COMMENT

MINISTERIAL PRIVILEGES

In the annals of responsible Parliamentary government in Australia in modern times there are few instances where Ministers of the Crown have stood trial on criminal charges arising out of their conduct as Ministers, and fewer still instances where the accused, being the holder of a high public office, has claimed that evidence proposed to be adduced by the Crown should be excluded on the ground that disclosure would be contrary to the public interest. In *R. v. Turnbull*[1] the accused was, prior to his trial, Treasurer and Minister for Health in the State of Tasmania but had been relieved of his portfolios pending verdict. During the trial his counsel objected to the admission of evidence concerning statements he had made in the House of Assembly on the ground that production of such evidence would constitute a breach of his privileges as a member of Parliament and also objected to evidence concerning the order of business at a particular meeting of Cabinet and to the disclosure of words that had passed between the accused and officers of the Treasury.

The charges of bribery upon which Dr. R. J. D. Turnbull stood trial arose out of negotiations for the grant of a licence to operate Tasmanian Lotteries. On November 12, 1957, the Tasmanian Cabinet had ruled that the lottery licence should, in future, be granted to a company rather than to an individual, and on the same day Dr. Turnbull was alleged to have made assurances to a Sydney businessman, Mr. Fitzpatrick, that for consideration, he would see that Mr. Fitzpatrick would be granted the lottery licence. The steps leading up to the filing of the indictment against Dr. Turnbull need not detain us.[2] On August 22, 1958, Dr. Turnbull was remanded for a further trial, the jury having failed to reach a verdict upon the first trial. Upon his second trial in October, 1958, Dr. Turnbull was acquitted and thereafter resumed his ministerial offices until his dismissal from Cabinet in April, 1959.[3]

Before proceeding to a consideration of the evidentiary aspects of the case it should be noted that the objections made by counsel for the accused which are to be discussed here were not made during the first

---

[1] This note concerns rulings made by Gibson J., a Puisne Judge of the Supreme Court of Tasmania, during the trial of Dr. Turnbull in October, 1958. The rulings to be discussed here were made on October 14, 16 and 20.

[2] A short account of the events preceding the trial is given by W. A. Townsley in 4 Australian Journal of Politics and History, 263-4 (1958).

[3] The constitutional aspects of Dr. Turnbull's dismissal have been discussed elsewhere in this issue by R. P. Roulston.

trial before Crisp J. with a jury. This may have been due to a change in the senior counsel for the second trial before Gibson J. with a jury.

ADMISSIBILITY OF STATEMENTS MADE IN PARLIAMENT

The proposal of the Crown to adduce evidence as to statements made by Dr. Turnbull in the House of Assembly as recorded in the Votes and Proceedings of the House and by a journalist was objected to by counsel for the accused on the basis that the admission of such evidence would constitute a breach of the Parliamentary privilege of freedom of speech. Though His Honour sustained both objections he allowed evidence as to certain times in the proceedings of the House.

In making these rulings Gibson J. referred very briefly to the history of Parliamentary privilege and to the necessity for protecting members of Parliament 'from the use of statements made by them in Parliament in civil or criminal proceedings.' He went even further and suggested that in the case of statements made by a Minister of the Crown in Parliament, the protection afforded by s. 9 of the Bill of Rights, 1689, was particularly important, for Ministers 'are responsible to Parliament, and so have to answer to Parliament for their exercise of the administrative functions entrusted to the Cabinet by the enactments of Parliament.' Why the need to protect Ministers for what they may say in Parliament should be any greater than the need to protect private members is difficult to appreciate. Granted that it is important that Ministers should not, in fulfilling their responsibility to Parliament by answering questions relating to the administration of their departments or in reporting on departmental affairs, be restrained by fears lest their words be used against them in a court of law, is it not equally important that the private member enjoy a co-extensive freedom to criticize Ministers?

Even before the State of Tasmania acquired responsible Parliamentary government in 1856 the Judicial Committee of the Privy Council had ruled that colonial legislatures have those powers which are reasonably necessary for the proper exercise of their functions. Although it was held that the power to punish for contempt was not inherent in colonial legislatures,[4] there has never been any doubt that the freedom of speech and debate guaranteed by the Bill of Rights inheres in the colonial parliaments. The Australian Federal Constitution contains an express provision (s. 49) for the application of the privileges of the British House of Commons to the Australian Federal Parliament, but there is no corresponding provision in the Tasmanian Constitution Act, 1934. The

[4] Kielly v. Carson (1842) 4 Moore P.C.C. 63; Fenton v. Hampton (1858) 11 Moore P.C.C. 347. It is of interest to note that the later case came to the Judicial Committee on appeal from Tasmania. (See E. I. Clark, The Parliament of Tasmania: An Historical Sketch, ch. IV (1947)). The reason advanced for denying to colonial legislatures power to punish for contempt was that this power inhered in the High Court of Parliament and that only the House of Lords and the House of Commons might be considered as the descendants of that institution. The disability of the Tasmanian Parliament was remedied by the Parliamentary Privileges Act, 1858.

Standing Orders of the Tasmanian House of Assembly approved by the Governor in March, 1955, do, however, provide that:

> In all cases not provided for hereinafter, or by Sessional or other Orders, resort shall be had to the rules, forms and practice of the Commons House of the Imperial Parliament of Great Britain and Northern Ireland in force when these Standing Orders receive the approval of the Governor, and they shall be followed as far as they can be applied to the proceedings of this House. (Rule No. 1).

Hence the rules relating to the privileges of the House of Commons in March, 1955, are also the rules applicable to the Tasmanian House of Assembly subject only to the requirements that the privileges claimed are necessary for the proper exercise of the Assembly's functions and that the rules relating to privilege are rules for 'the orderly conduct of business' within the meaning of section 17 of the Constitution Act, 1934. The Tasmanian Parliamentary Privileges Act, 1858, confers upon both Houses of the Tasmanian Parliament power to punish by imprisonment certain contempts, but it does not purport to be anything more than legislation curing the deficient power of colonial legislatures, and expressly provides that it does not affect any powers or privileges possessed by the Houses prior to 1858. The Bill of Rights applies in the State of Tasmania by virtue of section twenty-four of the Australian Courts Act, 1828, and hence the immunity from legal consequences of words spoken or written in connection with proceedings in Parliament accorded to members of the Tasmanian Parliament may be considered a statutory privilege.[5] This Gibson J. did not recognize clearly, though he did regard the British law and practice relating to this Parliamentary privilege as applicable to the Tasmanian Parliament.

It is surprising that amongst the authorities cited, reference was not made to the two English cases in which the production of evidence of speeches in Parliament was involved. In *Chubb v. Salomons* (1852)[6] the trial judge ruled that a member of Parliament summoned as a witness was not bound to answer questions about how another member voted in the House

---

[5] The extension of this privilege to Tasmania might be based on either of two grounds. As an Act of the Imperial Parliament, the Bill of Rights would apply by virtue of the Australian Courts Act, 1828 (9 Geo. IV, c. 83, s. 24) and as a privilege necessary for the effective functioning of a legislative body, freedom of speech and debate could be vindicated as a power inherent in the Tasmanian Parliament irrespective of the Bill of Rights. It must be remembered that this privilege had been regarded as essential to the proper performance of Parliament's functions long before the Bill of Rights. It is interesting to note, however, that the Judicial Committee in Fenton v. Hampton thought that if the legislature of Tasmania (then Van Diemen's Land) could not vindicate its claim of power to punish contempts on the basis that such power was inherent in a legislature, it could not claim that such power was transferred to Tasmania as part of the common law of England by the Australian Courts Act, 1828. The Full Court of N.S.W. has held that the absolute privilege accorded to Members of Parliament in respect of statements made in Parliament arises from inherent necessity: Gipps v. McElhone (1881) 2 L.R. (N.S.W.) 18.

[6] 3 Car. and Kir. 75; 175 E.R. 469.

of Commons without the permission of the House. In *Plunkett v. Cobbett* (1804)[7] Lord Ellenborough ruled that the Speaker of the House, who had been called as a witness, was bound to say whether a member had spoken in the House or had taken any part in the debate, but he was not bound to disclose what was said.

Gibson J. did in fact note the ruling of Townley J. of the Supreme Court of Queensland sitting as a Royal Commissioner on the question of whether the statutory power of a Royal Commissioner to compel persons to give evidence conferred power to compel a Federal Senator to give evidence regarding a speech made by him in the Senate. Townley J. held that the Senator could not be compelled without the permission of the Senate, and even if permission was granted it was questionable whether the Senator could be compelled by a Court or a Royal Commission to give evidence regarding his speech.[8]

Had the Crown taken the precaution of securing the leave of the House of Assembly to produce the relevant Votes and Proceedings there would have been no difficulty in meeting the objection made by counsel for the accused. Whether the evidence of the journalist as to what Dr. Turnbull said in the House would be admissible, even if the consent of the House had been obtained, is another matter, for if Hansard's Debates are inadmissible as evidence of matters before the British Parliament it is unlikely that unauthorized reports would be treated differently even where there is no Hansard, as is the case in Tasmania.[9]

There is no indication that the Crown considered the question of Parliamentary privilege, but even assuming that it did, there is no suggestion that the House of Assembly was ever approached for permission to adduce evidence of its proceedings.[10] Nor did Gibson J. explicitly state that the House's consent would be necessary, and his ruling leaves one with the impression that in no circumstance can evidence of Parliamentary proceedings be admitted in a court of law. Except where the Standing Orders provide otherwise the House of Assembly regards May's *Parliamentary Practice*, so far as it relates to the House of Commons, as an authoritative statement of the privileges essential to the functioning of

---

7 5 Esp. 136; 170 E.R. 763.

8 [1956] St. R. Qd. 225.

9 Parliamentary journals are prima facie evidence of matters before the House and Hansard's Debates are not admissible as journals: Sydney L. Phipson, The Law of Evidence, 8th ed. by Roland Burrows; 328, 542 (1942); McCarthy v. Kennedy, The Times, March 3, 1905.

10 The obtaining of this consent may be exceedingly difficult in some circumstances. For example, if the evidence of what was said in Parliament is proposed to be used against a government Member in the trial of that Member on a criminal charge, the Members of the government party may be disinclined to give their consent, especially if the situation is such that the conviction of the accused would result in his disqualification from membership of Parliament and consequent loss of the government's majority in the House.

Parliament. This being so, the consent of the House of Assembly to production of evidence of its proceedings could be obtained by petition or in the event of Parliament being in recess, by applicaton to the Speaker.[11]

The disallowance by Gibson J. of the objection to evidence as to times of proceedings in the House of Assembly can be supported by Lord Ellenborough's ruling in *Plunkett v. Cobbett*, but the only reason given by Gibson J. was that there is no need 'to protect this information from disclosure.'

The contention that the Crown's evidence as to meetings of Caucus (Parliamentary Labor Party) was precluded by Parliamentary privilege was rejected categorically by Gibson J. 'The Caucus,' he said 'or private meeting of members of a party, to determine joint action in Parliament, is essentially a body which operates outside Parliament, whatever effect it intends to produce in Parliament. . . .' Superficially, it is difficult to conceive how any other ruling could have been made, but on reflection it appears that the matter is not simple as Gibson J. put it and that one might argue that meetings of Caucus are proceedings in Parliament to which the privilege of freedom of speech and debate applies.

First, it must be noted that all the members of Caucus are members of Parliament as well as being members of the Labor Party. Secondly, the primary function of Caucus is to consider Parliamentary action. That Caucus meets outside the legislative chamber is irrelevant for 'proceedings in Parliament' are not confined to speaking and voting in Parliament and extend to actions done outside the precincts of Parliament, *e.g.*, execution of the orders of the two Houses. If the sale of alcohol within Parliament House is regarded as a proceeding in Parliament, and as such exempt from statutory rules regarding hours of sale,[12] surely a meeting of Parliamentarians called to discuss Parliamentary business can be regarded as a proceeding in Parliament even if it is not held in Parliament House?

What constitutes a proceeding in Parliament is a matter which has occasioned great difficulty. The courts recognize that the Houses of Parliament have exclusive jurisdiction over their own proceedings and this jurisdiction is recognized as one of the privileges of Parliament. The crucial question is whether this privilege implies that the Houses of Parliament also have exclusive jurisdiction to determine what constitutes a proceeding in Parliament or whether the courts, by virtue of their power to determine whether an alleged privilege exists, and, if so, its limits, can determine what is a proceeding in Parliament. One may conclude from *R. v. Sir R. F. Graham-Campbell; ex parte Herbert*[13] that the

---

11 Sir Thomas Erskine May, Treatise on the Law Privileges, Proceedings and Usage of Parliament, 16th ed. by Sir Edward Fellowes, et al, 63-4 (1957). (Strictly speaking, the 15th edition of May (1950) is the more authoritative edition for the House of Assembly).

12 R. v. Sir R. F. Graham-Campbell; Ex Parte Herbert [1935] 1 K.B. 594.

13 Ibid.

courts take the view that the Houses of Parliament can, by express or implied authorization, attribute to actions not directly connected with legislative business, the quality of being proceedings in Parliament. In other words, the courts, having decided that Parliament has exclusive control over its own proceedings, have not only recognised the privilege as being part of the common law but have decided that the limits of this privilege, *i.e.*, what are proceedings in Parliament, are what Parliament itself defines as the limits.

Supposing that in *R. v. Turnbull* counsel for the accused had supported his objection to production of evidence about Caucus meetings with a message from the House of Assembly that what transpired in Caucus constituted proceedings in Parliament which, therefore, could not be questioned or impeached in a court of law, would Gibson J. have had to accept the House's rulings or might he have inquired independently into whether Caucus meetings were proceedings in Parliament? With the possible exception of *R. v. Sir R. F. Graham-Campbell; ex parte Herbert* there is no English judicial decision which would prescribe how this problem should be resolved. *Bradlaugh v. Gossett*[14] does not help very much, though it can be interpreted as a decision in support of the conclusion that a ruling of the House cannot be questioned by the courts. Bradlaugh complained that the House of Commons, in preventing him from taking his seat, had contravened the Parliamentary Oaths Act, 1866, but Stephen J. held that insofar as this Act related exclusively to the internal proceedings of Parliament, there could be no appeal to a court of law in respect of an alleged misinterpretation or disregard of the Act. Now it might be concluded that what Stephen J. did in this case was to inquire, first, whether the Act and House's resolution related to the internal proceedings of the House, and having satisfied himself that internal proceedings only were involved, he then, and only then, declined to inquire into the House's alleged disregard of the Act. From this it might be concluded that the courts may inquire whether a matter falls within the category of internal proceedings of Parliament. On the other hand it could be argued that this was a special case involving the application of a statute, and that since statute law cannot be altered by the resolution of one House, Stephen J.'s only function was to see that the Act had not been contravened. In short, the decision might be interpreted to mean that a court of law can only regard itself not bound by a resolution of the House declaring a matter to fall within Parliamentary privilege when it is alleged that the resolution conflicts with statute. There was little doubt in *Bradlaugh v. Gossett* that the Act in question related only to the internal proceedings of Parliament, so it cannot be said with any assurance that Stephen J.'s decision concludes the question of whether a court must accept the rulings of the Houses of Parliament on what affects proceedings in Parliament. In *R. v. Sir R. F. Graham-Campbell; ex parte Herbert* the statute invoked did not relate exclusively to Parliament but was of

---

[14] (1884) 12 Q.B.D. 271.

general application, yet there the court held that since the House had chosen to regard the sale of liquor within Parliament House as Parliamentary business, it could not challenge that ruling.

But if the consistency of the action of one of the Houses of Parliament with statute law is not involved the case for saying that the courts can determine whether a matter is truly a proceeding in Parliament becomes weaker. Where freedom of speech and debate is involved the claims of the Houses of Parliament for protection of their members have seldom been challenged by the courts, and what the Houses have said to be words spoken or written in connection with proceedings in Parliament have been accepted by the courts presumably because they feel that Parliament is the sole judge of whether there has been a breach of privilege.[15]

In 1939 the Select Committee of the House of Commons on the Official Secrets Act[16] declared that freedom of speech covered 'everything said or done by a member in the exercise of his functions as a member, even communications between members outside Parliament closely relating to matters pending or expecting to be brought before the House.' A Canadian judge has said that a member of Parliament is protected in respect of 'anything he may say or do within the scope of his duties in the course of parliamentary business'.[17] If Caucus is considering business directly or closely related 'to matters pending or expected to be brought before the House', can there be any reason why Caucus discussions should be withdrawn from the privileges extending to private members? That the members of Caucus are members of a party seems irrelevant, and should the House of Assembly resolve that in a particular instance the privilege of freedom of speech should be asserted in respect of Caucus deliberations, a court of law would, it is submitted, have to accept that resolution.[18]

---

[15] May, 53.

[16] H.C. 101, 1938-39.

[17] R. v. Bunting (1885) 7 Ontario Rep. at p. 563.

[18] It is not, however, improbable that a court of law might regard the question of what are proceedings in Parliament as a question involving the limits of a recognized privilege and as such one upon which it might adjudicate. It cannot be said that the respective jurisdictions of the Houses of Parliament and the courts are clearly marked out or that the Houses and the courts actually keep within those limits. The House of Commons, it should be noted, has never accepted explicitly the ruling in Stockdale v. Hansard (1839) 9 A. & E. 1, that the courts are not bound by resolutions of either House that particular matters fall within the privileges of the House. The House has not relinquished its claim to determine the extent and limits of its privileges. It is said, moreover, that neither the Houses of Parliament nor the courts regard the decisions of one another as binding upon themselves, which leaves open the possibility that there may be two doctrines of privilege (May, 173). It is not without significance that when the House of Commons referred a privilege question in the notorious Strauss case to the Judicial Committee of the Privy Council (In re Parliamentary Privilege Act, 1770 [1958] A.C. 331) it did not request the Committee to pass an opinion on the question of whether a letter written by G. Strauss, M.P., to a Minister complaining about the operations of the London Electricity Board was a proceeding in Parliament. This was regarded by the House as a question for the Committee of Privileges and ultimately for the House as a whole.

The extension of Parliamentary privilege to Caucus or other secret party meetings of Members of Parliament is not unprecedented. By a slender majority the Committee of Privileges of the House of Commons so held in the Allighan Case in 1946, and the whole House affirmed the ruling, again by a majority of 198 votes to 101.[18a] It should, however, be noted that this extension of Parliamentary privilege was not so wide as to cover all meetings of Caucus. The ruling in this instance related to discussions in a meeting of Caucus held within the precincts of the House and the matters in respect of which privilege was claimed were matters to be proceeded with in the House. While the latter aspect may be said to be crucial, it is doubtful whether the place of a meeting of Caucus is material, for the purpose served in protecting secret party meetings of Members of Parliament must be the same wheresoever the meeting is held. Where the meeting is held within the precincts of Parliament House there might be a stronger presumption that the matters discussed at the meeting are matters to be proceeded with in Parliament.

One should not be over-critical of the stand taken by Gibson J. in *R. v. Turnbull* for the claim of privilege was made by one member of Parliament only and there had been no resolution by the House of Assembly that Caucus meetings should be deemed proceedings in Parliament for the purposes of the privilege of freedom of speech. In these circumstances a judge is justified in not treating communications between members outside the walls of Parliament as privileged. The bounds of Parliamentary privilege, like the bounds of Crown privilege, may be extended too far and already the powers of the courts to control the excesses of Parliament and the Executive in these matters are circumscribed. Hence, although there is reason to suppose that Caucus proceedings might be equated with proceedings in Parliament, the attitude exemplified by Gibson J. in the case under discussion was both sensible and commendable.

ADMISSIBILITY OF PROCEEDINGS OF CABINET

At both trials of Dr. Turnbull the question was considered as to whether evidence of the business transacted in a meeting of Cabinet — evidence of the order of business rather than of proceedings as recorded in the Minutes kept by the Under-Secretary—was admissible. At the first trial counsel made no objection to the admission of such evidence and it went in. On the second trial objection was made and the objection was sustained by Gibson J.

In ruling that evidence from the Cabinet Minutes was inadmissible Gibson J. relied, not on the general ground that to allow such evidence to be adduced would be contrary to public policy, but on the oath of secrecy taken by Executive Councillors under the Promissory Oaths Act, 1869, that they shall 'not directly or indirectly reveal such matters as shall be debated in Council and committed to . . . their secrecy.' His

---

[18a] See Madeline R. Robinton, 'Parliamentary Privilege and Political Morality in Britain, 1939-1957,' 73 Political Science Quarterly, 179-205 (1958).

Honour apparently found this oath to be analagous to that taken by British Privy Councillors 'to keep secret matters revealed or treated of in the Council.' Although he noted statements in Todd's *Parliamentary Government in England*[19] and Halsbury's *Laws of England*[20] on the secret and confidential nature of Cabinet deliberations, and the statement in Halsbury that the duty of secrecy depends less on the oath and more on a working rule of Cabinet,[21] he preferred to base his ruling solely on the terms of the oath taken by Executive Councillors and upon the cases of *R. v. Tooth*,[22] *R. v. Davenport*,[23] *Irwin v. Grey*[24] and *Dickson v. Viscount Combermere*.[25]

While there are cogent reasons for treating evidence of Cabinet deliberations as inadmissible it seems most unreal to base this rule of exclusion upon the oath of secrecy of Executive Councillors and equally unreal to say, as Gibson J. said, that such evidence could be adduced if the Administrator's consent (or the Governor's consent) was obtained. Furthermore, it is doubtful whether the cases cited by His Honour are as conclusive as he supposed.

