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A POSITIVE APPROACH

Dr A. M. Finlay's appointment as Attorney-General came too late for the JOURNAL *to carry a Christmas Message to the profession from him. Perhaps the accompanying message, prepared for the* JOURNAL *before the November elections, may be viewed as a New Year's Resolution.*

There is a growing need for the old adage about justice having to be *seen* to be done to be construed literally. I foresee a more activist role for the Justice Department, in which it will not merely set the stage on which the legal actors perform. I feel it must to some degree participate, and also explain what is going on. Too many people come to our Courts, as litigants, witnesses, jurors or only visitors, and find themselves totally mystified and confounded by what goes on. We ourselves contribute a lot to this with our dog-Latin tags, the habit of interrogating rather than cross-examining witnesses, our resort to ritual incantations like "May it please your Honour" and in-jokes with the Bench. But there is a lot that could, and must be done to make the citizen feel that Her Majesty's Courts of Justice are *his* Courts too—and perhaps this will stimulate the profession to review its own part in the show. For show it is, and I would be the last to see its solemn panoply replaced by the informality of a committee meeting—except, no doubt, in a Small Claims Court, but that's another story. A start has been made in the Magistrate's Court at Auckland where there is at least a man on duty in the mornings to tell people where to go, and which of the many Courts is the one they want. But *something more than this* is needed—but what is needed is a kind of general public relations department for the whole service.

But that's only the lesser part. More and more it's being realised that the Justice Department, if it is to deserve its name, has a duty to do more than provide a Court where a person may be charged. It's also got to ensure that there he will receive justice—and even-handed justice at that, not qualified or measured by his affluence, his appearance, or his volubility. This calls for proper representation and we are tardy in accepting the American realisation that this is a public responsibility where it is not met privately.

The Law Society, and particularly the Auckland District Law Society, has shown itself to be alert to this, and in advance of Government thinking and planning. It has put forward proposals for duty solicitors or public defenders, favouring the former. Those proposals will not gather dust. The Third Labour Government will definitely call on the practical experience of the Society to work out the most feasible means of seeing that justice is seen—visibly—to be done in this area.

But the Law Society's interest and activity does not stop there. Its members have played a vital role in bringing into and continuing in operation various Citizens' Advice Bureaux, dealing with questions that arise before any encounter with a Court and all sorts of other family and social problems. I must say I value this work so highly that when I am recommending appointments requiring legal qualifications—however eminent the office—I will be inclined to give considerable weight to service and experience of this kind. This is important because we do tend to become inward-looking

and concerned with the private advantages of our own clients, and a measure of social concern and engagement is a salutary and arresting antidote.

I wish I could express the same admiration for all the pursuits of our profession. The exploitation of the housing needs of those in urban areas is becoming—has indeed become—a public scandal, and some of our members are too closely involved in this for my liking. It is a situation that cannot be allowed to continue and if those concerned in all its aspects do not themselves mend their ways, they can hardly be surprised, and will have little ground to complain, if the State steps in and does it for them—and to them.

THE REFORM OF THE SUPREME COURT CODE

Practitioners have been made aware that a Special Committee of the Rules Committee under the Chairmanship of the Hon. Mr Justice McCarthy has been engaged for some time in an overall examination and reformation of the Supreme Court Code. The purpose of this article is to keep the profession informed of the progress that has been made, and enable its members to make considered suggestions to the Committee. The latter wisely invites all co-operation that the profession can give of a constructive nature; this article is purposely provocative with a view to stimulating thought, only possible to minds informed fully on the Committee's activities.

Be it said at the outset that the present code with its amendments has functioned for upwards of one hundred years (it appeared as the Second Schedule to the Supreme Court Act 1882). To those who care to know their procedure it has functioned as a good and effective Code, with of course, scope for improvement as in most human affairs, but the writer does not share the conception that anything in the way of revolution is necessary. Re-casting may be, but under control, and only where some definite improvement is apparent. It cannot be overlooked that over the years three generations at present in practice have acquired a settled outlook on procedure with an accepted vocabulary and ways of practical thought, and a total change can produce a new confusion in a world where disorder becomes increasingly the order of the day. In a word, the writer's approach and outlook on the subject is conservative as may be expected. One cannot perceive in the parallel case, where ecclesiastical codes are under revolution by the Reformers (including *inter alia* the perfect language of the Lord's Prayer, which has served generations for centuries) has brought any particular satisfaction or content to its devotees. Reform merely for the sake of change can of itself be definitely suspect.

The Committee has circulated its first contribution to what is generally referred to as "revolution" of the Code—a voluminous document (revealing unquestionably very great energy on the part of the Committee) of three Sections (a) a general discussion under some nine pages in ten paragraphs. Para. 10 is intituled "The next stage" which conveys the suggestion that this present contribution is in its formulated shape, but awaiting only careful revision of its details. (b) The attack proper upon the Supreme Court Code intituled Part I is of some eighteen pages, and concentrates upon a number of miscellaneous rules taken for the most part from the present late stages of the existing Code—RR 600, 601 (holidays, Court sittings and Office hours), R. 590 (time), and into this section miscellaneous provisions as to service of Statement of Claim, Filing defence in Long Vacation, R. 594 Enlarging or abridging time, R. 604 (Cases not provided for), a new provision with no previous rule "Consent instead of Leave of the Court", which demands the closest consideration. RR. 555 and 8 come under reform in the para. 8 intituled "Costs". Without going into further detail this overall rearrangement is made to cover a miscellany of rules. This Part I of the Reformed Code then covers a lot of new rules directed to documents, their shape, and purports to cover late Rules 598A, 598B, 597, RR. 14 and 15.

As far as this part is concerned, if it be the case that this unrelated miscellany of Rules is to form the opening stages of the new revised Code it is hard to detect what is gained by placing such a miscellaneous group in the forefront of the Code, and the question obtrudes as to whether on an overall view of the whole completed "revolutionised" Code a better order is not possible, and the placing of these rules severally and individually. The present product gives the impression that the Committee is throwing down for consideration jointly and

severally a variety of unrelated topics, and without any preconceived plan of the whole picture of the Code to which in the appropriate place new rules and order will be assigned. In other words, the suggestion is made that the first step in a Revolutionised Code if, as heralded, it is to be revolution, is to determine the overall general plan and structure of the Code as a whole; when the rules are recast and transferred they should fall naturally into the place where by their content they fit, and not a higgledy-piggledy chaos, where anything might be found anywhere, if the searcher is lucky. Code makers in the past here and elsewhere have not, in the writer's experience, been distinguished for the overall structure and arrangement of their productions.

Part II of the draft document then proceeds in some 44 pages to the institution, preparation and disposal of actions and all other proceedings in the Supreme Court. There is a semblance of order in the setting out of these proceedings, but the omissions, as mentioned below, give ground for much comment.

Section I is "Parties" and embraces equivalents to RR. 59, 61, 62, 64, 95-99L (Third Party procedure). 65, 77, 78, 79, 554C (Limitation of parties and representation), 69-76 (infants suing by a next friend), 67-76 (Mentally disordered persons), 89 (misjoinder), 90 (striking out and adding).

The detail of all this wants close analytical attention, as there is obviously a good deal of new thought which is included on the footing that it is improvement, as it probably is.

Section II of Part II then proceeds to the commencement and preliminary matters of Supreme Court actions, with a special Section 8A directed to reformed Interpleader procedure (forms RR. 482-489). The contents of this part are culled from sundry places in the Code, Writs of Summons (RR. 1, 4, 8), Statements of Claim, (RR. 136, 136A, 14, 16 etc.) Statements of Defence (RR. 121-128), Counterclaims (RR. 129-136C), Third and Subsequent Parties (RR. 97-99O), Place of Trial of Counterclaims (RR. 132-134).

The great bulk of the above gives rise to the necessary of close examination by the profession of the *minutiae* of what is substituted, or what are entirely new rules, and the Committee invites such examination. But the *minutiae* is subsidiary and comes second. What calls for examination in the first place, and searching comment, is the larger and all-important aspect of radical changes in the Code, which the Committee envisage; and no appearance is given that the Committee have considered this in the wider aspects involved. There are the consequences of the central change of all, namely the abolition of the writ as the commencement of the action, and the commencement of all proceedings by a single document, i.e. the mere filing of a Statement of Claim.

The draft new Rule provides that *every* proceeding in the Supreme Court (other than appeals from Magistrates or Statutory Tribunals) shall be commenced by filing a Statement of Claim in the proper office of the Court, with a prayer for the relief sought. This is to be followed (Section III) by a "Notice of Proceeding" giving the defendant (now for some reason to be called Respondent) notice of the place for filing defence, and the relevant warnings.

The suggested rule is "Every proceeding". By its language this means abolition of every other kind of originating proceeding, barring the stated exceptions. Let us look for a moment at what originating proceedings other than Writ of Summons actions which exist at present, and examine where we are getting to. These are:

(a) The present Extraordinary Remedies (RR. 461-475A, Mandamus, Injunction, Prohibition, Removal from Office).
(b) Interpleader (RR. 482-489).
(c) Bills of Exchange (RR. 490-504).
(d) Interlocutory and Originating Applications (Part VI and RR. 394-453)
(e) Relief against Forfeiture (R. 505)
(f) Wrongful Distress, proceedings for (RR. 506-507)
(g) Relators (RR. 508-511)
(h) Writ of Arrest (RR. 512-516)
(i) Probate and Administration (RR. 517-531CC)
(j) Originating Summonses (RR. 537-554).

With the exception of (b) (Interpleader), which is given special attention and reform of its procedure in Part II Section 8, no indication is given from the present drafts what is to happen to or about these procedures, other than the bald statement cited above as to "every proceeding". It would seem that the Committee has considered only in a partial way the new procedure for actions, and purported to apply it to "every" proceeding. The thoughts that obtrude upon the suggested abolition of all the above "other" proceedings are:

Extraordinary Remedies (RR. 461-475A).

These rules contain not only the directions as to how the procedures are to be made, but also definitions of the occasions when they may be used; frequently this definition is the reflection of long established legal practice and historical

growth. Does the Committee then intend to deprive us of all this guidance and authority and leave practitioners and the Courts in a sea of uncertainty to ascertain when the heralded improvement, as outlined above, is to be applicable. There is here a basis for the view that these existing Rules are more than Rules of Procedure but are declarations of jurisdictions—and very necessary and time saving ones.

(c) *Bills of Exchange.* (R. 490-504).

Familiarly known as the Bill Writ.

The Committee states that this has been discarded "it being considered that an abridgement of time for filing a defence in a suitable case is more just and more convenient in most cases."

The *Bill Writ* process on the limited occasions it may be used is, in the writer's experience, a very useful accelerator of justice. A defendant bluffing on payment of a cheque or other Bill of Exchange has at present to get leave to defend, and must show a *prima facie* defence. Under the new Rule the shuffler is apparently given the right to defend but with a shortening of the time for pleading, and there are the delays that coming to trial involves. Who is the gainer by this reform other than the man who is avoiding his undoubted obligation?

