THE LANGUAGE OF THE COURTS*

A lecture entitled 'Language of the Courts' must have created a doubt in your mind as to what you were likely to hear. It would have been perfectly possible for me to have discussed the way in which words are used to express legal decisions in our courts. However, if that had been the object I would have found myself trespassing in the field of the scholar of jurisprudence, a field I fear to tread although in recent years one has seen many a linguistic philosopher rush in.[1] My subject though not unconnected with the use of words by courts is really a different one. I shall attempt to consider some of the questions which arise when a legal system attempts to change the language in which its business is conducted. Naturally, the problem of a change of language is connected with the way in which the courts use language, but only in this sense are the subjects inter-related.

I suppose it is possible that some of you may wonder why I have chosen to open the Faculty's programme of public lectures which a subject such as this. There are two kinds of objections to a lecture of this kind. The first, which is ostrich-like, is that there is no question of such a changeover in Malaya at present and the result of any discussion would be to stir up a new controversy. The answer to this objection is surely that although there is no current discussion of the subject, such a question would certainly arise as a result of the switch-over from English to Malay as the National Language both in the Federation and Singapore. When, or perhaps even before, Malay becomes the language of the administration in practice, the question of extending it to cover judicial administration will arise. This has been the experience of at least three newly-independent countries, *i.e.* Burma, Israel, and Ceylon. Further, the answer to that kind of objection is that this lecture is not only concerned with the particular problem in Malaya but with more general considerations common to Southern Asia.

The second objection is that this is not a legal problem which should primarily concern lawyers, whether practitioners or academics. This is based on the assumption that the problem is really a political one as the decision to make a change will have to be taken at a political level. This is certainly true, but it will be the purpose of this lecture to show that

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1. O. C. Jensen — *The Nature of Legal Argument* (1957).

the problems which follow such a decision are properly the concern and the responsibility of the lawyer. An examination of these problems may even be a pointer as to the time when the political decision may properly be taken.

Before the methods, which may be employed to effect a switch-over, are examined one preliminary point has to be determined. This concerns the object of a switch-over. The question we have to ask here is — what do we hope to achieve by changing the language through which a legal system operates? There is, of course, the obvious and understandable feeling of national pride. Sometimes it has been argued that where the language of the mass of the population is the language of the courts, laws would be more easily and more widely understood. This, so it is suggested, will make the people more law abiding and there would be a greater respect of law. This argument, even if viewed charitably, remains unestablished on the evidence available. The protagonists of this point of view have to prove that the fewer offences committed by the English-educated is due to their knowledge of English and their understanding of the law through the English medium rather than due to their better social and economic conditions. Further it has not been established that this language group is less prone to the usual offences of their social class, *e.g.* false income tax returns. The critical objection to this view is that although people understand a language they do not necessarily understand the legal connotations of that language without special training. Another argument, which is superficially attractive, is that the use of the national language will result in the development of a national law and the reliance placed on foreign elements will be reduced or eliminated. It is possible to point out that the object of a national law as an expression of a kind of Savignian "Volksgeist" is not in itself desirable.[1a] The last experience of an attempt to create a 'national' law was in Nazi Germany. However, for our purposes this argument is not essential. Even if the protagonists of this view only want the courts to pay more attention to local circumstances when applying laws of foreign origin, it can be established that a change in language will have no significant effect on the substance of the law applied.[1b] The mere translation of a statute into the national language, even if it is declared that the new text is paramount will not prevent lawyers, — and that includes judges — from looking at the former English text and drawing upon the experience of the interpretations given to words and phrases in the former text. This inclination to look behind an enactment becomes an obligation when, as with us, the courts follow a doctrine of binding precedent. The fallacy in this point of view is the assumption that the legal mind can be restricted by legislation. Even in a country

1a. See Dennis Lloyd — *Introduction to Jurisprudence* p. 331 at p. 332 and the authorities cited therein.

1b. *Cf.* T. B, Smith, *Studies Critical and Comparative,* p. 93,

like England which has a long legal history it is not unknown for judges to go beyond the English law when formulating their decisions. A good example of this is the judgment of Scott L.J. in *The Tolton*.[2] In this case, Scott L.J. held that he was entitled to look beyond English Law and resort to "the general law of the sea", for a solution. Translation is then superfluous if the purpose is to create a 'national' law.