Generations of students of constitutional law have accepted on faith the 'shibboleth' that Cabinet is an institution unknown to law, and it is largely because the courts have not been ready to equate laws with constitutional conventions that the working-rule of secrecy of Cabinet deliberations has been enforced only by the unreal process of holding Cabinet Ministers to their oath as Privy Councillors or Executive Councillors. Though writers of repute agree that these oaths *legally* bind Ministers to secrecy in respect of Cabinet deliberations, they also agree that the duty of secrecy is a convention and that observance of secrecy is secured not so much by regard for the terms of the oath as by acceptance of the convention.[26] Furthermore, to identify meetings of Cabinet with meetings of the Privy Council or the Executive Council is a fiction, though it may be permissible to speak of the Privy Council or the Executive Council as 'the legal personality of Cabinet.'

When the Australian Colonies were founded it was true to say that the Executive Council chosen by the Governors to advise them were Cabinets of a sort. But when elected legislatures were established and when responsible Parliamentary executives were formed, the Executive Council assumed the status of an institution whose function it was to execute such formal instruments as Proclamations, Orders in Council and regulations which by statute had to be made by the Governor in

---

19 Vol. II, p. 240.

20 Vol. VII, p. 354 n. (o) (3rd ed.).

21 This view is expressed also by Sir Ivor Jennings and Sir A. Berriedale Keith: Jennings, Cabinet Government, 208 (1937); Keith, The British Cabinet System, 123 (2nd ed. by N. H. Gibbs, 1952).

22 (1874) 4 Q.S.C.R. 96.

23 (1874) 4 Q.S.C.R. 99.

24 (1862) 3 F. & F. 638; 176 E.R. 291.

25 (1862) 3 F. & F. 527; 176 E.R. 236.

26 See n. 21 supra.

Council.[27] In all Australian States, Ministers of the Crown are members of the Executive Council. In Tasmania appointments are for life, though only Ministers of the Crown for the time being are summoned. Judges are appointed but they, like ex-Ministers, are never summoned to meetings.[28] While in practice the Cabinet in Tasmania is the operative Executive Council, the Council, in its composition and functions, is a different body from the Cabinet. Furthermore, in view of the limited business of the Council and since every decision of Cabinet does not have to be made effective by the execution of an instrument by the Governor in Council, it seems absurd to treat every deliberation of Cabinet as a matter debated in Council. The absurdity is compounded when it is stated that for deliberations of Cabinet to be inadmissible in a court of law, the consent of the Governor or the Administrator must be obtained. Certainly if such consent was sought the Governor would not act except on the advice of the Premier, but it should not be necessary to go beyond the Premier.

The distinction between discussions in the Executive Council and discussions in Cabinet was clearly recognized by Lutwyche J. of the Supreme Court of Queensland in *R. v. Davenport*, but the basis of the distinction is tenuous. During the hearing of the case former Ministers of the Crown declared their willingness to give evidence of proceedings in both the Executive Council and Cabinet, but Lutwyche J. ruled that such evidence was inadmissible, the reasons being that Cabinet was 'not a body recognised by the Constitution' and that to admit evidence of discussions in Council would be to 'open a door' which would not 'be very easily closed again'.[29] Though it is by no means so clear in the judgment, the rejection of evidence of Cabinet discussions was a conclusion which appears to have been reached by the following line of reasoning: Cabinet is unknown to law, it does not exist for the purpose of the law, therefore discussions in Cabinet have no existence as far as courts of law are concerned.

The decision of Lutwyche J. was reversed on appeal to the Judicial Committee of the Privy Council,[30] and it is of significance to note that the opinion of the Board referred to the evidence of the Cabinet deliberations which Lutwyche J. had ruled inadmissible.[31] This suggests that Cabinets are at least known to law. Certainly there are other cases in which courts have taken notice of the existence of Cabinets. The Supreme Court in *Toy v. Musgrove*[32] gave a great deal of attention to the implications of responsible government when it examined the validity of a

---

[27] See Geoffrey Sawer, 'Councils, Ministers and Cabinets in Australia,' Public Law, 110-38 (1956).

[28] See Proclamation of Governor Arthur of December 12, 1825, and Letters Patent providing for the office of Governor of Tasmania, 1900. Both documents are reproduced in Butterworth's Consolidated Tasmanian Statutes (Reprint), 1936, Vol. I.

[29] Op. cit. at p. 100.

[30] (1877) 3 App. Cas. 115.

[31] Ibid., at p. 125.

[32] (1884) 14 V.L.R. 349.

Cabinet decision to exclude Chinese. The conventions of responsible government have also been considered by the High Court of Australia and the Judicial Committee,[33] and one might interpret s. 64 of the Australian Federal Constitution as incorporating the Cabinet system into the Constitution. That section provides that Ministers of State shall be appointed by the Governor-General and shall be members of the Federal Executive Council and that 'after the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes' a Member of one of the two Houses. Although the Cabinet, by that name, has not been recognised explicitly in the Tasmanian Constitution or in Tasmanian legislation, one can say that it has been recognised implicitly. Section 34 (2) I of the Constitution Act, 1934, removes Ministers of the Crown from the operation of the general provision regarding disqualification from membership of either Houses of Parliament by reason of holding offices of profit by appointment of the Crown. The statute entitled An Act to alter the Designation of certain Responsible Ministers of the Crown, 1882, refers throughout to 'responsible Ministers.' The same expression is used in the Ministers of the Crown Act, 1923, but here it is defined expressly as persons holding for the time being the offices listed or the office of Premier without portfolio. Upon a strict view it could be argued that none of these provisions constitutes recognition, explicit or implicit, of the institution we call Cabinet for none of them make the holding of Ministerial office conditional upon membership of one of the two Houses of Parliament. The Constitution obviously envisages that a person may be both a member and a Minister, and standing alone, the Ministers Designation Act, 1882, could be interpreted to mean that 'responsible Ministers' are Ministers who are members of Parliament and responsible to it. More important still is the Ministers of the Crown Act, 1923, as amended by the Parliamentary Salaries and Allowance Act, 1948. Taken together it is patently clear that Ministers must be members of Parliament. If it is said that the Cabinet system has been incorporated into the Federal Constitution, one must also say that the Cabinet system has been incorporated by legislation into the Tasmanian legal system.

The two English cases cited by Gibson J., *Irwin v. Grey* and *Dickson v. Viscount Combermere* did not concern deliberations in Cabinet and nor can they be regarded as cases in which matters dealt with in Council were involved, though in *Dickson's Case* the oath as Privy Councillor was considered to be the basis for the duty of secrecy. Neither case involved the Cabinet or the Council as a whole but only individual Ministers. In *Irwin v. Grey* the Secretary of State who had been sued for failing to present a Petition of Right by the plaintiff to Queen Victoria, appeared in court and proved not only that he had presented the Petition but also explained his advice to the Queen that the Petition be not granted. The

[33] See Newfoundland Cable Case [1916] A.C. 610; Engineers' Case (1920-21) 28 C.L.R. 147; Wooltops Case (1922) 31 C.L.R. at p. 483; Kreglinger's Case Radio Corporation Pty. Ltd. v. The Commonwealth (1937-38) 59 C.L.R. at p. 192; Ryder v. Foley (1906) 4 C.L.R. at p. 422.

trial judge, Erle C.J., ruled that there was no case made out for the plaintiff, and when application was made for a new trial on the grounds of misdirection to the jury, the Court of Common Pleas stated quite emphatically that the nature of the advice tendered to the Queen should not have been divulged. In *Dickson v. Viscount Combermere* the Secretary for War, after obtaining the Queen's permission, gave evidence concerning his recommendation to her that a Lieutenant-Colonel be removed from office.

Undoubtedly, secrecy about advice to the sovereign should be protected by the courts, but this can be justified on grounds of public policy and on the same basis as exclusion of evidence of communications between public servants and Ministers concerning affairs of State.[34]

Even if Cabinets be unknown to law—and this is doubtful—it would seem that discussions between Ministers of the Crown in Cabinet should be subject to the same considerations as apply to communications between Ministers and public servants. If that should be so, the further question arises of whether the consent of the Premier alone is sufficient for evidence of Cabinet deliberations to be admissible as evidence or whether the consent of all Cabinet Ministers must be obtained. If one approaches the matter from the point of view of the collective responsibility of Cabinet, or even if one draws on the analogy of Parliament, *i.e.*, that consent of the House is required, then the conclusion must be that the decision should be made by Cabinet as a whole. But if the practice concerning disclosure by Ministers who have resigned from Cabinet of proceedings in Cabinet is regarded as the closer analogy, the consent of the Premier suffices.[35]

Now just as it is clear that evidence of times of proceedings and whether a Member of Parliament voted or spoke in Parliament is admissible as being outside Parliamentary privilege, so it may be that evidence concerning times of meetings of Cabinet, Ministers present and even the agenda or order of business could be held admissible without infringing the rule of secrecy of deliberations. Lutwyche J. in *R. v. Davenport* thought that decisions of the Executive Council as contrasted with discussions in the Council leading up to decisions were admissible. It should not be overlooked that since the development of Cabinet secretariats and the keeping of minutes and records of Cabinet decisions, decisions of Cabinet might also be proved without reference to the preceding discussions. Professor Geoffrey Sawer has suggested that since there has been legislative provision for Cabinet decisions to be accepted as 'formal authentication of the governmental will' it may be highly desirable in some circumstances for Cabinet decisions to be proved in the courts. The

---

[34] The report of Dickson v. Viscount Combermere contains a note, presumably written by one or both of the reporters ((1868) 3 F. & F. at p. 578 n.; 176 E.R. at p. 264 n (c)) in which doubts are expressed whether, on the principles of public policy, it is competent for a Minister or ex-Minister to disclose the nature of the advice tendered to the sovereign. The lack of competency, it was said, would arise even without the oath of secrecy.

[35] Jennings, op. cit., 208-10; Keith, op. cit., 123-4.

example he gives is that of an issue 'substantially one of fact, in which acts of the government as a collective person with knowledge and intention become relevant'.[36]

Considerations of secrecy aside, a case can be made out for protecting disclosure of Cabinet discussions relating to Parliamentary business on the same basis as Caucus deliberations might be protected, *i.e.*, on the basis that when Cabinet discusses Parliamentary business, Cabinet Ministers could invoke Parliamentary privilege. Since Cabinet does control the legislature it would not be difficult to have the House resolve that meetings of Cabinet were proceedings in Parliament.

ADMISSIBILITY OF EVIDENCE OF COMMUNICATIONS BETWEEN MINISTERS OF THE CROWN AND SENIOR PUBLIC SERVANTS

In the last decade a great deal of concern has been expressed about the extension of the range of communications between public servants and Ministers which are excluded as evidence on grounds of public policy. Much of what has been said by way of criticism of extension of so-called 'Crown privilege' has been directed against the decision of Viscount Simon L.C. in *Duncan v. Cammell Laird*[37] and more particularly against His Lordship's ruling that the determination of whether a communication, document or oral statement should be divulged is a matter for the Minister alone to determine.

In the light of the increasing dissatisfaction with the present condition of the law relating to Crown privilege, the ruling of Gibson J. in *R. v. Turnbull* is to be applauded. The Crown in this case proposed to adduce evidence of the Under-Treasurer (the head of the civil service Department of the Treasury) and of his Deputy as to conversations they had had with Dr. Turnbull. Although neither the Treasurer for the time being nor the Under-Treasurer claimed privilege, counsel for the accused did so on the grounds: (a) that it was contrary to the public interest that departmental communications be disclosed since in the conduct of departmental business neither the Minister nor his advisers should be deterred by the possible legal consequences of what they might say; (b) that the granting of a lottery licence involved appointment to a public office in the broad sense and that it would likewise be contrary to public interest that departmental discussions of the fitness of an applicant be disclosed in a court of law.

In ruling that the objection could not be sustained Gibson J. noted that the considerations which justified the exclusion of evidence on the basis of Crown privilege in civil cases did not necessarily apply to criminal matters and concluded 'that the courts should not regard the claim of Crown privilege in criminal matters as always unexaminable.' Reference was made to two cases[38] in which disclosure of police reports made by subordinate officers for their superior officers was allowed and His Honour

---

[36] Sawer, op. cit., 116.

[37] [1942] A.C. 624.

[38] R. v. Salter (1939) 34 Tas. L.R. 16 and Gibbons v. Duffell (1931) 47 C.L.R. 50.

found there was nothing precluding him from examining the quality of the proposed evidence.

There are a number of features of Gibson J.'s ruling which invite comment. First, the claim of privilege was made by a former Minister temporarily relieved of his portfolio during his own trial for alleged misconduct as Treasurer. In other words, he who was standing trial for suspected misconduct as Treasurer was claiming that it would be against public policy to admit in evidence communications within the Treasury when he was Treasurer. Where so much is at stake as a person's freedom and a politician's reputation it can hardly be supposed that a 'suspended' Minister of the Crown standing trial on a criminal charge in respect of his conduct as a Minister can be an unprejudiced judge of what disclosures would be detrimental to the effective functioning of his department. Obviously the claim of privilege in this instance was founded more on considerations of self-interest rather than of public interest.

Although it may not have been theoretically impossible for Dr. Turnbull to claim privilege, one cannot overlook Viscount Simon's reminder that the decision to object to the admission of evidence of departmental communications should be made by the political head of the department, and that it is permissible for the permanent head to make the objection 'where it is not convenient or practicable for the political minister to act,' as where the political head is out of reach or ill.[39] It may be argued that in circumstances such as those which led to the appointment of another Minister to the Treasury pending the trial of the former Treasurer, Dr. Turnbull, the permanent head might be in a better position to make the decision than the 'temporary' Treasurer. But in any event it seems eminently just that if objections to disclosure of departmental communications are to be made they should be allowed only when the persons responsible for the administration of the department decide that to allow disclosure would be detrimental to the functioning of the department.

This does not mean that in no other circumstance can objections on the basis of Crown privilege be upheld. In *Chatterton v. Secretary of State for India*[40] A. L. Smith L.J. stated that even if no objection is taken to production of a document by the person in whose custody it is, it is the trial judge's duty to intervene both to prevent its production or production of secondary evidence.[41] Phipson goes so far as to state that objections may be taken by any party interested in excluding evidence, but for this no authority is cited.[42] Where a Minister or a public servant is sued or indicted for improper conduct performed in an official capacity, it is not inconceivable that if objections to the production of evidence concerning departmental dealings were upheld, the courts would be deprived of a great deal of evidence tending to prove the delinquency of the Minister or civil servant. Ellenborough C.J.'s ruling in *Anderson v.*

39 [1942] A.C. at p. 638.
40 (1895) 2 Q.B. 189.
41 Ibid., at p. 195.
42 Op. cit., 182.

Hamilton[43] on a privilege objection illustrates that when it is clear that the exclusion of the proposed evidence would make it almost impossible for the person suing the civil servant to establish any kind of a case, an objection made by the civil servant will not be regarded with favour by the court. The case concerned an action against the Governor of Heligoland for false imprisonment and the Governor's objections were in respect of the production of a letter from the plaintiff to the Secretary of State for the Colonial Department complaining of imprisonment, and the production of correspondence passing between the Governor and the Secretary of State. Although Ellenborough C.J. held that all the correspondence from the Secretary of State was privileged, the plaintiff's letter would be privileged only in the event of the Secretary of State having objected to its production.

The necessity for requiring privilege to be claimed by the Minister in charge of a department or by the permanent head becomes very important when the objection to production of departmental communications, documents and oral statements (on the ground that to allow production would be contrary to the public interest) is conclusive. Gibson J. apparently overlooked the unequivocal statement by Viscount Simon L.C. in *Duncan v. Cammell Laird* that such objections are conclusive,[44] or else he did not believe that this applied to criminal proceedings.[45] He referred to the view expressed by Macnaghton J. in *Spigelman v. Hocken*[46] as authority for his ruling that he could examine the evidence proposed to be adduced by the Crown, but went on to say that 'some matters of State are undoubtedly protected' in illustration of which he cited *Chatterton's Case*. Did he mean by this that in some matters of State a judge had to accept a Minister's objection as conclusive, or did he merely intend to refer to the general rule of exclusion of evidence concerning affairs of State? The only sensible interpretation consistent with *Duncan v. Cammell Laird* which can be placed upon Gibson J.'s words is that while in civil proceedings a judge must accept a Minister's objection as conclusive, in criminal cases he is entitled to examine the evidence proposed to be adduced and determine for himself whether public interest would be prejudiced by disclosure of the evidence.

His Honour buttressed his attitude by reference to the Tasmanian case of *R. v. Salter*,[47] a criminal case in which an objection had been made by the Crown to the production of a report by a police officer to his superior officer. Speaking from recollection Gibson J. said that the court had examined the report for the purpose of ascertaining whether it should be excluded in the interests of justice. One thing Gibson J. overlooked was that the reported case of *R. v. Salter* deals only with an application by the

---

[43] (1816) 2 B. & B. 156 n.; 129 E.R. 917.

[44] [1942] A.C. at p. 642.

[45] Even Viscount Simon L.C. admitted that the principles he was propounding might not apply to criminal cases: ibid., at pp. 633-4.

[46] (1934) 150 L.T. 256.

[47] (1939) 34 Tas. L.R. 16.

Crown for a new trial. The trial judge, Clark J., had overruled the objection by the Crown to the production of the report without so much as examining the report. Both Crisp C.J. and Hall A.J. were of the opinion that Clark J. should have looked at it and that he 'should have interposed to prevent reading of the report unless it was his opinion it would disclose something tending to show the innocence of the accused.[48] Quite clearly counsel for the accused wished to have the report put in as evidence since it assisted to prove his client's innocence and this was probably an unexpressed reason for the ruling of Crisp C.J. and Hall A.J. that there had been no such miscarriage of justice as would justify a new trial.

If it is the accused who wishes to have such reports adduced in evidence, it is surely not unreasonable that the judge should, either on his own initiative or after the Crown has objected, call for the report for the purpose of determining whether it tends to show the innocence of the accused. But if it is the accused who makes objection to the production of a similar report by the Crown on the ground of public interest why should the judge regard himself as bound to examine the document before making his ruling? If the objection is to be sustained, it will be sustained on the grounds of public interest, and surely the Crown is in a better positon than a judge to determine when production of police reports is likely to be prejudicial to the business of criminal investigation?

Where production of police reports is called for in criminal cases by the accused, there are two interests at stake, the interests of private persons in not being convicted on criminal charges except on the strongest evidence, and the interests of the public at large in efficient criminal investigation services. The manner in which these interests have been compromised is that the general rule that departmental communications cannot be disclosed in evidence if the departmental head claims privilege may be overridden if the accused is able to satisfy the judge that the communication tends to establish his innocence.

This was, no doubt, the type of situation envisaged by Viscount Simon L.C. when he said that the principles regarding Crown privilege in civil cases did not necessarily apply in criminal proceedings. In *R. v. Turnbull* the considerations outlined above were not present and one is left in doubt as to whether Gibson J. interpreted *Duncan v. Cammell Laird* to mean that the principles enunciated there applied only to civil matter or whether he felt that since privilege was claimed not by the Treasurer for the time being, or the permanent head, but by Dr. Turnbull, he was not guided by *Duncan v. Cammell Laird* and therefore did not have to consider the objection as conclusive. On the face of the ruling the first interpretation of Gibson J.'s reasoning seems the most feasible.

If *Duncan v. Cammell Laird* is accepted as an authoritative statement of the law relating to Crown privilege, and if it is the case that this decision does purport to settle finally the question of the conclusiveness of the

[48] Ibid., at p. 19.

Minister's objection in criminal proceedings, is one entitled to say that in *all* criminal proceedings the court may examine the evidence to which objection has been made by the Minister for the purpose of determining whether the Minister's claim is justified? It is submitted that in criminal cases the court must have power to examine such evidence for otherwise the accused might never be able to adduce evidence in his favour. For what other reason would an accused person wish to have departmental communications put in as evidence than to prove his innocence? Just because the court has power to examine departmental communications does not mean that the Crown's objection will not be sustained, for having examined the communications in question it might decide that they did not tend to prove the accused's innocence.

If, however, the objection to proposed evidence relating to departmental communications is made by the accused and there is no objection on the part of the Minister in charge of the department it would seem, in this writer's opinion, that the court should overrule the objection as being unwarranted—indeed absurd—without so much as examining the quality of the proposed evidence.

In this context one might be permitted to raise the question of whether Australian courts are in any circumstance, civil or criminal, precluded from examining evidence the production of which a Minister claims would be contrary to the public interest. In *Duncan v. Cammell Laird* the House of Lords overruled the decision of the Judicial Committee of the Privy Council in *Robinson v. State of South Australia (No. 2)*[49] that the court should inspect documents in respect of which a claim of immunity from discovery had been made by the Crown. While objection to production of documents is not the same as a claim for immunity from discovery, this does not affect the question of whether the court is bound to inspect the documents or evidence of oral statements to determine whether Crown privilege or immunity should apply. Certainly this is how Viscount Simon regarded the matter and it was his view that the courts should not inquire into the reasons and justifications for the Crown's claims of privilege. The question for Australian courts is whether the House of Lords' decision should be preferred to that of the Judicial Committee.