Perhaps when the Committee uses the expression (p. 3 of the Draft rules) "an abridgement of time for filing a defence" it is intending to say "abridging the time for applying for leave to defend" as used in present Rule 493. The matter needs clearing up and *quaere* whether the present useful and smooth working procedure of making the defendant apply for leave should not be carried into the new Rules.

Interlocutory and Originating Applications (RR. 394-453)

This Part VI has been a build-up process mainly by S.R. 1954/55, and other miscellaneous rules, presumably in the interests of improvement at the time, but it remains at present an ill assorted meandering series of rules. It establishes the process of originating motion, and by R. 394 purports to define the originating proceedings to which Part VI is applicable, and then it is only to the cases where no other form or originating process is described by these rules or by the Declaratory Judgments Act, i.e. it leaves intact all originating summons procedure as established under the Rules or by Statute. The Rules in this Part proceed to be a mixture of Court and Chamber Practice, with sundry rules addressed to the odd occasions. A code for the drawing up and sealing of Orders, variation of Orders and Costs, with a series of Special Rules (RR. 426G-426M) addressed to the Powers of Registrars to make Orders in Chambers; a number of occasions as defined under Rules and Specified Statutes.

The draft circulated by the Committee gives no hint as to the handling of all this matter upon the innovation of a single document addressed to every form of application to the Court in "every" proceeding, save that by implication it is abolished. The matter becomes complicated when the proposed definition of "proceeding" is looked at, namely "any application to the Court for the exercise of the Civil jurisdiction of the Court other than an interlocutory application". What then is to be the form of document for an interlocutory proceeding addressed to the Court?

Relief against Forfeiture (R. 505).

Presumably this Rule and procedure would have grafted into it the new form of Originating Statement of Claim and should cause no trouble. The rule is referable to defined occasions as they arise in general law. No harm would be done by keeping the rule with amendment.

Wrongful distress (RR. 506-507).

The same remarks would apply to this, but R. 507 providing for judgment for rent could be useful and should be retained. One would accept that a rule of the kind defining the right to apply should be in the Code conferring jurisdiction on the Court.

Relators (RR. 508-511).

No amendment of these rules is necessary, but they should be retained along with the new procedure.

Writ of arrest (RR. 512-516).

This is not strictly an originating proceeding but a process of execution and presumably is unaffected by the provision that "every proceeding etc.".

Probate and Administration (RR. 517-531CC).

By the explanation at p. 2 of the circulated document this branch of procedure is to be governed by the single new document process. The above rules as they exist at present constitute a Code in itself for most matters likely to arise in probate practice; coupled of course with ss. 5 and 21 of Part I of the Administration Act 1969 itself. Sections 53 to 61 of the Act also contain much procedural matter. This will no doubt fall naturally enough into the new procedure when the method of starting Chamber

matters is also defined, but it is to be hoped that in this extensive field practitioners will not be left to search and fumble as to the enactments under the new rules, and what of the old is to be omitted from the new Code. In a word, a carefully constructed Probate and Administration Code calls for enactment of itself, and having its correct place in the new set up. The circulated draft conveys no information on this, although applications for grants are obviously originating proceedings to the Court.

Originating Summonses (RR. 537-554).

The above current rules provide for the issue of originating summons on a great variety of occasions, and the accompanying procedure. They have had value in defining numerous occasions when the procedure may be used, and in this respect are declaratory of jurisdiction, although of course Section 16 of the Judicature Act 1908 declares that the Court shall continue to have all the jurisdiction which it had on the coming into operation of the Act, and all judicial jurisdiction which may be necessary to administer the laws of New Zealand; and s. 2 of the Declaratory Judgments Act 1908, enacts that the Court may make binding declarations of right, whether any consequential relief is, or could be claimed or not. At the moment we are left in the dark as to what repeals are to take place consequent upon the establishment of the new single process, and it is suggested that the abolition of the originating summons procedure calls for closer attention than it appears to have been given. And what about the Declaratory Judgments Statute itself (s. 3) which says that Declaratory Orders are to be made on originating summons? The statute would be subordinate of course to the new rule by virtue of s. 38 of the Statutes Amendment Act 1941, which enacts that Rules of Court may modify Acts prescribing procedure on applications to the Supreme Court, and in case of repugnancy the Act shall be subject to the Rules.

So much for the miscellaneous originating proceedings, which seem to call for more detailed consideration. The above cited paragraph 10, in the general observations, states that what is already promulgated covers all matters up to the commencement of the trial, but Part II s. 1 (1) as cited above, is to the effect that *every* proceeding (other than limited exceptions at the moment irrelevant) shall be commenced in the manner indicated. Rightly or wrongly the impression obtains that the bulldozer has started on its revolutionary destruction, but the constructive new work to follow in its wake is hasty and not fully considered. No picture appears yet of the whole to which the new is to be related.

It is suggested with all respect that the Committee pause and thoroughly complete this first instalment, and have it in final settled shape before going on to the next stage, as foreshadowed. When Sir Michael Myers C.J., as first Chairman of the Law Revision Committee officially opened its first sessions, his commanding plea or reminder was "*Festina lente*". The writer was privileged to be a member of that Committee during the whole of its life (some 30 years or thereabouts), and feels some assurance that the acknowledged success achieved by the committee was due to not disregarding the conservative mind, and the pace at which it prefers to proceed.

It is only a suggestion, and may on reflection need further consideration, but it has occurred to the writer more than once, that the true overall approach to a more easily understood Code would be to have it dealt with and arranged according to the *place* where the proceeding is to operate. The principle in its essence occurs by having Court of Appeal Rules and the Supreme Court Code, but the line of thought stops there. In the Supreme Court there are the natural divisions:

(a) Proceedings in Court including interlocutory proceedings.
(b) Proceedings in Judges Chambers.
(c) Proceedings in Registrars Chambers.
(d) Miscellaneous Rules of Practice (which in that order in the Code would be numerous), so that instinctively practitioners would go to the right quarter to find what was wanted.

Under (a) the while gamut of originating Court proceedings and everything associated with them could be dealt with comprehensively, including attention to all the above enumerated existing proceedings; and Court interlocutory proceedings.

Under (b) Chamber practice can be given and detailed attention; should there be repetition of some matters which appear in the Proceedings in Court division, e.g. motions, a simple cross reference would readily put it right. At present the above cited Part VI is a medley of Court and Chamber proceedings and leaves one with a sense of disorder and incompleteness. As an illustration of the confusion that exists at present on Chamber matters, take s. 83 of the Divorce and Matrimonial Proceedings Act 1963, intituled "Proceedings may be heard in Chambers". The previous heading in the 1928 Act, as amended, to the equivalent section was "Pro-

ceedings may be heard *in camera*" which, in the writer's opinion, it was intended by the present 1963 Act to reproduce, but the draftsman was only dimly aware of the difference between a hearing in Court behind closed doors (*in camera*) and a hearing in Chambers, which *ex hypothesi* happens to be not open to the public. See note on the point in *Sim's Divorce Law and Practice* (8th ed.) p. 267. The whole field of Chamber practice can appropriately be given explicit attention as such in the new rules, and not leave practitioners to put it together like a jigsaw puzzle. The writer finds it hard to understand what real purpose is served by the present intention to abolish the distinction between Court Orders (which are appealable to the Court of Appeal) and Judges Orders (which when made in Chambers, as such, are appealable to the Supreme Court itself). Since the Reformers theme, as promulgated, is "Revolution", it is suggested that we have "Revolution" not hasty patchwork of the old, which, unless handled with the thoroughness it needs, will be productive of confusion, with consequent delay and expense. Let the first step be a downright examination of "Proceedings in Court" and bringing into account every present provision of the Code that bears on such procedures; followed by a similar examination of Chamber Proceedings and Registrars Proceedings, with adequate cross references which simplify understanding.

SIR WILFRID SIM Q.C.

1973 Abidjan World Conference—Judges and members of the legal profession will convene in a World Conference in 1973 in Abidjan, Ivory Coast, August 26-31. Sponsored by the World Peace Through Law Centre, this Conference which has generated world-wide interest and support will be attended by more than 3,000 participants from over 100 nations.

This first meeting of the world's legal profession in Africa, as befitting its site, will stress the role of the developing countries in international law and will be a tremendous educational and professional Conference with enormous benefit for lawyers and Judges.

Charles S. Rhyne, President of the Centre, stresses the fact that every Judge, and every lawyer in the world is invited to participate in this great Conference. Mr Rhyne said: "A visit to Africa is a fascinating experience even aside from the professional and personal enrichment coming from joint endeavours with jurists and lawyers from over 100 nations."

The Conference will provide and propose concrete, practical solutions to many of the world's current problems. A Model Uniform Law for nations on Control of Dangerous Drugs, one result of the Centre's year-long study, by a group of experts from throughout the world, on the Control of International Narcotics, will be offered for approval.

Practical discussion of environment problems of the developing countries in their important process of industrialisation will occur. An updated version of the Centre's Environmental Convention will be considered. Included in the Conference environment programme will be the model laws for nations on noise control, water and air pollution and weather modification.

There will be a tremendous spotlight on Human Rights by a celebration of the 25th Anniversary of the signing of the Universal Declaration of Human Rights. A report will be presented on human rights progress for the past 25 years highlighting decolonisation of Africa, destigmatising of the "untouchables" and wiping out of race, colour and creed discriminations on a world-wide basis. As the culmination of another in depth study report, a Model National Law on Rights of Refugees will be presented for consideration.

There will be demonstration "Trials" similar to the famous Belgrade Spaceship Trial on sky-jacking and pollution to demonstrate the practical feasibility of an international Court system.

An essay contest on the theme "The Impact of Developing Nations on International Law" will help focus upon this area of African concern at this historic world conference.

The Centre will celebrate, in Abidjan, its 10th Anniversary as an independent and non-political international association of the world's leading lawyers and jurists. With participants now from 135 nations, the Centre has stressed repeatedly the necessity of building a solid foundation of international law rules and legal institutions in order that peace, security, and order with justice will prevail throughout the world.

Those desiring full details of the programme, travel, and other arrangements for the Conference should write to:

World Peace Through Law Centre,
400 Hill Building,
Washington, D.C. 2006 USA.

THE MANCHESTER ARBITRATION SCHEME

It has often been said in recent years that the English legal system fails to provide an adequate or just solution to the problem of disputes over small monetary sums. Potential litigants with small claims are unable, or at best discouraged, from using the county Courts to gain compensation because of the financial disincentive that the legal costs may well outweigh the sum recovered. Most of these small claims involve defects in consumer goods or unsatisfactory services. A limited research project by the late Consumer Council (published as "Justice Out of Reach") indicated the necessity, although not the extent of the need, for some cheaper method of resolving the legal claims of consumers. One solution suggested by this report was the establishment of informal small claims Courts run by the Registrars of county Courts, designed for people to use without the need for legal assistance or representation.

