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# LAND TRANSFER SYSTEM IN NEED OF OVERHAUL

Much has been written over the years both in this publication and various legal textbooks regarding the Land Transfer system as such, particular aspects of its operation and so on. However no one as far as the writer is aware has sat back and taken a good analytical look at its organisation and operation in a general sort of fashion with a view to emphasising its strengths and weaknesses.

Although its origins are firmly fixed in the South Australian Torrens philosophy there are significant differences in practice which the changing pattern of the years has sometimes favoured the Australian precepts and at other times shown the New Zealand system to advantage. The three most significant differences are the decentralised provincial system as established in New Zealand as compared with the central state offices of Australia the recognition of the virtues of conducting the Registry system as a separate Department of State and the role which the Land and Survey Department has been allowed to assume in the New Zealand system. It is proposed to deal with these three matters first before passing on to some other significant developments of the system which those people who use it should be thinking about.

The decentralised system of twelve registry offices in New Zealand had its origin in the system of provincial government although offices were created at widely different periods of time and the newest at Hamilton at a stage when the idea of provincial government had been long forgotten. Should New Zealand have preserved its system of provincial government we would have had the spectacle of independent registry offices in the same manner as the State offices exist in Australia each office being controlled by an Act emanating from the State Legislature.

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The Commonwealth's only function as regards the land law of Australia is limited to control in the Federal Capital systems at Canberra and that of the Northern Territory. Only Queensland has more than one office within its territory and its satellite offices at Townsville and Rockhampton have none of the discretionary powers vested in their Controlling officers which our District Land Registrars enjoy.

As has been said many times before, Torrens based his system on settlement at the Land Transfer counter, a practice which involved a pre-examination of the Register and an immediate entry in the records. In this sort of atmosphere the small offices of New Zealand flourished mightily and even the largest at Auckland was able to offer some semblance of the system as originally devised. After the Second World War a subdivisional explosion occurred and the large centralised Australian offices fared very badly for a time in their attempts to meet this new situation. Conversely the decentralised system in New Zealand coped with the situation much more creditably although difficulties began to appear in the Auckland and Wellington offices. The whole picture was changed dramatically by the introduction of photography as a means of title reproduction and the Australian offices found a

solution to their problems in the Xerox camera, multilith copiers, and deposit plans suitable for mass production of titles. At the same time the intake procedures were changed to dispense with precheck so that daily intakes of from 500 in some states to the enromous input of 1,800 daily which occurs in the Sydney office could be handled. While it could be said that this nullifies the Torrens precepts it at least keeps the system operating. In the independent atmosphere of their own State control the large centralised Australian offices have been able to develop the techniques which best suit themselves although the mass production techniques mentioned above are common to all of them. The picture is very different in New Zealand where Departmental planning attempts to devise procedures which will be acceptable to Auckland which matches Adelaide, Perth and Brisbane with its intake of 500 plus and centres such as Nelson, Blenheim and Hokitika to quote the extreme example which might be lucky to top double figures in its daily batting average. A little reflection will show what a potentially dangerous situation exists in an organisation which is attempting to provide for offices which require mass production techniques and others where such an approach would be obviously ridiculous and in the worst interest of the offices concerned. The writer has lived and worked in different parts of New Zealand to a degree where he feels that he should be able to escape the charge of parochialism but it does seem that the best system would be a centralised one where the number of offices in New Zealand were reduced to three, Auckland, Wellington and Christchurch. Such a move would allow these three offices to obtain the best from photography and other forms of mass production and at the same time allow the dwindling resources of the Division in legally qualified and experienced officers to be concentrated at three points. It would also prepare the way for computer operation in the field of the supplementary information which at present clutters up and obstructs the main purpose of the Register.

This is almost certainly a Utopian concept unacceptable to the provincial interests of those who would be deprived of a District office but if we accept this attitude a strong case exists for special consideration to be given to the wants of the large Auckland office, and to a lesser degree to the growing Wellington, Christchurch and Hamilton offices. They should be freed from the trammels of identity with relatively small offices and the fact freely accepted that what goes in one office in New Zealand may not be acceptable in another even to a stage where we see widely differing practices being utilised in individual offices at the same time. The most modern and sophisticated equipment must be provided to allow the few larger offices to operate in an efficient manner. Anyone with experience in the field will tell you that it is a fallacy to suggest that if ten people can handle a daily intake of 100 documents twenty people should be able to cope with 200 documents and so on: this is just not so, sheer volume brings with it complications unimagined by the originators of the system.

The large Australian offices have lived with problems of size for a good many years and they are attacking its problems with a singleness of purpose which is to a great degree lacking in New Zealand. All Australian offices regard a Xerox reducing camera, a small multilith copier, and plans specially prepared for photographic reproduction as standard equipment: even Tasmania which has an intake only equivalent to the Otago office is so equipped. None of this equipment has been made available in New Zealand the greatest concession being the use of the Government Printers equipment at a distance. It is a remarkable and astonishing fact that equipment which is freely available to Universities and Libraries is not allowed for a sphere of operation as important as the recording of the Land transactions of this country.

The Australian States have sent representatives round the world to examine the possibilities of computer use for the system and it is becoming increasingly clear that while the central system does not readily lend itself to the computer the fringe or support information suits such an arrangement admirably. A pilot scheme has recently been established in Sydney to explore the possibilities of computer use. The other Australian States have been asked to provide representatives to work in Sydney on the scheme, which they are doing, but the possibilities are being ignored by this country.

No Australian State system nearly approaches the responsibilities which have been loaded on to the New Zealand offices. The policing responsibilities which have been placed on Registrars in New Zealand under the Municipal Corporations Act 1954 and the Counties Amendment Act 1961 are virtually unknown in Australia, similarly no State accepts responsibility for supplying the load of statistical information which is required in New Zealand. All this type of information together with Town and Country Planning restrictions such as zoning, valuations and rating data could be handled by a computer linked to each large Registry office. Not only would this provide a much better and com-

prehensive service to those seeking this information but it would also remove what is becoming an intolerable burden on the services of an office such as Auckland. This topic will be enlarged on in a later part of this article for it is one of very real importance to practitioners in the Auckland District and will assume similar proportions in other districts as they grow.

The second major difference in the two systems is the role the Land and Survey Department has managed to assume in the operation of New Zealand Land Transfer offices. No one would doubt the excellence of the standards of survey here but it could be that we are going beyond what is necessary in our standards of definition. In New South Wales surveyors retain their own Traverse Sheets and Field notes and in other state offices there is not the demand for the wealth of survey data we are accustomed to in New Zealand. There is every good reason for removing this survey information from the files of the Titles system and placing it with the Land and Survey Department. The details of such an arrangement where accepted some five years ago but it is now said that it will become effective in 1973. At the same time there will be a change to black and white definition of deposit plans, something which allows for the full use of photography. In the meantime the bigger offices sink deeper into the subdivisional morass and the legal profession bears the brunt.

Torrens toured South Australia in his initial attempts to popularise his system, and at that time stated that provided perimeter boundaries of a block were established by good survey work, there was no reason why internal subdivision could not be accomplished in the case of straight line cuts, by a paper definition only. There has always been a tendency in Australia to be more generous with the dispensation of diagram on transfer as it is referred to in this country. However a satisfactory compromise from a Titles office point of view is the limiting of the information on the copy of a survey plan which is deposited to those matters which are necessary to safeguard the issue of titles allowing the extra survey data to be lodged with and handled by the Land and Survey Department. The mass of survey data which is shown on our present Deposit Plans inhibits attempts to mass produce certificates of title by photography and arrangements should be made for it to be placed on a separate copy of the plan filed in the Land and Survey Office as soon as possible. All Australian offices have arrangements in one form or another whereby a plan is available for inspection and reproduction which is not cluttered up with a bewildering mass of survey information. Apart from the process of registration there is continuous competition for the use of Deposit Plans as between the two Departments and this can only be overcome by providing separate Plans.

Now to deal with the third matter mentioned at the beginning of this article. The Land and Deeds and Stamp Duties Department functioned in a fairly uneasy partnership as a Department up to 1951 when the Department succumbed to the Public Commission policy of reducing the number of Departments wherever possible. The Stamp and Death Duties section of the Department became part of the Inland Revenue Department an obvious move which has resulted in better administration of this facet of revenue collection ever since. The Land and Deeds together with the functions of the Companies office was attached to the Justice Department. This latter move had a less obvious rationale and has resulted in the Land and Deeds offices being administered since that time by Departmental officers who could not be expected to understand the technical implications of the system or the administrative requirements necessary to make a Registration office function in the best possible manner. One has only to visit the well equipped powerful State offices in Australia all of which with the exception of Victoria are Departments in their own right to realise the difference in approach. The writer would make bold to say that a good case exists for a Department of Registration covering the Land Titles system, the Companies office, registration of chattels, securities and Births, Deaths and Marriages. There would scarcely be a Department of State which did not deal in some form of registration and there is every reason for them to be dealing with the independent authority of a separate Department. The immensely well organised office of the Registrar General in Sydney is the outstanding example in Australasia of what can be done in this direction. Looking back to the New Zealand scene the authorities have preserved the independence of the Department of Valuation which would be numerically smaller than the Land and Deeds on the grounds of the specialist functions they perform. This reasoning would appear to be even more cogent in the case of a Registration Department.

The writer would now like to deal briefly with some special aspects of the technical and administrative work of the Lands and Deeds office. There appears to be a reluctance to move forward to new forms and procedures required by large Land Transfers offices. New Zealand was first in the field with Easement Certificates, a conveyancing device which is appreciated in all

busy law offices. New South Wales were sufficiently interested to send a Senior Officer to New Zealand to have a look at the system and they immediately decided that it was worth going further than we had and by statutorily setting aside the unity of Seisen Rule they caused the Easement Certificates to become fully effective on its registration. Additionally the system can be used for all types of easements, restrictive and other covenants. This step has been followed generally throughout Australia and has been something which has facilitated the mass production of new titles. The system as they use it results in a new title issuing fully furnished with all the rights and conditions which it should be subject to or will require the benefit of at the outset of its effectiveness. An unexpected result of the New Zealand system of Easement Certificates was the fact that in many ways it placed more work on Land Transfer office staff and to some degree hampered the speedy issue of the new titles. The chief beneficiaries were the legal profession who escaped the wordy documentation previously necessary to create easements. Adoption of the Australian system would allow Land Transfer offices to share in full the benefits which conveyancers have enjoyed.

While on the subject of Easements it would be well to mention the desirability of extending the statutory definitions already supplied in the seventh Schedule to cover every type of easement including covenants and restrictive conditions. A statutory definition of a Fencing Covenant could save endless repetitive typing. The objective is obtained in Tasmania by the simple use of the words "will fence" in the Easement Certificate.

Another field which cries out for rationalisation is that of approval of forms. The present requirements are clumsy, outdated, and inefficient. In fact over ninety-percent of transfer and mortgage forms are in the same form word for word yet the Department goes through the solemn ritual of requiring a legal office to have its name printed on the forms and a special approval given. While stringent conditions are laid down in this field the Department itself sells unlabelled forms to anyone who cares to produce the twenty cents asked for them. It is freely accepted that a situation cannot be allowed whereby forms become available over business counters but on the other hand it seems equally desirable the cost of stationary being what it is today that legal stationers be allowed to sell their forms to the profession without any special restrictions.