Piro v. Foster[50] offers no guidance on this point for it lays down no more than that when a previous decision of the High Court conflicts with a later decison of the House of Lords on a matter in which Australian law is fundamentally the same as English law, the High Court should follow the decision of the House of Lords.[51] Notwithstanding the authority accorded to House of Lords decisions by the highest appellate tribunal in Australia, it should not be forgotten that the Judicial Committee rather than the House of Lords constitutes the apex of our judicial system and that the Committee's dignity is no greater or less than that of the House

[49] [1931] A.C. 704.

[50] (1944) 68 C.L.R. 313.

[51] This is admittedly a simplification of the High Court's decision, but the variations between the rulings of individual Justices are not material here.

of Lords. While there may be situations in which an Australian court would feel the House of Lords' decision to be a better one than an earlier and conflicting decision of the Judicial Committee and would find a way, by the devious route of distinguishing precedents, to follow the House of Lords' decision, it requires no judicial gymnastics to prefer decisions of the Committee. In the words of Sir George Paton: 'Even if there is a subsequent House of Lords decision, that of the Judicial Committee is technically binding'.[52] In a matter as controversial as Crown privilege no Australian court should feel itself a traitor to the common law by declining to follow the now unpopular decision in *Duncan v. Cammell Laird*.[53]

Even if Gibson J. did not give attention to this question he appears to have been well aware of the trend away from slavish adherence to the House of Lords' decision and of the necessity for the courts to check unwarranted extension of Crown privilege. In his concluding remarks he commented that: 'Public policy is an "unruly horse" It is clear that if one proceeds to develop one ground of public policy to the exclusion of all others it may be developed too far.' Had he been prepared to sustain the objection by counsel for the accused even in the face of no objection by either the political or the permanent head of the Treasury, one would have been inclined to think that the 'unruly horse' of public policy had at last thrown its rider.

Enid M. Campbell.

DISMISSAL OF MINISTERS OF THE CROWN

A TASMANIAN PRECEDENT

In early April this year a unique and unprecedented political situation arose in Tasmania. For the first time in the history of any of the Australian States a Minister of the Crown was dismissed from office by the exercise of the Royal prerogative upon his refusal to resign from office when requested to do so by the Premier. Although the existence of such a prerogative in the representative of the Crown has in general been theoretically recognised there has apparently been only one other instance of its exercise in Australia, and in that case the situation arose in relation to the Commonwealth Parliament and not in a State context. It is, however, interesting to observe that even in that case the Minister dismissed was a Tasmanian representative for the Bass electorate in the Commonwealth Parliament.[1]

---

[52] G. W. Paton (ed.), The Commonwealth of Australia: The Development of its Laws and Constitution, 11 (1952).

[53] For criticisms see Sir Carleton Kemp Allen, Law and Orders, 369 et seq. and Appendix 4 (2nd ed., 1956), P. Ingress Bell, 'Crown Privilege,' Public Law, 28-41 (1957) and H. W. R. Wade, 'State Secrets and Private Rights,' in Law in Action, No. 2 (1957).

[1] See Sawyer, 'Federal Politics and Law, 1901-1929', (1956) p. 161.

THE BACKGROUND[2]

The Minister dismissed by His Excellency the Administrator (Sir Stanley Burbury) was the Treasurer and Minister for Health (Dr. R. J. D. Turnbull). Dr. Turnbull had, since his election to the Tasmanian Parliament, been a political stormy petrel. He was first elected to the House of Assembly as an endorsed Labor candidate at the general elections in 1946. Even before election he showed his independence of view in that, during his first election campaign, in an election speech he attacked the then Labor Minister for Health who was appearing on the same platform.

In 1948 he was appointed Minister for Health and held ministerial office, with a variety of portfolios, until his dismissal. There were during this period many instances of conflict between Dr. Turnbull and his ministerial colleagues (some of which raised intriguing questions concerning constitutional conventions relating to Cabinet unanimity and their application in the Tasmanian context). Friction between the Treasurer and other Ministers was not uncommon. He publicly criticised a former Minister for Health and frequently clashed with the former Chief Secretary and the Attorney-General and Deputy Parliamentary Leader. He was at one time criticised by the present Premier (Mr. Reece) on the floor of the House of Assembly, and the year before his dismissal had been asked to resign. He had on that occasion refused and the matter was, with somewhat doubtful propriety, referred to the State Conference of the Australian Labor Party. This body referred the issue back to the Parliamentary Labor Party (hereinafter referred to as Caucus, its more common appellation) and on that occasion the differences were uneasily resolved within the Ministry and the demand for his resignation was withdrawn — the compelling reason apparently being the desire of the Labor Government to retain the reins of government as it had control of the House of Assembly by the narrowest of margins, one vote.

The uneasy peace that prevailed after that time was broken in March of this year when further difficulties arose between Dr. Turnbull, then Treasurer and Minister for Health, and his Cabinet colleagues over the granting of licences to conduct lotteries in the State. At a Cabinet meeting held on March 24th, the Treasurer left the meeting before a discussion in which he was engaged could be completed. At the next Cabinet meeting the conduct of the Treasurer at the previous meeting was raised and again, before the discussion was concluded, the Treasurer left the meeting thus creating a situation in which the Treasurer had, at two successive Cabinet meetings, walked-out on his ministerial colleagues.

The Premier (Mr. Reece) thereupon summoned a meeting of Caucus for the next day. This meeting had before it a letter from the Treasurer stating that he was unable to attend. The meeting then adjourned until the following day, after ascertaining that the Treasurer would then be able to attend.

---

[2] The factual background material is contained in 'The Mercury' newspaper, April 3rd to April 16th, 1959.

When Caucus met again on the next day (Saturday) the Premier placed the matter before the meeting and the Treasurer made a statement. The Treasurer then left the meeting, saying that he would remain in his office for half an hour to enable the meeting to make up its mind as to what it wished to do. At the end of the half hour, after being requested by the Labor Party Whip to remain longer, he left for his home.

Caucus remained in session and finally passed unanimously a motion 'that the Premier be instructed to arrange for the appointment of the Treasurer and Minister for Health (Dr. Turnbull) to be terminated'.[3]

It should be noted that this was a decision of the full Caucus and not of Cabinet alone and that it was unanimous. To terminate the appointment of a Minister of the Crown merely because he happened to leave two meetings of Cabinet before the Cabinet had concluded the discussion of business would on the face of it appear to be a completely inadequate and untenable basis for requiring such termination. The decision is only explicable, if at all, with reference to the long background history of friction between the Treasurer and his ministerial colleagues and the refusal of the Treasurer on previous occasions to bow to the imposition of party discipline. In reality this decision of Caucus was a culmination of a long history of events, some of which have been briefly outlined. Further light on the background issues leading up to the decision to dismiss was shed by Dr. Turnbull in a subsequent broadcast address. In this statement he gave details of a number of other clashes he had had with the Premier in Cabinet meetings, including differences over the appointment of a new Auditor-General, loans to municipal councils, the venue of Cabinet meetings, the allocation of ministerial responsibility and the question whether the existing privately-owned lottery should continue or be taken over and conducted by the Government.

This last matter appeared from his statement to be the vital culminating issue. Dr. Turnbull had issued a press statement purporting to set out Cabinet's decision to prepare a draft bill to take over the lottery, and, according to Dr. Turnbull's statement, the Premier claimed that he should not have done this as 'it closed the door on any transfer to individuals' and told Cabinet that he (the Premier) proposed to recommend to Caucus Dr. Turnbull's expulsion.[4]

It is of interest that in this statement Dr. Turnbull claimed the right to depart from the obligation of secrecy which is imposed on Ministers as to what passes in the Cabinet. Although in earlier periods of constitutional development there have been many examples of laxity, it is beyond question that the obligation of Cabinet secrecy now approaches an absolutely binding obligation.[5] Dr. Turnbull justified this extra-

[3] 'The Mercury,' April 6th, 1959, p. 1, c. 4.

[4] 'The Mercury,' April 16th, 1959, p. 6.

[5] See Ridges, 'Constitutional Law,' 8th Ed. (1950) p. 161. Anson, 'The Law and Custom of the Constitution,' 4th Ed. (1935), Vol. II, pp. 119-123. Dr. E. M. Campbell has elaborated on other aspects of the secrecy rule in her comment elsewhere in this volume.

ordinary detailed and frank disclosure of Cabinet proceedings by saying: 'In case it may be thought there was something improper in disclosing events which had occurred in Cabinet, he had it on the highest authority that a Cabinet Minister was invariably permitted to disclose such facts to explain his resignation or expulsion'.[6]

One may be permitted to question the 'highest authority' referred to. No doubt at times the veil of secrecy is lifted and it is the practice to waive the rules of secrecy to allow a Minister who has resigned to explain the grounds of his action. Even so, such disclosures are, it is well established, only made with the permission of the Crown. Permission is sought through the intervention of the Premier and the disclosure should be strictly limited by the terms of the permission granted.[7] Dr. Turnbull neither asked for nor received permission, and the reader may reflect upon Lord Melbourne's remonstrance: 'If the arguments in the Cabinet are not to be protected by an impenetrable veil of secrecy, there will be no place left in the public counsels for the free investigation of truth and the unshacked exercise of the understanding'.[8]

THE DISMISSAL

On the following Monday a letter was delivered to the Treasurer from the Premier. The letter informed the Treasurer of the decision of Caucus on the preceding Saturday and contained a formal request for his resignation. The Treasurer then made a public statement in which he said, *inter alia,* 'I have no intention of resigning'.[9]

Cabinet met that day to consider this refusal on the part of the Treasurer to relinquish his portfolio. On the following day the Premier waited on the Administrator. The Administrator in Tasmania acts in the place of and has the same powers, privileges and prerogatives as the Governor of the State. He exercises his office when the office of Governor is vacant (as it then was) or when the Governor is absent from the State.

His Excellency the Administrator accepted the Premier's advice and a message was issued from Government House in these terms:

> The Honourable the Premier waited on His Excellency the Administrator today. He advised His Excellency that he no longer had occasion for the services of Dr. Turnbull as a Minister of the Crown, and that as Dr. Turnbull had not, in accordance with accepted constitutional practice, acceded to his request to submit his resignation he was obliged to exercise his undoubted constitutional right to advise His Excellency to revoke the appointment of Dr. Turnbull as Minister of the Crown.
>
> Acting upon this advice His Excellency has today, by appropriate instruments in the name and on behalf of Her Majesty, revoked the appointment of Dr. Turnbull as Treasurer.

---

6 'The Mercury,' April 16th, 1959, p. 6, c. 6.

7 See n. 5 above.

8 'Melbourne Papers,' p. 216; Anson, loc. cit. p. 122.

9 'The Mercury,' April 7th, 1959, p. 2, c. 4.

> Subsequently His Excellency presided over a meeting of the Executive Council at which formal consequential steps were taken to revoke the proclamation committing the administration of the Department of Health Services to the Treasurer.

The next day the Premier announced that he would present a submission to His Excellency the Administrator for the dissolution of the House of Assembly with the purpose of holding a general election. On the morning of the following day the Administrator granted an immediate dissolution. The Premier then announced that a State election would be held on May the 2nd, and later that day the State Executive of the Labor Party suspended Dr. Turnbull from membership of the party pending the hearing of charges of breach of party rules against him.[10] These charges were never heard as Dr. Turnbull contested the election as an independent candidate thereby incurring automatic expulsion from the Labor Party.

THE CONSTITUTIONAL ISSUE

These unusual circumstances gave rise to a situation without precedent in English or Australian States constitutional history. Although writers on constitutional theory have from time to time canvassed the theoretical possibility of the Crown dismissing a Minister, at the request and on the advice of the Premier, it has never been seriously considered as a practical reality.

Most commentators have accepted it as unthinkable that a Minister, if asked to resign, would not do so. Although a request for resignation is sometimes referred to as 'dismissal of a Minister' it is clear that, in form at least, such cases are no different from any other resignation from Cabinet. Although Sir Ivor Jennings refers to the resignation of Palmerston as 'a classic precedent for the dismissal of a Minister' it is abundantly clear that Palmerston in fact resigned, albeit at the request of Lord John Russell.[11]

Sir William Harcourt stated admirably the accepted constitutional convention on the occasion in 1884 when Mr. Gladstone wished to remove Lord Carlingford as Lord Privy Seal, not because of his conduct or incompetence, but solely in order to appoint Lord Rosebery. He then said:[12]

> In my opinion it is no more open to the head of a department in the Cabinet to say to the potter that he will be an *urceus* or an *amphora* than it is to the Commander of a Division to say to the Commander-in-Chief that he will not be superseded in the command by another officer. The interests at stake are far too serious to admit of the doctrine of fixity of tenure.

---

10 'The Mercury,' April 16th, 1959, p. 1.

11 Jennings, 'Cabinet Government' (1937), p. 157.

12 'Life of Sir William Harcourt', Vol. 1, pp. 508-9. Quoted in Jennings, loc. cit. p. 161.

> That this must be so is obvious because the First Minister can always say to any other of the Administration, 'If you don't go, I will', but it is incredible that things should ever be pushed to such a point as that. Good feeling as well as good sense forbids it. And a man must be a pachydermatous indeed who is incapable of accepting the first hint that his room is wanted whether he is on a visit or in a Cabinet. . . .

A similar view appears in Anson, *Law and Custom of the Constitution*:[13]

> The holders of important political offices who oppose, or do not support, the ministry in matters which are not treated as open questions are liable to dismissal not, as formerly, as proof of Royal confidence, but as a matter of necessity in transacting the business of government.
>
> At the present day such questions could only arise where administrative policy or practice is concerned. A Minister who voted against his party in a division for which the Government tellers were employed would, by convention, place his resignation in the hands of the Prime Minister as soon as he had determined on his course of action.
>
> Moreover, when it is said that the Prime Minister has the power of dismissing his colleagues, no more is meant than this, this he can say to the King, 'he or I must go'.

And Ridge regarded as a principal convention of constitutional law the proposition that 'where a Cabinet Minister differs from his colleagues he must abandon his position or resign'.[14]

Although it is clear that voluntary resignation is the normally accepted practice, this fact had not given rise to any doubts that the Premier was entitled to call for the resignation of any Minister who did not first voluntarily tender his resignation. Sir Robert Peel considered that:[15]

> Under all the circumstances if there were a serious difference of opinion between the Prime Minister and one of his colleagues and that difference could not be reconciled by an amicable understanding the result would be the retirement of the colleague not of the Prime Minister.

If this were not so the Prime Minister's control of his Cabinet could not be maintained and this is a matter not only of convenience but of practical necessity in the normal transaction of the business of government.

As Sir Ivor Jennings expressed the position:[16]

> The conclusion seems to be that the Prime Minister possesses the right to ask a Minister to resign or to accept another office. This right arises from the necessary pre-eminence of the Prime Minister in his Cabinet, it is, usually, not necessary to use the Crown's power of dismissal. There is a tradition—a kind of public school fiction—that no minister desires office, but that he is prepared to carry on for the public good. That

---

[13] 4th Ed. Vol. II (1935), p. 137.

[14] Ridges, 'Constitutional Law,' 8th Ed. (1950), p. 21.

[15] Report from the Select Committee on Official Salaries (1850), p. 36.

[16] loc. cit. p. 163.

> tradition implies a duty to resign when a hint is given. But in the last resort, the Prime Minister could advise the King to dismiss any recalcitrant Minister. . . .
>
> Conflict between the Prime Minister and a colleague is, however, a rare occurrence. There is, usually, on the one hand confidence in the colleague and on the other hand loyalty to the Prime Minister. The Prime Minister rarely has the time or the desire to interfere in departmental matters. If a colleague cannot be trusted, he will not be appointed. If he proves inefficient, a hint is usually enough to produce a resignation. If he proves ineffective in a particular office, it is usually possible to obtain his consent to a transfer, provided that it is possible to make it appear a promotion or that some good reason can be assigned for it.

Now although this tradition has in the past almost invariably been observed, it may occur, as it did in fact in the case of Dr. Turnbull, that the Minister is not disposed to regard himself as under a duty to resign when asked. What then is the position? Can the Premier advise the Crown that the Minister must be removed from office?. If so, must the Crown accept such advice, or is there a discretion in the exercise of the prerogative? Or can the Premier only properly offer the Crown the alternative of accepting his resignation or dismissing the Minister whose removal is demanded?

Although there is little in the way of precedent to guide us it seems clear on any view of constitutional theory that there is a prerogative of dismissal vested in the Crown. As Ministers, in theory, at least hold their office at the pleasure of the Crown, they may in law be dismissed at any time. By well established convention, however, Ministers can only properly be appointed by the Crown on the advice of the Premier. It follows that it would be improper and unconstitutional for the Crown to dismiss a Minister except on like advice.[17] The prerogative can be exercised only on the advice of the Premier, but it would seem, even when such advice is given, that the Crown is not bound to accept such advice in all circumstances. Under modern conditions it is a convention that the Crown must call on the leader of the majority party, and so long as the Premier has a majority without having to rely on the delinquent Minister it is submitted that it is not open to the Crown to find a new Ministry as an alternative to accepting the Premier's advice to dismiss the Minister.

But where, as in the present case, the dismissal of the Minister would almost certainly result in the loss of the Government's majority in the House, then the Crown could refuse to accept the Premier's advice if it was prepared to find a Ministry to replace the existing one. In this case, it is submitted, it was open to the Crown to reject the Premier's advice, but, in the absence of any certain indications as to what would be Dr. Turnbull's future political allegiance, the adoption of such a course of conduct would probably ultimately have had to rest for its vindication on an appeal to the electorate.

---

[17] Ridges, 'Constitutional Law,' 8th Ed. (1950), p. 157.

The reasons why the extreme step of advising the dismissal of a Minister has not in practice occurred in the past are not hard to find. The effects of dismissal are, of course, serious to the Minister dismissed, to the government advising his dismissal, and to the Crown in dismissing him. This aspect has frequently been emphasised.[18]

> But this prerogative is exercised solely on the advice of the Prime Minister. Such advice would be given only in the most extreme cases. A dismissal is a declaration of weakness which necessarily has repercussions in the House of Commons and in the constituencies. The minister dismissed may have support in the House or even in Cabinet. If a sufficient section of the House supports him, the Government will be defeated. If a sufficient section of the Cabinet supports him, the Cabinet will be broken up. Moreover, a mere disagreement will lead to the resignation of the dissenting ministers. In the great majority of cases, a minister who is responsible, either in fact or merely technically for some maladministration, will resign. . . .

A similar view was expressed by Keith:[19]

> Removal, of course, is always a strong step. It is seldom that a minister has not some following in the Commons, some support in the Cabinet itself, some popularity outside the House. Removal, therefore, indicates defective judgment in placing the minister in office, will suggest error of policy on the part of the Premier. These considerations explain abundantly the fact that ministers of very poor calibre may remain in office long after it would seem desirable that they should be honourably retired with a peerage to soften the blow. An alternative to removal is transfer to another office. Technically, formal dismissal is hardly known, since Pitt gave the King the choice between him and Thurlow in 1792.

In the case of the dismissal of Dr. Turnbull the surrounding political circumstances made it inevitable that the consequences of the exercise of the Crown's prerogative of dismissal would be quite catastrophic. The Government, by its action in advising the dismissal of the Treasurer upon whose support they relied for a majority in the House, presumably lost control of Parliament, but the Ministry did not choose to test this by calling Parliament together and risking a vote of no confidence to bring about their downfall. The Premier took the only other possible alternative and tendered to the Administrator advice that he could no longer govern and asked for an immediate dissolution. The Administrator accepted this advice and granted an immediate dissolution of Parliament. Presumably the Adminstrator was more readily able to accept this advice because of the equal state of the parties in the House and the necessity, in any event, to hold a general election later in the year.

At the subsequent elections, held as a result of the dissolution, Dr. Turnbull stood for election as an independent candidate and was returned

---

[18] Jennings, 'Cabinet Government' (1937), p. 156.

[19] 'The British Cabinet System', 2nd ed., pp. 76-7.

with a near record majority of votes, a majority only exceeded by the Premier, Mr. Reece.

In the final result of the election the Government obtained seventeen seats, the Opposition sixteen, and independent candidates two. At the time of writing the Government has retained control of the Treasury benches by relying upon the support of the other independent member, Dr. Turnbull voting consistently with the Opposition. How long the Government can retain this precarious hold and the full consequences of the dismissal in political and constitutional terms remain as tales to be told on another day.

R. P. Roulston.

RECENT DECISIONS ON DANGEROUS DRIVING

On two occasions last year a question arose before a Judge of the Supreme Court of Tasmania as to the proper direction to be given the jury on the trial of an indictment for a crime briefly described as driving in a manner dangerous to the public.[1] The judgment of His Honour the Chief Justice in *The Queen v. Cripps* and the judgment of His Honour Mr. Justice Gibson in *The Queen v. Lucas* (both as yet unreported) are contained in the appendix to this article.

It is submitted that the objective test as to the manner of driving which the learned trial judge adopted in *Lucas's* case is in accordance with the authorities from *The King v. Coventry*[2] to *Hill v. Baxter*[3] and that *Andrews v. The Director of Public Prosecutions*[3a] is properly distinguishable.