A new experimental scheme to test the feasibility of informal procedures to settle consumer claims is the Manchester Arbitration Scheme for Small Claims, which is basically a voluntary arbitration scheme and is advertised as a "cheap, speedy, informal method of settling disputes." This scheme is limited to claims in contract where the amount claimed is £150 or less, which is intended to restrict its use to small consumer claims. In order to prevent any possibility of its use as a commercial debt-collecting system, it is also limited to private persons who are not claiming in respect of a business. A further restriction is that only claimants who reside in Manchester and certain surrounding areas are at present accepted; the residence or place of business of the respondent, or the place of making the contract are not relevant. These geographical limits have been gradually extended since the scheme's commencement, and the catchment area currently covers a population of slightly over one million.

Acceptance of case

The procedure is relatively straightforward. A potential claimant comes directly to the scheme's offices in central Manchester, or is referred to the scheme by another agency, such as the Citizens' Advice Bureau or a solicitor. If the secretary to the scheme is satisfied that the case is within the scheme's jurisdiction, the claimant will be asked to complete a short, standard form offering to submit the dispute to arbitration and giving brief details of the dispute. At this stage the claimant pays a fee of £2.50 (if the claim is for £75 or less) or £5 (if it is for more than £75). The secretary then approaches the named respondent in order to secure either satisfaction of the consumer's complaint or the respondent's agreement to submit the dispute to arbitration. If neither course is successful, the claimant will be informed of the respondent's refusal and the fee will be returned.

The respondent may alternatively agree to arbitration, in which case he will submit a brief statement of defence together with a fee of £2.50 or £5 depending upon the amount of the claim. An arbitrator is then appointed by the president of the Manchester Law Society from a panel of approximately 50 local solicitors who have previously indicated their willingness to act. A date, time and place convenient to all parties is arranged by the secretary.

The arbitrator has power to refer technical questions, e.g. as to whether defects in a carpet are caused by fair wear and tear or by a fault in manufacture, to experts who inspect and report on the goods in dispute. These arrangements are normally made through the Manchester Chamber of Commerce Testing House. This procedure can be very useful in certain cases where the only legal issue is a factual one as to whether the goods are, or were, of merchantable quality or fit for their purpose. This report can be arranged either before or after a hearing and the maximum fee is £6.50 irrespective of the value of the claim.

Hearing

The hearing itself is designed to be as informal as possible. The rules of the scheme prohibit professional representation of any kind, an oath is not administered, and the rules of procedure and evidence are not necessarily adhered to during the proceedings. The arbitrator's overall approach is directed towards a full discovery of the facts in an informal atmosphere without hindrance by legal formalities. After hearing the parties and any witnesses, and after considering any expert's report, the arbitrator will make an award in the form of monetary damages, and not specific performance. The arbitrator does not have to give reasons for his decision. It is usual to award costs of the two arbitration fees and of any expert's fee against the losing party, which will be a maximum of

£16.50, i.e. £5 + £5 + £6.50 if the claim is over £75 and an expert's report was required. The arbitrator's remuneration is equivalent to the two arbitration fees paid by each party, i.e. £5 or £10 depending on the size of the claim, and there is no appeal from his decision. The award itself, if unpaid, can be enforced in the county Court as a single contract, and this method has been used twice without any difficulty.

Cost

The cost of running the scheme is being met by a grant from the Nuffield Foundation which is financing the scheme as a research project for three years. The scheme has now been operating since July 1971 and, at the time of writing, the scheme's offices have received over 350 inquiries. Of these inquiries 103 claimants have signed the form offering to submit to arbitration, while a large proportion of the remaining inquiries had to be refused because they lived outside the geographical limits. There have been so far 63 completed cases; in 14 of these (22 percent) an arbitration has been arranged, in 18 cases (29 percent) there has been a settlement to the customer's satisfaction, and in 31 cases (49 percent) the respondent has either refused to go to arbitration or has been untraceable. Of the 12 awards made, the claimant has been wholly unsuccessful in only one case, while in two other cases the respondent has also succeeded in a counterclaim.

Any conclusions as to the overall viability and effectiveness of the scheme must remain tentative at this stage. The functions of the scheme have appeared in practice to be twofold and to some extent contradictory. It acts both as an easier and cheaper method of legal settlement and also as a provider of legal and/or consumer advice and assistance, or in order to pursue a justified complaint where all possibilities of satisfaction from the seller or the manufacturer have not been exhausted. It has not happened in every case that the complaint has been filtered either by the consumer, or by other agencies, so that the case reaches the scheme at or near the stage where county Court action would be contemplated had an orthodox method of legal redress been followed. This could lead to the danger that the scheme was not seen solely as an impartial mechanism for securing informal adjudication, but also as a consumer orientated complaints service.

The percentage of respondent refusals has been lower than many people expected, but the failure rate is nevertheless high enough to indicate that a major obstacle is the scheme's voluntary nature. There is evidence that actual arbitrations involve disputes where first the respondents believe their defence to be justified, and where secondly the respondents also find it as convenient and as cheap to submit to arbitration.

Scheme vindicated

Last week for the first time a decision made by an arbitrator under the scheme was challenged in the county Court. The Registrar gave judgment which effectively enforced the arbitrator's award. He refused to reopen the facts of the case. The scheme has always claimed that its awards are enforceable by the Court, but critics expressed doubts. Now those doubts are silenced. The Registrar said that by signing the scheme's simple form, each side made a binding contract to abide by the award.

In this case, the customer paid £15 deposit for a custom-made suit, total price £45. He then said he did not like the collar style and refused to pay the remaining £30. Through the scheme he claimed the £15 deposit back. The tailor agreed to arbitration, counter-claiming the £30. The arbitrator ordered the customer to pay only £15 more. The customer, disliking the award, refused to pay. The tailor took out a default summons in the county Court registry, to which the customer entered a defence. In Court, he tried to reopen the question of the suit, but was not allowed to do so.

This is the first time in the development of the scheme that a defence has been entered, but it is the second time an award has been upheld by the Court. In the first case in February this year, Judge Zigmond declared that all the forms used by the scheme were valid, that a contract to pay the award was made and could be enforced. He said that in future a simple default summons would be enough to enforce this contract. The case concerned a motorcar taken for a Ministry of Transport certificate. The garage recommended a repair, then another which were both paid for, but meanwhile the garage lost the licence to carry out Ministry of Transport tests. They recommended further repairs and obtained money, but never returned the car and finally refused to produce it at all. More than a year from first taking the car into the garage, the owner claimed under the scheme. The car was then valued by an expert at £5 scrap. The owner was awarded £116, but the garage failed to pay until Court action was taken. All the money, including Court fees, has now been paid out by the Court to the car owner.

Conclusion

If some kind of small claims Court is require on a national compulsory basis, then the actual procedure and method of hearing used by the scheme seems excellently suited to an informal process of litigation. What the scheme does not, and cannot, prove, is whether the public will be better served by small claims Courts as such, rather than other alternative methods of bringing justice within reach.

KEN FOSTER in *The Solicitors' Journal.*

CHARITABLE TRUSTS AND PUBLIC BENEFIT

The decision of the House of Lords in *Dingle* v. *Turner* [1972] 1 All E.R. 878 settles an issue of the law of charities which had been somewhat uncertain for over twenty years. The rule that in order to be charitable a trust must involve benefit to the "community or a section of the community" (*a*) had been relaxed in the case of trusts for the "poor relations" of the settlor (*b*), and this had been extended by the Court of Appeal in England, in *Gibson* v. *South American Stores (Gath & Chaves) Ltd.* [1950] Ch. 177, to trusts for the relief of poverty among the employees of a company and their dependants. Yet it had never been clear whether the "poor relations" principle would stand the test of the House of Lords as the cases had been described as "anomalous" (*c*), and there was even further doubt whether the extension to company employees would stand.

The uncertainty had been perhaps compounded in 1950 when the House of Lords in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*, without determing the validity of the poor relations principle iteslf, refused to apply it to trusts for the education of the children of the employees of a company. The learned Lords expressly reserved themselves on the future of the poor relations cases: Lord Simonds, while pointing out that the House was generally reluctant to overrule a long-established series of decisions, stated that it was not for him to "say what fate might await those cases if in a poverty case this House had to consider them" (at p. 308) and Lord Morton of Henryton observed that the cases would require "careful consideration in this House on some future occasion" (at p. 313).

In the meantime there had been decisions of lower Courts indicating both acceptance and rejection of *Gibson* v. *South American Stores*. In New Zealand Wilson J. concluded that the Court of Appeal in the *Gibson* case had established the general principle, which he accepted, that the requirement of benefit to the community was not as stringent in the case of trusts for the relief of poverty as in other charitable trusts (*d*); indeed the learned Judge was prepared to go so far as to suggest that the element of public benefit was not at all necessary in trusts for the relief of "aged, impotent and poor people" (*e*). In Ontario, on the other hand, the Court of Appeal had decided, in 1951 (*f*), that *Gibson* v. *South American Stores* was inconsistent with the decision of the House of Lords in *Oppenheim* and that the public benefit test was the same for all heads of charity. Eight years later, however, Wells J. of the High Court of Ontario, boldly decided that his Court of Appeal's determination in the earlier case was *obiter* and he followed the *Gibson* decision. Surprisingly enough apparently this was not appealed.

The House of Lords have, however, finally decided in *Dingle* v. *Turner* [1972] 1 All E.R. 878 not to disturb either the "poor relations" cases or their extension to poor employees. In *Dingle* v. *Turner* a testator had directed the creation out of his residuary estate of certain "Pension Fund Trusts", the income of which was to be applied in paying pensions to certain poor employees of E. Dingle & Co. Ltd., or any company to which its assets and goodwill might be transferred. The House decided that in spite of the narrow class to be benefited this was a valid charitable trust.

In the principal judgment, with which the other members of the House concurred, Lord Cross of Chelsea adopted the approach presaged by Lord Simonds in the *Oppenheim* case. He said:

> "The status of the 'poor relations' trusts as valid charitable trusts was recognised more

(*a*) *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297 per Lord Simonds at 305.

(*b*) *Re Scarisbrick, Cockshott* v. *Public Trustee* [1951] Ch. 622.

(*c*) per Lord Greene M.R., *Re Compton* [1945] Ch. 123, 139.

(*d*) *Re Mitchell* [1963] N.Z.L.R. 934.

(*e*) *Ibid.*, 940. For a criticism see Paterson, "Charitable Trusts for Relatives", (1967) 1 Otago L.R. 182.