In some newly-independent countries where the political decision has been taken, some progress has been made in implementing it. In Ceylon, there is the Language of the Courts Bill (1961).[2a] This statute empowers the Minister of Justice to order that the national language be used by a particular Court in conducting its business. No orders have still been made.[3] In Burma, Burmese is the language of the courts, but permission is frequently given to conduct a case in English. The new Statutes are all in Burmese. There has, however, been no attempt as yet to deal with the statutes published in English and still in force. The majority of judgments reported are in English.[4] However, legal education in both Ceylon and Burma is still in English.

However, it is in Israel that the process of implementing the political decision has progressed furthest. It is therefore proposed to discuss the developments in Israel in detail. I should however begin with a warning that all the problems and developments in one country will not necessarily be found in another. It is therefore perhaps best to start with a comparison of the position in Malaya and Israel at their respective dates of independence. Both countries have drawn upon English legal experience. The laws of Malaya, with little exception, have their roots in English law. Although the laws of Israel have been drawn from heterogeneous sources there is little doubt that the predominant influence has been English. The commercial laws of both countries are based on English law, and have, therefore, very many similarities. Both countries follow English procedure and draw lessons from English decisions.

In Malaya at the time of independence the business of the courts, was conducted, with the exception of a few minor courts, in English. In Israel on the other hand the business of all courts, other than the Supreme Court, was conducted in English, Hebrew or Arabic. After the first ten years of the mandate, about 1930 it became a matter of national pride for Jewish judges to conduct their business in Hebrew and Arab judges to conduct their business in Arabic. This led to the practice of only lawyers competent in the judge's language appearing

2. [1946] P. 135 at 147 *et seq*.

2a. No. 3 of 1961.

3. One order has been made subsequently directing a District Court. 25 orders have been made to Rural Courts. See: S. R. Wijayatilake. Paper presented at the Regional Conference on Legal Education (Singapore), 1962.

4. The Burma Law Reports now contain reports in English and Burmese.

before him. Thus only Arabic-speaking lawyers would appear before an Arab judge. In the Supreme Court where judges were almost always drawn from the Colonial Legal Service the language was English. This, of course, caused problems when the Supreme Court sat as a Court of Appeal. This was solved by the judge himself sending up a 'translation' of his own judgment. These judges were as competent in English as in their own mother-tongues. It has even been suggested in some quarters that as some of the judges were more competent in English it was the oral judgments that were translated! Therefore in the lower courts of Palestine for nearly twenty years before the founding of the State of Israel, judgments were often delivered in Hebrew or Arabic, although English remained the language of record. Only judgments recorded in English were reported in the Palestine Law Reports. Thus arguments based on discrepancies arising as a result of the use of two languages, could not arise in subsequent cases.

There was a similar divergence in statute law. In Malaya Federal statutes have always been published in English.[5] In Palestine, during the mandate, statutes were proclaimed by the mandatory power in English. However, Hebrew and Arabic translations were issued simultaneously or very soon afterwards. The English text was, of course, the only valid text. No other text could be cited in Court. The other texts though issued from official sources had no official status and they were only issued for the convenience of the public.

Another relevant difference arises out of the relative legal development of the two languages, Malay and Hebrew. Malay has been used in the past for the formulation of some state statutes[6] and there are ancient Malay Digests.[7] On the other hand there exist a considerable amount of legal literature in Hebrew. Much of the Talmud and the Mishna is legal literature. This legal tradition has been carried on all through the time the Jewish people were in the Diaspora. There has been a continuous history of interpretation and decisions for over two thousand years. Hebrew then possessed legal terminology and literature to a far more significant extent than Malay. Further, as the legal literature was also religious, it was known to a wider public than is usual with ordinary laws. This paucity of legal literature and terminology in South-East Asian languages is to my mind not a disadvantage. We must first remember that we are attempting to use these languages for the purpose of expressing through them not legal notions and concepts of their own

5. Some State Statutes, *e.g.*, Kedah, were in Malay and English.

6. The Laws of the State of Kedah, *e.g.*, the Kedah Land Enactment [No. 56]. In the Jawi text of the enactment certain English words such as 'transferred' and 'transmitted' are contained in the body of the statute in order to explain the term written in Jawi script. See s.47(1).