On the other hand, the conception of fault as an ingredient of the crime advanced by the learned Chief Justice in *Cripps's* case appears to have originated in the mind of Dr. Glanville Williams and would appear to have no case authority in its support. Moreover, it is respectfully submitted that an unqualified direction to a jury in terms of fault without the correction of an objective standard would necessarily involve an invitation to them to make a moral judgment of the accused.[4]

The truth is that the words of the section demand guilt without any fault, moral or otherwise, being proved at all.[5]

---

1 See Appendix, where the revelant statutory provisions are set out.

2 59 C.L.R. 633.

3 (1958) 2 W.L.R. 76.

3a [1937] A.C. 576.

4 'Blameworthiness [in criminal law] is the ultimate ground of liability, but the actual measure of liability is not what is blameworthy in the particular individual, but what would, in his circumstances, be blameworthy in a man of ordinary knowledge and capacities', per Holmes J., Commonwealth v. Pierce (1884) 138 Mass. 165 at p. 180.

5 A comment by the late Oliver Wendell Holmes is again worth mention. 'For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncoloured by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought'. 'The Path of the Law', 10 Harv. L.R. 457-8.

What may be regarded by some as a harsh prohibition against dangerous driving is ameliorated by the common law defence to a statutory crime of an honest and reasonable mistake of fact.[6]

The difference in view between the two judges can perhaps be illustrated by considering a particular fact situation. In *Kay v. Butterworth*[7] a driver driving home after having worked a night shift in a factory was overcome by sleep and ran into a party of soldiers. The justices held that as the driver was temporarily unconscious at the material time he could not be convicted of the offence of dangerous driving.

The brief judgment of Humphreys J., with which Cassels J. agreed, is worth quoting in full:

> A person who drives a car into the rear of a party of persons in broad daylight when visibility is perfect is guilty of a number of offences. If a driver allows himself to drive while he is asleep, he is at least guilty of the offence of driving without due care and attention because it is his business to keep awake. If drowsiness overtakes a driver while he is at the wheel, he should stop and wait until he shakes it off and is wide awake again. A person, however, who, through no fault of his own, becomes unconscious while driving, for example, by being struck by a stone, or by being taken ill, ought not to be liable at criminal law. In the present case the driver must have known that drowsiness was overtaking him. The case is too clear for argument. The appeal must be allowed and the case remitted to the justices with a direction to them to find the charges proved.

This case, it is suggested, is an illustration of the principle that a voluntary act of driving must be proved to have occurred at the time of the alleged dangerous driving. No doubt the prosecution commenced by alleging the collision with the soldiers as the manner of dangerous driving: it finished by successfully relying on the act of falling asleep. But the case lends no support to the view that fault is an ingredient of the offence[8]: rather, it is submitted, the learned judge had in view, in using the term fault, that no person guilty of a mere involuntary act could have been convicted. In this case it was clear the driver must have known drowsiness was overtaking him, but suppose he had taken benzedrine tablets before leaving work and suppose his evidence had been that right up till the last moment he honestly believed he could keep awake.

This defence it is submitted would involve disentangling the ingredients of the offence from the alleged honest and reasonable mistake.

---

[6] Referred to in the majority judgment in The King v. Coventry at pp. 637-8, quoted by Gibson J. in The Queen v. Lucas.

[7] (1945) 173 L.T. 191.

[8] Edwards, 'Automatism and Criminal Responsibility' (1958) 21 M.L.R. 375, has exhaustively considered the mental requirement of the act of driving in dangerous driving. In a note at p. 382 he has referred to several authorities including Kay v. Butterworth illustrative of what he terms 'the no fault of the driver principle'. This principle is, it is suggested, explicable in terms of the common law defence as suggested in this article. Mr. Edwards' citation of Scarth's case (1945) St. R. Qd. in this connection appears to be misconceived.

Thus once the jury had decided that the accused was driving when he fell asleep they would then proceed to consider whether, regarded objectively, the manner of driving was dangerous.

> Thus, whereas the act of driving, of controlling the steering wheel, etc., involves proof of volition, the absence of which completely negatives criminal responsibility, the manner of driving is judged objectively by reference to the somewhat elastic standard of driving by a reasonably careful motorist in similar circumstances.[9]

The jury would take all the external physical circumstances of the driving transaction and their effect on the reasonable motorist into account, but of course in the absence, for example, of expert evidence as to the hypnotic and sleep inducing effects of some succession of reflections on the roadway, they could hardly refrain from concluding that ordinary careful motorists do not fall asleep. Only then it is submitted could the jury proceed to consider the defence of mistake. But if the majority judgment in *The Queen v. Bonnor*[10] is correct it is submitted that the onus is upon the accused not only initially to adduce some evidence of his defence of mistake but finally and ultimately to prove it to the tribunal of fact upon the balance of probabilities. It is here that the practical importance of the difference in view between the judges in *Lucas's* case and *Cripps's* case lies. In *The Queen v. Bonnor* it was held by Herring C.J., Gavan Duffy and O'Brien JJ. (Barry and Sholl JJ. dissenting) that on a charge of bigamy under s. 61 of the Victorian Crimes Act, 1928, the burden lies on the accused of proving on the balance of probabilities that he believed honestly and on reasonable grounds that his former marriage was dissolved. The clear implication it is submitted to be drawn from the majority judgments is that once the essential ingredients of a statutory crime have been disentangled from a defence which amounts to a reasonable and honest mistake the burden is on the accused to prove the residue.

> In inquiring whether the learned trial judge was correct in placing the burden of proof on the accused, we should, I think, keep two principles quite distinct. If any mental state, be it intention, knowledge, or any other, is a constituent part of the crime charged, the burden is on the Crown of establishing that such mental state existed, just as it must prove every other constituent. In the first place, presumptions of one kind or another may result in the Crown making a *prima facie* case on which a jury may convict by merely establishing that the accused has committed the forbidden acts, but whether the mental element is expressly made a constituent of the crime or is to be implied, the ultimate burden of proof is on the Crown. We habitually speak of the requirement or the presence of such a mental state as the *mens rea*, but while such requirement may result in the offence not being complete without the presence of *mens rea*, proof of its existence is not required because of any principle that there cannot be a crime without *mens rea*, but because the complete definition of the crime requires it.

---

[9] Edwards op. cit. p. 381. See, too, R. v. Carter [1959] V.R. 105 at p. 112 per Sholl J.

[10] [1957] V.R. 227.

> A very different matter is what I may call the common law defence of mistake. In *R. v. Tolson* (1889) 23 Q.B.D. 168, Cave J. put it thus, at p. 181: 'At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act, has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim, *actus non facit reum, nisi mens sit rea.* It will be apparent that this common law defence differs in essence from the obligation of the prosecution to prove every constituent of the crime'.[11]

If the view here advanced is correct it can be appreciated that in *Lucas's* case the trial judge correctly placed the entire burden of proof upon the Crown. On an academic analysis Lucas did present a defence of mistake as well as a denial of part of the Crown case (driving in a dangerous manner). But the defence of mistake was directly related to the physical circumstances of the driving transaction and was entirely swallowed up, so to speak, by the Crown burden of proof of the essential ingredients of driving dangerously.

The trial judge in *Cripps's* case may, however, have placed too great a burden of proof upon the Crown if *Bonnor's* case was correctly decided.[12] There the jury might have been directed to ask themselves the question whether the ordinary careful motorist driving this particular vehicle would necessarily have discovered some time before the accident that the brakes were defective (*e.g.*, by considering the state of the brakes and the hills and stop streets in the route travelled). Having arrived at the conclusion that the reasonable man would have discovered the defective brakes and that a continued driving with such knowledge would have been a potential danger[13] to the public in all the circumstances the Crown case, it is submitted, would have been complete. The jury would then have had to consider a defence that the accused believed before the journey commenced that the brakes were sound, for example, because a garage mechanic had recently told him so and that therefore he made an honest and reasonable mistake that the brakes were sound during the

---

[11] per Gavan Duffy J. ibid. pp. 228-9.

[12] The defence appears to have been composite, i.e., a denial of the act of driving at the time of the collision, a denial of driving dangerously before the brakes failed, and a residual common law defence of mistake. Thus in principle the facts resemble Kay v. Butterworth discussed above.

[13] The word 'danger' includes potential danger. Kingman v. Seager (1937) 157 L.T. 535; Durnell v. Scott [1939] 1 All E.R. 183; Bracegirdle v. Oxley [1947] 1 All E.R. 126. These three cases deal with the second limb of the section, i.e., speeding in a manner dangerous to the public, and amply demonstrate the objective test. As Lord Goddard said in his judgment in the latter case at p. 128: 'Supposing, for instance, you are driving on an arterial road, say the Great West Road going out of London, or any of the main roads surrounding or in London, it is obvious that you can be driving there at a pace which in itself must be a danger to the public'. In this case Lord Goddard remitted it to the Justices with a direction to convict and expressed an interesting warning against Justices failing to accept the objective test laid down. 'If they (the Justices) do not obey the rulings of this court and persist in giving decisions which are contrary to the judgments of this court they will find themselves in serious trouble'. One wonders what grim fate lay in wait for these disobedient Justices from Cheshire.

progress of the journey. The question would now have been not the objective reasonableness of the accused's *manner* of driving but the reasonableness of the accused's mistaken *belief*.

The objective test suggested here is to subject the hypothetical reasonable man to all the external or physical conditions or influences experienced by the accused during the progress of the material driving transaction. But it is impossible to generalise with any sense of safety,[14] it is difficult enough to analyse and disentangle any particular fact situation. What is clear, it is submitted, is that if the word 'objective' constantly reiterated in the cases is to have any meaning it cannot exist side by side with a definition of dangerous driving which includes fault as an ingredient.[15] Nor can there be any room left for operation of the defence of reasonable mistake referred to by the High Court in *R. v. Coventry* above.

If, for example when a half-witted driver has a collision one must objectively consider the manner of driving of a mentally defective reasonable man in similar circumstances then the word 'objective' has become a useless husk.

Strictly regarded, the language of the section is absurdly wide. One can, of course, assume that although every driver causes some risk and potential danger to the public when he drives, the Crown has acquired no licence to prosecute all drivers. To avoid absurdity some standard must be applied. Even so, the sad truth is that most drivers at odd times take unjustified risks and drive dangerously in the objective sense. Yet, as lawyers experienced in running-down cases know, the driver who admits culpability or even contributory negligence is rare indeed. The law may have a logical place as an alternative to motor manslaughter and to fit the so-called bad case. But in its true colours, it is also aimed at the ordinary dangerous driver,[16] and it is difficult to see why the odd driver whom the police catch should be singled out for a punishment which cannot because of the unintentional nature of the crime itself either deter others or induce repentance or reform.

---

14 Because no case authority up to now appears to have defined what the objective test should include.

15 In The Queen v. Tarrant (21/5/59 unreported) His Honour Mr. Justice Green followed the decision in Lucas's case in preference to Cripps's case. After directing the jury as to manslaughter, with which the accused had been charged, His Honour directed the jury that they could not find the accused guilty of an alternative charge of reckless driving if they acquitted him of manslaughter. The other two alternatives in s. 32 of the Traffic Act, 1925, were left open to the jury but the accused was convicted of manslaughter. His Honour presumably takes the view that except for the requirement of causality between the death and the recklessness in manslaughter the crimes of motor manslaughter and reckless driving are one and the same.

16 Even a momentary disregard of safety precautions or a momentary act of negligence may amount to dangerous driving. R. v. Parker (1957) 41 C.A.R. 134 and R. v. Coventry above at p. 638.

A future generation may well regard as barbarous the refusal of our time to interfere decisively with the liberty to recklessly or unwittingly kill or maim other road users (for example, by legislation directed to govern the maximum possible mechanical speed of vehicles). The attempt to deter the dangerous driver by means of the odd example must surely be regarded as futile.

Edward Sikk.

APPENDIX

A

The crime of driving in a manner dangerous to the public, together with the crimes of reckless driving and driving at a speed dangerous to the public, was first introduced into Tasmania by Act No. 14 of 1957, which amended Section 32 of the Traffic Act, 1925, to its present form as follows—

32. (1) A person who drives a motor vehicle on a public street recklessly, or at a speed or in a manner that is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the public street and the amount of traffic that actually is at the time or that might reasonably be expected to be on the public street, is guilty of an offence against this Act.

Penalty: Imprisonment for two years, or a fine of two hundred pounds, or both.

(2) A person who drives a motor vehicle on a public street negligently, having regard to all the circumstances of the case, including the nature, condition, and use of the public street and the amount of traffic that actually is at the time or that might reasonably be expected to be on the public street, is guilty of an offence against this Act.

Penalty: Fifty pounds.

(3) Notwithstanding any other law to the contrary but subject to the right of election conferred by subsection (4) of this section, proceedings in respect of offences under this section shall be heard and determined by a police magistrate sitting alone.

(4) If on a person being charged with an offence under subsection (1) of this section—

I. That person, on his appearance to answer the charge and not afterwards, elects to be tried on the charge by jury: or

II. The police magistrate before whom that person is charged considers that the offence is of so serious a nature that it should be tried on indictment,

the offence shall be deemed to be a crime within the meaning of the Criminal Code and to be punishable on indictment thereunder accordingly, and the police magistrate shall proceed therein as provided in Part IV of the Justices Procedure Act, 1919.

(5) A person may lawfully be charged and convicted of an offence under this section notwithstanding that death or bodily harm has resulted from the driving of the motor vehicle in the circumstances

that are the subject of the charge and that he might have been charged with a crime under the Criminal Code arising out of the same circumstances.

(6) A police officer may apprehend without warrant the driver of a motor vehicle who commits an offence under subsection (1) of this section within his view if the driver refuses to give his name and address when required so to do by the police officer, or if the motor vehicle does not bear a distinguishing number or mark of identification, or its proper distinguishing number or mark of identification.

(7) If the driver of a motor vehicle who commits an offence under subsection (1) of this section refuses to give his name and address when required so to do, or gives a false name or address, he is guilty of an offence against this Act, and it is the duty of the owner of the vehicle, if required by a police officer, to give any information that it is within his power to give, and that may lead to the identification and apprehension of the driver, and if the owner fails to do so he also is guilty of an offence against this Act.

A simultaneous amendment to the Criminal Code (Act No. 13 of 1957) enacted that upon an indictment for manslaughter a jury might in the alternative convict of a crime under Section 32 (1) above.

B

In *The Queen v. Cripps* His Honour the Chief Justice invited submissions from counsel at the end of the defence case as to the ingredients of the crime and the correct direction to the jury. The judgment was as follows:

The accused is charged on indictment under Section 32 of the Traffic Act with two offences—driving at a speed dangerous to the public and driving in a manner dangerous to the public. In the Court of Petty Sessions he was only charged with the offence of driving in a manner dangerous to the public, and he elected for trial by jury. But the Crown filed an indictment charging the two offences. That in my view was entirely irregular, and I have already made an Order quashing Count 1. So Count 2 remains, which is a charge of driving a motor vehicle on a public street in a manner which is dangerous to the public, having regard to all the circumstances of the case.

The Crown submits that this offence is complete upon proof that in fact the accused drove in a manner dangerous to the public and that the legislature has absolutely prohibited dangerous driving and that *mens rea* is not a necessary ingredient. In this case there is virtually undisputed evidence that the accused's car was being driven down Springfield Avenue towards the Main Road, Glenorchy — which is a right-of-way street — and did not stop at the intersection but proceeded across the Main Road at a speed in the order of 30 m.p.h. and collided with a car driven by Mr. Martin. The defence, as I understand it, does not really dispute that that was the actual behaviour of the car, but they say that it was involuntary because the brakes of the car failed suddenly and the accused had no knowledge that the brakes were faulty. The Crown goes so far as to submit that even if the jury thought that the brakes did fail and there was no fault on the part of the

accused — or that they were left in doubt as to whether there was any fault on the part of the accused—they should be told that they should still convict the accused if they were satisfied of the objective fact that he was driving in a manner dangerous to the public. The Crown says that although if that were the case it would obviously be a matter for a nominal penalty, the accused ought still to be convicted of the offence, because dangerous driving is absolutely prohibited. The Crown relies for that submission on the decision of the High Court in *The King v. Coventry* 59 C.L.R. 633. In that case at p. 637, four of the learned Justices of the High Court in their joint judgment adopted what Sir Leo Cussens said in *Kane v. Dureau* (1911) V.L.R. 293 at 296—that:

> 'This section' (a similar section to Section 32 of the Traffic Act) 'constitutes a number of different offences . . . driving recklessly, driving at a speed which is dangerous to the public, and driving in a manner which is dangerous to the public'.

They then said:

> 'The chief fear of the Crown is that the judgment from which special leave to appeal is sought, imports the element of driving recklessly into the other offences mentioned in the clause. The correctness of such a reading of the judgment may be doubted, but it seems better to say that in our opinion, indifference to consequences is not an essential element either of driving in a culpably negligent manner, or of driving at a speed which is dangerous to the public, or in a manner which is dangerous to the public. The driver may have honestly believed that he was driving very carefully, and yet may be guilty of driving in a manner which is dangerous to the public. The jury is to determine, not whether the accused was in fact, as a matter of psychology, indifferent or not to the public safety, but whether he has driven in a manner which was dangerous to the public. The standard is an objective standard, "impersonal and universal", fixed "in relation to the safety of other users of the highway".'

Then at p. 638, the Court said:

> 'No doubt the language of the section does not exclude a defence of mistake of fact on reasonable grounds or of involuntariness (for example, interference by another person with the driving of the car), and perhaps there may be other exceptional excuses, based on special facts, to which a state of mind may not be immaterial. But, speaking generally, the expression, "driving at a speed, or in a manner, which is dangerous to the public", describes the actual behaviour of the driver and does not require any given state of mind as an essential element of the offence. It is not desirable to attempt to make an exhaustive catalogue of possible defences, and what we have said is sufficient to deal with the present case.'

Mr. Justice Starke in a separate judgment at p. 639 said:

> 'The offence is established if it be proved that the acts of the driver create a danger, real or potential, to the public. Advertence to the danger on the part of the driver is not essential; all that is essential is proof that the acts of the driver constitute danger, real or potential, to the public'.

The Crown also relies on Mr. Justice Barry's judgment in *The Queen v. Ashman* (1957) A.L.R. 44, but His Honour there really did no more than adopt what the High Court had said in *Coventry's* case. And the Crown also relies on *Hill v. Baxter* (1958) 2 W.L.R. 76 at p. 79 where Lord Goddard C.J. said in relation to this very offence of driving in a manner dangerous to the public:

> 'The first thing to be remembered is that the Road Traffic Act, 1930, contains an absolute prohibition against driving dangerously or ignoring "Halt" signs. No question of *mens rea* enters into the offence; it is no answer to a charge under those sections to say, "I did not mean to drive dangerously", or, "I did not notice the 'Halt' sign". The justices' finding that the respondent was not capable of forming any intenton as to the manner of driving is really immaterial'.

The decision of *The King v. Coventry* establishes that the prosecution does not have to prove that the driver adverted to the danger—that is to say, that indifference to the consequences is not a necessary element of this offence, as it is in the offence of driving recklessly. I observe that Mr. Justice Starke in that case did say that—

> 'Driving dangerously to the public will usually, if not in all cases, involve a high degree of indifference to the safety of others.'

But it is clear that that is not a necessary element.

No specific *intent* on the part of the driver need be proved. But that is not to say that no *fault* on the part of the driver need be proved. The view that fault on the part of the driver is not an essential element in this offence I think is inconsistent with what Lord Atkin said in *Andrews v. The Director of Public Prosecutions* (1937) A.C. 576. In that case Lord Atkin emphasised the distinction to be drawn between criminal negligence required in the crime of manslaughter and the crime of dangerous driving, and at p. 585 said that the trial judge should in the first instance in a case of manslaughter charge the jury substantially in accordance with the general law, that is, requiring the high degree of negligence indicated in *Bateman's* case (19 C.A.R. 8), and then explain that such degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving, and then indicate to them the conditions under which they might acquit of manslaughter and convict of dangerous driving.

It is implicit in that passage that Lord Atkin thought that *some* degree of negligence would be required in a case of dangerous driving.

I refer also to Dr. Williams' book on the Criminal Law—the General Part—Section 30 at p. 96, in which he said in relation to the offence of driving dangerously:

> 'As a matter of fact, it is possible to drive dangerously without any fault on one's own part. Clearly, however, some requirement of fault must be implied; to distinguish it from the summary offence of careless driving, there must be a higher degree of negligence than in a civil action'.

But to come back to the words of the Section itself, the offence is *driving* a motor vehicle *in a manner* which is dangerous to the public. The words

descriptive of that offence do not include the word 'negligence'. It is clear from *Coventry's* case that the expression 'manner of driving' includes all matters connected with the management and control of a car by the driver when it is being driven. In my view, the *conduct* of the driver in the management and control of the car must be shown in some way to be at fault. If he deliberately drove the car in a manner dangerous to the public, that, of course, would be sufficient. If he adverted to the risk, that is to say, knew that he was driving dangerously but showed indifference to the consequences, that of course would be sufficient. But neither of those elements is essential. If his conduct in driving—and I emphasise it is *his* conduct—it is his manner of driving—that is careless, that in my view is sufficient. And careless conduct is the same concept as negligence when used in relation to criminal and *quasi* criminal offences. It is to be distinguished from negligence in the sense of breach of a duty giving rise to a claim for damages. See Judge Charlesworth's book on the Law of Negligence, 3rd Edn. p. 2 and p. 6. I also refer to my unreported judgment in the case of *Fehlberg v. Gallahar* (12/10/57).