(*f*) *Re Cox* [1951] O.R. 205.

than 200 years ago and a few of those then recognised are still being administered as charities. . . . Indeed counsel for the appellant hardly ventured to suggest that we should overrule the 'poor relations' cases." (at p. 888)

Moreover Lord Cross went on to say that "poor employee" trusts "have been recognised as charities for many years" and that "to draw a distinction between different sorts of 'poverty' trusts would be quite illogical and could certainly not be said to be introducing 'greater harmony' into the law of charity". Thus the House upheld the validity of both the poor relations and the poor employees cases.

To this extent the decision accords with what many might well have predicted. Perhaps the more interesting aspect of the case, however, lies in the further comments of Lord Cross, for instead of limiting himself to a decision based on the antiquity of the authorities he went on to make some more general comments about the tests for determining whether the purported benefit of a charitable trust was of a sufficiently public nature. The learned Lord pointed out that the traditional test, in terms of a "section of the community" as opposed to "a fluctuating body of private individuals", was vague and difficult to apply. The residents of a geographical area though a "section of the community" could equally be seen as a "fluctuating body of private individuals" and the employees of a large company although not regarded as a section of the community could be numerically just as extensive as the groupings accepted as such a section. Moreover the test expounded by Lord Greene M.R. in *Re Compton* (at pp. 129-130) according to which the Courts are required to distinguish between classes determined on the basis of a personal relationship or status, which are not charitable, and those determined on an impersonal relationship, which are, was equally regarded as unsatisfactory.

In making these criticisms Lord Cross was, as he acknowledged, re-echoing the comments of Lord MacDermott in his sole dissenting judgment in *Oppenheim* (*g*). There Lord MacDermott has said of the distinction made in *Re Compton* that it could hardly be regarded as a "criterion of general applicability and usefulness". He went on:

> "I see much difficulty in dividing the qualities or attributes, which may serve to bind human beings into classes, into two mutually exclusive groups, the one involving individual status and purely personal, the other disregarding such status and quite impersonal". (at p. 317)

In other words it was a delusion to think that there was a simple principle which could be applied to determine whether or not a sufficiently broad public was being benefited.

When it came to describing a more appropriate test for the Courts to apply Lord Cross was more circumspect. He suggested (at p. 889) that the purpose of the trust ought to be taken into account, thus the *Oppenheim* could be justified on its facts as the education of the children of the employees of a company is a "company" purpose and not a "public" purpose in that it purports to provide a fringe benefit to employees, hence making it more attractive to remain in their employment (*h*). Furthermore, said Lord Cross, the Court must be realistic and face the fact that a charitable trust is going to attract significant fiscal privileges, and there is no reason why the taxpayer should be required to contribute to a scheme providing company employees with such benefits.

This latter reference to the fiscal privileges of charitable trusts was one with which three of the other law Lords could not bring themselves to agree (*i*). Lord MacDermott allowed that such considerations may be relevant "on the question whether what is alleged to be a charity is sufficiently altruistic in nature to qualify as such" but he doubted whether "these consequential privileges have much relevance to the primary question whether a given trust or purpose should be held charitable in law".

Yet surely it is factors such as these which lie at the heart of the public benefit test and, as Lord Cross has so clearly demonstrated, resort to a simple *dictum* such as, there must be benefit to a section of the community rather than to a fluctuating body of private individuals, serves only to mask the real choices which the Courts

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(*g*) *Supra* (*b*) at 313. In *Dingle* v. *Turner* Lord MacDermott concurred in the judgment of Lord Cross, adding that "the views which I have expressed at some length in relation to an educational trust in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* seem to me to apply to this appeal and to mean that it fails".

(*h*) But this is really a question of where one places one's values. The education of employees' children provided for by the Dingle Company was certainly a company purpose in that it sought to provide a fringe benefit for employees, but in so far as it furthered education it was surely a public purpose as well. Whether one sees this ultimately as a public rather than a company purpose depends on whether a value is placed on education sufficient to override the fact that the education is for a limited group of people.

(*i*) Viscount Dilhorne, p. 880, Lords MacDermott and Hodson p. 881.

have to make. Basically there have been two policy questions in this area; first, is there a public interest in allowing any category of trust to avoid the rules governing private trusts with respect to certainty, perpetual duration and taxation? This question obviously needs no answer. That there is such a public interest is axiomatic and its boundaries have been prescribed by the Statute of Charitable Uses 43 Eliz. I c. 4 (1601) and, more particularly, by Lord Macnaghten's judgment in *The Commissioners for Special Purposes of the Income Tax* v. *Pemsel* [1891] A.C. 531 where the three specific categories of poverty, education and religion were stipulated as potentially beneficial and a fourth more general category of "other purposes beneficial to the community not falling under any of the preceding heads", (at p. 583) (*j*) was laid down. The second question, which is one the Courts have had to answer in each case, is whether the particular instance of a charitable purpose is one in which there is a sufficient public interest to warrant granting of the privileges of a charitable trust. It was in answer to this question that the *Compton* test, the utility of which has now been doubted, was formulated.

This test of public interest in the particular case is one which pre-eminently must involve a balancing of interests and benefits, those of the particular beneficiaries under the trust and those of the public at large. In admitting that trusts for the relief of poverty need not comply with as stringent a test as trusts for the advancement of education or religion the Courts, no matter that they justify their decision on the ground of antiquity and reliance, are recognising a greater value in the relief of poverty than in the advancement of education or of religion. In other words there is a public benefit simply in relieving poverty, but there is no public benefit in educating people unless a sufficient cross-section of the community are to be educated.

Should the Courts be making social judgments of this nature? Surely there must at least, be some clear guidelines on which they can operate. A precise statutory definition of a charitable trust (*k*) leaving the Courts the function merely of determining whether there is tangible benefit might remove the problem from the Courts (*l*). Unfortunately this still raises many difficulties, for the very determination of the existence of benefit implies some class or body in receipt of that benefit. If the object of the trust was a single person then it could hardly be argued that there was any substantial public interest in granting fiscal privileges.

Alternatively one might argue that the concession to trusts for the relief of poverty is unjustified and that such trusts should have to comply with the same tests for benefit to the public as other charitable trusts (*m*). To argue this, of course, involves denying the overriding value placed upon the relief of poverty by the Courts through the "poor relations" and the "poor employees" cases. Moreover, it does nothing to clarify the difficulties involved in ascertaining whether or not a sufficient section of the community is being benefited.

The point is that the resolution of this question is one which is inappropriate for the Courts. The relative social merits of the relief of poverty, the advancement of education and the advancement of religion can only be determined as a matter of policy on which there should be legislative guidance. Certainly such policies should not be determined through the invocation of what have hitherto been regarded as rules guiding the Courts but which, in fact, only conceal the real process in which the Judges are involved.

Finally, we should pay heed to Lord Cross who indicates that serious attention be given to the suggestion of the English Royal Commission on the Taxation of Profits and Income (*n*) that the classes of charity to receive fiscal privileges be narrowed. This would not prevent charities which did not fall into the new categories, because, for example, their benefit was spread over a narrow class of persons, from receiving other privileges, such as the right to perpetual duration or even a modified scheme of taxation.

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(*j*) The approach of the Courts has generally been limit this category by reference to the Statute of Charitable Uses.

(*k*) In England the Nathan Committee on the Law and Practice relating to Charitable Trusts. (*Cmd.* 8710) recommended that Lord Macnaghten's four categories be given statutory effect, but added that the case law should remain as it is, thus continuing the public benefit test.

(*l*) In *Re White's Will Trusts* [1951] 1 All E.R. 528, Harman J. concluded that a gift to be used to provide a house of rest for nurses was a valid charitable purpose. Although the class directly benefited was small, the indirect benefit to the hospital as a whole was sufficient to satisfy the test of public benefit. The case goes some way to recognition of benefit in the fact of the existence of a purpose and relegates the requirement of a benefit to a broad section of the community to a lesser position.

(*m*) Paterson, "Charitable Trusts for Relatives" (1967) 1 Otago L.R. 182.

(*n*) *Cmd.* 9474. Lord Cross had previously, in a different capacity, indicted his support for the Radcliffe Commission's proposals, see Cross, *Some Recent Developments in the Law of Charity*, (1956) 72 L.Q.R. 187, 203-206.

LET'S KILL ALL THE LAWYERS

By John L. Farris, President of the Canadian Bar Association.

When I told one of my "friends" that my title was "Let's Kill All The Lawyers", he said, "Just make sure there's no unfinished business."

Good natured bantering of this kind is of no concern to lawyers but when the bantering becomes more serious and reflects a misunderstanding of the role of lawyers in society today, it then becomes a matter of concern, not simply to the legal profession, but to the community as a whole.

The phrase "Let's Kill All The Lawyers" was uttered by one of the characters in a play of Shakespeare's. Even before the days of Shakespeare, and continuing to the present time, there has been a feeling of impatience and irritation with the legal process and those familiar with its mysteries.

There's nothing surprising about this. Dissatisfaction to some degree is almost inevitable. Law involves restraint. However necessary and salutary it may be, men have never been reconciled to it entirely. There is always the feeling of "I want what I want when I want it."

Further, law involves compromise and therefore it is inevitable that there will be those who want more or those who want less of any particular type of law. These dissatisfactions are easily transferred from law to lawyers. It is not unusual to hear it said, "My damn fool lawyer says I can't do it." The resentment that should be directed against the law is directed against the lawyer.

However, apart from these general considerations there is reason to observe the barometer of the present day with some misgivings. There are proposals afoot for the control and regulation of the legal profession which show a complete lack of understanding of the true function of lawyers in civilised society. These proposals place in jeopardy fundamental rights—the right to be represented by counsel who is entirely independent of the state—the right to attack the state or any of its institutions, and in that attack to have the advice of a trained advocate who can represent you without fear of consequences. Therefore, these proposals require a careful analysis.

There is in the Province of Quebec today a bill before the Quebec Legislature known as Bill 250. The provisions of this bill and the implications of it are so far-reaching, that there must be a complete understanding by the public of what is involved. The effect of the bill is to subject, at some point of other, almost every aspect of a lawyer's professional life to Government regulations.

The bill sets up a code to govern the incorporation and affairs of professional societies and through them the conduct of their members. The code applies to all so-called professional groups. The advocates of Quebec on the one hand, and on the other the hearing aid acousticians of Quebec, and the physiotherapists of Quebec. In all, there are some 34 occupations which are within the purview of the bill.

It provides for committees or boards with the most far-reaching powers, including the power to supervise the professional practice of the members of a professional corporation and, in particular, to inspect their records, books and registers relating to such practice. This would include the right to look at your personal documents in your lawyer's office.

Key members of these boards are appointed by the Government. The responsibility for discipline of a profession is transferred from the governing body of the profession as it is today to a government dominated group. The persons entrusted with the discipline of the Bar would be chosen and paid by the Government.

The bill also requires each professional group to adopt a code of ethics and to establish indemnity funds—actions that the legal profession took long ago.