7. P.P. Buss-Tjein — Malay Law (1958) 7 *Am*, *J.C.L.* 248 at p. 258,

but legal ideas nurtured in the peculiar background of the English law. In this situation the existence of similar notions is more a hindrance than a help. One example from Israeli experience will serve as an adequate illustration of the problem involved. Both Jewish and English laws have the notions of a 'chose in action' and 'chose in possession'. In English law the distinction between a 'chose in action' and 'chose in possession' depends on the questions of whether the 'chose' has been reduced into possession. On the other hand, in Jewish law the distinction depends on whether the thing has come into existence or not. An Israeli judge — Mr. Justice Silberg, an outstanding scholar in Hebrew — and in Jewish law, purported to translate the English concept by the Hebrew word used to denote the Jewish concept. This purely literal assimilation of two notions did not result in an assimilation of the divergent connotations but resulted a state of confusion.[8] It has since been realised that assimilation of connotations is perhaps possible only between two closely allied legal systems, *e.g.,* Roman and early Roman-Dutch law or between two closely related languages.

Despite the relative paucity of Malay legal terminology, this situation could arise in Malaya, if there was an attempt to translate English notions into Malay with words possessing a special legal meaning. For instance it would be an error to express the English notion concerning property jointly acquired by the spouses during marriage with '*harta pencharian*'. Similarly, although E. N. Taylor[9] says that '*pasah*' "is a judicial divorce, corresponding closely to the European conception of divorce by decree," it would be an error to translate divorce by decree with '*pasah*'. It is important to realise that however close the correspondence, nothing short of complete indentity will eliminate confusion. The only occasion when it may be possible to use a local legal term is when that term has lost its special legal meaning owing to the fact that the legal system in which it operated has become obsolete.

8. The difficulty of the courts is illustrated by the following attempt to enunciate a satisfactory test. In *Mitova Ltd.* v. *Jacques Qazem* 6 Piskei-Din (1952) 5 at p. 12, Deputy President Justice Cheshin said:

> " Whenever a Court has to interpret a legal term appearing in an enactment passed since the establishment of the State, and that term is also found in, or borrowed from, classical Hebrew literature, the Court is entitled to clarify the essential meaning of the word by reference to the sources, if, and only if, by a process of examination and comparing it is established beyond all doubt that the stipulations of modern law and the prescription of the ancient law are comparable to one another in the legal context under discussion, or that the fundamental legal meaning in the source literature is sufficiently broad to include the modern ideas for which the legislator 'borrowed' the ancient word."

9. 'Mohammedan Divorce by Khula', cited by P. P. Buss-Tjein (1958) 7 *American Journal of Comparative Law* 248 at p. 266,

Faced with this situation, there are only two alternatives. Either new words must be coined or English words must be transliterated — the latter is of course hardly a problem if one is dealing with Romanised Malay. In Israel, they have adopted the course of coining new words. This is, of course, a more difficult course but it has been done principally for two reasons. First, since English and Hebrew have sprung from different roots and their subsequent histories have been different, it is considered that transliterations are inelegant. Secondly, the Israeli authorities are attempting to simplify legal language and to use words which will be easily understood by the mass of the population. An example of this effort is found in the translation of the word 'endorse'. The newly-coined Hebrew word literally means 'written on the back'. This may be an admirable object but it is difficult to resist the conclusion that legal terminology cannot be prevented from taking special connotations different from meanings attached to them by the general public.

It is suggested that when one is concerned with translation into a heterogeneous language — and by that I mean a language which has been considerably influenced by widely differing languages — inelegance does not necessarily result from the introduction of legal terminology borrowed from a language which has already influenced the receiving language. It may be possible to regard Malay which has had influences from Sanskrit, Portuguese, Dutch, English and other languages in this light.

Once too much reliance is not placed on the argument of elegance it is possible to appreciate the factors that favour transliteration or a similar close adaptation. First, the whole process of a change-over becomes easier if no new words have to be coined. In any switch-over the transitional period is the most painful. A large number of persons who have been dealing with the law would have to switch-over from using one language to another. These persons may have to learn the new language and not only the new legal terms. The task has proved difficult in many countries and it has been found to be particularly strenuous on older people. Learning of new words by means of glossaries is difficult and unnecessarily consumes the time of persons who would be better employed in the tasks they have been trained to do. All this, of course, adds very much to the expense.

