THE LIKELY PATTERN OF FUTURE LEGAL CHANGES IN THE COMMONWEALTH

BY THE RIGHT HONOURABLE LORD GARDINER*

[*In this, the Ninth Southey Memorial Lecture Lord Gardiner considers the likely pattern of future legal changes in the Commonwealth by reference to general issues of the nature of law reform machinery and administration of justice where he considers problems of legal education and legal aid. He then discusses particular issues of entry into the Common Market, corporal punishment, rehabilitation of offenders and the general prevention of crime. A consideration of these issues leads Lord Gardiner to the conclusion that the adaptibility of the Common Law ensures its capacity to change in the manner that the future will dictate.*]

No wise motor car manufacturer fails to ascertain improvements in the manufacturing processes in use in the factories of his foreign rivals, and the specialist surgeon is concerned to know of improved techniques in his field by similar specialists in other countries. In the field of law the Common Law countries have always borrowed from one another. This has been particularly true of procedure. Our law of discovery and of third party procedure we got from Maryland and other American States before Independence. And much of our social laws we have taken from Australia and New Zealand.

We once had an Empire. The rest of the world is the best judge of how we discharged that responsibility. It is certainly one which we are happy to relinquish. We should, I am sure, not wish anyone to make use of the Privy Council who does not wish to do so. It is, however, true to say that our biggest export has always been our law and legal system, so that today, in spite of the size of the populations of Russia, China and Japan, nearly one-third of the population of the entire world is still ruled by the law and legal system which came from that small island in the north of Europe from which I come to visit you.

I thought, therefore, that today we might consider together the likely pattern of future legal changes in the Commonwealth, alhough, as it will naturally be based on a projection into the future of changes in the recent past, I must confess that, while I attended the Commonwealth Law Conference in Australia in 1965 and have since attended the Centenary of the New Zealand Law Society and a meeting of the Canadian Bar Association,

* P.C., Lord High Chancellor of Great Britain, 1964-70.

I am still not as familiar as I would wish to be with legal changes in the Commonwealth outside the United Kingdom. I think in the first place that our law and legal institutions are becoming more disciplined, more rational and less introspective in the sense that we are paying much more attention to other relevant disciplines such as psychology and sociology.

LAW REFORM MACHINERY

A clear example is the machinery of law reform. Until 1965 the Lord Chancellor had a Law Reform Committee and the Home Secretary had copied him by having a Criminal Law Revision Committee. These still exist, but they have always consisted of busy judges, barristers, solicitors and academic lawyers, doing this work in their spare time. By next month we shall have had eight years' experience of a wholetime Law Commission. There can be no doubt of their respective merits. Indeed, it would be quite unreasonable to expect the Committees to match either the speed, the volume or the quality of the work of the Law Commission.

The Commission's work on a project starts with a draft working paper, prepared by one of the Commissioners and members of the Commission's legal staff, setting out the law in the field in question, its suggested defects and the Commission's provisional proposals for reform. When all the Commissioners are satisfied with the working paper it is sent out to the Bench, Bar, Law Society and representatives of all those who would be affected by a change in the field of law in question, and a long period of consultation then takes place. In addition, the Law Commission may itself initiate research.

For example, as part of its overhaul of Family Law, they had a social survey on the attitude of married people to their property and its management carried out by the Social Survey Division of the Office of Population, Censuses and Surveys. There is, you may think, a good deal to be said for the view that the law of intestate succession as it affects the surviving spouse and children ought to be what most married people want it to be. It is only after this very long period of consultation that the Commission present their report and draft bill, and nearly all their reports have been implemented.

In contrast, the Criminal Law Revision Committee, which consists of seven of our most distinguished judges, three of our most distinguished professors of law, the Chief Metropolitan Magistrate, the Director of Public Prosecutions, the chief legal adviser to the Home Office and a solicitor, produced last year, after eight years work on it, a report on the law of evidence in criminal cases. In addition to many good recommendations, they recommended sweeping away the right to silence and the Judges' Rules for the conduct of police interrogation, a reduction in the need for corroboration, and the admissibility of some hearsay evidence and, in some cases, of previous convictions.

This led to a storm of protests from the Bar Council, Justice, the Society of Labour Lawyers, the London Criminal Courts Solicitors' Association and the National Council for Civil Liberties, and in a debate on the report in the House of Lords, Lord Reid ended his critical speech by saying: 'I trust that the Government will put the report aside and say "We have got to start again". I trust that they will send the whole subject immediately to the Law Commission.'

REPEAL OF OBSOLETE STATUTES

I envy all those parts of the Commonwealth which have not got our terrible statute book. Here, however, the Law Commission is responsible, and has been making great strides, both in getting off the statute book those Acts which, whether technically obsolete or not, serve no useful purpose in remaining there and by consolidating groups of others.

I am happy to inform you that we have now dispensed with the Act 'for the attainder of several persons guilty of the horrid murder of his late sacred Majesty King Charles the First'. I am less happy to have lost the Act of 1863, the Lord Chancellor's Augmentation Act. Gone, too, are the Steam Engines Furnaces Act of 1821, the Australian Colonies Duties Acts of 1873 and 1875, and the rather curious Act of 1774 'to establish a fund toward further defraying the charges of the administration of justice and support of the civil Government within the province of Quebec in America'.