In the Province of Manitoba, a committee of the Legislature is pondering on similar proposals.

It is my submission to you today that these proposals are not in the public interest and are a matter of concern to all Canadians. It is essential that there be a strong and independent Bar—independent of control by the state and free from excessive influence by Government. Destruction of the independence of the Bar means danger, first of all, to the rights of the individual, and secondly, to the independence of the judiciary.

In support of these submissions I propose to discuss the role of the legal profession in our system of administering justice and to consider the extent to which the legal profession had discharged its obligations to the public. Against this background I will develop my submission that the proposals are unsound and dangerous.

I am not here to advocate special privileges for the members of the legal profession. We are capable of looking after ourselves. I am here as President of the Canadian Bar Association, representing 13,000 lawyers, who have an obligation of service to the public. In discharge of that obligation, it is our duty to alert you to dangers to a way of life that is basic to our civilisation.

Western civilisation receives its stamp from Christianity. Its main characteristic—its essential featute—is the emphasis on human personality—the significance of the individual—the recognition that man has a soul, that we are not animals—or just a number.

In Greece and Rome there were citizens on the one hand and slaves on the other. It was not the man—the human being—it was merely the man the citizen who enjoyed the protection of the law. Only membership in the omnipotent state conferred legal rights. The slave, living on the wrong side of the state community, lived also on the wrong side of the law.

With the arrival of Christianity, man as such the individual—is freed from the totalitarian atmosphere of the state and obtains an objective of his own anchored in eternity—an objective which the state has to respect and advance.

Hand in hand with the growing importance of the individual and his rights is a growing importance of the Bar—the necessity to have a body of trained professionals who are both qualified and willing to protect the rights of the individual against all attacks—whether from the state, from institutions or individuals.

In the American Revolution, with its Bill of Rights—in the French Revolution with its Declaration of the Rights of Man and the Citizen, the political rights of the individual were staked out. These spotlights on history remind us that the conditions of freedom and justice in the state, established at such great cost, need the protection and support of qualified champions.

Abortive attempts to set up a society without law have been made throughout the history of civilisation. Every Utopia that has been dreamed has been designed to dispense with lawyers. This has been true especially of ideal schemes imagined after revolutions. In our own time—the Russian Revolution abolished the organised legal profession. The attempt proved vain. Today the Soviet law books make up a library of no mean proportions and a College of Lawyers is an established institution.

Colonial America had visions of a New World Society without law—and so without lawyers. From antiquity experience has shown that the adjustment of relations among men and the ordering of their conduct requires law and that law requires lawyers. It has never been easy for laymen to accept these propositions.

Historically, the practice of law is a profession and it must remain a profession. A profession has been defined by Dean Pound of Harvard "as a group of men pursuing a learned art as a common calling in the spirit of public service, no less a public service because incidentally it may be a means of livelihood." Most men have to earn a livelihood. In most walks of life, in business and in trade, it is the primary purpose. In a profession the earning of a livelihood is not the primary purpose. If public service is not a primary purpose of a calling, then it is not a profession.

Certain other callings in recent times claim a like dignity to the professions of medicine, law, teaching and the ministry, but they lack the essential primary purpose of public service. For example, if an engineer discovers a new process, or invents a mechanical device, he may obtain a patent and retain for himself a profitable monopoly. If, on the other hand, a physician discovers a new specific for a disease, or a surgeon invents a new surgical procedure, they publish their discoveries or inventions to the profession and so to the world. If a lawyer through research or experience discovers something that is useful to the administration of justice, he publishes it in a legal periodical, or expounds it before a Bar Association or a lecture to the law students. It is not his property. The process, or method, or developed principle he has worked out belongs to the world.

There are various occupations today which are endeavouring to be recognised as professions, although they are primarily money making in purpose and spirit. The movement to elevate the standards of business in all callings is a worthy one. The regulation of brokers by Security Commission legislation, the improvement of the standards of real estate appraisers must command public approval but in elevating these occupations that are primarily money making in purpose, we must be vigilant to see that the elevation is not achieved by pulling down the standards of the old recognised professions to a common level with the newer ones.

We must equally be vigilant to see that there is not Government domination of a profession

that can only properly function without political interference. The professional tradition cannot be replaced by a political tradition of office holders owing primary allegiance to political parties and depending for advancement on the favour of political leaders.

Now to what extent are the lawyers of Canada discharging their obligations of public service? If we are failing to meet out responsibilities, then there may be just cause for the proposals that are being made in Bill 250. I propose, however, to demonstrate to you that the lawyers of Canada have and are fulfilling their responsibilities and are pioneers and leaders in the field of law reform. In the recital that I am about to give you, you may think that we are boasting. I prefer to say that we are applying the principle "that he that bloweth not his own horn, the same shall not be blown."

There is no doubt that there is a need for law reform. There is a need to bring the process of justice into conformity with modern times. If you examine the record you will see that it has been the lawyers and Judges of Canada that have been in the forefront of recognising this need—of speaking publicly about it and of urging Parliament and Legislatures to enact the necessary reform.

Let me give you a few examples. *The changes in the Divorce Law.* These were brought about, in large measure, by the activities and pressures of the Canadian Bar Association—going back over a period of many, many years before Parliament was prepared to enact the necessary legislation. But it was the insistence of the lawyers that created the political climate that made it possible to bring about this much needed and long delayed reform.

In the field of abortion—these laws were pioneered, again, by the lawyers of Canada.

The establishment of the *Law Reform Commissions* which have been recently set up, both at the Provincial and National level—these again were the result of pressures having their origin in the Canadian Bar Association and the various Provincial Law Societies.

Legal Aid—the Canadian Bar Association and the lawyers of Canada have long recognised the right of every citizen to have access to the Courts—to have legal advice in the conduct of his affairs. For years, the lawyers to the extent that it has been humanly possible, have been supplying this service. In today's society with all the complexities that there are, the problem is not one that can be solved by private initiative, but only through proper legal aid schemes. The lawyers of Canada have been pressing for this and have supported legal aid wherever it has been made available by the state.

Section Activity—Probably the greatest contribution to law reform in the last 25 years has been made by the various sections of the Canadian Bar Association. We have sections dealing with commercial law, criminal justice, civil justice, civil liberties, taxation, family law and so on. In my Province of British Columbia alone, 1,000 of the 2,000 lawyers we have are members of one or more of these sections. The sections, on a national and provincial level, are actively making recommendations which are being found, in many cases, acceptable by Parliament or Legislatures and result in necessary changes by legislation.

In addition, the Canadian Bar forms special committees from time to time to deal with special problems. Let me give you a few examples. In recent years we have had a committee on tax reform which has made what has been acknowledged in the House to have made a major contribution in this field. We have had committees on expropriation, on divorce, on the Competition Act, on the Privacy Act. We presently have a special committee of distinguished lawyers from across Canada reviewing the jurisdiction of the Supreme Court of Canada with a view to making recommendations to improve the functioning of that Court. In carrying on this work the lawyers contributed their own time and the costs, up until two months ago, have been borne entirely by the Canadian Bar Association. It is only this year, for the first time, that we have received from the Donner Canadian Foundation a grant to assist, not for the remuneration of lawyers engaged in this work, but simply to pay for the out-of-pocket disbursements and the necessary technical staff.

I think I have said enough to dispel the misconception that lawyers have a vested interest in the *status quo* and are, to use a colloquialism, "dragging their feet" in the field of law reform. It's the lawyers who perceive the need for change and who have the reasoned arguments that are most likely to persuade Parliament and the Legislatures to bring about the necessary reform. In carrying out this responsibility they reflect the views of their clients who are, after all, the people of Canada, and they are, to a substantial degree, the mechanism by which those views can be reflected in action. If you did not have lawyers, capable and independent, to render assistance and expertise in the field of reform, pressures would build up even greater than they do in our turbulent society. The fact that steps are being taken to bring about change is one

of the ways in which to defuse the violence of the day.

It is in this context and with this background that one must look at the proposals that would impair or destroy the independence of the legal profession. The Quebec Bill 250 is not only of concern to the residents of that Province, but it is of concern to all of Canada. The businessman in Toronto, the businessman in Victoria or Halifax, who is doing business with his counterpart in the Province of Quebec, has a vital interest in the laws of that Province and in the manner in which they are to be enforced. In addition, all Canadian citizens have a vested interest in the administration of justice in all parts of Canada.

In this Bill there appears to be no recognition of the fact that the legal profession is an integral part of the system of administering justice—that lawyers are the group from whom our Judges are selected. The Government power of appointment to the boards and bureaux supervising the legal profession cannot be justified.

Government appointees generally will reflect Government views. It is not unreasonable to expect that Government displeasure at proceedings against Government agencies and objectives will find sympathetic response by those appointed and paid by the Government and who are in a position to control the legal profession. In this connection it is interesting to note that recently the Vice-President of the United States has suggested that public funds should be withdrawn from legal aid organisations that have the temerity to attack Government agencies.

This threat to the independence of the Bar is likewise a threat to the independence of the judiciary. It is basic to our system that there shall be an independent judiciary. It is indispensable to a free society. The character of the judiciary is no better, no stronger than the Bar from which it is drawn. The lawyers are the Judges of the future. The quality of the Bench depends upon the quality of the lawyers—thus the independence of the Bench depends on the independence of the legal profession.

One of the characteristics of our legal system is the intimate connection between the Bench and the Bar. The Judges are men who have passed a large portion of their lives in the world of practical affairs and have won respect there. The common experience and training unite the Bench and Bar in an understanding of each other which would be difficult to obtain if their professional lives were spent in different careers. This co-operation between Bench and Bar is of the utmost importance for the working of our system.

Today the Canadian Bar Association is playing a vital role in the selection of our Judges. We have a national committee on the judiciary. Every Province in Canada is represented on the Committee by a distinguished lawyer who, by taking appointment to the Committee, disclaims any judicial ambitions. Since its formation some four or five years ago, the Minister of Justice has referred to the Committee names of persons who the Government is considering appointing to the Bench. The Committee, after careful investigation, reports back to the Minister of Justice as to whether a particular individual is not qualified, qualified, or highly qualified.

This system is working very well. Almost without exception, the Government has accepted the Committee's views and has not appointed a person who has failed to pass the scrutiny and assessment of the leaders of the legal profession. If the legal profession were to be controlled by the Government, the Judges of the future would not have to pass the test of approval by independent and experienced lawyers.

Let there be no misunderstanding as to the basis of our opposition to Bill 250 or similar legislation. What the Bar of Canada is concerned with is the control of the legal profession by Government. We recognise, however, that there is an obligation on the profession to account. We do not object to legislation providing a mechanism by which the public becomes fully informed as to the manner in which the legal system and, in particular, the lawyers, are functioning. We fully support the public's right to know.

