The New Zealand
LAW JOURNAL

17 JULY 1973 No. 13

ON NOT BEING PREPARED

The Police Offences Amendment Act 1954 makes it an offence to sell or give or otherwise dispose of a contraceptive to a child under 16 years of age or to offer to do any of those things. It makes it an offence to instruct or persuade any child under 16 years of age to use any contraceptive or to attempt to do either of those things. It makes it an offence for a child under 16 years of age to procure or attempt to procure a contraceptive, knowing its purpose.

These provisions are currently under attack. Submissions to the Statutes Revision Committee have urged their repeal.

Before deciding whether any particular piece of legislation is to be rescinded or retained it is always wise to examine the circumstances of its original enactment.

In the second week of the month of July in the year 1954 a number of youths appeared in the Lower Hutt Magistrate's Court on various charges of unlawful carnal knowledge. The newspapers gave considerable prominence to accounts of the sexual frolics in the course of which these incidents had taken place. To expose sexual misbehaviour in fearless detail is, of course, entirely consistent with the best traditions of our press. The anxiety of the public, or at least of the leader-writers, was aroused. It was an election year. Something had to be done, and the Prime Minister did it. On 23 July 1954 he appointed a Special Committee.

The committee was required "to inquire into and to report upon conditions and influences that tend to undermine standards of sexual morality of children and adolescents in New Zealand and the extent to which such conditions and influences are operative, and to make recommendations to the Government for positive action by both public and private agencies, or otherwise". In the selection of the members of the committee the temptation to appoint experts was resisted. There was no behavioural scientist. There was no child welfare or probation officer. The chairman was a barrister, the late Dr O. C. Mazengarb, Q.C. There was the President of the New Zealand Junior Chamber of Commerce, which is understood to be as its name implies an organisation made up of young persons who are engaged in trade. There was a clergyman. There was a lady from the Catholic Women's League. It was said at the time that Federated Farmers had been invited to nominate a representative but declined to do so.

A commendable sense of urgency marked the committee's approach to its job. Its report was dated 20 September 1954, a bare two months after its setting up. And indeed the committee had come into existence only just in time, for, so it found, "the situation is a serious one, and something must be done". The committee's task was a distasteful one. "The committee learned of an accumulation of sordid happenings occurring within a short space of time which people who regard themselves as men of the world could scarcely believe possible in this Dominion." Some of the depravity was not even heterosexual. "The committee . . . considers it wise to remind parents that sexual misbehaviour can occur between members of the same sex." But in all this darkness there was one area of light. While the North Island (and possibly Stewart Island, the report is not clear on this point) was plainly a seething mass of corruption "no submissions were presented to the committee that sexual offending by juveniles in the South Island had increased to any alarming extent".

The reasons for the moral decline were not

difficult to discern. "The acceptance of the Christian position cannot fail to promote good conduct in all fields including the relationship between the sexes." But alas, certain scientists had publicly rejected religion based on faith. Not only this but psychologists had propagated the view that the suppression of the natural development of human personality and the misery caused by guilt feelings had an adverse effect on mental health. The melancholy consequence of this scientific irresponsibility was that "many people whose loose behaviour was instinctive rather than inspired now had apologists for their conduct. The moral drift had become moral chaos".

This moral chaos manifested itself in various ways. One was the frequent repetition on radio programmes of recordings of popular song hits "that are capable of misinterpretation", a practice that was undesirable "particularly in times like the present". One was the availability of contraceptives. "The committee has found a strong public demand that contraceptives should not be allowed to get into the hands of children and adolescents. Whatever views may be held concerning the use of contraceptives by older people (married or unmarried) no responsible father or mother would countenance their possession by their young sons and daughters. The Committee is unanimous that adolescents should not buy or have contraceptives in their possession."

The Government acted swiftly on this recommendation. On 27 September 1954 the Police Offences Amendment Bill was introduced. It was not at any stage debated. It had its third reading on 29 September 1954. The House of Representatives rose on 1 October 1954. The General Election (which the Government won, as no doubt it deserved to do) was held on 13 November 1954. It would surely be wrong to suggest that the hurried passage or failure to discuss the Bill were in any way determined by the imminence of the general election. Emergencies demand swift responses. Captious criticism has no place in times of national peril and this is as true of moral peril as of other dangers.

As will have been seen the committee did not spell out precisely why contraceptives and contraceptive instruction should be withheld from those under 16. When the Bill was introduced the Minister in charge contented himself with indicating its contents, again without articulating on what precise grounds the measure was thought to be desirable. No doubt to both the committee and the Government the reason was self-evident. Plainly if young people were deprived of contraceptives they would abstain from sexual intercourse. And if they did not any consequential pregnancy was a punishment not undeserved.

