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LAW COMMISSION'S DRAFT PROPOSALS ON POWERS OF THE COURT OF APPEAL TO SIT IN PRIVATE AND RESTRICTIONS UPON PUBLICITY IN LEGITAMACY PROCEEDINGS

INTRODUCTION

1. As an immediate response to the recent decision in B. (otherwise P.) v. A.-G., now reported in [1965] 3 All E.R. 253, and [1966] 2 W.L.R. 58, the Law Commission commenced an investigation into whether the court should have power to sit in private when hearing an application for a legitimacy declaration. In the course of this investigation it became clear that there was a widespread feeling that it was equally urgent to consider a change in the law which would confer on the Court of Appeal the power (which it has in recent years held itself precluded under the existing law from exercising) of sitting in private, especially in custody and wardship cases. Accordingly the Lord Chancellor, on 10th February 1966, directed the Law Commission to extend the inquiry "so as to include an examination of the desirability of the Court of Appeal's having the same powers to sit in private or in chambers as are enjoyed by the court from whose decision the appeal is brought" and to provide advice on the subject in pursuance of section 3(1)(e) of the Law Commissions Act 1965.

Hence these Proposals relate to two different but related topics. Before dealing with each separately it appears desirable briefly to summarise the present law relating to publicity of court proceedings.

THE PRESENT POSITION

Sittings in Open Court, in camera, and in Chambers.

2. Normally a Judge must sit in open court to which the public are admitted. Sometimes, however, he may sit in private. There are two ways in which he can do so. The first, technically known as a hearing in camera, is when the Judge orders the court to be closed during the whole or part of the trial. The second is when the Judge is technically not sitting in court at all but in Chambers. Although he may then sit in his usual courtroom, wigs and gowns are not worn, and there is a wider right of audience, for, even in the High Court, solicitors and, with the leave of the Judge, their clerks may be heard. In both cases the public are not admitted.

In this paper the expression "in private" is used to describe both these types of hearing; the technical expressions "in camera" and "in Chambers" being used only for the purpose of distinguishing between two methods of achieving a private hearing.

3. The leading case on the duty to administer justice in open court is Scott v. Scott [1913] A.C. 417, in which it was held by the House of Lords that the Probate, Divorce and Admiralty Division had no power, either with or without the consent of the parties, to hear a matrimonial suit in camera in the interests of public decency. Although Earl Loreburn was prepared to recognise that the Court might sit in private where publicity would reasonably deter a litigant from proceeding, that view was not supported by the other law Lords and has now been held to be wrong: B. (otherwise P.) v. A.-G., supra, following Greenway v. A.-G. (1927) 44 T.L.R. 124. On the other hand, it is recognised that a trial can be in camera where trade secrets are involved since otherwise the subject matter of the action, the secret, would be destroyed and justice thereby be denied. Similarly a hearing in camera may be ordered in the interest of national security. It was also accepted in Scott v. Scott, supra, that, where the court acts in its parental or administrative jurisdiction when dealing with infants

(for example in wardship cases) or with persons suffering from mental disorder, it may sit in private. Normally that is achieved by sitting in Chambers. Moreover the obligation to sit in open court applies only to the trial itself and not to the preliminary interlocutory matters of an administrative character. These, too, in the High Court are dealt with in Chambers. Further there is authority for saying that "where Parliament has conferred a jurisdiction upon the High Court or any of its predecessors, the court has power to delegate that jurisdiction to a single judge sitting in chambers unless Parliament has also provided that the court itself, and not a single judge, is to exercise the jurisdiction": per Scarman J. in Re Bellman decd. [1963] P.239 at p. 242, citing Smeeton v. Collier (1847) 1 Ex 457 and Re Davidson [1899] 2 Q.B. 103, D.C. Section 61 of the Judicature Act 1925 appears to provide that in such circumstances delegation to a judge in Chambers may be effected by Rules of Court.

4. Accordingly there are four sources from which the Court may derive power to sit in private:-

(a) When this is permitted under an exception to the rule in Scott v. Scott.

(b) In interlocutory and administrative matters,

(c) When the jurisdiction has been validly delegated to a single Judge sitting in Chambers,

(d) Under express statutory provision.