When I took office as Lord Chancellor there were 3,680 Public Acts on the statute book. About 75 new such Acts are passed every year, so that seven years later one would have expected there to be about 4,200. In fact there were 3,525—119 fewer than when I took office. This was almost entirely due to three Statute Law Repeal Bills of the Law Commission. A fourth now passing through Parliament repeals a further 118 Acts wholly and 148 in part.

Great headway, too, is being made in the consolidation of the remainder, a field in which the State of Victoria has done so well, and the Law Commission is also in process of codifying the whole of the law of contract, the criminal law and the law of landlord and tenant.

I do not know enough of your position to be able to hazard a useful guess as to whether your statute book is becoming any problem to you. I do, however, observe that, in comparison with our average of about 75 new Public Acts a year, the average in the State of Victoria appears to be rather higher.

The statutes at large, published about every twenty years in chronological order, is to be abandoned in favour of a statute book arranged under titles and published in loose-leaf form. By 1985 we should have a statute book of which we need no longer be ashamed. It has always been my hope that

I should live to see Acts of Parliament written in English. I regret to say that no headway whatever has been made in this field.

ADMINISTRATION OF JUSTICE

All over the Common Law world a great deal has been, is being and I do not doubt will be, done to make the administration of justice, both civil and criminal, more efficient. We started with a Royal Commission on Assizes and Quarter Sessions and implemented their recommendations in our Courts Act, which constituted the biggest reform in the administration of justice since the Judicature Acts, and in some ways since the reign of King John. Its main effect has been to replace an extremely rigid system of Assize towns and Quarter Sessions, where certain judges could alone try particular classes of cases, by a system of great simplicity, and the transfer of the administration of the courts, other than the magistrates courts, from local authority coutrol to government control. I am sure that before long we shall make a similar change in relation to the magistrates courts.

Here I come to a Commonwealth curiosity. Ninety-eight per cent of all criminal cases are tried in the magistrates courts. A thousand such courts sit every day and ninety-four per cent of them are manned by lay justices alone. Since the Courts Act they also sit in the Crown Courts. I know of no other country in which lay citizens play so large a part in the administration of justice. Considering that there are some 22,000 Justices of the Peace, so that on occasion some are bound to say or do something foolish, what is remarkable is how relatively few appeals there are, and fewer that are successful, and that when Lord Chancellor I received fewer complaints comparatively about the lay magistrates than I did about the professional judges, and the present Lord Chancellor has recently said that that has also been his experience.

I now invite you to consider how it came about that this admirable feature of our legal system, which works so well, is the only major feature of our legal system which has never been really adopted in America or any Commonwealth country.

I know, of course, that in Victoria (which is exceptional in this respect) and in some of the other States, you have Justices of the Peace, but I understand that their numbers are few in comparison with ours, and that their jurisdiction is so much smaller, and the proportion of criminal cases tried by them is so much less, that it is not on a scale comparable with that which has for so long existed in England. Indeed, in New South Wales, the office of Justice of the Peace is, I believe, almost an honorary one.

I believe that there were two reasons why this feature of our legal system has not been followed in the Commonwealth as a whole. The first is that when we colonized parts of Africa and Asia the level of public

education was not such that the local citizens could have discharged so difficult a task. The second is that when men left Britain to found new worlds in America and the old Dominions, the Justices of the Peace were the local squires in the counties and their counterparts in the towns, and that those who were left were men who had no liking for such a class-ridden system and intended to found a more egalitarian society.

Today our Justices of the Peace, two-thirds of whom are men and one-third women, are drawn from every kind of occupation and are of every social class. I would not be surprised if, even now, some parts of the Commonwealth apart from Victoria do not adopt a system which works so well and costs so little.

It is not, I think, surprising that it has occurred to many that a great deal of court time would be saved if we abolished trial by jury. Nor is it surprising that such a proposal should be greeted by violent opposition. Here we could compromise by having first some civil cases now tried by juries and, perhaps, later even our criminal Crown Court cases decided by, say, one judge and four Justices of the Peace sitting together, the judge deciding the law, and he and the justices deciding the facts together by a majority. Without lay justices no such solution would be open to any other part of the Commonwealth which had none.

LEGAL EDUCATION

All over the Commonwealth there is, I think, an increasing realization that legal education has been too narrow, that the lawyer in the modern world should have some knowledge of related disciplines and particularly perhaps of the sociology of law, that legal education should not stop on qualification and that there is a need not only for refresher courses for practitioners but also training courses and sentencing conferences for the judiciary; and I would expect to see in the future a considerable expansion in those fields in most developed Common Law countries.

Strictly speaking, the Lord Chancellor has no responsibility for, or control over, legal education; but if one sees an area in which desirable change is being prevented, a Lord Chancellor can sometimes act as a catalyst. It was with that object that, just as one of my distinguished predecessors had appointed a Committee on Legal Education of which Lord Atkin was chairman, I appointed a Committee on Legal Education under the chairmanship of Mr Justice Ormrod. For the first time members of the Inns of Court, the Council of Legal Education, the Bar Council, the Law Society, the University Law Schools, the Society of Public Teachers of Law, the Colleges of Further Education and the Law Commission got round a table together and produced what I thought was a first-class report.