The House of Lords in *Andrews v. The Director of Public Prosecutions* did not state what degree of negligence is necessary to constitute dangerous driving, but said that it must be contrasted with culpable negligence as an ingredient in the crime of manslaughter. But I think there is nothing in *Andrews's* case which requires the jury to be directed on this offence of dangerous driving that they must be satisfied that there was a degree of negligence on the part of the accused somewhere between the civil standard and the criminal standard in the crime of manslaughter. This is a matter in which I find some difficulty, but to come back again to *Coventry's* case—at p. 638 of that case four of the learned Justices of the High Court said:

> 'It is, in our opinion, wrong to exclude an act or omission from 'manner of driving' because it is casual or transitory in some senses in which these somewhat flexible words may be understood. Such an exclusion may even suggest that carelessness or inattention may constitute a defence to a charge under the relevant provision of the Section. Sudden, even though mistaken, action in a critical situation may not, in all the circumstances of a case, constitute driving to the danger of the public. But casual behaviour on the roads and momentary lapses of attention if they result in danger to the public, are not outside the prohibition of that provision merely because they are casual or momentary.'

Now, with that statement of the law I should compare what Dr. Williams said in the passage I have referred to—that clearly some fault must be implied and to distinguish it from the summary offence of careless driving there must be a higher degree of negligence than in a civil action. I disagree with that statement of the law. I also disagree with the note on *Hill v. Baxter* in the March 1958 issue of the Criminal Law Review at p. 194. The author of that note says:

> 'Though the Lord Chief Justice described the offence of dangerous driving as one of absolute prohibition, it is submitted that the *ratio decidendi* goes no further than to hold that it can be committed by gross negligence'.

I am at a loss to understand how one could direct a jury that in this offence gross negligence is necessary but it need not be the same degree of gross negligence as is necessary in manslaughter. I must distinguish something that I said *obiter dictum* in *Fehlberg v. Gallahar*. In that case it was argued that since *Callaghan's* case, 87 C.L.R. 115, before a court could be satisfied that a charge of negligent driving under the Traffic Act was made out, the court would have to be satisfied of culpable negligence. It was submitted in that case that as the Traffic Act then stood the offence of negligent driving for second offence might be visited with imprisonment—that no distinction could be drawn between the degree of negligence required upon a charge of negligent driving and the degree of negligence required upon a charge of manslaughter. I rejected that submission. I said that negligence for the purpose of the Traffic Act must be careless conduct and that all that is required is that the Court must be satisfied beyond reasonable doubt that the driver was guilty of careless conduct. I said that it was a mistake to attempt to equate the negligence referred to in Section 32 with negligence for the purpose of establishing civil liability, because negligence for the purpose of establishing civil liability involves a breach of duty to another, but negligence for the purpose of the Traffic Act simply means careless conduct. That is to say, that negligence for the purpose of the Traffic Act is a different concept from negligence for the purpose of establishing civil liability.

In the case of *Fehlberg v. Gallahar*, I did say *obiter dictum*:

> 'Section 32 itself recognises different degrees of negligence. Reckless driving *and* dangerous driving import higher degrees of negligence than negligent driving *simpliciter*. The recognition by the legislature of degrees of negligence in driving motor vehicles is made even clearer by Section 32 as amended by the Traffic Act 1957. The Section as so amended prescribes a higher punishment for reckless and dangerous driving than for negligent driving'.

While I think that that is a sound proposition so far as reckless driving is concerned, upon further consideration I do not think that it is a sound proposition so far as dangerous driving is concerned. The two subsections in Section 32 cause some difficulty, but I think the correct view is that Section 32 subsection (2) deals with negligence in the sense of careless driving *simpliciter*, that is to say, negligence which need not necessarily be driving in a manner dangerous to the public. Driving in a manner dangerous to the public is an offence *sui generis*. The jury must be satisfied that the manner of driving, that is to say, the accused's manner of driving, was dangerous. His manner of driving may be dangerous because he is driving that way deliberately or carelessly. In either case, if it is his manner of driving that is dangerous to the public, it is sufficient. Thus, in the present case, if he tried to apply his brakes and through no fault of his the brakes suddenly failed and did not stop the car, he has not driven in a manner that is dangerous to the public at all; it is not his manner of driving that is dangerous to the public.

I repeat that the offence is not described in terms of negligence. And I think that the direction to the jury when the offence is described

as driving in a manner dangerous to the public should not be complicated by any discussion of different degrees of negligence. If they are satisfied beyond reasonable doubt of fault on the part of the accused, either by way of active misconduct in driving or careless conduct, and that the behaviour of the car constituted a real or potential danger to the public, that suffices.

I should add that I have not overlooked *Callaghan's* case. I have already referred to it. In that case the High Court recognised that different degrees of negligence may exist in matters of crime, notwithstanding the apparent logical inconsistency of that view.

So that I propose to direct the jury that they must be satisfied beyond reasonable doubt that the accused drove in a manner that was dangerous to the public—that is to say, that his *manner* of driving the car, including all matters connected with the management and control of the car, did constitute a real or potential danger to the public. I will further direct them—so that they will be clear that they are not only concerned with the behaviour of the car—that they must be satisfied beyond reasonable doubt that the behaviour of the car was due to some fault on the part of the accused in the management and control of the car—for example, if they thought that he deliberately drove it in this way—or if they thought that he adverted to the risk of driving in this way and was indifferent to it, or if they thought that his driving was careless—that his conduct was careless. And I will emphasise that they must be satisfied of that beyond reasonable doubt. In the last resort it may be that there is little practical distinction between telling a jury that they must be satisfied of some degree of negligence higher than the civil standard and not as high as manslaughter, and telling them that they must be satisfied beyond reasonable doubt that there was misconduct or careless conduct on the part of the accused in driving the car.

The jury was directed accordingly and Cripps was found guilty.

C

In *The Queen v. Lucas* the undisputed evidence was that the accused drove a motor vehicle down Elizabeth Street in Hobart at about 8.30 p.m. and collided with a stationary motor lorry parked on its correct side near Brisbane Street. The weather was described by witnesses as 'drizzly' and the accused's vehicle was not equipped with windscreen wipers. The impact killed one of the accused's passengers.

In substance the Crown case was that the accused was driving dangerously in that he was driving at an excessive speed and not keeping a good look out (or alternatively had not ensured for himself a good look out).

The accused, who gave evidence on oath, denied driving at an excessive speed, asserted that the street and motor lorry were poorly lit and claimed in effect that he had committed an error of judgment which was in the circumstances excusable. Argument arose after the evidence as to the proper direction to the jury and the judgment delivered by the trial Judge (His Honour Mr. Justice Gibson) was as follows—

Counsel have raised the question of the proper direction to be given to the jury upon a trial on a charge to driving in a manner dangerous to the public, having regard to all the circumstances of the case, contrary to Section 32, subsection 1 of the Traffic Act, 1925. It has been held by the Chief Justice that a judge should direct the jury not only that the accused drove the vehicle in a manner dangerous to the public, but also that the dangerous behaviour of the car was due to some fault on the part of the accused (*R. v. Cripps,* unreported).

With respect I think that the latter part of the direction would be generally unnecessary, and not in accordance with the decision of the High Court in *The King v. Coventry* (1938) 59 C.L.R. 633, where Latham C.J. and Rich, Dixon and McTiernan JJ. in a joint judgment say at pp. 637-8:

'. . . in our opinion, indifference to consequences is not an essential element either of driving in a culpably negligent manner, or of driving at a speed which is dangerous to the public, or in a manner which is dangerous to the public. The driver may have honestly believed that he was driving very carefully and yet may be guilty of driving in a manner which is dangerous to the public. The jury is to determine, not whether the accused was in fact, as a matter of psychology, indifferent or not to the public safety, but whether he has driven in a manner which was dangerous to the public. The standard is an objective standard, "impersonal and universal fixed in relation to the safety of other users of the highway" (per Hewart L.C.J. in *McCrone v. Riding*; and see *Kingman v. Seager*). The standard is impersonal in the sense that it does not vary with individuals, and it is universal in the sense that it is applicable in the case of all persons who drive motor vehicles. No doubt the language of the section does not exclude a defence of mistake of fact on reasonable grounds or of involuntariness (for example, interference by another person with the driving of the car), and perhaps there may be other exceptional excuses, based on special facts, to which a state of mind may not be immaterial. But speaking generally the expression "driving at a speed or in a manner which is dangerous to the public" describes the actual behaviour of the driver and does not require any given state of mind as an essential element of the offence. It is not desirable to attempt to make an exhaustive catalogue of possible defences and what we have said is sufficient to deal with the present case'.

Mr. Justice Starke in a separate judgment, said at pp. 639-40:

'The offence is established if it be proved that the acts of driver create a danger, real or potential, to the public. Advertence to the danger on the part of the driver is not essential; all that is essential is proof that the acts of the driver constitute danger, real or potential, to the public. But whether such danger exists depends on all the circumstances of the case, *e.g.*, the character and condition of the roadway, the amount and nature of the traffic that might be expected, the speed of the motor vehicle, the observance of traffic signals, the condition of the driver's car especially if he knew, for instance, if his brakes were out of order and so forth. Substantially the judgment on appeal accords with this view. Upon a charge of driving at a

speed or in a manner which is dangerous to the public the prosecution is not so much concerned with the state of the defendant's mind as with his conduct. The essence of this charge is the objective fact —the risk of injury to others. And, citing *McCrone v. Riding*, that standard is an objective standard, impersonal and universal, fixed in relation to the safety of other users of the highway'.

The only intentional act on the part of the accused that it is necessary for the Crown to prove is the act of driving. The Criminal Code, Section 13, deals with intention. Subsections (1) and (2) are as follows:

'(1) No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance.

'(2) Except as otherwise expressly provided, no person shall be criminally responsible for an omission unless it is intentional'.

The necessity for proving an intention to drive in a dangerous manner is negatived by the construction put upon a corresponding section in *R. v. Coventry* (*supra*). Matters of defence are indicated in that case in the passage that I have quoted. It will also be a defence to show that the accused cannot be said to be driving at all. As Lord Goddard C.J. said in *Hill v. Baxter* (1958) 1 A.E.R. 193 (at p. 195):

'Suppose he had a stroke or an epileptic fit, both instances what may properly be called Acts of God, he might well be in the driver's seat even with his hands on the wheel but in such a state of unconsciousness that he could not be said to be driving. A blow from a stone or a swarm of bees I think introduces some conception akin to "*novus actus interveniens*".'

Again, it will not be a case of driving dangerously, if the danger arises from some defect in the vehicle of which the driver is unaware, as in the case put by the Chief Justice in *R. v. Cripps* (*supra*). In that case His Honour relied upon a passage in Lord Atkin's speech in *Andrews v. The Director of Public Prosecutions* (1937) A.C. 576 at p. 585 to infer that some degree of negligence involving fault would be required in a case of dangerous driving. The case was an appeal from an order of the Court of Criminal Appeal dismissing an appeal against a conviction for manslaughter, and it was complained that the learned trial judge had wrongly directed the jury that, if the appellant was driving recklessly and in a dangerous manner within the words of Section 11 of the Road Traffic Act, 1930, and it was because of that that a named individual was killed, it was their duty to convict of manslaughter. (The element of recklessness within the statutory meaning can be ignored for the present purpose. See Glanville Williams Criminal Law, General Part, page 97). There was a difficulty, at the time unresolved, that upon one view of the section proof of guilt under Section 11 amounted automatically to the proof of manslaughter (*R. v. Stringer* (1933) 1 K.B. 704), *R. v. Leach* (1937) 1 All E.R. 319). In the course of his speech Lord Atkin said:

'On the facts there would appear to have been a very clear case of manslaughter, and the only question that arises is whether the judge correctly directed the jury'.

He then proceeded to consider manslaughter 'from the point of view of an unintentional killing caused by negligence, *i.e.*, the omission of a duty to take care' and how a high degree of negligence came to be required. Then after discussing the famous formula of *Bateman's* case (1925) 19 C.A.R. 8, and the propriety of using the epithet 'reckless' in motor manslaughter cases, he says:

> 'If the principle of *Bateman's* case is observed it will appear that the law of manslaughter has not changed by the introduction of motor vehicles on the road. Death caused by their negligent driving, although unhappily much more frequent, is to be treated in law as death caused by any other form of negligence and the jury should be directed accordingly.

His Lordship then proceeds to deal with the complications introduced by statutory prescription of the duties of road users. He says:

> 'If this view be adopted it will be easier for judges to disentangle themselves from the meshes of the Road Traffic Act. Those Acts have provisions which regulate the degree of care to be taken in driving motor vehicles. They have no direct reference to causing death by negligence. Their prohibitions while directed no doubt to cases of negligent driving which if death be caused would justify convictions for manslaughter extend to degrees of negligence of less gravity. Section 12 of the Road Traffic Act imposes a penalty for driving without due care or attention. This would apparently cover all degrees of negligence. Section 11 imposes a penalty for driving recklessly, or at a speed or in a manner which is dangerous to the public. There can be no doubt this section covers driving with such a high degree of negligence as that if death were caused the offender would have committed manslaughter. But the converse is not true and it is perfectly possible that a man may drive at a speed or in a manner dangerous to the public, cause death, and yet not be guilty of manslaughter. The legislature appears to recognise this by the provision in the Road Traffic Act of 1934, Section 34, that on an indictment for manslaughter a man may be convicted of dangerous driving. But apart altogether from an inference to be drawn from section 34, I entertain no doubt that the statutory offence of dangerous driving may be committed though the negligence is not such a degree that would amount to manslaughter if death ensued'.

The words are general enough to cover the whole ambit of Sections 11 and 12 of the Act. But His Lordship was considering cases of culpable negligence where, according to the view taken by the jury, the accused might be guilty (if at all) either of manslaughter which involved the element of high degree of disregard for the life and safety of others, or one of the offences under the Traffic Act, 1930, which on the facts, was of the same character, although of less gravity. He was not considering the complete content of the offence of dangerous driving, as such, or the possibility that it might be constituted without fault, in pursuance of the policy of the legislature in attempting to enforce safe standards of conduct on the part of drivers of motor vehicles.

No doubt if there were a 'clear conflict' between the House of Lords and the High Court on this point it might be my duty to apply the

decision of the House of Lords in accordance with *Piro v. Foster* (1943) 68 C.L.R. 313. But I see no clear conflict, and the High Court saw none in *Coventry's* case, where *Andrews's* case was cited by Starke J. If there were, I should have to consider what Coppel A.J. said in *Hobson v. Hobson* (1953) V.L.R. 186.

The divergence of opinion probably has very little practical effect. Most cases of dangerous driving are those in which there is a marked absence of care on the part of the accused, and the present case would not seem to depend on any discussion of the mental element in dangerous driving.

His Honour directed the jury accordingly and, as in *Cripps's* case, the entire burden of proof was placed upon the Crown. Lucas was acquitted.

THE COMPANIES ACT: 1959 MODEL[1]

The post-war economic boom experienced in Australia has brought with it the necessity for a review of existing legislation aimed at regulating the activities of those associations most intimately concerned with, and, in some instances, responsible for such commercial expansion.

In the light of State jealousies and problems peculiar to the several States, it appears unlikely that the Federal Parliament will enact legislation in the sphere of company law notwithstanding the desire for Commonwealth intervention which has been expressed from time to time.[2]

Victoria has led the way in the overhaul of the various State Acts, having enacted a new consolidation which came into force on 1st April this year.[3]

Tasmania has followed this example, as a Companies Bill, having been reviewed by legal practitioners, accountants, business men and the like over a protracted period, has been presented to the present session of Parliament.

The last major consolidation of company law in this State was effected in 1920, and the past two decades have from time to time revealed deficiencies in the legislation, many of which have been remedied in a rather piecemeal fashion.[4]

It is not likely that the enactment of legislation of this type will engender disputes in the political sphere, but it is unlikely that it will be received in the legal and commercial world with unqualified acclamation. To company lawyers, accountants, directors and managers, the worth of the legislation will be somewhat offset by the necessity for a further

---

[1] The observations made in this paper are based upon the Companies Bill, 1959, as lately presented to Parliament. The Companies Act, 1920, will be referred to as the 'Act,' and the proposed legislation as the 'Bill.'

[2] See Wallace, ' Company Law Reforms in Australia,' Vol. 22 A.L.J. 25 at pp. 25 and 32, and 'Notes,' Vol. 26 A.L.J. at 161 and Vol. 28 A.L.J. at 334.

[3] The Companies Act, 1958, No. 6455.

[4] See Acts of 1927, 1939, 1940, 1945, 1946 and 1957.

period of study to make themselves conversant with the new innovations and the re-arrangement of those provisions of the Act which have been retained.

Unfortunately, the writer has been unable to elicit much information as to the circumstances leading to the drafting of the Bill or as to the comments made on the original drafts when presented for review, and even experienced difficulty in obtaining a copy of same. One point which did emerge from enquiries made is that it was a Victorian company lawyer who drafted the Bill—a comparison of the new Victorian Act and the Bill under reference reveals how closely the former has been followed (in content if not in form): specific instances of the adoption of the Victorian precedent will, where significant, appear in the text.

It is to be hoped that this course of action was adopted with reference to the similarity of problems which have arisen in the two States rather than for the sake of convenience and expedition. Whatever the reason, one result should be that companies incorporated in the one State can set up and carry on business in the other without any annoying administrative problems occasioned by a disparity in statutory requirements. If other States besides Tasmania follow the Victorian precedent, the end result, uniformity of company law throughout the Commonwealth, could be achieved without the Federal intervention adverted to above.

A comparison of the Bill with the Act reveals that the former contains important changes both in content and form. There are 324 sections set out in 12 parts, the latter being further subdivided into 32 divisions. The number of schedules has been increased to 10, and these are now utilised for more worthwhile purposes than those to which the five schedules in the Act are devoted.[5]

It is to be hoped that when the Bill is enacted and printed in final form, the comparative table (showing the manner in which 'the provisions of the Companies Act 1920 and of the Companies Act 1927 have been disposed of') at present incorporated in the Bill, will be retained. This would prove of immense value to those who, having dealings with company law, will have to adapt themselves to the Bill, especially as without some form of 'key' the alphabetical index of company law topics contained in the 1936 Consolidation of Public General Acts will be valueless.

The general purpose of the Bill is to give further and better effect to the basic principles underlying company law—relative ease of incorporation, maintenance of company capital, control and publication of company affairs and, through this, adequate protection of the public, creditors and shareholders. Special consideration has been given to shareholders and many of the more important innovations are directed to safeguarding their interests from the machinations of unscrupulous directors and managers. Arising out of this we find that directors and other officers

[5] e.g., they no longer contain memoranda for companies with or without share capital and guarantee or unlimited companies, for which there are precedents in numerous text-books.

have come under very close scrutiny—this statement will be amplified below when the 'chronological' treatment of the Bill brings us to a consideration of their various powers, duties and obligations.

In this paper no attempt has been made to analyse in detail the merits and limitations of the Bill as a whole—its prime purpose is to acquaint the reader with provisions which appear for the first time, and the treatment afforded those sections of the Act which have been perpetuated.

Preliminary

The definition section[6] has been almost doubled in content due to an increase in the scope of the Bill (*i.e.*, to cover companies such as unit trust companies, investment companies and the like) and to the incorporation of many definitions previously embodied within sections of the Act. Holding and subsidiary companies are defined in such a way that (*inter alia*) a company can be a holding company by owning (directly or through nominees) more than fifty per cent. of the issued share capital of its 'subsidiary,' even though the shares held need confer no voting or other method of control on such a 'holding company'.[7] The significance of such a definition will emerge from the text, particularly with reference to company accounts.

Administration of the Act

As the duties of the Company Registrar are to be coupled with those of the Registrar of the Supreme Court, it remains to be seen whether the new powers vested in the Company Registrar as to a demand for the amendment of documents lodged for registration [where, for example, they do not comply with the requirements of the Bill, or contain matters contrary to law] will be fully implemented.[8] If every document presented for registration is to be perused to ascertain its correctness or validity, there will no doubt have to be an increase of qualified staff in the Registry.

Incorporation

The treatment of incorporation has undergone some important alterations. The basic differences between, and the requirements for, the various types of incorporated associations have been more clearly set out, and it is of interest to note that the ambit of the Bill has been extended to include no-liability mining companies.[9] One criticism which can be made of the content of this part is that the information as to the minimum numbers with which one can register and carry on the business of a public,

---

[6] S. 3.

[7] S. 3 (5). The two other 'sensible' definitions extend to cover companies where one company holds shares such as to entitle it to more than fifty per cent. of the voting power, or where it has power (not only by virtue of the provisions in a security [e.g., debenture]) directly or indirectly to nominate or appoint the majority of the directors in the 'subsidiary' company. This latter power does not expressly authorize the holding company to control the exercise of the Board's powers, but it is submitted that the right to remove directors (at least from a public company) achieves this effect. [See n. 56 (infra)].

[8] S. 7 (4).