As will be seen from the following paragraph, under the rules and practice of the courts there is now quite a wide range of cases in which there may be, a private hearing, generally by sitting in Chambers. The rules and practice presumably derive from one or other of the above sources, though it is not always easy to determine which. In some cases the Judge has a discretion to sit in private; in others he must do so.

5. In the Chancery Division, where the administrative role of the court looms largest, there is a wide power to sit in Chambers: see R.S.C. O.55 r.2 which lists a number of matters to be heard in Chambers and concludes with "(18) Such other matters as the Judge may think fit to

dispose of in Chambers". In the Revised Rules which come into force on 1st October 1966, these are no longer listed in one place but the more important of them (those which do not relate to obviously administrative matters) are referred to below. The concluding rule 2(18) will be replaced in the following terms in the Revised Rules as O.32 r. 19: "The judge may by any judgment or order made in court in any proceedings direct that such matters (if any) in the proceedings as he may specify shall be disposed of in chambers".

The recognised practice of sitting in private in wardship cases has been extended to all applications as to guardianship, maintenance and advancement of infants (see R.S.C. O.55 r.2 – Revised Rules O.91 rr.9 and 10 – C.C.R. O.46 r.1, and the Guardianship of Infants (Summary Jurisdiction) Rules 1925, r.3), and to adoption proceedings (see Adoption Act 1958, s.9(5), the Adoption (High Court) Rules 1959, r.1, the Adoption (County Court) Rules 1959, r.16, and the Adoption (Juvenile Court) Rules 1959, r.16.). Although motions for attachment or committal must normally be heard in open court, the court is expressly authorised to sit in camera in cases relating to infants or to persons, suffering from mental disorder, or to secret processes, or "where it appears to the court that in the interests of the administration of justice or for reasons of national security the application should be heard in private": R.S.C. O.44 r.2(4) (O.52 r.6(1) of the Revised Rules). Under an amendment to the rules in 1965, if an order is made as a result of a hearing in private in these cases a statement must be made in open court: R.S.C. O.44 r.2(4A) (O.52 r.6(2) of the Revised Rules). In the Chancery and Probate, Divorce and Admiralty Divisions motions for an injunction also have to be moved in open court, but in the Chancery Division if infants are concerned the judge normally accedes to a request to hear the case in camera. In the Queen's Bench Division interlocutory applications for injunctions are made to a Judge in Chambers so that privacy is automatically ensured unless there is an adjournment in open court. Summonses under section 26 of the Matrimonial Causes Act 1965 (maintenance from the estate of a former spouse) are dealt with in Chambers in the Probate, Divorce and Admiralty

Divisions: Re Bellman, supra, in which it was held that this practice was authorised by r. 58B of the Matrimonial Causes Rules 1957 and that the Rule was intra vires under the general power to delegate jurisdiction to a single judge (see paragraph 3). Analogous actions in the Chancery Division under the Inheritance (Family Provision) Act 1930, are, however, dealt with in open court unless the interests of an infant or other person under disability are affected, in which event there may be a hearing in Chambers: R.S.C. O.104 r.12 (Revised Rules O.99 r.4).

Further, it is now a statutory rule that in nullity proceedings evidence on the question of sexual capacity must be heard in camera – thus over-ruling the actual decision in Scott v. Scott – unless the judge is satisfied that, in the interests of justice, any such evidence ought to be heard in open court: Matrimonial Causes Act 1965, s.43(3). Under the Magistrates' Courts Act 1952, the general public have no right to be present during the hearing of domestic proceedings (s.57(2)), and although the Press have a right to be present the court may be cleared and the Press excluded during the taking of any indecent evidence if this is thought necessary in the interest of the administration of justice or of public decency: s.57(3). The Children and Young Persons Act 1933, imposes similar restrictions on the right of the public to be present at sittings of juvenile courts (s.47(2)) except in proceedings under Part I of the Children Act 1958 (see s. 10 of that Act) or under Part IV of the Adoption Act 1958 (see s.47 of that Act), and entitles the bench to clear the court (but not to exclude the Press) while children are giving evidence in cases involving conduct contrary to decency or morality (s.37).

6. The Court of Appeal has no Chambers and accordingly an appeal to it from a Judge in Chambers has to be heard in open court (see paragraph 10 below) unless the circumstances are such as to fall within an exception recognised by Scott v. Scott, supra, or unless there is express statutory authority to sit in camera.