In substance it recommended that the normal academic qualification for a lawyer should be obtained in the university law schools, and that there

should also be a year's vocational training, which a majority thought should be provided within the university and college of higher education structure. Although this report was published over two years ago, its recommendations have not yet been adopted by the professional bodies who are reluctant to give up the control they have always had over legal education.

One of the specific recommendations was that the possibility of running legal aid clinics in conjunction with the vocational course should be explored. This leads me to add a few words on legal aid and advice.

LEGAL AID

There has, of course, been a considerable expansion in the developed Commonwealth in the provision of legal aid in both civil and criminal cases, so that no one should be deprived of the opportunity to enforce or defend his legal rights for lack of means.

But we are all, I think, aware that there are still grave deficiencies in the field of legal advice. If we are honest we must, I think, agree that the reason for this is the lack of contact between the lawyer and the very poor. In today's welfare state the tendency is for the very poor not to get more than part of what the welfare state provides simply because they do not know what they are entitled to, or how to claim it, and the lawyers themselves are less well versed in this branch of the law than in any other.

In the United States considerable use in this field has been made of university law students. Of the 147 accredited law schools, 125 have established programmes in which students, supervised by faculty members, work in a variety of real-life situations. Mr Michael Zander has recently made a study in this field. Over 50 law schools operate a legal advice facility in a prison by students under faculty supervision. In others, the law students assist in neighbourhood law firms. At Harvard, for example, the students man a fully-fledged neighbourhood law firm in a poor area. There are five supervising lawyers who use the services of a hundred students.

Other students conduct courses in law in the high schools. They prepare and distribute a series of community education booklets explaining welfare and other rights, draft legislation, and are involved in test cases in the courts. In other law schools the programme consists primarily of representing indigent persons in court. Thirty-eight States have given students a right of audience in court under the supervision of academic or practising lawyers. Some programmes place students with the local prosecutor's office or with the Public Defender.

At New York University a student can opt for any one of eleven such courses. There is a Consumer Credit course involving work with the City Department of Consumer Affairs, a Juvenile Delinquency course involving work with the relevant Legal Aid office and the Legislative Committee on

Child Abuse, and a Law and Psychiatry course involving work in a mental hospital. Yale has a course on pre-trial detention involving work with pre-trial prisoners. The whole of this method of enabling students to become involved in the problems of the local community as part of their legal education has been warmly welcomed by the United States Chief Justice. I know the strides that you have made in this field in relation to case referral, but little of this kind has happened in England. I must not despair, but I am afraid that legal education has never been our strong point. Indeed so long as the professional bodies retain the vocational training, not much progress of this nature can be made.

SOME COMMON PROBLEMS

In the field of civil law our problems and concerns are, I think, much the same everywhere and happily we can all copy one another's ideas with advantage. We can all improve or modernize procedure. We have all got to provide for computerized evidence. We have all considered, or are in the middle of considering, the field of personal injuries. We have just appointed what I might call a Woodhouse Royal Commission, as it will cover much the same ground as the New Zealand one did. In any case, as long as actions for damages for personal injuries remain, I would expect to see our present hit-or-miss methods of assessing damages give way to a proper appreciation and use of actuarial evidence which the Law Commission has for some time advocated.

We all face the same difficulties about our labour laws. We all look at one another's. I cannot say that I think that any Common Law country has found the answer. Any one of them that does will earn the undying gratitude of the rest of us.

As in Australia, we are in the middle of greatly strengthening our consumer protection law, for which one Minister is now responsible. As in Australia, we are experimenting with Small Claims Courts. As in Australia, we are feeling our way towards the clearer formulation of basic Human Rights. Indeed, the first British Institute of Human Rights has been established. We are, just at the moment—as I see you are, just at the moment—wondering what we ought to be doing about pyramid selling. In all these fields we can, and I have no doubt shall, learn from one another.

In the field of family law we are all busy borrowing from one another, although this is a field in which we have usually followed reforms initiated in this part of the world, and your experience and that of New Zealand is always before Parliament and referred to in our debates.

Our new Divorce Act appears to be working as intended, including its provisions enabling the court on a dissolution of marriage to re-distribute the spouses' property, one requirement being that regard must be had to any contribution made by looking after the home or caring for the family.

We are all glad, I think, to have got rid of the doctrine of the matrimonial fault.

ENTRY INTO THE COMMON MARKET

I might here observe that, while we have often profited from changes in both the law and legal system in other parts of the Commonwealth, our entry into the Common Market has not only meant our accepting the laws of the European Communities, but at least a commercial interest in the law of the member countries.