Finally the writer would like to revert to a matter touched on briefly earlier in this article and something the significance of and influence on the operation of large Land Transfer offices is not generally realised. The Legislature has chosen to use the Land Transfer Registers for its effective control of Town and Country Planning Restrictions, the mechanics of acquisition of land by the Crown and notice of various forms of charges under Local and Central Government authorities. Furthermore the mass of survey data referred to earlier reposes either on the register or in documents and plans which are adjuncts of it. Over a third of the searching which is done daily is carried out by representatives of Government Departments and Local Authorities who are not really concerned with the operation of the Land Transfer system as such but are merely seeking access to the data stored on the Register. The Legal profession concluded an agreement with the Department whereby search fees where built into the registration fees for the sake of convenience and out of this arrangement that those who use the Land Transfer Register for its intended purpose pay, but all those who are seeking information for other purposes are the beneficiaries of the very people whose operations they defeat. This was not a situation of great importance while the system was small enough to be operated with bound volumes as all that resulted from a number of people examining the register was the inconvenience of the books not being available. Now that a search copy service is supplied the picture is entirely changed and some hundreds of copies of the register are distributed daily without charge, to various sources. This situation in itself seems annoying but when one realises that outside demands are putting such a strain on the operation of the Land Transfer Register that it does not function properly in regard to its main objective then there is real cause for alarm. To take the Auckland Registry for example, the system of registration recently installed which provides almost immediate notice of lodgment by a copy of the abstract being filed with the Register would rival that of any in use at present in Australasia but the beneficial effects of it are largely lost by the size of the queues demanding copies and in the process obtaining pages of information in which they have no interest. There is only one real solution to this problem and this is one which was suggested earlier. The Land Transfer Register must be freed from the trammels of Survey Data and the constant demand for information connected with the operation of other Departments which causes it to be beseiged daily. This can be done firstly by placing survey data with the Land and Survey Department and

secondly by the use of a computer for the various forms of information required by outside authorities. The computer could be geared to provide a standard of service which has never been achieved before in that Ratings and Valuations Restrictions and Zoning under Town and Country Planning legislation could all be grouped and available at the one time. This would be a real boon to our profession and at the same time the Land Transfer register would be freed to fulfil the role for which it was really intended. Should such an arrangement be accepted it would again raise the possibility of the amalgamation of a number of the smaller Land Transfer offices to justify the cost of the computer.

How is all this to be accomplished? There is only one group with the interest and prestige to supply the pressure on Governmental authorities which would be necessary and that is the Law Society. It would be fair comment that the system has only struggled on in recent years without serious mischance because conveyancing is the prerogative of the legal profession. With rapid population growth this will not be enough in the future as the relationships between practising solicitors become more impersonal through the sheer problem of size. The situation cries out for something to be done and it should be done soon. Just as there is a feeling that a changed approach is necessary in the Courts and other branches of law, there is every justification for a reappraisal and sweeping changes in the operation of the Torrens System in New Zealand.

To conclude this article the writer sets out briefly what he regards as the main issues and objectives to be met:

1. Amalgamation of the existing twelve offices into three major offices, two in the North Island and one in the South Island. Each of these offices to be equipped with or limited to a computer capable of handling all the ancillary banks of information which are at present crippling the operation of the Registry. Such a move would also make the best use of the dwindling band of experienced officers in the Land and Deeds.

2. In the very likely event of a failure to accept the first proposal a change of departmental attitude to accept absolute flexibility in the systems operated in the various offices thus allowing the few large offices to develop in a way which is unacceptable and unnecessary in the case of the majority of the smaller offices.

3. Establishment of a separate Department of Registration, a step which has every justification in that almost all Departments use the Land Registry system and its independence must be maintained to ensure that the quasi-judicial powers provided in the Land Transfer Act are used properly. The special requirements and responsibilities involved in the operation of the system cannot be fully appreciated by administrative officers who have developed in other fields and it is at least essential that administrative decisions be taken by people who fully understand the implications of the system. The Land Titles system is not and should not be a profit making organisation but at least the fees it does attract should be spent on the operation of the system and not on widely differing activities.

4. Acceptance by the Department of the necessity for some completely changed procedures and an abandonment of certain concepts which have been regarded as inviolable tenents of the system. In particular procedures should be provided for mass production of new titles on subdivision with all the easements rights and additions necessary for the use of the land established at that time. It has been suggested that there has been an overindulgence in Commissions and Inquiries in New Zealand in recent years but there seems to be a real case for an inquiry into the Torrens System both from legal and professional aspect and from the administrative implications of the various agencies, Survey, Town Planning and so on which have been allowed to obscure the primary purpose of the system of recording title to land.

The moves which have been suggested above can only come from the initiative of the Law Society. Unless that body adopts a positive attitude to this task conveyancers can only expect to continue in an atmosphere of decreasing and less efficient service to the detriment of their clients' interests and their own well-being. What has happened already has made a mockery of the Torrens system and this position can only worsen unless a willingness emerges to face up to a comprehensive reappraisal of the system.

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**Applications for Mining Privileges**—A useful pamphlet, "Applications for Mining Privileges—Advice to Applicants" has been issued by the Mines Department, Wellington where they may be obtained on application.

The pamphlet is an essential tool for the transition period for practitioners who are concerned with applications under the Mining Act on behalf of clients.

The steps which applicants must take when applying for mining privileges are succinctly set out and the short document should serve to overcome a potential hiatus.

# SUMMARY OF RECENT LAW

## COMPANIES UNDER THE COMPANIES ACT—REGISTRATION OF MORTGAGES AND CHARGES

*Money deposited with company in exchange for note acknowledging sale of Government or Local Body stock together with certificates and transfers thereof—Right of depositor to repayment at 24 hours call and undertaking to resell stock—Documents together constituting a distinct charge over a distinct asset—Not an "issue" of debentures within s 102 (2) (a) of the Companies Act 1955 and not requiring registration—Companies Act 1955, ss 102, 103. Statutes—Criminal and penal statutes—Ambiguity in penal statutes—Construction not to interfere with rights under common law.* This was an appeal from the judgment of Wilson J reported [1972] N.Z.L.R. 438, wherein he held that deposits made by the appellant with the respondent company at 24 hours call at interest, for which the appellant received numbered notes signed by the company's manager and certificates for Government or Local Body stock having a like or greater value than the sums deposited, and unregistered executed transfers thereof, constituted mortgages of the stock and were charges within s 102 of the Companies Act 1955 and being unregistered were void as against the company's liquidator under s 103 of the Companies Act 1955. The appeal concerned three deposits made on different dates. *Held*, 1. Whether a transaction is a true sale and repurchase of a mortgage depends upon the intention of the parties and the Court must have regard to the form of the transaction, but more particularly to the substance, the position of the parties, and the whole of the circumstances under which the transaction came about. (*Beckett* v. *Tower Assets Co Ltd* [1891] 1 Q.B. 1, 25-26, applied.) 2. The documents given by the respondent company to the appellant were by way of security only for repayment of the deposits and interest thereon. 3. The three transactions in question constituted distinct charges securing distinct debts. 4. The word "issue" in s. 102 (2) (a) of the Companies Act 1955 must be construed as referring in a collective sense to the aggregate of a number of individual debentures issued by a company. 5. Since s. 102 (10) imposes a penal sanction and the effect of ss. 102 and 103 is to interfere with the ordinary operation of a charge at common law, if there were any real ambiguity it should be resolved in favour of the appellant. (*Allen* v. *Thorn Electrical Industries Ltd.* [1968] 1 Q.B. 487, 503; [1967] 2 All E.R. 1137, 1142, referred to. 6. The charges over the stock did not require registration under s. 102 of the Companies Act 1955. Judgment of Wilson J. reversed. *Automobile Association (Canterbury) Inc.* v. *Australasian Secured Deposits Limited (In Liquidation) and Another* (Court of Appeal, Wellington 9, 10 October; 1 November 1972. Turner P, Richmond and Speight JJ.).

## HUSBAND AND WIFE—DISPOSITION OF PROPERTY

*Joint family home—Spouses living apart in matrimonial home but no proceedings for separation or divorce commenced—Application by one spouse for declaration of the rights of spouses in joint family home—Application premature—Matrimonial Property Act 1968, ss. 5 (1), 6 (2).* This was an appeal against an order declaring that the matrimonial home, settled as a joint family home, should thenceforth be the property of the husband as to a two-thirds interest therein, and of the wife as to a one-third interest therein. The spouses still occupied the property but a state of disharmony existed between them. There had been no divorce or separation proceedings. The application for the declaration of the rights of the spouses in the matrimonial home was founded upon s. 5 of the Matrimonial Property Act 1963. *Held*, 1. Once a spouse puts forward a claim to an interest in the matrimonial property different from the one defined on the face of the title a "question" arises under s. 5 of the Matrimonial Property Act 1963 sufficient to found the Court's jurisdiction to enquire into the merits of the matter. 2. The Court is not obliged to make an order apportioning interests in a joint family home upon the application of one spouse, in the face of opposition by the other, while the spouses are still in joint possession or before a separation and the Court must first consider if it is just in the circumstances that any order at all be immediately made. 3. The application for a declaration of the rights of the spouses in the joint family home was premature. *Per* McCarthy J.: 1. The participle "expressed" in s. 6 (2) of the Matrimonial Property Act 1963 means "made definite, explicit, unmistakable in import", and conduct if sufficiently unequivocal may suffice to establish that explicitness, though generally the Court will look for words oral or written. 2. That the spouses were less closely united than in their younger days was insufficient for the Court to conclude that the common intention that the property should be held as joint tenants no longer had force. The appeal was allowed and the order made in the Court below was vacated. *Dryden* v. *Dryden* (Court of Appeal, Wellington. 9, 10 August; 9 October 1972. Turner P., McCarthy and Richmond JJ.).

## HUSBAND AND WIFE—DOMESTIC PROCEEDINGS

*Enforcement of orders—Husband charged with making default for 14 days in payment under maintenance order—Section 14 of the Summary Proceedings Act 1957 applies to information under s. 107 of the Domestic Proceedings Act 1968—Default a "continuing" offence—Domestic Proceedings Act 1968, s. 107 (1).* In January 1964 the defendant was ordered to pay a weekly sum of $10.50 to his wife and $4 for each of his two children. The wife later divorced the defendant and remarried and the order for her ceased on 23 February 1967. The defendant was still liable to pay the amounts for the children. Up till 23 February 1967 a sum of $2,116.30 was owing by the defendant. An information was laid under the Domestic Proceedings Act 1968, s. 107, that the defendant had within the space of six months last past, namely on 23 December 1971, without reasonable cause made default for fourteen days in payment of moneys under the maintenance order, being an offence punishable summarily. A case was stated to the Court concerning the effect of s. 14 of the Summary Proceedings Act 1957 (limiting the time for laying informations). *Held*, 1. Section 14 of the Summary Proceedings Act 1957 applies to an information laid under s. 107 of the Domestic Proceedings Act 1968. 2. The offence of making default for fourteen days in the payment of any money payable under a maintenance order under s. 107 (1) of the Domestic Proceedings Act 1968 is a "continuing offence". (*Re*

*Wolter* [1923] N.Z.L.R. 328; [1922] G.L.R. 582, *Stray* v. *Docker* [1944] K.B. 351; [1944] 1 All E.R. 367, *R.* v. *Wimbledon Justices, Ex parte Derwent* [1953] 1 Q.B. 380; [1953] 1 All E.R. 390, and *R.* v. *Chertsey Justices, Ex parte Franks* [1961] 2 Q.B. 152; [1961] 1 All E.R. 825, discussed.) 3. The word "any" is a word which ordinarily excludes limitation or qualification and should be given as wide a construction as possible. (*Victorian Chamber of Manufactures* v. *Commonwealth (Prices Regulations)* (1943) 67 C.L.R. 335, 346, applied.) 4. An information is laid within time if it alleges a default which has continued up to a time within the limitation of time fixed by s. 14 of the Summary Proceedings Act 1957. 5. A defendant is entitled to sufficient particulars of the relevant date and amount of arrears so that he is aware of the matters in respect of which he is called upon to show reasonable cause for non-payment. *Maintenance Officer* v. *Griffin* (Supreme Court, Auckland. 13, 25 October 1972. Henry J.).