Publication of Proceedings

7. When the trial is heard in open court it follows that the Press can be present and normally is free to publish a full report. This freedom is protected by section 3 of the Law of Libel Amendment Act 1888, and section 8 of the Defamation Act 1952, whereby a fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority within the United Kingdom is immune from an action of defamation if published contemporaneously with the proceedings (as regards reports of proceedings outside the United Kingdom, see the Defamation Act 1952, s.7 and Part 1 of the Schedule and Webb v. Times Publishing Co., [1960] 2 Q.B. 535). This protection has been extended of news broadcasts by section 9(2) of the Defamation Act 1952. It will be observed that the privilege does not extend to matters heard in camera or in Chambers. Such publication is not itself contempt of court, but will be if the proceedings relate of wardship, adoption, guardianship, custody, maintenance or upbringing to an infant; or to certain provisions of the Mental Health Act 1959; or if the court sits in private for reasons of national security; or if the information relates to a secret process in issue in the proceedings: Administration of Justice Act 1960, s.12. And if the published information is incorrect it may be contempt and an actionable libel.

8. There are also certain statutory restrictions on the right to publish details of judicial proceedings heard in public. The Judicial Proceedings (Regulation of Reports) Act 1926, forbids the publication in relation to any judicial proceedings of "any indecent matter or indecent medical, surgical or physiological details being matters or details the publication of which would be calculated to injure public morals": s.1(1)(a). Further, in relation to any judicial proceedings for dissolution or nullity of marriage, or for judicial separation or restitution of conjugal rights, no particulars may be published other than the names, addresses and occupations of the parties and witnesses; a concise statement of the charges, defences and countercharges; submissions and decisions on any point or law; and the

summing up of the judge, the finding of the jury, and the judgment of the court and observations made by the judge in giving judgment: s.1(1)(b). Under s.58 of the Magistrates' Courts Act 1952 there is a similar limitation on publication of evidence in domestic proceedings (which include affiliation proceedings) in magistrates' courts, and under s. 57(3) (supra) press representatives are among those who may be excluded during the taking of indecent evidence. Under the Children and Young Persons Act 1933, a court may direct that no newspaper report or picture or sound or television broadcast shall be published which might lead to the identification of any child or young person concerned as a party or witness in the case or in respect of whom the proceedings are taken: s.39 as amended by s. 57 of the Children and Young Persons Act 1963. It seems that this applies to all civil and criminal proceedings notwithstanding the heading to the Part of the Act in which the section appears. In proceedings in juvenile courts and on any appeal therefrom any such publication is prohibited without the need for a direction to that effect: ibid s. 49 as amended by s.57 of the 1963 Act.

Need for General Review

9. It will be observed that there are now quite extensive exceptions to the general rule that proceedings must be conducted in public and can be freely reported. The extensions since Scott v. Scott, supra, seem all to be based either upon the protection of the public decency (thus reversing Scott v. Scott which held that this was not a sufficient reasons for hearing a case in private) or on the need to protect infants or mental patients. But the present position can hardly be regarded as satisfactory. Although the House of Lords in Scott v. Scott stressed the paramount need to hear in public cases involving status, it is precisely in such cases that the main exceptions have been recognised. In other civil litigation there have been no extensions to the exceptions recognised in Scott v. Scott, notwithstanding that it has been repeatedly stressed that the general rule deters resort to the courts and encourages the use of arbitration instead: see, for example, the Report of the Commercial Court Users' Conference

(Cmnd. 1616 of 1962). The prohibition on publishing the evidence in divorce and similar cases, though it protects the public from being titillated by morning and evening accounts of the salacious details brought out in evidence, does not prevent it from learning these details in due course if the judge thinks it necessary or desirable to review the evidence in full in his judgment or summing up (unless the Press consider that publication "would be calculated to injure public morals". What is more serious is that the parties and, more especially, their innocent children whose identity is frequently revealed as a result of the details which can be published, suffer the disturbing experience of having the most intimate details of the family life exposed. While it may be said that the parties have only themselves to blame, no such argument can apply to the children whose privacy the law takes pains to protect in other cases. It is also anomalous that a juvenile criminal may receive more protection from publicity than, say, a juvenile victim of a sexual assault – a fact which sometimes makes it impossible to obtain the necessary evidence for a prosecution. Perhaps most anomalous of all is the fact that on an appeal from a Judge in Chambers to the Court of Appeal privacy is lost. Almost equally anomalous is the fact that applications for legitimacy declarations cannot be heard in camera and, unlike other forms of relief dealt with in the Matrimonial Causes Act, publication of the evidence is not forbidden by section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926.