There has, I think, been a good deal of quite natural misunderstanding in the Commonwealth about the effect on our laws and legal system of our entry into the European Community. I do not think that I could summarize the general position better than it was recently stated by the Lord Chancellor in his Presidential Address to the Holdsworth Club. He said:

> It is unnecessary in this company to issue any warning against the illiterate and hysterical nonsense which is circulated from time to time about the end of Magna Carta, or the presumption of innocence or trial by jury in criminal cases, all of which are sometimes alleged to flow from our adherence to the Community. Nor is this the place to discuss the laughable doctrine that Parliament will have abdicated its functions by adherence to the treaty. What is important is for the academic body and the practising profession to prepare itself for the assimilation into the legal system of its means of contact with the Community Law. This means the integration of some general knowledge about the Communities and their legal thinking into the body of educational syllabus both at undergraduate level and in professional training. The treaties will be part of English law. Some legal rules, and some regulations will have direct application in the ordinary courts and will supersede our domestic rules.
>
> In Company law, *Kelner v. Baxter*[1] will be modified, and various other rules will in fact be different.
>
> Where questions of Community law fall to be applied to our courts, there will be occasions when even inferior courts will have the discretion, and the Court of Appeal or House of Lords, whichever is the Court of ultimate appeal, will have the duty of referring a question for decision to Luxembourg. More important still, as the enlarged Community develops, both the academic and practising branches of the profession will have the opportunity with European lawyers and businessmen of building up a system of commercial and company law, and patent and copyright law and so on, which for the first time in history may make a common code of commercial law run from the North Cape to Sicily and from the extreme west of Ireland to the frontiers of the Iron Curtain.
>
> As it is certain that Common Lawyers from the United Kingdom and Ireland will be able to play a full part and even take some initiative in the creation of this code, it is clear that, once the rivets and bolts of the application of the existing Community law have been successfully run in, the lawyers of this country, academic and professional, may look forward to a period of

[1] (1866) L.R. 2 C.P. 174; 36 L.J.C.P. 94; 15 L.T. 213; 15 W.R. 278.

real creativity which may produce, over a comparatively short period, a profound and permanent effect on the jurisprudence and legal thinking of the entire planet.

May I add that even in the short term, membership of the European Community will naturally result in our taking more interest than we have in the past in the laws of the civil law countries to the extent that such studies may lead us to change some of our own laws of our own volition and these changes, being in a Commonwealth country, may lead in turn to their adoption in other Commonwealth countries.

We sometimes, I think, in the Commonwealth speak as if the whole Commonwealth consists of nothing but common law countries—forgetting perhaps that Scotland is not very far from England and that Scotland is a civil law country, just as is Quebec in Canada.

Let me give three examples of what I have in mind:

ADMINISTRATIVE LAW

First, there can be no doubt that the common law countries lag behind the civil law countries in having no comprehensive or coherent system of administrative law. Whether we need a *Conseil d'Etat* or not, the Ombudsman or, as we call him, the Parliamentary Commissioner, has proved to be no substitute for such a system. In 1969 the Law Commission strongly recommended an enquiry into Administrative Law by a Royal Commission, or by a committee of similar status. The Government, of which I was a member, thought that it was then too late in the lifetime of that Government to start on the appointment of a new Royal Commission. It is now four years since that recommendation was made and the present Government say that they are still considering it.

I would suspect that the opposition is coming from the Civil Service. The Law Commission had pointed out that one of the questions which ought to be considered in this field was whether the remedies controlling administrative acts or omissions should include a right to damages, and I gather this caused alarm in the Civil Service.

I do not know why. The damages, of course, would be payable by the Government. The best of Civil Servants must, being human, sometimes make mistakes and, as the sphere of administration continues to increase, I do not know why the citizen who has suffered damage by an erroneous administrative action should not have a remedy which can sometimes only be achieved by a monetary payment. I know that Administrative Law is now being considered by your Commonwealth Government.

CORPORAL PUNISHMENT

Secondly—a short point: corporal punishment of children is permissible in all our schools and children's homes. We recently looked across the

Channel and found that the corporal punishment of children in state schools, private schools and state children's homes is illegal in Belgium, Italy, Holland and Luxembourg; and in the state schools and state children's homes in France; and legal in Germany only in elementary state and private schools and on the same basis in state children's homes. It may be, of course, that in Europe everyone is out of step except our Johnnie.

REHABILITATION OF OFFENDERS

Thirdly, at the end of 1970, Justice, the Howard League for Penal Reform, and the National Association for the Care and Resettlement of Offenders, appointed a Committee—of which I was Chairman—to consider the problem of old convictions.

The problem is caused by the fact that there are many people who commit one or more serious offences, usually in adolescence, and then get a job, marry, settle down and thereafter live the lives of good citizens; yet for the rest of their lives they are prejudiced in the fields, for example, of employment and insurance, in that they never know when their present and future will not be pullled from under their feet by their past.

The question is whether, when such a man has done everything he can to rehabilitate himself, and a sufficient time has elapsed, it is not in society's interest to accept him for what he now is—a rehabilitated person. I am now piloting a Private Member's Bill, entitled Rehabilitation of Offenders, through the Lords in an attempt to give effect to our report. Indeed, it concluded its passage through the Lords on 20 March, 1973.

We had a research study carried out by the Home Office, because we found that we did not know ourselves how many people we were dealing with, and we asked the Home Office, and they said that they did not know but kindly had a study done. They found[2] that of those who had committed indictable or other serious crimes, usually in adolescence, of the first offenders 64 per cent remained free of further convictions for five years and 60 per cent for ten years; of those who had already had previous convictions 33 per cent remained free of further convictions for five years and 30 per cent for ten years; that the re-conviction rate after ten years free of conviction was not only minimal—it was slightly less than the prospect of a conviction by somebody who had never had a conviction before, and that there are about a million such people walking about.