**INCOME TAX—ASSESSABLE INCOME**

*Sum paid by continuing partners to retiring partner being the latter's share in the value of uncompleted professional work at the date of retirement—Sum paid assessable income in the hands of retiring partner.* This case concerns the payment to a retiring partner of a sum paid to him by the continuing partners, representing the value of the retiring partner's share in the uncompleted work at the date of retirement. It was contended that this sum was not income in the hands of the retiring partner. *Held*, The payment so made was income in the hands of the retiring partner. *Jamieson* v. *Commissioner of Inland Revenue* (Supreme Court, Auckland. 16 October; 6 November 1972. Woodhouse J.).

**INCOME TAX—INCOME TAX PAYABLE**

*Assessable income—Sale of goodwill and lease of motels—Grant of lease by vendor—Vendor assessable for purchase price for goodwill and lease—Payment "derived" from the lease by the vendor as owner of the land—Land and Income Tax Act 1954, s. 88 (1) (d).* This case was an appeal from the decision of the Supreme Court reported [1972] N.Z.L.R. 646 upholding an assessment for income tax on the sum of £5,000 which had been paid to the objector under an agreement for sale and purchase of the goodwill and lease and the furniture and fittings of motels erected on land owned by the objector. The assessment was made pursuant to s. 88 (1) (d) of the Land and Income Tax Act 1954. *Held*, 1. The payments caught by s. 88 (1) (d) of the Land and Income Tax Act 1954 are not limited to payments which are only disguised rents for the lease of the land. 2. Such payments do not have to arise by virtue of some provision in the lease itself. 3. There must be a real nexus between the grant of the lease and the payment of the goodwill before it can be said that it is "derived" by the owner of the land from the lease, i.e. that the lessee's right of occupancy under the lease is essential to the enjoyment of the goodwill of the business. 4. The Court declined to express an opinion as to what the position might be if there were a real and significant element of personal goodwill involved. Judgment of Quilliam J. affirmed. *Romanos Motels Limited* v. *Commissioner of Inland Revenue* (Court of Appeal, Wellington. 18 October, 9 November 1972. Turner P., Richmond and Speight JJ.).

**WILLS—CONSTRUCTION**

*Class gift to children of testatrix with substitutionary gift to issue of any child who predeceased the testatrix—After date of will son of testatrix predeceased her leaving a daughter—Daughter adopted by her mother and her mother's second husband—Daughter not issue of deceased son of testatrix. Wills—Admissibility of extrinsic evidence—Evidence of intention of testatrix not permitted—Mistake as to the legal effect of language used no ground for altering construction of will. Infants and childrn—Adoption—Effect of order—Child adopted after death of her father by her mother and mother's second husband—As from date of order child ceased to be child of her father—Adoption Act 1955, s. 16.* The testatrix died in 1970 having made a will on 18 July 1957 wherein she gave her residuary estate equally between such of her children as should survive her with a substitutionary clause in favour of the issue of any child who should have predeceased her. A son predeceased the testatrix and died in 1959 leaving a daughter. In December 1961 the daughter was adopted by her mother and her mother's second husband. *Held*, 1. The gift of residue being a class gift, the members of the class were to be determined on the date of death and the class is limited to those who survive the testatrix. (*Re Woods* [1931] 2 Ch. 138 applied.) 2. Parol evidence as to the intention of the testatrix was inadmissible. (*Higgins* v. *Dawson* [1902] A.C. 1, 10, and *Ward* v. *Van der Loeff* [1924] A.C. 653, applied.) 3. Mistake as to the legal effect of language used is no ground for altering the will or for construing it so that a result desired by the testatrix is obtained. (*Re Horrocks* [1939] P. 198, 209; [1939] 1 All E.R. 579, 584 and *Re Morris* [1971] P. 62, 79-80; [1970] 1 All E.R. 1057, 1066, applied.) 4. The word "deemed" in s. 16 of the Adoption Act 1955 imported an exclusive definition and not an extension of meaning. (*Muller* v. *Dalgety & Co. Ltd.* (1909) 9 C.L.R. 693, 696, referred to.) 5. The daughter after the adoption was no longer one of the issue of the deceased child of the testatrix. *Re Walker (deceased), Clarke* v. *Walker and Others* (Supreme Court, Hamilton. 15, 22 September 1972. Henry J.).

**WORK AND LABOUR—WAGES PROTECTION AND CONTRACTORS' LIENS ACT**

*Charge on money—Maintenance retention moneys becoming payable after notice of liens—Maintenance moneys available for lien claims—Wages Protection and Contractors' Liens Act 1939, ss. 31 (1); 32.* Further proceedings in the actions reported (on appeal) *sub nom Bank of New Zealand* v. *Cemac Modular Industries Ltd.* [1972] N.Z.L.R. 661. Under the contract or contracts between the employer and P. Graham and Son Ltd. moneys were retained by the employer for the periods of maintenance provided for in such contract or contracts. The maintenance periods expired after notices of claim of lien and charge had been given by the plaintiffs. It was submitted that the maintenance retention moneys were not available to meet the plaintiffs claims. *Held*, The maintenance retention moneys became payable to the contractor under the contract or contracts when, but not before, the relevant periods of maintenance expired. On becoming so payable they became subject to s. 31 (1) of the Wages Protection and Contractors' Liens Act 1939 under which they must be held by the employer to the extent required to satisfy the claims under the Act of which notice had been duly given. *John Burns & Co. Ltd. and Others* v. *Bank of New Zealand and Others* (Supreme Court, Christchurch. 30 October 1972. Wilson J.).

# CORRESPONDENCE

### Plea for a standard building agreement

Sir,

With the imminent increase in new housing starts shortly to be upon us may I suggest that the New Zealand Law Society produce a fair suggested draft form of house building contract, including in particular, a fair provision for retention of monies for defects and a decent maintenance period.

Many of my fellow practitioners, including myself, seem to be plagued either by purchasers cold-bloodedly retaining the entire liens retention monies for minor defects, the rectification cost of which bears little, if any, resemblance to the amount retained and on the other hand builders refusing to make any move at all until all liens retention money is paid over.

Building contracts these days seem to be proferred on a take it or leave it basis, one either receives the completely executed contract on a standard form or if one receives the contract for execution and trys to secure alteration of some of the clauses there are anguished cries of delay and ominous threats of consequent price and material increases, the cause of which is laid directly at the practitioner daring to alter a standard form of agreement.

Perhaps an answer would be for the State Advances and other major lending institutions to refuse to grant loans and unless and until along with the plans specification and quote there is lodged an executive building contract in a fair and approved form.

Yours sincerely,
A. N. MACLEAN, Christchurch.

### Giving Gold

Sir,

In the January issue of the Law Quarterly Review on page 32 there is an article entitled "The Outer Temple as a Legal Inn." On page 33 of the same article the author says that to "Give Gold", was the expression used for the cremony of becoming a Serjeant at Law. He quotes Fortescue as saying that, "On that day he will give away gold, according to the custom of the realm, followed in this case." A footnote on the same page says that whether the giving of gold was distinct from the gifts of gold rings, is not clear. The author of the article is quoting a passage from a year book which, he says, "adds to our meagre store of information and confuses understanding perhaps still more."

If I may be allowed to confuse the issue a little more there is the passage about Kelying from 2 Modern page 9, where the reporter of that volume says, "Memorandum : Seventeen serjeants being made on the 14th day of November (21 Charles II) a day or two after, Serjeant Powis, the junior of them all, coming to the Kings Bench, Lord Chief Justice Kelyng told him that he had something to say to him, namely, that the rings which he and the rest of the Serjeants had given, weighed but eighteen shillings apiece, whereas Fortescue in his book *De Laudibus Legum Angliae,* says, "The rings given to the Chief Justices and the Chief Baron, ought to weigh 20 shillings apiece," and that he spoke not this expecting a recompense, but that it might not be drawn into a precedent, and that the young gentlemen there might take notice of it."

My own impression is that the phrase "to give gold," meant no more than to give gold rings to the Justices.

Yours faithfully,
W. H. BLYTH, Auckland.

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## BILLS BEFORE PARLIAMENT

Admiralty
Broadcasting Authority Amendment
Commonwealth Games Boycott Indemnity
Companies Amendment
Crimes Amendment
Department of Social Welfare Amendment
Domestic Purposes Benefit
Explosives Amendment
Maori Purposes
Marine Pollution
Ministry of Transport Amendment
Municipal Corporations Amendment
National Roads Amendment
New Zealand Day
New Zealand Export-Import Corporation
Niue Amendment
Overseas Investment
Rates Rebate
Recreation and Sport
Rent Appeal
Wool Marketing Corporation Amendment

### STATUTES ENACTED

Moneylenders Amendment
Post Office Amendment
Trade and Industry Amendment
Trustee Savings Banks Amendment

# CASE AND COMMENT

## New Zealand Cases Contributed by the Faculty of Law, University of Auckland

**Suspension of School Teachers**

The decision of the Privy Council in *Furnell* v. *Whangarei High Schools Board* (Judgment 13 November 1972) is of special interest for two reasons. The case was decided by a majority of three, Lords Morris, Simon and Kilbrandon to two, Lord Reid and Viscount Dilhorne. The difference between them lay in the nature of the duties imposed on the defendant Board and its investigating subcommittee when considering the possible suspension of a school teacher. The majority were satisfied that all that these two bodies needed to do to take a valid decision suspending Mr Furnell was to comply with the Education Act 1964 and the Secondary and Technical Institute Teachers Disciplinary Regulations 1969, the relevant provisions of which were not seen to be "unfair". There was, therefore, no obligation to give the teacher details of the charges before he was suspended. His suspension was therefore held to be valid. The minority declared that the teacher was entitled to a hearing, including notice of the charges, before he was suspended and would have invalidated his suspension.

From the point of view of Mr Furnell the issue may have appeared as an academic one in that he had resigned from the New Zealand teaching service, but that is not entirely correct. Had he succeeded, his suspension would have been invalid, his salary would presumably have been payable until he resigned and he would have avoided any slur that suspension might be seen to entail.

The most important part of the judgment of the majority is probably the statement that natural justice "is [not] a leaven to be associated only with judicial or quasi-judicial decisions". This statement at least implies that those charged with administrative or executive decisions may be obliged to comply with some of the principles of natural justice, a point of view frequently taken by Lord Denning M.R. in earlier cases. It will be interesting to see whether this approach, which does not appear to have been taken in any earlier New Zealand case, will be followed by our own Courts. If it is, it will become necessary somehow to distinguish between those cases where a hearing by an administrator is unnecessary (and this should be the vast majority) and those where a hearing and more demanding procedural protections must be accorded to those affected by the decision. There is a danger that, in an effort to reduce the differences between the obligations of those making judicial and other decisions, procedural requirements will be set which are inappropriate in the case of administrative and executive decisions.

J.F.N.