It is with these two last anomalies that these Proposals are concerned. A full review of the whole position would be a lengthy operation and raise controversial issues. On the other hand, such consultations as the Law Commission has had on these two specific points suggests that immediate action would be generally welcomed and not be regarded as controversial.

THE COURT OF APPEAL

Present Power to Sit in Private

10. The position regarding the powers of the Court of Appeal to sit in camera was reviewed in the two fairly recent cases of Re Agricultural Industries Ltd. [1952] 1 All E.R. 1188, C.A. and Re Green (a Bankrupt) [1958] 1 W.L.R. 405, [1958] 2 All E.R. 57, C.A. In the former case, an appeal in an interlocutory matter from a Judge in Chambers, Evershed M.R. pointed out that the Court of Appeal had no power to sit in Chambers and that accordingly the Court could sit in private, even on an appeal from a Judge in Chambers, only if it could be shown in the particular case that, as laid down in Scott v. Scott, the ends of justice would otherwise be liable to be defeated. The court heard the arguments in camera and then delivered judgment in open court dismissing the appeal. In Re Green the court heard in open court the application that it should sit in camera but then granted the application and cleared the court. It appears from the brief judgment of Jenkins L.J. that it did so because satisfied that the case was of a nature which under Scott v. Scott could be heard in camera. However, Counsel had also argued that in that particular case the Court of Appeal was exercising the original jurisdiction of the registrar and bankruptcy judge and that the proceedings involved no lis so that the court could sit in private on this ground. It is not clear from the reports whether that argument had any effect on the decision.

11. The Evershed Committee on Supreme Court Practice and Procedure (Cmd 8878 of 1953) considered a suggestion that for the hearing of interlocutory appeals from a Judge in Chambers, the Court of Appeal should itself sit in private. They pointed out that: "It would appear logical at first sight that the business which is habitually dealt with in chambers below should be similarly dealt with in the Court of Appeal ....", though they emphasised that "legislation would be required for such purpose, there being no 'chambers' of the Court of Appeal and no

statutory power for the Court of Appeal – as there is for the Judges of the High Court under the Judicature Act – to 'sit in chambers'": paragraph 608. Two arguments were put forward in support of the suggestion: reduction of costs and avoidance of "blackmailing" appeals taken for the express purpose of obtaining publicity. The Committee did not recommend the adoption of the suggestion. They stated that: "In our view the powers conferred by Scott v. Scott are adequate to protect any litigant whose interests would be prejudiced by a hearing in public". They did recommend, however, that "where application is made to the Court of Appeal to exercise the powers conferred by Scott v. Scott to hear an appeal in camera that application should itself be heard in camera" paragraph 612. That recommendation has not been embodied in legislation and the practice seems to vary: cf Re Agricultural Industries Ltd., supra and Re Green, supra.

12. The Evershed Committee did not consider the matter except in relation to interlocutory appeals. It is clear, however, that the Committee assumed that the Court of Appeal had power to sit in private – as it then used to – when concerned with the parental jurisdiction over infants. Specific reference was made to this in paragraph 608 of the Report: "It was pointed out that the Court of Appeal already has occasion from time to time to sit in camera, e.g. when dealing with any question relating to the custody of an infant." That practice has now been discontinued. The court now sits in public but the Press is requested to refrain from publishing the names of the parties and the case is reported as Re A or the like. Although the Press loyally comply with the request this does not necessarily prevent the parties and their children from being identified by people in their locality since the published facts will often leave no doubt as to who they are.

13. It would seem that the Court of Appeal has taken the view that, when matters are heard at first instance in Chambers, this is not because they are matters which come within recognised exceptions to the general rule upheld in Scott v. Scott, but rather because "Chambers" are a special

institution distinct from open court. Since the Court of Appeal has no Chambers, in an appeal to it the case has to be heard in open court unless its particular facts are such as to justify a hearing in camera because the ends of justice would otherwise be liable to be defeated. In the light of the decision in B. (otherwise P.) v. A.-G., supra, it appears that the formula is narrower than was often thought (for example by the Evershed Committee), since it is not sufficient to show that a litigant would be reasonably deterred from proceedings with the action.

