which is subject to statutory prohibition or restriction on assignment or charging (a provision which could affect certain persons, both civil and military),
(c) any money deposited in the Post Office Savings Bank.

R.S.C. O.41 r. 4 prohibits the ordinary order of attachment against the Crown but provides that the Court may make an order prohibiting the judgment debtor from accepting such money, and directing payment by the Crown to the judgment creditor so that the essence of an attachment order is here granted.

3. Local Authorities

In regard to local authorities (which are not Crown servants), it was, in the nineteenth century, decided in England that execution could be levied against their property, which was not immune because of its public character. It was considered that once a right of action for the wrongful acts of such bodies had been conceded (Mersey Docks Trustees v. Gibbs (1866) L.R. 1 H.L., 93), there was also necessarily conceded a right of execution to the judgment creditor: Wirral Waterworks Co. v. Lloyd (1866) L.R. 1 C.P.719. On occasion, though, it might be that, if the property were acquired for particular purposes or trusts of the authority, it would be immune from being taken in execution for the general liabilities of the authority—see e.g. Earl of Jersey v. Uxbridge Rural Sanitary Authority [1893] 3 Ch. 183, where lands held for the purposes of sewage works for a particular district in the area of the authority were immune from process of execution for the general obligations of that authority. This distinction as to the property of the authority has now gone (Local Government Act, 1933, S. 197), but it seems, however, that a judgment against a local authority will not operate as a charge on its property, since the charging of such property requires the consent of the Minister. (Local Government Act, 1933, SS. 172, 195.)
Moreover, apart from such limitations, although sequestration of the property of a local authority has on occasion been ordered (A-G. v. Walthamstow U.D.C. (1895) 11 L.T.R. 533) the writ was directed to lie in the office for a period to enable the authority to comply with the original order meanwhile (Stancomb v. Trowbridge U.D.C. [1910] 2 Ch. 190, and, even where an order was made, doubts were expressed about its effectiveness (Spokes v. Banbury Board of Health (1865) L.R. 1 Eq. 42). This reluctance to interfere radically with the property of such authorities is reflected in cases such as Blaker v. Herts and Essex Waterworks Co. (1889) 41 Ch.D 399 where Kay J. having emphasized the public interest said (at p. 408): “In all the circumstances, therefore, I think it would not be right to make an order authorizing the selling or breaking up of this waterworks company.” The rule was not however absolute and, if it was apparent that the public interest could best be served otherwise, a winding up order affecting the property of the utility could be made at the suit of the creditors: In re Barton upon Humber and District Water Co. (1889) 42 Ch. D 585. As with local authorities the remedy of creditors lies primarily against the revenues, and not the capital, of the authority. Thus mortgagees are, by s. 211 of the Local Government Act, 1933, limited in remedy to the appointment of a receiver, who will, under that provision, only be concerned with revenue, and it seems that the proper remedy of a judgment creditor in the event of default would be by means of an order of mandamus which, if necessary, could direct the levying of a rate to satisfy the demands upon the authority. The power to issue mandamus for this purpose is recognized in Julius v. Bishop of Oxford (1880) 5 App. Cas. 214 at 243. The remedy however remains discretionary and delay in applying for it may cause the order not to be issued, R. v. Leigh Rural District Council [1898]1 Q.B. 836; Croydon Corporation v. Croydon Rural District Council [1908] 2 Ch. 321.

4. Public Services

As is apparent from what has been said, the principles which operate in connexion with public services generally have developed in the same way as, and together with, the principles applicable to local authorities. This development was perhaps inevitable, since the development of those services was intimately connected with local
authorities. Elsewhere, where this connexion was not so strong, the position has been regulated by statute. Thus the Railway Companies Act, 1867, s. 4 prohibits distress against the rolling stock and equipment of railway companies and provides for the appointment of a receiver or a receiver and manager. This statute is, it seems, still applicable to protect the nationalized railway corporation. The principle incorporated in this section appears, however, to be one of common law, and in the absence of specific statutory provisions, or of immunity as a servant of the Crown, would be applicable to modern state-created public service corporations.

5. SCOTLAND

In general the same principles are applicable in Scotland, thus s. 4 of the Railway Companies (Scotland) Act, 1867, exempting the rolling stock, plant, etc., of railways from being taken in execution is repeated in the Act applying generally elsewhere throughout the United Kingdom. This parallelism, is, perhaps typical. Greater uniformity was introduced by the Crown Proceedings Act, 1947. Before that statute the remedies against the Crown were somewhat more extensive in Scotland than was the case in England, and the Crown was not so clearly distinguished by Scots law from other public authorities. (See The Royal Prerogative in Modern Scots Law, in “Public Law” (1957) Vol. II.) For a variety of reasons, apart from statutory intervention, these differences have in modern times tended to disappear, though the differing foundations of the two systems of law still leave their marks. As is perhaps only to be expected in a system owing more to Civil Law, the doctrines of res extra commercium, which reflect upon execution have a stronger hold, and play a more prominent part, in Scots law. The conception of a “public trust” as affecting the property of local authorities is well established in English law (see e.g. A-G. v. Mayor etc. of Liverpool (1835) 1 My. and C. 201), while, in Scotland, it was the doctrine of res extra commercium (which might be merely an alternative formulation) which dominated. Thus, in Phin v. Magistrates of Auchtermuchty (1827) 5 S. 690, speaking of the town house, gaol and petty customs of the burgh, Lord Pitmilly said (at p. 692), “The burgh could not sell these subjects voluntarily, except in the case of their having provided new ones for the use of the burgh, . . . and if the
burgh could not sell it necessarily follows that the creditor cannot attach them.” This doctrine and its basis were recognized in the institutional writers (see e.g. Erskine Inst. II i. 7) and have been accepted as sound in modern times (see Magistrates of Kirkcaldy v. Marks and Spencer Limited 1937 S.L.T. 574). There is a substantial body of authority to support these principles—(see e.g. Kerr v. Magistrates of Linlithgow (1865) 3 M. 370, Magistrates of Lochmaben v. Beck (1841) 4 D. 18) yet, in Wotherspoon v. Magistrates of Linlithgow (1863) 2 M. 340, the Court appeared disposed to allow the property of a burgh to be sequestrated, and in Macdonald v. Reid (1881) 9 R. 211, arrestment of the funds of police commissioners (the fore-runners of certain modern local authorities) was apparently accepted as possible, though it failed in that particular case. On examination, however, neither case runs contrary to the general line of authorities which have been mentioned. The Linlithgow Case was peculiar in that the burgh, having got into financial difficulties, petitioned on its own behalf for sequestration, but in subsequent proceedings the immunity of the governmental property of the burgh from processes of execution was recognized, as it was in substance in Macdonald v. Reid.

So far as other public authorities are concerned, the same principles, which have been described above, are also applicable, though sometimes differently formulated. In fact s. 4 of the Railway Companies (Scotland) Act, 1867, had a foundation in Scots common law where the public character of such undertakings had already been recognized. This can be seen from Hill v. College of Glasgow (1849) 12 D 46, 53-4, per Lord Justice-Clerk Hope and Glover v. City of Glasgow Union Railway Co. (1869) 7 M 338 at 340 per Lord President Inglis, speaking of “the matured opinion of lawyers that the composite heritage called a railway is not liable to be attached by adjudication for debt.” In the absence of specific statutory provisions it would seem that these common law principles would be applicable to public services generally.
SOVEREIGNTY OF PARLIAMENT—YET AGAIN

By

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SOVEREIGNTY OF PARLIAMENT—YET AGAIN

We are no strangers to political unions founded upon economics. The economic causes of the Union of 1707 were at least as important as the dynastic ones. Even after over two hundred and fifty years of that Union the disputes between those who are supranationalists and those who believe in the *royaume des patries* are not entirely stilled, and those disputes had at the time of the Union a bearing on the shape of the Acts of Union. There was to be the one, supranational, Parliament, but one party to the Union compact was anxious to retain a certain distinctiveness or separate identity. The reconciliation of these anxieties with the concept of an incorporating union inevitably led to uncertainties about the position of that Parliament, uncertainties which are not resolved by the skeletal constitution which is made up of the Acts of Union. The fact that political unions, based as was that one, are once again in the air must serve as an excuse for another spin upon the merry-go-round called the sovereignty of Parliament.

Constitutions and constitutional doctrines are the result of history. In the United Kingdom our overt revolutions occurred relatively early in the history of the modern state, and at times when the writing of a full constitution to crown the revolution had not become customary. These factors affect particularly strongly the doctrines relating to Parliament. While its position and powers have been in some respects hedged about with protections, there are few specific attributions of power to it. In this respect Parliament is no different from many of our other institutions, but this circumstance is, perhaps, particularly important in relation to Parliament, since it is an institution peculiarly liable to growth and change as a result of a changing climate of opinion. This background must be borne in mind when considering the doctrine of the sovereignty of Parliament, for some of the precedents, some of the authoritative writings, must be considered (to an extent at least) in the light of the Parliament which existed contemporaneously with them, and which may be materially different from that which now exists, either in itself or in general acceptance. This varying background is also important since, on the whole, no theory about the

1 Some of the provisions of both the Claim of Right and the Bill of Rights serve both purposes.

2 The sequence of events starting in 1832 has substantially affected modern ideas of Parliament, and to take two authors at random, Coke wrote at the close of the Middle Ages, Kames (who also conceived of some limitations on
sovereignty of Parliament can be proved, in the way that other legal concepts can be, by a chain of elucidatory decisions. This peculiarity of proof is partly due to the fact that cases must be rare in which the issue could be raised both properly and inescapably.4 Such precedents as do exist may also be inappropriate today, since inevitably they reflect the then current political facts. This difficulty of proof is also due to the fact that the problem of the sovereignty of Parliament is concerned with one of the fundamentals of the constitution. To such matters a different attitude must be adopted to that which is appropriate when dealing with subsidiary or derivative rules of law. The one set of rules creates or is the legal foundation of the state, the other is built upon that foundation. Because of these differences, too, uncertainty about the doctrine at any one moment of time is increased.

By the sovereignty of Parliament is generally meant the absence of any legal restraint upon the legislative power of the United Kingdom Parliament.4 This absence of legal restraint has two aspects. The positive one would mean that Parliament is competent to legislate upon any subject-matter, and the negative aspect implies that once Parliament has legislated no court or other person can pass judgment upon the validity of the legislation. These two aspects are obviously related, but must, for some purposes, be distinguished. Even if it be said that the legislative competence of Parliament is limited it does not follow that any court has power to review the validity of legislation.5 Both aspects were most

Parliament) at a period when natural law theories were still at their height in Scotland. Both circumstances are important in relation to the authors; neither now exists. See generally for such influences, Gough, Fundamental Law in English Constitutional History.

3 Thus, in MacCormick v. Lord Advocate, 1953 S.C. 396, which in recent times came nearest to this issue, the decision rested upon questions of relevance and title to sue. What was said upon the fundamental question, by, e.g., Lord President Cooper (at 411 et seq.) is strictly obiter. Other cases such as Vauxhall Estates Ltd. v. Liverpool Corporation [1932] 1 K.B. 733, were often susceptible of decision upon very narrow grounds, and were so decided. This attitude of the courts is common, cf. Dowling and Edwards, American Constitutional Law, 88 et seq.

4 It can be argued whether "sovereignty," "supremacy," or some other words such as "legislative omnipotence" are apt—see Jennings, Law and the Constitution (5th ed.), 133 et seq. It is true that the use of the word "sovereignty" can lead to difficulties, such as Dicey's separation of legal and political sovereignty, and that the word sovereignty lacks any one universally accepted meaning. Nevertheless, it is the word most often used in this context and will be here used in the general sense indicated.

5 Waine asserts, Droit Administratif (8th ed.) 427, that no court in France will accept this jurisdiction. For an explanation of the curious and limited jurisdiction of the Comité Constitutionnel see Chatelain, La Nouvelle Constitution, 177. Earlier, the conclusions of Chief Justice Marshall did not follow of necessity from his premises.
unequivocally asserted by Dicey, but events and argument since Dicey’s time have made necessary further discussion before his views can be accepted or rejected.

The doctrine has an initial attraction. Parliament has had such an outstanding part in the development of the modern constitution and today retains an apparently outstanding part in the legislative field. The Revolution of 1688 was, in both jurisdictions, a Parliamentary revolution, the Union of 1707 was likewise a Parliamentary Union, the title to the Crown is a Parliamentary one. This pre-eminence of Parliament is emphasised both by its position as virtually the sole source, either directly or indirectly, of legislation, and by its freedom from the restraints of any other system of law. Prerogative powers of legislation, in an internal sense, have disappeared, and within the United Kingdom subordinate legislative bodies derive their significant legislative powers from Parliament. It is clear that legislation cannot be confined by international law, or by morality or natural law, and, indeed,

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6 Law of the Constitution, Chap. I. Others who had earlier made somewhat similar assertions had also put forward elsewhere views difficult to reconcile with the general proposition, see Jennings, op. cit., App. III, Was Lord Coke also a Heretic.

7 Consider the terms of the English and Scottish Acts, 1705, authorising the appointment of Commissioners to treat for the Union (A.P.S. XI 292). By British theory His Majesty's Declaration of Abjuration Act, 1936, was necessary to enable Edward VIII's declaration of abdication to be effective in law.

8 Grieve v. Edinburgh and District Water Trustees, 1918 S.C. 700 at 713, per the Lord Justice-Clerk (Scott Dickson). The Case of Proclamations (1610) 12 Co.Rep. 74, and Mackenzie, Inst. I, 1, incorporating the effect of this decision. Matters formerly falling within the prerogative such as the regulation of the entry of aliens have been largely taken over by statute. Much earlier Balfour had laid down in his Practicks "na jugeis within the realm has power to mak any lawes or statutes save the Parliament alleyne"—cit. Of Law.

9 While common law corporations, such as Royal Burghs might have extensive internal legislative powers (see University of Glasgow v. Faculty of Physicians and Surgeons of Glasgow (1837) 15 S. 736, and the instances there cited) the important powers today are those conferred by statute, and conferred by statute by statute may have a restricting effect on common law powers, Graham v. Glasgow Corporation, 1936 S.C. 108 (cf. Att.-Gen. v. Laeaster Corporation [1943] Ch. 86), Att.-Gen. v. De Keyser's Royal Hotel, Ltd. [1990] A.C. 606.

10 Mortensen v. Peters (1906) 8 F.(J.) 95, 100, per Lord Dunedin, though the rules of international law may, where that is possible by the terms of the Act, influence interpretation; Co-operative Committee on Japanese Canadians v. Att.-Gen. for Canada [1947] A.C. 87, 104, per Lord Wright, and J.R.C. v. Collo Deals Ltd. [1962] A.C. 1.

11 Many earlier assertions to the contrary can be found; see in England Day v. Senaga (1616) Hob. 39, per Hobart C.J., Dr. Bonham’s Case (1610) 8 Co.Rep. 113b, 118a, per Coke C.J. and, in Scotland, Ersk. Inst. I, 1, 20, "What the law of nature hath commanded cannot be forbidden or even dispensed with by positive law"; Kames, Equity, Book II, Chap. 8, writing that the 'trust' upon which Parliament holds its power will not include the power to do injustice or to oppress. Stair (Inst. I, 1, 15) goes no further than saying that nations are happiest when the laws come nearest to natural equity. The stronger assertions could no longer be supported; compare Lord Wright in Liversidge v. Anderson [1942] A.C. 206, 261, "Parliament is supreme. It
may abolish any legal significance of physical differences between distinct things, and to that extent Parliament may be freed from the constraints of physical laws. It is also clear that legislation is not limited in time, or space, nor in relation to persons.

Because of these factors, there has grown up a belief in the legal ability of Parliament to pass any legislation at all. It is generally admitted that this apparent omnicompetence may be limited by factual considerations, such as the ability to enforce obedience, by rules of interpretation which may operate, in the absence of very clear wording, to restrict the operation of a statute, and by conventional rules governing the preparation of legislation. For the most part what were formerly asserted to be limitations upon the legislative capacity of Parliament have become presumptions of interpretation. So, a statute is presumed, in the absence of clear words to the contrary, not to take away property without compensation, not to exclude the jurisdiction of the courts, not to be retrospective, not to impose taxation. These presumptions may be more or less strong in particular circumstances, and while they do not impose any restriction upon Parliament they indicate the broad acceptance, in normal times, of general and fundamental constitutional ideas, which were once translated in theory, but not in practice, into restrictions upon Parliament in the name of natural law, or other names. The conventional limitations are currently more important. They include rules relating to the consultation of interests in the preparation of legislation and doctrines of mandate. It is accepted that convention (as well as practical considerations) requires a government to consult interests likely to be affected by general legislation.

can enact extraordinary powers of interfering with personal liberty." These survivals of natural law theories have now been translated into presumptions in statutory interpretation, and for a general account of them see Gough, *Fundamental Law in English Constitutional History*, and the authorities there referred to. There are many assertions, particularly in Coke, on the equation of natural, or moral, law, with the common law and in this respect Stair may be noticed. He comments (I, 1, 16) on the superiority of the common law as against statute law on the ground that desuetude does not affect the former, and then demonstrates that certain statutes were held inoperative because of the superior moral principles of the common law with which they conflicted.

12 Again formerly different views found expression: Ersk. Inst. I, 1, 23 (against retrospective legislation), and compare Mackenzie, Inst. I, 1, on the difference between declaratory and other laws in this matter.


14 Again, Erskine (I, 1, 23) excluded laws affecting individuals from "proper law", on the principle that legislation must be general; today one must accept such acts as the Niall Macpherson Indemnity Act, 1963, as law.

15 See, e.g., Cmd. 6502. One specialised instance, both of this and of the conventional relationship of Government and Opposition, is to be seen in the
Among these conventional limitations is the supposed doctrine of mandate. That doctrine can have several meanings. It may mean that a government should not introduce major changes by legislation unless they have been in issue in a general election, and that, correspondingly, a government which has lost general support in the country should not force major legislation through Parliament shortly before an election, even though that legislation may have been in its electoral programme. It may also, at times, be given the meaning that a government has an obligation to carry on to the statute books the main heads of its electoral programme. At first sight, this doctrine in any of its forms fits easily into theories of representative government, and, while it is true that instances can be given in which it has been disregarded, there are notable instances, such as the events leading up to the Parliament Act, 1911, which tend to support it. There are certainly many more instances where the doctrine has been invoked on behalf of or against proposed actions. This support may be more apparent than real. Recent evidence suggests that what may be thought to be a determining factor in an election (and thus a necessary foundation for a mandate) may in fact play a much less significant part in determining the result of the election than was thought to be the case. Again, it is clear that if the doctrine is not restricted to constitutional changes, but is extended, as is often the case, to major legislation generally, its force is greatly weakened by the fact that any government must determine policy (including legislative policy) in the light of current facts, which may be materially different from those which were known to party leaders or which existed at the time of an election. Further, on a proper examination, there are implications in the doctrine of theories of direct government which may be inconsistent with other constitutional doctrines. It may also assume a level of factual knowledge, political wisdom and rational assessment higher than that which always exists in the electorate at large. The doctrine then is not one which is clear cut or which has a clear foundation, and, even if difficulties of the classification of conventions are neglected, it cannot therefore be said to amount to any substantive limitation upon

methods of preparation of measures of electoral reform, through Speaker's Conferences, etc., though again the limits are not clear—see 595 H.C.Deb. 1030.


17 Matters such as the relationship of a Member of Parliament to his constituency or whether the whole theory of government of a pyramidal structure ending with the Cabinet as a committee of Parliament is to be accepted or not, are, for example, involved.
Parliament beyond what already results from the general democratic theory as practised in this country.

There is thus the appearance of unlimited legislative competence, which is little touched by the conventional limitations. The most significant of the latter—the doctrine of mandate—is of doubtful validity. Other conventional limitations which are of greater validity, operate "behind the curtain" and thus do not detract from the appearance. Thus a predisposition to accept the "positive" aspect of the sovereignty of Parliament is built up. There is a like predisposition to accept the "negative" aspect since any possibility of challenging the validity of legislation is, at best, so extremely rare that there has grown up a belief that any such challenge is impossible. Indeed, even were some of the so-called conventional limitations more precisely formulated and accepted as limitations, the possibilities of any such challenge would probably not be increased. The predisposition thus caused is strengthened by citation from writers of authority, so that Lord Shaw could dismiss the whole doctrine as being the "merest platitude." Such views have also been partly dependent on, partly productive of, the view that there are in law no limitations upon Parliament and that Parliament is incapable of imposing any such limitation upon itself. Allowing for the existence of these predispositions both the positive and negative aspects remain worthy of re-examination at this time, but the two must be treated *seriatim*, for the questions they provoke are severable, even though interlocking.

Turning first to the absence of limitations, there is strong support among writers of authority for the proposition that Parliament cannot bind itself. Instances abound where one Parliament has overthrown the work of another. Equally there can be found

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18 Compare Thornelos and Clarkson, Ltd. v. Board of Trade [1960] 2 All E.R. 245.
19 Coke, IV Institutes 36, Blackstone, I Commentaries 91. See too Officers of State v. Coutte & Ors. (1611) M. 7397.
20 Legislature and Judiciary.
21 "Whatever a Parliament can do at one time, in making of laws, or determining of causes, may be at their pleasure abrogate or derogate"—Stair, Inst. IV.1, 41. See too Erskine, Inst. 1, 1, 18; Blackstone, I Commentaries, 180; Coke, 4 Inst. 25.
22 To the instance of the Statute of Henry VIII, 28 Hen. 8, c. 17 (repealed during the minority of Edward VI, Edw. 6, c. 11) commonly cited, can be added references to the statutes restoring episcopacy in Scotland, which others had abolished in all time coming, and to the statutes dealing with the Crown. What in 1681, Parliament declared to be beyond legislative competence was achieved in 1639, and accepted. Sir George Mackenzie asserted that Parliament was bound by certain fundamentals, influenced, no doubt, by the fear of just such happenings as later occurred in 1707, see his *Observations on the Acts*, 17th Parliament of James VI. Consider also the development since 1599 (briefly recited in the Act Ratifying the Confession of Faith, 1690) in the light
judicial support for the same principle. To it there has been admitted from time to time the possible exception that Parliament could abdicate its power to another. More recently, some reconsideration of the principle was prompted by litigation in South Africa, and subsequently doubts found expression here in MacCormick v. Lord Advocate particularly in the opinion of Lord President Cooper. In discussing the general proposition it seems necessary to distinguish, though this has not always been done, different types of limitation. There is first the limitation which may exist in a constituent document, there is secondly the limitation which Parliament once created may subsequently impose upon itself. This second form of limitation could again take various forms, the abdication or denial of legislative power, or the imposition of restrictions as to time, form, or content of legislation, or any combination of these last limitations. Different principles may apply in each case.

WAS PARLIAMENT BORN UNFREE?

Taking first the point of a constituent document; if it be accepted (as it seems it must be, both because of their terms and origin) that the Acts of Union of 1707 were intended to be, and were, constituent Acts, then 1707 forms a fresh starting point. Logical difficulties about the transfer of legislative power from a sovereign to a non-sovereign body need not be too heavily stressed. Moreover, it is not clear either that in 1707 the English Parliament was accepted as "sovereign" in the sense in which the word is now used or that, alternatively, the Scottish Parliament could not, in legal theory, be said to be as "sovereign" then as was the English one. It is more probable that, in the modern acceptance of the phraseology of the Act of that year for abolishing of the "actis contrair to the trew religion" (A.P.S. III 541); and see Duke of Douglas and Ors. v. The King's Advocate (1748) M. 1796, wherein grants ratified in Parliament were upheld even though the procedure which Parliament itself had imposed had not been followed. It is arguable whether such cases do not rather reflect a situation of power more than they reflect any constitutional theory.


24 Anson, "Government of Ireland Bill and the Sovereignty of Parliament" (1886) 2 L.Q.R. 427, 437-438; Dicey, Law of the Constitution, Chap. 1 though this may be inconsistent with one reading of the views of Lord Sankey in the British Coal Corporation case.


26 Though this supposed difficulty is emphasised by Lord Cooper, 1953 S.C. at 411.

27 Consider the doubts expressed about the validity of the Septennial Act, 1715.

28 The very rapid growth of the Parliament of Scotland between 1688 and 1707 is often overlooked, and see note 23, supra. The argument based upon the
of that term, the doctrine, if it exist, is a post-Union development closely linked with the ideas underlying the reforms of 1832. It is certainly possible that as constituent documents the Acts of Union could have imposed limitations, and it is equally clear that some of those responsible for them hoped to do so. This possibility is enhanced by the terminology of the Acts. Too much cannot be built upon such phrases as "in all time coming" or "for ever" which were of common occurrence in the Acts of the Parliament of Scotland. Nevertheless, the insistence upon the protection of the church, of the courts, and on equality, marks out such provisions, and they have equally been emphasised in decisions which isolate them as of particular importance.

existence of the doctrine of desuetude is weak, and the operation of that doctrine was itself at the mercy of Parliament.

Apart from the uncertainties which were expressed in the early part of the 19th century, as to the validity of the Septennial Act of 1715, or the possibility of the repeal of the Acts of Union in 1713 (see History and Proceedings of the House of Lords (1742) ii, 394–397). The doctrine is dependent upon the development of the political power of Parliament. So long as it can be maintained that it is dangerous for a Parliament to continue after the death of a King "for then a Parliament called by a King might continue without the consent of the King that succeeds and make Acts prejudicial to him," (Campbell, Lives of the Chancellors, Vol. X, 113) it is clearly difficult to maintain, as accepted theory the principle of the sovereignty of Parliament. Parliament is on that basis to be subservient. Legal theory feeds upon political fact, and the growth of the theory of the sovereignty of Parliament depends on the growth of Parliament. Such remarks as that of Lord Hardwicke in the debate upon the Bill for the abolition of the Heritable Jurisdiction that "In all countries the legislative power must to a general extent be absolute" (Campbell, Lives of the Chancellors, Vol. X, 113) assume a different position in the state (though it may be noted in passing that Lord Hardwicke asserts that the United Kingdom Parliament inherited the sovereign position of the Parliament of Scotland: loc. cit.). That assumption is equally apparent elsewhere, see, e.g., Brodie's annotations to Stair, I, 1, 16; see Ersk. I, 1, 45 for the ideas underlying his doctrine that the posterior statute may always derogate from the anterior one.

