

## **FB's Column in *Justice of the Peace* (No. 2)**

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### ***Olla Podrida***

#### **An Occasional Medley of Legal Snippets**

#### **FRANCIS BENNION**

#### **Don't Forget *De Minimis* . . .**

The legal principle most often forgotten or overlooked by prosecutors and others is *de minimis non curat lex*, the law pays no attention to trifles.<sup>1</sup> It was the first thing I learnt on my degree course at Balliol. My blind bachelor tutor Sir Theodore Tylor taught us a mnemonic which caused him great hilarity:

There was a young fellow named Rex  
who showed little sign of his sex.  
When charged with exposure  
he replied with composure  
*de minimis non curat lex.*

*De minimis* was the answer in the recent case of *McMillan*, though it was not mentioned in the report<sup>2</sup>. The claimant alleged misbehaviour by the arresting officer, who merely "took the [drunken] claimant by the arm to escort her out of the garden". The allegation was dismissed on the ground that the officer was acting within the bounds of "generally acceptable standards of conduct".

A recent Scottish case cried out *de minimis*, but again it was not mentioned in the report. Ray Kutscher-Byrne was convicted of an offence under the Wildlife and Countryside Act 1981. He owns a house on the banks of the River Doon in Ayrshire. It was being threatened by the collapse of the river bank and he obtained permission to shore this up. In the course of the work two freshwater pearl mussels, a protected species, were found attached to the river bank. One was dead. The sheriff admonished Mr Kutscher-Byrne, the lowest level of punishment available. He now has a criminal record, and should never of course have been prosecuted.<sup>3</sup>

#### **Answer To The Gymslip Mother?**

The noted parapsychiatrist Dr Barney Bulimia has asked me to join his support team. He tells me they are currently working up arguments for his newest project, which is to secure an upward adjustment of the age of consent to 21. The good doctor claims this to be the answer to the gymslip mother and other problems of teenage sexuality.

It will be remembered that Dr Bulimia was one of the expert advisers to the Home Office on the content of the Sexual Offences Act 2003. Having secured part of his object of suppressing adolescent sexuality by law, he is anxious to go on and complete the good work. It is not enough; he says, to have reached the position that any sexual expression whatever by a young teenager, even kissing, constitutes a criminal offence. It is vital to continue this reform right up the age range.

<sup>1</sup> See *Bennion on Statutory Interpretation* (5<sup>th</sup> edn, 2008), section 343.

<sup>2</sup> Page 646, *ante*.

<sup>3</sup> Reported in *The Daily Telegraph*, September 30, 2008.

The Bulimia school apparently thinks youngsters should be encouraged to binge on food so as to get their minds off sex. I have told him I will think about his request.

### **The Words For Saying It Come Easily**

The *New Law Journal* for September 19 published an item saying that in *Oxonica Energy v Neuftec* (reference not given) Peter Prescott QC, sitting as a High Court Judge, criticised a boiler-plate term in a contract as “exceedingly hard to interpret”. He quoted the 17<sup>th</sup> century French poet and lawyer Nicolas Boileau:

Ce que l’on conçoit bien s’enonce clairement,  
Et les mots pour le dire arrivent aisément.

This precept can be translated (accurately if clumsily) as “That which one conceives well enunciates itself clearly, and the words for saying it come easily”. This, said Mr Prescott, is the secret of drafting legal documents, and lawyers should have it framed and displayed on their desks.

I’m not sure what old Nicolas (full name Boileau-Despreaux) would have made of that. He meant his precept as advice to poets, and included it in his book *L’Art Poétique*<sup>4</sup>.

### **Fraud on an Act**

Bars in Minnesota have, says the *Daily Telegraph*, “discovered a loophole to resist the public smoking bans sweeping the world”<sup>5</sup>. People love to discover what they think is a loophole in a law, whereupon they try to drive a coach and horses through it – usually unsuccessfully. This propensity is so familiar that the Commonwealth Association of Legislative Counsel (of which I am privileged to be a member) calls its occasional journal, *The Loophole*.

The Minnesota so-called loophole seeks to exploit a well-intentioned provision whereby performers in theatrical productions are exempted from the smoking ban. It works like this, according to the report.

Bars stage *faux* theatrical productions with cigarettes as props. The owners print playbills encouraging patrons to come in costume. They are then treated as actors and permitted to smoke on the bar premises. They are said to be playing themselves in a historical drama set at a time before the smoking ban was introduced. The Rock Bar in St Paul calls such a production *Before the Ban*.