So far, at any rate, as concerns cases heard in Chambers because they relate to the parental jurisdiction over infants or persons of unsound mind, it is arguable that in truth they are heard by a Judge in Chambers because they are recognised exceptions to the rule in Scott v. Scott. Scott v. Scott itself affords some support for this argument, as does the fact that O.44 r. 2(4), (Revised Rules O.52 r. 6(1)) supra, equates cases concerning such persons with those relating to trade secrets and those where national security is concerned – the undoubted exceptions to the general rule. On the view taken by the Court of Appeal it would appear to follow that that court cannot sit in camera on an appeal from an application for committal or attachment in a wardship case; although O.44 r.2 expressly applies to the Court of Appeal the wording suggests that it does so only when the application is made to the court in the exercise of its original jurisdiction (a highly unusual case).

Law Commission's Proposals

14. The Evershed Committee rejected the suggestion that the Court of Appeal should itself sit in private when hearing on appeal in an interlocutory matter from a Judge in Chambers. The Law Commission agrees that there should be no fixed rule requiring the court to do so. As the Evershed Committee pointed out: "Interlocutory appeals normally reach the Court of Appeal only if they raise some point of outstanding importance. [This perhaps over-states the case.] We think that in the interests of the administration of the law as a whole it is vitally important

that the decisions of the Court of Appeal in interlocutory questions should be reached in public, so that they can be properly reported for the future guidance of practitioners": paragraph 612. Nevertheless the Law Commission considers that the court should have power to hear the whole or any part of the appeal in private if it thinks fit to do so. It is believed that this power is required for the second of the two arguments put to the Evershed Committee, namely to prevent appeals on interlocutory matters being taken to the Court of Appeal wholly or partly for the express purpose of obtaining publicity. Even in such a case the judgment could be delivered in open court and reported if an important point of law was involved.

Appeals which are totally unmeritorious and which can only be regarded as akin to blackmail are believed to be very rare. But they do occasionally occur. The Evershed Report (paragraph 608) gives the following illustration:-

> [A] plaintiff who has a clear right of action is met with a defence raising scandalous accusations against him which have no bearing on the case. He applies to strike out the defence and obtains an order from the Master which is affirmed on appeal to the Judge in chambers. The defendant, however, obtains leave to appeal to the Court of Appeal and this involves that under the present procedure the scandalous accusations will be discussed in public. What is the plaintiff to do? If he allows the appeal to proceed, even though he wins the appeal, the damage will have been done – for the accusations will have been ventilated in public. His only alternative is to discontinue his action, thereby perhaps suffering an injustice through having to abandon a perfectly good claim."

This is an extreme example and therefore an extremely rare one; so extreme that one wonders how the defendant could succeed in obtaining leave to appeal. But the injustice is just as great where the case of the plaintiff is not so overwhelmingly strong and the conduct of the defendant

not so obviously inexcusable – a much more common case. This sometimes occurs where the defendant is resisting an application for summary judgment under Order 14. In his affidavit he may make accusations reflecting on the conduct or reputation of the plaintiff. If he is refused leave to defend no he has a right of appeal (without leave) from the Judge in Chambers to the Court of Appeal (Judicature Act 1925 s.31(2)) and can thus ensure that his accusations are made public. This has been known to cause the plaintiff to give up.

In the opinion of the Law Commission, if a litigant has legitimate grounds for bringing or defending an appeal from an interlocutory decision made in private, he should not be forced to forego his rights because he is not prepared to face a public hearing at that stage. It is the nature of the proceedings, not the elevation of the court, which should be decisive. If it is appropriate that interlocutory matters should normally be dealt with in private, there should be power to deal with them in private irrespective of whether the tribunal concerned is a Master, Judge, or the Court of Appeal. Unless there is such a power one party will be encouraged to appeal against a rejection of his scurrilous attacks on the other and that other will be discouraged from defending the appeal.

15. It appears that the Evershed Committee refrained from making a similar recommendation only because they believed that "the powers conferred by Scott v. Scott are adequate to protect any litigant whose interests would be prejudiced by a hearing in public." But B. (otherwise P.) v. A.-G. has now held that Scott v. Scott does not empower the court to sit in private because a litigant would be reasonably deterred from pursuing his claim if it were heard in open court.