We are, therefore, providing in the Bill that if they did not have a custodial sentence, then, after five years, or if they had a custodial sentence of not more than six months, then, after seven years, or if they had a custodial sentence over six months but not more than two and a half years, then after ten years, free of conviction, their past, with certain exceptions, can no longer be brought up against them.

[2] *Living It Down, The Problem of Old Convictions.* Appendix C, 42-3.

Society will treat them for what they in truth are—rehabilitated persons. I mention all this because here, too, we were surprised to find out that we were the only country which was a member of the Council of Europe which had no rehabilitation law of this kind.

So all I want to point out is, firstly, that our Parliament has now accepted, and incorporated into our law, all the laws of the European Communities and that, where in our courts any question arises as to their interpretation, our courts will be bound to refer that question of interpretation to the European Court for decision; but, secondly, that whatever the effect may be on our economic life, it will have very little direct effect at all on the lives of the individual members of our country and none at all, for example, in the fields of criminal law or family law; but, thirdly, that the world is getting smaller, that we live in a very small island, that you live in a very large island, that those who live in islands tend perhaps to be insular, and that it may not be a bad thing if we now have to be less insular.

In the field of law, after all, it would be strange if all the merits were to be found in the common law countries and none at all in the civil law countries. Indeed, the world increase in communications suggests that we may all have a good deal to learn from one another.

CRIME: ITS PREVENTION AND TREATMENT

In the field to which I now turn, that of crime and its prevention and treatment, all the developed countries of the world, common law and civil law alike, have the same problems facing them. In all these countries the standard of living is rising, and yet in most of them crime, which was once thought by many to be caused mainly by poverty, is greatly increasing, particularly crimes of violence.

If we are honest, I think we must admit that we do not even yet know what the causes of increasing crime are. Everyone has his own pet theory.

It is broken homes. Or it is that we have gone soft and do not punish offenders sufficiently. Or it is the decline in religious belief. Or it is mothers going out to work instead of staying at home and looking after the children. Or it is too much education. Or it is too little education. Or it is the television. Or it is the welfare state. Or it is the affluent society. Or it is the bomb. Everyone has his theory. But nobody knows. Some day, perhaps, the research institutes may be able to tell us.

Some comments may, I think, be made. Firstly, the cry for an increase in deterrence is as old as mankind; but it has never worked—not even in the days when we had capital punishment for over 200 different offences. In fact since the last war there has been a steady increase in my country in the length of sentences. This is the natural judicial reaction to a crime wave. Where we now have many thousands living three in a prison cell made for one, one of them would have been there before the war, the

second is there because of the increase in crime and the third is there because of the increase in sentences.

Broken homes may well play a part, but we have to remember that in our community we have one highly criminal group which commits over 90 per cent of all crime, and another group which is very little criminal. But it is the fact that both groups grow up in the same families, broken or not, and go to the same schools. Because the only difference between the two groups is that one is called male and the other female. If only men behaved as well as women do, the whole of the crime problem would, of course, be solved overnight.

In these circumstances I should be rash to prophesize the future developments in the Commonwealth and, perhaps, elsewhere in this field.

But I would say, first, that if you take the crimes committed in any police district, the one thing that seems clear is that if the convicion rate, that is to say the proportion which the convictions bear to all the crimes known to the police, goes up, crime goes down; if the conviction rate goes down, crime goes up.

I do not know why this should be surprising. If it is true it means that when young Snooks is hesitating whether to do that housebreaking job or not, what mostly decides him, apart from the way he was brought up, is that, if he thinks that if he does the job he will get away with it, he does it; if he thinks that if he does it he will be caught and punished, he does not do it. It may be, therefore, that the first lesson we shall all have to learn is that an increasing crime rate imperatively requires an increase in the police force to match the increase in crime. We were very slow to learn this lesson ourselves.

Secondly, there is a similar dissension about how criminals ought to be dealt with. I believe myself that the causes of crime in a community are deep-seated and probably depend more on how children are brought up than on any other factor, and that lawyers always tend to exaggerate the extent to which anything the law courts can do affects the rate of crime.

It seems to me that the criminals of every developed country tend to fall into groups. About 50 per cent learn their lesson the first time and will never offend again, so it does not matter in the slightest what you do with them. Of those sent to prison five per cent are highly dangerous and ought to be kept out of society for varying periods. Another five per cent are basically mental cases and ought to be in mental hospitals. About ten per cent with us are alcoholics and ought to be in alcoholic units. Most of the rest are petty recidivists, mentally subnormal, passive inadequates who cannot hold down a job or keep out of trouble without a lot of help from society.

I believe that most countries will find out that these men are a nuisance but not a danger to society, that as it costs us about Twenty Pounds a

week to put them in prison and One Pound a week to put them on probation, what they really need is physical improvement, elementary education, training in a job they can do, and a hostel from which they can go out to work.

We ourselves are still experimenting and giving courts additional powers to that end. They already had in their armoury an absolute discharge, a conditional discharge, a fine, a probation order, a binding over, a day-attendance centre order, a detention centre, Borstal, a suspended sentence of imprisonment and an immediate sentence of imprisonment. Last year's Criminal Justice Act added a power to defer sentence, an order sending offenders to a Day Training Centre and Community Service Orders.