In this connection we agree with the Law Society Act of 1970, passed by the Ontario Legislature. That provides for a body known as the Law Society Council, whose obligation is to consider the manner in which the members of the Upper Canada Law Society are discharging their obligations to the public and generally matters affecting the legal profession as a whole. The Lt. Governor appoints nine persons to that council who are not lawyers. The Council reports twice a year to the Lt. Governor-in-Council. We don't object to this and we welcome public participation in this manner.

We are doing similar things in the profession ourselves quite apart from any legal obligation. For example, in the committee I've mentioned, formed to study the jurisdiction of the Supreme Court of Canada, and to come up with recommendations affecting this most important Court, we have at the request of the Donner Canadian Foundation appointed a non-lawyer to the committee—Mr Norman Smith, the editor of the *Ottawa Journal* and recently President of Cana-

dian Press. We recognise that if the Canadian Bar Association is going to be making recommendations affecting the highest Court in the land the public has a right to know the basis upon which these recommendations are being made and to have an outside point of view represented in the deliberations leading up to the recommendations. The Canadian Bar Association and the Law Societies of Canada have no desire to be secret societies engaging in rites of black magic.

So I return to the exhortation, "Let's Kill All The Lawyers" urged by Jack Cade and his friends in *Henry VI*. A few scenes later they were dead, victims of the violence resulting from their attempt to create a society without lawyers.

So my message is, don't kill all the lawyers. Don't kill the independence of the legal profession—and don't jeopardise the independence of our Judges.

PUBLIC AND PRIVATE MORALITY

In 1957, the *Report of the Committee on Homosexual Offences and Prostitution* stated what the Wolfenden Committee believed to be the function of the criminal law, especially as it concerned homosexuality and prostitution.

> "In this field, its function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in mind or body, inexperienced, or in a state of special physical, official, or economic dependence." (*a*)

Applying this principle to homosexuality, they recommended that homosexual behaviour between consenting adults in private should no longer be a criminal offence. For

> "Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality." (*b*)

In 1958, Lord Patrick Devlin gave the second Maccabean Lecture in Jurisprudence of the British Academy. The title of the lecture was *Morals and the Criminal Law*. Devlin was not happy with the reasons the Wolfenden Committee put forward in recommending the removal of homosexual acts between consenting adults as a criminal offence. Neither was he happy with the Committee's distinction between public and private morality. In his essay, he poses three questions, the correct answers to which he believes will give a more adequate distinction between crime and sin, public and private morality. The questions are:

(1) Has society the right to pass judgment at all on matters of morals? Ought there, in other words, to be a public morality, or are morals always a matter for private judgment?
(2) If society has the right to pass judgment, has it also the right to use the weapon of the law to enforce it?
(3) If so, ought it to use that weapon in all cases or only in some; and, if only in some, on what principles should it distinguish? (*c*)

It is important for us to keep these questions separate as I think there are times when Devlin confuses them, and this has resulted in some of his critics attacking him a little unjustly.

Devlin's answer to the first question is "yes." Society does have the right, in principle at least, to make morality a public matter. However, Devlin's justification is by no means clear. His main argument for society's right in principle to be concerned with morality is based on his concept of society. For him, society means a community of ideas, for without shared ideas on politics, morals and ethics, no society can exist. When these shared ideas are threatened, then society's existence is also threatened:

> "An established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history

(*a*) *Report of the Committee on Homosexual Offences and Prostitution* (Cmd. 247), 1957; par. 13.
(*b*) ibid., par. 62.
(*c*) P. Devlin, *The Enforcement of Morals*, (O.U.P.); pp. 7-8.

shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions." (*d*)

What does it mean to say that society should cease to exist? It seems to me that there are at least three possible ways which are relevant. Firstly, a society could cease to exist as would be the case if enough atom bombs were dropped on it. Secondly, a society could disintegrate in the sense that its inhabitants were all shipped off to other countries and the land re-demarcated in a similar way that Europe was changed following World War I. Thirdly, a society could change its nature in some fundamental way. Examples of this third possibility would be if in New Zealand, institutions such as parliamentary democracy or monogamous marriage were changed for something inherently different. If this happened, then our society could be said to have ceased to exist. These institutions are fundamental, because in our history, they have developed in such a way enabling people to live together in a type of life whereby they can satisfy certain important human needs. This is not to say that they are essential for a different society. Neither is this to say that our present forms of these institutions are in no need of criticism or modification. But it does mean that certain institutions cannot be drastically changed without a corresponding change in the nature of our society. It is this third possibility which concerns Devlin.

But is a common morality essential for the preservation of these institutions? If Devlin is claiming that any deviation from the accepted morality threatens the existence of society as a matter of empirical fact, then he is historically inaccurate. Professor Hart in his book *Law, Liberty, and Morality* says that:

> "No reputable historian has maintained this thesis, and there is indeed much evidence against it. As a proposition of fact it is entitled to no more respect than Emperor Justinian's statement that homosexuality was the cause of earthquakes." (*e*)

Devlin in a later lecture mentions that morality is like a single seamless web, and if one part is unpicked, then eventually the whole garment will come to grief. Another common image is that of the dyke holding the sea at bay: if the sea comes in at any point, then the whole wall will ultimately give way. As historical theses, these similes are misleading and inaccurate.

However, Devlin's justification for the right of society in principle to be concerned with the morality of its citizens could be interpreted (Hart claims) in a more extreme way. The statement that any immorality threatens the existence of society could be a necessary truth claim, because Devlin gives no historical evidence for his position. But if we interpret Devlin in this way, then society becomes identical with its morality at any given moment. And if there is even the smallest change in that morality, then another society comes into existence in place of the previous society. This is, of course, distorting the word "society" almost beyond recognition. So this second possible interpretation of Devlin's attempted justification is dealing with something else than what we normally call society, and renders it unacceptable.

In a footnote (p. 13) Devlin replies to Hart by saying that he did not assert that *any* deviation from a society's shared morality threatens its existence, but that any deviation is *capable* of this threat, and therefore cannot be put beyond the law. It now seems that Devlin is asserting that it is not the case that any deviation in fact threatens the existence of society, and by implication, that the single seamless web and dyke similes are inaccurate. What I take Devlin to be saying is that any particular deviation has the logical possibility of threatening society's existence. If Devlin is claiming this, then I cannot see how one can disagree with him. For in another society, different from ours it is possible that such activities, as, say, homosexual behaviour, do constitute a real threat to society's existence. It is logically possible that any deviation could be a threat, and therefore one cannot deny the authorities the logical possibility of legislating against such a deviation.

This conclusion is one that Hart would also agree with. In his *Concept of Law* he states that:

> "Reflection on some very obvious generalisations—indeed truisms concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organisation must contain if it is to be viable. Such rules do constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control." (*f*)

If both Devlin and Hart agree that there must be some kind of public morality, why the con-

(*d*) ibid., p. 13.
(*e*) ibid., p. 50.

fusion and disagreement on Devlin's justification for this? It is because I think Devlin confused the first question he posed himself with the other two questions. For while it is logically possible that any deviation *could* be a threat, it is also logically possible that any such deviation from a shared morality could *not* be a threat to society's existence. Just as we can envisage a society where any deviation from the shared morality constitutes a threat, so we can envisage a society where any deviation does not constitute a threat. Moreover, there is a distinction between a deviation being a threat and a deviation causing substantial harm.

It could be conceded that homosexual behaviour is a threat to the family group, yet this does not commit one to saying that homosexual acts actually do harm the family. Hence the answer to Devlin's first question is no help in practice in drawing the line between crime and sin, though he appears to think that somehow it does influence this practical question.

So society has the right in principle at least, to pass judgment on the morality of its citizens. Has it then the right to use the weapon of the law to enforce it? Again, Devlin would give an affirmative answer, for he wants to say that society is justified in taking the same steps to preserve its shared morality as it does to preserve its government and other essential institutions. It does not matter if this common morality is not acceptable to anyone outside of the society. It does not matter even if this common morality is unjust. All that matters is that it is commonly accepted. To use Devlin's own words:

> "What is important is not the quality of the creed but the strength of the belief in it. The enemy of society is not error but indifference." (*g*)

Both Hart and F. W. M. McElrea disagree with Devlin on this point, for such an argument would justify the continued existence of such regimes as Hitler's Germany, and Vorster's South Africa. McElrea states that:

> "In the international scene, the shortcomings of Devlin's position are best illuminated and most distressing . . . What holds true for the individual in society holds true also for the individual nation in international society—neither has the unlimited right to self-preservation at the expense of others." (*h*)

(*f*) ibid., p. 188.
(*g*) ibid., p. 114.
(*h*) F. W. M. McElrea. "The Legal Enforcement of Non-Utilitarian Morality" in *Otago Law Review* (1, iii), July, 1967; p. 209.
(*i*) G. Hughes. *Essays in Legal Philosophy* (Blackwell); p. 193.

This, I think, is a fair criticism, but it does not thereby mean that society has no right to use the weapon of the law to enforce its shared morality. It just means that the quality of the creed is more important than Devlin would allow. Though at times it may be hard to maintain the distinction, there is an important difference between what the majority of individuals in a society *think* is essential for preserving a society, and what *is* essential for maintaining a society's existence. Hence, where this shared morality is essential for the continuation of the society, where it exists for the betterment of its citizens (leaving open the question of how one decides what is better), and where this morality is accepted by the majority (in order to keep the law in respect and thereby enforceable) then I think the authorities have the right to enforce the shared morality, though this need not necessarily involve punishment or retribution.

In the light of such qualifications, I think Devlin's third question should be reformulated to read "What principle or principles should one use to demarcate the morality which is essential for the existence and improvement of society?" Devlin would reject as an adequate answer to this question the utilitarian principle.

Devlin begins the justification of his rejection of the utilitarian position by maintaining that English law has never worked on such a principle:

> "If the criminal law were to be reformed so as to eliminate from it everything that was not designed to preserve the order and decency or to protect its citizens (including the protection of youth from corruption) it would overturn a fundamental principle. It would also end a number of specific crimes. Euthanasia or the killing of another at his own request, suicide, attempted suicide and suicide pacts, duelling, abortion, incest between brother and sister, are all acts which can be done in private and without offence to others, and need not involve the corruption or exploitation of others."

In criticism, Graham Hughes points out that since Devlin wrote his lecture, both suicide and attempted suicide have been abolished in Britain as criminal offences. The examples mentioned by Devlin, says Hughes, are all the subjects of keen debates. "To mention their presence in the criminal law as a rebuttal of the utilitarian position is thus not a tenable argument." Professor Hart quotes Mill's principle: that possible enforcement of morality is only justified when harm to others is involved. Hart extends this principle to include paternalism, where this

involves the protection of individuals from themselves. Where Mill's principle is extended in this way, claims Hart, then this explains quite adequately the function of the criminal law.