## LEGAL LITERATURE

**Legal Practice Manual—Vols. 2 and 3**—Edited by Stuart MacFarlane, published by the Law Society of the District of Auckland.

The Law Society of the District of Auckland has continued its very real assistance to the profession in New Zealand by publishing Vols. 2 and 3 of its manual (a review of Vol. 1 appeared at [1971] N.Z.L.J. 508). The distillate of years of experience of many practitioners, these essentially practical books deserve a place in every legal office.

Subjects covered include stamping (it is unfortunate that the rates of duty set out were those under the previous Act), sale and purchase of land, dealings with the Ministry of Works, probate, conveyancing, company work, sales of businesses, adoption, debt collection and matrimonial matters.

We can only be grateful that the busy northern practitioners have been able to find the time to write their contributions.

Copies are available from the Auckland Law Society, but they are confidential to the profession.

L.F.B.

**What's in a Word**—A Bill has been introduced into the Pennsylvania Senate amending the 1965 Dog Law. The Bill will change the definition of "dog" to include "cat".

**Judges' Rules**?—Our Hong Kong correspondent writes that according to the Hong Kong *South China Morning Post* "Police last night questioned 14 deaf and dumb youths about a robbery of a number of passengers on board a Kowloon bus."

# TRIBUTES TO THE LATE GORDON LEGGAT

A special sitting of the Supreme Court was held recently at Christchurch to pay tribute to the late Mr J. G. Leggat. With Mr Justice Macarthur on the Bench were Mr Justice Quilliam, Sir Kenneth Gresson and Sir Francis Adams. Both the body of the Court and the gallery were packed for the occasion.

Addressing the Court on behalf of the Canterbury District Law Society, its President, Mr R. E. Wylie, said:

"The Canterbury District Law Society has sought this opportunity for its members to appear before your Honours to pay a tribute to the late Mr Leggat. A great deal has been said and written about John Gordon Leggat in the last ten days and there is little new that I can add. It is however, fitting that some of the things which have already been said should be echoed within the walls of this building where so much of his professional life was spent and so much of his reputation gained. The request for permission for the profession to pay its respects to a former member of the Bar as we do today is one which is not made lightly, nor indeed would it be lightly granted by your Honours, but such was Mr Leggat's pre-eminence in his profession and in this Court that there could be no more appropriate setting for the Bar to do honour to his memory and to express its sympathy to his widow and children.

"When Mr Leggat died on Friday 9 March at the tragically early age of 46 he had already achieved much more than most others achieve in an adult life twice as long. From his very early years he showed the promise of qualities which he later fulfilled to a degree attained by few other men. He was educated at the Fendalton School, at Christchurch Boys' High School, and at what is now the University of Canterbury. He crowned his years at the Boys' High School in 1943, not only by holding the office of senior monitor of that school but by competing with distinction in every main school sport—cricket and tennis, football and hockey, and by collecting an array of academic prizes especially in English, the classics and debating. Thus at this early stage he had set very clearly the pattern his life would take. He was to become a leader of men, a sportsman of distinction and, of particular significance to those present today, a lawyer of outstanding ability.

"Having so clearly demonstrated his quite exceptional qualities it was inevitable that within the realm of sport he should find himself a first-class cricketer, playing with success for his province and his country, that he should later find himself managing a New Zealand team on an overseas tour, and later still a national selector and finally Chairman of the Board of Control of the New Zealand Cricket Council. And as if that were not enough he showed his versatility by holding office as the Chairman of the New Zealand Hockey Association for a number of years.

"Also in the field of commerce his abilities were recognised and at the time of his death he was a director of two public companies, of one of which he was chairman.

"But it is his career within the law which is closest to the thoughts of his colleagues who appear before your Honours today and again we find the early promise being carried out in the fullest measure. While at the University of Canterbury he was President of the Law Students Association and was prominent in the Dialectic Society. He had no sooner been admitted as a barrister of this Court in 1950 than he began to appear regularly in all the Courts in this city. His fluency, his mastery of the language, the keenness of his intellect and his quite exceptional ability to cut through irrelevancies to the nub of any problem very quickly earned him a reputation well beyond the bounds of Christchurch and he was soon to be found travelling from one end of New Zealand to the other to conduct cases in which he was briefed. He was quite unable to refuse help to anyone who wanted his services and as a result he punished himself by accepting a burden of work and travel far beyond that which most of us could bear. There were few Courts and Tribunals anywhere in the country in which he did not appear frequently. There were no aspects of the law in which in the view of the profession he did not show a degree of competence well beyond that of the great majority of his fellows and in an astonishing variety of fields he appeared to the profession to show a complete mastery of his subject. He seemed equally at home in whatever forum he chose, whether before a criminal or civil jury, whether in banco matters or in the Court of Appeal.

"It was inevitable too, that he should be elected to the Council of the Canterbury District Law Society as he was in 1960 and that he should eventually succeed to the office of President in

1966. It was an office he filled with distinction and those of us who were privileged to serve on the Council under him will remember his dedication to that office and the efficiency with which he discharged its duties. He served also for three years as a member of the Council of the New Zealand Law Society and the abilities which he demonstrated there led to him being given a number of special assignments by the New Zealand Council from time to time. One of the noteworthy appointments which he still held at the time of his death was as a member of the Legal Aid Board, a position which he held for the first three years of that Board's existence in its most difficult formative years.

"But in spite of his extremely busy life Gordon Leggat found time to spend with his friends both within and outside the profession. He was a very human man. He loved a social half hour at his club, he loved the gossip of the robing room, the comradeship of the morning tea adjournments. He never forgot a face or a name, he was interested in young lawyers and students, their wives and their families. He gave back to the University something of that which he had gained from it by lecturing in torts, and did it in such a way that showed he loved doing it—and the feelings of students towards him was demonstrated by the presence of a number of them at his funeral service. And above all he was a family man who loved and was proud of his wife and his two sons. It is touching to remember that it was in this very building that he first met his wife when she was associate to the then Chief Justice.

"And so, may it please your Honours, the profession appears before you today saddened by the loss of a friend, a colleague, and an exceptional lawyer. His death is a loss to the profession, and if I may say so with respect, also to the Court. But it is for his wife and family and for his sister for whom we feel the most today and, with your Honours' permission, the profession would want to express in this building and in this company its very deepest sympathy to them and also its profound gratitude to them for all that they did to help make the outstanding man we commemorate today."

Acknowledging Mr Wylie's tribute, Mr Justice Macarthur said:

"The Chief Justice has asked me to say that he wishes to be associated with us in this tribute to the memory of Gordon Leggat. The President and Members of the Court of Appeal have also sent me a message with a similar request. Mr Justice Roper greatly regrets his inability to be here. He is away from Christchurch on official business. I am, however, accompanied by Mr Justice Quilliam, and we have with us our two retired Judges, Sir Kenneth Gresson and Sir Francis Adams. In addition I should observe that His Worwhip the Mayor of Christchurch is in attendance, as are several of the Magistrates, and many others—too numerous to mention individually—who knew Gordon Leggat in connection with one or more of his various interests. The size of the gathering here today is itself eloquent proof of the esteem in which he was held. Mr President, I ought to say straight away that the Judges had no hesitation in granting the request of your Society for a reference of this kind to be made.

"Gordon Leggat was undoubtedly an advocate of the first rank. In the profession of the law we not infrequently refer to our Court men by mentioning the particular field in which they excel. Thus we say of one 'He is a good jury man' and of another 'He is particualry good in banco work'. It is seldom that we are able to say that a man is equally competent in every branch of advocacy. Yet this was so in the case of Gordon Leggat. In this very Court during the past fifteen years or more he appeared as counsel in a large number of cases, including criminal trials before a Judge and jury, civil actions tried by a Judge alone or with a jury, and a host of other matters ranging across the various jurisdictions exercised by this Court—common law, equity and matrimonial causes. Moreover, he appeared frequently as counsel in the Court of Appeal. Over this wide field he was extremely competent in all that he did.

"He had the true advocate's ability of seeing the essential points of a case and then the wisdom to base his case on those points, abandoning all irrelevancies. He had a pleasing manner in Court. His style was quiet but penetrating and overall very effective. He had a neat turn of phrase and way of expressing himself, with occasional flashes of wit. To the Court, and also to the witnesses in a case, he was always courteous; but he was also insistent in putting forward everything that he considered proper on his client's behalf. He had what Sir James Barrie called 'the lovely virtue'—courage. If he had a fault it was only that on occasions he appeared to undertake too much, and this arose simply from his strong desire to help all those who asked for his help. His work load was obviously an extremely heavy one.

"Mr President, you have spoken of his service to the legal profession, and of his wider interests, particularly as regards cricket, the game that he loved and to which he gave so much. You have

also spoken of him as man, mentioning rightly his humanity, and what good company he was. All these things go to fill in the complete portrait of the man. He was not just an eminent lawyer. He was a Canterbury man who gave much to his own city, to his province, and indeed to his country. He was, in short, an outstanding New Zealander.

"Gordon Leggat had the blessing of domestic happiness. He was the head of a closely knit family. To his widow and their two boys and to his sister we too offer our deepest sympathy in their tragic loss."

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# VICTIMOLOGY

With the study of crime and criminals gradually becoming more systematic, it was only a matter of time before the attention of researchers would also be drawn to consider those who might be said to be the objects of certain types of crime. At least, this is so in the West. In communist countries, basic assumptions are so radically different that victimology—the study of the victims of crime and of their behaviour—makes little sense.

In the U.S.S.R., for example, it is mostly the state or the community, in one form or another, which is considered to be the offended party if a crime is committed. For it follows from communist ideology that most disruptive, aggressive or exploitive acts are perceived primarily as directed against, say, a state industry or a nationalised trading concern; and only very secondarily against an individual. Private property is not only rarer but also much less important than public property or transport or trading interests. So far is this attitude taken that ordinary human failings such as, for example, greed, which play an important part in criminal motivation, are redefined as "remnants of the ideology of private ownership".

In our different system, and seen from what communists no doubt consider our benighted point of view, the victims of the majority of crimes are in fact individuals or individually owned firms. And if it is British Rail rather than John Brown or George Smith Ltd. who suffered a loss, then the Courts will not necessarily consider the damage to the former as graver or more blameworthy by definition than damage to the latter two.

Victimology, as we know it in the West, ranges from the study of the often unconscious inter-relationship between offender and victim (such as has been carried out by Hans von Hentig, the distinguished German criminologist who worked in the United States during the war) to the most recent factual research into murder undertaken by the Home Office Research Unit. In this latter we have a statistical analysis of all the victims of murder over a period of 10 years and their relationship to the murderer; demonstrating, for example, that murder is mainly a family crime.

Indeed, there is an element of victimology in almost any study which looks in depth at a particular form of crime. It is impossible to look at, say, shoplifting and its changing pattern and not also to be aware of the changing behaviour of the victim—in this case often stores and supermarkets, whose methods of displaying goods have certainly contributed to the opportunity for, and possibly to the incidence of, this offence.

The house owner who fails to take elementary safety precautions or who advertises his absence by rows of milk bottles remaining outside his front door is risk-taking in a manner as well known to victimologists as it is to the police. So is the girl who comports herself provocatively and finishes up being indecently assaulted; or the "punter" who comes up from the provinces looking for sex or sensation in Soho and who walks into a clip joint where he is duly relieved of his money.