Lang Mathieson in his Scotland and the Union at p. 213 recognises the intention to create fundamental provisions, though denying the possibility in law of so doing. Taylor Innes, in his Law of Creeds in Scotland, puts it that "the royal sanction on the 6th March, 1707, consummated the Union on the basis of fundamental conditions not to be altered or derogated from in any sort for ever" (p. 58). The understanding of the Church is shown by the Memorial of 1713 against restoration of lay patronage, and in the protests which preceded the Claim of Right of the Church of Scotland moved in the Assembly, 1842, which argued that the Act for Securing the Protestant Religion had removed from the "cognisance and power of the federal legislature created by" the Union all matters dealt with in that Act.

See particularly Minister of Prestonkirk v. The Heritors, F.C. Feb. 8, 1808 (the opinions are fully set out from the Session Papers in Connell, Tithes, Vol. III). "Our Ancestors, at the Union, provided that the regulations applicable to our national church should be absolutely irrevocable, and that the Parliament of Great Britain should have no power in any way to repeal those provisions": per the Lord Justice-Clerk (Hope) at p. 321. "The people of Scotland, at the period of the Union, were most careful to preserve unalterably all the rights of their Presbyterian Church as by law established": per the Lord President (Blair) at p. 376. See too, Duke of Queensbury v. Officers of State, F.C. Dec. 15, 1807 (M. Jurisdict. App. No. 19). Contrast the Strathbogie Case (1840) 2 D. 595 at 594, where Lord Gillies accepts Blackstone's proposition that Parliament can alter the established
The degree and consequences of entrenchment are not so clear. In the first place, if it be conceded that the Acts of Union are to be regarded as constituent then it follows that they should be interpreted in the flexible manner normally used in constitutional interpretation. Thus, the meaning of the phrases public or private right cannot be taken to have been fixed in 1707. In the next place allowance must be made for other changes in ideas. Ideas of the nature and purposes of education change, and these changes are reflected in the way in which certain provisions in the Act for Securing the Protestant Religion are to be regarded. On a wider scale ideas about the relationship of church and state fluctuate. The conception of Parliament as the temporal head of the church which could be advanced in 1848 is rejected by Parliament itself in the Church of Scotland Act, 1921. This shift of opinion on the relationship of church and state cannot be without effect upon the interpretation of and attitude to the Union legislation, as, indeed, the contrasts between the majority and minority opinion in the Disruption litigation show clearly. Thus the thing which is

religion. In contrast there are to be found in both the majority and minority decisions in the "Disruption Cases" assertions of the fundamental nature of the Act for Securing the Protestant Religion, though these declarations are more frequent in the minority opinions. Thus Lord Moncrieff in the Auchterarder case, Robertson's Report, Vol. ii, 333, asserted that that Act had rendered the law "definite and unalterable," and (at p. 339) treated the Act as "fundamental and essential" to the state. See too in the Auchterarder case, Robertson's Report, Vol. ii, at 381, per Lord Jeffrey and at 148, per Lord Medwyn. (Lord Medwyn's "compact" theory necessarily involved this idea.) In Cruikshank v. Gordon (1848) 5 D. 909 at 1000, Lord President Boyle would, it seems, regard the Act as binding upon both Church and State. See too per Lord Fullerton in the Culsalmond case. The Act for Security is also recognised by the Regency Act, 1937, s. 4 (2), as having a special position. That section is ambiguous; while recognising that special position, it implicitly contemplates the possibility of repeal in circumstances outside the scope of the Regency Act.

32 It is difficult to imagine that today a custom duty granted to a town could be regarded as a private, as distinct from public, right as it was in Reid & Kerr v. Magistrates of Edinburgh (1712) 2 Fount. 696.

33 The provisions imposing the test upon those who taught in Universities and Schools might well have been regarded as fundamental by the draftsmen, and they continued to be so regarded by some at a much later period (see The Protest, Declaration and Testimony, 1849, of the Church of Scotland, which regarded the control by the Church of schools as being as important as the establishment of Presbyterianism itself). Nevertheless, changed attitudes to education and the Disruption itself meant that this view was no longer generally held. The Universities (Scotland) Act, 1853, limiting the test was, in effect, put forward by the Church itself, and few would have considered the Education Act, 1872 (creating school boards), as being in conflict with the Union legislation.

34 The Auchterarder case, Robertson's Report, Vol. ii, 10, at p. 13. The Lord President refers to the Act of 1690 as "an admission on the part of the Church, of its dependence on the legislature, and of the necessity of the authority of Parliament to render even its doctrines and creed valid in law." See too Lord Gillies in the Strathbogie Case (1840) 2 D. 594.

35 See particularly Art. V of the Schedule thereto.
"entrenched" is not, for a variety of reasons, anything which is absolutely constant.

Even if these external matters are disregarded, and the Act for Securing the Protestant Religion is looked at in isolation, parts of it must be read as ancillary to the primary purpose of securing a Presbyterian Church. It is true that the Act itself declares that its terms shall be fundamental and essential conditions of the Union, without any alteration or derogation, and thus all its terms are, on the surface, of equal and absolute standing. Yet, some Acts, notably that of 1690, are picked out "more especially," other provisions are added "for greater security"; above all the Confession of Faith, ratified in 1690 and included in the Act for Security, contains within itself both machinery for alteration and an admission that it may incorporate error. Chapter XXXI states that—"it belongeth to Synods and Councills . . . to set down rules for the better ordering the publik worship of God and government of his Church" and also that—"All Synods or Councills since the Apostles time whether general or particular may err and many have erred, therefore they are not to be made the rule of faith or practise but to be used as a help in both." Thus too rigid an interpretation of this Act might conflict with the expressed intentions of those for whose benefit entrenchment was contemplated. A looser interpretation, that is to say that the Act intended to protect a protestant presbyterian church in general rather than in detail, accords with opinions later expressed.36 It equally is the interpretation which reconciles the Church of Scotland Act, 1921, and the Act for Security, to which the 1921 Act makes express reference.37

The same type of construction is, it seems, applicable to Article XIX of the Act of Union, relating to the Court of Session. That provision is on the face of it less rigid than the provisions relating to the Church since it contemplates regulation "for the better administration of justice." Nevertheless it seems that the essential point of a distinct court may be regarded as fundamental. In MacCormick v. Lord Advocate 38 Lord Russell expressly reserved his opinion on this matter, and in 1807 the Memorial to the House of 36 See Report as to the Subscription of Tests of the Scottish Universities Commission, 1892 (C. 6790). Apart from the doubts expressed by some Professors of Divinity on the Confession of Faith as a doctrinal test, the Church of Scotland itself proposed arrangements which, while consistent with the interpretation suggested above, were inconsistent with a more rigid interpretation (see particularly Report pp. xvii and xix). For the changing attitude of the Church itself to tests see Lord Sands' article, "Doctrinal Subscription in the Church of Scotland" (1905) 17 Juridical Review, 201.
37 Consider particularly s. 2 and Arts. II and V of the Schedule to the Act. The treatment of Art. I is in accord with the interpretation here suggested.
38 1953 S.C. 396, 417.
Lords from the Senators of the College of Justice clearly envisaged limits to the power of regulation such as would be imposed by such an interpretation.  

Thus it seems that hypothetically the Acts of Union could have imposed limitations upon the Union Parliament, being antecedent to it, and that those limitations could be valid. It also appears that such was the intention of the framers and that this intention has been recognised, indirectly at least, in some of the decisions. The limitations are however few and imposed in such a way that any infringement of them is improbable. Direct proof of such propositions is difficult. It depends upon the attempted breach of an entrenched provision and a challenge to that breach. It is doubtful if there has as yet been any breach, and in the case coming nearest to a breach (the sequence of legislation starting with the Universities (Scotland) Act, 1858) that "breach" if it be one was in effect carried out at the request and with the consent of the body most able to express national opinion upon the topic. Should the breach involve Parliamentary legislation proof would also depend upon the acceptance by the courts of jurisdiction to listen to a challenge to the validity of the later Acts, a matter which is treated hereafter.

The somewhat similar position which existed in relation to Ireland should be noticed. The Union between Ireland and Great Britain brought about by the Union with Ireland Act, 1800, was stated to be "for ever after" January 1, 1801, and the Churches of England and Ireland were, at the same time, united, the continuance of the United Church being said to be an essential and fundamental part of the Union of the Kingdoms. Yet, in 1869, by the Irish Church Act, the Union of the Churches was broken and the Irish Church disestablished and in 1922 the Union of the Kingdoms was broken. The situations appear to be parallel, yet perhaps they are not. As has already been said too much cannot be built upon the words "for ever"; strong and enduring nationalist

39 "We are of opinion that in fair bona fide construction, as between the independent nations, it cannot be held to have been in the contemplation of either, that any law should, in future times, be considered as merely a regulation for the better administration of justice which goes to subvert the supreme jurisdiction of the Court of Session, and to render it subordinate to a new court, unknown to our ancestors." This protest and others like it had its effect upon the shape of the reforms then made.

40 See particularly the speech of the Duke of Argyll introducing the Bill for the 1858 Act into Parliament. Too much should not be made of this "mandate" point. The arguments (which follows from what has been said above) that there was no breach is preferable. The arguments in Goodhart, English Law and Moral Law, Chap. 2, are here relevant. It is noticeable that in the patronage cases the direct issue of the validity of the Patronage Act, 1712, was evaded, perhaps necessarily so in view of the very uncertain position of the law on that matter in the years preceding the Union.
movements cannot ultimately be confined by words upon the statute book, and law must eventually come into step with reality, as it did to some extent in 1922. As to the churches, the Church of Ireland was not in 1800 or in 1869 a national church in the same way as the Church of Scotland was in 1707 and remains. By 1869 it had become clear that the Union and the supposed fundamental provision could not both endure, though it was not yet clear that neither could. Historically the Irish Church Act, 1869, must be regarded as part of the process of dissolution of the Union. Looked at in that light the Irish precedent, even in so far as it can be relevant, does not therefore necessarily conflict with what has been said.

Nevertheless the dependence of law on political fact which it re-emphasises remains important. Words like "ever" or "never" in such contexts must be read in a relative sense, and it is impossible, in any absolute sense, to confine the evolution of societies by the statute book. That certainly is not done by a written constitution, and when the process of formal constitutional amendment is too slow, or is for other reasons inappropriate or ineffective, other means are found to keep constitutional words in touch with life. It may be that those words are "illumined" in different ways from time to time as Lord Wright put it,41 or the process of changing interpretation may be more open.42 A constitution which attempted to protect too much, and which contained no method of adjustment would prove unworkable. Just as on a smaller scale it has been found necessary to restrict the ability of testators and settlers to plan for future generations, so on a larger scale succeeding generations must have or will find opportunities of development according to their ideals. Granted then the shape of the Union legislation, which contains no machinery for constitutional amendment, the interpretation suggested above is the one which in practice is most likely to fulfil the needs of the societies for which it was intended. Nevertheless it must be emphasised that although the suggested interpretation can have practical advantages it does not rely on them for justification. It can, it is thought, be justified by ordinary methods of interpreting the documents and other materials alone. It seems therefore probable that the new Parliament was by its constituent Acts created unfree, at least as to the Church of Scotland and the Court of Session, subject to this proviso, that the limitations go to essentials and not to detail.

The second question relating to the sovereignty of Parliament is whether a Parliament can fetter its successors. There is a substantial body of authority which denies that this can be done, and for good reason. When Stair asserts that “Parliament can never exclude the full liberty of themselves, or their successors, no more than persons can by one resolution secure that they cannot resolve to the contrary, and therefore the same session of Parliament may judge that to be unjust, that it judged to be just, and contrariwise, as oft as they will; and much more may different Parliaments: for, whatever a Parliament can do at one time, in making law, or determining of causes, may be at their pleasure abrogate or derogate,” he may have been thinking mainly of Parliament as a court, but he specifically includes Parliament as a legislature. The considerations which underlie, in the judicial field, arguments in favour of a loose doctrine of precedent, or of devices, such as that of convening a full court, to remove obsolete or inconvenient decisions, are just as important in the legislative field. At lowest this is but a necessary concession to the fallibility of human reasoning, understanding and foresight, and to the freedom of successive generations to mould the law to their liking or to the requirements of their age, a freedom which in any event they will take even if they are not given it.

Before the Union the Parliament of Scotland demonstrated, as has been shown, a willingness to repeal or amend statutes which earlier Parliaments had attempted, at least by the appearance of the statute, to make binding upon their successors, and to disobey formal limitations. In post-Union times there has equally been acceptance of the general proposition that what one Parliament

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43 Inst. IV, 1, 41, and Erskine, Inst. I, 1, 19, when he relies on Justinian for authority. This is not merely a question of power. It may also be a question of necessity. To the objection "Who then should punish and coerce the Parliament in case of exorbitance?" Samuel Rutherford answered "Posterior Parliaments," and when it was urged that they too might err he gave the ultimate cure: "God must remedy that"—Rex Lex, Question 38.

44 Taylor Innes in his Law of Creeds in Scotland, at p. 63, applies this reasoning to the Union legislation itself, yet it seems that, granted the interpretation given above, it is possible to accept a view that some portions of that are fundamental and at the same time allow adequate freedom to future generations.

45 Ante, note 22. Erskine finds this (Inst. I, 1, 46) on will or consent and thus equates this situation to desanctitude, which he regarded as a revocation of consent. Some statutes went far in an attempt to bind Parliament—see Hope, Major Practicks 1, i, 15. For a clear illustration of such disobedience which was upheld by the courts see Duke of Douglas v. King’s Advocate (1748) M. 7096, and see Stuart v. Wedderburn (1697) Durie 301.
makes another can unmake, either expressly or by implication. 46 Again however the question whether Parliament can bind its successors requires more precise phrasing before an adequate answer can be given. Limitations upon future legislative activity may be of several kinds, they may be as to the form or method of legislation, or as to subject-matter, or as to time or space. Some of these types of limitation may more correctly provoke a different question—whether Parliament may re-define itself. 47 It does not follow that the same answer would be given to all types of limitation as is given to one particular type, nor, if the question is put in a different form, that the usual answer to the usual form of question would be as readily given. The case for the martyrdom of which Lord Mackenzie spoke in the Culsalmond case 48 does not arise if he had merely asked himself—Has Parliament spoken?

If examined, the cases, with few possible exceptions, go very little way to answering in an authoritative manner any of these more detailed modes of putting the more generalised customary question, simply because the point of the question was not an issue in the cases. The cases of implied repeal prove little. First because the repealed statute did not attempt to limit future legislation, and secondly because the rule is treated as having the same foundation as the rule of interpretation which decrees that the latter part of a statute shall prevail over an earlier part, 49 a rule which is equally applicable to private documents. Even where phraseology is found which might be construed as a limitation, such as the reference in the Acquisition of Land (Assessment of Compensation) Act, 1919, to “any statute (whether passed before or after the passing of this Act),” 50 upon proper examination and construction the words

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46 The courts may not readily concede a repeal by implication, see Bain v. Mackay (1876) 2 R. 32, 36, and in applying the doctrine of such repeal the courts may apply a doctrine very close to that of “Occupying the field” common in constitutions where there is a distribution of legislative power, Arthur v. Lord Advocate (1895) 22 R. 382. The English authorities, Vauxhall Estates Ltd. v. Liverpool Corporation [1932] 1 K.B. 739 and Ellen Street Estates Ltd. v. Minister of Health [1934] 1 K.B. 591, are familiar enough in this area of law.


48 (1919) 4 D. 695, 1010. See text at note 72 below.


50 s. 1, dealing with the appointment of official arbitrators. S. 7, which was involved in both the Vauxhall Estates case and the Ellen Street Estates case, was not so strong and it is not clear, though it was argued, that that section was bound up with s. 1. For another view on these cases see H. W. R. Vade, “The Basis of Legal Sovereignty” [1955] C.L.J. 172 at 174 and compare Jennings, Law and the Constitution (6th ed.) at 162-163.
have a much more limited significance, hardly more than the much older phrases as "in all time coming" as used in the Acts of the Parliament of Scotland, which did not even prevent a statute in which they were used from falling into desuetude. Neither the Vauxhall Estates case nor the Ellen Street Estates case go very far, despite some dicta contained in the judgments. In the first, of three judges only one, Arvory J., was prepared to construe section 7, and he held that it only applied to statutes existing in 1919. In the Ellen Street Estates case Talbot J. inclined to that view. Scrutton L.J. found, in effect, a direct amendment of the Act of 1919 by a later Act, and it was conceded that a direct repeal was effective. Maugham L.J. held that one Parliament could not bind another as to form, but it was not demonstrated that in 1919 Parliament had attempted to do so.

Certainly there are other strong judicial assertions that no Parliament can bind another. Notable among them is that of Lord Sankey L.C. in British Coal Corporation v. The King. Speaking of section 4 of the Statute of Westminster, 1931, he said "indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the statute. But that is theory and has no relation to realities." On the other hand, Parliament persists in putting purported limitations on the Statute Book. Apart from section 4 of the Statute of Westminster, 1931, there is section 4 (3) of the Regency Act, 1987, and section 1 (2) of the Ireland Act, 1949. There remain, then, several possibilities, either, for example, Parliament believes that there is some force in these provisions, or else it is content to enact what is in effect a sham, or again, it may be that there is a greater connection between theory and reality than Lord Sankey suggested.

51 The wording of the Act of 1592 (A.P.S. III 579), prohibiting the exercise of crafts in the suburbs of burghs, which was so held in Paterson v. Just, F.C. Dec. 6, 1810.
52 [1892] 1 K.B. 738.
53 [1934] 1 K.B. 590.
56 At p. 590.
57 "The Regent shall not have power to assent to any Bill for changing the order of succession to the Crown or for repealing or altering an Act of the fifth year of the reign of Queen Anne made in Scotland entitled 'An Act for Securing the Protestant Religion and Presbyterian Church Government'."
58 "It is hereby affirmed that in no event will Northern Ireland or any part thereof cease to be part of His Majesty's dominions and of the United Kingdom without the consent of the Parliament of Northern Ireland."
"The phraseology of this part of the subsection presents difficulties of interpretation. It is phrased as an "affirmation" and could therefore be construed as being merely a declaration of intent included in a statute as distinct from an enactment. The whole circumstances seem however to point to greater force than that being intended."
The real objection, in principle, is to the total renunciation of legislative competence in any field, in a manner which leaves a vacuum. Proponents of the classical view of the sovereignty of Parliament have asserted that Parliament can abdicate its power to another legislature, and this is acceptable since a legislative vacuum does not then arise. On somewhat similar arguments there does not, subject to qualifications, appear to be any objection in principle to a limitation in time or form. A parliament which must, for certain purposes, observe particular forms, or procedures, but which has nevertheless a full competence as to subject-matter, may, nevertheless, be regarded as "sovereign." It has been accepted in this country that Parliament may make rules governing the legislative process, so that primary legislation may be made in several ways. This is done by the Parliament Act, 1911, which means that, in effect, in certain circumstances Parliament means the Sovereign and the Commons to the exclusion of the House of Lords. It is equally clear that Parliament can, as by the Life Peerages Act, 1958, alter its own composition. It is true that neither of the measures cited are expressed to be eternal, but for the time being they are accepted as effective law.

If against this background we turn once again to the purported self-limitations of Parliament, we see that they present various

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59 Anson, "The Government of Ireland Bill and the Sovereignty of Parliament," (1886) 2 L.Q.R. 425; 440; Dicey: Law of the Constitution, 9th ed., 88-89 and see Covam, "Legislature and Judiciary" (1953) 15 M.L.R. 282 and 16 M.L.R. 373 but compare Wade, op. cit. [1955] C.L.J. 192 et seq. On any other assumption, granted that either the English or Scottish Parliament (or both) was (or were) sovereign in 1706 and the Union of 1707 could not have come about. Those who deny this proposition tend to do so because of fear of a particular consequence of admitting it. Compare Sir George Mackenzie arguing, in the Jus Regium, against the power of the King to abdicate (which, on his hypotheses, is the same argument) where he says "nor could [the King] in law consent to an Act of Parliament declaring that he should be the last King. And if such consents and Acts had been sufficient to bind Successors, many silly kings in several parts of Europe had long since been prevailed upon to alter the Monarchy from hereditary to elective."

60 Harris v. Donges, 1962 (2) S.A. 428. It is true that the limitations were imposed by the statute creating the Parliament, and thus the case is not exactly in point. Nevertheless the propositions on the topic of limitations and sovereignty are general and do reflect on the weight to be attached to considerations of whether a Parliament is sovereign or subordinate which affect the weight to be given to Att.-Gen. for N.S.W. v. Trethowan (1931) 44 C.L.R. 544. In fact the principle may be quite a general one aimed against the creation of impotence: see Mitchell, The Contracts of Public Authorities, 19th ed., 13.

61 The Parliament Act, 1911 (as amended by the Act of 1949), must, it seems, be regarded as a statute laying down rules for the legislative process, or alternatively, as a redefinition of Parliament for particular purposes. Legislation resulting from it, such as the Parliament Act, 1949, cannot be regarded as a form of delegated legislation, though see H. W. B. Wade, op. cit. Consider, inter alia, s. 4 and see generally Marshall, "What is Parliament?", Political Studies (1954) 185.
problems. Section 4 of the Statute of Westminster is the most complex. It can be construed as imposing a limitation upon Parliament. It can be construed not as a restriction upon legislative competence, but as a rule of construction directed to the courts. Further, its effect may differ if looked at from the point of view of the law of the United Kingdom, or from that of one of the members of the Commonwealth. Neglecting this last possibility, the first two raise issues here relevant. If it be regarded as a rule of construction, then at first sight no difficulties arise: there has been no limitation upon Parliament. Nevertheless the issue of an implied repeal could arise in relation to a subsequent statute and thus the problem of a formal limitation would be provoked. On the other construction there is quite clearly a purported limitation of the United Kingdom Parliament. If, however, the whole statute is looked at, section 4 does not create the abhorrent vacuum, since by other parts of the statute full powers of ordinary legislation are given. Thus it seems that section 4 can be regarded as part of a whole scheme of transference of legal power, intended to make law and fact coincide, and as such capable of being effective, even on the classical theory. The same conclusion may be reached even on the alternative construction. The rules governing the legislative process are, in the main, customary. This results simply from the course of history, and does not give to those rules any particular sanctity. It is clear that they may be altered by legislation passed in the ordinary way, and that that legislation is valid until repealed. It is true that the only example of such legislation at present is one which excludes a certain stage. If this can be done, there seems to be no reason why, subject to limitations which will appear, an additional stage should not be added as a prerequisite for validity. This, on the alternative construction, section 4 may be regarded as doing—by adding an extra-Parliamentary stage. No question of implied repeal here arises. If the prerequisites of legislation are laid down, material which does not comply with them is not legislation. It would

63 It is upon such a theory that the Canadian Bill of Rights appears to have been drafted, which is much more clearly directed to the courts.
64 See s. 2 (2) and s. 9. The limitations upon legislative competence of the then dominions related to constitutional legislation.
65 The suggestion, in argument, in the E.M.I. case (supra) that a United Kingdom Act of 1885 could, without compliance with s. 4, be treated as operative in Australia was said by Menzies J. "to attribute an impossible intent to the Imperial Parliament" (italics supplied); and see Dixon J. in Trethowan's Case (1931) 44 C.L.R. 394 at 426, where he suggests that in such a case "the courts might be called upon to consider whether the
however remain true that on the wording of section 4 alone section 4 could be repealed vis-à-vis the United Kingdom courts alone by ordinary legislation which did not comply with the terms of that section. That statement, however, is itself to be understood as being subject to the "conventional" rules set out in the preamble to the statutes. A full discussion of their impact would involve a preliminary argument on the nature of conventions, and must for the time being be left on one side.

Thus, in the absence of any such repeal it seems that, on either interpretation, section 4 could be regarded as effective. As a redefinition of Parliament for certain purposes it may effectively operate upon the activities of a body which, while for other purposes a parliament, is not one for those certain purposes. As imposing a rule of construction, the whole circumstances give to that rule such force that recognition by the courts of a chance repeal by implication is, to use Lord Sankey's words, unthinkable. A direct or explicit repeal involves the matters which have already been discussed.

In a similar way section 1 (2) of the Ireland Act, 1949, may be regarded, if it be taken as legislative in effect and not merely declaratory of an intent, as redefining Parliament to make it a more widely based body, or as requiring an additional stage for certain legislation. It would follow from the preceding argument that a case can be made for the validity and effectiveness of such legislation, and that that case is not destroyed by any existing authority in whichever way the section be construed.

There remain the provisions of the Regency Act. These undoubtedly exclude the possibility of legislation on certain topics. Again, however, if rightly regarded, they do not create the legislative vacuum. That part of the subsection dealing with the Act for Securing the Protestant Religion may be left on one side. Properly that part must be looked at in the light of the earlier argument upon the Union legislation, at least so far as repeal is

supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression, and by the elements in which it had come to reside."

65 In the E.M.I. case (supra) these conventional rules (as they existed before incorporation in the preamble) were referred to as "strong and unbending" (at p. 612), and as "a rule of construction which this court would be expected to apply" (at p. 613).

66 The insertion of this provision is curious and ambiguous. The fact that the Scottish Act is thus protected, and not the English one, is consistent with the history of both. The Scottish Act was the result of deep-seated emotions, the English was rather an afterthought, the product of political and ecclesiastical "me-tooism." The provision in relation to the Scottish Act is, however, ambiguous, in that, while it prefers that Act above all other legislation, by implication it suggests that that Act is not protected except during a regency.
concerned. So far as the subsection deals with "alteration" of the Act of Anne it must either be treated on the same footing or else it falls to be dealt with in the same way as the other limitations upon the Regent. So far as the succession to the Crown is concerned the limitation is one in time. There is no total exclusion of legislative competence, and there are conceivable circumstances in which such a limitation would be desirable. It seems therefore that arguments of principle should lead to the conclusion that this too must be treated like a formal limitation and thus to be rated as potentially valid.