In Israel, however, as they have chosen to coin new words the State has set up the necessary machinery to 'manufacture' new words. The principal organ for producing new words is the Academy of the Hebrew Language, which regularly produces glossaries and has lawyers on its committees.

One of the first Acts of the Israeli Knesset (the Parliament) was to abolish the requirement that certain legal forms and documents should

be in the English language.[9a] The statute illustrated the fact that all the new laws were to be in Hebrew. English and Arabic translations are provided, but these are issued only for the purpose of convenience for the Hebrew text is the only one that may be cited in court. The position of English and Hebrew has been reversed. More important for our purposes is the provision for translating the Ordinances which were in English. Israel preserved almost all the laws that existed during the Mandate and the official texts of these were in English. It is interesting to note that the procedure laid down did not contemplate giving any of the already existing unofficial texts statutory force.

The present position in Israel is that where the law was enacted before the establishment of the State and a new Hebrew version has not been published, the English text prevails. This is provided for by section 16 of the Law and Administration Ordinance, 5708-1948. This ordinance, which was one of the first to be passed by the new State, empowers the Minister of Justice to publish in 'Reshumot' — the Gazette — the draft of a new Hebrew version of any Palestine law in force in Israel. After this, the Minister must appoint a committee — an Advisory Committee — to consider the draft. The committee consists of three members. The Chairman of the committee is a judge nominated by the President of the Supreme Court. Another member represents the Attorney-General's department. The third member is a representative of the Bar Association of Israel or a representative of the Faculty of Law of the Hebrew University, Jerusalem. The committee examines the draft version and considers any representations made to it by the public. It then submits a report in writing to the Constitutional Law and Justice Committee of the Knesset drawing the Knesset committee's attention to the corrections which should be made to bring the draft into conformity with the original law.

In the light of the recommendations of the Advisory Committee, the Knesset Committee decides upon the final text of the new Hebrew version. This new version is then sent to the Minister of Justice and it comes into force on being published under the hand of the Minister of Justice in the 'Reshumot'. Thereupon no plea can be entertained that the Hebrew version differs from the original English text. The English text is not deprived of validity but it ceases to have any practical effect.

The present procedure for producing a new version is more complete than that which was thought necessary in 1948. The problem was then considered to be a simple one of a technical nature not involving public committees. It was soon realised that the task could not be done by a few officials in the Ministry of Justice. The problem was not merely one of selecting words to replace others. Even in the matter of the right choice of words it was found that there were deep differences of

9a, Section 15 (b), Law and Administration Ordinance No. 1 of 5708-1948,

opinion. Further, it was found that the change-over involved changes of drafting technique. As Rosenne points out the difficulty was one of "using in the Hebrew Language drafting techniques and patterns of legal thought originally evolved for the English language and English social environment." [10] Added to all this is the multiplicity of ideas and ideals about Law which exist in Israel and which Rosenne describes as a "part and parcel of the intellectual ferment of the ingathering of the Exiles." [10]

In Malaya, and South-East Asia generally, we are not faced with this kind of intellectual ferment, concerning the direction which the law should take. If, however, any switch-over is attempted the problem will have to be approached as something more complex than word substitution. Considering the extent to which languages in this part of the world have hitherto been employed for legal purposes, there is no doubt that we would have to think in wider ways and at least, for instance, consider a new drafting technique suitable to the language adopted.

However it is clear that any attempt to change the language of the courts must be accompanied by one accepted official version of the laws and this version must broadly speaking be acceptable to the public and the legal profession. Where there is no such arrangement the result is at least highly inconvenient and often borders on chaos. One of the important criticisms of the position in Israel today is that official Hebrew versions are being provided only as regards Palestine Statute Law. No attempt has hitherto been made to translate the old Ottoman Codes which still apply — and only apply — in Israel. Judicial opinion is strongly in favour of extending the provisions of section 16 of the Law and Administration Ordinance to cover Ottoman Legislation. [11] In the absence of an official translation Judges, when faced in Court with the many unofficial translations, are required by virtue of the decision in *Morris Dayan* v. *Jacob Abutavol*,[12] if they have no knowledge of the original, to weigh the advantages and disadvantages of the different translations and to choose that which is most appropriate to Israeli conditions. This is a most unsatisfactory test. First, much of the Ottoman legislation is a translation of French, German or Italian legislation. They were translated carelessly; simply by a system of word-substitution. Israeli judges have not hesitated to look at the French, German or Italian prototypes when faced with Ottoman legislation. The prototypes have come to be considered as originals. Secondly, a distinction is made between judges who have knowledge of the original and those who do not. The former are obliged to accept the interpretation given to the original,