In an exactly opposite way, the behaviour of the potential victim who is careful and takes trouble with his burglar alarms is of interest to the victimologist. A European criminologist has once calculated how many wage snatches might be prevented and how much money might be saved in one year if all wages were paid by cheque. But the weekly wage packet is so much part of the British working-class ethos that it will take a lot more than the voice of a continental expert or a few robberies to change that tradition.

The position of the victim both during criminal proceedings and after them is another aspect of the same subject. Time was when, if one man stole from another, the aggrieved struck back himself. But once the state intervened and private vengeance was ended by law,

the victim was reduced to a minor role. In this country, he may help to provide the proof, as it were, of the criminal pudding, but that is often as far as his interest is officially allowed to go. In France or Germany, it is not uncommon for the victim or his lawyers to sit through the trial of the offender, ready to sue him for damages. Alas, it is not often a particularly fruitful course to take.

Here our Courts may award compensation, and the recent Criminal Justice Act confers upon them new powers. But if the offender has no money, for those who have suffered physical injury there is the Criminal Injuries Board. It can award damages and is of real help to those victims who have been temporarily or permanently incapacitated. Without such damages, they might be rendered destitute. Our system and that in New Zealand at present form the subject of study undertaken by the member countries of the Council of Europe. There is ,too, the question of the offender himself making some kind of reparation. if only symbolically, through giving up part of his prison earnings.

But the system of compensation is no more perfect than the understanding of the role of the victim in the crime itself and in the trial of the criminal. Next September, the first international symposium on victimology is to be held.

It is sponsored by the International Society of Criminology together with the Government of Israel and will take place in Jerusalem. Israel has developed a sensitive and protective way of eliciting information from the child victims of sex offenders. This may then be given in evidence and the children are spared the need to appear at the trial itself. Whether one agrees with the detailed procedure or not, it is the kind of thinking which should be a good omen for the success of the symposium. HUGH J. KLARE in the *Justice of the Peace.*

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# THE CONCEPT OF OBSCENITY

A system of law which decides to ban obscene literature is faced with the difficult task of defining what it means by "obscene". England has long tried to manage with a test to the effect that literature is obscene only if it has a "tendency to deprave and corrupt" readers. It is said not to be enough that the work is dirty, or disgusting (in fact, it is probably not even necessary, for books about violence or drug-taking can be just as much obscene as books about sex); there must be this additional tendency to deprave and corrupt. Although originating in the common law last century, the test is now enshrined in statute. Section 1 (1) of the Obscene Publications Act 1959 (U.K.) provides that an article is deemed obscene "if its effect is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely . . . to read, see or hear the matter contained or embodied in it."

It is perhaps surprising that the test has survived three remarkable facts. First, no one has ever really supplied proof (as opposed to speculation) as to the effects of reading dirty or violent books. Second, the Judges have never satisfactorily defined what is meant by "deprave and corrupt"; indeed, they have never really tried to, except to say that the words mean more than "lead morally astray" and rather apologetically to quote the nugatory dictionary definition "to make rotten". Third, the Courts have steadfastly refused to allow expert evidence by persons such as psychiatrists as to the effects of reading pornography, presumably because their (probably conflicting) evidence would prolong the trial. In the light of these facts, it is hard to see that the time-honoured formula can add anything of substance to the inquiry. Glanville Williams once wrote:

> "To put the matter in realistic terms, no such tendency is necessary, it being sufficient that the writing complained of goes so far beyond accepted standards as to shock the tribunal of fact."

Yet the Courts—and lawyers—have felt obliged to pay something more than lip service to the test, and now that it is in statutory form the obligation is stronger than ever. The case *D.P.P.* v. *Whyte* [1972] 3 All E.R. 12 shows the curious results which can follow:

The accused, a husband and wife, ran a book shop at which they sold a large amount of reading matter which everyone admitted fell under the description of "hard pornography". Some of the titles are a clear index to the nature and quality of the subject-matter: "Teen Pro", "Oral Artist", "Sexus Defectus" and "Dingle Dangle No. 3". The books had no literary merit whatever. A majority of the House of Lords found, not surprisingly, that the books were obscene, and directed the justices from whom

the appeal had come to convict. (The two Lords who dissented did so on the technical ground that to reverse the justices would be to interfere with their findings of fact.) Yet what is surprising is that the lower Courts had been persuaded to acquit the accused because of two arguments based on the standard "deprave and corrupt" test. Both arguments were founded on the fact that the great majority of the accuseds' clients were old men: "inadequate, pathetic, dirty-minded men seeking cheap thrills". They, in the terms of the section, were the persons who were "likely" to read the books.

The first argument was that these old men were already so degenerate that reading the books complained of could not be said to deprave or corrupt them: they had already reached the limits of depravity and corruption. This ingenious argument succeeded before the justices. The majority of the House of Lords pointed out flaws in it. For one thing, the argument contains its own refutation. It presumes that the old men were corrupt because they had been reading this kind of book for so long; but that is to admit that such literature does have a tendency to corrupt. For another, the section does not suggest that it is only a tendency to the corruption of innocents which can make a work obscene; its words are perfectly open to the interpretation that it is sufficient if the work can maintain persons already corrupt in their existing state. As Lord Wilberforce said, the Act protects the addict "from feeding or increasing his addiction".

The second argument was a rather more attractive one, and goes to the whole question of the meaning of "deprave and corrupt". It was argued that the words refer to some observable effect on the overt behaviour of readers; in other words that a man is only "depraved and corrupted" if he goes out and acts on what he has read, as opposed to merely sitting and thinking about it. The House of Lords rejected this argument also. "Influence on the mind is not merely within the law but is its primary target." (Lord Wilberforce at p. 20.) "The words 'deprave and corrupt' in the statutory definition refer, in my opinion, to the effect of an article on the minds (including the emotions) of the persons who read or see it." (Lord Pearson at p. 21) . . . In so holding, the House was merely affirming what had been assumed to be the position in earlier centuries, although no doubt in those times the "clean mind, clean body" notion had rather more religious significance than it does in 1972. Yet if this is all that the law requires, it would seem that Glanville Williams' comment is as true now as it ever was, despite the fact that the "deprave and corrupt" test is now statutory. Dirty books induce dirty thoughts in those who read them; in fact, that is precisely why they do read them. That being so, if a book is dirty it is by very hypothesis obscene.

It is interesting to speculate on what would have been the outcome if the *Whyte* case had occurred in New Zealand. By virtue of the Indecent Publications Act 1963 the case would have been dealt with here in two stages: a classification of the books by the Indecent Publications Tribunal, and then a prosecution in the Courts. The first stage is the more important. The Tribunal would have been required to make a general ruling as to whether the book was indecent, not indecent or indecent in the hands of a restricted class of persons. This determination would not be related to the facts of the particular case; it would be a general determination for all purposes. But it would have been open to the Tribunal to classify the books as indecent in the hands of persons under 18; indeed, this is the most common sort of classification nowadays, because it has been said in the Supreme Court that "the protection of young persons from contamination by mischievous literature still survives as the salient purpose of the present Act." (*Robson* v. *Hicks Smith & Sons Ltd.* [1965] N.Z.L.R. 1113 at pp. 1120-1121 per Haslam J.) Our Legislature seems thus to have accepted that it should be more solicitous of the mental attitudes of school children than of old men. (Does it thereby indicate that it is not particularly concerned about the spectacle of aged addicts "feeding their addiction"? Presumably, however, it does not wish them to increase it, because it recognises, by providing for a category of "indecent" without qualification, that there are some books that even they should not see.) This being so, the Whytes might just have escaped prosecution in New Zealand, although it does seem that the literature they had been peddling was of such an extreme nature that it might well have been classified as indecent for all purposes.

"Tendency to deprave and corrupt" forms no part of the test of indecency in this country. Instead, the Legislature has provided an inclusive definition: "indecent includes describing, depicting, expressing, or otherwise dealing with matters of sex, horror, crime, cruelty, or violence in a manner that is injurious to the public good". The concept of "injury to the public good" is certainly no more tangible nor simple of application than that of "tendency to deprave and corrupt". Moreover, the Supreme Court in the

*Robson* case has assumed that it requires an examination, not just of the book, but of the consequences of its publication to the community (something which, in the present state of knowledge is still a matter of speculation); it has also expressed the view that the purpose of the legislation is to prevent the "contamination" of readers (is this really very different from "depravity and corruption"?). There is no real reason for thinking that in New Zealand, any more than the United Kingdom, one would need to show a tendency to affect the overt behaviour of readers as opposed to their mental attitudes.

One is left wondering whether legal definitions really accomplish very much in this area, where decisions tend to be a matter of instinct. To most people (probably all people despite what some of them say) dirty or shocking books are obscene books, and the dirtier a book is the more likely it is to be held obscene. Whether obscenity should be punished, however, is a totally different matter. One cannot really argue this question sensibly until one has much more cogent evidence than is now available as to the actual effects of reading pornography. Even if it is finally established that it has no effects on overt behaviour at all. it would then have to be debated whether this is a reason for assuming that the law has no right to interfere. Then everything would depend on one's view of the functions of a legal system.

J. F. BURROWS.

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# OFFERS TO SELL AND SUPPLY IN THE CRIMINAL LAW

In a number of modern English cases the Queen's Bench Division has held that diverse statutory offences requiring an "offer for sale" on the part of the defendant are not committed unless the defendant has done something which amounts to an offer to sell for the purposes of the law of contract: there must be an offer which, if it was lawful, could be converted into a binding contract by an acceptance on the part of the offeree, and a mere invitation to treat by the defendant is not enough. This was held to be so in the well-known case of *Fisher* v. *Bell* [1960] 3 All E.R. 731, where it was held that the display in a shop window of an ejector knife, accompanied by a price ticket, was not an "offer for sale" within s. 1 (1) of the Restriction of Offensive Weapons Act 1959, because such a display was a mere invitation to treat. For the same reason the display in a shop window of obscene photographs, with price, was held not to be an "offer for sale" within s. 2 (1) of the Obscene Publications Act 1959 (*Mella* v. *Monahan* [1961] Crim. L.R. 175), and similarly the insertion in a magazine of an advertisement, "Bramblefinch cocks, Bramblefinch hens, 25s. each", did not amount to an "offer for sale" contrary to s. 6 (1) of the Protection of Birds Act 1954 (*Partridge* v. *Crittenden* [1968] 2 All E.R. 421).

These decisions have now been applied to yet another statutory offence. In *British Car Auctions Ltd.* v. *Wright* [1972] 3 All E.R. 462, the defendant car auctioneers were convicted of "offering to sell" a motor vehicle for delivery in such a condition that its use on the road in that condition would be unlawful by virtue of certain regulations, contrary to s. 68 (1) of the Road Traffic Act 1960. The Divisional Court held that this conviction must be quashed because it was "technically incorrect to describe an auctioneer as offering the goods for sale", for it is clear that "as a matter of strict law of contract . . . the auctioneer when he stands in his rostrum does not make an offer to sell the goods on behalf of the vendor; he stands there making an invitation to those present at the auction themselves make offers to buy . . . the offer comes from the bidder in the body of the hall and the acceptance is communicated by the fall of the auctioneer's hammer" (ibid., 466, *per* Lord Widgery C.J.). As in the earlier cases the Court was somewhat reluctant to apply the technical meaning of "offer to sell" in interpreting a penal provision, but it thought the earlier authorities required it to take this course unless there was something in the particular statute which made it clear that there the words had a different meaning.