The distinction which, it is suggested, must be made is between Parliament incapacitating itself and Parliament imposing limitations which do not incapacitate. The first is clearly obnoxious in principle and is opposed by the authoritative writers. The second is not obnoxious in principle and may well, in particular circumstances, be desirable. The possibility that Parliament may effectively limit itself is thus consistent with Parliamentary practice, is consistent with relevant, but not binding, modern authority elsewhere, and is not precluded by any domestic authority. Indeed, support can be found in Parliamentary practice for the view that at one stage Parliament conceived itself to be bound by formal limitations which it had imposed upon itself. Thus, on balance, since the law is not clear, it seems at present possible to assert that Parliament may thus effectively limit itself. The distinction between the two types of limitation may be easier to write than to discern in particular cases. A limitation in form could be so phrased that, in substance, it amounted to a deprivation of power. Such a limitation would, it seems, be invalid.

68 It seems to be the principle upon which the Canadian Bill of Rights was drafted; see particularly s. 2, which is addressed to both Parliament and to the courts, imposing rules of draftsmanship on the former and rules of construction on the latter.

69 By 1 Geo. 1, Stat. 2, c. 4, any naturalisation Bill had to have a clause excluding the person concerned from Parliament. When it was desired to provide particular exemption from this that Act was first repealed and then the conflicting measure was introduced, see the illustration in Hatsell, Precedents relating to the Prince of Brunswick, Vol. II, p. 6.

70 See the doubts of Lord Haldane in Re The Initiative and Referendum Act (1919) A.C. 935 at 945, and compare the limitations upon the power of the states to refer matters to the Commonwealth in Australia under placidum xxxvii of s. 51 envisaged in Graham v. Paterson (1930) 51 C.L.R. 373 at 416. In this last instance the problem is complicated by the necessity of maintaining a federal structure, which introduces other considerations. On a much lower plane the same sort of considerations are operative, see The Magistrates of Crail, Petitioners, 1947 S.L.T.(Sh.Ct.) 81. The principle that a body cannot disable itself from performing public functions is close to that which insists that the body must itself perform these functions. This or cognate problems arise in several forms; see Laskin, Canadian Constitutional Law (2nd ed.), 41, and cf. Jaffe, "Delegation of the Legislative Power" (1947) 47 Col.L.R. 359, 561.
but none of the instances at present upon the Statute Book amount to a deprivation: they go no further than imposing limited conditions.

The Courts and the Validity of Statutes

The problems hitherto discussed might have no more than a theoretical interest. Whether the interest is greater or not depends to a large extent upon the answer to the question whether judicial review of the validity statutes is possible with us. If it is not, that conflict between academic logic and political reality to which (in a slightly different sense) Lord President Cooper drew attention 71 remains. Again, the traditional answer is that no such review is possible. "We sit here as a court created by Parliament, and must judge according to what appears to be the will of Parliament, or resign our office. I have felt no call to any such martyrdom and shall certainly adhere to my duty of obedience to Parliament" said Lord MacKenzie in 1842. 72 Once again support for this view can be, or has been, found both in the cases and in the writers. 73 Yet once again the authorities are not all

71 MacCormick v. Lord Advocate, 1953 S.C. 396, 419. Lord Cooper was there referring to the "academic logic" which denied any validity to s. 4 of the Statute of Westminster and the political realism which so clearly recognised the validity of the same section.

72 Middleton v. Anderson (1849) 4 D. 957 (the Culsalmond case) at 1010. The statement antedates the equally forceful question of Wills J. as to whether the courts were to sit as regent over what is done in Parliament, see Lee v. Bude and Torrington Junction Rly. (1871) L.R. 6 C.P. 576 at 582. Lord Cooper in MacCormick's case was at first sight of the same opinion when he said: "This at least is plain, that there is neither precedent nor authority of any kind for the view that the domestic courts of either Scotland or England have jurisdiction to determine whether a governmental act of the type here in controversy is or is not conform to the provisions of a treaty." But his declaration is less plain on examination. The "governmental act" could bear reference to the Royal Proclamation, and thus be irrelevant to the present purpose. Moreover he added, with careful specification, that "I am constrained to hold that the action as laid is incompetent in respect that it has not been shown that the Court of Session has authority to entertain the isene sought to be raised." The narrowness of this formulation makes it difficult to construe the whole passage as a general denial of possibility of judicial review, particularly if regard is had to some of the authorities cited. Lord Guthrie in the Outer House was more explicit, see p. 408. Lord Russell in the Inner House expressly reserved his opinion on this point (see p. 417).

73 Edinburgh and Dalkeith Rly. v. Wauchope (1842) 1 Bell's App.Cas. 262, 279, per Lord Campbell; Mortensen v. Peters (1906) 8 F.(J.) 93, 100, per Lord Dunedin; Hoonie Te Hohen Pakiyo v. Aotea District Maori Land Board (1941) A.C. 308, 322, per Lord Simon, citing Labrador Company v. The Queen [1883] A.C. 104. Among the older Scottish authorities see Mags. of Dumbarton v. Mags. of Glasgow, F.C. Nov. 19, 1771, where a statute was challenged, but the Lords held "though they could explain an act of the legislature, they had no power to supply or correct it; and could even give it no other interpretation than the precise terms used naturally and positively authorised." Yet earlier in Stuart v. Wedderburn (1637) Durie 301 it is said: "The said Act of Parliament could not be drawn in dispute before the Session, if it was formally or well done, or not, they
on one side, or consistent with themselves. Coke, in *Bonham's Case*, spoke with a different voice, and in *The Prince's Case* the validity of a statute was examined. There are suggestions of judicial review in *Queensberry v. Officers of State*; and in *Mackenzie v. Stewart* a private statute was set aside on grounds of fraud. It must be remembered that the Scottish background is here somewhat different. So far as public general statutes were concerned the doctrine of desuetude, while it did not amount to judicial review of the initial validity of a statute (which is here in question), did amount to a judicial review of the continuing validity of statutes. So far as private Acts were concerned (and *Wauchope's Case* involved such a statute) the Court of Session was given specific jurisdiction to reduce them, and the effect of the various Acts *salvo jure cujuslibet* was to re-emphasise this jurisdiction and also to emphasise the uncertain status of such private Acts and ratifications. This difference of background makes understandable both the decision of the Scottish courts and the surprise and dismay of the House of Lords in *Wauchope*.

The contrast between jurisdictions should not be over-emphasised. An appeal, in some form, ran from Session to Parliament and had its influence; "and in case the Lords had decided against the Act of Parliament, which no man will suppose, yet their decision would not take away the force from the Act of Parliament but that decreet might be reduced in Parliament," runs the report in *Officers of State v. Cowtie*. Such statements

not being judges thereto." Among the writers see Dicey, *Law of the Constitution* (5th ed.), 40; Blackstone, I Comm. 166, refers to the uncontrollable power of Parliament; Sir George Mackenzie in both the *Jus Regium*, cited below, and his *Criminal Law*, tit. III. The sense of Bankton, I, 1, 66, would deny any possibility of judicial review.

74 (1610) 8 Co.Rep. 114, 118; and see Plucknett, "Bonham's Case and Judicial Review," 40 H.L.R. 30.
75 (1606) 8 Co.Rep. 1a.
77 (1764) Pat.App. 576, where it was argued that an Act of Parliament obtained upon a recital of fictitious debts barred the setting up of the true state of affairs, but this argument was rejected in the House of Lords (reversing the Inner House). Lord Kames (Sol. Dec. 18) was strongly of opinion that the courts must afford a remedy even against an Act of Parliament in such a case. See too Donald v. Mags. of Anderston (1832) 11 S. 119, but contrast *Threash v. Gordon* (1841) 3 D. 450.
78 Act of 1667 (A.P.S. III 29).
80 (1611) M. 7097, a case of the conflict of later and earlier statutes. See too *Murray v. Erle of Torwoodhead* (1683) Harcarse 18, holding that decreets of Parliament are not to be quarrelled by inferior judges, and Mackenzie, *Criminal Law*, tit. III.
are echoed in England, so also are there statements in both jurisdictions emphasising the inferiority of judges—cases of difficulty are not to be settled by them but by Parliament. Sir George Mackenzie based a like view on a hierarchical idea of law, and when he says, "And then, if the Judges of England should publish Edicts contrary to the Acts of Parliament, or if a Justice of the Peace should reverse a decree of the judges of Westminster, these their Endeavours would be void and ineffectual," he would doubtless have said the same of Scotland. These older statements do something more. They show the interplay of political ideas and political facts in the creation of ideas or rules of law. The proclamation of the subservience of courts to Parliament after 1688 was necessary, since in the years before the parliamentary revolution the courts had not proved themselves strong bulwarks against prerogative claims. This interplay persists, and, in a slightly different way, again creates (as will appear) a feeling of subservience.

Just as it is necessary to look at some of the declarations (including those of Coke and Blackstone) against their political background, so also is it necessary to look at some of the more modern declarations more closely if their proper meaning is to be appreciated. Their generality is then limited by the circumstances of the case. Some turn upon other general principles, such as that international law is not the system administered by domestic courts, and thus treaties cannot there be debated. Most of the others turn simply upon a general need for finality, which operates in law far outside the narrow confines of the debate on the sovereignty of Parliament. Both Wauchope's case and the Bude and Torrington Railway case are concerned with private legislation and a procedure which approximates to a trial. What is there conceded is that Parliament is master of its own procedure, a concession which would be made to the judgment of any supreme

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81 See e.g., Petty, *Jurisdiction of Parliament*, Chaps. 3 and 4.
82 Balfour, *Practicks*—of Law—"na jugies within this realme hes power to mak any laws or statutes except the Parliament allanerie," and see Petty, *op. cit* Chap. 5. At times steps were taken to re-emphasise this inferiority, and see Dirleton's *Doubts* and *Stewart's Answers* thereto *sub voce* "Impugning Parliament," and *Kennedy v. M'Letten* (1534) M. 7200.
84 Thus Hume bases his idea of the overwhelming power of Parliament upon a concept of representative government, *Criminal Law*, Chap. 18, speaking of the making of an Act of Indemnity against civil as well as criminal consequences he says, "and this though beyond the power of royal pardon is however lawful to be done in Parliament, because all the lieges are represented there."
court,\textsuperscript{66} and is consistent with the treatment of other aspects of Parliamentary life.\textsuperscript{67} Equally the general common-sense principle, which appears elsewhere in rules relating to the finality of judgments, here appears in the rule that the factual or legal assumptions upon which legislation is founded cannot subsequently be challenged in a court of law.\textsuperscript{68} It is as true upon general political principles that, under our system, the courts cannot set themselves up as judges of the appropriateness or expediency of legislative action. The matter is put into its proper perspective by Lord Wright in Co-operative Committee on Japanese Canadians v. Att.-Gen for Canada.\textsuperscript{69} Thus, if these cases are looked at in their context, either the generality of particular passages contained in the judgments tends to disappear, or else those passages point to a general principle which has no necessary connection with any doctrine of the sovereignty of Parliament.

Something more must be said of the latest of these cases, \textit{MacCormick v. Lord Advocate},\textsuperscript{70} in which the most deliberate attempt, so far, was made to secure judicial review of a statute. It must be said at the outset that the greater part of the opinions there given consists of \textit{obiter dicta}. The statutes possibly involved were the Crown Proceedings Act, 1947, and the Royal Titles Act, 1953. The challenge to the first (in so far as it removed the possibility of obtaining an interdict against the Crown) as being inconsistent with Article 19 of the Act of Union, was not pressed. Any challenge to the second disappeared once it was held that that statute was quite irrelevant to the question of the royal numeral.\textsuperscript{91} Nevertheless, the issue of judicial review was fully dealt with in the opinions, and Lord Cooper said, "This at least is plain, that there is neither precedent nor authority of any kind for the view that the domestic courts of either Scotland or

\textsuperscript{66} Compare the discussion in Cheshire, \textit{Private International Law} (5th ed.), 692 \textit{et seq.}

\textsuperscript{67} Bradlaugh v. Gossett (1884) 12 Q.B.D. 271.

\textsuperscript{68} Maggs. of Dumbarton v. Maggs. of Glasgow, F.C. Nov. 19, 1771; Labrador Co. v. The Queen (1893) A.C. 104, 123; The Aotea Case [1941] A.C. 308, 322.

\textsuperscript{69} (1947) A.C. 87, 102. It must be remembered that even where judicial review of legislation is generally operative this same principle is continually reiterated, though the line between legality and expediency is often not easily drawn. The point is most clearly made by the type of problem which is regarded in the U.S.A. as being non-justiciable because it is a "political question"—see the references in Corwin, \textit{The Constitution and What it Means Today} (11th ed.), 135 \textit{et seq.} and particularly the opinions in \textit{Baker v. Carr} (1961) 369 U.S. 186. With us the deference of the courts in matters of foreign affairs has a somewhat similar origin to these American rules and to the domestic rules under discussion, see e.g., \textit{R. v. Bottrill, ex p. Kuechenmeister} (1947) K.B. 41.

\textsuperscript{70} 1953 S.C. 396.

\textsuperscript{91} See Lord President Cooper at p. 410; he added that had he had to construe that statute, its form made that task impossible.
England have jurisdiction to determine whether governmental acts of the type here in controversy is or is not conform to the provisions of a Treaty ... and I am constrained to hold that the action as laid is incompetent in that it has not been shown that the Court of Session has authority to entertain the issue sought to be raised." Lord Russell added, however, "On the hypothetical question as to the power that might be exercised by this court in relation to an Act passed which infringed such provisions as Article 19 or Article 25 of the Treaty of Union I desire to reserve my opinion." This echoed a similar reservation by Lord Cooper, "I reserve my opinion with regard to the provisions relating expressly to this court, and to the laws which concern 'private right' which are administered here." The opinions, then, speak with a double voice, while rejecting judicial review in a particular case, they deliberately express reservations about possible future and different cases.

Perhaps this ambiguity itself suggests solutions. First, the question of title to sue is of great importance. Here the pursuer was seeking general political redress. It is clear that in modern times the courts are not the appropriate forum for the ventilation of general political grievances, and that fact alone may impose a substantial limitation upon any general judicial review. Second, there is an emphasis on the fact that the traditional answer denying judicial review was to a large extent dependent on the traditional view of the sovereignty of Parliament. If that view of sovereignty be not accepted, views on judicial review are affected.

Thus, if it is accepted that the Acts of Union are

92 At p. 413. It may be noted that none of the earlier Scottish authorities, such as they are (and which have been referred to above) appear to have been cited in argument.

93 At p. 417. It may be noted that immediately before this passage Lord Russell had referred to the process of denationalising what had shortly before been nationalised as illustrating the supremacy of Parliament. With respect the illustration was inept, the nationalising statutes having no purported fetters upon their repeal, and a proved ability to pull down a house of cards does not demonstrate an ability to blow down a brick wall.

94 At p. 412.


96 Here notice Lord Cooper's reference to Harris v. Minister of Interior, 1952 (2) S.A. 428 (A.D.), where, granted the existence of entrenched clauses, judicial review was held to follow. "To hold otherwise would mean that courts of law would be powerless to protect the rights of individuals which were specially protected in the constitution of this country": per Centlivres C.J. at p. 470. There is here an echo of the principle upon which Marshall C.J. wrote judicial review into the constitution of the U.S.A. in Marbury v. Madison (1803) 1 Cranch 137. The conclusion does not necessarily follow, see Minister of the Interior v. Harris, 1952 (4) S.A. 769 A.D. at 790, but seems to do so logically in the absence of any express provision. The matter is admirably ventilated in an address (which reasonably stopped short of firm conclusions) by Sir Owen Dixon (1957) 91 A.L.J. 240, "The Common Law as an Ultimate Constitutional Foundation."
constituent documents containing some, if few, fundamental provisions, the argument for possible judicial review is greatly strengthened. The foundation of the distinction drawn in Trethovan v. Att.-Gen. for N.S.W.97 then disappears. Similarly, if attention is paid to what Sir Owen Dixon describes as, "the identification of the source of a purported enactment with the body established by law as the supreme legislature and the fulfilment of the conditions prescribed by the law for the time being in force for the authentic expression of the supreme will"98 and it is assumed or accepted that the definition of that source and the prescription of conditions are matters of law, which appear to be the case, then again the case for some form of judicial examination or review is strong.

In considering this possibility it must be remembered that courts have in the past considered such an issue,99 and that Parliament itself has taken steps to validate "Acts" which suffered from any substantial procedural defect; moreover, presence on or absence from the Parliament Roll has been said to be inconclusive as to the existence of a statute.2 The cases and the statutes are however, old, and it may well be that if it appears on the face of the statute that all necessary steps, such as obtaining the normal threefold consent have been taken, then the courts would not inquire further. There seems, however, to be no authority for the proposition that if it appeared from the statute that it had not been passed according to the appropriate forms of law, or that in some other way a rule of law had been broken, the courts would be powerless to question the validity. The arguments which lead to acceptance of the record do not carry this further proposition, and it must be remembered that preambles have not been treated as unchallengeable.3 Moreover, the "untouchability" of Parliamentary activities must be regarded. Sometimes this quality in this context is over-emphasised and is regarded as peculiar, when it is not,4 and in every case the quality of the defect would

97 (1932) 44 C.L.R. 394.
98 (1957) 31 A.L.J. at 244.
99 The Prince's Case (1605) 8 Co.Rep. 13b; the old Scottish doctrine of desuetude went even farther by inquiring whether an admitted statute was still valid. The strength of these cases is however affected by the arguments earlier set forth.
1 May, Parliamentary Practice (18th ed.), 600-601, and see Cowen, "Legislature and Judiciary" (1953) 16 M.L.R. at 275.
4 The modern rules about how obviously inappropriate words in a statute are to be dealt with in the courts scarcely differ from similar rules governing the construction of wills.
require careful analysis. The dichotomy of "formal" and "substantive" limitations is probably too rough and ready. Even the supposed rule that the internal actions of either House are no concern of the courts may be too broadly phrased. Finally, other factors must be taken into consideration. Two questions are involved, the validity of a statute and, if invalidity, or the possibility of invalidity, be conceded, the existence of a remedy. As Lord Cooper emphasised, these questions are separate.

The problems of remedy are varied. Some remedies, interdict or injunction for example, may involve a direct interference with the internal operations of Parliament, and there is a growing reluctance to grant such remedies, which, being discretionary, are much affected by subtle changes of attitude, and success in Trethowan v. Att.-Gen. for N.S.W. does not necessarily indicate a probability of success elsewhere. Account must be taken, in assessing the likelihood of success in seeking an interdict or injunction in such circumstances, not merely of this deference of one court for another but also of the possibility of any post-enactment remedy. If that may exist the court may be much less ready to interfere in earlier stages, and vice versa. Above all account must be taken of the background of general theory against which judges must now work. The place of Parliament in legal thinking cannot be divorced from the place of Parliament in current political thinking. Political decisions are, as far as possible, to be there taken, and the growth of the democratic process since 1882 has obviously

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5 In effect a conflict of opinion in this between the two Houses underlies the Laying of Documents before Parliament (Interpretation) Act, 1948, and the Act assumes limits to the proposition that the courts could not consider procedure in Parliament.

6 1953 S.C. at 412-413.


affected the attitude of the courts. 9 It equally must be remembered that the Acts of Union date from a different period, when natural law elements or the primary of the common law were much stronger. Thus, despite what is said in MacCormick's case, 10 it seems highly doubtful whether the courts today either could or should set themselves up as an appellate court from Parliament to judge whether any alteration of the laws which concern private right is for the evident utility of the subjects within Scotland. Whether for good or ill modern constitutional thinking would regard such decisions as appropriate to a political arena. That was one of the difficulties facing the pursuer in MacCormick's case, and it is reflected in the argument about a title to sue. Where review at large of "governmental" statutes is concerned, as in a hypothetical case of a disregard of the provisions of the Ireland Act, 1949, these difficulties may well be so great as to prevent any review. Where, however, challenge is more specific and individual 11 the authorities do not, when viewed in the light of modern trends, conclusively rule out any possibility of review. The possibility is perhaps stronger when the challenge is oblique, e.g., it arises in an attempt to enforce upon an individual an Act which may be claimed to offend some fundamental or limiting provision. Such an enactment is not inconceivable in relation to any future measure which might conflict with the Act for Securing the Protestant Religion in the limited sphere in which, it has been suggested, that that Act is to be treated as fundamental.

The argument may, then, be summarised thus, a conjunction of influence produced at one time the concept of an unlimited parliament, incapable of limiting itself. Since that time events and ideas have caused a reconsideration of this concept and of the

9 This is clearly reflected in such opinions as that of Lord Normand in Pollock School v. Glasgow Town Clerk, 1946 S.C. 373 at 386, and though in the same litigation Lord Cooper thought that some of the earlier expressions might have gone too far, 1947 S.C. 655 at 660, it is evident that such general constitutional changes have a persuasive influence on the law, and clearly influenced such writers as Professor Hearn (who in turn affected Dicey): see his Government of England, particularly the first and last chapters. Earlier still this attitude is reflected in Brodie's note to Stair I, 1, 16, on Desuetude, "It just amounts to this that though the Lords of Session derive all their authority from the legislature as the supreme power, they are entitled at their discretion to give effect to or disregard the very statutes devised by their power whence their own authority proceeds . . . at this rate the legislature is an absolute mockery." (Italics supplied.)

10 1953 S.C. 896 at 412.

11 An individual interest was present, e.g., in MacDonald v. Cain [1953] V.L.R. 411 but was closely scrutinised. In the Senate Case (Collins v. Minister of the Interior, 1957 (1) S.A. 692 (A.D.)) the most general of the South African issues, an individual interest, was present since the challenge to the Senate Act was linked inseparably with the challenge to the South Africa Act Amendment Act which affected the appellants' right to vote.
authorities upon which it was based. These latter do not, it is conceived, go as far as was at one time thought. Similarly close examination of the problem of limitation has emphasised distinctions between the Acts of Union and subsequent Acts of the Union Parliament. Events elsewhere, notably in Australia, Canada and South Africa have also prompted reconsideration in respect of both initial and subsequent limitations. These considerations coupled with continuing Parliamentary practices make it impossible to adhere with certainty to the older principles in their simple form. Correspondingly and consequently the problem of judicial review has been reopened. It has been reopened because any shift in theory on the question of limitation necessarily requires a reconsideration of the problem of judicial review. That reconsideration is also prompted by changes in general thought on the place of Parliamentary and on the role of judicial checks in the system of government. The system of government has grown so complex that Parliamentary checks may not, in a modern state, have the perfection which was once attributed to them. Further, it has been shown in other countries that those checks may not, even leaving the complexity of the state on one side, have the strength that was at one time thought. So again much more tentative answers must be given on judicial review, though it is believed that the possibility of that, if earlier authorities are examined critically, is much stronger than would formerly have been allowed. In view of the lack of modern authority and of the shifts of opinion no concluded answer can be given. Such uncertainty need not excite surprise in this area of constitutional law. Essentially, the accepted doctrines have grown up as beliefs based rather more on assertion than proof. From time to time it may not be foolish to ask if beliefs are really justified.

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"THE CONSTITUTIONAL POSITION OF THE POLICE IN SCOTLAND"

by

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THE CONSTITUTIONAL POSITION OF THE POLICE IN SCOTLAND

The police, even if for a variety of reasons they are less in evidence upon the beat, are nevertheless currently as much a subject for debate as ever they were. Perhaps it is true to say that the debate has never been as heated or as widespread since the early debates on the establishment of regular forces in a modern sense just over a century ago. Then, as now, the public attitude to the police was of vital importance and public opinion influenced the arrangements made for the government of the police, and was in its turn influenced by them. At a time when, once again, public opinion is important because of uncertainty as to which way it will run, it seems worthwhile to look at the principles which underlie or affect those arrangements. Much has recently been written in England on this matter where events in Brighton and Nottingham added point to the discussion to a far greater degree than did events in Thurso. What follows is intended primarily as a discussion of the situation in Scotland, since, while there are basic similarities of organization in the two jurisdictions, there are major differences in organization and surrounding circumstances which may be important and should not be lost from sight.

The regulation of the constitutional position of any body or organization within the state is always the result of the conflict of a variety of ideals or principles. Such conflicts are of particular importance in relation to the police. Since criminals do not observe the boundaries of local government or other authorities, a good case could be made out for police forces which likewise transcend such boundaries. Efficiency in other respects may press in the same direction. The size of force may govern opportunities for promotion, the availability of equipment, and other technical matters. On the other hand past history, present conditions, and other general theories may require police forces to be local. Traditionally they are so. Currently it is probable that it is desirable that the maintenance of law and order should be regarded as the responsibility of the community in a not too generalized form.
For defence, the nation may still be the community, for police purposes it is desirable that, if possible, the sense of responsibility should be more localized. Compromise is thus inevitable and is, for example, apparent in the Police (Scotland) Act, 1956, S.5 (relating to the police in the Border counties). Compromise does not necessarily mean loss. Indeed the dispersal of power, inherent in a system of local police forces, may in itself be a valuable constitutional safeguard, granted a necessary adjustment in respect of the force responsible for policing the seat of the central government. (While Edinburgh must rightly be regarded as in some sense a capital city this element is not so strong that it requires the police force to be removed from local control). The neutrality of the force, and thus its insulation from political bodies, is clearly desirable, but complete autonomy, while aiding neutrality and possibly leading to greater efficiency, is inconceivable in a society which expects those who wield power to be ultimately responsible to the community. These and other similar general considerations prevent the constitutional position of the police from being entirely logical either now or in the future, they also probably require that at times responsibility be imprecisely defined or be overlapping.