[9] S. 12 (1) (e).

as opposed to a proprietary, company is not stated affirmatively, but is left to be inferred from s. 30.[10] In this regard it should be noted that one can carry on a public company with five members whereas previously seven was the minimum figure.[11] The provisions relating to proprietary companies are at last inserted in their correct place and not, as heretofore, in a part of the Act dealing with 'management and administration'.[12]

Objects

One startling innovation which should do much to overcome the somewhat anachronistic *ultra vires* rule (and thus afford protection to would-be creditors of the company) is contained in s.15 (4) and Schedule III, which, between them, provide twenty-six 'incidental and ancillary objects and powers' with which any company will be invested. By and large they are stipulations which can be found in any well drawn memorandum of association, but they do show a trend away from the rigid delimitation of objects and powers which has in the past worked injustice on numerous innocent (although somewhat neglectful) third parties.[13] Coupled with this there is a change in the attitude of the legislature to the alteration of 'object' clauses. No longer are there to be specified categories into which an intended alteration must fall before it will receive the sanction of the court.[14] In the Bill the only limitation on the power of a company to alter its objects is the right of 15% of the 'issued' shareholders, or of members where there is no share capital, or debenture-holders, to apply to the court for an order that the determination to alter [passed as a special resolution] be cancelled.[15] Such a system has its demerits in so far as it may be difficult for a far-sighted member to accumulate sufficient adherents to the objection within the twenty-one days allowed, yet it manifests a desire to protect such minority groups.

The wording of section 28 could conceivably be overhauled in an effort to rationalize those cases where members have been unable to enjoin the company to observe the terms of articles of association, when 'individual'

---

10 Which prohibits the carrying on of a company's business with fewer than the statutory minimum of members. In addition to the reduction in members adverted to below, a public company which manages to purchase one hundred per cent. of the shares in a proprietary company in a take-over bid, need not now perpetuate the old fiction of vesting one share in a nominee to keep up the necessary number of members, for the 'taken over' company becomes a 'proprietary company of the prescribed class' which need have but one member, so long as that member is a public company. [S. 30 (2)].

11 The Victorian Act of 1958 (s. 31) reproduced s. 28 of the 1938 enactment which made provision for five members being sufficient for a public company.

12 S. 131.

13 The case usually cited as being illustrative of the effect of the ultra vires rule is re Jon Beauforte (London) Ltd. [1953] Ch. 131, with particular reference to the 'coke dealer.'

14 S. 18 of the Act provides eight categories ranging from 'the carrying on of business more economically . . .' to 'subscribing to funds for charitable . . . purposes.'

15 S. 23. This could raise an interesting problem as to whether a company could effectively ratify that which was initially an ultra vires act under the 'previous' memorandum.

rather than 'membership rights' were in question. The insertion of 'and the company' in the phrase '. . . sealed by each member . . . and contained covenants.' would remove all doubts as to whether registration of 'incorporation documents' does in fact bind the company in favour of members.[16]

Prospectuses and Allotment

Factors relating to the issuing of prospectuses and allotment of shares are subjected to much more detailed analysis than heretofore and the required contents of a prospectus are considerably extended (s. 36 and Schedule V). Persons issuing such documents are now liable to a penalty for the 'wilful non-disclosure of material matter',[17] presumably on the basis that, to the uninitiated, it is as difficult to discern and deal with a half truth as it is with a deliberate untruth. In addition to the obligation imposed on directors to repay application moneys within a specified time[18] upon the failure to receive the minimum amount of such application moneys, directors and officers of the company must treat the cash received as subjected to a trust, and any person failing to treat the money on such basis is liable to a 'penalty of £500'.[19]

One point upon which the rules as to the contents of prospectuses could justifiably be extended arises from a consideration of sections 33 (3) and 36. The former prohibits an allotment unless, within three months of issuing the prospectus, the directors have received the amount of application moneys stated therein as the minimum sum which must be raised by the issue. The latter requires the prospectus to contain a statement that allotment shall take place on a date which falls not more than six months after issue. From a prospective shareholder's point of view it would seem more appropriate to cause a statement as to the 'three month' period to be included, or alternatively for both provisions to be set out in the documents. The possibility of an interregnum could mean that an inexperienced member of the public may leave his claim for the return of application moneys until the expiration of the period within which allotment can take place, only to find a fraudulent promoter has decamped with the funds.

The writer is unable to ascertain the reason why, for the purposes of section 36 (2) (only), the date inserted in a prospectus is to be taken as the date of its 'issue'.[20] Without that limitation, the provision would settle a question which to date has received no definite answer at common law,

---

16 At present the section reads '. . . the memorandum and articles when registered bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

17 S. 41 (1).

18 S. 33 (3) within four months of the prospectuses issue.

19 S. 34 (1) and (2).

20 Under S. 87 (1) of the Act, unless the contrary be proved, the date shall be taken as the date of publication.

namely, when is a prospectus issued?[21] In the absence of such a restriction, however, section 37 would prove an unnecessary trap for honest promoters and directors, for, under its provisions, a prospectus is not to be issued unless it has been registered by the Registrar. Thus if the document is dated prior to the date of the day on which it is presented for registration, it could be maintained that the prospectus has been 'issued' without registration, and further, that the Registrar could not thereafter register it because it does not appear to comply with the Act.

The point is by no means insignificant because numerous periods of time within which certain acts and duties must be performed, date from the date of issue of the prospectus. It may be that the subsection would be more happily worded if it stated that the date is the date of issue 'unless the contrary be proved.'

In addition to the extended civil liability for mis-statements and non-disclosures in prospectuses,[22] prospective promoters and directors should be wary of section 42 which provides for imprisonment for a term of twelve months or a penalty of £500, or both, and further, appears to throw the burden of proving *bona fides* on the accused once the untrue statement or wilful non-disclosure is made out.[23]

Shares

There are some important changes in relation to company capital. Warrants may no longer be substituted for share certificates[24] and, contrary to the common law as expounded in the *Ooregum* case,[25] shares may, under certain circumstances, be issued at a discount.[26] The requirements of the Bill ensure that any consequent diminution in the nominal capital will be publicised and have to be sanctioned by the court. Unfortunately, nothing has been done to overcome the other methods whereby shares may be issued at a discount, namely, by the payment of commissions to persons subscribing or procuring others to subscribe for shares, and by the issuing of shares for consideration other than cash. Shares may be issued at a premium[27] without the ridiculous restriction placed upon the procedure by s. 27 of the Act, *i.e.*, only where a company has been carrying on business for more than twelve months. To provide for a possible

---

21 See, e.g., the rather indecisive comments made in Nash v. Lynde [1929] A.C. 158.

22 See note 17 supra.

23 Where in a prospectus there is an untrue statement or wilful non-disclosure any person who authorized the issue . . . is guilty of an offence . . . unless he proves either that the statement or non-disclosure was immaterial or that he had reasonable ground to believe and did . . . believe that the statement was true or the non-disclosure was immaterial.

24 As they can under S. 44 of the Act.

25 Ooregum Gold Mining Co. of India v. Roper [1892] A.C. 125.

26 S. 48. The most important restriction placed upon this power to issue discounted shares is contained in S. 48 1 (c) which precludes such an issue within twelve months of the date on which the company was entitled to commence business.

27 S. 49.

increase in the use to which this section will be put, the legislature has provided more detailed rules as to the application of the 'share premium account' which comprises the proceeds of such an issue.[28]

A passing reference must be made to the omission from the Bill of what was section 47 of the Act, which permitted a company to return paid-up capital (with a consequent increase in the amount unpaid on shares) out of undivided profits. Such a course of action could not be categorized as a reduction of capital but was a useful adjunct to the power of a company to rid itself of capital in excess of its wants.

Class Rights

Special provision has been made for the protection of shareholders in relation to the question of variation or abrogation of class rights.[29] Notwithstanding the power of a specified proportion of the holders of the class of shares affected to consent to a variation or abrogation, not less than fifteen per cent. of the holders of that class may apply to the court to have the variation or abrogation cancelled. The section goes one step further than its English counterpart[30] in so far as it provides that a member, having voted for the resolution on information provided, may join in with those making the application for cancellation if he discovers that material information was not fully disclosed.[31] The test upon which the court is to base its deliberations is broadly defined as one of 'unfair prejudice (to) the shareholders'. The section has done nothing to define what is a 'variation' or an 'abrogation', although the questions are not free from difficulty.[32]

Presumably section 54 is not to be regarded as obligatory in all respects and that the cumulative and/or participating nature of preference shares is still to be decided in accordance with the rules laid down from time to time by the courts.[33]

Section 55 has perpetuated the practice of prohibiting company capital being used to assist individuals in their purchase of the company's shares (or shares of its holding in a subsidiary company, as the case may be). The writer suggests that to complete the picture there should be a further prohibition [comparable with that contained in section 27 of the English Act of 1948] on the purchasing by a subsidiary company of shares in its holding company.

---

[28] S. 49 (2): May be applied (inter alia) in issuing paid-up shares as fully paid bonus shares, paying dividends in the form of issued shares, writing off preliminary expenses or redeeming debentures or preference shares.

[29] S. 53.

[30] S. 72, Companies Act, 1948.

[31] S. 53 (2).

[32] e.g., Greenhalgh v. Anderne Anemas Ltd. (1946) 1 All E.R. 512, and White v. Bristol Aeroplane Co. (1953) Ch. 65 and the cases therein reviewed.

[33] S. 54. 'No company shall allot any preference shares . . . unless there is set out in its memorandum or articles, the rights of the holders . . .' (as to capital, dividends, whether cumulative, participating, etc.). Gower devotes two pages to a summation of the 'various canons of construction which are adopted' with reference to such shares. See 'Modern Company Law,' Ed. II pp. 341-343.

Debentures

Debenture and debenture-stockholders are afforded more adequate protection in so far as the company is under more stringent duties to keep the trustees and holders informed as to company affairs.[34] Holders of at least one fifth in value of the issued debentures are empowered to convene a meeting for the purpose of considering accounts of the company and to give to the trustees directions,[35] and thus, if the terms of the debentures so provide, play a more active part in the administration of the debtor company.

Unit Trusts

Section 62 bears close scrutiny at this stage, for no similar provision has yet appeared in a Tasmanian Companies Act. It relates to unit trusts, a relatively new star in the commercial firmament.[36] They differ from investment companies in so far as the purchasers of 'rights and interests' are not shareholders in the 'managing company' but derive their income from the proceeds and produce of a trust fund, the corpus of which consists of shares in various other companies, such shares being purchased by the 'managing company' and vested in a trustee.[37] The section ensures that the trustee will be able to scrutinize the conduct of the 'managing company' and to see that it is being carried on 'in a proper and efficient manner.' The trustee is likewise subjected to restrictive rules of conduct the sum total of which should adequately safeguard any investor.

Unit holders may convene a meeting to peruse accounts and dictate the policy of the managing company in relation to the exercise of its voting power at an election of directors of a company the shares of which are held under the scheme.[38] One would have thought that if the unit holders were to be given a say on that question, they would have been given the right to dictate the votes of the managing company in such other companies on *all* matters of policy. It would seem that the company whose shares are held under this scheme cannot confer such a right on the unit holders.[39]

---

[34] S.S. 57-61.

[35] S. 61 (2) (c). The trustees may also apply for a court order that a meeting of the holders of debentures be held to 'consider any matters in which they are concerned and advise the trustees thereon . . .' [S. 61 (6)].

[36] 'The total amount invested throughout Australia in such kind of trusts appears to be a large one. One witness gave the figure as approximately £20,000,000 and another . . . about £30,000,000'. See McLelland J. in Aust. Fixed Trusts v. Clyde Industries (1959) S.R. N.S.W. at 41.

[37] It is of interest to note that the trustee may be an individual, whilst in England only a company is permitted to fulfil that function. See Prevention of Fraud (Investments) Act, 1939, S. 16 (1) (d).

[38] S. 62 (10) (d).

[39] Aust. Fixed Trusts v. Clyde Industries (1959) S.R. N.S.W. 33.

Title and Transfers

The necessity for the comprehensive index referred to above is illustrated by the separation of 'member registration' from 'title and transfers', heretofore dealt with in Part III of the Act. We now find that reference is made to the registration of share-transfers[40] some fifty-six sections before the necessity for a register of members[41] is adverted to. We also find (no doubt to avoid repetition) that the Bill sets out in precise terms the rules relating to the form of share certificates[42] and to the certification of transfers,[43] etc., prior to the provision making it mandatory for a company to issue such share certificates upon allotment or transfer.[44]

Certification on Transfer

An attempt has been made to sheet home responsibility to the company where an innocent third party has been defrauded, by him having placed reliance upon the certification by a negligent company official as to the *prima facie* title to shares or debentures vested in an intending 'transferor'.[45] Whether the section will have the desired effect is problematical, for it appears that the obligation to establish authority in the 'certifying' official falls upon the injured 'transferee'.[46]

Charges

The list of charges upon company property which have to be registered in order that they might not be rendered void as against the liquidator and any creditor of the company has been extended, and now includes (*inter alia*) a charge on any ship or share therein, and goodwill, patents, copyrights or trade marks.[47] For some reason, a mortgage constituting a charge solely on land does not have to be registered.[48] Once again it may be explicable on the basis of a slavish duplication of the new Victorian Act, in regard to which it is to be noted that the equivalent section[49]

---

[40] S. 67.

[41] S. 113.

[42] S. 65 (2).

[43] S. 69.

[44] S. 70.

[45] S. 69 (1). 'The certification by a company of any instrument of transfer of shares or debentures shall be deemed to be a representation by the company . . . that there have been produced to the company such documents as on the face of them show a prima facie title . . . in the transferor . . . (2) Where a person acts on the faith of a false representation by a company made negligently, the company is under the same liability to him as if the certification had been made wilfully'.

[46] Subs. (4) (b) (i) and (ii). '. . . the certification . . . deemed to be made by a company if — person issuing . . . is a person authorized to issue . . . and certification is signed by a person authorized to sign'.

It is submitted that once the certified instrument goes out under the hand of any company official the onus of proving lack of authority should fall upon the company.

[47] S. 71 (3) (a)—(g).

[48] S. 101 (1) (iv) of the Act reads 'a mortgage or charge on any land, wherever situate or any interest therein . . . shall be void . . . unless . . . registered'.

[49] S. 72 Companies Act, 1958 No. 6455.

perpetuates a section of the Victorian Act of 1938,[50] which omitted a reference as to the necessity for registering such a charge. An obvious gap in the Act has been remedied by the requirement for registration of charges extant on property at the time of purchase by the company.[51] Whether or not there has been a prevalent practice in such dealings is beyond the knowledge of the writer, but the section will no doubt ensure that company property be not encumbered to an extent whereby it becomes valueless to creditors and shareholders without the fact being given due publicity.

Directors

As alluded to above,[52] directors and other officers have come under very close scrutiny, and there is now a division relating solely to these persons. Besides stipulating the minimum number of directors with which public and proprietary companies can carry on business,[53] the Bill also precludes certain 'types' from assuming such an office. An undischarged bankrupt who accepts a directorship without the previous consent of the court runs the risk of a fine of £500, imprisonment for six months, or both,[54] and an individual against whom an order has been made by the court on the grounds of fraudulent promotion, management, etc., in relation to another company, assumes office under the risk of a similar penalty, if the duration of the term set by the order has not expired,[55] or he has not obtained the leave of the court.

Statutory authority has been given to public companies to remove directors from office,[56] although the right of action for damages which arises upon such a removal has not been abrogated.[57] Such companies will have to ensure that this provision be not rendered innocuous by the directors entrenching themselves in office with highly remunerated contracts of service. 'Ticket voting' has been prohibited and a motion for the appointment of two or more persons as directors of a public company by a single resolution will be of no effect and a resolution passed with reference thereto rendered void, unless the meeting has previously agreed to such a course of conduct without any vote being given against it.[58]

---

[50] S. 79 Companies Act, 1938 No. 4602.

[51] S. 73.

[52] pp. 304-305.

[53] S. 83 (1). A public company shall have at least three directors and a proprietary company shall have at least one director.

[54] S. 86 (1).

[55] S. 90. The prohibition period stipulated by the order shall not exceed five years. Why such a person shall be deemed to have 'reformed' after five years is beyond the writer's comprehension.

[56] S. 89. By ordinary resolution made on 28 days notice (i.e., special notice as defined by S. 106). The English equivalent to this section (S. 184) draws no distinction between public and proprietary companies in this regard. [As to the importance of this dictinction in relation to the definition of a holding company see n. 7 supra].

[57] S. 89 (7).

[58] S. 87. The necessity for such a provision seems somewhat doubtful, but it is no doubt designed to give a greater amount of freedom to 'small' shareholders in electing the principal officers of the company.

One of the most interesting of the new provisions in the Bill is that contained in section 93.[59] The first paragraph appears to be a paraphrase of Rower J.'s judgment in *re City Equitable Fire Insurance Co.*[60] The following paragraphs are more extensive in ambit—so extensive, in fact, that the generalities they contain could be construed as covering a 'multitude of sins.' Time alone will give content to the phrases as to what is an 'improper advantage', a 'detriment to the company', a 'breach of the foregoing provisions', 'profit made by him' or 'damage suffered by the company'. The obvious intention of these paragraphs is to prohibit directors and officers with inside information (*e.g.*, as to prospective 'take over bids') from capitalising on their position at the expense of the 'ignorant' shareholders, and, contrary to the principles enunciated in *Percival v. Wright*,[61] to bring directors and officers into a quasi-trustee-beneficiary relationship with members of their company. As a further limitation on the secrecy of dealings by directors, the writer suggests that the English precedent of requiring a separate register of director share and debenture holdings should be followed.[62] At the moment, the Bill seems to stop half way, at a point following the provision regarding the disclosure of the holding of any office or the possession of any property 'whereby either directly or indirectly, duties or interests might be created in conflict with his duties or interests as director'.[63]

Meetings

This division does not contain much new material, and many of the provisions, as in the Act, commence with the words, 'So far as the articles do not make other provisions in that behalf'. Provision has been made whereby a wholly owned subsidiary of a public company[64] can comply with the requirements as to meetings through the minutes of a duly authorized officer of the holding company.[65]

The court is given power to order a meeting of a company 'when for any reason it is impracticable to call a meeting in any manner in which meetings may be called or to conduct the meeting in manner presented by the articles or this' Bill.[66] This provision is similar to the section of the English Act which enabled the court to order a meeting at which one member (out of the four) was to constitute a quorum.[67]

---

[59] Subs. (1). 'A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.'

[60] [1925] Ch. 407.

[61] [1902] 2 Ch. 421.

[62] S.S. 195 and 196. Companies Act 1948.

[63] S. 92 (5).

[64] See note 10 (supra).

[65] S. 103 (3) and (5).

[66] S. 104.

[67] Re El Sombrero (1958) 3 All E.R. 1.

The old distinction between special and extraordinary resolutions has been abolished and matters heretofore required by the company's articles to be done by the latter method may be done by a special resolution.[68] It is also possible for a majority (holders of 95% of the total voting rights) to attend to business of which less than the specified notice (twenty-one days) has been given.[69] As an additional safeguard to shareholders in relation to publication of proceedings at meetings, section 110 permits inspection of minutes of such proceedings by any member, and imposes an obligation on the company to deliver copies of same when called upon so to do.[70]

Share Register

The division dealing with 'register of members' evidences an attempt, long overdue, to facilitate ease of access to records of shareholdings. The requirement for an indexed register 'to enable the account of (that member) in the register to be readily found,[71] is most certainly a step in the right direction.

Annual Returns

Annual returns have not been affected in any major respect, but one omission from the Act[72] is the power of a company to file a certificate of 'no alteration' in lieu of such return. This would be of great assistance especially to the small 'family-type' companies in which there is infrequent fluctuation in membership, capital borrowings or directorships.

Arrangements and Reconstructions

Tasmania, of late, has seen many instances of the manner in which large companies can effectively take over smaller concerns. The procedure whereby such schemes are effected should be, and of late have been, subjected to rigid control. In 1957 the Act was extended to include provisions relating to 'arrangements and reconstructions', provisions which have been even further enlarged in the Bill. It would appear that Tasmania has now reached the stage of awareness that was achieved in the United Kingdom some eleven years ago. Particular note should be taken of the new section which makes it obligatory for directors and trustees for debenture-holders to disclose any 'material interest' in a proposed compromise or arrangement to a meeting of creditors or members as the case

---

68 S. 105 (1) and (5).

69 Subs. (2).

70 Coupled with S. 82 (publication of registers, minute books or documents) and S. 135 (delivering of copies of profit and loss accounts and balance sheets to members before annual general meeting), this provision ensures that members have an opportunity to make themselves conversant with current transactions even when, for some reason, they have been unable to attend meetings.

71 S. 114. The index must be amended within 14 days of an alteration in the register of members, under pain of a fifty pound, and a default, penalty.