16. The Law Commission considers that the case for empowering the Court of Appeal to sit in private is even stronger in the case of appeals in non-interlocutory matters in which the court from which the appeal is brought sits in Chambers or otherwise in private. This is especially so in guardianship and wardship cases, where the present practice is liable to

destroy the infant's protection against publicity so carefully preserved in the court below. It seems that the Evershed Committee assumed that the Court of Appeal could sit in private – as it then did – in such cases.

17. It is not considered that the power of the Court of Appeal to sit in private should be solely dependent on whether the court below has sat is camera or in Chambers. It is recommended that the Court of Appeal should be empowered in its unfettered discretion to hear the whole or any part of the appeal in private if the court from which the appeal is brought had power to sit in private or in Chambers for any part of the hearing. This would enable the Court of Appeal to sit in private notwithstanding that the court below had not exercised its power to do so, and to refrain from sitting in private notwithstanding that the court below had done so. It would also enable part only of the hearing – for example delivery of judgment – to be in open court

18. The Law Commission also considers that, as recommended by the Evershed Committee, where application is made to the Court of Appeal to hear an appeal in private, the application should itself normally be heard in private. Once again, however, it is considered that the court should have a discretion and that it should suffice if it were laid down that the application should be heard in private unless the court otherwise directs. It seems that this flexibility is needed; it might be desirable, for example, to adjourn into open court for the purpose of giving judgment on the application, as the court did in Re Agricultural Industries Ltd., supra.

19. It is not recommended that Chambers should be created in the Court of Appeal. All this is sought to be achieved is a power to sit in private and for this purpose there is no point in creating Chambers where none exists at present. Of the other distinctions between open court and Chambers the only one, apart from privacy, which may be of any relevance is the slightly lesser degree of formality that prevails in Chambers and the fact that solicitors have a right of audience. It is argued that this might reduce cost and it was on this ground as well as that of

privacy that it was suggested to the Evershed Committee that the Court of Appeal should have power to sit in Chambers. The Law Commission is acutely conscious of the need to diminish the expense of litigation but does not believe that this is the way to do it. As the Evershed Committee pointed out (paragraph 609) in almost every case which reached the Court of Appeal counsel would be briefed to argue the appeal. If, as previously recommended, the court has power to sit in private there will be less likelihood of unmeritorious "blackmailing" appeals, where the respondent might not consider it necessary to brief counsel since no question of real importance was involved. The availability of Legal Aid will ensure that the respondent is not deterred on grounds as expense, and if the appellant's case lacks merit he should be deterred by the likelihood that he will have to bear the costs.

In any case the Law Commission is opposed to the reform of the law by the use of fictions. If it is thought that solicitors' rights of audience should be extended this should be done openly and not clandestinely by the pretence that the Court of Appeal is not sitting as such but in Chambers.

20. The Evershed Committee pointed out that legislation would be necessary to enable the Court of Appeal to sit in Chambers. It seems clear that the same applies to the alternative proposed, namely, that there should be a wider power to sit in camera: see paragraphs 3 and 4. It is thought that this could not be achieved by Rules of Court rather than by statute. On the other hand, the recommendation that an application to hear an appeal in private should itself normally be heard in private could, it is thought, be implemented by Rule of Court once the Court of Appeal has had conferred on it by statute power to sit in private when hearing the appeal. To this extent an amendment of the Rules would appear to be more appropriate than a statutory provision.

21. Although the reference to the Law Commission in restricted to the powers of the Court of Appeal, any legislation that results should not

throw doubt on the powers of other appeal courts to sit in private. So far as the Divisional Court is concerned it is not clear whether it can sit in Chambers. The position of the House of Lords and Judicial Committee of the Privy Council is also somewhat obscure. In principle one would suppose that the House of Lords can exercise the privilege which it certainly has while sitting as a legislative body to exclude strangers and that the Privy Council can be as private as its name implies. But it has been repeatedly stressed that both the Appellate and Appeal Committees of the Lords and the Judicial Committee of the Privy Council are essentially court of law, and on that basis it can be argued that they can sit in private only when empowered to do so by Scott v. Scott or by statute. In practice they always sit in public, though formerly the Appeal Committee of the House of Lords sat is private when hearing applications for leave to appeal. It is not very likely that either the House of Lords or the Judicial Committee would often want to sit in camera, but it might if an appeal in a custody or wardship case went to it.