In *Fisher* v. *Bell* the Court recognised that there had probably been an "offer for sale" if those words were given their ordinary meaning, but it took the view that Parliament should be presumed to have intended the technical meaning of the words it used, because "any statute must of course be looked at in the light of the general law of the country, for Parliament must be taken to know the general law" ([1960] 3 All E.R. 731, 733, *per* Lord Parker C.J.). This reasoning has been criticised by Professor J. C. Smith as representing too restricted a view of

the Court's powers of construction and as giving too little emphasis to the mischief aimed at by the statute. In the law of contract the concept of an offer is given a somewhat restricted interpretation so that obligations are not imposed upon a person unless he reasonably appeared to intend to undertake them, but quite different policy considerations may be involved when criminal liability is imposed for "offering" to sell something; in the latter context there is of course no question of the offer being held binding and thus no real conflict between the civil and the criminal law will arise from giving the word "offer" its ordinary popular meaning (see J. C. Smith [1972 B] C.L.J. 197, 198-201; and [1961] Crim. L.R. 180; [1972] Crim. L.R. 563).

The English Courts, however, have expressly rejected the argument that in view of the purpose of the Act in question a wider meaning may be given to "offer for sale", such a process being described as "a naked usurpation of the legislative function" (*Partridge* v. *Crittenden* [1968] 2 All E.R. 421, 424, *per* Ashworth J.); again in *British Car Auctions Ltd.* v. *Wright* [1972] 3 All E.R. 462, 468, Melford Stevenson J. said that the adoption of a wider meaning would effectively be "adding a definition in the statute which is not there, and that we cannot do". Some support for this view might perhaps be had from the fact that in some statutes Parliament takes care to provide just such a definition.

In the light of these English decisions it is of some interest to consider the recent decision of the New Zealand Court of Appeal in *The Queen* v. *During* (unreported; judgment delivered on 7 July 1972). The defendant had been convicted of offering to supply a narcotic (heroin) contrary to s. 5 (1) (d) of the Narcotics Act 1965, the alleged offer being contained in a letter written to a friend. In the letter the defendant had said: "I've been offered some chase at a reasonable price but need to buy a lot? [*sic*]. Do you want to buy some or could you lend me some bread?" There followed inquiries as to other possible sources of finance and the letter concluded with a reference to an apparently separate drugs transaction, the defendant writing that he hoped "the gear" which "Franz" had sent would arrive soon, and added crypitcally, "I let you have some". There was evidence to the effect that in current slang "chase" meant heroin and "gear" meant hard drugs. On behalf of the defendant it was argued at the trial that the letter should not be taken seriously, the suggestion apparently being that it was not an offer because the defendant never really contemplated that he would be able to supply any drugs. This was rejected by the jury but the defence had also emphasised that the letter was couched as an inquiry and on appeal it was argued that it could not be an "offer to supply" within the statute because this required an offer which could be converted into a contract by acceptance by the offeree. There can be little doubt that the defendant's letter would not satisfy this test, but the Court of Appeal rejected the proposed test, and in doing so it went so far as to say that it found none of the earlier English authorities to be "of any persuasive force" in this particular case.

The Court held that "offer to supply" in s. 5 of the Narcotics Act 1965 had a wider meaning than that suggested by the defence and it put its conclusions in the following way: "In the context of that section we have not the slightest hesitation in holding that one of the harms at which the section is plainly and unambiguously directed is an intimation by the person charged to another that he is ready on request to supply to that other drugs of a kind prohibited by the statute". (judgment, p. 12, *per* Turner P.) The Court thought that the letter plainly contained such an intimation and therefore affirmed the defendant's conviction.

This conclusion will no doubt win approval from those who are critical of the approach in cases such as *Fisher* v. *Bell*, but in any case the English cases were clearly distinguishable. In all the English cases the question has been whether there was an "offer to sell" but in *During* the defendant was charged with an "offer to supply". Section 5 (1) (d) of the Narcotics Act 1965 also proscribes offers to sell (and to give or administer) narcotics but, although some statutes provide extended definitions of "offer to supply" (see, e.g. *Doble* v. *David Greig Ltd.* [1972] 2 All E.R. 195), there seems to be no reason why the unqualified phrase "offer to supply" should be given a specially limited meaning equivalent to that imposed on "offer to sell" by the law of contract (cf. the inconclusive references to the term in *John* v. *Matthews* [1970] 2 All E.R. 643, 646). The phrase "offer to supply" contains no overt reference to any contract and thus there seems to be no reason to suppose that that part of the law is material. If this is so there is nothing to prevent the Court giving the words their ordinary meaning, in so far as this is consistent with the object of the Act, and in the context of the Narcotics Act the Court of Appeal's conclusion may be acceptable: "offer to supply" appears to be quite capable of including an intimation of readiness to supply, or indeed an intimation that the defendant is willing to

negotiate with a view to selling to another if that other offers acceptable terms.

It may be objected that the effect of this interpretation of "offer to supply" is to penalise acts which are not sufficiently proximate to actual supply to constitute an attempt to commit that offence; but, quite apart from the fact that Parliament probably intended this, the proximity test for attempts is notoriously unsatisfactory and further more an "offer to supply" within the above definition might well amount to an incitement of, or an attempt to conspire to commit, the offence of "dealing" in any narcotic, contrary to s. 5 (1) (d). A possibly more surprising result which is implicit in the decision in *During* is that a defendant may be guilty of an "offer to supply" narcotics when he intimates that he is willing to supply them, even though at that time he is not in possession of any narcotics. It follows from this that there may be a sufficient offer and intention to supply even though the offer relates to some future (and possibly uncertain) date and the intention is conditional on the defendant acquiring the "offered" narcotics. Such an "offer" might be remote indeed from the proposed transaction, although the more remote and uncertain the proposed supply the more difficult it will be to prove that it was a serious proposition. The actual facts in *During* present rather a hard case: it does seem surprising that such vague "intimations", which might easily fail to result in any actual supply, should amount to such a serious offence.

Moreover, although the actual conclusion of the Court in *During* might be supported the reasoning used in the judgment seems to be open to criticism. In the first place the Court appears to suggest that the English decisions were distinguishable because all of them concerned alleged offers made by conduct, so that the Court had to consider the possible implications of the conduct, whereas in this case the "offer" was in a letter, and "the question of its interpretation becomes principally, if not entirely, a matter of the meaning of the words used" (judgment, p. 12). This is no doubt correct, and it may well be that it will be easier to establish an offer when words are used, but the distinction does not seem to be relevant ot the question whether "offer" means "contractual offer". It may be added that the alleged offers in *Partridge* v. *Crittenden* and *British Car Auctions Ltd.* v. *Wright* were in fact in words, not by conduct, but this made no diffeernce to the principle applicable.

Of rather more importance is the fact that in holding the English cases to be "of little use" the Court of Appeal appears to have regarded it as significant (and perhaps crucial) that none of the English cases concerned the control of narcotics. Thus, the Court noted that "the subject-matter of the English statutes is different in each of the cases cited from that of the statute which we have under consideration", and in bypassing the English cases it was emphasised that the Court had to decide what "offer to supply" meant "in an Act passed for preventing the use of, or traffic in, dangerous drugs" (see judgment p. 11-12). With respect, this does not seem to be a legitimate method of distinguishing the English decisions: there seems to be no reason to suppose that the Narcotics Act can properly be subjected to special rules of interpretation and the English cases clearly imply that no distinction is to be made based on the subject-matter of the statute—the same principle has been applied to statutory provisions concerned with the suppression of such diverse evils as offensive weapons, obscene material, dealing in wild birds, and dealing in unsound vehicles.

In *During* the also Court noted that the "context" provided by the rest of the section in which the words were contained was different from the contexts provided by the English sections. The English statutes outlawed offers for sale or hire, and in some cases the actual lending or giving of the thing in question, but s. 5 of the Narcotics Act 1965 contains more comprehensive provisions explicitly designed to proscribe all unlicensed "dealing" in narcotics. Thus, the section expressly prohibits the import or export, production, cultivation or "distribution" of any narcotic, and then s. 5 (1) (d) provides that no person shall "sell, give, supply, or administer, or offer to sell, give, supply, or administer, any narcotic to any other person, or otherwise deal in any narcotic"; possession for any of the purposes in para. (d) is an offence under para. (e) and all the above offences are punishable by a maximum of fourteen years imprisonment. But although it is thus plain that Parliament has attempted a comprehensive prohibition on unlicensed dealing in narcotics it is difficult to see that that makes it plain that "offer to supply" must include intimations that a defendant is ready to supply if and when he acquires possession of a narcotic.

The manner in which the Court reached its conclusion in *During* suggests that a defendant charged with an "offer to sell" under the Narcotics Act 1965 could not rely on the English

decisions discussed above, although this remains debatable because the Court's conclusion was in terms confined to the meaning of "offer to supply". More generally, it may be open to dispute whether the English decisions are applicable at all in New Zealand for s. 5 (j) of the Acts Interpretation Act 1924 might be invoked here to support the proposition that the words "offer to sell" should be given their ordinary popular meaning if that is calculated to further the object of the Act in question. On the other hand, if the Court is at all in doubt as to the meaning of words in a penal enactment it appears that the current view of the Court of Appeal is that such words should be interpreted *in favorem libertatis* (*R.* v. *Lee* [1973] 1 N.Z.L.R. 13, 17-18 *per* Turner P.) and this might encourage the Courts to accept the general applicability of what appears to be a well settled rule of construction in England.

G. F. ORCHARD.

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# LAWYERS IN AN OPEN SOCIETY

*An address by Hon. Otto Lang, Canadian Minister of Justice, to the Canadian Bar Association's 54th Convention.*

During the past year we have witnessed a new intensity of debate—in and outside the profession—about the need for public control of the legal profession. I note that one of the major plenary sessions of the annual meeting this week is to be devoted to the subject of the independence of our profession. That session should produce some frank assessments of the lawyer's role in society today and a critical evaluation of his responsibility to the community which he should serve. If we claim independence for our profession, and indeed we should, it must be in return for our willingness to recognise and fulfill our obligations to society.

The premise is that the independence of the Bar is a privilege based on the expectation that lawyers, as professionals, will conduct themselves in the true spirit of public service and not in their own self-interest. In other words, the independence granted the profession by the State is a trust and a burden is cast upon the trustees to ensure that the privilege is used to serve the public. The practice of law is a monopoly but the law belongs to the people. If we minimise the mystery and maximise access and evenhandedness we may justify our independence as the basis for better service. No one will deny the importance of an independent Bar, but let it never be forgotten that it is a privilege of the lawyer that must not be abused.

In my time this morning, I want to comment on several aspects of legal service and how we might improve our performance. These concern the role of the adversary system, the delivery of legal services to the disadvantaged, the training and employment of para-professional legal personnel, the education of the public concerning law, the cost of legal services and public participation in the control of the legal profession. In speaking of these matters, I propose to ask questions rather than propound solutions and I do so with confidence that you may elaborate some of the answers.

First I want to repeat the view of the Prime Minister expressed at the National Conference on the Law last February that the adversary system need not be regarded as the ideal means to resolve every dispute. While we should recognise its merit in assuring that the relevant issues are examined carefully by an impartial adjudicator—when opposing and independent counsel do their job well—we should weigh its costs in full, costs to the client and to public, against the benefits and with alternatives firmly in mind. Particularly when the adversary system of controlled combat may increase hostilities in situations where compromise and conciliation are desirable, we should look for alternatives not only because of cost but because the credibility of law and lawyer require it. The onlooker knows—more than we give him credit—when our system or practices are too slow or are perverse.

I think particularly of family law and of labour law as fields where more and simpler alternatives to the traditional adversary processes should be sought.