This criticism is not completely justified. While Hughes's point is worth mentioning, he seems to miss Devlin's recognition that just because the law has been based on moral principle, this does not justify accepting it for future legislation.

Basil Mitchell in his book *Law, Morality and Religion in a Secular Society* shows that Hart's notion of paternalism is ambiguous. If Hart mean only "physical paternalism" then this is hardly sufficient: incest and bigamy for example, could not be ruled out on this account. If Hart means "moral paternalism," then in effect he is agreeing with Devlin. If he means "psychological paternalism" then there is difficulty in finding criteria of psychological harm which are value-free. Lady Wootton in *Social Science and Social Pathology* concludes:

> "Long indeed is the road to be travelled before we can hope to reach a definition of mental-cum-physical health which is objective, scientific, and wholly free of social value-judgments." (*j*)

And if psychological paternalism is not value-free, then one can not appeal to the notion as an independent criterion for the division of sin and crime. It is not easy to foresee how Hart would reply to this.

If Devlin accepts the argument that just because the law has been based on certain principles in the past, this does not justify these principles being automatically used in the future, what are his reasons for rejecting the utilitarian principle for future legislators? In *Morals and the Criminal Law* I think Devlin felt that his "single seamless web" notion of society justified his rejection of the utilitarian position, a justification which I think is inadequate. In a later lecture entitled *Mill on Liberty in Morals*, he deals with this question in more detail. In this later lecture, there are similar ambiguities as in the earlier lecture, but I shall only concern myself with what I consider the more acceptable thesis.

Mill's principle, as Devlin sees it, is:

> "That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others." (*k*)

And this "harm to others" is chiefly physical harm. (It is not relevant here to discuss whether Devlin is correct in his interpretation of Mill.)

Devlin believes that this is unacceptable because of an inadequate notion of society. Society can be seen as necessary for the individual, a benefit rather than a hindrance. Social institutions can be said in some sense to exist for the furtherance of the individual's welfare. Of course, these social institutions require improvement. Mill thought, Devlin says, that improvement was best achieved through discussion and experiment. But for Devlin, freedom is not absolute but only relative. Freedom is not a good in itself; we believe it to be good because out of freedom stems more good than bad. Freedom of thought and action must be relative to the health of society, and only society can judge what is beneficial to it or not, as there is no other tribunal to which the question can be submitted.

There are other reasons why Mill's principle is imperfect (such as the point that mental and moral harm can be just as fatal as physical harm to an individual) but Devlin's basic disagreement concerns his notion of society. Briefly stated, Devlin sees society as a means of assisting the individual; and Mill (as interpreted by Devlin) regards society as a threat to the individual.

I think this interpretation of Devlin's has much to commend it. Social institutions in some form or another are necessary if people are to live together without complete disorder. While there will be occasions when these institutions will limit the individual's freedom, I think certain restrictions beyond those advocated by Mill are necessary if society is to function adequately.

However, like Mill, Devlin exaggerated the thesis to the point of committing errors of judgment. This is seen very clearly in Devlin's answer to the question "How does one decide what is the minimum amount of moral restriction necessary for the well-being of society?", that is, what is the best procedure for determining the public morality?

Devlin maintains that the common morality is what every "reasonable man" believes—it is the view point of the man in the street, or the man in the Clapham omnibus—it is the standard of the right-minded man", it is what the man in the jury box would decide.

This position has drawn fierce criticism. Graham Hughes says:

> "Here is an overt rejection of rationality startling in its frankness . . . The legislator

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(*j*) Lady Wootton as quoted in B. Mitchell, op. cit; p. 58.

(*k*) P. Devlin, op. cit; p. 103.

cannot be wiser than he is, but he does not have to be as stupid as the stomach of the man in the street." (*l*)

Professor Wollheim maintains that Devlin excludes "what it has been the triumph of civilisation to establish: the taming of conscience by reason." Professor Hart asks if the rational judgment of men who have studied moral questions and pondered long on what the answers ought to be, is to be blown aside by a gust of popular morality compounded of all the irrational prejudices and emotions of the man in the street. In New Zealand, a survey undertaken by the Political Science Department of the Victoria University of Wellington in 1963, showed that 60 percent of New Zealanders approved of flogging. If reason is to play no part in discerning right from wrong, then it is difficult to see how any just progress can be made.

Though Devlin's critics have voiced their opposition firmly, and have interpreted him most unfavourably, I think their position is justified, if that is what he meant. But is that what he meant? Again, I think Devlin's position is ambiguous. His phrase "the man in the Clapham omnibus" suggests that common morality should be determined merely by counting heads. However, his expression "the man in the jury box" does not indicate a snap judgment, but a decision reached only after argument, instruction, and deliberation. Though this procedure, if taken literally, could allow twelve persons of little or no rational conduct to determine what is to be the common morality of society. I think this type of approach is a fair one, and what actually happens in practice. In formulating legislation, I think the legislators should heed expert opinion as well as the reaction of the general public. As Basil Mitchell notes, it is bad to pass laws which do not command the respect of most reasonable people who are subject to them.

It is not exactly clear where Devlin stands concerning this ambiguity, though I gain the impression at times that he favours "the man in the Clapham omnibus" approach. However, even if he prefers the jury box type procedure, and even if he is aware of the ambiguity (which is not clear either), he has nobody but himself to blame for the way the majority of his critics have interpreted him.

Although Devlin has argued (in my opinion, incorrectly) that the government has the right to legislate against behaviour which may possibly threaten society's existence, and the right to employ the weapon of the law against such behaviour, he does not believe that the law should thereby be automatically used against deviant behaviour. There are times when there must be consideration for the individual in the name of freedom:

> "What I mean by striking it (the right balance) in favour of freedom, is that the question to be asked in each case is 'How much authority is necessary?' and not 'How much liberty is to be conceded?' " (*m*)

I think that what Devlin means is that although the authorities have the right (in his opinion) to legislate against behaviour which could possibly harm society in some important way, they should not exercise this right automatically, but only when there are reasonable grounds to show that the particular activity does constitute a real harm to society.

This means that there can be no single formula to decide the division between crime and sin; as the Wolfenden Committee believed. Instead, Devlin suggests four guiding principles to be used by legislators when attempting to distinguish between public and private morality:

(1) There must be toleration of the maximum freedom consistent with the integrity of society.
(2) The limits of tolerance shift.
(3) As far as possible, private behaviour should be respected.
(4) The law is concerned with the minimum, not the maximum performance.

As concerns (1), Devlin writes:

> "Those who are dissatisfied with the present law on homosexuality often say that the opponents of reform are swayed simply by disgust, if that were so it would be wrong, but I do not think one can ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached." (*n*)

Now there is some point to this. Wittgenstein, when talking about the justification for obeying a rule, states:

> "If I have exhausted the justifications I have reached bedrock, and my spade is turned Then I am inclined to say 'This is simply. what I do'." (*o*)

But as McElrea mentions, it would be better to call this non-rational rather than irrational. Moreover, I do not think this is as important as Devlin seems to think; I remain unconvinced about intolerance, indignation, and disgust: being the forces behind the moral law.

(*l*) G. Hughes, op. cit; pp. 198, 206.
(*m*) P. Devlin, op. cit; p. 102.
(*n*) ibid., p. 17.

I think the other three principles mentioned by Devlin are reasonable, and would be quite acceptable to Hart and others. However, I do not think Devlin's principles are sufficient. Mitchell states some further principles which he thinks important for legislators. They are:

(a) So far as possible, privacy should be respected.
(b) It is bad as a rule, to pass laws which are difficult to enforce, and whose enforcement therefore tends to be patchy and inequitable.
(c) It is bad to pass laws which do not command the respect of most reasonable people who are subject to them.
(d) One should not pass laws which are likely to fail in their object or produce a great deal of suffering or other evils such as blackmail.
(e) Legislation should be avoided which involves punishing people for what they very largely cannot help.

Devlin would accept (a) and (c) without any trouble. The other three are of a more practical nature and are particularly relevant to the debate of whether or not homosexual acts between consenting adult males should be criminal offences, and are not as general as Devlin's four principles. The last point in particular must be handled carefully. While it may be fair to advise legislators against punishing people for actions which involve very little choice, there must often be some kind of legislation to limit their behaviour: insane people who murder may not be able to help themselves, yet there must be some kind of control over them.

This would suggest that the distinction between public and private morality is not absolute, but relative to the situation. Hence a definition of public or private morality must be done in a similar manner to Wittgenstein's way of defining "game." From a number of contexts one can list distinguishing characteristics of games, some of these features being sufficient in one situation to call the activity a "game" yet different qualities in another context are sufficient to name a different activity a "game." Each of these sets of characteristics bear "*family resemblances*." That is, from all games we are able to list salient qualities A_1, A_2——A_X, ——, A_X. In one context the activity may have qualities A_1, A_3, ——, A_X. These are sufficient to allow the term "game" to be applied. In another situation, there may be the features A_1, A_2, A_X, ——, A_X. Again, there are enough common qualities to call this second activity a game because of the "family resemblance" with the first situation.

As with "game", so with "public morality." Using the principles mentioned by both Devlin and Mitchell, I think homosexual behaviour between consenting adults in private, should be classified under the category of private morality. As homosexuality is not a disease but the sexual disposition of a minority of people, such persons have, on the whole, little choice in determining their homosexual condition. Because of this, it could be argued that homosexual behaviour is not a real threat to the family and the integrity of society. Moreover, the law against male homosexuals is not fairly enforced, producing unnecessary suffering and the real likelihood of blackmail. Also, a greater understanding of the homosexual predicament by the general public is slowly leading towards society accepting homosexual acts between consenting adults in private as non-criminal. These factors allow certain resemblances to be seen between homosexual conduct and adultery (which in New Zealand is not a criminal offence). These similarities are sufficient to warrant the former being classified within the scope of private morality—when practised in private between consenting adults.

McElrea observes that Lord Devlin starts by affording licence to the legislature. That is, Devlin emphasises society's right to legislate and act against behaviour which is menacing and harming the existence and well-being of the community. But his four guiding principles substantially qualify this legislative licence. On the other hand, Hart begins from Mill's principle, and qualifies this with the notion of paternalism. Do these opinions meet in the middle? An answer could not be given without further examination of Hart's position: and even then a categorical answer may not be possible. My impression is that these two conflicting standpoints will not converge completely. The utilitarian viewpoint would favour reform more than Devlin would advocate: and Devlin would possibly find it difficult to accept legislation in advance of public opinion. Yet in application, Devlin is not far behind the utilitarians. Despite their differing approaches, however, there seems to be considerable agreement between them on definite issues such as whether or not homosexual acts between consenting adults in private should be regarded as a criminal offence.

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(o) L. Wittgenstein, *Philosophical Investigations* (trs. G. E. M. Anscombe) Blackwell: p. 85 (section 217) quoted by McElrea.