72 S. 34 (3).

may be.[73] Additional provisions now regulate the position where a company offers to purchase the shares of another company where it, the intended purchaser company, already holds more than ten per cent. of the shares of the class concerned in the offer. The calculation of the ninety per cent. of shareholders, whose consent is necessary before the transferee company can compulsorily buy out dissentients, is now to be made without reference to the shares held by the company at the time of the offer.[74]

Oppression

At the risk of appearing unnecessarily repetitive, the writer feels that some prominence should be afforded the section which, *par excellence*, safeguards shareholders from oppression. By virtue of this section[75] a member may apply to court with a complaint that the affairs of the company are being conducted in a manner oppressive to members (including himself) of the company. If satisfied that the conduct alleged would found a petition for a winding-up of the company on the basis of 'justice and equity', yet that a winding-up would unfairly prejudice the members oppressed, then the court may 'make such order as it thinks fit whether for regulating the conduct of the company's affairs in future or for the purchase of the shares of any member by other members or by the company (with a consequent reduction in the company's capital) or otherwise'. The provision follows s. 210 of the English Companies Act which to date has not been litigated to any great extent.[76] According to a Northern Ireland Committee of Inquiry into Company Law reform,[77] the requirements of the English s. 210 place too great a burden on the applicant in so far as the cases indicate that he has to show a 'lack of probity akin to fraud'. The Committee suggested that the sole test be an exercise of power 'in a manner oppressive' or 'in disregard of the (shareholders') interests'. One further suggestion was made that applications under the section should be heard in chambers, in order that undue publicity might not prejudice the future existence of the company.

The Tasmanian section does not go as far as its English equivalent in that it fails to provide for the compulsory registration of a copy of the

---

[73] S. 125 (1) (a).

[74] S. 127 (1) and (2). There has been a refinement added to what is S. 130 (B) of the Act, in that where more than ten per cent. of the shares in question are held by the transferee company, the right to acquire dissentients' shares does not arise unless (1) the same terms are offered to all shareholders and (2) the shareholders who accept represent not only ninety per cent. in value (other than those already held) but also 'three fourths in number of the holders of those shares.'

[75] S. 128.

[76] Cases which have come before the court so far are re Harmer [1959] 1 W.L.R. 62, Elder and Os. v. Elder and Watson [1952] S.C. 49, Scottish Co-op. v. Meyer [1958] 3 All E.R. 66, and re Antigen Laboratories Ltd. [1951] 1 All E.R. 100. It should be noted that the subject heading to S. 210, 'Minorities,' is misleading, for the section is in no way confined to a question of numbers.

[77] Delany in 22 Mod. L.R. 304, at p. 308 (1959).

order.[78] As an order made under the section can 'add to or alter' the memorandum and articles, and, without the court's sanction, no further amendment can be made by the company inconsistent with the order, such a requirement is of prime importance. No doubt s. 16 (2) (which stipulates that the company must file with the Registrar an office copy of any order or resolution affecting the memorandum within 21 days) will ensure registration of any order affecting that document, but if the company is to continue, the order will most likely relate to the articles of association.

Accounts

On the point of company accounts the writer is unable to offer any constructive comment as it is a subject more for the accountant than the law research student. Whether a 'professionally' unqualified shareholder will be more adequately safeguarded than under the Act is a question beyond the competence of the writer, but one topic worthy of consideration is the new power of directors to present to the general meeting a balance sheet and profit and loss account made up to any date not more than six months prior to the meeting.[79] It would appear to give an unnecessary opportunity, to those with such an inclination, to withhold topical information from the meeting, the antithesis of the principle underlying the requirement that such reports and information should receive due publicity and scrutiny by those most intimately concerned. The 'true and fair view' of the state of the affairs of the company as at the end of the period of accounting could, theoretically, bear no relation to the state of affairs as at the date of the meeting.[80]

A trend in the opposite direction is indicated by the requirement that the profit and loss account, as well as the balance sheet, must be presented to the annual general meeting and forwarded to all persons entitled to attend that meeting.[81] It is perhaps unfortunate that the persons interested in the finances of the company do not receive more than seven days notice as to the contents of these reports in order that they might more thoroughly review such important documents. In England the period is 21 days.[82]

The required contents of accounts to be laid before the general meeting have been extended to cover particulars of loans made to officers of the

---

[78] S. 210 (3). 'An office copy of any order under this section altering or adding to, or giving leave to alter or add to a company's memorandum or articles, shall within fourteen days after the making thereof, be delivered by the company to the registrar of companies for registration. . . .'

[79] S. 131 (1). This may be extended by the registrar if he thinks fit (Subs. 2). The equivalent English section (S. 148) goes even further in this regard and permits a period of nine months.

[80] 'True and fair' appears to be the all-important test in relation to the contents of financial reports—the phrase is used four or five times in this division.

[81] Under the Act only the balance sheet was required (S. 116 (2) (ii) and (iii).

[82] S. 158 (1) Companies Act, 1948.

company or to persons who subsequently become officers of the company.[83] This should place a curb on directors voting themselves loans on dubious securities without the circumstances of the transaction being publicised, but it is to be noted that loans to 'employees' (nowhere defined) need not be publicised if the amount of *the loan* does not exceed £2,000 and the directors certify that it is, or is about to become, the practice of the company to make such loans.[84] It is suggested that the word 'employees' should be defined so as to exclude 'officers' of the company, and that it should be the aggregate of *loans* made during the financial year (if they exceed £2,000) which should be the determining factor as to whether details of the transactions should be publicised.

Schedule IX contains a more detailed list of the information required to be set out in profit and loss accounts and the annual balance sheet. A point worthy of note is the necessity for the publication of a separate profit and loss account and balance sheet for each subsidiary company with the holding company's financial reports, or where circumstances warrant a consolidated profit and loss account and balance sheet of the companies eliminating all inter-company balances.[85] This seems to be another tear in the 'veil of incorporation', but whether it will be of practical significance from the point of view of shareholders or creditors has yet to be determined.

The requirement for a directors' report to be attached to a balance sheet, containing information as to dealings of an abnormal character (such as a change in accounting principles, transfers to or from reserves, writing off of bad debts, etc.) coupled with the necessity for the publication of loans made to directors and officers, will do much to ensure that such officers do not have unreasonable opportunities to make away with company funds, or to recommend the payment of dividends in such circumstances as to diminish the company's capital.

Inspection

The control over the appointment of inspectors to investigate the affairs of a company has been, since 1920, vested in the court, but under the Bill is now to be vested in the Governor.[86] This is yet another instance of the Victorian example being followed without heed being paid to local conditions and customs—the 1938 Victorian Act had already made provision for the vesting of such power in the Governor-in-Council,[87] a provision which has been perpetuated in the 1958 enactment.[88] However, the substantive provisions have been extended and debenture-holders now possess the right to apply to the Governor for the appointment of an inspector.[89]

---

[83] S. 133.
[84] Subs. (2) (a) and (b).
[85] Schedule IX 3 (1), (2) and (3).
[86] S. 141 (1).
[87] S. 136 Companies Act, 1938 No. 4601.
[88] S. 144 Companies Act, 1958 No. 6455.
[89] S. 141 (1) (a).

Coupled with the right of a specified minority of members to make application for such an appointment,[90] the section provides yet another bulwark against oppression and can result in an order being made under s. 128. Not only can the inspectors inquire into the affairs of the company under reference—they can also investigate the affairs of any other body corporate which is, or has been, a holding company or subsidiary of the first mentioned company.[91]

It is important to note that the Attorney-General may institute proceedings in the name of the company to recover damages for fraud, misconduct and recovery of property misapplied or wrongfully retained, should the inspection reveal that such misfeasances have been committed.[92] Precisely what weight would be given in subsequent proceedings to the contents of such a report is certainly not made clear and it is presumed by the writer that the facts upon which the Attorney-General relied will have to be proved independently to the court.

Special Investigations

At first sight the separate treatment of 'investigations' appears to be an unnecessary corollary to the provisions dealing with inspections, but on closer analysis the basic difference appears to be the lack of necessity for an application to be made before an appointment of inspectors will be made. The Attorney-General must 'satisfy himself that a *prima facie* case has been established that it is necessary for the protection of the public or of the shareholders or creditors of the company that the affairs of the company should be investigated under this division.[93]

Had the legislature any real interest in protecting the public, one would have thought that the Bill would contain provisions whereby the identities of those who really control companies could be ascertained. By the use of nominees and proxies, control and influence of company policy can be exercised by persons the identity of whom often remains unknown to members, let alone the public. Imperial legislation has been enacted on this point,[94] although in England, with its anti-monopoly policy, the need is greater.

Receivers and Managers

Provisions dealing with the appointment, the publication of such an appointment, and the remuneration, powers and duties of receivers and

---

[90] Subs. (1) [one tenth of the shares issued, or where there is no share capital, one fifth in number of members].

[91] S. 143 (1). This could entail a preliminary investigation to determine whether the relationship of holding and subsidiary company exists [especially in relation to nominee shareholders. See note 7, supra].

[92] S. 141 (6).

[93] S. 144 (3).

[94] S. 172 Companies Act, 1948. The framers of the Bill were obviously aware of this anomaly, having made provision that 'director' includes . . . any person in accordance with whose directions or instructions the directors of a foreign company are accustomed to act'. [S. 3 (1)].

managers are amplified and should provide adequate safeguards for those whose positions are likely to be jeopardised or affected by such appointments.[95]

Winding-Up

Winding-up can no longer be effected under the supervision of the court. The grounds upon which a company may be wound up *by* the court have been extended to (*inter alia*) cases in which the directors have acted 'in the affairs of a company in their own interests rather than in the interests of the members as a whole, or in any other manner that appears to be unfair and unjust to other members'.[96] This would appear to be an appropriate reason for the removal of such an officer, the appointment of an inspector, or intervention by the court under s. 128, rather than for the winding-up of the company.[97]

The powers of liquidators have in the main been retained athough subjected to a good deal of re-arrangement. We now find the section dealing with the appointment of a committee of inspection to act with the liquidator,[98] positioned after the section relating to the release of the liquidator upon fulfilment of his allotted tasks and the making of a final distribution.[99]

Voluntary Winding-up

There are some important innovations in the rules regulating voluntary winding-up. The first of these enables a director, within a period of five weeks prior to the resolution (by the members) to wind-up the company, to make a declaration that in his opinion the company will be able to discharge its obligations within a period of not more than twelve months.[100] The significance of this provision can be gleaned from the marginal notes to the sections distinguishing between a member's and a creditor's voluntary winding-up, and by reference to Division I of this Part wherein is found a definition[101] of the two types of voluntary windings-up referred to above. It appears that if a declaration is made, the company has the right to appoint the liquidator who thus remains free from the creditors' control. To prevent directors from attempting to

---

95 S.S. 149-156.

96 S. 163 (1) (g).

97 The other ground included for the first time appears to the writer unnecessary. Subs. (1) (h) empowers the court to order a winding up if ' an inspector has, under this Bill, reported that he is of opinion that the company cannot pay its debts and should be wound up.' Why should this rather vague criterion be included when Subs. (2) provides sufficient material for determining when the company is, in fact, incapable of paying its debts?

98 S. 187.

99 S. 186.

100 S. 209.

101 S. 157. 'Creditors voluntary winding up' means a winding up in a case where a declaration under section 209 has not been made. 'Members voluntary winding up' means a winding up in a case where a declaration under section 209 has been made.

conceal their own defaults by utilising s. 205, or from making such a declaration in a capricious manner, severe penalties are imposed if it be found that the declaration was made without 'reasonable grounds', and further, that failure to pay the debts within the specified time raises a presumption that such grounds did not exist.[102] Creditors are not left 'out on a limb' as it were, for they have the right to appoint a committee of inspection without first having to apply to court for permission to do so.[103]

Sales for Shares

In relation to the power vested in liquidators to sell the undertakings of the company for shares,[104] one cannot help but notice the deletion of subsection (2) of s. 194 of the Act, whereby the agreement for such a sale was binding on the members. It could be that a member who objects to the proposed sale can proceed, under s. 128, instead of being left with the rather 'negative rights', either to request the liquidator to refrain from effectuating the sale or to purchase his shares at an agreed price.

Provisions 'applicable to every winding-up' have been amplified, and in particular a liquidator has the power to disclaim onerous property upon receipt of the court's sanction[105]; (a person injured by the operation of this power is not left without remedy for he is entitled, as a creditor, to prove the amount 'disowned' as a debt in the winding-up[106]). This provision, coupled with those in ss. 231 to 237, provides for the maximum of company property to remain available for the payment out of creditors, and (*inter alia*) specify and provide penalties for such offences as the keeping of assets from the hands of the liquidator, falsification of records, defrauding creditors and fraudulent trading. On the point of dissolving companies, we now find that the Registrar, in whom outstanding interests in land and outstanding chattels vest upon a dissolution, does not have to pay the proceeds of realization thereof into the Supreme Court. Precisely what is to happen to any such fund is not made clear—under the Act, after six years any undistributed surplus passed to the credit of Consolidated Revenue,[107] but no similar provision is made in the Bill, notwithstanding that the Registrar has to keep detailed accounts of such moneys and the sums are subjected to a trust for the purposes of s. 48 of the Trustee Act, 1898.[108]

No-Liability Companies

For the first time no-liability companies are provided for under a general Companies Act. Previously such concerns have been governed by the provisions of the Mining Companies Act of 1884.

---

102 S. 209 (3).
103 S. 214.
104 S. 219.
105 S. 230.
106 Subs. (8).
107 S. 232.
108 S. 255.

In general the provisions of this latter Act have been transposed into the Bill—one point worthy of note is the protection afforded the minority groups, for directors now have to publicise their reports and a proposed distribution of surplus assets, on a cessation of business without a winding-up, or upon a winding-up within twelve months from incorporation, may be contested upon the application to court 'of any person appointed in that behalf in writing by the holders of not less than 15% of the shares in the company.[109] The legislature has seen fit to place a curb upon promotions of such companies in that it has provided that notwithstanding the provisions of the memorandum or articles, no 'preference' is to be given vendors and promoters in the event of a winding-up.[110] This appears to be an unjustifiable provision, particularly in cases where, upon a winding-up, it appears that there are absolutely no grounds for imputing dishonesty or fraudulent dealings to the original promoters of and vendors to the company.

Investment Companies

The treatment of investment companies is of particular interest, as previously they have received no special consideration. Any company engaged in 'marketable' security speculation for revenue and profit purposes (but not for purposes of exercising control) may on application be proclaimed as an investment company, and in addition the Governor may make such proclamation on his own motion.[111] Being subject to the restrictions outlined below, such a proclamation may amount to a somewhat dubious advantage. Limits are placed on the amount which an investment company may borrow and also in the manner capital borrowings may be borrowed.[112] The investments to which a proportion of the net tangible assets may be devoted are likewise restricted,[113] and in particular it should be noted that investment in another investment company is absolutely prohibited.[114] The Bill prescribes that the articles (?) must set out the type of security in which it is among the *objects* of the company to invest and whether it is among the *objects* of the company to invest within or outside Australia or both.[115] The Bill has made mandatory that which is usually contained in the documents of incorporation

---

109 S. 278 (2).

110 S. 278 (1) ['If a company ceases to carry on business within twelve months after its incorporation, on a distribution of assets shares issued for cash to the extent of the capital contributed by subscribing shareholders, rank in priority to those issued to vendors and promoters, or both, for a consideration other than cash] and see S. 279.

111 S. 282 (2).

112 S. 283 (1). No investment company shall borrow a greater amount than an amount equivalent to fifty per cent. of its net tangible assets, and of the amount so borrowed a greater amount than an amount equivalent to twenty-five per cent. of its net tangible assets shall not be borrowed otherwise than by the issue of debentures.

113 S. 284. No more than ten per cent. of its net tangible assets in any one company.

114 S. 287 (a).

115 S. 286.

of such a company, namely, that profits and losses occasioned by purchases and sales of securities are not to be distributed in the form of dividends, but are to be carried to an 'investment fluctuation reserve' (out of which income taxation may be paid).[116] This provision should ensure that 'circulating capital' will be maintained and not returned to the shareholders, thereby reducing the capital fund upon which creditors of the company rely in extending credit.

Foreign Companies

This important topic has been split up into two divisions, the first entitled 'Foreign Companies with places of business in this State', the second 'Foreign Companies Prospectuses'. The increase in the number of sections dealing with the topic has been occasioned by the subdivision into more readily accessible, and more intelligible, sections than the provisions contained in the Act.[117] It should be obligatory for such companies to make as detailed a publication of their affairs as those concerns locally incorporated, yet we find that 'reduction of capital' is not one of the matters as to which a foreign company must file a return.

Local creditors and would-be investors are protected against a foreign company trading with the fact of limited liability concealed, or publishing a prospectus without disclosure of relevant facts; why should the all-important question of capital be overlooked? The fact that a return has to be made as to an alteration in the foreign company's memorandum or articles, as well as an increase in nominal capital,[118] acknowledges the fact that such a company's documents of incorporation need not in every case include a statement as to capital, and thus acknowledge any reduction thereof when same occurs.

Enforcement of the Act

The final part of the Bill is devoted to a consideration of points relating to 'enforcement' of and 'offences' under the Bill. Considerable space has been saved throughout the Bill by discontinuing, in appropriate cases, the practice of itemising each penalty for the offences outlined—now the words 'default penalty' are substituted and in s. 319 we find that such a penalty involves a fine of £10 per day. This is a practice obviously adopted from the Imperial precedent.

Schedules

The contents of the schedules are too detailed to permit a more than cursory mention. The first sets out the Acts repealed and affected by the Bill, whilst the second itemises the fees to be paid to the Registrar.[119] Schedule III contains the fundamental and ancillary objects and powers adverted to above, and Schedule IV, Part I, consists of what will be

116 S. 290.

117 S.S. 264-266.

118 S. 294 (1) (a) and (2).

119 The content of this Schedule is summed up in a cryptic comment appearing in an explanatory note to the Bill: 'these fees have been greatly increased.'

'Table A' for companies incorporated under the Bill.[120] Part II of this schedule sets out a 'Table B' for a no-liability company. Schedule V itemises the required contents of a prospectus. Statements in lieu of prospectuses will be quite comprehensive documents, according to the provisions of Schedule VI, and much detail is required of a unit trust company as to the statement required under Schedule VII (this statement taking the place of a prospectus). Annual returns and accounts are dealt with in Schedules VII and IX respectively, and the Bill concludes with Schedule X which is devoted to foreign company 'forms' such as the agent's declaration and the certificate of registration given by the Registrar.

John A. Munnings.

CONFERENCE ON THE LAW OF THE SEA

The United Nations Conference on the law of the sea was held at Geneva from 24th February to 27th April, 1958, at which 86 states were represented in a discussion of draft articles prepared by the United Nations International Law Commission. Pursuant to the General Assembly Resolution of 21st February, 1957, the Conference examined 'The law of the sea, taking account notably of the legal but also of the technical, biological, economic and political aspects of the problem . . .'

When the texts of the various conventions[1] produced at the Conference were released to the world, public opinon seemed to be that the entire Conference was a failure. This misconception probably arose from over emphasis of the so-called 'political aspects of the program'. In fact, with a few important exceptions such as the width of the territorial seas and questions of fishing rights, the Conference achieved what amounts to a codification of the recognised law of the sea for times of peace. Most criticism centred around the lack of agreement on the width of the territorial sea, a controversy which still remains.

The Conference embodied its work in four conventions, one protocol and nine resolutions. The conventions dealt with (a) 'The Territorial Sea and Contiguous Zone', (b) 'The High Seas', (c) 'Fishing and the Conservation of the Living Resources of the High Seas', (d) 'The Continental Shelf'. An optional protocol concerning the compulsory settlement of disputes was open for signature, together with the conventions, until 31st October, 1958. All were subject to ratification by each signatory and each convention became effective among the ratifying parties only after it had been ratified by twenty-two of the signatory nations.

The Conference formed five Committees, one on each convention and a fifth which considered the recommendation of a preliminary conference on landlocked states, held at Geneva from 10th to 14th February, 1958.

---

120 Modelled on the third Schedule to the Mining Companies Act, 1884.

1 (1958) 4 A.J.I.L. 830.

In its resolution convening the Conference[2] the General Assembly referred the Conference to the Report of the International Law Commission covering the work of its eighth session as a basis for consideration of the various problems involved in the development and codification of the law of the sea, and also to the verbatim records of the relevant debates in the General Assembly. The Conference also had before it the comments by Governments on the 'Articles Concerning the Law of the Sea' prepared by the International Law Commission and preparatory documentation prepared by the Secretariat of the United Nations, by certain specialized agencies and by independent experts invited by the Secretariat to assist in the preparation of this documentation.

CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE

The first Committee was allotted the task of examining the International Law Commission's draft articles on the territorial sea and contiguous zone. In general the articles deal with the definition of the territorial sea; the measurement of the breadth of the territorial sea; the straight baseline method for drawing baselines along a deeply indented coast; a non-specific definition of the outer limit of the territorial sea; the definition of a bay and its enclosure by straight baselines; the incorporation of roadsteads in the territorial sea; islands in the territorial sea; the right of innocent passage in the territorial sea; criminal jurisdiction of coastal states in relation to foreign ships in territorial waters; freedom of foreign ships from the civil jurisdiction of the coastal state in relation to persons on board; rules applying to the passage of warships through the territorial sea, and rights in a contiguous zone extending 12 miles from the coast. The articles as finally agreed became the Convention on the Territorial Sea and the Contiguous Zone.[3]

The majority of the articles contained in the Convention are declaratory of existing international law but certain new principles have been adopted. Articles 3 codifies generally accepted international law as confirmed in the *Anglo-Norwegian Fisheries Case*[4] 'that the normal baseline for measuring the breadth of the territorial sea is the low water line along the coast as marked on large scale charts officially recognized by the coastal state'.