I doubt myself that they will get away with it. The so-called loophole seems to fall within the words Lord Rodger of Earlsferry applied to another similar attempt:

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“The notion of a fraud upon an Act, acting *in fraudem legis*, is ancient. Although the outer limits of the doctrine remain notoriously difficult to define, this case at least falls squarely within its scope.”<sup>6</sup>

### **Thunderer Dumbed Down**

The recent dumbing-down of the once great newspaper the London *Times*, which used to be proudly known as the Thunderer, is illustrated by the fate of two letters I sent them on the same theme. The first was published; the second was not. Here is the first letter, published on 28 December 1995:

“Your report (12 December 1995) that the Home Secretary asked the police and the Crown Prosecution Service to change prosecution policy in a certain area is disturbing. He told them they should treat any ‘have a go’ hero more sympathetically.

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<sup>4</sup> I, 153.

<sup>5</sup> *The Daily Telegraph*, 3 August 2008.

<sup>6</sup> *R v J* [2004] UKHL 42, [2005] 1 All ER 1 at [64].

Mr Michael Howard has no right to tell these officials any such thing: it is not his business. His interference (even though some may like the idea behind it) is unconstitutional. The British constitution entrusts the Attorney General, not the Home Secretary, with the oversight of prosecution policy. This accords with the Attorney's function as the paramount non-party-political guardian of the public interest in matters concerned with law. That function was confirmed by the Appellate Committee of the House of Lords only last year in *Brookes v DPP of Jamaica* [1994] 1 AC 568 at 579. For very good reason, the exercise of the prosecutive power is constitutionally separate from the exercise of the executive, legislative, and judicial powers.

Some functionaries within the enforcement system, notably the police, are regarded as part of the executive. Others, namely the courts, exercise the judicial power of the state. In addition there are the independent wielders of the prosecutive power, or power to put persons on trial. Under the constitutional arrangements now prevailing in England, prosecution policy stands apart. That is a vital safeguard, which Mr Howard should respect. It means that governments cannot decide whom they wish to try. It also means that courts cannot decide who shall appear before them. Their sole function is to try whoever it is they find arraigned. I see no sign that the present Attorney General is aware of his responsibilities in this connection. In his capacity as guardian of the prosecutive power, he is supposed to stand aloof from the executive. Why then has he not stood out against the presumptuousness recently displayed by the Home Secretary?"

Admittedly the *Times* shortened the above slightly, but they did think it worth publishing. Not so with the following, which I sent to them on 18 October this year:

"There is cause for concern in your report that the Government is drawing up guidelines whereby fruit and vegetable traders who sell their produce using imperial measures will not be prosecuted. You quote John Denham MP, whom you describe as "the Innovation Secretary", as saying: "It is hard to see how it is in the public interest, or in the interests of consumers, to prosecute small traders who have committed what are essentially minor offences. I would like to see an end to this kind of prosecution, which is why I have asked for new guidance to be introduced."

This is an innovation too far. For very good reasons, the exercise of the prosecutive power of the state is constitutionally separate from the exercise of the executive, legislative, and judicial powers. The British constitution entrusts the Attorney General, not the executive, with the oversight of prosecution policy. This accords with the Attorney's function as the non-party-political guardian of the public interest in matters concerned with law.

This constitutional principle regarding prosecutions has been accepted since the Campbell Case in 1924, when its interference in the prosecutive process brought down the first Labour Government. The principle means that governments cannot decide whom they wish to try and whom they wish to see escape justice."

Their failure to publish this illustrates the way the *Times* has abdicated as the Thunderer. Its readers still include experts in many fields of the national life, but it no longer wishes to capture their expertise for its once-esteemed letters page. The contributions published on that page are now on the tabloid level. In fact they are outdone by those published by the *Daily Mail*.

### **A "New Way Of Governing"**

The Prime Minister Mr Gordon Brown has set up what is described as an "economic war cabinet"<sup>7</sup>. Its proper name is the National Economic Council (NEC) and it comprises 17

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<sup>7</sup> *The Daily Telegraph*, 4 October 2004.

Ministers of the Crown, the Chair being Mr Brown. He has called it “a new way of governing”<sup>8</sup>. This strikes me as overweening and sinister.