President Nixon notwithstanding, I will confidently predict that before long all the Western Christian countries will have abolished capital punishment. The fact is that they have practically all given it up for reasons they separately and individually found to be right. And they were right. Looking at a map of Western Europe and reading, so to say, from right to left, it has been abolished in Finland, Sweden, Norway, Western Germany, Italy, Switzerland, Holland and Portugal. It has not been abolished in Belgium but they have had no execution since 1863. It has not been abolished in Luxembourg but they have had no execution since 1822.

In the last five years it has virtually fallen into disuse in the United States, Canada, France and Eire. And even in Northern Ireland there has been no execution for 30 years. More than half of all the executions in the world now take place in one country—South Africa. These are, of course, the killings of black men by white men.

You are aware of the position in Australia and New Zealand. Now that the use of death as a punishment has been abandoned in virtually every Western Christian democracy it would seem probable that the remainder will soon follow suit.

CHANGE IN GENERAL

One of our great difficulties in considering future changes is, I think, the speed of change. It appears to be true that ever since man began, the speed of change all down the ages has continually increased. Mr Justice Patrick Hartt, Chairman of the Law Reform Commission of Canada, in an address entitled 'Transitional Man' has said:

> It is becoming apparent that our society is not only developing much faster, it is being transformed into a quite different kind of society to one in which we have yet to learn how to live.

and he suggests,

> [t]hat one of the main reasons for our current social unease is precisely that we do not and cannot yet know how to live in this new world that is

> coming upon us at an ever-accelerating pace. All we can see is that the old ways and the old laws do not seem to fit the new needs.

He takes an illustration from the field of drugs. He says:

> If the game had been played by the old rules, our children would have learned about drugs slowly; and drug abuse would have entered our collective experience at a speed that we could deal with through traditional institutions; from the family, the church and the school to the law. Yet overnight our children know how to use, manufacture and distribute.
> An entire generation of children experimented with LSD, learned from their experience, and largely abandoned it; while we attempted to control their experimentation with laws that were designed for a wholly different purpose; of regulating the manufacture of dangerous drugs by commercial manufacturers.

He concluded that we should continue to make our traditional values available to the young without being hurt if our values are sometimes rejected:

> Older values have always been rejected. In earlier, more leisured, days the rejection took place gradually over a generation or two, or even a century. Now it takes place over breakfast—The choice is theirs. This is patently obvious. They are the only ones with a legitimate mandate to make such a choice; and, indeed, have the responsibility since it is they who must live with the consequences of that choice.

I cannot myself help wondering whether our machinery for law reform and our legislative process can cope with the speed at which the law may be required to change if the legal system is not itself to break down. I cannot resist quoting one more paragraph from Mr Justice Hartt:

> Traditionally, the law and its enforcement machinery has been principally directed towards interests related to economic, proprietary and purported moral values as espoused by the dominant groups in the particular society. We now have the possibly unique opportunity to assist in adapting the social force of the law to the minimum needs of a new society, that is to the protection of values concerned with individual dignity and acceptable quality of life standard for all.

I try, not always successfully, to keep up with the legal attitudes as well as legal changes in the Commonwealth. I see from my current issue of the Bulletin of the Canadian Bar Association that the theme of this year's Convention is 'To identify and examine current and anticipated trends in the law and the role of lawyers over the next eleven years in the formulation of policies and priorities by the lawyers of Canada'. Why eleven years, I do not understand; but it looks as if this lecture would have been better informed if their Convention had already taken place.

For what changes, then, do we have to prepare? At what are the next generation aiming? They see a world in which greed and competition in all its forms and violence appear to predominate rather than love and co-operation. I should think that 'Make love not war' is perhaps the best four-word slogan ever invented.

They see a world in which the developed countries are getting richer and the under-developed countries are getting relatively poorer, and a world in which—in developed countries—the disparity between the very rich and the very poor increases rather than decreases. They see a world in which—while a large proportion of its inhabitants are undernourished—too high a proportion of the world's wealth is devoted to armaments and the exploration of outer space. They see that the industrial revolution has led to a rate of extraction and consumption of raw materials which cannot continue, partly because of the pollution which it causes and partly because the materials are not there.

They would probably agree with my colleague, Lord Tanlaw, who recently said:

> One day, perhaps, it will begin to dawn on our masters that to plunder, in a single generation, resources that have taken 350 million years to accumulate, is a crime for which our descendants will never forgive us.

They know that at the time of Christ the population of the world was about 250 million, that it doubled in the next 1,050 years, and has since been doubling again at ever shorter periods and looks like doubling again in the following 45 years, and that this process—if not arrested—can only end in disaster.

After Taiwan, England is the most densely populated country in the world, so that we are perhaps more aware of this problem than you are.

What, then, I think the demands of the next generation are likely to be are, first, a demand for a simpler life, prepared to give up further extensions of material well-being if others can have enough food; an increase in personal freedom and an increase in egalitarianism.

White children brought up in schools with black children are not naturally racial and the young have little patience with racial prejudice.

And I can see that—at least in the developed countries—the next generation are simply not going to put up with the ways in which women have always been discriminated against. If I speak to you feelingly on this subject it is because, although we have passed the Equal Pay Act, for nearly a year now I have been sitting weekly on a Select Committee of the House of Lords on a Bill[3] to make illegal discrimination against women in the fields of education, training and employment, and hearing evidence of the discrimination which now exists, starting in the home and going right through the whole educational field and into employment. About 40 per cent of our labour force are now women; and 60 per cent of all working women are married women.