Historically, in Scotland as in England, the police are local forces, and there has similarly been a division in both jurisdictions between town and country, evidenced by the Police (Scotland) Act, 1857, and the Burgh Police (Scotland) Act, 1892, and in England by the origins of the forces in the Municipal Corporations Act, 1835, and the County Police Act, 1839. This division has diminished in importance in Scotland as a result of more recent legislation, notably the Police (Scotland) Act, 1956, which in this respect went much further than the Police Act, 1946, applicable to England and Wales. Special Acts regulated (and in some operational aspects still regulate) the forces in Edinburgh, Glasgow, Aberdeen, Dundee and Greenock, creating a further division, but as a result of S.37 of the Act of 1956 the general administrative arrangements for the police have been made uniform.¹

While in broad outline the development of the forces in Scotland may, then, be said to be roughly similar but by no means identical to that in England, allowance must, nevertheless, be made for two major causes of difference/
difference between the place of the police in the two jurisdictions. Firstly, and probably of lesser importance, there is the much smaller part played by Justices of the Peace in Scotland either in the administration of the law or in the life of the community, and the correspondingly more important part of the Sheriff. Secondly, there is the existence of the Scottish system of public prosecution independent of the police. This second fact alters the whole relationship of the police force to other authorities, and to the public. Neither the conduct of a prosecution, nor the decision whether to prosecute or not, is the responsibility of the police. It is merely the duty of the police, where offences have been committed, to "make reports to the appropriate prosecutor as may be necessary for the purposes of bringing the offender with all due speed to justice" (S.4(1)(b)). This situation is reflected in the scope of the ability of other bodies to give directions to a chief constable, and the limits upon the powers of persons or bodies to give directions which are set out in S.4(3) are important. In relation to the investigation of offences there is a power to issue directions vested in "the appropriate prosecutor" by the proviso to that sub-section. In relation to general police duties only, powers of direction can lie with the magistrates in a burgh or the sheriff in a county, but the direction, whether general or particular, can under the sub-section only relate to "any place". These authorities are therefore clearly incompetent in law to issue directions in connexion with offences. Thus on the one hand, the police are, in both burghs and counties, insulated from any political pressures in relation to offences, and on the other hand, in the same field they are the servants of the general machinery of justice, and are not their own masters. They are thus, in what is from some points of view the most important part of their functions (and which is in any case a very significant part), placed by law in a position of neutrality. While the relationship of the police to other authorities will be discussed in detail below/
below, this matter, which in its clarity is in contrast to the position in England, is of such importance in the relationship of the police to the public and to the performance of their duties that it should be placed in the forefront. 

S.10 of the Summary Jurisdiction (Scotland) Act, 1954, authorizing a chief constable (or other officer in charge of a police station) to grant or refuse bail in certain minor cases may be regarded as introducing an exception to the general rule, but it is one eminently justified by convenience. S.78 of the Burgh Police Act, 1892, authorizes the appointment of a chief constable as Burgh Prosecutor, but it is recognized that this conjunction of offices is undesirable, and, as far as is known does not now exist, and has not for some years past. It is a provision which might well be removed. Against this background the relationship of police authorities to Police forces can be examined in more detail.

Police authorities are either the town council of a burgh or the county council, those burghs which are police authorities being scheduled to the 1956 Act. Each of these authorities was required to appoint a committee for police purposes by the Local Government (Scotland) Act, 1947, S.112, and under that Act the Council was required, except where there was urgency, to receive a report of the committee on any matter referred to it, but the committees did not have autonomy in law. The abolition of the obligation to appoint a committee by the Local Government and Miscellaneous Provisions Act, 1958 (6th Schedule, Part III) does not therefore materially alter the relationship in law of the Council to the police force. It is the function of the Police Authority:

1. To appoint (with the approval of the Secretary of State) the Chief Constable (S.6(1));
2. To settle (with the consent of the Secretary of State) the establishment of the force (S.3(1));
3. To employ persons other than constables (subject to a like consent) to assist the police (S.13);
4. To be the disciplinary authority for the Chief Constable, Assistant Chief Constable and the deputy to the Chief Constable (S.11(5)(b));
5. To provide and maintain appropriate land and buildings (S.15).
The discharge of some of these functions is subject to regulations made by the Secretary of State which materially limit the apparent discretion of the police authority. Moreover it is to be noted that the functions largely relate to the provision of the necessary facilities. The working of those facilities is with few exceptions the responsibility of the chief constable. S.4 of the Act of 1956 provides that "it shall be the duty of the constables of a police force, under the direction of the appropriate chief constable" to carry out these functions (see also S.4(2)). In carrying out his duties the chief constable is enjoined (S.4(3)) to observe those instructions which have already been referred to, namely instructions of the magistrates or sheriff as to any place, or of a prosecutor as to an offence. As was pointed out, the ambit of those instructions is narrow and defined. Indeed it is noticeable, as an indication of the position of the Chief Constable, that under S.16 dealing with the aid of one police force to another, the whole matter is for negotiation between chief constables, or failing agreement between them for direction by the Secretary of State to one of them. The only point at which the police authorities appear is after the event on the division of cost.

These limitations are reflected in the cases. Running through cases concerned with the responsibility of police authorities for the allegedly illegal actions of the police are such phrases - "The Standing Joint Committee have only statutory duties and statutory powers and the control of the police is not one of them". Operational or functional control is clearly denied to a police authority. Even more firmly are these authorities excluded from the field of criminal prosecution. Where the issue was whether the chief constable should report common law petty offences to the Justice of the Peace Fiscal (as he was directed to do by the Sheriff) or whether he should report them to the Sheriff Court Fiscal (as he, supported by the County Council, desired) it was said that neither the County Council nor the Standing Joint Committee "would be within its province in giving any orders whatever to the chief constable as to which of two prosecutors he shall report cases to". Clearly any interference by these bodies in matters of substance affecting prosecution would be even more firmly excluded. The relationship of the police authority to the chief constable and to the other constables is summarised, in the same case/
case, by the Lord President as follows:

"By the Police (Scotland) Act, 1857, the duty is laid on each county of equipping a disciplined police force, of which the chief constable is the commanding officer. The force thus equipped is placed, along with its commanding officer as an integral part of it, at the disposal of the authorities charged with the preservation of peace and the prosecution of crime, and, to make matters perfectly clear, the chief constable is, by the 26th section, directed to obey all lawful orders and warrants of the Sheriff and Justices,® in the execution of his duty."

Police authorities are thus limited to being "paymasters" in a broad sense, including the provision of the necessary physical facilities for the police force. So much so that even where by reason of construction works the number of people in an area is abnormally increased and the police authority can only direct the chief constable to make such arrangements as he considers necessary for increasing the available number of constables (S.32). It is true that by S.31 the police authority may enter into special agreement for guarding particular premises, but it seems that, even if this power is not delegated to the chief constable, the foundation of the agreement must be the goodwill and consent of the chief constable, for there is no power to direct him to carry out an agreement to which he had not consented.

The chief constable is appointed to a force by the police authority, with the approval of the Secretary of State (S.6(1)). To him is entrusted (S.4) the general control of the force, and he also is responsible for appointing (subject to general regulations) all constables in the force (S.7), including the assistant chief constable.9 He also may (S.10), with the consent of the police authority, appoint a person to be his deputy. (While the recognition of an individual as deputy may require this consent, it seems that in a small force the effective selection of the deputy would not necessarily involve that consent, since the chief constable has in his own power alone to appoint to the appropriate rank, of which there might be only one established post). The chief constable is also disciplinary authority for the whole force, with the exception of himself, the assistant and the deputy/
deputy chief constable for whom the disciplinary authority is the police authority (S.11(5)). In all cases there lies an appeal under the Police Appeals Acts, 1927 and 1943, to the Secretary of State. Thus the chief constable acts as an insulator between the force and the police authority both as to discipline and function, his independence being only limited by the obligation to report and the subservience to instructions noted elsewhere. While his control over the force is large in law, and probably greater in practice, it must be noticed that duties are imposed directly on constables (S.4), and this and other circumstances have meant that constables are not treated as the "servants" of the chief constable.

Even within those spheres in which a police authority has jurisdiction it is not autonomous. To a very great extent its operations are circumscribed by regulations, (thus their discretion in the appointment of a chief constable, which in itself is exercised subject to the approval of the Secretary of State (S.6(1) is limited by S.I. 1956 No. 1999), or by statutory provisions (the provision of land and buildings is subject to the consent of the Secretary of State (S.15)), or by those general administrative devices (such as grants and inspection) by which the central government is accustomed to control local authorities. In relation to police authorities it appears therefore that the Secretary of State has at his disposal adequate sources of power and influence to maintain efficiency in certain respects at a proper level, without making the provision of the service a national matter. Control by this method is however necessarily limited, for granted the relationship of police authority to police force, the Secretary of State cannot control the operation of the force through the police authority. Nor could he lawfully interfere with any instruction of a public prosecutor. He has however direct powers in relation to the forces themselves. The Inspector of Constabulary appointed and controlled by him (S.33) reports to him on the efficiency of the force, and the Inspector's reports could be reflected in the grant. (Under the Police Grant (Scotland) Order S.I. 1947 No. 1659 (S.66) Reg. 3 the interpretation of efficiency is very broad, covering all facets of police work.) The Secretary of State may also at any time require from the chief constable a report on the policing of the area for which the force is responsible (S.34(1)). Many of these provisions afford a means of influencing the operation/
operation of a force but stop short of authorizing direct instructions, even though in practice the distinction between the two may be a subtle one. The power of the Secretary of State to give directions in regard to mutual aid can, for example, only be exercised on appeal under the provisions which have already been noticed (p.5) and it seems that he could not initiate any such direction. Once again it seems that offences are excluded from the ambit of the powers of the Secretary of State, but central authorities may be concerned with offences since by S.4(3) the appropriate public prosecutor (which term includes, above all, the Lord Advocate) may give directions as to the investigation of offences. Thus, the chief constable is placed vis à vis the Secretary of State in a position somewhat similar to that of a police authority in relation to matters falling within the authority's jurisdiction in relation to that large area of general management of the force which is entrusted to him and in which other local authorities have either no powers or only very limited powers of control. While the chief constable retains a sufficient area of discretion, he is, like those authorities, circumscribed by regulations made by the Secretary of State as to discipline, promotion, etc. (See inter alia S.I. 1956 No. 1999) and by administrative devices such as inspection. Nevertheless the area of discretion left to a chief constable appears to be sufficiently large to maintain his standing in the force and the public conception of locality of the force.

It was proposed by the Scottish Local Government Law Consolidation Committee (Cmd. 8993) that the Secretary of State should have a specific power to give more general instructions, but this power was deleted from the Bill presented to Parliament and does not appear in the 1956 Act. It is a power which seems superfluous, and if overtly given is one which could injure the whole attitude of the public to the police.

The general picture is then one of police forces, each under a chief constable, having general powers of management and a certain degree of autonomy. Over him there are a series of bodies, which do not interlock among themselves, each one of which has powers of direction or influence in relation to a part of the functions of the force and its chief, but no one of which has an unlimited power. While the resulting administrative pattern/
pattern is untidy, it appears to be a pattern which is broadly necessary to reconcile the conflicting principles which govern the diverse activities of the police, and also to reconcile the conflict between the national and local characteristics of the police. It is evident that among these authorities the Secretary of State is pre-eminent and his position is enhanced by the fact that he already runs (under 3.29) a central training institution, the Scottish Police College, which will influence members of the forces at all critical stages of their career, and under the same section he has the power (after appropriate consultations) to provide any other service on a centralized basis.

This administrative pattern, which affects responsibility to a superior body, also affects answerability. A chief constable is only answerable to any other person or body to the extent that that person or body has jurisdiction over him. This is particularly important in relation to the Secretary of State who is answerable to Parliament. Clearly the Secretary of State is answerable for, and could be questioned, on functions directly placed upon him, such as the operation of the Inspector of Constabulary, the Police College, or even the appointment of a particular chief constable. It is also obvious that, granted the shape of debates upon Statutory Instruments, the range of his regulatory powers will afford ample opportunity on occasion for general Parliamentary criticism. A Minister is however also technically answerable for what he could do but has not done. The power in S.34 to call for reports notionally opens up a very wide field for Parliamentary questioning. The problem here is akin to that in relation to nationalized industries. In that case, the House accepted within limits a self-denying ordinance on questioning and also a modification of the rule against the repetition of questions. It is doubtful, granted reasonable ingenuity in framing questions, if S.34 has greatly extended the potential scope of questions as compared to the position under English legislation, and to the extent that answers have already been refused it is probable that the same barrier to questioning has already been raised in both jurisdictions by the repetition rule. The barrier against Parliamentary questioning of ministers in matters concerning the police is thus not the product of the law, which by itself gives/
gives the necessary basis of responsibility, but it is rather the product of the House of Commons itself. In so far as questioning is thus governed by the rules of the House (there being in this case no self-denying ordinance in the background), it is open to the House to work out some compromise between autonomy and answerability, as it has done in the case of nationalised industries.

Apart from the methods referred to, there are other opportunities to raise in Parliament matters relating to the police. Debates on the adjournment and similar occasions may be used. The Select Committee on Estimates has in recent years examined questions relating to the police, and that, or similar reports, could have formed the foundation for debate. It is though arguable whether any increase in control by Parliamentary Question or by other Parliamentary devices is desirable. Such controls tend over the years to cause centralization; any Minister who may be questioned on, or have to answer for, a service in any way will ensure that he controls it. Such controls, even apart from that possible consequence, might well also diminish public confidence in the neutrality of the police, since inevitably the activity in the House of Commons tends to have a political aspect.

Just as the overall administrative arrangements for the police complicates the question of political responsibility they also complicate questions of legal responsibility. It follows, even apart from the fact that constables are appointed by the chief constable, from what has been said about the degree of control of police authorities that constables cannot be regarded as the servants of police authorities so as to make the latter liable for any wrongdoing of constables. Since again constables do not fall within the definition of a Crown servant in The Crown Proceedings Act, 1947, S.2(6), no action founded upon that Act can be raised against the Crown for any of their wrongdoings, even if it could be established that for other purposes they are Crown servants. The liability of the chief constable for the actions of individual constables has also been rejected unless it can be shown that what was done was in accordance with his direct authority or orders, the grounds being that the constables are performing duties imposed upon them by law and that the relationship or/
of master and servant does not exist between them and the chief constable. Thus it appears that in the absence of any certainty as to obedience to specific orders (which will be difficult to ascertain) the only safe course is to sue the individual constable. Even then the pursuer will be faced with an added difficulty. A policeman acting in the course of his duty is protected unless malice and want of probable cause on his part are averred and proved, and this protection will avail him in respect of peripheral acts amounting to errors of judgment, but it will only be of avail where the act concerned is, at least at first sight, an official act.

Here again, conflicting principles are operative. It is no doubt often important to maintain an element of personal responsibility of an official, as a re-enforcement to internal disciplinary procedures. Even where the concept of official responsibility is highly developed the doctrine of faute personelle may be retained as being important. It is probably also necessary, in order to ensure that the swiftness of action of the police is not unduly impeded, that some such protection as the "malice" rule should be afforded and the operation of normal rules of liability be thus affected (the limited right to search without warrant points to the same need). It is probably also reasonable and desirable that police authorities, granted their very limited powers of control (which it is not desirable to increase) should not be made answerable, for, again, answerability in the courts would be likely to lead to greater control of actions from which liability might arise. Nevertheless it appears to be undesirable that no public body should be responsible for the actings of public servants or that where official responsibility should lie (in a delictual and not political sense) a pursuer should be faced by the present uncertainty about whether or not public funds will be used to back the possible impecunious constable whom he is forced to sue and to meet any award of damages or expenses. Equally granted that individual responsibility is maintained, it seems desirable from the point of view of the police that constables should be aware that, in official matters, higher authorities will stand behind them. The immunity of the head of the force from liability is in the main attributable to an inability to find the relationship of master and servant in the normal sense. It is clear/
clear that in the field of public law in its developed state, the analogies of private law may be unsatisfactory, as is recognized in somewhat similar circumstances by the Crown Proceedings Act, 1947. In effect the dissent of Lord Salvesen in Adamson v. Martin recognized this. It is therefore suggested that by statute responsibility should attach to the chief constable officially for the acts of his subordinates done in the performance of their duty.\textsuperscript{21} The constable who acts wrongly upon a frolic of his own (a phrase which here need not receive the same interpretation as in a private law relationship), would not attract liability to the force, but the constable who in the purported performance of his duty strayed just beyond the strict confines would do so, as well as having a personal liability.

Apart from affecting the problem of liability, the peculiarities of the control of the police also affect the classification of the latter. Though historically police forces are local, constables cannot be classed as the servants of local authorities, partly because of the very limited authority exercised over them by local authorities, and partly because their most important functions in relation to law and order are not those of local authorities. Traffic functions, while having a much greater "local" flavour are not of such constitutional importance, and while they greatly affect relationships with the public should not govern classification. There seems therefore to be no good ground for reconsidering the older cases which clearly lay down that the police are not servants of local authorities.\textsuperscript{22} On the other hand there appears to be no authority in Scotland which clearly lays down that they are Crown servants, and there is sound authority which conflicts with that view.

There has been a straight rejection of the plea of Crown servant to prevent the arrestment of salary,\textsuperscript{23} and in other cases when the classification of the police has been considered it has been said that they are servants of the State.\textsuperscript{24} Cases dealing with the recovery of documents are not helpful; the plea to prevent recovery, even when made by the Lord Advocate,\textsuperscript{25} is made in the public interest. It does not depend upon the police being Crown servants, and in one case where application has been made for police reports and in which the Lord Advocate did not appear the application was rejected on general grounds without/
without any reference to the Crown. Moreover much of the background relied on by McCardie J. in Fisher v. Oldham Corporation, in which he suggested that the police were servants of the Crown, is not applicable to Scotland. It may be noticed the declaration taken by a constable in Scotland differs substantially from that in common use in England (though not in Fisher's Case) having no reference to the Crown. The concept of "Crown Service" is not a clear one, and is in many ways not a satisfactory one in modern law (it is a concept which has perhaps played a lesser part in Scots than English law) and it seems best to recognize, as the cases suggest (to put it no higher) that the status of the police is sui generis. That status fits the neutrality which is desired of them. In any event concepts of service work uneasily in the field of public law, and if for purposes of liability constables are regarded as the servants of the chief constable it seems that no difficulties will arise from thus classifying the police as a whole.

While generally this question of classification may be regarded as academic, it is not necessarily so in relation to the police. There have been some amalgamations, it seems likely that the criterion of efficiency may, in future, require more. Granted the present relationship of local authorities to police forces such amalgamations scarcely alter the legal powers of the former - they remain paymasters even if at one stage removed, and amalgamations need not (assuming appropriate areas are chosen) militate against the feeling of locality, to which reference has been made. Constitutionally therefore amalgamations present no difficulties which would counterbalance benefits which might flow. Nevertheless since it is likely that amalgamations will be compulsory ones, thus publicly, if not in law, increasing the role of the Secretary of State, there could be advantages in the recognition of the special status, referred to above, a recognition which might even increase the acceptability of proposed schemes of amalgamation.

There remains one problem of the accountability of the police to which attention has recently been directed. The relative autonomy of the police, the diverse but limited controls over the police by other agencies (some of which, such as the sheriff, are not themselves accountable) make it difficult/
difficult to raise complaints, in ways which the ordinary citizen has grown accustomed in relation to either local or central government services. Three things have to be borne in mind here, first that if the police are to enjoy their position of neutrality, some limitation must be placed on accountability. As an extreme illustration of a similar principle the position of the judges is relevant. Second, rules of law (which may not be widely understood) operate as a firm check upon the police. In critical matters such as search, questioning, etc., the rules as to admissibility of evidence are not laid down with rigidity. There is an uncertain area before the limit is reached in which evidence may or may not be admissible. Thus the police if they stray too near the limit are made aware that wrongful actions on their part may frustrate the whole of their purpose; the exclusion of evidence leading to an acquittal. It is probable that this "discretionary area" controlled by the courts has a much greater inhibiting effect than a strict and certain limit would have. Such a limit would have to be drawn to allow for extreme contingencies and if thus drawn would permit the police greater freedom of action than they now enjoy. The third factor is that it is perhaps a mistake to concentrate unduly upon parliamentary forms of redress. That concentration suppresses the recollection that there are other methods which exist or which could exist. In so far as there are allegations of malpractices in relation to persons brought to trial an opportunity of ventilating grievances clearly exists at the trial. In relation to other persons, granted a legal aid scheme and the Sheriff Court system, a cheap effective remedy is available. This last possibility was apparently neglected in the proceedings leading up to the Tribunal of Inquiry into events at Thurso in 1957 (Cmnd. 718). The oversight of these alternatives could be serious. Any increase in such inquiries would be unfortunate, and, while it is thought that (subject to what has been said about necessary limitations) adequate machinery already exists for the investigation of complaints, if it is thought necessary to introduce any additional machinery it is suggested that special ad hoc investigating bodies or individuals would be unsatisfactory. From the nature of the allegations satisfactory evidence would necessarily be difficult to obtain, and any wide ranging inquiry would be likely to resemble/
resemble that to which reference has been made. It is conceivable that a preferable and possible machinery might be found through H.M. Inspector of Constabulary. If the Inspector operated after the manner of District Auditors or the Secretary of State’s Auditors in regard to general local government services, then a method of ventilating grievances without introducing new machinery, could be readily provided. It may be however that such a use of the Inspectorate would have serious effects upon their other functions. If this is thought to be likely, then the present situation is not thought to be so serious in fact as to warrant special measures. Nevertheless, in considering possible gains and losses some weight must be given to the state of public opinion. Even if the provision of some additional machinery would not be justified on a factual basis, yet if that provision were to have a substantial effect on the attitude of the public to the police it might well be justified on that ground alone. In that case the Inspectorate seems to be the best machinery to use and to be preferable to any other special machinery. Such use would probably involve the appointment of an additional Inspector of Constabulary in Scotland, but granted proper administrative arrangements might well involve no increase of staff of the Inspectorate in England.

There are points on which the present constitutional position of the police could be criticised from the point of view of neatness, and in general it is desirable that lines of responsibility should in constitutional matters be clear. Nevertheless the role of the police is peculiar, any clarification of lines of responsibility and any increase in answerability are likely to entail other risks and perhaps some losses. With minor amendments, particularly in regard to delictual matters it seems that the present situation does not afford many grounds for criticism. The process of standardisation evident in the 1956 Act, might be carried further. Yet the whole problem is as much governed by feeling as by logic, and the interplay of conflicting desired ends may well prevent or make undesirable any fundamental changes at this time.
1. Local enactments conflicting with the Police (Scotland) Act, 1956, were thereby repealed, subject to the preservation of particular provisions. S.I. 1959 No. 1996 (S.92) preserves a few sections covering, inter alia, the appointment of Special Constables in Aberdeen, rewards to constables in Edinburgh and the arrangements for policing the port and harbour of Greenock.

Where Sections are hereinafter referred to without mention of a Statute the reference is to the 1956 Act.

2. The Standing Joint Committees which existed in counties from the Local Government (Scotland) Act, 1899, to the Local Government (Scotland) Act, 1929, were joint committees of the County Councils and the old Commissioners of Supply, the bodies of the same name in England which continue to be the police authorities in counties are Joint Committees of County Council and Justices.

3. It is to be noticed that the powers of banning processions for a period under S.3(2) of the Public Order Act, 1936, are entrusted to the magistrates with the approval of the Secretary of State, so that, in what could well be a political matter, responsibility is ultimately placed in political hands.

4. It is true that McCordie J. emphasized that a Watch Committee could not order the release of anyone arrested, Fisher v. Oldham Corporation [1930] 2 K.B. 364, 372-3, yet it is evident that there remains much uncertainty about the answerability of a chief constable to the police authority, because of the terms of the relevant legislation, see 609 H.C. Deb. 52, (Mr. Butler's written answer on the Nottingham affair).

5. See particularly as to Counties S.112(1) "No decision of the police committee shall be final until the same is confirmed or adopted by the council."

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6. Girdwood v. Midlothian Standing Joint Committee, 1894 22 R. 11; as to cities Lathan v. Magistrates Committee of Glasgow (1898) 5 S.L.T. 121, Brown v. Magistrates of Edinburgh, 1907 S.C. 256, Simpson v. Dundee Corporation and Others, 1928 S.N. 30. Earlier cases had emphasized that the controlling authority of the County Council or Town Council, which was not then the police authority was even less. Young v. Corporation of Glasgow, 1891 18 R. 825. Leask v. Stirling C.C., 1893 1 S.L.T. 240, and suggestions in these cases that the appropriate committees might have responsibility because of control were rejected when those committees were sued (see the cases above).

7. County Council of Dumfries and Anor. v. Phyn, 1895 22 R. 538 at 550 (per Lord President Robertson).

8. A phrase referring to the then state of the law. The 1956 Act in these circumstances refers to the instructions of the sheriff alone.

9. In contrast in England in boroughs (though not in counties) constables are appointed by the Watch Committee.


11. The letter from Lord Moncrieff as Lord Advocate quoted in Phyn's Case is here of interest on the distribution of authority and on the basis of the prosecution's powers in relation to the police.


13. See Speakers Ruling 449 H.C. Deb. 1630-4: - "this rule presents the admission to the order paper of all future questions dealing with the class of matters dealt with by the Questions to which an answer was refused" Erskine May (16th Edn.) 361.

15. See the authorities cited in Note 6 supra. There had been much hesitation earlier. The concept of a "fund" only available for statutory purposes, and therefore not available for the payment of damages, was at one time a bar, but was finally discarded in Virtue v. Police Commissioners of Alloa 1873 1 R. 285, and on the other hand there had been a readiness to concede the liability of Police Commissioners, even though they would not appoint or dismiss the particular wrongdoer and not authorized the particular wrongdoing if the act done was within the general scope of their responsibility, see Mitchell v. Stuart 1838 16 S. 409.