The recommendation as to contraceptives was not the only suggestion made by the Mazengarb committee. It would be unfair to overlook the recommendation to the broadcasting service "that a married woman be immediately appointed to the auditioning panel". Nor should one fail to note the recommendation to the service, that it "ensure that the concept 'crime must never pay' is more prominently featured in crime serials". And one would give a totally false impression of the work of the committee if one did not mention the recommendation that the offence of indecent assault should be altered to catch girls of loose morals who in the darkness of second-rate cinemas and similar venues corrupted upstanding lads by making physical advances of the less subtle kind.

But the Police Offences Amendment Act 1954 is the Mazengarb committee's monument. Those legislators charged with the duty of deciding whether the act should stand or fall would do well to bear in mind that repeal would destroy the memorial to an episode in New Zealand history that neatly typifies the siprit of the time in which it occurred.

D. F. DUGDALE.

COMMENTARY TO HALSBURY'S LAWS

The Rt. Hon. Sir Alexander Turner, having retired from Judicial office, has undertaken the New Zealand General Editorship of the Australian and New Zealand Commentary on *Halsbury's Laws of England* (4th edition) now in the course of publication.

His editorial office is on the second floor of McKenzies Building, 222 Lambton Quay (alternatively, 111 The Terrace), Wellington. He is generally to be found there in the *mornings,* Monday to Friday inclusive, but excepting Thursdays.

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All communications relevant to the Australian and New Zealand Commentary of Halsbury should be addressed c/o Butterworths of New Zealand Ltd., P.O. Box 472, Wellington.

SUMMARY OF RECENT LAW

CRIMINAL LAW — APPEAL IN SUMMARY JURISDICTION AGAINST SENTENCE

Magistrate imposed sentence of two years—Magistrate's jurisdiction maximum three years, Supreme Court maximum 14 years—Supreme Court treated appeal as though Magistrate had refused jurisdiction and substituted sentence of four years—No jurisdiction to impose sentence in excess of three years. Summary Proceedings Act 1957, ss. 44, 121. In this case the respondent was prosecuted under s. 5 (1) (a) of the Narcotics Act 1965. The offence was an indictable offence, but the section contemplates that an offender may be prosecuted summarily. The information was issued in the form prescribed when an offender is prosecuted summarily, and the offender elected to be tried summarily. The offender pleaded guilty and was sentenced to two years' imprisonment. The Crown considered the sentence was inadequate and with the consent of the Solicitor-General, pursuant to s. 115A of the Summary Proceedings Act 1957, appealed. In the Supreme Court the sentence was increased to four years' imprisonment, the appeal being treated as though the Magistrate had declined jurisdiction. The maximum sentence the Magistrate could have given was three years' imprisonment in accordance with s. 7 of the Summary Proceedings Act. *Held,* 1. If a Magistrate has convicted and sentenced an offender the Supreme Court has no jurisdiction under s. 121 (3) (b) (i) to deal with the matter as though the Magistrate had declined jurisdiction under s. 44 (1). 2. Section 121 (1) of the Summary Proceedings Act 1957 does not empower the Supreme Court to re-examine the discretion given to the Magistrate to sentence or not to sentence. 3. Section 121 (6) empowers the Supreme Court to exercise any power that the Court appealed against could have exercised *as a sentencing Court.* (*R.* v. *Bullock* [1964] 1 Q.B. 481; [1963] 3 All E.R. 506, applied.) The sentence of the Supreme Court was quashed and the maximum term of three years' imprisonment substituted therefor. *R.* v. *Barr* (Court of Appeal, Wellington. 9 November; 1 December 1972. Turner P., Richmond and White JJ.).

HUSBAND AND WIFE—DOMESTIC PROCEEDINGS

Separation orders—Discretion to grant or refuse orders—Domestic Proceedings Act 1968, s. 19 (1) (a). Statutes—Interpretation—Functions of Court—Construction by appellate Court—Court delivering single judgment—"Obiter dictum" or "ratio decidendi". This was an application for leave to appeal on a question of law from a decision of the Supreme Court dismissing an appeal against a separation order made in the Magistrate's Court pursuant to s. 19 (1) (a) of the Domestic Proceedings Act 1968. Counsel for the appellant relied heavily on passages in the decision of all the members of the Court in *Myers* v. *Myers* [1972] N.Z.L.R. 476 delivered by Woodhouse J. The judgments in the present case point out that the extracts from the judgment in *Myers* v. *Myers* are not to be read as if they formed part of the text of the Act. *Held,* 1. There may be cases where the *de facto* separation of the spouses is due to the unilateral fault of one spouse which may be an important or decisive factor in considering whether a separation order should be made or not. 2. The passage in *Maffey* v. *Maffey* [1971] N.Z.L.R. 690, 693, line 43—694 line 2, was approved. 3. The Domestic Proceedings Act 1968 imposes no legal duty upon a husband or a wife to take positive steps towards reconciliation and failure to do so is not a bar to the making of a separation order, but the absence of any effort towards reconciliation may or may not be an important factor in any particular case in considering whether to make a separation order. Per Turner P. Where statutes are construed by an appellate Court in a single judgment, there is a danger that a single sentence in the judgment will be construed as *ratio decidendi.* (*Dicta* of Lord Reid in *Chancery Safe Deposit and Offices Co. Ltd.* v. *Inland Revenue Commissioners* [1966] A.C. 85, 110; [1966] 1 All E.R. 1, 10, and *Saunders* v. *Anglia Building Society* [1971] A.C. 1004, 1015; [1970] 3 All E.R. 961, 963, referred to.) *Walker* v. *Walker* (Court of Appeal, Wellington. 10 November; 1 December 1972. Turner P., Richmond and White JJ.).