The fact is that we have had several recent revolutions. My father's second name was Septimus, because he was the seventh son in a family of nine children. My uncle Willie had eleven, and today the average is 2.3.

[3] Sex Discrimination Bill, 1973.

The second revolution is in marrying habits. They all, I think mistakenly, marry so much younger, and when the mother of the two children is in her mid-twenties they may be in nursery school, if not at primary school, and she then has forty years left to live and, disregarding all the excesses of the Women's Lib movement, most of them are no longer prepared to spend forty years playing with the Hoover and the washing machine.

And most young men now agree. Indeed most of the young husbands I know do in fact share the cooking and cleaning with their wives, just as it has become common form with us for the matrimonial home to be in their joint names.

Lastly, may I most warmly congratulate this great University on the Centenary of its law school and in this context repeat words which the present Lord Chancellor has recently used:

> Law preceded Civil Rights and was a condition of them, just as Civil Rights preceded democracy, and were a condition of democracy. I could wish that every law faculty in every university, where law, and respect for law, are not always popular conceptions, carried the need for justice like a banner in front of them to be seen by neighbouring faculties. For law is the first of the social sciences, the first to be practised, the first to be taught and studied systematically and, I would claim, the first logically and in importance.

To those words of the Lord Chancellor may I add this reflection? There can be no freedom except freedom under law. And in this context I would suggest that the great gulf in the world today is not between capitalism and communism: it is between the totalitarian countries and the democracies. We have to face the fact that in recent years there has been in the totalitarian countries a grave increase in the extent to which governments torture their political opponents in their prisons.

Owing to a number of Russian men and women, mainly writers, we know what is happening to about a million people in about a thousand slave labour maps in Russia, and we know of their recent appalling practice of incarcerating those who do not agree with the party line in mental hospitals on the plea that they obviously need psychiatric treatment.

We know the nature and extent of the tortures employed in Brazil. I have myself spoken to many, including students and lawyers, who have been tortured in the prisons of totalitarian Greece and Portugal. This has also been more recently true of Turkey, another military dictatorship, including the *falaka* systematic beating of the soles of the feet and electric shocks to the genitals. This happened quite recently to a number of students and to at least seven lawyers who had defended opponents of the military regime in Turkey.

Two months ago, the students of Athens were demonstrating against the refusal of the Colonels' Government to allow them to elect their own

officers. Some of them have been beaten up and others have been arrested and charged. Six weeks ago six lawyers—whose names we know—who had appeared for the students, have been arrested by the military police—who are the ones who do the torturing—and Amnesty International has received evidence that they have in fact been tortured in the prisons of Athens. These countries are our gallant N.A.T.O. allies. The preamble of the N.A.T.O. Treaty states that it is to fortify and preserve the principles of democracy, personal freedom and political liberty, the constitutional traditions and the rule of law which are their common heritage.

In the democracies university students, including law students, seem to have developed something of a practice of demonstrating. I am myself Chancellor of a university of over 40,000 students, and I do not in any way object to this. But I do sometimes wonder whether they realize how lucky they are to be living in a democracy. In totalitarian countries like Greece and Turkey, the university students and the lawyers have led the fight for democracy at appalling risks to their own freedom, and I must pay my tribute to their courage and devotion to democracy.

But those students, and particularly law students, who have the good fortune to live in a democrary will, I hope, remember that freedom in a democracy is based on law and that without respect for law there can be no freedom and no democracy.

I have done. I apologize for the necessarily random nature of my *tour d'horizon* of the likely pattern of future legal changes in the Commonwealth.

I do not think that we need apologize about the past. All over the world we have left a law and legal system which has provided incorruptible judges and which, on the whole, has provided a thing which is British, but which cannot be translated into French, because there is no translation for it—'fair play'.

We have difficult times ahead—but the Common Law has always been adaptable. And with common sense, goodwill and co-operation we shall, I hope and believe, prove equal to that capacity to change which is always a necessary ingredient of survival.

THE POSITIVE CORPORATE SEAL RULE AND EXCEPTIONS THERETO AND THE RULE IN TURQUAND'S CASE

By K. E. Lindgren*

[*This article is primarily a statement and illustration of the principle that the appearance of a corporate seal will be taken as conclusive evidence of corporate assent, and of the exceptions to that general principle. Professor Lindgren refers to the historical rule that a corporation's seal was the sole mode of expressing its contractual assent as the 'corporate seal rule'. The positive aspect of this rule was that where the seal appeared the corporation's assent was proved and it was bound. A discussion of the nature of this rule and the exceptions to it lead the author to conclude that the common seal is an original expression of corporate assent which operates independently of the human acts of affixation and that an appreciation of this principle will illuminate the rule in* Turquand's *case and the several cases on forged company contracts.*]

INTRODUCTION

Contracts by corporations are regulated by the normal general law of contract devised to govern contracts by individuals. Therefore corporations must have notional counterparts for the individual's contracting equipment; *viz*, an effective mind, a mouth, a hand and a seal. The first gave the individual power of decision; the last three were legally recognized modes of expressing decision. Because of the fiction theory and of the corporate seal rule shortly to be discussed, more early cases were concerned with how a corporation's decision was *expressed* than with how it was *made* and the inquiry to be pursued in this article is concerned with the common law mode of expressing corporate contractual assent rather than with how it was formulated.