LEGITIMACY DECLARATIONS

Present Power to Sit in Private

22. The present position relating to publicity in applications for legitimacy declarations was highlighted by the recent decision in B. (otherwise P.) v. A.-G. to which reference has already been made. That case concerned consolidated petitions for declarations of legitimacy brought by two small children through their mother acting as next friend. At the commencement of the hearing, counsel for the children applied for the petitions to be heard in camera. Wrangham J., in his judgment rejecting this application, stated:

> "I was told, and accept of course from counsel who appears for the infant petitioners, that their mother took the view that the public discussion of the matters which would have to be disclosed in evidence in order to support the petitions would be so harmful to the interests of the children that she would not think it right on their

behalf to proceed with these petitions unless they were heard in private .....

"It is not necessary for me either to agree or disagree with the views which the mother has expressed. It is sufficient for me to say that it seems to me to be a view that could perfectly reasonably be hold upon full consideration

"The position, therefore, is that in this particular case there is ground for supposing that the litigants would be reasonably deterred from bringing their consolidated suits to a final hearing if that final hearing were not ordered to be in private. The question that arises, therefore, is whether the reasonable apprehension that they would be so deterred is sufficient justification in law for making the order that the hearing shall be held in camera": [1966] 2 W.L.R. at p. 59.

Applying Greenway v. A.-G. (1927) 44 T.L.R. 124, the learned judge came to the conclusion that:

"I have no jurisdiction, whatever my wishes might be, to order that this trial take place in camera": ibid p. 63A.

The Judge, at the request of counsel, then passed on an appeal that to save the infants from harm the public should withdraw and the Press refrain from publishing anything which would enable the parties to be identified: ibid at p. 63. It would appear that he could have given a direction to the Press under s. 39 of the Children and Young Persons Act 1933, as amended by the 1963 Act (supra, paragraph 8) but this does not seem to have been suggested. After a short adjournment counsel stated that the mother "while never doubting the integrity of the Press, was not prepared to run the risk of the suit coming to the notice of the children involved, and was not prepared to continuo" The Times Newspaper, 16th June 1965. The hearing was then adjourned generally. There has been no appeal against the Judge's decision, which seems to have been inevitable in the present state of the authorities.

It is understood that adoption proceedings have been instituted instead, thus achieving in privacy the aim of regularising the position of the children, though in a manner that could be less advantageous to them.

23. Legitimacy petitions are, no doubt, distinguishable from adoption and the other proceedings concerning children which are heard in Chambers or in camera in that they do not inevitably concern infants and, even where they do, are less likely to require the infants to give evidence. Moreover while adoption proceedings are designed to conceal natural parenthood, legitimacy proceedings are designed to establish it. This affords valid reasons for not insisting that legitimacy proceedings shall be in private, but does not seem a valid ground for denying the Court the right to sit in private if satisfied that a hearing in public would adversely affect infants. In most respects the analogy between legitimacy and adoption proceedings is very close, for both raise the same issues of status and citizenship. Moreover, in legitimacy petitions there is an additional protection against any abuse resulting from privacy because the Attorney-General has to be made a respondent: Matrimonial Causes Act 1965, s. 39(6).

24. Legitimacy petitions are also distinguished from other forms of relief dealt with in the Matrimonial Causes Act in that the restriction on the publication of evidence imposed by section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926, does not apply to them. Hence there is no legal restriction on the publication of all the details except the general prohibition of publication of indecent matter calculated to injure public morals: ibid s. 1(1)(a). Protection of infants against harmful publicity is therefore dependent on the self-restraint of the public and the Press and on their response to any appeal or direction from the Bench. Although it seems that under the amended section 39 of the Children and Young Persons Act 1933 a direction to the Press can be given in legitimacy proceedings, that is so only if the children are concerned as parties or witnesses, which may or may not be the case. While judicial appeals for discretion seem generally to be effective, the

layman can scarcely be blamed for not being willing to rely on this. Moreover, no judicial appeal or direction will necessarily be effective in preventing local gossip. In any case it is unsatisfactory that everything should depend on the discretion of the Press and such members of the public as happen to be present in court.