16. See particularly Adamson v. Martin 1916 S.C. 319, there was however a strong dissent in that case by Lord Salvesen emphasizing that while the master and servant relationship might not exist power of control existed through the right to give orders and the ability to dismiss. There is much in general principle which makes this dissent attractive. For other cases supporting the majority view in principle, see Gridwood v. Midlothian Standing Joint Committee 1894 22 R. 11, Simpson v. Dundee Corporation 1928 S.N. 30., Lathan v. Magistrates Committee of Glasgow (1898) 5 S.L.T. 121. It is true that in Graham v. Hart 1908 S.C. (H.L.) 33 a police constable was held to be an "agent" per the purposes of the Prevention of Corruption Act, 1908, S.(1) but the principles involved were very different.

17. Robertson v. Keith 1936 S.C. 29 where a court of seven judges explained the limitations on this general doctrine suggested by the House of Lords in Shields v. Shearer 1914 S.C. (H.L.) 33, the latter being in part dependent on a local act. There is a long history for this doctrine which is most fully discussed in Beaton v. Ivory 1887 14 R. 1057, see too Young v. Magistrates of Glasgow 1891 18 R. 825, Malcolm v. Duncan 1897 24 R. 747, McGilvray v. Main 1901 3 F. 397.


19. So in Hill v. Campbell 1905 8 F. 220 it is said that this question of malice is irrelevant in relation to such matters as an assault by a constable when the only question is whether more force was used than was reasonably necessary to achieve the particular purpose, e.g. of arrest.

20. 1916 S.C. 319, see Note 16 (Supra).
21. It is to be noted that this suggestion runs counter to some local legislation, e.g. The Edinburgh Corporation Act, 1958, (S.36) authorizes the Corporation to stand behind any constable if it sees fit. It seems more satisfactory that there should be an obligation, and that it should fall upon shoulders other than those of the Corporation.

22. See particularly the cases referred to in note (6) supra.


25. See e.g. M'Kie v. Western S.K.T. 1952 S.C. 206, 213, Glasgow Corporation v. Central Land Board 1956 S.C. (H.L.) 1, Rogers v. Orr 1939 S.C. 492. It is possible that cases of "Crown Privilege", properly so called, could arise in connexion with the police, e.g. as to circulars issued by the Secretary of State, but such instances would prove nothing on the present point.


27. [ZT9307] 2 K.B. 364.

28. For Scotland see S.R. 1956 No. 1999 (S.95) Reg. 8, which prescribes the following declaration: "I hereby do solemnly and sincerely and truly declare and affirm that I will faithfully discharge the duties of the office of constable," and for England the form in Special Constables Order, 1923, S.R. and O. 1923 No. 905 Reg. 3, which appears to be the general basis, see Halsbury's Laws of England (3rd Edn.) Vol. 30 p. 53.


30. Such a clarification of the law might also remove difficulties such as those in Metropolitan Police District Receiver v. Croydon Corporation and Anor. [1957] 1 A11 E.R. 76. It is though doubtful if such an action could be got on its feet in Scotland, see Allan v. Barclay 1864 2 N. 873; Reavis v. Clan Line Steamers Ltd. 1925 S.C. 725.
31. Lawrie v. Muir 1950 J.C. 19. Even the distinctions drawn between the admissibility of real evidence and statements emphasising the subtlety of the control here exercised by the courts.

32. A case can be made for reviewing the whole machinery for dealing with cases of mal-administration, of which any misconduct by the police is only one example. The problem should, it is thought, be approached as a whole (and not necessarily by way of an "Ombudsman") and its consideration should not be hampered by piecemeal provisions.

33. A case can be made for standardising some of the provisions affecting the police in an operational aspect contained in legislation applicable to the counties of cities, of which the section quoted in note 21 above is an example.
SOME ASPECTS OF MUTUAL WILLS

By

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SOME ASPECTS OF MUTUAL WILLS

The subject of mutual wills is one which appears so rarely in English law reports that it might be regarded as one of purely academic interest. Re Green,\(^1\) however, demonstrates that such wills are still made, and that the subject has practical importance. At the same time it affords an opportunity of reviewing some of the consequences which flow from mutual wills, consequences which perhaps are not always contemplated by the authors of such documents. The general principle has been summarised thus: 'Where two persons have made an arrangement as to the disposal of their property and executed mutual wills in pursuance thereof, on the death of one of them without having revoked his will, the arrangement crystallizes into a contract. Accordingly the personal representatives of the survivor take the survivor’s property upon trust to perform that contract.\(^2\)

The nature of the obligation.

The two concepts of trust and contract are somewhat loosely used in this context. In the normal case it is a third person, a stranger to the mutual will agreement, who, as one of the ultimate beneficiaries after the dropping of both lives, is seeking to enforce it. Clearly as a stranger he must find more than a contract in his favour. He must find a trust. Moreover, since generally he is a volunteer, he must go further, if he is to succeed, and show that the trust is fully constituted.\(^3\) That the trust concept is at the foundation of this doctrine was recognised in Dufour v. Pereira,\(^4\) the parent case. Although Lord Camden, there, used the word ‘contract’ it is clear that he regarded the arrangement as more than that, and expressly calls the survivor a trustee.\(^5\) In the same way Lord Haldane insisted on proof of a clear agreement before the court could find that a mutual will arrangement had come into being.\(^6\) He did so because without that agreement there could be no trust, not because without it there would be no contract. There is therefore little dispute about the nature of the rights involved, or about the conditions necessary to the existence of the agreement. The difficulties that arise relate rather to proof of compliance with those conditions. On that point Re Green (supra) has at least removed doubts which had arisen as a result of Re Oldham.\(^7\)

\(^1\) Re Green (Deceased), Lindner v. Green and Ors. [1960] 2 All E.R. 913.
\(^2\) Williams on Executors, 12th ed., p. 78.
\(^3\) Jeffries v. Jeffries (1841) Cr. & Ph. 138.
\(^4\) (1769) 1 Dick. 419; more fully reported in 2 Hargr.Jurid.Arg. 304.
\(^7\) Re Oldham, Hadwen v. Myles [1925] Ch. 75.
whether the trust could exist when the gift to the survivor in the first testator’s will was apparently absolute. *Re Green* establishes that it can if the evidence is strong enough. If, however, the general principles governing the existence of this trust are sufficiently clear the same cannot be said of its details, incidents and consequences, and it is with these that the present inquiry is chiefly concerned.

The Creation of the Trust.

It may obviously be important to determine at what point of time and by what act the trust is brought into being. There are at least three possible times from which it might be treated as binding, namely, the date when the agreement was made, the date of death of the first testator, or the date of death of the survivor. To select the first date would mean that the arrangement could not be revoked even during the life of both parties to the agreement, save by mutual consent and then only if a power of revocation were reserved. It is no doubt open to two persons, who so desire, to achieve this by making a common pool of their property to be held on trust for themselves for their lives with remainders to the agreed ultimate beneficiaries. Such an arrangement would, however, lack the advantage of the ambulatory character of wills and it is clear that the trust under mutual wills is not binding as from the date of the agreement. Either party may revoke his will during their joint lives, at least on giving notice to the other. Notice is required in order to give to the other party an opportunity of revoking his will also, if he wishes, and does not seem to be necessary where the revoking party is the one first to die. The surviving party in the latter case is free of any obligation, but, *seemle*, has no claim against the estate of the first to die. Nevertheless, the agreement itself is not entirely without effect. Thus it can operate to sever a joint tenancy and will, it seems, serve to delimit the bounds of the trust. The third starting point—the death of the survivor—is expressly ruled out by *Re Hagger* where the beneficiaries, who had predeceased the survivor were, nevertheless, held entitled since they took not under the survivor’s will but by virtue of a trust operative from the death of the first party to die. This last-mentioned date must therefore be taken as the date at which the trust comes into being.

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8 For brevity this phrase will be used to describe the first party to the mutual will arrangement to die.
9 *Ellison v. Ellison* (1809) 6 Ves. 656.
13 *Re Hagger, Freeman v. Arscott* [1930] 2 Ch. 190, 194.
15 Contrast the statement of principle from *Williams on Executors* (supra), and see *Birmingham v. Renfrew* (1937) 57 C.L.R. 666, *per* Dixon J.
Granted that this is the true date a subsidiary question arises, does the trust become operative by reason merely of the first testator having died leaving unrevoked a will in the agreed terms or does it become operative only if the survivor takes and does not renounce the benefits conferred on him by the will? If the latter is the true rule then a disclaimer will operate to free the survivor from his obligations under the agreement. This becomes of greater importance once it is recognised that the doctrine of mutual wills can operate even where gifts are apparently absolute. In such cases the gifts to the intended ultimate beneficiaries in the first testator's will may not be operative where they are phrased, as is usual, only to take effect in the event of the death of the other party to the mutual will arrangement during the lifetime of the testator, since that contingency will not have happened. There could therefore be an intestacy under which the survivor (assuming he or she to be a spouse of the testator) would take and yet be free of any obligation under the agreement. To exclude the possibility it seems desirable that in such cases the ultimate gifts should be phrased so as to take effect either on the earlier death or renunciation of the other party. It is not, however, certain that renunciation will free the survivor. At first sight Lord Camden seems to have been of opinion that the death of the first party by itself made the arrangement binding. He said, 'It is too late afterwards for the survivor to change his mind because the first dier's will is then irrevocable, which would otherwise have been differently framed if that testator had been apprised of this dissent',' but he also said 'consider how far the mutual will is binding and whether the accepting of legacies under it by the survivor is not a confirmation of it. I am of opinion it is '. Clauson J. inclined to the view that the agreement would be binding even though the survivor did not elect to take benefits under the first will. On the other hand Gorell Barnes P. stated, (although obiter) that it was the taking of a benefit which binds; but again the statement is not clear. Astbury J. and Sir John Collier seem to support this view as do some of the text writers. Nevertheless it is thought that the logic of Lord Camden's judgment requires that the other view should be accepted—that death alone suffices—since the core of his argument is that the 'first dier' would not have made his will in the form he did but for his belief that the scheme would be carried out and ' no man

17 This point seems however to be added for greater certainty, there having been an acceptance in the case before him.
18 Re Hagger, supra, n. 13, at p. 195.
19 Stone v. Hoskins, supra, n. 10, at p. 197.
20 Re Oldham, supra, n. 7, at p. 89.
21 Dennyseon v. Mostert (1873) L.R. 4 P.C. 286, 293.
shall deceive another to his prejudice'.

It is thought therefore that the disclaimer is immaterial, but that nevertheless the precaution in drafting suggested above is desirable.

**Scope of the Trust.**

The date of creation has important consequences on the scope of the trust. It is obvious that where the first testator’s will only gives a life interest to the survivor, no question arises in relation to that estate. It must be held upon trust to give effect to the whole will including the ultimate dispositions. Similarly even if it apparently gives an absolute interest, yet the survivor holds all that he receives thereunder on trust for himself for life and then for the ultimate beneficiaries. The trust, however, where the doctrine applies, affects not only the estate of the first testator but also that of the survivor. The question is as to the extent to which it does so. Is the entirety comprised in it and if so is it the entirety as at the first death or does the trust also comprise after-acquired property?

The short answer would simply be that the extent of the trust is defined by the agreement. Thus in *Re Green* the trust was to operate on property received from the other party and on property which was derived from another trust. This definition might be express, as in that case, or implied, by reason, for example, of the fact that the ultimate gifts are set out in specific sums and not as residuary dispositions. This short answer is not, judging from the few reported cases, satisfactory since the agreement is often silent or ambiguous on the point. In one case the trust apparently only affected property held by the survivor at the first death. That restriction was perhaps dictated by the fact that the mutual wills were only intended to deal with the assets of the two testators which resulted from a business they had carried on together. It was therefore reasonable to allow the survivor a free hand with the fruits of his unaided labour. In *Re Oldham* Astbury J. seemed disposed to hold that the trust only binds the property held by the survivor at the time of his death, thus leaving unimpaired the power of disposition *inter vivos*. This seems to conflict with the decision as to lapse in *Re Hagger*, which implies

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23 *Dujour v. Pereira*, 2 Hargr.Jurid.Arg. at p. 310. Added support for this argument is to be found in the cases on secret trusts, where again it is in this deceit of the testator which is critical. See also *Strickland v. Aldridge* (1804) 9 Ves. 517 and the other cases discussed in Keeton, op. cit. at p. 56.

24 *Re Green*, supra. n. 1.

25 In this respect *Re Green* does nothing more than make clear the effect of the agreement, which was implicit in earlier decisions such as *Re Hagger*, at p. 195, or *Re Oldham*, where, had the trust been regarded as effective, there would nevertheless have been some free property. The arrangement in *Dujour v. Pereira* seems only to have covered residue. See 2 Hargr.Jurid.Arg., p. 305.

26 *Re Hagger*, supra, n. 13.

27 [1925] Ch. at p. 88.
that the interest of the beneficiaries is vested during the lifetime of the survivor. Moreover a devise to A with a direction to settle ‘so much as he shall die seised of’ has, by reason of uncertainty, been held incapable of creating a trust.28 Yet, in effect, that is what the view of Astbury J. amounts to. The significance of this question lies of course in the powers of the survivor over his own property during his life. It would seem absurd if the court is prepared to prevent his breaking faith with the first testator only to the extent of preventing inconsistent testamentary dispositions thus allowing him to make the arrangement nugatory by dispositions inter vivos. It seems, therefore, that the two arguments of certainty and good faith lead to the conclusion that, in the absence of any definition, the trust of the survivor’s property must be treated as embracing that which he holds at the death of the first testator together with subsequently acquired property; though clearly he will be entitled to deal freely with the income of the fund and accumulations of the income. Such indeed seems to be the implication to be drawn from Lord Camden’s direction for accounts to be taken in Dufour v. Pereira, and to have been the opinion of Lord Loughborough. It was one of his objections to finding an agreement in Lord Walpole v. Lord Orford,29 that it would have resulted in an inability of the survivor to raise portions for his daughters by mortgage. This breadth of the scope of the trust, or at least the possibility of it, affords another reason for delimiting it in the agreement.

Consequences of the Trust.

When the scope of the trust is determined, it is possible to discuss its consequences. The fact that those claiming under the survivor do so by virtue of a trust and not under his will must exclude not only the doctrine of lapse30 but also the application of section 15 of the Wills Act, 1887, so that the claim of the beneficiary will not be prejudiced by his having attested the survivor’s will,31 though any claim under the first testator’s will must, it seems, be governed by that section. More important is the effect of such an arrangement upon possible claims under the Inheritance (Family Provision) Act, 1988. Where the survivor has remarried, claims under that Act are possible, provided that he has made a new will. Although this new will is ineffective to dispose of property comprised in the trust, it is valid as a will.32 The

28 Bland v. Bland (1745) 2 Cox 349. See also Re Jones [1808] 1 Ch. 438.
29 (1797) 8 Ves. 402, 417. For the opposed view see however Dixon J. in Birmingham v. Renfrew (1937) 57 C.L.R. 666, 669.
30 Re Hagger, supra, n. 13.
31 Compare O’Brien v. Condon [1905] 1 Ir.R. 51, or Re Young (deceased), Young v. Young [1950] 2 All E.R. 1245, dealing with the position of the beneficiary under a fully secret trust which is analogous.
conditions for jurisdiction of the court under section 1 of the Act may therefore be complied with. Nevertheless any appeal to that jurisdiction must, it seems, be vain, since provision for a dependant, such as the widowed second wife, can only be made out of the testator’s ‘net estate’. That being defined (section 5) as the property of which the testator was free to dispose by his will, and the trust being binding over the whole or a substantial portion of the survivor’s estate, it follows that there is no, or very little, property out of which provision could be made. It is difficult to conceive that the trust, being one which thus excludes the Act, would be held void as contrary to public policy, particularly where the parties to the mutual will are husband and wife. In such a case, the second marriage is not in contemplation when the arrangement is made and there is no deliberate attempt to evade the Act. Even if there were it seems doubtful if the policy of the Act is of such an overriding nature as to invalidate the disposition.

The consequences of the trust are by no means limited to those of a testamentary character. Thus, once the trust has become binding, it should follow that the ultimate beneficiaries ought to have, during the life of the survivor, all the remedies appropriate to prevent the survivor breaking the trust, as by disposing of the property. The suggestion of Sir William Grant M.R. that the testator’s ‘own interest and convenience’ would afford sufficient security against dealings inconsistent with obligations to leave property by will, is too optimistic, since the realisation of the assets of the survivor and their investment in an annuity will both satisfy that convenience and defeat those obligations. In the case of contracts the courts have given remedies, and Lord Camden’s reasoning of good faith seems to require, as already indicated, that here too the beneficiaries should not be left unprotected. Once the trust of the survivor’s estate is recognised its enforcement in this way seems inevitable. It should also follow from that recognition that, while purchasers without notice from the survivor will be protected, the possibilities of tracing within the limits of Re Diplock must

33 The fact that the will does not effectively dispose of property is here regarded as immaterial on the assumption that the Act is capable of application to partial intentions as it seems it is. See Theobald on Wills, 10th ed., p. 78.

34 Thus in Dillon v. Public Trustee of New Zealand [1941] A.C. 294, Lord Simon upholds the effectiveness of dispositions inter vivos, and here we are concerned with a constituted trust not with a contract. That case therefore even if applicable to the English legislation does not govern this issue, the critical point here being not the extent of a liability but the non-existence of any estate belonging to the testator.

35 Fortescue v. Hannah (1812) 10 Ves. 67.


37 Re Diplock, Diplock v. Wintle [1948] Ch. 465, affirmed in the House of Lords sub nom. Ministry of Health v. Simpson [1950] 2 All E.R. 1137. The principles are, however, more fully discussed in the Court of Appeal. Thus in the event of re-marriage by the surviving husband it seems the beneficiaries should be able to trace the wedding and engagement rings given to his second wife if provided out of capital. In practice it would seem that the remedy of
exist. Obviously this is only true of dispositions of capital rather than of accumulation from income, but the difficulties of distinguishing the two may be considerable.

Apart from the position as to alienations, the trust must also, if recognised, affect the survivor’s position in other respects. Thus it seems to be arguable from the cases that the benefits under the first testator’s will are testamentary, and those derived from the survivor are not. Hence the two funds may be differently regulated. To the former, the rule in Howe v. Earl Dartmouth must in suitable cases apply, but not to the latter, being a trust created inter vivos. Although there may therefore be no duty to invest the survivor’s assets in trustee securities immediately, that duty will arise on any variation of investment, subject to any alteration of the general trust investment rules by the mutual will agreement.

Of greater significance, perhaps, is the effect on the character of the survivor’s estate ownership. Thus where as in Re Green land is under the agreement specifically devised in the mutual wills, the effect of cutting down the survivor’s interest to one for life is to bring the land within the definition of settled land. The position would seem to be similar if on the survivor’s death the land is together with his other estate to be held on trust for sale to provide legacies, or if the devise to the survivor by the first testator is, although prima facie absolute, in truth comprised in the arrangement. The result must be that dealings by the survivor, even if not interfered with by the beneficiaries, must be subject to section 13 of the Settled Land Act, 1925, and that the whole Settled Land Act machinery and limitations are brought into play.

Conclusion.

Enough has been said to show that the consequences of mutual wills may be more far reaching than the testators intend. Clearly the possible consequences are not here exhausted. Thus the arrangement may, subject to the limits of section 42 of the Bankruptcy Act, 1914, withdraw the assets of the survivor from his creditors. It may equally allow a wider scope to the concession in section 5 (2) of the Finance Act, 1894. Some of these consequences may be inconvenient, but not all, and the arrangement may, although cumbersome, have its uses. Thus it may be convenient tracing might be the only effective one, since the beneficiaries, except in the case of a joint mutual will, may be ignorant of the circumstances leading to the creation of the trust until the death of the survivor.

38 (1892) 7 Ves. 137.
40 Trustee Act, 1925, ss. 3 and 4.
41 Weston v. Henshaw [1950] Ch. 510 gives a sufficient warning of the seriousness of this possibility.
42 Perhaps the most important limitation of this section is that it does not apply to the administration of estates on death.
where, as in Re Hagger, supra, two spouses have conducted a common business, or where two persons have contributed to a family pool of assets so that the separate property of each has ceased to be identifiable, as with two sisters who have been living together. In such cases an arrangement leading to mutual wills may seem a convenient device. Its adoption, however, involves a number of risks some of which have been indicated. To avoid them the greatest care must be taken in framing the governing agreement. In view of the few cases on the subject the conclusions which have been drawn can only be regarded as tentative but they are certainly possible since they seem to follow by necessary implication from the reported cases. In particular it is suggested that care must be taken in defining the scope of the trust of the survivor’s property and his powers over the trust funds during his lifetime. The latter in particular is not an easy task, since, if the definition is too broadly drawn it will carry the arrangement outside the category of Dufour v. Pereira into that of Re Oldham and thus defeat the whole purpose. The difficulty may perhaps be adequately met by a sufficiently broad investment clause. By such definition of the position by the agreement many of the difficulties arising from the time of origin may be surmounted as also may be those which spring from the fact that, as the law now stands, the arrangement may restrict the survivor in his dealings with his own property more severely than the parties intended or desired. Thus provision should be made for such matters as re-marriage, the birth of posthumous children or disclaimer. If carefully drawn the arrangement may well serve a useful purpose while if this is not done it may simply give rise to numerous difficulties.

These difficulties really arise from the fact that the concept of mutual wills is an importation from the Civil Law and exists here without the background of community of property for which it was designed. Nevertheless it is a concept which has become well established in English law linked with the English institution of trust. Until it is shown that the courts are prepared to apply special rules to this particular trust it seems necessary for mutual testators to take considerable care over their arrangements.

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THE REVOCATION OF TESTAMENTARY APPOINTMENTS ON MARRIAGE

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THE REVOCATION OF TESTAMENTARY APPOINTMENTS ON MARRIAGE

The object of this article is to explore some of the questions raised by section 18 of the Wills Act, 1837, particularly those parts of the section concerned with testamentary appointments which have recently been before the courts in In the Goods of Harry Gilligan (Deed.). In effect the section contains three rules. It runs:

'Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions)'.

The section thus gives—

(1) a general rule, that all wills are revoked by subsequent marriage;

(2) an exception, which excludes from the general rule wills made in exercise of a power; and

(3) a sub-exception, which directs that even a will in exercise of a power shall fall under the general rule and be revoked on marriage in those cases where the property in default of appointment would pass to one of the specified classes set out in italics above.

It is with the class of 'next of kin' that we are here primarily concerned and particularly whether or not it includes the surviving spouse. The precise limits of this class in section 18 are critical, since whether or not a will is revoked by a subsequent marriage depends upon whether the instrument creating the power has specified this class to take in default. If it has, the sub-exception preserves the operation of the general rule and causes revocation; if it has not, then, the exception prevailing, the will so far as it makes an appointment is unaffected by the marriage. In In the Goods of Gilligan (supra), Pilcher J. decided that in this context the words 'next of kin under the Statute of Distributions' included the widow. His judgment has three main roots: (1) earlier cases


2 While it is true that the words set out in italics may not be strictly a sub-exception, but rather a qualification of the exception, it is convenient for the sake of brevity to use this description, which is that used in Halsbury's Laws of England, 2nd ed., and may therefore be familiar.
upon the statute; (2) the interpretation of similar words in private documents; (3) the intention of the Wills Act. An examination of these will clarify the discussion of that case and its consequences.

Earlier cases on the Statute.

In the Goods of Gilligan is apparently the first case in which these particular words of section 18 have been judicially interpreted, though indirectly some earlier cases throw light on their interpretation. At the outset it may be worth pointing out that these cases, so far as they go, are still binding, since it seems that the phrase 'next of kin under the Statute' in section 18 must still bear the same meaning that it has always had, whatever that may be. Section 50 (1) of the Administration of Estates Act, 1925 (directing that references to statutory next of kin, etc., shall be treated as referring to those persons now entitled on intestacy), is specifically limited to instruments inter vivos made or wills coming into effect after 1925, and hence, prima facie, does not affect in any way the interpretation of an earlier statute.

The principal case relied on in In the Goods of Gilligan was In the Goods of Russell. There the testator had a general power which he exercised by a will leaving all his property to the person he subsequently married. In default of appointment the property would, under the settlement creating the power, have gone to the testator's brothers and sisters. Despite the subsequent marriage Butt J. admitted the will to probate to the extent that it exercised the power. The principal argument was whether a will, in exercise of a power but also disposing of other property, could be in part saved and in part revoked by section 18. Nevertheless the question of whether the power was within the exception had to be decided before that issue arose. The learned judge accepted the proposition that the power was within the exception and not the sub-exception and was therefore unaffected by the subsequent marriage. It is arguable that he did so on the grounds that since the testator's brothers and sisters were, as it happened, his true next of kin, they with his widow made up the class of 'next of kin' under the Statute of Distributions referred to in section 18. Accordingly, since the settlement excluded the widow from the gift in default, that category named in the sub-exception had not been specified and therefore the will must stand unrevoked under the exception. Though this is apparently the explanation accepted in In the Goods of Gilligan, it is not a proposition expressly made in

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3 (1890) 15 P.D. 111.
4 At p. 113.
the former case, the proper grounds for which would seem to be simply that it is not sufficient, in order to bring the sub-exception into play, that the persons taking in default are in fact the same as those entitled under the statute if they do not take in that capacity or are not ascertained by the rules of the statute. Accordingly, in *In the Goods of Russell* (supra) the will, so far as it was an appointment, would not have been revoked, the testator's brothers and sisters taking as named persons and not as members of the class of next of kin. On this view the question of whether the widow was or was not included in the phrase in section 18 did not arise in the case. Since *In the Goods of Fitzroy* was cited by Butt J. with approval (though on a different point), it would seem reasonable to suppose that the learned judge was relying on this second ground set out above. On that assumption *In the Goods of Russell* is in agreement with earlier cases which emphasise that, for the sub-exception to apply, there must be a gift to a class as such, a class denoted by the phrase 'next of kin under the Statute' in section 18. Where, therefore, the gift is to individuals, even though they may be members of, or constitute the class, or to a class wider or narrower than that designated by the phrase in section 18, the sub-exception could not be applicable and the will would stand unrevoked. When viewed in the light of these cases, *In the Goods of Russell* appears properly explicable on this ground alone, and is not therefore an authority for the inclusion or exclusion of the widow. On this point the earlier cases on the statute are, it is submitted, silent.