My friend Prince Igor, whom I mentioned last time in this column, is a student of the British Constitution. He asks whether Mr Brown is authorised to alter the constitution off his own bat in this fundamental way? I say no, of course he isn't, but that won't deter him.

The official handout says that the NEC

“. . . will work to help people and businesses to deal with the current economic uncertainties. It will coordinate efforts to help families deal with higher food and energy prices as we work with our International partners in managing the world's scarce natural resources, and provide the forum on how to equip the country for the future by making the right investments in education, skills, science and infrastructure.”

That is part of the ordinary business of government. Mr Brown tries to dress up this “new way of governing” by calling it a Cabinet Committee. But of course Cabinet Committees are part of the existing way of governing too, and there is nothing new about them.

Mr Brown can't have it both ways, though as usual he tries to.

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### **Criminal Law Codification Bites The Dust**

In a recent article<sup>9</sup> I referred to the preparation of a Criminal Code by the Law Commission. I should have mentioned that the Commission have recently concluded that the project is not realistic, and have removed it from their programme<sup>10</sup>. They say:

“With forty-two years' experience of seeking to codify the law, the Commission has taken the opportunity of the Tenth Programme to reappraise whether projects with codification as their principal outcome are realistic and whether effort and resources should explicitly be given to achieving that outcome.”

Odd that it should take 42 years for the Commission to wake up to the need to ensure that their codification projects are realistic. Even odder that a statutory body should express such doubts about a process they are required by statute to perform. The Commission blame “the increased pace of legislation, layers of legislation on a topic being placed one on another with bewildering speed, and the influence of European legislation”.

Evidently codification is another victim of the constant law-churning against which I have often inveighed.<sup>11</sup>

### **Advertisers Complain Of Free Speech Infringements**

It is not generally known that the 2012 London Olympics are backed by a penal Act of Parliament, the London Olympic Games and Paralympic Games Act 2006. This authorises restrictions on advertising which have attracted criticism. It is reported that normally innocuous words such as Game, Medals, Gold, 2012 and Summer cannot be combined in advertising around the Olympics, with anyone flouting the law facing a fine of up to £20,000.<sup>12</sup> The Chartered Institute of Marketing (CIM) says few traders appreciate the constraints of the legislation, and face a rude awakening when they discover they have broken the law. The CIM attacks the Act as “draconian”, warning that:

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<sup>8</sup> *Ibid.*

<sup>9</sup> Page 619, *ante*.

<sup>10</sup> See the Law Commission's Tenth Programme of Law Reform, Law Com No. 311 (2008), [www.lawcom.gov.uk/docs/lc311.pdf](http://www.lawcom.gov.uk/docs/lc311.pdf).

<sup>11</sup> See, e.g., “Law-Churning and the Sociologists”, p. 228, *ante*, [www.francisbennion.com/2008/010.htm](http://www.francisbennion.com/2008/010.htm).

<sup>12</sup> *The Observer*, September 21, 2008.

“An advertisement for sun tan lotion, for example, with the strapline ‘Get bronze in 2012’ would be found to be in contravention of the Listed Expressions element of the Act.”<sup>13</sup>

Tobacco advertisers fear that a different form of censorship is threatened. Denis Campbell of *The Observer* says “Government plans that would force tobacco firms to sell cigarettes in plain, unbranded packets could be the most powerful tool yet unleashed in the war on smoking”<sup>14</sup>. He reports Deborah Arnott, director of the health campaigning charity Ash, as saying, with remarkable lack of originality, that plain packing is an idea whose time has come. She adds:

“The industry knows that plain packs spell the death knell to industry profitability. [It] cannot survive without recruiting replacements for the 100,000 UK citizens its products kill each year. Most of these new smokers are children and young people, who our research shows find plain packs much less attractive.”

### **Are Counsel Needed To Uncover The Truth?**

At the Club the other day my old friend Sir Merryweather Merriedew QC (universally known as Merry) was controversially holding forth as usual. “I have practised in the courts as counsel for over sixty years”, said Merry, “and I can confidently say that the truth is best discovered without their use”.

“You mean by just having litigants in person?” I asked.

“Precisely” said Merry. “I’ll give you an example at random from the Family Court.”

Merry told us that he was, as counsel for the husband, cross-examining the wife, who described how the husband constantly called her names.

*Wife* Then he called me a rabbiting Irish cottage woman.

*Counsel* That was just in the heat of the moment was it not?