In Article 4 the new principles stated in the *Fisheries Case* are codified. Article 4 (1) states that:

> 'in localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured'.

In enumerating the 'appropriate points', the remaining sections of Article 4 simply adopt the tests propounded by the International Court of Justice, *viz.*, that the baselines must follow the general direction of the

---

2 See Resolution 1105 (XI) of 21st Feb., 1957, of Gen. Assembly of U.N.
3 A/Conf. 13/L. 52., 28th April, 1958.
4 5 I.C.J. Rep. 1951, p. 116.

coast; the areas lying within the lines must be sufficiently linked to the land domain to be subject to the regime of internal waters; and economic interests peculiar to the region may be taken into account when drawing baselines, if evidenced by long usage.

Criticism of the *Fisheries Case* had been such that it was to be hoped that the effect of the decision would be considered by the Committee, and would result in a modification or complete discarding of the case in the Convention on the Territorial Sea and Contiguous Zone. Instead, the Committee adopted practically *in toto* the finding of the International Court of Justice. Thus a rule of law founded on geographical uniqueness and economic hardships has been given the approval of the majority of maritime nations, leaving the way open for further subjective legislation and a consequent weakening of international law. The only modification of the decision in the *Fisheries Case* in Article 4 would seem to be subsection 3 which states: 'baselines shall not be drawn to and from low tide elevations, unless lighthouses and similar installations which are permanently above sea level have been built on them'. Norway, in drawing baselines from 48 fixed points off the Norwegian coast, used not only islands as points but also 'drying rocks' which were covered at high tide. This practice is no longer permitted by Article 4 (3).

Article 6 reflects the failure of the Conference to reach a successful conclusion as to the width of the territorial sea. Some have seen this as a complete failure of the Conference, a view which can only be held by the uninformed. It was on the question of the width of the territorial sea that the political considerations were best displayed. The Soviet and Arab blocs joined forces in supporting a 12-mile limit while the remaining nations were in favour of a width varying from the customary three miles to 12 miles. It is interesting to note the principal viewpoints and their supporters:

(1) A three miles territorial limit with an additional nine-mile contiguous zone of exclusive fishing jurisdiction (Canada).

(2) A straight three-mile territorial limit with no exclusive fishing rights outside (U.K. and U.S.A., West Germany, Japan, France, Belgium, etc.).

(3) A variety of limits varying from four to six miles (Scandinavian countries).

(4) A flexible three to 12-mile limit (principally Mexico and India).

The most spectacular proposal of the Conference was the compromise offer by the U.S.A. for a six-mile territorial sea with a six-mile contiguous zone which included exclusive fishing rights for the coastal state, subject only to so-called 'historic rights' for states whose nationals had fished in the area for five years previously. The proposal received the greatest support of any and failed by only seven votes to gain the necessary two-thirds majority in plenary session. Having failed to agree, the Conference referred the matter of the width of the territorial sea to the United Nations for further study. Unfortunately, there would appear

to be little hope of agreement while the issue remains linked with international politics. Both the Icelandic Fishing Dispute between the United Kingdom and Iceland and the Formosa Strait Dispute involve consideration of the width of the territorial sea. Parties on either side are unlikely to compromise when to do so would mean a *volte face* both economically and politically. Likewise, the Soviet Union's claims to a 12-mile limit have been enforced in the Baltic region by the use of force and without regard to the existing international law. At present the width of the territorial sea would seem to be proportionate to the strength of the coastal state's navy.

Article 7 relates to bays the coasts of which belong to a single state. The statement of the Permanent Court of Arbitration in the *North Atlantic Coast Fisheries Case* in 1910,[5] that 'a bay is to be considered as an indentation of the coast, bearing a configuration of a particular character easy to determine specifically but difficult to describe generally', is somewhat redundant in the light of Article 7. While adopting the customary definition of a bay, Article 7 (2) says more specifically that an 'indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than that of the semi-circle whose diameter is a line drawn across the mouth of that indentation'. Such a definition removes much of the doubt which previously surrounded the question of what was or was not a bay. Article 7 (3) provides for the measurement of the area of a bay as that lying between the low water mark around the shore and a line joining the low water marks of its natural entrance points.

Article 7 (4) providing for a maximum distance of 24 miles across the mouth of a bay to delineate internal waters, aroused heated debate during the Conference. Prior to this new provision the generally accepted maximum was thought to be 10 miles,[6] subject to the exception of certain 'historic rights'. Both the United Kingdom and the United States considered 24 miles as excessive, but the provision was adopted with the support of Arab and Soviet blocs. Article 7 (6) states that the foregoing provisions shall not apply to so-called 'historic bays', and this difficult problem was referred back to the United Nations for further study.

Articles 14-23 of the convention deal with the right of innocent passage, including rules applicable respectively to all ships, to merchant ships, to government ships other than warships, and to warships. Discussion at the Conference on these particular articles centred mainly around the treatment of warships. The Soviet bloc, in the List of Declarations and Reservations made at the time of signature, made reservations in adopting Articles 20 and 23. Article 23 deals with rules applicable to warships and a typical reservation as exemplified by that of the U.S.S.R. was that 'the

---

[5] H.C.R., p. 140 at 187.

[6] This length was that propounded by the Permanent Court of Arbitration in the North Atlantic Coast Fisheries Case (1910) H.C.R. 140, at 187—'In every bay not hereinafter specifically provided for the limits of exclusion shall be drawn 3 miles seaward from a straight line across the bay in the part nearest the entrance, at the first point where the width does not exceed 10 miles'.

government of the U.S.S.R. considers that a coastal state has the right to establish procedures for the authorisation of the passage of foreign warships through its territorial waters'.

Article 24 provides for a contiguous zone, not extending beyond 12 miles from the baseline from which the breadth of the territorial sea is measured. If the breadth of the territorial sea becomes accepted as being 12 miles then without amendment this article would appear meaningless. At the present time international law recognises a territorial sea of at least three miles width, so that with the exception of certain 'historic' claims[7] to a greater width, a coastal state is entitled to a contiguous zone extending nine miles beyond the limit of its territorial sea.

CONVENTION ON THE HIGH SEAS

The second Committee considered the International Law Commission's draft articles concerning the regime of the high seas. In general the articles deal with definition of the high seas; a declaration of the freedom of the high seas; rights of non-coastal states to access to the sea; nationalities of ships; immunity of government owned ships and warships; safety of navigation; piracy; rights of visit and hot pursuit; pollution; submarine cables and pipelines. Although mainly declaratory of existing international law, the convention has done much to clarify the law in this area. Article 1 defines the 'high seas' as being all parts of the sea that are not included in the territorial sea or in the internal waters of a state. Freedom of the high seas includes by Article 2, both for coastal and non-coastal states (1) freedom of navigation, (2) freedom of fishing, (3) freedom to lay submarine cables and pipelines, (4) freedom to fly over the high seas.

Freedom of fishing on the high seas is still a controversial question as the Icelandic dispute in 1958 demonstrates. With the extension of the territorial sea to 12 miles, such freedom would become virtually nugatory since the bulk of the world's fish are sought within 12 miles of the shore. Similarly, regulation of fishing by a coastal state beyond the limit of its territorial sea can severely restrict the rights of other states. The Canadian proposal for a three-mile territorial limit with an additional nine-mile contiguous zone of exclusive fishing jurisdiction, which the United States was prepared to accept as a compromise, would have had this effect.

Throughout the convention, mention is made that the provisions apply not only to coastal but also to non-coastal states. Thus Article 4 expresses the right of every state, whether coastal or not, to sail ships under its flag on the high seas. The convention firmly sets out to establish effective control by a flag state over ships registered in that state. Article 6 (1) states that 'ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in

[7] In the Fisheries Case the United Kingdom did not dispute Norway's historic claim to a territorial sea. See also Dean, 'The Geneva Conference on the Law of the Sea: What was accomplished' (1958) 52 A.J.I.L. 627, n. 86.

these articles, shall be subject to its exclusive jurisdiction on the high seas'. Reading this article, together with Article 11 (4) which provides that in the event of a collision or other incident on the high seas, only the flag state can institute penal or disciplinary proceedings against the master or person in the service of the ship, the convention decisively rejects the principle underlying the decision in the *Lotus Case*.[8] There the Turkish authorities instituted criminal proceedings against an officer on a French ship involved in a collision with a Turkish vessel on the high seas. The Permanent Court of International Justice held that in doing so, Turkey had not acted in conflict with the principles of international law contrary to Article 15 of the Convention of Lausanne, 1923, respecting conditions of residence and business and jurisdiction.

Artcle 8 (1) confirms the complete immunity from the jurisdiction of any state other than the flag state of warships on the high seas. Article 9 applies immunity to ships, owned and operated by a state and used only on 'government non-commercial service'. This would leave it within the domestic jurisdiction of a state to decide whether or not such a ship was being used by another state solely for 'government non-commercial service'. It is in the light of this that the reservations of the Soviet bloc to Article 9 must be considered. In stereotyped form they declare that 'the principle of international law according to which a ship on the high seas is not subject to any jurisdiction except that of the flag state applies without restriction to all government ships'.

Piracy on the high seas is defined in Article 15 and subsequent articles. Declarations were made by each member of the Soviet bloc to the effect that 'the definition of piracy given in the convention does not cover certain acts which under contemporary international law should be considered as acts of piracy and does not serve to ensure freedom of navigation on international sea routes'.

The right of hot pursuit and the regulations of such pursuit are contained in Article 23. International law allows the right of pursuit of a foreign vessel within the territorial or internal waters. Article 23 in addition allows pursuit if the foreign vessel is within the contiguous zone and if there has been a violation of the rights for the protection of which the zone was established. Thus the right of hot pursuit is considerably lessened if the terrtorial sea is three miles in width, being restricted in the contiguous zone to violation of customs, fiscal, immigration or sanitary regulations within its territory or territorial seas (Article 24, Convention on the Territorial Sea and the Contiguous Zone). Providing proper signals are given to stop, a right of hot pursuit exists against a team of boats working from a mother ship, if one of such boats is pursued from a point within the territorial sea or contiguous zone. Such a provision has obviously been included to allow for the pursuit of a whaling factory ship or similar mother ship, when one of the catchers is pursued from within the specified zone. The rules of hot pursuit may be exercised by aircraft as well as by ships.

[8] World Court Reports, Vol. II, p. 20.

With the rapid increase in the use of atomic power, provision has been made in the articles on pollution, for dumping of radioactive materials in accordance with any standards and regulations formulated by competent international organisations, *e.g.*, International Atomic Energy Agency. Pollution from discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil is to be regulated by states (Article 24). The remaining articles are concerned with the right of a state to lay pipelines or cables on the bed of the high seas, the requirement for a flag state to make it a punishable offence to wilfully or negligently damage such cables or pipelines, and provisions for compensation.

CONVENTION ON FISHING AND CONSERVATION OF THE LIVING RESOURCES OF THE HIGH SEAS

The third Committee considered the International Law Commission's draft articles concerning fishing and conservation on the high seas. In final form this became the Convention on Fishing and Conservation of the Living Resources of the High Seas.[9]

As a whole the convention marks a significant step in the regulation of an essential world-wide activity by international law. The preamble stresses that the development of modern techniques for the exploitation of the living resources of the sea has exposed some of these resources to the danger of being over-exploited and that considering the nature of the problems involved in conservation, international co-operation through the action of all states concerned is required. Through many years prior to the adoption of the articles of the convention, bilateral and multilateral treaties have been concluded between interested states on the subject of fishery conservation and regulations.

By the bilateral agreement of the Convention of London of 20th October, 1818, Great Britain granted to the inhabitants of the United States 'for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind' in specified inland waters and territorial seas of British territories in North America. The right of Great Britain to regulate such fisheries accounted in part for the dispute in the *North Atlantic Coast Fisheries Arbitrations*.[10] More recent treaties concerning fishery regulations and conservation include that concluded between the United States and Mexico in 1949 on tuna fishing, the United States and Costa Rica and the major international agreement for the North-West Atlanic Fisheries in 1949. The nations participating in the latter agreement were Canada, Denmark, France, Iceland, Italy, Portugal, Norway, Spain, the United Kingdom and the United States. A similar treaty was signed in Tokyo in 1951 establishing an International Commission for the North Pacific Fisheries.

---

9 A/Conf. 13/L, 28th April, 1958.

10 Supra.

The treaties since 1945 have used as a basis the criteria mentioned in the proclamation issued by President Truman on 28th September, 1945, on fishery conservation on the high seas. Under this proclamation it was apparently contemplated that a high seas fishery would be regulated by that nation or nations having a substantial interest in the fishery. Two criteria were indicated whereby a nation may be said to have a substantial interest in a fishery: (1) if the fishery is located in the high seas contiguous to its coasts, (2) if its nationals habitually resort to the fishery thereby participating in its development and maintenance. These principles have been adopted in the Articles of the Convention on Fishing and Conservation of the Living Resources of the High Seas.

Article 1 (1) provides that: 'all states have the right for their nationals to engage in fishing on the high seas subject (a) to their treaty obligations, (b) to the interests and rights of coastal states as provided for in this convention, and (c) to the provisions contained in the following articles concerning conservation of the living resources of the high seas'. Article 1 (2) provides: 'all states have a duty to adopt or to co-operate with other states in adopting such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas'.

It is in Article 6 that the rights and interests as expressed in the Truman Declaration are found. Article 6 (1) stresses that 'a coastal state has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea'. Such state may take part on an equal footing in conservation of living resources in that area even though its nationals do not carry on fishing there. Similarly, a state whose nationals are fishing in any area of the high seas adjacent to the territorial sea of a coastal state, may enter into negotiations with such state with a view to prescribing, by agreement, measures necessary for conservation if such measures do not already exist.

Article 7 allows a coastal state to adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea [provided that negotiations to that effect with other states concerned have not led to an agreement within six months] by virtue of the special interest subsisting in a coastal state by Article 6 (1).

It is obvious that in regulating such fisheries, disputes will arise between the states concerned. A tendency for the maritime states, amply provided with economic ability and improved techniques, to press for free exploitation of the resources on the high seas, must be balanced against the desire of the small states, without sufficient facilities to compete with others in exploitaton, to demand the reservation of resources for themselves. The convention, in Article 9, provides machinery for the settlement of disputes arising between states under the preceding Articles. This is a major provision, the importance of which cannot be overstressed. If a dispute arises, then at the request of any of the parties,

it may be submitted for settlement to a special commission of five members. The members are to be named by agreement between the states in the dispute. If after three months no such agreement is reached the members shall, upon the request of any state party, be named by the Secretary-General of the United Nations, within a further three month period. The Secretary-General is required to consult with the states in dispute, the President of the International Court of Justice, and the Director-General of the Food and Agriculture Organisation of the United Nations in appointing the members from among well qualified persons being nationals of states not involved in the dispute and specialising in legal, administrative or scientific questions relating to fisheries, according to the nature of the dispute to be settled.

Decisions of the commission are to be by majority vote. Article 11 declares such decisions binding upon the states concerned and applies the provisions of Article 94 (2) of the Charter of the United Nations to them.[11]

Article 13 deals with the regulations of fisheries conducted by means of equipment embedded in the floor of the territorial sea of a state.

CONVENTION ON THE CONTINENTAL SHELF

The fourth Committee examined the problems of the continental shelf, and the results of its work are embodied in the Convention on the Continental Shelf.[12] As a concept in international law, the doctrine of the continental shelf has progressed very rapidly since the Truman Declaration of 1945. Many nations followed the United States lead and by declarations, reserved the exploitation and conservation of the resources of the shelf for themselves. In his statement the President was careful to distinguish between jurisdiction and control over the bed of the shelf and the subjacent areas, and the unaffected freedom of the high seas and air space above. Certain South American countries, including Chile, Peru, Equador and Argentina, failed to follow this basic division and claimed exclusive sovereignty over the continental shelf and the waters above to a distance of 200 miles from their coasts. Strong objections to such claims were made by many nations, as having no basis or support in international law. In the Convention on the Continental Shelf the principles expressed by President Truman have been followed and the status of the high seas retained.

The articles of the convention deal with definition of the continental shelf; the right of a state to exploit the resources of the shelf; definition of the resources; non-impeding of the laying or maintenance of submarine cables or pipelines; provision as to installations erected for the purpose

---

[11] Para. 2, Article 94, states, 'if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'. Such recourse is of doubtful value in the light of the veto power.

[12] A/Conf. 13/L. 55, 28th April, 1958.

of exploring and exploiting the resources; settlement of the boundaries of the continental shelf between two adjacent states; and the right of a coastal state to tunnel irrespective of the depth of water above the subsoil. The term 'continental shelf' is used in the convention as referring to the seabed and subsoil of the submarine areas adjacent to the coast outside the territorial sea, to a depth of 200 metres, or beyond that limit to where the depth of the superjacent waters admits of the exploitation of the resources of the said areas. It is similarly used to refer to the submarine areas adjacent to the coasts of islands.

Article 2 (1) gives sovereign rights to the coastal state over the shelf for the purpose of exploring and exploiting its natural resource, such rights being by Article 2 (2) exclusive, in that if they are not exercised by the coastal state then no other state may do so without consent. The principle of freedom of the high seas and the air space above, over the continental shelf is affirmed by Article 3. Article 2 (3) dispels any claim to the shelf based on occupation, effective or notional, or on any express proclamation. For academic lawyers this may come as a blow, but if a legal basis for acquisition is required, that of 'contiguity' as suggested by Professor Lauterpacht[13] seems the most satisfactory. Article 2 (4) is of particular interest. It reads:

> 'The natural resources referred to in these articles consist of the mineral and other non living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil'.

Controversy over the inclusion of sedentary species of organisms in the list of resources of the continental shelf has been acute. Its adoption in the text of the convention is the final result of a decision in 1953 by the International Law Commission, in which the Commission resolved to bring sedentary fisheries within the scope of the shelf doctrine.[14] This resolution reversed the 1951 policy of the Commission. At the committee stage, Article 2 (4) was the joint proposal of Australia, Ceylon, the Federation of Malaya, India, Norway and the United Kingdom. At least three of these states had personal interests in sedentary fisheries — Australia in pearl fisheries and India and Ceylon in chanks. In Australia's case the regulation of the sedentary pearl fisheries led to the Australia-Japanese Pearl Fishing Dispute. The Governor-General of Australia on 11th September, 1953, issued two proclamations, published in a special Commonwealth Gazette, declaring sovereign rights over the continental shelf contiguous to the Australian coast and also to the continental shelf contiguous to the coasts of territories under Australian authority. Rights declared in these proclamations extended to sedentary fisheries. Contemporaneously with the publication of the two proclamations relating to

---

[13] 'Sovereignty over Submarine Areas' (1950) 27 B.Y.I.L. 376.

[14] U.N. Doc. A/CN. 4/SR. 205.

the continental shelf, legislation was passed in the Commonwealth Parliament to amend the Pearl Fisheries Act, 1952.[15]

The 1952 Act purported to control 'fisheries in Australian waters beyond territorial limits' but did not expressly declare such control to extend to foreigners and foreign vessels. Under the 1953 amending Act the control was applied directly to foreign persons and foreign vessels outside territorial waters but within the limits that international law recognises as being subject to Australian jurisdiction for certain purposes.[16] The area of waters within which the Act is enforceable against foreign persons, ships and boats, includes the waters of the continental shelf of Australia and named territories. The Japanese pearl-fishing fleet which operated in the waters off the north coast of Australia was directly affected by the legislation. Protests were made by the Japanese Government to the Australian Government and it was finally agreed to place the dispute before the International Court of Justice. As such it has been pending before this body since 1954 and no agreement has been reached by the parties up to the present. In April, 1959, Mr. Casey, Australian Minister for External Affairs, discussed the dispute with Japanese Government representatives, with results as yet unpublished. However, the Australian claim to regulate sedentary fisheries would appear now to find support in Article 2 (4). Pearl fisheries would come within the definition of organisms 'which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil'.[17] Such a definition would not include crustaceans, *e.g.*, shrimps.

The remaining articles have been extensively commented on elsewhere by other learned authors[18] and nothing of benefit can be added here.

The fifth Committee was created to deal with the special problems of land-locked states, but it produced no separate convention. In addition to the conventions several resolutions were adopted by the Conference dealing with nuclear tests on the high seas; pollution of the high seas by radioactive materials; international fishery conservation conventions; co-operation in conservation measures; humane killing of marine life; special situations relating to coastal fisheries; regime of historic waters; the convening of a second United Nations Conference on the Law of the Sea; and a tribute to the International Law Commission.

Adopting the words of the tribute to the entire Conference, it produced in the matter of codification and development of international law a work of great juridical value.

Duncan Chappell.

---

15 Pearl Fisheries Act No. 2, 1953.

16 Sect. 6—'This Act extends to all the territories and to all Australian waters and applies to all persons including foreigners and to all ships and boats including foreign ships and boats'.

17 For criticism of the inclusion of 'sedentary species' as within the resources of the shelf, see among others Editorial Comment (1958) 52 A.J.I.L. p. 733 et seq.

18 See for extensive work on the Convention of the Continental Shelf, Marjorie M. Whiteman, (1958) 52 A.J.I.L. 629.