The legal profession can claim with pride, to have pioneered the efforts to provide legal advice and service to those unable to afford the normal fees. Indeed, it has been largely through the initiatives of the profession that governments have in recent years moved to establish publicly-funded legal aid programmes.

I have just recently put in the mail to my colleagues in the provincial governments a pro-

posal that the federal Government assume a large part of the costs involved in providing legal aid to persons in need of such assistance in matters involving the criminal law. The federal Government, with particular responsibility in the area of criminal law, is willing to pay to every province that has or is prepared to establish a legal aid plan for criminal law matters a per capita grant of 50 cents up to 90 percent of the expenditures on such aid. We propose to leave administration and indeed the type of delivery system to the provinces but we will try to assure that every person in need is covered and that, in the more serious cases at least, a choice of lawyer is preserved.

I hope that members of the Bar will co-operate and indeed give leadership in seeking and applying a variety of forms of delivery system so that we may benefit from varied experience in the next few years. The objective of more equal access to the protection and of the law and public willingness to pay for it deserve support and not fearful suspicion about dangers to the integrity of the law.

We must also ask ourselves if we are prepared to learn about the nature of the legal problems faced by the disadvantaged. The corporate client has his special legal problems and so too does the person who has been denied the economic, social or cultural advantages of our society. These people must be seen as having an equal claim on the special talents of the lawyer. But, are we prepared to accept the challenges of learning, understanding and making available our professional talents for these problems? I think our sense of social responsibility must guide us to say yes. Professional service to the public must mean service to all parts of the public and the amount of the fee involved must not be the governing criterion.

Lawyers have been slow to recognise the need for para-professional personnel who may be able, if properly trained, to provide a variety of legal services to clients where the skill of a highly qualified (and proportionally expensive) professional lawyer is simply not required, or because of geography will not be available. I think of many matters of simple debt or contract, straightforward probate or sale, or real estate transactions in some provinces where the parties will not pay for and may not need the help of a legal specialist. A person is faced with a choice between a full lawyer's fee or a complete amateur's assistance.

Is it not time the legal profession took a close look at its responsibility to encourage and develop a programme of training of legal assistants to give the client a third and middle choice? The profession might supervise the work of such assistants and help in the development of appropriate training programmes and safeguards.

In this connection, our profession will undoubtedly follow with interest the experiment now being undertaken by the Dalhousie Legal Aid Services (*a*) project which is designed to examine the means by which lay persons may be educated and trained to engage in the delivery of para-professional legal services. I am happy to note that this experiment is receiving support and encouragement from the Barristers' Society of Nova Scotia.

Similarly, the Saskatoon Legal Assistance Clinic Society is now embarked on a programme designed to train native Court workers in a rural area who will assist persons brought before the Court in understanding the legal process to which they are being subjected. This, too, is an innovative experiment in training legal assistants.

I think it is essential that our profession break away from the monopolistic notion that legal services of all types can be provided only by the lawyer who has gone through the present lengthy process of admission.

Not only must we, as a profession, ensure that the legal system is made fully accessible to the community; we must also ensure that the law and the system are made more intelligible to the people whose rights and obligations are governed by it. It has been said, perhaps with considerable justification, that lawyers have succeeded to the earlier role of the high priests as the guardians of the secrets of the law. But surely our true role must not be to perpetuate the mysteries of the law but rather to demystify the law and its processes.

Yet, I wonder how much we have done to educate people about the nature of the law and their rights and obligations within the legal order?

In recent times there has been an effort, particularly on the part of the younger professionals in community legal services projects, to undertake legal education programmes for the public. The quality has not been uniform. At another level, the Chairman of the national Law Reform Commission has been emphasising the need for laws, both in their legislative language and in their application, to be made intelligible to the persons to whom they apply. We all look forward to the proposals the Commission will be bringing forward to attain these goals.

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(*a*) See [1972] N.Z.L.J. 432.

To provide legal information in an intelligible form to the public does not mean that every person can or should become his own lawyer. It should mean that the average person will be in a better position to identify his potential or actual legal problems and consult a lawyer to seek either preventive advice or remedial action as the situation may require. I would suggest that every lawyer, whether he be in practice, in academia or in government, has a social responsibility to contribute his professional talents to demystifying the law. This can be done by carefully prepared publications, intelligibly drafted laws, and creatively developed public education programmes.

In this regard, I am happy to say that my Department is now prepared to offer assistance to worthwhile proposals for the development and dissemination of materials whose object is to generate a better understanding by the public of the law and the legal system. In a free society a legal system relies for its efficacy upon the respect and support of the general public. This respect and support is seriously undermined if a substantial portion of the population feels that the law is unknowable, irrational or applied in a discriminatory or arbitrary fashion. It must be our task to present the legal system to the public in forms they can comprehend.

I have earlier touched upon the always sensitive subject of the cost of legal services, but I should like to add a few more general observations on the matter because in no area of his social responsibilities is the lawyer and the profession more vulnerable to public criticism than in the setting of tariffs of fees and in the billing for services rendered.

Like all professional services, those provided by lawyers are expensive and there is some justification for this in the fact that the lawyer has invested substantial human and material resources in obtaining his professional qualifications. However, we must ever remember that the obligation of our profession to society is to make our services available to clients at a reasonable price—a price that the client can afford whether the cost is borne by the individual or by the State. Legal services are not after all a luxury but a necessity.

In permitting the profession to establish its tariffs of fees, governments must have assumed that the minimums set would be a reasonable reflection of the charges for the services rendered. This privilege places on us, collectively and individually, a grave rssponsibility to ensure that the tariffs set and the fees charged *are* reasonable.

There are several practices in relation to the costs of legal services about which I worry. Some work, particularly of the type which should be or is performed by clerks or assistants is charged for in full at lawyer's rates. This is offset against complicated or time-consuming work which no one would dare to charge for in full. This is a system of subsidy and taxation which no government intended to empower law societies to create. It perpetuates two evils—the performance by a lawyer of simple tasks he is too valuable to perform at their proper value, and the performance at all of certain tasks which might disappear or lead to reform if charged for in full.

Finally, I believe our profession should assert its social responsibility, by taking a positive and forward look-attitude on the question of involving members of the public in its control. It is not my intention here to express any views on government participation in the decision-making councils of the legal profession. But I do wish to offer my observations on the social obligation of the profession not only to open its council doors to public view but also to consider the importance and value of having lay people participate in the deliberations of its councils. As the Honourable J. C. McRuer observed in his assessment in 1968 of the self-governing professions, self-government is granted by the Legislature not to give or to reinforce a professional or occupational status, but rather to safeguard the public interest; in other words, to protect the public interest, not the profession's. The Commissioner concluded that the protection of the public interest demands that the public be represented, not as observers but as participants in the governance of the profession.

The desirable goal of independence of lawyers will best be attained if we take leadership in assuring public involvement and if we make doubly sure that our objective is service and is in plain view. As our Association's Ontario vice-president said not long ago: "We can no longer afford to shroud ourselves in the law in an atmosphere of mystery. We are publicly accountable for the privileges we enjoy as a profession."

In concluding my remarks on our responsibility in society, it is perhaps fitting to recall the thoughts of Lord Brougham spoken in 1828 on the subject of law reform. While he directed them to the Sovereign, they are even more aptly addressed to *us* in 1972.

> "But how much nobler will be the (lawyer's) boast, when he shall have it to say, that he found law dear, and left it cheap; found it a sealed book—left it a living letter; found it the patrimony of the rich—left it the inheritance of the poor; found it the two-edged sword of craft and oppression—left it the staff of honesty and shield of innocence."

# ANOMALIES IN VALUING STRATA AND UNIT TITLES

Recent legislation facilitating the issue of licences to occupy flats or offices (*a*), and the subdivision of land into units owned on the basis of freehold or leasehold stratum estates resulting from the deposit of unit plans (*b*), brings to the surface problems in valuing these stratum parcels. It would seem that this legislation has been passed without full regard for its effect in terms of the Valuation of Land Act 1951 and the Rating Act 1967. The difficulties, which existed prior to this legislation, are discussed below, but as a prelude it is pertinent to comment upon "strata titles" generally.

There never seems to have been any reason why land or sub-surface or air space in New Zealand should not be subdivided into strata for title purposes (*c*). Nor does there appear ever to have been any obstacle in the Land Transfer Act 1952 to the issue of titles to tiers of air space or layers of sub-soil. Although strata implies layers, there is likewise apparently no reason why a one-storey structure should not be subdivided into lots with air space rights above and sub-surface rights below.

Land as defined in s. 2 of the Valuation of Land Act 1951 comprehends all land in the ordinary sense, viz., soil or earth and everything attached to the land above or below the surface. Land may be physically delineated by vertical as well as horizontal boundaries (*d*), or, indeed, with reference to an inclined plane. Air space and sub-soil are legally land. Land is not defined in the Land Act 1948, but it is defined in s. 2 of the Valuation of Land Act 1957 as meaning:

> ". . . all land, tenements . . . and all chattel interests therein, and all trees growing or standing thereon."

There has been earlier (*e*) comment that:

> "This it is submitted, comprehends land in the ordinary sense, i.e., soil or earth and everything attached to the land above or below the surface.
>
> "Thus surface subdivisions of land involve only the normal valuation problems. However, an inclined plane or horizontal subdivision, i.e., division into layers, must give rise to new and entirely different problems of which the chief is surely that of ascertaining the unimproved value. One of the cardinal principles of valuation is that unimproved value must be ascertained without reference to the improvements (*f*), but, in the case of horizontal subdivision, it is the very structure, namely the improvements, which marks out the strata. In other words, the unimproved cannot exist without the improvements."

This anomaly, which had been first discerned in Australia (*g*), still persists in New Zealand, notwithstanding the Valuation of Land Amendment Act (No. 2) 1970, which, whilst substituting the term "land value" for "unimproved value", preserved the terms of the old definition of "unimproved value", altered its effect because of the new definition of "improvements", but did not, it is submitted, carry the alteration far enough. The exclusion of what were commonly referred to as "invisible improvements" was the substantive change, and so legislative modification of the law in New Zealand in so far as strata valuations are concerned is still overdue.

Horizontal, vertical and inclined plane subdivisions pose two peculiar problems: "under the old law, the problem of ascertaining "unimproved value", and, under the new law, the similar problem of fixing "land value". Division into strata or layers means that the strata must be marked out by "improvements". In a multi-storey structure, the first floor is marked out by the ground floor and the second floor, and so on.

It is trite valuation law that the "unimproved value" must be ascertained without reference to the "improvements" (*h*). However, in the case

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(*a*) Section 80A of the Companies Act 1955 as inserted by s. 2 of the Companies Amendment Act (No. 2) 1965 following *Jenkins* v. *Harbour View Courts Ltd.* [1966] N.Z.L.R. 1.

(*b*) Unit Titles Act 1972 which came into force on 1 April 1973.

(*c*) Indeed, see E. C. Adams, *Land Transfer Act 1952* (2nd ed.) 150 for a discussion, and also for a model draft certificate of title for part of the air space. See also *Ruapekapeka Sawmill Co. Ltd.* v. *Yeatts and Yeatts* [1958] N.Z.L.R. 265.

(*d*) *Resumed Properties Dept.* v. *Sydney Municipal Council* (1937) 13 L.G.R. 170, the first case to the best of the writer's knowledge, involving valuation of a stratum parcel.

(*e*) J. A. B. O'Keefe, *Law and Practice Relating to Crown Land In New Zealand* (1967), 200.