Law Commission's Proposals

25. It appears to the Law Commission to be wrong in principle that people should be deterred from establishing their legitimacy or that of their children through a reasonable fear of the adverse effects that publicity may have on the children. This can produce a denial of justice similar to that which may flow from the present limitations on the power of the Court of Appeal to sit in private. Accordingly the Law Commission recommends that section 39 of the Matrimonial Causes Act 1965 should be amended by conferring on the court (including the County Court) a discretion to sit in private when hearing applications for legitimacy declarations. This discretionary power should be exercisable in respect of the whole or any part of the proceedings. It is not envisaged that the discretion will normally be exercised in favour of a private hearing unless infant children are concerned and then only if the court in satisfied that the publicity would be likely to be harmful to them. On the other hand, it is not thought advisable expressly to impose any such limitation on the court's discretion; the court can be trusted to exercise it with good sense and restraint. There may be some exceptional cases where the interests even of adults of full capacity require and deserve protection, especially perhaps where they are involved in the proceedings involuntarily.

26. Secondly, it is recommended, consistently with the similar recommendation in the case of the Court of Appeal, that an application to hear such a petition in private should itself be heard in private unless the court otherwise directs. It is suggested that this should be laid down as a general rule applicable to any application for a hearing in camera and not be limited to legitimacy declarations.

27. It is arguable that the objects to be achieved by the foregoing recommendations could be attained by an amendment to the Rules of Court providing for hearings by a Judge in Chambers (see paragraphs 3 and 4). But, as with the recommendations relating to the Court of Appeal, it is thought that it would be safer and preferable to enact by statute that the Court should have power to sit in private rather than to leave it to Rules of Court to provide for hearings in Chambers. The power to sit in private in nullity cases is conferred by Statute (Matrimonial Causes Act 1965, s. 43(3)) and it is thought that the same should apply to legitimacy declarations. This is especially so since the power is to be conferred on the County Court as well as the High Court and, even if the dictum in Re Bellman (supra, paragraph 3) accurately states the powers of delegation of the High Court, it is not clear whether County Courts have similar powers of delegation to a Judge in Chambers.

On the other hand it is thought that the recommended general rule that where a court is asked to exercise its power to sit in private it should normally hear the application in private, could properly and preferably be dealt with by Rules of Court.

28. Finally, it is recommended that the restrictions on publication imposed by section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926 should be extended to proceedings for legitimacy declarations. The Law Commission can see no valid reason for treating those difficulty from divorce, nullity, judicial separation and restitution of conjugal rights. The evidence is likely to be of an equally intimate character; the only difference being that it may relate to the misdeeds of an earlier generation. The Act permits quite extensive reporting, including the identity of the parties, the nature of the claims, the legal submissions and the judgment, and it is considered that this is more than adequate to satisfy any legitimate public interest in the trial and the needs of the legal profession.

In implementing this recommendation it will be necessary to provide that the matters allowed to be reported shall include particulars of the declaration sought in the petition (instead of a statement of the charges, etc.)

SUMMARY OF RECOMMENDATIONS

(i) The Court of Appeal should have a discretion to sit in private during the whole or any part of the hearing of an appeal if the court from which the appeal is brought would in the circumstances have had power to sit in camera or in Chambers: paragraph 17.

(ii) Where application is made to the Court of Appeal to hear an appeal in private the application should itself be heard in private unless the Court of Appeal otherwise directs: paragraph 18.

(iii) Amending legislation giving effect to these recommendations should not throw doubt on the powers of other appeal courts to sit in private: paragraph 21.

(iv) Section 39 of the Matrimonial Causes Act 1965 should be amended by conferring on the High Court and County Court a discretion to hear in private and whole or any part of an application for a legitimacy declaration: paragraph 35.

(v) Any application to the court to hear a case in private should itself be heard in private unless the court otherwise directs: paragraph 26.

(vi) The foregoing recommendations, other than (ii) and (v) should be implemented by statute, not by Rules of Court, and recommendations (ii) and (v) by Rules of Court: paragraphs 20 and 27.

(vii) Section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926, should be amended by including legitimacy declarations among the matrimonial causes therein referred to: paragraph 28.

21st April 1966.