BLOOD TESTS AND PATERNITY

What type of civil case is likely to lead to an application for blood tests? One thinks of affiliation proceedings in Magistrates' Courts: blood tests may help the complainant (the mother) by providing corroborative evidence—often otherwise hard to come by—or they may help the defendant, proving that he could not be the father of the child. Or in divorce proceedings, tests could be used to support allegations of adultery, to disprove paternity or to show that a person treated as a child of the family is not necessarily such a child (see *T (H)* v. *T (E)* [1971] 1 All E.R. 590). Or blood tests could be used to prove or disprove that X., who claims to be entitled to share in Y.'s estate, falls within the category of beneficiaries in the contemplation of the testator or settlor or within the provisions of relevant statutes.

Two facts are well established about blood tests in relation to paternity. First, such a test can show that a particular man *cannot* be the father of child C. Secondly, a test is incapable of proving positively that another man *is* the father of that child. But this is not all. Blood tests can further show that a particular man *could* be the father of child C. and (in the case of some rare blood quality) that this is true of only one man in a million of the male population of Western Europe. As it is not usually a question of finding the one man in a million who could be C.'s father, even a much more common affinity of blood characteristics may produce evidence well worth consideration.

When it is known that C. is the child of one of two given men, even a result showing that one of them, in common with, say, 25 percent of the men in Western Europe, *could* be the father of C. is worth having—provided that the same cannot also be said of the other.

There are further limits to the use and usefulness of blood tests, some non-medical, others medical.

The Law Commission in their report, *Blood Tests and Proof of Paternity Com.* (No. 16) found no religious body which objected to the removal of a sample of blood from one of its adherents. Nor, it seems, are there more than a very few cases where the taking of blood samples might involve danger to health. It has been shown that with proper care blood samples may be taken even from haemophiliacs without danger to health. The medical practitioner appointed to take the blood sample ("the sampler")

For other comment, see [1968] *N.Z.L.J.* 201; [1969] *N.Z.L.J.* 567; [1970] *N.Z.L.J.* 42, 327; [1971] *N.Z.L.J.* 71, 469.

may however decide not to proceed. He will not e.g., take a sample from a subject who has, within the past three months had a blood transfusion, since this may produce misleading results. He may possibly decide not to take one from a subject who has been given blood plasma within that time. He will, of course, also respect a refusal by any party or by those in charge of any party. If he decides not to take a sample from one party, he will probably not sample the others either. In the majority of cases a complete set is needed.

Though refusal without adequate explanation may lead the Court to draw adverse inferences, a party who has little to hope from the result of a blood test may decide to save himself the trouble of submitting to a test. With any luck, he may come before a Court which does not place too much weight on his refusal.

An even less honourable way out of taking a blood test may occur to some parties: to arrange for the wrong person to be tested. To satisfy the parties, it is advisable for them to identify one another, or for their legal adviser to identify them, in as many cases as possible.

The test itself falls into two parts: (i) taking a blood sample from each subject, and (ii) analysing and comparing the samples. (For the sake of simplicity each person tested is in this article referred to as "the subject" and "he") Only the first part can be conducted separately for individual subjects. Indeed the regulations provide that the sampler should take one blood sample at a time—probably about 5 mls. or a teaspoonful—put it into a container, mark the label on the container with the subject's name and the date, sign the label and get the subject also to sign it. Only when he has completed this procedure does he go on to take a sample from the next subject. Unless the label is likely to come off, or further blood is likely to be added later—both remote possibilities—this procedure would seem quite adequate.

The set of three blood samples (of mother, child and possible father) are analysed by a serologist. In many cases the subjects will have

attended the tester to have samples taken, in others a general medical practitioner or several G.P.s may take the samples and pass them on to the tester, in their labelled containers.

Tests are based on the fact that blood possesses known attributes which are inherited according to known genetic laws. Most of us have heard of the four blood groups, O, A, B and AB. They refer to the absence (O) or presence of the antigens A or B or both in the red blood cells. No parent belonging to the very common blood group O can pass antigens A or B to a child. It follows that if a woman belongs to blood group O and her child to blood group A, the child must have received antigen A from its father. If, therefore, the man she charges with paternity does not have A to give (because he belongs to blood groups O or B) he "is excluded from possible paternity". If, on the other hand, the man belongs to blood groups A or AB, this particular test would show him "not to be excluded from *possible* paternity". The ABO test on its own is not necessarily conclusive and numbers of further tests are then carried out, using either the red corpuscles or the blood serum, before a "non-exclusive" report is made. Some tests rejoice in romantic names like (K) for "Kell" and (Lu) for "Lutheran".

The report of the tester states not only whether the subject is or is not excluded from possible paternity, it gives detailed results and assesses their value.

It is estimated that at present a full set of tests gives a man, falsely charged, a 70 percent chance of being excluded by the test. Tests of red corpuscles alone give an exclusion chance of about 60 percent. This is worth bearing in mind, as the blood serum does not develop all its characteristics until a child is nearly twelve months old, whereas many applications for affiliation orders have to be made well within its first year.

Advisers of men faced with a non-exclusive result may take some comfort from the words of Lord Reid in *S. v. S; W. v. Official Solicitor* [1970] 3 All E.R. at p. 110: ". . . if it were to appear from a blood test that the charactertistics common to father and child could have been supplied by, say, any one of half the men in this country then the test would be of no value at all in helping to prove that the husband was the father. But, on the other hand, if these characteristics were so uncommon that if they were not derived from the husband they could only have been derived from one man in a thousand, then the result of the test would go a long way towards proving (in the sense of making it more probable than not) that the husband was in fact the father because it would be very unlikely that the wife had happened to commit adultery with the one man in a thousand who could have supplied this uncommon characteristic. And if it appeared that only one man in a hundred or one man in ten could have been the father, if the husband was not, that might go some way towards making it probable that the husband was the father. Such an inference ought not to be lightly drawn, but it should not be ruled out". LESLEY E. VICKERS in the *New Law Journal*.

Duty Solicitors

The first "duty solicitor" scheme in an English Magistrate's Court ended at Bristol after running for the month of May, with expressions of optimism and satisfaction on the part of those responsible for it.

Fourteen solicitors were involved in the experiment on a volunary basis, the first hour or so of each morning being spent in the cells interviewing prisoners before they appeared in Court. Information was obtained which could be of assistance to the Court in making decisions concerning bail and this was provided to the Court in writing. Advice was available to other persons only through the office of the clerk of the Court and this was rarely used—six being referred to the duty solicitor out of a total of 54 defendants. If the scheme were to be put on a permanent basis however it might well be extended to allow accused not in custody to approach the duty solicitor directly.

Mr Richard Dent, a Bristol solicitor responsible for organising the scheme, and to whom we are indebted for this subject, is reported to have felt that it demonstrated a real need for such a service, particularly for defendants in custody. The inarticulate, unrepresented defendant particularly was not at such a disadvantage as he would have been without the scheme. Mr H. M. Bray, clerk to the Bristol Magistrates, said that the scheme had saved the Court's time on several occasions by assisting defendants in deciding how to plead and by providing information concerning prisoners in custody.

The Hand of Friendship—From California comes the news that all narcotics officers, plain-clothes policemen and members of the security service will get a cash discount on the admission prices to student activities at De Anza College. The Student Council unanimously approved the 20 percent reduction for "agents who show proper identification".

THE RIGHT TO BE SILENT

The National Council for Civil Liberties in Britain have issued a report entitled "Civil Liberties and Judges' Rules" at the same moment of time as the Conservative Central Office issued a report called "The Conviction of the Guilty" written by the chairman and vice-chairman of the criminal law sub-committee of the Society of Conservative Lawyers. Both reports are unanimous in calling for reform of the Judges' Rules. The Conservative Lawyers comment that the rules are an obstacle to justice from the honest policeman's point of view and a facade to the dishonest. The NCCL say that the rules are inadequate, ambiguous and require writing in terms which are clearly understood by both the general public and law enforcement officers. The two reports differ in their objects and in their recommendations. The NCCL are concerned to strengthen the rights of the individual against authority and believe that "the current high powered attack on the rights of the defendant may be a preliminary to an attack on the whole jury system and on rights such as the right of appeal". The Conservative Lawyers are concerned "to ensure that, more frequently than happens at present, the guilty are convicted". It is not therefore surprising that their recommendations differ widely. Where the two reports meet head on is on the right of an accused to remain silent. At the moment the law is that the prosecutor may not comment adversely on the defendants' failure to go into the witness box but the Judge may do so. Nor, save in very exceptional circumstances, can any inference be drawn from the failure of an accused at a police station or eslewhere to give any explanation or disclaimer when told that someone else had made an accusation against him: *Hall* v. *R.* [1971] 1 W.L.R. 298. The Conservative Lawyers recommend that the prosecutor as well as the Judge should be free to comment on the defendant's failure to go into the witness box. They also recommend that the police should warn a suspect at the police station that failure to give any explanation or answer could be held against him at his trial. If no explanation or disclaimer is forthcoming the prosecutor and the Judge would then be free to make adverse comment. The NCCL recommend contrariwise that the present right to silence must be maintained, that no inference should be drawn from silence, and that a defendant who runs the risk of antagonising a jury by his demeanour, attitude or views must have the right not to give evidence. The Conservative Lawyers seem to make the better case. Undoubtedly too many guilty defendants are acquitted, not to mention the unquantifiable number of guilty persons who are not brought to trial for lack of evidence. The NCCL do not appear to recognise that this in itself is a threat to civil liberty. All crimes, particularly violent crimes, necessarily involve a gross infringement of the victim's civil liberty, and any improvement in the law to help to secure the conviction of the criminal which at the same time secures an adequate safeguard for the innocent must be welcomed. The Conservative Lawyers recognise the dangers involved in curtailing the right to be silent, and recommended that only admissions actually signed by the defendant should be allowed at the trial unless a properly proved tape recording of the interview with a certified transcript can be produced. They can, however, be criticised for not considering whether the suspect at the station should have access to a solicitor. Instead they recommend the Lord Chancellor's Department to consider the feasibility of staffing a system wherein there is judicial supervision of the interrogation of a suspect. This would surely involve the creation of an army of stipendiaries (they object to lay justices fulfilling this function). Where would all these stipendiaries come from? Would it not be preferable for the rules to be framed to give a suspect access to a solicitor at any time and to provide that no adverse conclusion can be drawn from his silence unless the police are able to prove that the suspect was first given the right to have a solicitor present if he wished? Let us hope the Criminal Law Revision Committee, who are believed to be currently examining the situation, are able to suggest a practical solution. The police require help in their fight to secure the conviction of the criminal. The innocent need greater protection against abuse of police powers than the present rules provide. *The Solicitors' Journal.*

Make Laws not Laughs—Actors, a leading television personality, a famous Neopolitan singer of "traditional and excessively sentimental songs", and Italy's best known football referee are all seeking election to the Italian parliament.