(*f*) *Tooheys Ltd.* v. *Valuer-General* [1925] A.C. 439.

(*g*) "Report by the Committee of Inquiry on Certain Matters arising under the Valuation of Land Act 1916-1950 (N.S.W.)" (1963) 17 *The Valuer*, 47, 96.

of layer subdivisions it is the building itself which marks out the layers (*i*). The "unimproved value" or the "land value" of the strata or layers cannot exist without the "improvements". It is contended that modifications of the normal valuation principles and practices as applied to ground subdivisions are altogether inadequate.

An approach to this kind of valuation would be to regard the subject property as a notional (*j*) investment. A starting point could be a simple annuity type calculation involving predicted future profit for an appropriate time and then determination of present worth by discounting at a factor related to risk (*k*), a suitable discounted cash flow application. Estimates of earning capacity (rent), appropriate time (how long), discount for risk (safe market rate of interest) are items entailing the application of professional experience.

The strata cases exemplify how outmoded the "unimproved value"/"value of improvements" dichotomy really is. Possibly the only valid reason for its retention today is for purposes of the Rating Act 1967. It is practically impossible to determine the true proportion of returns from property attributable to the land itself. Without the land, there can be nothing, so that it is logical to say, in one sense, that all is attributable to the land. Arbitrary division accomplishes little, especially when land valuation is viewed as a species of investment analysis process, because, mathematically, the anwser is pretty much the same if no apportionment of gross returns is made. In the example below the "unimproved value" of the land works out to nothing (*l*) which demonstrates that there is no theoretical need to interpose this fiction.

The ghost of "invisible (or ground) improvements" has been laid except that it is a species of "invisible improvements" which marks out the "land value" of a stratum or air space parcel, namely, the structure in which the stratum (or unit or floor) is a tier forms an integral part of "land value". It is a startling but logical proposition that a stratum parcel cannot have "land value" as presently defined (*m*), and therefore might be non-rateable.

Strata valuation anomalies provide a lead in to the greater anomalies resulting from the introduction of the term "land value" in 1970 and the problems of unit title valuations which will be discussed in the next article.

J. A. B. O'KEEFE (*n*).

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(*h*) *Tooheys Ltd.* v. *Valuer-General* [1925] A.C. 439.

(*i*) See *Resumed Properties Dept.* v. *Sydney Municipal Council* (1937) 13 L.G.R. 170.

(*j*) Where owner occupied, this would need to be done anyway.

(*k*) E.g. $V=(AR-E)\frac{[Rt-1]}{[R)(Rt]}$

Where V=value based on anticipated earnings, AR=actual or estimated annual rent, E=expenses in production of AR, R=interest rate, t=approximate time.

(*l*) E.g., take a 40-year-old residence, of which the estimated net earning capacity is an assumed rental of $1,000 per year. Its replacement cost, allowing for depreciation adjustment is $11,000. The life expectancy of the structure is 40 years. Current market fair return is 8 percent.

| | | | |
|---|---|---|---|
| (i) | Net rent .. .. .. | | $1,000 |
| | Annual deduction for amortisation cost of residence. | | |
| | (15,000 x .00828) (say) .. | | 120 |
| | | | $880 |
| | Value of property (880 x 100) / ( 8 ) .. .. .. | | $11,000 |
| (ii) | Net Rent .. .. .. | | $1,000 |
| | 8% on depreciated cost of residence. | | |
| | (11,000 x .08) .. .. | $880 | |
| | Amortisation annuity .. | 120 | |
| | | $1,000 | $1,000 |
| | Depreciated cost of residence | | $11,000 |
| | Capitalised value of land .. | | nil |
| | | | $11,000 |

Annuity factor from Table D9, Appendix D, Marston, Winfrey and Hampstead, 473.

(*m*) Under s. 2 of the Rating Act 1967, "land" is very widely defined. Section 3 makes all such land rateable property, and s. 62 makes the occupier primarily liable. But to rate "land" it must have a "roll" value ascertained with reference to "land value".

(*n*) Mr O'Keefe is qualified both as a lawyer and a land valuer.

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**It may yet follow**—Referring to his special award for "distinguished public service" over four decades made to him at the American Bar Association's Annual Dinner, Bob Hope remarked: "It's the first time I ever got anything from a lawyer without paying a bill."

**Can't figure**—When escorting a client petitioner in divorce proceedings (who worked in the most reserved bank in the land), to swear her affidavit of non-cohabitation a practitioner's secretary was asked by the client, "What's this non-cohabitation bit?"

# DELAYING PAYMENT FOR GOODS

When a purchaser of goods delays payment beyond the agreed date the supplier can claim damages to compensate for expense incurred as a result of the delay, but even continual delays will not usually entitle the supplier to terminate the agreement without giving reasonable notice. It is however recognised that it would probably not be possible to enforce this rule by attempting to compel a supplier to continue supplying goods at the request of a purchaser, but the Courts will seek to achieve the same result by forbidding the supplier to make his goods available to anyone else, especially when it is the purchasing company that has been responsible for building up demand for the supplier's products. This is clear from the decision of the Court of Appeal in the recent case of *Decro-Wall International S.A.* v. *Practitioners in Marketing Ltd.* [1971] 2 All E.R. 216; [1971] 1 W.L.R. 361.

The Court of Appeal was told that by an unwritten agreement made in 1967, a French manufacturing company, Decro-Wall International, had undertaken not to sell their products in the United Kingdom to anyone other than the purchasing company. Practitioners in Marketing Ltd., and to ship goods promptly on receipt of their orders. The French company also undertook to supply the purchasing company, on demand, with advertising material. For their part, the purchasing company undertook not to handle goods competing with those supplied by the French company (which included imitation mosaic tiles), to pay for goods which they bought by bills of exchange due 90 days from the date of the invoice, and to use their best endeavours to create and develop a market in the United Kingdom for goods produced by the French company. It was also agreed that this arrangement could be brought to an end on reasonable notice being given by either side.

Without a word of warning to the purchasing company, the suppliers had arranged in April 1970 for another company to be appointed their sole concessionaires in the United Kingdom. At about the same time, the suppliers wrote to the purchasing company, Practitioners in Marketing Ltd., alleging that the purchasing company had wrongfully repudiated the agreement between them by failing to pay the bills on time, and purporting to accept the termination of the agreement which they said the purchasing company had, by their conduct, expressed a wish to bring to an end. The suppliers subsequently brought an action against the purchsaing company claiming the amount of the bills accepted and unpaid, sums for goods sold and delivered, and a declaration that the purchasing company had on 10 April 1970 ceased to be their sole concessionaires in the United Kingdom. At the trial of this action judgment was given for the suppliers in respect of the dishonoured bills and the goods sold and delivered, but judgment was delivered for the purchasing company on their counterclaim for a declaration from the Court that they were still the suppliers' sole concessionaires in the United Kingdom. It was also held that the agreement between the suppliers and the purchasing company was only terminable by 12 months' notice from either party, and the suppliers were ordered to pay the purchasing company's damages for their own breach of contract in terminating the agreement without giving proper notice. In consequence of this finding, the French company undertook to continue supplying the purchasers with their products until the expiry of 12 months' notice (which they duly gave) to terminate the agreement, and not to appoint any other persons as concessionaires for their products in the United Kingdom until that date, nor themselves to sell or distribute their products in the United Kingdom until the 12 months' notice had expired. Having done this, the French suppliers then appealed to the Court of Appeal against the decision.

The Court of Appeal decided that the failure of the purchasing company to pay the bills of exchange promptly, and the likelihood of similar delays in the future, did not amount to repudiation of the agreement.

The suppliers' breach of the agreement in appointing another company as concessionaire in the United Kingdom and the repudiation of the agreement by a letter that they had sent on 9 April 1970, had not terminated the agreement because, for a contract to be discharged, the repudiation must be accepted by the other party.

The Court of Appeal recognised that no concessionaire would have proceeded with such an agreement unless he knew that he would have at least 12 months' notice of termination. Accordingly, as the suppliers were required to give 12 months' notice, the period of notice in the present case ran from the date of the formal notice that they had given after the hearing by the trial Judge. The suppliers were released from

their undertaking to continue supplying the purchasing company, but were not allowed to inflict a ruinous blow on the purchasing company's business by appointing other companies as concessionaires for their products before the period of notice had expired.

Situations of the kind which arose in the present case are likely to become increasingly common as national boundaries continue t be eroded and regional economies merge. It is therefore important to know that when a source of supply cannot easily be replaced at short notice, failure to pay promptly will not, in the absence of an express stipulation to the contrary, justify the supplier in terminating the agreement without giving the purchasing company reasonable notice. The supplier's only immediate remedy will be to claim damages. F. THOMAS POOLE in *The Solicitors' Journal.*

# LAWSON ON BRITOFREEZE

*Dr Richard Lawson writes again from Britain.*

It was, I believe, Richard Sutton who complained mightily over the behaviour of the Government with regard to the Stabilisation of Remuneration Regulations. There was, he vouchsafed, no statutory power in the Government to issue such regulations. It was blandly supposed, he lamented, that Parliament would ratify such a ukase when it eventually resumed business. He was not surprised, therefore, when this is precisely what it did.

But Richard Sutton was a voice crying in the wilderness. Untypically, the many ignored him: at any rate, the cries of anguish were still throughout the land.

Now, I do not suppose that it is the arrogation of sovereign power which has set in train (if that expression is not too insensitive) the current bout of industrial unrest in this most disunited kingdom.

It may be remembered that, in an earlier report, I noted that our great leader, E. Heath, had imposed a statutory price and wage freeze. He did this after his vociferous condemnations of statutory intervention in the free market as "unworkable". Mr Heath, I was later to discover, performs "U-turns". Mr Wilson does "somersaults".

I digress. The point is that this freeze (Phase I of the Prices and Incomes Policy) was succeeded by Phase II. A Government paper decreed that, during Phase II wage increases were to be limited to £1 per week plus four percent. In no cases were wage increases to exceed £250 in any year.

These proposals were embodied in what is still, be it noted, the Counter Inflation *Bill.* Yet, because this Bill is stated Government policy, employers have treated it as law and declined to give wage awards exceeding the limit. Furthermore, the Government, in their capacity as employers, have taken the Bill as law; and have been advising all else that increases beyond the £1 plus four percent are illegal. Doubtless, that will eventually be the case: but it is not so yet.

The result of assuming that what will be already is (a sound maxim of equity, I believe) has been industrial turmoil. The gas workers have been going slow, with all the consequences which that entails; so have the train drivers, of with one-day stoppages occasionally thrown in for good measure; worst of all, so have the people who keep our hospitals clean, scrub down wards and supply fresh linen. Now, only emergency patients are being accepted.

All this turmoil has been caused by a Government assuming that its proposals will ultimately have, and retrospectively at that, the force of law.

By concentrating on this aspect of our industrial disputes, I have given a totally false impression of the attitude of the unions. That the Government now rules by decree is treated as of no moment, a mere diversion in the struggle for more cash and higher wages. But how else could it be when the leader of the Trades' Union Congress speaking of the need immediately to castigate the Government policy, said: "I can take immediate action and get approval afterwards".

I heard a news item the other day to the effect that a deadly gas had escaped and was spreading over Auckland. I found that distressing enough. But even more disturbing was the attitude of the media which treated it as a huge joke—the type of trouble that the Colonials will get into. The same attitude was shown towards the Irish troubles until, last week, a bomb exploded outside the Old Bailey. One man was killed and over two hundred injured.