After much debate[1] as to whether there was a 'positive doctrine of

* B.A. (N.S.W.), LL.B. (Hons.) (London), M.A., Ph.D. (Newcastle), Solicitor of the Supreme Court of New South Wales, Professor of Legal Studies, University of Newcastle. This article is extracted from the author's Ph.D. thesis on the topic 'The Sources and Some Aspects of the Historical Development of the Law Governing Contracts by Registered Companies.'

[1] In addition to the invaluable judgment of the Court of Appeal in *Freeman and Lockyer* [1964] 2 Q.B. 480, esp. that of Diplock L.J., that of Slade J. in *Rama Corporation Ltd v. Proved Tin and General Investments Ltd* [1952] 1 All E.R. 554 should be noted. For the voluminous periodical literature on this development see Sir

constructive notice' and as to whether an outsider must have read the registered company's public documents before he could rely on the rule in *Royal British Bank* v. *Turquand*[2] it is now generally said that there must be an appearance to the outsider that the company is contractually bound before either the doctrine or the rule have scope for operation. Cases where a company has been held not bound[3] are explained by the related propositions that there was no apparent authority as to the act in question or that the outsider was put on inquiry by what did appear to him. The indoor management rule is now thought of as a clog or limitation or qualification on the negative doctrine (the only doctrine) of constructive notice of the registered company's public documents.[4] This modern view followed a distorted view according to which the rule was conceived of as an element in the very *appearance* of corporate contractual assent or *creation* of ostensible authority. The typical way in which the rule was expressed in the old case (a way which gave rise to the distorted view) was by a statement that an outsider dealing with individuals who purported to commit a company in contract was entitled to presume that they had the power or authority which they purported to have, if they *might* have had it consistently with the company's public documents—that their potential authority was their actual authority.[5]

If the actual decisions in the early cases are to stand with the modern view there must, for the rule to operate, be found in them an appearance of

Arthur Stiebel, 'The Ostensible Power of Directors' (1933) 49 *Law Quarterly Review* 350; J. L. Montrose, 'The Apparent Authority of an Agent of a Company' (1934) 50 *Law Quarterly Review* 224; Andrew R. Thompson, 'Company Law Doctrines and Authority to Contract' (1956) 11 *University of Toronto Law Journal* 248; I. D. Campbell, 'Contracts with Companies' (1959) 75 *Law Quarterly Review* 469 and (1960) 76 *Law Quarterly Review* 115; R. G. Nock, 'The Irrelevance of the Rule of Indoor Management' (1966) 30 *The Conveyancer* (*N.S.*), 123; J. L. Montrose, 'The Apparent Authority of an Agent of a Company' (1965) 7 *Malaya Law Review* 253; M. J. Trebilcock, 'Company Contracts' (1965) 2 *Adelaide Law Review* 310: And for monographs see Daniel D. Prentice, 'The Indoor Management Rule', *Studies in Canadian Company Law* (ed. Jacob S. Ziegel, 1967) Ch. 10; *Palmer's Company Law* (21st ed. by C. M. Schmitthoff and James H. Thompson, 1968) , Ch. 27, 242-52; L. C. B. Gower, *The Principles of Modern Company Law* (3rd ed. 1969) Ch. 8, 150-69; Robert R. Pennington, *The Principles of Company Law* (2nd ed. 1967) Ch. 5 105-118.

[2] *Royal British Bank v. Turquand* (1855) 5 E1. & B1. 248, (1856) 6 E1. & B1. 327.

[3] *E.g. Kreditbank Cassel* (*G.m.b.H.*) *v. Schenkers* [1927] 1 K.B. 826 (C.A.), *J. C. Houghton & Co. v. Nothard Lowe & Wills Ltd* [1927] 1 K.B. 246 (C.A.); *Rama Corporation v. Proved Tin etc.* [1952] 1 All E.R. 554.

[4] Even such a statement of the modern approach might be improved upon for what is meant is that the rule does not modify the doctrine but endorses what is inherent in the doctrine itself; *viz* that it is only the *public documents* which are constructively known.

[5] Cf. *Biggerstaff v. Rowatt's Wharf Ltd* [1896] 2 Ch. 93 (C.A.): Sankey J. in *Dey v. Pullinger Engineering Co.* [1921] 1 K.B. 77; perhaps Lord Hatherley in *Mahony v. East Holyford Mining Co.*, (1875) L.R. 7 H.L. 869, 894; and esp. *per* Wright J. in *Kreditbank Cassel v. Schenkers* [1926] 2 K.B. 450 and in *Houghton & Co. v. Nothard Lowe & Wills Ltd* [1927] 1 K.B. 246, 247-51. The cases were reviewed in great detail by Slade J. in *Rama Corporation v. Proved Tin etc.* [1952] 1 All E.R. 554 and the position clarified in *Freeman and Lockyer v. Buckhurst Park* [1964] 2 Q.B. 480. And see the literature noted n. 1 *supra*.