**Cases on Private Documents.**

When one turns to the interpretation of the same phrase 'next of kin under the Statute of Distributions' in private documents, authority is both clearer and more abundant. Perhaps the weakest of the cases is *Garrick v. Lord Camden,* cited by Pficher J. in *In
the Goods of Gilligan. In Garrick’s Case the question arose on a residuary gift to ‘my next of kin as if I had died intestate’ (a phrase not clearly distinguishable from that in section 18). Lord Eldon held that this phrase did not include the widow, partly because she was not ‘of kin’ but in part, it is true, on the general intent demonstrated in the will before him. Nevertheless he emphasised (at p. 381) that the natural meaning of the phrase before him was not the same as that of such a phrase as ‘as if I had died intestate’, since some significance must be attached to the reference of kinship. This latter point was made more strongly by Cholmondeley v. Lord Ashburton, where, in construing the phrase ‘next of kin according to the statutes for the distribution of personal estate of persons dying intestate’ contained in a gift in default, Lord Langdale excluded the widow, saying ‘if the words “next of kin” had been omitted I should have no doubt that the widow would then be entitled; but, having been inserted, I must give them full legal effect and look for the persons whom the law designates by that expression. I find that the wife is not one of the next of kin’. Lord Langdale adopted the same interpretation in Kilner v. Leech, and Malins V.-C. in Re Collins’ Trusts agreed that the natural meaning of the words ‘next of kin under the Statute’ excluded the widow, though in the case before him he found a sufficient indication to exclude that meaning. There is one seeming exception to this trend of authority, namely Ash v. Ash, where the widow was held entitled under a residuary clause stating an intent to bequeath the residue by codicil, or otherwise ‘to allow the same to the next of kin according to the statute for the distribution of estates of intestates’. The judgment is, however, based, not on the interpretation of this final phrase, but rather on the grounds that the clause was not dispositive, i.e., that in the absence of a codicil there was no disposition of residue, and in the resultant intestacy the widow was entitled. The case is therefore irrelevant to our purpose. Although it is true that section 18 may similarly be said not to be dispositive, yet the

9 (1843) 6 Beav. 66.
10 (1847) 10 Beav. 362.
12 In addition to these cases see also Withy v. Mangles (1843) 10 Cl. & F. 215, per Lord Cottenham at pp. 248-9 and p. 252, where he emphasised the distinction drawn by the Statute of Distributions between the next of kin and the surviving spouse. In Jenkins v. Gower (1846) 2 Coll. 557, where Sir John Knight Bruce V.-C. in interpreting a will distinguished between a gift in default to the next of kin under the statute and one to those entitled on intestacy, on the grounds that only the latter included the widow. See also Elmsley v. Young (1838) 3 My. & K. 750, though it is perhaps not clear there whether the learned judge is considering the position of the widow or the question of representation.
13 (1863) 33 Beav. 187.
documents containing the words to which it refers are dispositive, and at first sight it would seem that the natural meaning of this phrase 'next of kin under the Statute' in section 18 should bear the same meaning as it does in these documents, i.e., that it points to the class of those who are of kin and who succeed on intestacy, thus excluding the widow.

**General Intent of Section 18.**

There remains the question of whether this interpretation is in keeping with the general intent of section 18. The underlying purpose of that section is clearly to prevent the accidental survival of a will after a radical change of circumstance, namely, marriage. It follows that this reason is operative only where the new family could benefit by the revocation, and so the sub-exception ensures that the revocatory effect of marriage shall be operative only in the case of powers where generally that benefit will or may result. Even when this result might follow, the sub-exception does not always apply by reason of the requirement of the gift in default being to a class. Thus in *In the Goods of Worthington*, although the gift in default was to the children of the marriage, yet the will was unrevoked. Similarly this justification of the section does not entirely explain the revocation where the gift in default is to the executors or administrators, since here it might result solely for the benefit of creditors.

Despite these limitations it is probable that the general effect of the section and the sub-exception is beneficial. But it would seem that in most cases the intention of the settlor would be to benefit the issue of the marriage or failing them the kin of the appointor (thus in the normal case, keeping the property in the original family), rather than to benefit the surviving spouse. This result is achieved by the primary meaning attributed to the phrase in question in private documents. Such an interpretation is, moreover, consonant with the past history of the revocation of wills on marriage. Before the Wills Act, 1837, the ante-nuptial will of a husband was only revoked after the birth of children, not simply by marriage. Moreover, even then the will was not revoked unless the children would benefit. These reasons tend to show that it is reasonable to assume that the widow was not among those who were intended to benefit under section 18, and accordingly that she should not be included in the phrase 'next of kin according to the Statute of Distributions' used in that section. Again, this

14 (1872) 20 W.R. 260 (supra, note 7).
15 *Christopher v. Christopher* (1771) Dick. 445.
assumption is further reinforced by the reference to the 'heir' in the
sub-exception, since the widow could not be denoted by that word.

**In the Goods of Gilligan.**

The result of these lines of reasoning is, it is submitted, that the
sub-exception should only apply where there is a gift to a class, not
to individuals, and that that class excludes the widow. This is,
however, contrary to the conclusion reached by Pilcher J. in *In the
Goods of Gilligan.* The case involved the effect of a marriage in
1912 on a will made in 1910 exercising a power of appointment
conferred by an earlier settlement. In default of appointment of
one moiety of the trust funds, that moiety would, under the
settlement, go to such 'person or persons as would have been
entitled thereto under the statutes for the distribution of the per-
sonal estates of intestates on the death of the said [H.G., (the
testator)] had he died possessed thereof intestate and without having
been married'. The testator died in 1916. There was no other
will, and accordingly there would have been an entire intestacy
if the sub-exception were applicable and the will thus revoked by
the marriage in 1912. This could only be so if the classes designated
by the settlement and the sub-exception were the same, both
excluding the widow. If the phrase 'next of kin, etc.' in section 18
included the widow, the will stood unrevoked. It was this latter
construction which Pilcher J. adopted in upholding the validity
of the portion of the will concerned with the power, despite the
subsequent marriage. His argument seems to fall into four parts.
First, the learned judge referred to *Garrick v. Lord Camden.*
Secondly, he discussed the phraseology of the Statute of Distribu-
tions, and concluded that 'it would not perhaps be unreasonable'
to assume that in using the words 'next of kin, etc.' the framers
of the Wills Act, 1837, intended that a will exercising a power
should only be revoked if the instrument conferring the power
provided that in default the property should go to the true next of
kin to the exclusion of the widow. These two lines of reasoning
therefore pointed to the opposite of the conclusion finally reached
but they were outweighed by two other lines of reasoning, namely,
the support found by Pilcher J. for his conclusion in *In the Goods
of Russell,* and the presumed general intent of section 18 to
benefit the new family. Thus he said 'I think the intention of the
section was that a will exercising a power of appointment

\[18\] (1807) 14 Ves. 872.
\[19\] See p. 37.
\[20\] (1890) 15 P.D. 111.
should only be wholly revoked by the subsequent marriage of the testator in those cases in which the instrument creating the power provides that in default of appointment the fund shall devolve as on intestacy, in which event the widow of the deceased will take her portion of the fund.

Of these four reasons, it has been shown that Garrick v. Lord Camden is not an isolated authority but only one instance of a settled interpretation of the phrase in question where used in private documents. It was therefore perhaps a stronger authority than the learned judge allowed. On the other hand, In the Goods of Russell, when viewed in the light of earlier cases on the Wills Act, has been shown to be a weak authority for the conclusion drawn from it by Pilcher J., being properly explicable on other grounds. So far as the intention of the section is concerned it seems, with respect, that the learned judge’s first impression (which he regarded as ‘not unreasonable’) was more accurate than the second. The arguments for preferring the first view have already been set out and need not be repeated. The second view appears further to conflict with such cases as Jenkins v. Gower, where Sir John Knight Bruce was at pains to point out the difference between such phrases as ‘next of kin under the Statute’, which did not denote the whole class of beneficiaries on intestacy, and such a phrase as ‘those persons entitled under the Statute’, which did, the reference to kinship being regarded as critical. In the present case the two were treated as identical.

Practical Application.

There are thus, it seems, with respect, difficulties in accepting the reasoning and result of In the Goods of Gilligan. When the consequences of the decision are considered, these difficulties are accentuated. First, as to powers contained in pre-1926 documents, there is this paradox. Even though the precise words ‘next of kin under the Statute of Distributions’, which occur in section 18, are used in such a will or settlement it seems that the sub-exception would not be applicable. This is the result of the divergence in interpretation, since, by the line of cases of which Garrick v. Lord Camden is one, the natural meaning of the phrase in that context as excluding the widow is well settled. Hence the class of persons to be specified if the sub-exception were to apply has not been designated even by the identical words, since in the sub-exception

21 (1846) 2 Coll. 537.
22 The question may, of course, arise for some time, as to such documents, the interpretation of which is unaffected by s. 50 (1) of the Administration of Estates Act, 1925.
they must, it seems, now include the widow. For the sub-exception to apply the will or settlement must therefore have added the widow explicitly. Moreover if the power were given to the wife and not to the husband the complications increase. A widower was not included in the phrase 'next of kin according to the Statute', or its equivalents, since he took on intestacy by marital right and not under the statute at all. Accordingly, even on the basis of In the Goods of Gilligan the husband could not be comprised in the phrase 'next of kin under the Statute'. Suppose then that a father had before 1926 left property to his daughter for life, with a power of appointment, the property, in default of appointment, to go to her next of kin under the statute together with her husband, and had left property to his son similarly, with a gift in default to his next of kin under the statute together with the widow, and then both children had made testamentary appointments and married. The result would be that the will of the son is revoked, the class designated by the sub-exception according to In the Goods of Gilligan taking in default; but that of the daughter is unrevoked since that class would have been specified with an addition, namely, the husband; hence the sub-exception would be excluded. This particular inconsistency would not, of course, have arisen had the words in the sub-exception been given their Garrick v. Lord Camden meaning.

There remains the question of the operation of section 18 on post-1925 documents. Here allowance must be made for section 50 (1) of the Administration of Estates Act, 1925, directing that references to statutory next of kin in instruments made after 1925, or wills coming into effect thereafter, shall, unless the context otherwise requires, be taken as referring to those entitled on intestacy under that Act. Prima facie therefore the reference to 'next of kin under the Statute' must in such documents mean those persons referred to in section 46 of the Administration of Estates Act. This is a class which although it includes many of the class of those entitled under the Statute of Distributions is clearly not identical. The most obvious difference is that succession is only possible within a narrower degree of relationship. The possible accidental coincidence of the two classes is irrelevant for the purposes of section 18, since unless the section 18 class alone can take without addition or subtraction, the cases show the sub-

22 For this, Milne v. Gilbert (1854) 5 De Q.M. & G. 510, is a strong authority, and the point is emphasised by s. 25 of the Statute of Frauds, making it clear that the Statute of Distributions does not extend to the estate of 'femes covertis', but that the husband's rights are preserved as they were before that Act.

24 In the Goods of McVicar, supra, note 7.
exception is inapplicable. Hence it appears at first sight that the words 'next of kin according to the Statute' in a post-1925 document will never bring the sub-exception into play, because section 50 (1), being only applicable to private documents and not to the Wills Act, has caused a new divergence in the interpretation of identical words.

Conclusion.

In the Goods of Gilligan therefore raises this dilemma—that unless a settled interpretation of the phrase 'next of kin under the Statute of Distributions' were used in pre-1926 private documents is to be upset, the sub-exception could only apply in those rare cases where there was also a specific mention of the widow. Similarly, section 50 (1) of the Administration of Estates Act, 1925, has excluded the operation of the sub-exception where the gift in default is contained in post-1925 documents. From this dilemma, there is a possible escape. The interpretation directed by section 50 (1) gives way to a contrary context, and was intended to prevent an inadvertent reference to the old intestacy rules. Where, therefore, the phrase is used in connection with a gift in default, there is, it is submitted, a sufficient context to exclude the reference under section 50 (1) to the post-1925 rules of succession. If knowledge of section 24 of the Wills Act may be imputed to the testator, there seems no insuperable obstacle to imputing a knowledge of section 18 which would necessitate a reference to the pre-1926 rules. Where the words 'next of kin, etc.' are inserted in a gift in default, at least in a professionally drawn document, it does not seem absurd to infer that they have been so inserted having regard to section 18 of the Wills Act, and accordingly that in that context their old meaning must be given to them to preserve that intended effect.

However, there would still remain the particular difficulties of In the Goods of Gilligan already set out, arising from its divergence

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25 In the Goods of Fitzroy, supra, note 6.
26 It should be noticed that the same difficulty does not arise in relation to a gift in default to the heir of any person, the heir being still ascertained by the pre-1926 rules: Law of Property Act, 1925, s. 152.
27 In In the Goods of Gilligan, Philch J. recognised that s. 50 (1) of the Administration of Estates Act, 1925, did not affect the interpretation of s. 18 of the Wills Act. However, he regarded his inclusion of the widow in the class referred to in s. 18 as the 'next of kin under the Statute of Distributions' as more acceptable because she would be included in that phrase where used after 1925. Nevertheless, he then said (at p. 37) that this reference to s. 50 (1) was not strictly relevant to his purpose, i.e., the interpretation of s. 18. However, since s. 50 (1) is only applicable to private documents, it seems that even this continuity of interpretation is illusory.
28 Re Horton [1920] 2 Ch. at p. 11.
from the general trend of interpretation. If that case be correct, it would seem that the phrase 'next of kin under the Statute' should, even in pre-1926 documents, where used in connection with a gift in default, be interpreted as including the widow for precisely the same reasons as those suggested for the exclusion of the prima facie effect of section 50 (1) of the Administration of Estates Act, 1925—namely, to ensure uniformity of interpretation of similar phrases in statutes and private documents which implicitly refer to each other. Such uniformity is necessary to give effect to the probable intention of the testator or settlor. It is true that this course involves a departure from the line of cases discussed, and even if adopted would leave the case of the widower undetermined, but at least the position would be more logical than that which at present obtains. If, however, opportunity should arise for a re-consideration of In the Goods of Gilligan this uncertainty might be resolved. The adoption of an interpretation of the phrase in section 18 similar to that in Garrick v. Lord Camden has the attraction of uniformity, since section 18 is itself referring to private documents in the interpretation of which the meaning excluding the widow was generally accepted, and moreover it is an interpretation which, with respect, appears preferable, for the reasons already given, to that adopted in In the Goods of Gilligan.

It may be true, as Lord Langdale said, that none of these cases is really satisfactory because of the popular meaning attributed to 'next of kin,' as including all intestate successors, and that to press one particular interpretation is to insist too much on a technical meaning. Nevertheless this unsatisfactory state of affairs is not improved by the adoption of diverse interpretation of identical words in related contexts, and to adopt both in private documents and in section 18 the Garrick v. Lord Camden meaning is to give full weight to the words of kinship. This interpretation has too the merit of continuity, which Pilcher J. sought, and seems more likely than another to give effect to the true intent of settlors, who are normally more concerned with the possible issue of the marriage and with their own family than with the other spouse. As such, the interpretation contended for does not offend even the more liberal views of construction advanced in Perrin v. Morgan.39

Finally, it may be argued that this part of the sub-exception is not worth the effort of preservation. Yet despite what has been said of the limits within which it protects the new family, the fact remains that it will generally do so and will prevent the accidental

29 Cholmondeley v. Ashburton (1843) 6 Beav. at p. 87.
survival of many appointments, which in altered circumstances would never have been made, a result which, after all, underlies the doctrine of the revocation of wills by marriage and does give effect to what is the intent of the section as a whole.

Summary.

In connection with the revocation of testamentary appointments by subsequent marriage, difficulties arise from divergent interpretations of the phrase ‘next of kin under the Statute of Distributions’. In the Goods of Gilligan is decided on the basis that in section 18 of the Wills Act the phrase includes the widow, Garrick v. Lord Camden shows that normally in private documents the phrase excludes the widow, and as a result of section 50 (1) of the Administration of Estates Act, 1925, a third class, the present beneficiaries on intestacy, may be designated by that phrase. If a testamentary appointment is to be revoked by marriage the precise class specified in section 18 of the Wills Act, 1837, must be designated to take in default. Here these divergencies are important. Their effects may be set out shortly by calling the category specified by section 18 Category ‘A’; that specified by Garrick v. Lord Camden, ‘B’; and the present class of beneficiaries on intestacy, ‘C’.

(i) The sub-exception to section 18 can only apply where ‘A’ is specified in default in the instrument creating the power.

(ii) In pre-1926 documents where the phrase ‘next of kin under the Statute’ was used, Category ‘B’ is specified. Therefore the sub-exception could not apply, Category ‘B’ being Category ‘A’ less the widow.

(iii) In post-1925 documents the same phrase may, as a result of section 50 (1) of the Administration of Estates Act, 1925, refer to Category ‘C’. Again, ‘C’ not being identical with ‘A’, the sub-exception cannot apply.

(iv) If, however, In the Goods of Gilligan is not accepted, then Categories ‘A’ and ‘B’ are identical, and the first difficulty does not arise. Further, on the true reading of section 50 (1) of the Administration of Estates Act, 1925, the phrase, when used in a gift in default, need not point to Category ‘C’ but may still, despite that section, refer to Category ‘B’. If this is so, then, Category ‘B’ being in the absence of In the Goods of Gilligan identical with Category ‘A’, the second difficulty is also resolved.

J. D. B. Mitchell.
THE PRESENT STATE OF TESTAMENTARY REPUBLICATION

By

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THE PRESENT STATE OF TESTAMENTARY REPUBLICATION

The term republication is used to describe either the re-execution of a will, or, more commonly, the confirmation of an existing will by a codicil. It is with the latter form that this article is concerned. The effect of republication is said to be that it gives the will “some force or efficacy which it did not previously possess,” 1 and the problems to which the doctrine gives rise are mainly those of defining how far it produces this result.

The term itself has long been an anachronism. It ceased to be used in an exact sense once the Wills Act, 1837, had, by section 13, enacted that every duly executed will should be valid without any other publication. Even before this the term could not be regarded as entirely accurate, since there was no universal requirement of publication. On the whole the Wills Act, 1837, had little direct effect on the doctrine. Section 34, although it states that “every will re-executed or republished or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be re-executed republished or revived” had no widespread effect. It seems that, on its proper construction, the section merely refers to the commencement of the Act and has no general application. 2 The Act did (except in circumstances where a privileged will can be made) prevent informal republication which had previously been possible for wills of copyholds or personalty. It also, as a result of section 24, diminished the importance of republication in one respect. Formerly a will, being regarded as a conveyance, could only deal with land belonging to the testator at the date of the will, and republication was necessary to bring after-acquired lands within its scope. After 1837, since section 24 of the Wills Act made devises ambulatory, republication was no longer necessary for this purpose. Nevertheless the doctrine of republication did not, however inaccurate its name became, lose all importance, or cease to develop, as a result of the Wills Act.

The imprecision in the use of the expression is matched by the imprecision of the description of the consequences of republication.

1 Jarman on Wills, 8th Ed., Vol. I, 212.
2 Re Elcom, Laybourn v. Grover Wright [1894] 1 Ch. 303 at 309, per Chitty J. The suggestions in Goonewardena v. Goonewardena [1931] A.C. 647 that the section has a wider effect do not appear to be justified either by its wording, or by the earlier cases.
in both the textbooks and the cases. Thus in one case it is said "a direct re-publication or re-execution is an unequivocal act, making the will operate precisely as if it was executed upon the day of the re-publication," while in another it is said that the fact of re-publication does not mean that you are "to read the will in any way different from the mode in which it would have been read if the testator had died the moment after he had executed it." Cases where it is said bluntly that re-publication cannot save a legacy which has once been revoked, or ademed, or has lapsed, can be balanced by cases where that effect appears to have been achieved by re-publication.

Between such cases the conflict is clear. In other cases the principle to be derived from the decision is obscured by the use of such phrases as that "for many purposes re-publication of a will may affect the property to which a devise or bequest in the will applies," or that re-publication "for certain purposes brings down the will to the date of the codicil," without any clear indication of the cases in which those results follow and those in which they do not. In a few cases attempts are made to lay down the exact limits of the rules and the exceptions, but those attempts have not met with universal approval. The state of the authorities is summarised in the current edition of Jarman as showing "at the present day, however, the tendency of the courts seems to be to give greater effect to re-publication than Mr. Jarman thought to be warranted by the older authorities"; but again the greater effect is not clearly defined. In this article it is proposed to examine the recent cases and the trends of authority leading up to them in an attempt to describe the present position with greater precision.

**The General Effect of Republication**

Since it is possible that the effect of re-publication may be different in regard to different questions, certain major topics have been

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3 Pigott v. Waller (1802) 7 Ves. 98 at 118, per Sir William Grant M.R.
7 Re Park, Bott v. Chester [1910] 2 Ch. 222.
9 e.g., Grealey v. Sampson [1917] 1 H.L.R. 236.
10 Jarman on Wills, 8th ed., Vol. 1 at p. 221, a passage which in itself involves one of the difficulties of re-publication. The same words also appeared in the 7th edition. It is interesting to speculate whether the "present day" therefore is to be taken as the date of first publication of the words or of their republication.
chosen and the cases dealing with each one isolated. Before turning to these it will be convenient to state briefly some generally accepted principles which form the background. It is clear that in speaking of the republication of a will what is meant is the republication of a will together with all intervening codicils, so that any alteration to the will by those codicils is unaffected. Any legacy which has been expressly or impliedly revoked by such a codicil will not therefore be restored by a subsequent republication. That effect can only be achieved by a revival under section 22 of the Wills Act, 1837, which requires stronger words than will suffice for republication, the effect of section 22 being to prevent revival by implication. It is also clear that republication can cure incidental defects of the will, such as the invalidity of a gift to an attesting beneficiary. On the other hand substantial defects, such as the want of testamentary capacity or the unattested nature of the will, must, it would seem, be cured by an incorporation by reference in a subsequent valid testamentary document; republication alone will not suffice. The distinction between republication and incorporation may be immaterial in most cases, but not in all, since a greater particularity of reference is required for the latter. The distinction is one which is made in the cases in some contexts, and should be made here. So pre-1837 cases where a subsequent duly attested codicil made effective as to realty an earlier

11 Re Fraser, Louther v. Fraser [1904] 1 Ch. 726, following earlier cases such as Croachie v. McDonal (1799) 4 Ves. 610. It seems moreover that the distinction between republication of a will and of a codicil drawn by Jessel M.R. in Burton v. Newbery (1876) 1 Ch.D. 294 (as explained in Green v. Tribe (1879) 9 Ch.D. 231) would not now be drawn; compare Re Harvey, Public Trustee v. Hoaken [1947] Ch. 265. French v. Hoy [1909] 2 Ir.R. 472, and In b. Reynolds (1873) 3 P. & D. 35, though sometimes referred to in this connection, are not strictly relevant, being properly cases of revival not republication.

12 Goldie v. Adam [1938] P. 85; In b. Steele (1868) L.R. 1 P. & D. 575. Compare Rogers v. Pitts (1822) 1 Add. 30, a case before the Wills Act, where however all the circumstances also made it clear that the effect of the codicil was to revive an earlier revoked will.

13 Anderson v. Anderson (1872) L.R. 13 Eq. 381.

14 Thus in Roper: The Revocation and Reproduction of Wills and Testaments, the author speaks, at p. 44, of the need for re-execution of such instruments: see Hauke v. Burton (1888) Comb. 84 and Miller v. Brown (1832) 2 Hagg.Ecc. 209, where the circumstances amounted to a fresh making, and see Mortimer at p. 188, referring to Doe d. Williams v. Evans (1832) 1 Cr. & M. 42; Re Smith, Bilke v. Roper (1890) 45 Ch.D. 652; Utterton v. Robins (1884) 1 Ad. & El. 428. Though these authorities may be old there is no reason to doubt their current effectiveness. Compare, however, Mortimer at p. 204 where it asserted that a will made while the testator was of unsound mind could be validated by republication after recovery. It seems, however, that the passages from Swinburne there referred to really deal with incorporation.

unattested document, which was by itself ineffective for that purpose, must be regarded as cases of incorporation.\textsuperscript{16}

Just as there is a distinction between the effect of republication on incidental defects and on substantial defects, so it seems there is also a difference in the effect of republication upon the scope of the words of the will. While republication may, as will be seen, vary the meaning of individual words or phrases, it will not alter radically the scope of a document originally limited in purpose, unless an intent to do so is made clear.\textsuperscript{17} The cases before 1837 which have just been referred to, whether they are regarded as cases of incorporation or of republication, do not conflict with this principle.\textsuperscript{18} Some of them will be found to be cases where the original unattested document was intended to deal generally with property and it was only the formal defect which would have prevented that result.\textsuperscript{19} In such cases the effect of the republished or incorporated document was no more than the testator had originally intended. In other cases it will be found that the enlarged scope of the original document was clearly in accord with the testator’s intent as evidenced by the codicil and the circumstances of its execution.\textsuperscript{20} It is possible that there has been some relaxation of this rule in relation to special powers, which are discussed subsequently.

Next among these preliminary points, it may be observed that in order for there to be a republication there is now no need for any express confirmation of the will. Any reference, express or implied, to it as a live instrument will suffice,\textsuperscript{21} and such a republication operates for all purposes even if the reference is a limited one.\textsuperscript{22} The concept of partial republication which could be of importance

\textsuperscript{16}See e.g., Carleton v. Griffin (1758) 1 Burr. 549, Doe d. Williams v. Evans (1832) 1 Cr. & M. 43.

\textsuperscript{17}Du Hourmolin v. Sheldon (1854) 19 Beav. 389 at 392, per Sir John Romilly M.R.

