Editorial

Scott and Parliament

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Much of the discussion about the Scott Report has, predictably, centred upon issues of ministerial veracity in accounting to Parliament, with the important if rather arcane matter of the use and abuse of public interest immunity certificates in criminal proceedings thrown in for good measure. The story is a dismal one not only of deceit but also of self deceit – with public policies ostensibly directed at denying military equipment to belligerent tyrannies being side-stepped within government itself on dubious commercial grounds, and with different parts of the government machine not knowing, and perhaps not wanting to know, what the other parts were up to.

What of the Scott Inquiry itself? The exercise exemplifies the longstanding tendency for politicians to turn to judges, both as experienced evidence-gatherers and as perceived custodians of apolitical wisdom and authority, to provide answers to embarrassing questions. Apart form its fact-finding role, a judicial inquiry takes some of the heat out of a public scandal, does something to reassure public opinion that an issue is being taken seriously and postpones the day of reckoning. Scott is one recent example, Nolan is another. There is a statutory procedure to judicial inquiries, under the Tribunals of Inquiry (Evidence) Act 1921, which was last used as the basis for the inquiry into the Crown Agents scandal in 1982; neither the Nolan nor the Scott Inquiry was set up under the provision of the 1921 Act.

Having laboured for more than three years and produced a five volume report of some 1,800 pages, Sir Richard Scott cannot be accused of skimping his task. Indeed, the painstaking throughness with which he has unravelled the massive complexities of the subject has in a sense thwarted a major purpose of the exercise, which was to provide the basis for meaningful political debate in order to call ministers, singly and collectively, to account before a well-informed Parliament. Parliamentary politics feeds on soundbites and easily digested conclusions. The Scott Report lays out the facts as received in evidence in daunting but unavoidably complex detail and eschews clear-cut allocation of culpability. The parliamentary debate skipped selectively through it without quite getting to grips with the ramifications. In the longer term, no doubt, weighty books, and PhD theses will be written about the affair, in the medium term the Report may usefully form the basis of select committee inquiry. But by then the moment of truth (that 'difficult concept') will have passed.

One unhappy moral might be that if you try to harness the Rolls Royce engine of a full scale judical inquiry to the juddering jalopy of parliamentary accountability, then the vehicle, unable to make effective use of the unaccustomed superfluity of power at its disposal, may end up shuddering moisily, but getting precisely nowhere.

Security by Deposit of Title Deeds Following the Decision of the Court of Appeal in the Case of *United Bank of Kuwait v Sahib & Others*

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Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 provides that a contract for the sale or other disposition of an interest in land, which includes mortgages and charges, can only be made in writing in a document signed by both parties incorporating all the terms of the agreement.

Since 27 September 1989 when the Act came into force, it has been thought that it is *no longer possible to create an equitable charge over land merely by depositing the title deeds with the chargee.* This was confirmed as correct again early this month in the Court of Appeal. In the hearing in the first instance of *United Bank of Kuwait v Sahib & Others* [1995] 1WLR Chadwick J ruled that the effect of section 2 could not be avoided by reliance on the deposit of the Land Certificate having created an equitable charge. Historically, a deposit of title deeds had been consistently treated as arising from a presumed or inferred contract and that, because the enforceability of a security by deposit lay in contract, such a security was caught by section 2 as the "contract" was not made in writing. The result was that therefore section 2 has abolished mortgages by deposit of title deeds.

This is perhaps surprising, as there is nothing in the Law Commissioner's report on *Transfer of Land: Formalities for Contracts of Sale etc of land* (Law Com No 164) published on 29 June 1987 which initiated the reforms effected by the 1989 Act to suggest that security by deposit of title deeds and certain other "deemed contracts' was intended to be affected or was even considered. Moreover, there is nothing in the 1989 Act which expressly or by necessary implications repeals the provisions of the Law of Property Act 1925 and later legislation recognising and extending the scope of security by deposit of title deeds, albeit that these statutes deal with the priority of an equitable charge rather than its validity.

Now that the Court of Appeal has confirmed that the analysis of Honour Judge Chadwick (*The Times*, 13 February 1996) was correct, then the equitable mortgage by deposit of title deeds alone has been swept away courtesy of the provisions of section 2 of the Law of Property (Miscellaneous) Provisions Act 1989. It must still remain open to question, however, whether it was ever the intention of Parliament that the effect of the Act should be so sweeping.

From a practical point of view it is now more vital than ever that on the taking of security by way of the deposit of title deeds a written memorandum is prepared to accompany the deposit. This must set out

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all the terms of the agreement between the parties and carry the signatures of all the parties concerned. Particular care should be taken where the property is held in joint names as the *United Bank of Kuwait* case is also authority to the effect that one of two joint tenants cannot unilaterally make a valid deposit of the title deeds to create security over the legal title, and that what is more in those circumstances, the deposit by one joint tenant has no effect at all.

Radcliffes Crossman Block acted for Société Generale Alsacienne De Banque SA in this case.