10. Rosenne — *The Constitutional and Legal System of Israel.*

11. Judge H. E. Baker in *A.G.* v. *Malka* 10 Pes. Met. (1955) 207. See also Baker, H.E. — *The Legal System of Israel* (1958).

12. 9 Piskei Din (1955) 1047.

while the latter are primarily concerned with the suitability of the law to Israeli conditions. Thirdly, even judges who have no knowledge of the original, will not necessarily come to the same conclusion as to which interpretation will suit Israeli conditions. The test is clearly inadequate to solve the problem. And any test which fails to establish the paramountcy of a particular translation or interpretation will also fail.

The machinery for producing new versions was set up in 1948. The first Ordinance to have a new version was the Interpretation Ordinance which was published six years later in 1954. This particular Ordinance was selected first in order to clarify certain terms, which could then be used in subsequent new versions. This, it was hoped, would help to increase the speed of translation by providing the translator with a reservoir of new terms. Since then, nine other statutes have been translated and new versions have been published. Nine statutes in seven years is mathematically speaking not an impressive record. If the six years taken to produce a new version of the Interpretation Ordinance are taken into account, the record looks poorer. At the present rate, Israel will need something from 10 to 17 years to finish the task although the target is 5 years. Even now despite the slow and careful way in which the new versions are being produced, voices can be heard protesting against the "rapidity" in which thing are being done. These people are of the view that sufficient consideration is not given to choice of words and elegance of language.

Whatever view one takes of the rate of progress in this field in Israel, one cannot ignore the real difficulty that faces the Israeli Ministry of Justice. The main problem is in finding people competent enough to carry out the task. Despite the presence of advisers in the Advisory Committee and the helpful suggestions made by lawyer members of Parliament, who sit on the Knesset Committee on Constitutional and Legal matters, the task of preparing a new version is principally in the hands of three officials in the Ministry of Justice. In the present scheme of things, the task of producing new versions is only one of the many duties of these officials. The officials entrusted with this task must possess diverse abilities, rare even in Israel which is reputed for its high proportion of talented men, The officials must possess an extremely good knowledge of both English and Hebrew, and preferably know both languages equally well. They must also be good lawyers, knowing preferably both Jewish and English law, and at least English law. They must be skilled draftsmen and in the case of Hebrew, travel unchartered paths to create a drafting style. In addition they must have some knowledge of philosophy and, as elegance is highly prized, a good style in Hebrew. Men with such a range of abilities are hard to come by and when they are found, it is probably far better to use their abilities in

other more important tasks. It is also difficult to obtain men with such talent as "back room boys" in a government service which offers modest rewards. For our purpose, in South-East Asia, it need not be emphasized that men with such diverse abilities will be more difficult to find and perhaps better employed in other work.

The training of members for the Israeli legal profession, *i.e.* at the Law Faculty of the Hebrew University and at the Law School at Tel Aviv is carried out entirely in Hebrew. Hebrew is the medium of instruction in all faculties at all seats of higher learning in Israel. Lectures and tutorials in the Law Faculty are in Hebrew. However a good proportion of the necessary materials is not in Hebrew and is in English, French, German or Italian. All the students and all members of the Faculty though not required to know English, find it absolutely necessary to know English. Their knowledge of English is sufficient to understand lectures in English and to appreciate writings in legal journals. Although the number of text-books in Hebrew is growing, they are still few in number. Many of the recent Israeli publications are in Hebrew with a table of contents and a synopsis in English. The Ha-praklit, the Journal of the Israel Bar Association, and the Ha-Mishpat which contain unofficial reports in judgments in Hebrew for the years, 1946 to 1948, which preceded the founding of the State, are in Hebrew. The Israelis have not, however, attempted to translate English text books or practitioners books. On the other hand, in Ceylon a beginning has been made with the translation of English law books. There seems little purpose in translating English text books. In the first place, it is practically impossible to translate the many English law books. It is almost as bad as trying to translate all the Law Reports! Secondly, there is hardly any purpose in translating some text-books and leaving others untouched. In such a situation, the student or the practitioner will still need to know English. Thirdly, law books become out of date very rapidly. It will be a well nigh impossible task to bring out translations so frequently and in some cases rapidly enough not to be out-of-date by the time they come out of the press. It has been said in some quarters that an exercise in translation is one way of building up a indigenous legal vocabulary. If this is the main purpose of translation it could be done more simply and perhaps more usefully by articles in a journal similar to the Ha-praklit. This has already begun in Ceylon, where there are two legal periodicals carrying articles and Law Reports in Sinhalese and English.[13] If the purpose in translating text-books is