\textsuperscript{18}For this purpose it does not appear to be necessary to distinguish between the two. The distinction between republication and incorporation could, in some circumstances affect questions of interpretation, since in the former case the original document has had testamentary effect since it was first made; in the latter it has not. No distinction seems however to be made in connection with interpretation. Compare for example, the language used in Dickinson v. Stidolph (1861) 11 C.B. (n.s.) 341 at 369 (a case of incorporation), with that in Re Blackburn, Smiles v. Blackburn (1859) 49 Ch.D. 75 (one of republication).

\textsuperscript{19}As Doe d. Williams v. Evans (1832) 1 Cr. & M. 43; Utterton v. Robins (1834) 1 Ad. & El. 428.

\textsuperscript{20}As in Dickinson v. Stidolph (1861) 11 C.B. (n.s.) 341.

\textsuperscript{21}A principle perhaps first firmly established in Acherley v. Vernon (1728) 1 Comyns 361, 3 Brn.P.C. 85; and see Barnes v. Crosse (1792) 1 Ves.Jun. 456.

\textsuperscript{22}Re Harvey, The Public Trustee v. Hosten [1947] Ch. 265. Indeed, it is doubtful if words of express confirmation add anything. They have long been recognised as being only words of form, see Isard v. Hurst (1698) 2 Freem. 224; and see Berkeley v. Berkeley [1946] A.C. 555, at 576, per Lord Porter, and at 582, per Lord Simonds.
before 1837 has, it seems, ceased to be important. This broadening of the doctrine of republication by the acceptance of constructive republication did not come about without some reluctance. To the extent that this reluctance influenced earlier cases upon construction the present force of their authority is weakened, since the general attitude to republication prevailing when they were decided has considerably altered.

One characteristic of the doctrine of republication has remained constant. It has always been regarded as beneficent, intended to give effect to the presumed intent of the testator, and not to defeat it. Hence its great use formerly lay in enabling after-acquired realty to pass under residuary and general devises. Hence too the general rule that a mere republication will not invalidate a gift which was once good; though a gift may be invalidated by a later instrument which not merely republishes, but also substantially alters, the original gift. Possibly it would be more correct in these cases to speak of the presumed intent of the testator, since, once it had been admitted that direct republication was unnecessary, the question of whether republication was actually intended could be one of considerable difficulty. Hence the rule formulated by Lord Ellenborough C.J.: "The effect of all these decisions is to give an operation to the codicil per se, and independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless indeed a contrary intent be shewn." In effect, the difficulties of finding an intent to republish are removed by creating a rebuttable

23 The Countess of Strathmore v. Bower (1798) 7 T.R. 483; Gibson v. Lord Montfort (1786) 1 Ves.Sen. 485. This issue was primarily of importance so long as wills of realty and personality were differently regulated, but might have survived the disappearance of that distinction. Other cases were concerned with the execution of powers, see e.g., Jourdet v. Board (1848) 18 Sim. 353; Hughes v. Turner (1838) 3 My. & K. 665.

24 See, e.g., Sir William Grant M.R. in Pigott v. Waller (1802) 7 Ves. 96 at 118. The change of attitude can be illustrated by the comparison of Ashley v. Wagh (1840) 4 Jur. 572 with Re Harvey, The Public Trustee v. Hosken [1947] Ch. 285.


26 See per Paterson J. in Doe d. Biddulph v. Hole (1865) 15 Q.B. 484 at 488 where he says that the only limitation of the doctrine is "that the intention of the testator be not defeated thereby," or Barton J. in Re Moore, decd. [1907] 1 Ir.R. 315 at 318, saying that republication is "a useful and flexible instrument for effectuating a testator's intentions, by ascertaining them down to the latest date at which they have been expressed."

27 Re Moore, decd., Long v. Moore [1907] 1 Ir.R. 315; Re Heath's Will Trusts, Hamilton v. Lloyd's Bank Ltd. [1949] Ch. 170; Re Bloom [1894] 1 Ch. 503. These cases may be regarded as being only concerned with the date when an instrument is made, as to which see note 41 below.


29 Goodtitle v. Meredith (1813) 2 M. & S. 5 at 14.
presumption of that intent.\textsuperscript{30} The neglect of this principle has, perhaps, been the source of many of the difficulties.

\textbf{The Effect of Republication upon Appointments under Powers}

Particular problems relating to republication must be considered against this general background. As has been suggested, most of them involve the question of how far republication alters the meaning and effect of a will, and since the cases relating to powers emphasise this they form a convenient starting point. Cases before the Wills Act, 1837, established that a power could not be exercised in anticipation of its creation or vesting, and, further, that a will purporting to exercise a power, not then created, even though republished after the creation of the power, could not, without more, be treated as making a valid appointment.\textsuperscript{31} After 1837 it was held that nothing in the Act affected the first rule so far as special powers were concerned.\textsuperscript{32} Indeed it seems that the effect of the Act may have been to make the courts less ready to find that an effective appointment had been made.\textsuperscript{33} As to general powers, it was held that the combined effect of section 24 and section 27 of the Wills Act did alter the law by causing general words in a will to exercise such powers even though created after the will was executed.\textsuperscript{34} The Wills Act therefore made republication unnecessary as to general powers, but contained no provision directly affecting special powers.

Since the rule as to the anticipatory exercise of such powers was maintained after 1837 it might have been expected that, in the absence of any relevant statutory provision, the rule as to the effect of republication would also continue in force. Yet it is established by \textit{Re Blackburn}\textsuperscript{35} that republication can have the effect of making a will exercise a power which could not have been

\textsuperscript{30} The exceptions to the general rule of republication are likewise based upon this presumed intent, see per Lord Porter in \textit{Berkeley v. Berkeley} [1946] A.C. 555 at 576.

\textsuperscript{31} \textit{Cowper v. Mantell} (No. 1) (1855) 22 Beav. 223, following \textit{Holmes v. Coghill} (1802) 7 Ves. 499; \textit{Hope v. Hope} (1854) 5 Giff. 13 at 25, per Sir John Stuart, V.-C. See also \textit{Walker v. Armstrong} (1855) 21 Beav. 294. It should be noted that in the last two cases and in \textit{Cowper v. Mantell} the date of the will was before the Wills Act came into operation. It is perhaps something of an overstatement to say that it is a rule established by the older cases, since it is difficult to find a direct decision. Nevertheless there is such a consistent body of opinion that it is hard to treat the rule otherwise.

\textsuperscript{32} \textit{Re Hayes, Turnbull v. Hayes} [1900] 2 Ch. 889; [1901] 2 Ch. 529 (C.A.) after a contrary decision in \textit{Stillman v. Weedon} (1846) 16 Sim. 26.

\textsuperscript{33} \textit{Re Williams, Foulkes v. Williams} (1899) 42 Ch.D. 93 at 96, per Cotton L.J.

\textsuperscript{34} \textit{Aisy v. Bowar} (1887) 12 App.Cas. 293.

\textsuperscript{35} (1899) 43 Ch.D. 75. Compare earlier cases such as \textit{Du Hourmelin v. Sheldon} (1854) 19 Beav. 399, where it was said that the republished will could only speak as to what was originally included in it.
exercised by the will alone. Both in that case, and in the similar case of Re Bower,36 it seems that a greater effect was given to republication than might appear at first sight. In both cases republication by a codicil was held sufficient to cause a will to exercise a power which had been created between the date of the will and the date of the codicil, and which the will, as it originally stood, could not therefore have exercised. In both cases, there were expressions in the will anticipating the grant of the power.37 It could be argued therefore that, in allowing republication to make the appointment valid, effect was merely being given to the expressed intent of the testator. Hence it could be said that these decisions would not be binding except where such an intention was clearly expressed. However, the principle of the cases seems not to be so narrowly confined. Thus, in Re Bower, Clauson J. appears to have been ready to allow republication to have effect even though the power could not have been contemplated at all by the testator at the time of making his will.38 In both cases an appointment was regarded as having been made by the republished will simply because the codicil gave the will a fresh starting point.39

In these cases therefore the doctrine of republication has been applied to extend wills to property which could not have been within their original scope. It should, however, be noted that that effect can only be achieved when the words of the will present no obstacle.40 If the words cannot be applied to the new situation without undue strain, then their original meaning will not be affected. With that limitation republication can, in the context of powers, enlarge the scope of the will and give a new and different content to the words used by the testator. This is achieved by giving the will a new starting point and a new reference point for words of time used in it. The time referred to in phrases such

36 [1930] 2 Ch. 89.
37 Such expressions would not affect the result in the absence of republication; see Farwell on Powers, 3rd ed., p. 256.
38 See e.g. [1930] 2 Ch. 82 at 91, when speaking of a power the possibility of which was evidently not in the mind of the testatrix. Certainly there could at the date of the will have been no such precise intent as was required in Re Slack's Settlement, Butt v. Slack (1923) 2 Ch. 359. It is scarcely possible to distinguish Hope v. Hope (supra) on the grounds that there the ratio of the decision was the uncertainty of appointment. The words in Re Bower were in many respects no more certain.
39 See per Clauson J. in [1930] 2 Ch. 82 at 90, 91 and per North J. 43 Ch.D. 75 at 79.
40 Compare with the above cases Re Taylor, Whitby v. Highton (1868) 57 L.J.Ch. 430 (a case which is in a sense the converse of the above) where Chitty J. held that a will which on its face only exercised powers could not by republication be made to have the effect of including free property. The real difficulty in arguing for an extended effect of the will due to republication was its phraseology which was inapt to deal with anything except powers.
as "over which I now have power to appoint" is moved forward from the date of the will to the date of the codicil.

**The Effect of Republication upon Construction**

In questions of general construction the solution adopted in relation to powers has not always been accepted, even where the interpretation of words of time was involved. Some of the apparent confusions may be removed if two questions are separated. In some cases it may be important to determine when a will was actually executed, in others what matters is the meaning of words of time contained in the will.

Cases involving the effect of statutes upon wills executed before, but republished after, the statute came into effect are good illustrations of the first group. It has been frequently held that, where an Act excludes from its scope "an instrument already made," the republication of an existing instrument by a later codicil does not by itself bring the instrument within the scope of the Act, even though the result might be different if there is something more than a simple republication. In these cases what is being considered is the actual date of execution of a will and not the construction of words of time in the will. Although for the latter purpose it may be possible to speak of the will as being made at the date of the codicil, republication alone cannot affect the actual date of execution. The only way that that can be affected is by a reference which will be sufficient to amount to an incorporation of the will so as to give it an entirely fresh start, or by such a substantial alteration of the will by a later document that it is virtually a new instrument. It is true that in Berkeley v. Berkeley Lord Porter (in contrast to the majority of the House of Lords in that case) laid down a general rule that (subject to certain exceptions which

41 *Re Elcom*, Leghorn v. Grocer Wright (1894) 1 Ch. 303; Rolfe v. Perry (1863) 3 De G. J. & S. 481; Re Heath's Will Trusts (1949) Ch. 170. In Berkeley v. Berkeley [1948] A.C. 556 the critical words were "provision made,"" the majority of the House of Lords holding that "provision was made" at the date of death since that phrase was taken as referring to the time when the provision became operative. The particular point here in issue was not therefore relevant on that view, since on that basis the date of execution was irrelevant. See also Re Taylor's Will Trusts, Public Trustees v. Burge (1960) 66 T.L.R. (Pt. 2) 507, dealing with the issue of when trusts are created or constituted for the purposes of s. 92 (3) of the Trustee Act, 1925. There was it seems more than a republication in that case. A post-1925 codicil had probably so altered the gift that it amounted to a new gift.

42 Willett v. Sandford (1748) 1 Ves.Sen. 186; Rolfe v. Perry (1863) 3 De G. J. & S. 481; Re Moore deed., Long v. Moore [1907] 1 Ir.R. 315. For this purpose the diminution of a residuary gift by a codicil does not appear to be a sufficient alteration, *Re Elcom* (supra). Contrast Att.-Gen. v. Heartseall (1754) 2 Ed. 294 which apparently conflicts with these cases, but does not do so in fact, since the judgment turns, not upon republication but upon the ambulatory character of a bequest.
do not cover this point) the effect of republication was to substitute the date of the codicil for the date of the will.\(^{43}\) The authorities by which he illustrated both the general rules and exceptions are, however, all cases of general construction.\(^ {44}\) Republication can alter the meaning of words, but not the actual date when they were written.\(^{45}\) If therefore that date is critical republication is irrelevant. The assertion that republication cannot alter the date of a will, but can alter the meaning of the word "now" contained in it, may appear illogical. In fact it is not, since different issues are involved in the two halves of the assertion. Moreover the distinction appears justified by its practical effects.

The cases on general construction are less clear. Although the problem is most clearly seen in connection with words of time, it is in fact wider and other cases of construction must therefore also be dealt with. It is possible to find many authorities which conflict with the general rule laid down by Lord Porter, and yet do not fall within the scope of his exceptions. Thus, to take but one example, in *Stilwell v. Mellersh*\(^ {46}\) it is said by Lord Cranworth that republication "does not mean that you are to read the will in any way different from the mode in which it would have been read if the testator had died the moment after he had executed it." So, he said, if you give to "the present Treasurer of Lincoln's Inn" republication would not alter the beneficiary.

In this context also there has been a broadening of the effect to be given to republication. The older cases, with some exceptions,\(^ {47}\) tended to be restrictive. Thus, although it had long been recognised that republication would, subject to a contrary intent, extend the operation of a will to after-acquired realty, yet\(^ {48}\) at times very little would suffice to prevent that effect.\(^ {49}\) Even so cases

\(43\) [1846] A.C. 555 at 575, 576; it should however be observed that s. 14 (3) of the Adoption Act, 1930, suggests that but for that provision a will would be treated as "made" at the date of the confirming codicil for the purposes of the Act, as to which see *Re Gilpin*, *Hutchinson v. Gilpin* [1933] 2 W.L.R. 740. S. 4 of the Married Women's Property Act, 1883, is perhaps to the same effect, though it speaks of re-execution or republication. On the other hand s. 34 of the Wills Act, 1837, appears to be drafted on the opposite assumption.

\(44\) *Grealey v. Sampson* [1917] 1 Ir.R. 286; *Goonewardene v. Goonewardene* [1911] A.C. 647; *Re Fraser*, *Lowther v. Fraser* [1904] 1 Ch. 728.

\(45\) The distinction is made in the words of Barton J. in *Re Moore, deed*. [1907] 1 Ir.R. 315 at 318. He said: "republication gives to the will a fresh starting point, it does not erase the old date," and, as p. 319, "but the real date and the real facts connected with the original execution of the will are not altered or falsified." Compare *Re Illingworth*, *Bosir v. Armstrong* [1909] 2 Ch. 297, where however the effect of republication was not discussed by Eve J.

\(46\) [1851] 20 L.J.Ch. 356.

\(47\) e.g., *Perkins v. Micklethwait* (1714) 1 P.Wms. 274 where the effect of republication was said to be "as if the testator had made his will anew, and had writ it over again." And see *Rider v. Wager* (1735) 2 P.Wms. 326, 394.

could be found which tended to diminish the importance of the intent of the testator to republish, and so to give wider scope to the will when republished. After 1837 this particular conflict was no longer possible in view of section 24 of the Wills Act, but what was essentially the same conflict appeared in a different form. Section 24 of the Wills Act gave way to a contrary intent. If therefore words of time, "now," and the like, were used, and were construed as excluding the effect of section 24, was the point of time referred to to be the date of the will or of the codicil? In the same way that it was formerly argued that republication for a limited purpose did not extend the scope of a devise, so it was now argued that republication did not alter the original scope of the will.

The reasoning of Stilwell v. Mellersh must lead to the conclusion that in all cases the original meaning of the will is unaffected. That view was reaffirmed by Sir John Romilly in Cowper v. Mantell (No. 1) and was accepted in Re Park by Parker J., who expressly adopted the arguments used in Stilwell v. Mellersh to limit the effects of republication, saying: "I do not think any of the authorities quoted go to the length that for all purposes in construing it I must treat the will as having been made at the date of the codicil." The support given in these cases for the view expressed in Stilwell v. Mellersh may not be as strong as it seems. It is possible for example that the real basis of Re Park is simply the general principle that a clear gift contained in a will cannot be cut down except by equally clear words.

Whatever the strength of these cases, there must be set against them others where the construction of a will has been altered by republication. Outstanding, as to persons, is Re Hardyman, where

49 See e.g., Lord Ellenborough C.J. in Goodtitle v. Meredith (1813) 2 M. & S. 5 at 14. See also Barnes v. Crome (1793) 1 Ves.Jun. 486; Williams v. Goodtitle (1830) 10 B. & C. 395, a clear case where a codicil for a limited purpose had the effect of extending the will.

50 As an early illustration, see Doe d. York v. Walker (1844) 12 M. & W. 501.

51 (1851) 20 L.J. Ch. 356.

52 (1853) 22 Beav. 223. To some extent the view expressed in the case is based upon an assumption as to the effect of a specific devise which is no longer valid; compare the passage on p. 228 with the judgment of Malins v. C. in Castle v. Fox (1871) L.R. 11 Eq. 542 at 551-2.

53 Re Park, Both v. Chester [1910] 2 Ch. 392. See also Mountassell v. Smyth [1896] 1 Ir.R. 346 where similar principles were expressed. The authority of the principal judgment of Walker C, in the latter is perhaps weakened by his reliance on Re Whorwood, Ogle v. Lord Sherborne (1887) 34 Ch.D. 446 where republication was not argued. Moreover the judgment of Fitzgibbon L.J. (at p. 363) appears to regard the codicil as itself referring to the date of the will for purposes of construction.

54 Re Hardyman, Teesdale v. McClintock [1925] Ch. 287, for an older case to the same effect see Perkins v. Midlothian [1714] 1 P.Wms. 274. Although the language of Lord Chancellor Harcourt in that case gives great effect to republication alone, it seems from the wording of the codicil that there might have been a substitution of beneficiaries irrespective of the effect of republication.
Romer J. held that republication altered the identity of a beneficiary, saying that the republished will amounted to an expression of the testator’s intent as at the date of the codicil. As to property, Re Reeves 55 shows that, even if the words “my present lease” are to be treated as excluding section 24 of the Wills Act, republication gives a new reference point for the description, and shows that such words of time are not equivalent to the insertion of the date of the will as was suggested in Stilwell v. Mellersh. Other cases also show that the critical point of time to be considered is the date of execution of the codicil. 56 This has been carried so far that the meaning of words and phrases has been altered even though it seems probable that at the date of the will they had been deliberately adopted to meet a then existing situation. Thus, in Re Rayer, 57 a reference to legacy duty was, as a result of republication, read as covering succession duty imposed by the Customs and Inland Revenue Act, 1888, after the date of the will. In a general review of the cases Ronan L.J., in Grealey v. Sampson, 58 concluded that for all purposes of construction the will must be treated as of the date of the codicil unless a contrary intent appears, and he adopted, as expressing the true principle of law as to republication, the statement by Williams J. in Dickinson v. Stidolph 59: “The cases which have occurred with respect to the effect of a codicil in republishing a will of realty appear to support the principle that the effect of such incorporation is to make it the duty of the court to construe the two instruments in the same way, and to allow the same operation to the language of the incorporated instrument as if it had been originally contained in the will which incorporates it.”

Perhaps Grealey v. Sampson goes somewhat too far. It certainly is not possible to regard the will and codicil as one for all purposes, otherwise the well-established distinction in equity as to the effect of double gifts in one instrument or in several must

Compare Went.Off.Ex.Ch. II: “As if one give to Sarah his wife a piece of plate or other thing, and hath no such wife at the time, but afterwards marrieth one of that name and then publishes his will again now this shall be a good bequest.”

56 e.g., Re Fraser, Louther v. Fraser [1904] 1 Ch. 726, a case on the effect of a legacy by will to a beneficiary dying between the date of the will and of the codicil. Its effect is perhaps weakened by the fact that the codicil referred to the death. In Winter v. Winter (1846) 5 Hare 306 at 312, however, Sir James Wigram V.-C., dealing with a somewhat similar situation was clearly of opinion that the relevant date to be considered was that of the codicil.
57 Re Rayer, Rayer v. Rayer [1903] 1 Ch. 685.
59 (1861) 11 C.B.(n.s.) 341 at 359. The word “will” in the last line of the quotation must clearly refer to a codicil.
go. Nevertheless the case is a useful corrective to Mountcashell v. Smyth 60 and to some of the broader statements in Re Moore, decd.," 61 which are sometimes accepted as conclusive. On the whole the cases appear to show a tendency towards allowing greater effect to republication, by giving the will a new starting point for the purposes of construction. Republication can thus alter both the objects and the subject-matter of gifts in those cases where that can be done without doing violence to the language of the will. 62 Those of the more recent cases such as Re Park 63 which tend to give a more limited effect are really to be explained on other grounds. It must of course be recognised that this wider effect will not be given where a contrary intent is shown, but now much more is necessary to show a contrary intent than was formerly the case. 64

THE EFFECT OF REPUBLICATION UPON LAPSED AND ADEEMED GIFTS

The question of the effect of republication upon construction cannot be left there. To cite cases like Re Rayer for this general proposition is perhaps to conceal a difficulty. Re Rayer was concerned with the incidents of a legacy, not with the object or subject of a legacy. It does not clearly follow that the same principle should apply in all three cases. If it does then the rule that republication does not save a lapsed or adeemed legacy cannot easily be maintained. Yet that is a rule which is regarded as well established by a continuous line of authorities, 65 even though cases like Re Hardymon 66 and Re Harvey 67 show that something very like that result can be achieved by republication. Once again there is a conflict between general propositions. A starting point to the resolution of this conflict may be found in the judgment of Ronan L.J. in Grealey

60 [1895] 1 Ir.R. 346.
61 [1907] 1 Ir.R. 315. The case is in line with Stilwell v. Mellersh.
62 A parallel development has occurred in regard to other matters of construction, thus the readiness with which phrases such as “herein given” or “given by this my will” will be allowed to cover gifts in codicils is now much greater. Compare, e.g., Re Smith, Prada v. Vandroy [1916] 1 Ch. 523 or Re Picton, Porter v. Jones [1944] 1 Ch. 303 with cases like Early v. Benbow (1946) 2 Coll. 354 and Bonner v. Bonner (1897) 13 Ves. 279. Again it is difficult to find consistency. Compare Re Whiting, Ormond v. De Launay [1912] 2 Ch. 1 with Re Forrest, Carr v. Forrest [1931] 1 Ch. 162.
63 Re Park, Bott v. Chester [1910] 2 Ch. 392.
64 Compare the language of Sargent J. in Re Smith, Prada v. Vandroy [1916] 1 Ch. 523 with that in cases such as The Countess of Strathmore v. Bones (1798) 7 T.R. 492.
65 Compare, e.g., Lord Manners in Re Monck, Monck v. Monck (1819) 1 Ba. & Be. 298 at 306, and Harman J. in Re Viscount Galway’s Will Trusts, Lowther v. Galway [1920] Ch. 1.
v. Sampson, where (at pp. 307–8) he treats cases such as the gift to the "present Treasurer of Lincoln’s Inn" as cases where there is a "contrary intent" excluding the effect of republication. Thus if you have a sufficiently precise reference to property such as would exclude section 24 of the Wills Act, then too the subject-matter of the gift will be unaltered by republication, and a legacy once deemed by the disappearance of the subject-matter will not be revived. Similarly as to persons: where the reference in the will is sufficiently specific, republication will not transfer the gift to another who answers the description if the person originally intended has died meanwhile. On this basis there is no conflict with the cases saying that there is no revival by mere republication of a lapsed or adeemed legacy, since, where the republished will applies to the altered subject-matter there has on this basis been no lapse, the description not having been sufficiently specific to exclude the ambulatory effect of section 24.

This method of resolving the difficulty is not entirely satisfactory. First, as to persons, there is in any event no ambulatory effect. The reference in the will in Re Hardyman could, as the will originally stood, only have applied to one person. As republished, it applied to another. Secondly it is difficult to say that cases like Re Harvey are not decided upon the basis that there is the revival of an adeemed legacy.68 Thirdly, as has been shown, republication can affect the meaning of a will in some cases even where the wording of the will alone might exclude the effect of section 24.69

In considering this issue it will be found that, when examined, the older cases fall into two groups. First there are the portion cases, and secondly there are cases where an act of the testator has materially changed the subject-matter. As to the portion cases it should be observed that they are an unsafe foundation for any general rule since they are governed by the strong leaning of equity against double portions. In view of the attitude of equity it would need very clear words to re-establish a gift satisfied by a portion.70 Yet, even in these cases the existence of a codicil is material, and

68 It is true that in Re Viscount Galway’s Will Trusts [1950] Ch. 1 Harman J. says that these are not cases of lapse or ademption because of the continuing interest of a person interested under the statutory trust for sale (an argument discussed subsequently); yet in Re Harvey, The Public Trustee v. Hosken [1947] Ch. 285 at 294 Valsey J. clearly relied on republication, saying "I have come to the conclusion that the fifth codicil sufficiently republishes . . . the testator's will so as to prevent or preclude ademption." Even if the issue of ademption is still arguable, it does not alter the fact that Re Harvey is based upon the assumption that there was an ademption, the consequences of which were prevented by republication.

69 Re Reeves, Reeves v. Pawson [1925] Ch. 251.

70 See e.g., Hopwood v. Hopwood (1859) 7 H.L.C. 728.
it is recognised that in cases of doubt a codicil might well be
decisive against an ademption.\textsuperscript{11}

As to other cases of ademption, the real source of authority is
\textit{Powys v. Mansfield},\textsuperscript{12} where Lord Cottenham denied that a codicil
makes a will speak as from a later date for the purpose of reviving
a legacy revoked, adeemed, or satisfied. It seems, however, that
Lord Cottenham was speaking of acts of the testator; the linking
of revocation with ademption is perhaps significant, and seems to
have been deliberate, since later he says that any other result would
mean that the codicil was undoing an act by which a gift had
been adeemed or satisfied. This emphasis on the fact that the
ademption was attributable to intentional acts of the testator is
apparent in other cases, both before and after the Wills Act. Thus,
in \textit{Drinkwater v. Falconer},\textsuperscript{13} speaking of the whole course of actions
of the testatrix (including the acts causing ademption), Sir Thomas
Clarke M.R. said: “Her acts operate in direct contradiction to the
will, consequently she meant not to put the will in a better condi-
tion.” Again, in \textit{Sidney v. Sidney}\textsuperscript{14} the legacy was specific, was
adeemed by the act of the testator, and was not revived by repub-
lication. In these cases there are deliberate acts of the testator
materially altering the subject-matter of legacies which are in them-
selves specific, not merely in the ordinary sense of that term, but in
the sense which would exclude section 24.\textsuperscript{15} Further because of
the aptness of the language to describe one person or thing only,
any effect of republication is also excluded under the principles
already discussed.