*Wife* It was not.

*(Counsel hastily passes on.)*

“You see how it is”, Merry remarked. “Counsel is really hamstrung, and produces nothing helpful to his client.” He went on to give us a sample of a similar interchange where the husband represented himself.

*Wife* Then you called me a rabbiting Irish cottage woman.

*Husband* That was the truth, wasn’t it?

*Wife* It was not.

*Husband* Well let’s take it in turn. One, you like rabbiting, don’t you?

*Wife* (unconvincing) I do not.

*Husband* Don’t people avoid you in the street because once you start they can’t get away from your rabbiting?

*Wife* They do not. Why only yesterday . . . (rabbits on until stopped by Judge).

*Husband* Two, I called you Irish. You are Irish by birth aren’t you?

*Wife* That I am, and will be till my dying day.

*Husband* Although you changed your nationality to British when you came to live in England? Three, your forebears lived in Irish cottages?

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

*Wife* There's nothing wrong in that.

*Husband* And you've always constantly told me that all you ever wanted was to live alone in a bedsit?

*Wife* (hesitant) Yes.

*Husband* My Lord, I rest my case.

### **Earl Forsooth and Prince Harry**

Here is another from my collection of indignant letters written by the Rt Hon. Earl Forsooth KG.

#### ***Montmorency Castle***

Rutland

14 January 2005

The Editor  
The Sun

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Sir,

I notice that your disgusting rag has again been traducing His Royal Highness Prince Henry Charles Albert David, commonly known as Prince Harry. This time it is over what he wore at a private fancy-dress party on the excellent theme of 'Colonials and Natives'. In your issue for 13 January 2005 a large front-page headline reads 'Harry the Nazi', which is grossly impertinent. Next to it is placed an unauthorised photograph of His Royal Highness wearing slacks and a short-sleeved shirt, both beige, with a swastika insignia on his left arm.

In *The Sun Newspaper Online* on 16 January you compound your offence by writing that 'Prince Harry's not the brightest star in the royal firmament', which again is disrespectful. You go on to say he is to be given a tutorial on the Holocaust by the Chief Rabbi, Dr Jonathan Sacks. This cannot be true. I happen to know that Dr Sacks is an honourable man, who would not dream of committing such presumption.

You have got this matter completely out of proportion. There is a long tradition of wearing this kind of costume at fancy-dress parties, and Prince Harry is a stickler for tradition. He hired the costume from a shop which had it in stock, and no doubt frequently hired it out to customers. Why should the fact that one of these customers happens to be Prince Harry make any difference? He is surely entitled to a private life? Indeed it is one of his human rights to have one. My chap Vencible tells me that Article 8 of the European Convention on Human Rights, which is part of our law, says that everyone has the right to respect for his private life and that this applies to Prince Harry as much as to any other British citizen.

You suggest the incident makes Prince Harry unfit to be admitted to the Royal Military College at Sandhurst for training, yet Vencible tells me he has seen photographs in the *Daily Mail* for 15 January 2005 of a fancy-dress parade at Sandhurst where cadets are dressed as Nazis. One young man, with fake Hitler moustache, is giving a Sieg Heil salute with arm raised. Another cadet wears jackboots and a Nazi SS uniform with swastika armband. So much for Sandhurst.

The *Sunday Telegraph* for 16 January reminds us that *The Producers*, currently playing to packed houses in London, features a spoof musical *Springtime for Hitler* where the cast are all dressed in Nazi uniforms. Prince Charles and his partner Camilla Parker-Bowles recently attended a performance of this and laughed along with the rest of the audience. What signal

did that give Prince Harry? asks the newspaper. It adds that dressing up as Nazis belongs to a long British comedy tradition, starting with Charlie Chaplin in *The Great Dictator* and continuing with shows like *Dad's Army*, *'Allo 'Allo* and *Fawlty Towers*.

I myself served in the Grenadier Guards throughout Hitler's War and I remember that we mocked the Fuehrer's idiots, as did the whole British people. It was jeering at him as Lord Haw-Haw that neutralised the effect of the traitorous William Joyce and his pitiful propaganda broadcasts.

So get real, if I may borrow a phrase frequently used by my grandchildren when visiting the Castle. In an earlier age, I may say, you would have been hung from the Castle battlements if any of my ancestors had got hold of you.

Yours faithfully (to the Crown),

***Forsooth***