13. Ceylon Law Recorder and Ceylon Law Weekly. See generally on the situation in Ceylon, Prof. T. Nadaraja 'Problems of Law School Development in Ceylon'. Paper presented at the Regional Conference on Legal Education (Singapore), 1962.

to make legal education available to those who do not possess a knowledge of English, then translations are insufficient to achieve this purpose. Our doctrine of precedent and our dependence on case-law will require the citation of authorities which are in English. One has then to translate all this mass — an almost impossible task — or undertake the equally difficult and expensive task of preparing a codification and restatements in the required language, and then declaring that earlier authority is without binding value in the courts. This is an extreme solution for any country to adopt and it will be an easier task to teach all lawyers English.

One further question remains to be considered. It is the question whether more than one language can be used in the Courts within one legal system. This is a problem of perhaps only academic interest in a country like Malaya, where one language has been accepted as the language of administration. It is also a question which is not answered much by Israeli experience. Both in Burma and Ceylon, the official policy is that of one language of the courts. Finland, Belgium and Switzerland are all countries where more than one language is employed but none of them belong to the common-law tradition with its doctrine of binding precedent. Canada which has two languages — English and French — has, in fact, two different systems of law. The problem will become clearer if we examine what is meant by using a language in court. There is no doubt that evidence can be given in any language; cross-examination can also be done in any language. It may be even possible to address a jury in any language, provided the jury understands it. In brief, it is possible to *conduct* a case in any language. Further legal documents, such as wills, contracts, deeds, etc., can be drawn up in any language without causing too much difficulty. The problem arises in matters of *record* such as statutes, decisions and reported judgments. First, it will be highly inconvenient to have law reports in more than one language. Secondly, it will give rise to disputes as to meanings of words in all the languages in which the judgments are recorded. Lawyers and judges will have to acquire a good command of all the recognised languages. Otherwise the lawyers will be slaves to translation and to any errors contained in it. In South Africa, where both Afrikaans and English are permitted, arguments as to discrepancies are not infrequent.

When statutes are published in more than one language we come up against a problem which is familiar in international law. When the texts in a treaty are in many languages it is common to find that one text

is declared paramount.[14] Naturally this problem arises in municipal law when more than one language is used. We are thus back at the position in Israel during the Mandate when the texts were published in English and translations which could not be cited in court were provided in Hebrew and Arabic.

It has not been my purpose to answer all the problems involved. But I hope I have been able to illustrate one thing and this is perhaps the most important lesson to be learnt from Israeli experience — what was thought to involve a simple political decision has been found to be far more complex. The decision itself cannot be rigidly separated from the problems of implementation. I have not attempted to solve the problems in implementing such a decision, but I hope I have indicated the lines on which we must proceed in order to find the answers. The task is in no sense impossible, only it has to be approached and tackled with adequate grasp of all its complexity.

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14. See McNair — *The Law of Treaties* Chapter XXV p. 432-435. Where no text has been declared paramount, International Tribunals have given the texts equal authority. In the Marommatis Palestine Concessions (Jurisdiction) case in 1924 the Permanent Court said that in such a situation "it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties." It is doubtful whether this solution could be adopted in municipal law. The problem is not unknown in English Law. See: *Parke Davis & Co.* v. *Comptroller-General of Patents, Designs and Trade Marks* [1954] A.C. 321 at p. 332, *per* Lord Cohen.