If one of these factors is absent, the result is not necessarily the
same as that where all are present. It is established that, where
a description is sufficiently general to be reasonably applicable,
property which has been substituted for that existing at the date
of the will can pass as a result of republication, even in the case of

\textsuperscript{11} \textit{Re Scott, Langton v. Scott} [1903] 1 Ch. 1 at 14 and \textit{Ravencroft v. Jones}
(1864) 4 De G.J. & S. 224. In cases other than portion cases the expressions
are somewhat stronger: see \textit{e.g.}, \textit{Re Aynsley, Kytle v. Turner} [1915] 1
Ch. 172.

\textsuperscript{12} (1837) 3 My. & Cr. 359.

\textsuperscript{13} (1759) 2 Ves.Sen. 623 at 628.

\textsuperscript{14} (1878) L.R. 17 Eq. 68. Again in \textit{Macdonald v. Irvine} (1876) 8 Ch.D. 101 the
act causing ademption was that of the testator selling certain stock the subject
of a specific legacy. In both these cases the wording of the will would also
have presented an obstacle to the revival of the legacy by a codicil.

\textsuperscript{15} The two senses should, it seems, be distinguished. Thus a gift of “my brown
horse,” while it may be specific does not necessarily exclude s. 24; see \textit{Castle
Sampson} are probably too broad and depend upon the gift being specific in the
narrower sense.
gifts which would be classed as specific. So also ought republication to prevent the consequences of ademption where the ademption is involuntary. Indeed, that point was made by Maugham J. in Re Warren. It is true that he also attributed weight to the effect of the statutory trust for sale, yet, since he felt himself compelled (although reluctantly) to follow Re Newman, something other than the nature of the interest under such a trust for sale had to be found if that case were to be distinguished. That other factor was found in the republication, and led Maugham J. to the conclusion: “I do not regard Powys v. Mansfield as laying down the general proposition that no kind of so-called ademption would be prevented by the confirmation of a will or codicil.” It was the fact of republication which enabled Re Newman to be distinguished, and the fact that the ademption was involuntary which afforded an escape from the consequences of the statements on the effect of republication found in Powys v. Mansfield. On this basis the case turned upon republication and not upon the nature of the trust for sale. If that is the true basis of Re Warren, and of the cases in which that decision has been followed, then Re Viscount Galway’s Will Trusts must be regarded as contrary to the trend of authority and it must be admitted that, despite that case, republication can restore a gift adeemed otherwise than by an act of the testator, provided that the words of the will can reasonably be applied to the property existing at the date of death. The result of Re Viscount Galway’s Will Trusts can be justified on the grounds that the proviso was not there satisfied. That, however, is not the basis of the judgment.

CONCLUSION

What conclusions can be drawn from a survey of the cases? The primary one seems to be that throughout there has been a steady

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76 Re Reeves, Reeves v. Pawson [1928] Ch. 351, or see cases such as Re Pyle, Pyle v. Pyle [1865] 1 Ch. 724, or Goonewardene v. Goonewardene [1931] A.C. 647, where again republication saved an adeemed gift. Re Hardyman [1925] Ch. 257 shows that the same principle applies in regard to persons. Other examples are the long line of cases showing that a renewed lease can pass, see Alford v. Earle (1890) 2 Vern. 209; Carte v. Carte (1744) Amb. 28.


79 It is true that ademption as a result of statutory changes is now rare, because statutory provision is usually made against it. But involuntary forms may still arise. e.g., on company reconstructions, etc. Illustrations of the proviso can be found in the older cases. So words of limitation could not be converted to words of purchase: Doe v. Turner v. Kett (1793) 1 T.R. 631. This too, seems to be the reasoning of Pattison v. Pattison (1839) 1 My. & K. 19. In the Law Journal reports (5 L.J.Ch.N.S.) 16 at 16) the Master of the Rolls is reported as saying: “The answer to the arguments in favour of the legatee is that this is a different fund from that given to Mrs. Pattison” (i.e., the fund existing at the death could not be treated as the same thing as the fund existing at the date of the will, which was described with some particularity). See also Strode v. Perryer (1879) 1 Mod. 267.
growth in the effect to be given to republication coupled with a steady diminution in the importance attached to seeking an actual intent to republish. Although the doctrine rests upon the supposed intent of the testator, the difficulty of finding that intent has been met by an increasingly strong presumption that a new start to the will was intended, unless there is very clear evidence to the contrary. With this development earlier limitations on the doctrine have tended to disappear. The doctrine of partial republication appears to have gone, the effect of republication upon appointments under special powers and upon construction is much greater than was formerly the case. While it is believed that it is fair to assert that today republication has a much greater effect than was formerly the case, it must be admitted that the development has been uneven and has been resisted at each stage. Hence the contradictions in the cases. Despite these conflicting cases it seems that of late the preponderance of authority is in favour of the broad view of the effect of republication. In practice the acceptance of this view has considerable advantages.

The main advantage of this broad view of the effects of republication is that it makes possible the application of the will to altered circumstances, and thus gives effect to the probable intention of the testator. On this view republication can, in suitable circumstances, save lapsed and deeded legacies, and give new meaning to the words of the will so that the latter remains effective. It is by this means that the will can be made to cover new powers, new subject-matter, and new objects. The effective limitation of the doctrine is that republication does not give a forced or unnatural meaning to the words of the will, and hence does not distort the wishes of the testator. The altered effect is only achieved within the framework established by the will, and the effect of the latter is not extended beyond the type of disposition contemplated by it. This limitation upon the doctrine of republication prevents its broad application having mischievous effects. That result is also prevented by the fact that republication gives way to a clearly expressed intent, or to a strong presumption of intent, as in the portion cases. The modern doctrine of republication has the further advantage of certainty. A rule which will apply in the absence of a clear intent to the contrary is better than one the application of which can only safely be determined by resort to the courts. The latter is the case where the effect of republication is made to rest too much upon actual intent. Moreover a study of the facts and effects of the recent cases shows that this doctrine is more likely to achieve the result which the testator would have desired than is a narrower doctrine. In the result republication has now reached a
stage when it can be regarded as a device of the law, supplementary to section 24 of the Wills Act, designed to keep up to date the testamentary dispositions of a testator, even where he has not consciously applied himself to that task. From a practical point of view what matters today is not, as was formerly the case, the search for an intent to republish, but rather the search for clear indication of an intent not to do so.

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LEARNER’S LICENCE

By

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To simple and bemused travellers brief directions may sometimes be as useful as detailed descriptions of the ground that has been traversed and of the way ahead. To such travellers the following directions are offered by one of their company. Those who prefer a survey to a signpost must seek it elsewhere.1

Introduction

1. A new interest, if it is to be capable as such of affecting third parties acquiring land, must be an interest in land—a right in rem. The mere recognition of the existence of a new right does not necessarily have this consequence. It may merely be recognised as a right in personam.

2. Rights exist in law and in equity. Any new right, if it owes its creation or recognition as a right in land to judicial decision, must be equitable. The categories of legal rights in land are closed by L.P.A., 1925, s. 1 (1) (2) and (3), but there is no insuperable difficulty in the way of the creation by the courts of new equitable rights in land, though the proviso to L. P. A., 1925, s. 4 (1) does present some difficulty.

3. Neither 1 nor 2 above has any application to rights created by statute, which may fall within the traditional classes, or may be of an anomalous nature. The right of the “statutory tenant” is but one example of the latter type (see 18 below).

4. The same situation can give rise to rights in rem and to rights in personam. In either case some or all of the rights may be legal, or some or all of them may be equitable.

5. Just as all the rights arising from one transaction need not have the same character, so they need not be coextensive. The legal and equitable rights may not be coterminous; the rights in rem need not be of the same duration as the rights in personam.

Compare: (a) As to options to purchase: so far as the option creates an interest in land it is limited by the perpetuity rule, so


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far as it creates pure contractual rights, rights in personam, it is not so limited. Woodall v. Clifton [1905] 2 Ch. 257; Hutton v. Watling [1948] Ch. 26.

(b) As to agreements for a lease: the agreement coupled with the fact of taking possession can give rise to (i) purely contractual rights; (ii) to a legal right in rem—a term from year to year; (iii) an equitable right in rem—a term for the agreed period. Here the purchaser may be affected by the equitable rights in rem, not by the legal rights in personam. The legal and equitable rights in rem are different in extent.

6. The enforcement of equitable rights in rem depends upon notice. The question of notice is regulated either by the provisions of the L. C. A., 1925, or L. R. A., 1925 (where applicable), or elsewhere by general equitable rules.


8. A major reform in English land law was worked by the property legislation of 1925.

Lease and Licence: The Background


10. The availability of these remedies does not necessarily convert the right of the licensee into a right in rem. Compare: Hutton v. Watling [1948] Ch. 26, where specific performance was available precisely because the right was in personam.

11. At common law exclusive possession is essential for the creation of a tenancy, and, conversely, where exclusive possession is conferred a tenancy of some sort necessarily results even if it be merely a tenancy at will or at sufferance. Doe d. Thompson v. Thompson (1822) 5 B. & Ald. 604 as to mortgagors.

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3 Not all licences are thus enforceable: Thompson v. Park [1944] K.B. 408. It is not clear if the new interest is only claimed where they are. See 16 M.L.R. at pp. 8-9.
4 See "Licensed Possessors," by Professor A. D. Hargreaves, 69 L.Q.R. 406. Contrast 16 Conveyancer 328. It is here assumed that tenancies at will still exist at law: see Wolstenholme and Cherry, Conveyancing Statutes, Vol. 1, p. 322.
Licences with exclusive possession

12. Hence, if a "licence" confers exclusive possession then a tenancy—a legal right in rem—will necessarily arise. The description as "a licence" cannot prevent this result (7 above). A third party acquiring the land must be affected by this right, but if the tenancy be at will he can terminate it (subject to any general rules, such as the Rent Restriction Acts). The tenancy need not necessarily be at will. If the duration of the licence is less than three years, a legal term for that period will result (L. P. A., 1925, s. 52). Otherwise the situation is similar to any other where there is an informal grant of an interest in land.

13. In addition to this legal right other rights may arise from the same transaction, which need not be of the same nature or duration (5 above). Thus, if the "licence" term is over three years an equitable term may arise of like duration, which will, if registered as a Land Charge Class C. (iv), bind a purchaser. If unregistered, a purchaser will be unaffected except by the legal tenancy, whether at will or for a greater period if rent has been paid. If the land is registered the situation is as in 34 below.

14. On particular facts an alternative to the situation in 13 may arise. There may be merely a tenancy at will at law coupled with a contractual obligation on one party not to exercise the power of determination. There is nothing inconsistent in this (see 5 above). In this case, while the legal right in rem could affect a purchaser, the contractual obligation not to exercise the power to determine could not, the burden of a contract being unassignable. This situation could arise where the construction of the so-called "licence" as an agreement for a term was impossible.5

15. The result in 12, 13, and 14 would be invalidated if it could be shown that the cases demonstrate that a licence can exist in its own right as an interest in land, and that the results of the cases are not attributable to the doctrines in 11 and 12 above. This does not appear to be so (see 18–21 below), but if it were, in so far as licence and lease would then cover much the same ground, confusion must arise.

Licences not giving exclusive possession

16. If the licence does not confer exclusive possession no tenancy can arise (11 above). The only possibilities of such a licence creating an interest in land are (a) if the licence could be construed as a grant of an easement, provided that the nature of the user of the land allows this (22 below), and the other requisites for a valid easement are present. If the licence can be construed as an informal grant of an easement then again, as in 13 above, registration under the L. C. A., 1925, will be necessary to bind a purchaser. (b) If the licence cannot be so construed then, since the licence falls outside

5 See 69 L. Q. R. 475; contrast 16 Conveyancer 323.
any existing category of legal or equitable rights in land, it can only exist as a right in land if a new equitable right has been recognised.

The new right on the cases

17. The existence of such an equitable right is claimed and denied. 7

18. The mark of a right in land—a right in rem—is its enforceability against third parties because it attaches to a thing. The modern cases relied on to support the new right are Old Gates Estates, Ltd. v. Alexander [1950] 1 K.B. 311; Errington v. Errington [1952] 1 K.B. 290; Bendall v. McWhirter [1952] 1 All E.R. 1307; Foster v. Robinson [1951] 1 K.B. 149; Ferris v. Weaven [1952] 2 All E.R. 283; Cobb v. Lane [1952] 1 All E.R. 1199; Street v. Denham [1954] 1 All E.R. 532, and perhaps Barclays Bank, Ltd. v. Bird [1954] 2 W.L.R. 319. Among older cases are Plimmer v. Mayor of Wellington (1884) 9 App.Cas. 699; Beaufort v. Patrick (1858) 17 Beav. 60; Ramsden v. Dyson (1860) L.R. 1 H.L. 129; Rochdale Canal Co. v. King (1853) 16 Beav. 630; Dilkwyn v. Llewellyn (1862) 4 De G. F. and J. 517. Of these: Old Gates Estates, Ltd. v. Alexander is concerned with a statutory tenancy of the nature of which is peculiar (see Brown v. Min. of Housing and Local Government [1958] 1 W.L.R. 1870) and can at best be an unsafe foundation for general propositions. 6 In Errington's case the legal estate, against which the rights were asserted was still apparently vested in the personal representatives of the licensor who had held that estate. Since these representatives would have been affected even by mere contractual obligations of their testator, there cannot be said to be any true third party in the case who was held bound by a right in rem. A somewhat similar objection holds for Bendall v. McWhirter, which, as an authority for any general proposition, is vitiated by the peculiar position of a trustee in bankruptcy. In Ferris v. Weaven the absence of a genuine intent to buy was so apparent that little reliance can be placed on it where that element is present. Indeed there was scarcely transfer of ownership in a real sense in that case. The same objections apply to Street v. Denham. Moreover the result in Errington's case as in Foster v. Robinson, is reconcilable with older doctrines. Cobb v. Lane is open to the objection that it is inconsistent with authority binding on the Court of Appeal, and is founded upon cases which are themselves open to attack. 9 Among the older cases Beaufort v. Patrick is explicable on other grounds, there being an appropriation, or sale of the land, of which the third party had notice. Dilkwyn v. Llewellyn is similarly concerned with the transfer of

6 15 M.L.R. 1.
7 68 L.Q.R. 397.
9 69 L.Q.R. 466.
legal estate. So also can Rochdale Canal Co. v. King and Clayton v. Ramsden be construed as concerned with traditional interests in land.

19. Against these can be ranged (a) the old authorities asserting the personal nature of a licence particularly in recent years, King v. David Allen and Sons [1916] 2 A.C. 54, and Clow v. Theatrical Properties, Ltd. [1986] 3 All E.R. 483; (b) the dicta or decisions to that effect in modern cases which conflict with those referred to in 18 above such as Hole v. Cuzen [1953] 1 All E.R. 87; Thompson v. Earthy [1951] 2 K.B. 596; R. v. Twickenham Rent Tribunal, ex p. Dunn [1953] 3 W.L.R. 517, and, it seems, Lloyds Bank, Ltd. v. Trustees of the property of O., a Bankrupt [1953] 1 W.L.R. 1460; further even in Errington v. Errington [1952] 1 K.B. 290 at 296 and Cobb v. Lane [1952] 1 All E.R. 1199 at 1202 there are denials that the rights there recognised were rights in land.

20. Further to the extent that the new status of licences is dependent upon cases involving the deserted wife, those cases can be only an unsafe foundation since it is not clear that her right is that of a licensee. Compare Bendall v. McWhirter [1952] 1 All E.R. 1311, per Denning L.J., “She is, therefore, only a licensee . . . her occupation is comparable with that of the contractual licensee” with Old Gates Estates, Ltd. v. Alexander [1949] 2 All E.R. 825, per Denning L.J., “the wife is not the sub-tenant or licensee of the husband.” Moreover, the authority of these cases as supporting general propositions of law is weakened in so far as they depend upon the peculiarities of the Rent Acts or of the position of husband and wife in respect of tortious actions under the M. W. P. A. (see 18 above and R. v. Twickenham Rent Tribunal, ex p. Dunn (supra)).

The new right on principle

21. If the cases are ambiguous and conflicting and the right of the licensee is not yet clearly established as a right in rem, it is permissible to consider the desirability of that result. Here a distinction should be made between contractual licences and the right of the deserted spouse.

Contractual Licences

22. As to the former it can be said: (a) that the law must recognise new rights to meet the needs of a modern society; (b) that whereas, on the one hand, exclusive possession is a prerequisite for a tenancy, on the other, lesser rights may yet be too extensive to allow a right to exist as an easement (Copeland v. Greenhalf [1952] Ch. 488) and hence that it is desirable that a new intermediate class of rights, possibly freed from the other limitations of easements, should be recognised, as in the past restrictive covenants were so recognised.
23. Against this it may be said: (a) modern society, a society of small property holders, requires cheap and easy conveyancing. If new rights can exist which are not easily ascertainable conveyancing will be neither cheap nor easy, and the essential services of building societies more difficult or more costly to obtain (see per Harman J. [1954] 2 W.L.R. at 822). (b) That the 1925 legislation marked a major reform by (as a general rule) making rights not apparent on inspection dependent upon registration for their enforceability against third parties or else overreachable. Hence (i) that further exceptions to these simplifying principles should not be readily admitted, (ii) possession as a means of notice has greatly diminished in importance (compare Coventry Permanent B/S v. Jones [1951] 1 All E.R. 901), and thus cases such as Hunt v. Luck [1902] 1 Ch. 428,10 lose much of their significance; the background against which they were decided has been altered. (c) In the case of the varied rights capable of existing as licences, possession itself can often be little warning of their existence (and compare 28 below). (d) That the admission of new rights inconsistent with former principles is likely to provoke more difficulties than will be solved by that admission. (e) The recent run of cases do not show any situation, incapable of being satisfactorily met on existing principles, and urgently calling for the development of a new right. (f) In so far as the contractual licence confers exclusive possession there is no need for, and indeed (without creating undue confusion) no room for, a new right (see 12 and 18 above). The issue is of great importance therefore only where exclusive possession is not given, and even there the cases do not demonstrate any inadequacy of existing rights such as requires urgent redress.

24. But if a contractual licence is recognised as a right in land then it appears to follow that such rights would be capable of falling within Land Charges Class D (iii). What is here important is what the words of the statute are capable of including as they stand, and not what the draftsman may have had in mind. (Compare Garner v. Burr [1950] 2 All E.R. 688.)11 A possible alternative—Class C (iii)—must it seems be ruled out as being more appropriate to charges securing sums of money. The decision in Lewisham B. C. v. Malone [1948] 1 K.B. 50, does not decide this issue since that case is only concerned with the peculiarities of war-time requisitoning as creating special statutory rights (see 3 above).

25. Hence a rejoinder to 23 could be that the objections in 22 are largely met, if registration is thus possible, since (a) to be valid as a contract the rights created must be certain and intelligible (British Electrical and Associated Industries, Ltd. v. Patley

10 Relied on in 16 M.L.R. at p. 10.
11 In the same way the new interest would necessarily fall within the scope of L. P. A., 1925, ss. 53 and 54.
Pressings, Ltd. [1953] 1 All E.R. 94), and (b) being registrable, the existence of rights is easily ascertainable, the difficulties as to possession as a means of notice are removed (see 24 above) and the purchaser is protected under L. C. A., 1925, s. 13 (2).

26. This rejoinder is not conclusive. It does not meet all objections, and even in those cases where it does the position of the purchaser is not greatly simplified so long as the Registrar does not regard it to be one of his primary functions to decide the validity of charges the registration of which is sought. Registration alone does not at present imply validity, and while it is true that at present similar difficulties can be met in connection with, e.g., restrictive covenants, the purchaser's difficulties when dealing with the present undefined group of rights could be considerable, and in view of the considerations in 23 outweigh the advantages of admitting the new category of rights as rights in rem.

The deserted spouse

27. As to the right of the deserted spouse, it seems that the position as in 11 and 12 cannot arise, the wife's claim is against the husband and against him she has no exclusive possession, indeed there is a power in the court to order his return, and, in cases of simple desertion, the wife can only be deserted if she does not exclude the husband. So against third parties she is asserting rights through him (Lloyds Bank, Ltd. v. Trustees of the Property of O., a bankrupt [1953] 1 W.L.R. 1460 at 1466, per Upjohn J.).

28. As to the recognition of her rights as rights in land the objections in 23 apply with greater force. The rights of the deserted spouse appear to depend on (a) the validity of the marriage; (b) on the fact that she is deserted; (c) on the absence of any subsequent matrimonial offence on her part; (d) seemingly on the continuance of the marriage, i.e., on the absence of divorce, annulment, or the death of the other spouse. None of these matters may be readily ascertainable, and as to (b) it must be remembered that under the doctrine of constructive desertion the party who leaves may be the deserted party. Possession is inadequate notice since capable of other more obvious explanations. Indeed, since possession is now only of limited force as a means of notice (see 23 (1) above) it is undesirable to admit other instances which can, in time, only reproduce all the complexities of constructive notice happily reduced by the 1925 legislation. The claims of recognition of this new right as a right in land can only be admitted at the cost of denying basic principles of the outstanding reform of English land law.

29. The public interest in the maintenance of the simplified system of land law outweighs the public interest in providing for deserted spouses (whose claims to sympathy may often be more

12 Compare the remarks in Re Ridgeway and Smith's Contract [1930] 3 V.L.R. 111 as to the effect of registering a verse of the Rubaiyat of Omar Khayyam.
apparent than real) through a new right in rem; those arguments in no way weaken claims in personam which the deserted spouse may have against the other.

30. If it is desired to confer rights on spouses in the matrimonial home then the proper course is to deal specifically with this issue through the introduction of a regime of matrimonial property and thus not prejudice general principles of land law. Whether such a course is justified in view of the existing remedies is arguable (see 32 below). If it is considered desirable to confer rights in property as a result of marriage the reform should be a legislative one, but it is not a difficult one to accomplish within the existing conveyancing machinery. Rights should however spring from the marriage, and not, as suggested in Lloyds Bank, Ltd. v. Trustees of the property of O., a bankrupt and Barclays Bank, Ltd. v. Bird, from the break-up of the marriage (see per Sholl J. in Brennan v. Thomas [1953] A.L.R. 214).

31. The cases being ambiguous, the practical objections to the recognition of the wife's rights as a right in rem being strong, and the balance of public policy being against it, the right should not be admitted as a right in land until binding unambiguous authority compels that course, or there is a legislative reform. Her right of residence in the matrimonial home should be considered as a right of maintenance in kind, the counterpart of the right of maintenance in cash. Just as the wife has no right in rem enabling her to follow her husband's money into the hands of third parties, so also she has no right in rem against the house. In both cases her right is of the same nature.13

32. Three further possibilities should be considered in the case of the deserted spouse.

(a) Where, when the husband leaves the wife, an arrangement is made that she shall be entitled to reside in the house to the exclusion of the husband, then, the interest of the wife being one for life determinable on an event, the transaction falls within the definition of a settlement in S. L. A., 1925, s. 1, the wife being capable of being regarded as tenant for life under S. L. A., s. 19. If there is no more than an agreement, then there is an informal settlement and hence, by S. L. A., s. 11, the provisions for registration of the agreement as an estate contract are made applicable and a purchaser will therefore be protected in the absence of registration. The machinery of the S. L. A. appears inapplicable where there is no agreement, the wording of the Act being only appropriate to situations springing from an agreement or an instrument.

(b) If the wife is present under an order of the court (when exclusive possession might be given) the situation is, it seems, already governed by the L. C. A., s. 6 (dealing with the registration of

13 See the analogies drawn by Sholl J. in Brennan v. Thomas [1953] A.L.R. 214, with the wife's rights over her husband's goods.
writs or orders affecting land). The wife can protect her rights by registration of the order and the purchaser would be protected under L. C. A., s. 7 (1) in the absence of such registration.

(c) If there is no agreement the wife may seek and obtain an injunction against the husband restraining him from selling the house over her head. *Lee v. Lee* [1952] 2 Q.B. 489n. Again the resultant order falls within the L. C. A., s. 6.

33. Hence adequate remedies are already available to the wife who takes proper steps without the invention of a new right, and the existence of such a right should not be admitted, save as in 30 above.

*Registered land*

34. The situation in regard to registered land must be separately considered, since L. R. A., 1925, s. 70 confers protection (subject to qualifications) on overriding interests which include the rights of persons “in actual occupation.” Although the word “rights” here used is ambiguous, it seems that in the context, and having regard to the opening words of the section, it can only refer to rights in land. Hence the right of the licensee, not being such a right, does not receive protection under L.R.A., s. 70 (1) (g) or 70 (1) (k) whichever is appropriate. (Compare Cowell v. Rosehill Racecourse Co., Ltd. (1937) 56 C.L.R. 605, and see Woolwich Equitable B/S v. Marshall [1952] Ch. 1; City Permanent B/S v. Miller [1952] 2 All E.R. 621.) The situation of the licensee is therefore no stronger here than it is in relation to unregistered land. If his “licence” gives exclusive possession he is protected. If it does not he has no interest in land and the fact that the land concerned is registered does not increase his rights. In the same way the deserted spouse derives no protection merely by the fact of occupation but, provided appropriate steps are taken, may obtain it under the ordinary rules.

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