VALUERS AND VALUATIONS—GOVERNMENT VALUATION

Value of improvements—Method of valuation—Valuation of Land Act 1951, s. 22. This was a case stated by the Supreme Court as a consequence of the Court of Appeal's decision reported *sub nom. McKee* v. *Valuer-General* [1971] N.Z.L.R. 436 wherein it was held that the unimproved value of the properties had been wrongly assessed and consequently was reduced. Throughout those proceedings the capital value of the properties had been fixed by agreement between the parties. The Valuer-General contended that the capital value remained unaltered notwithstanding the alteration of the unimproved value. The objectors were not interested but the Supreme Court was not content to accept the Valuer-General's contention and accordingly stated a case to the Court of Appeal under s. 18 of the Land Valuation Proceedings Act 1948. *Held,* 1. Generally the Court of Appeal is reluctant to deliver purely advisory judgments when no active dispute exists between the parties but under s. 22 of the Valuation of Land Act 1951 when the dispute was remitted to the Supreme Court, that Court, and in turn the Valuer-General, was required to make—"All such consequential alterations as are necessary for the purpose of fixing the capital and (unimproved value) and the value of improvements". 2. The practice of the Land Valuation Court has always been that the sum of the unimproved value and the value of the improvements is equal to the capital value. (*Re Wright's Objection* [1959] N.Z.L.R. 920, 922, referred to). 3. A valuer must disregard improvements when assessing the unimproved value of land, and assess the capital value of land by reference to what it would realise in the open market. The valuer is entitled to assume that the difference between these two values is the value of the improvements and it is

neither necessary nor desirable to attempt to value the improvements individually or collectively. (*Re Wright's Objection (supra)* approved.) 4. The capital value was agreed between the parties on the basis of what the properties would realise on sale and therefore remained unaltered. Had the agreed capital value been arrived at under a misunderstanding or mistake the Supreme Court would have been justified in reconsidering it. *Re 110 Martin Street, Upper Hutt, and 64 Gibbons Street, Upper Hutt* (Court of Appeal, Wellington. 5, 14 December 1972. Turner P., McCarthy and Richmond JJ.).

BILLS BEFORE PARLIAMENT

Admiralty
Air Services Licensing Amendment
Appropriation
Broadcasting Authority Amendment
Commonwealth Games Boycott Indemnity
Companies Amendment
Counties Amendment
Crimes Amendment
Department of Social Welfare Amendment
Domestic Purposes Benefit
Door to Door Sales Amendment
Equal Pay Amendment
Explosives Amendment
Health Amendment
Imprest Supply
Licensing Amendment
Licensing Trusts Amendment
Maori Purposes
Marine Pollution
Ministry of Transport Amendment
Municipal Corporations Amendment
Municipal Corporations Amendment (No. 2)
National Roads Amendment
New Zealand Day
New Zealand Export-Import Corporation
Niue Amendment
Overseas Investment
Plant Varieties
Property Speculation Tax
Public Works Amendment
Recreation and Sport
Rent Appeal
Reserve Bank of New Zealand Amendment
Sale of Liquor Amendment
Sales Tax
Social Security Amendment
State Services Amendment
Summary Proceedings Amendment
Syndicates
Transport Amendment
University of Albany Amendment
Wool Marketing Corporation Amendment

STATUTES ENACTED

Imprest Supply
Judicature Amendment
Moneylenders Amendment
Post Office Amendment
Rates Rebate
Trade and Industry Amendment
Trustee Savings Banks Amendment

REGULATIONS

Regulations Gazetted 27 March to 28 June 1973 are as follows:

Accident Compensation Act Commencement Order 1973 (S.R. 1973/128)
Accident Compensation Motor Vehicle Levies Order 1973 (S.R. 1973/141)
Accident Compensation Motor Vehicle Levies Regulations 1973 (S.R. 1973/142)
Agricultural Chemicals Regulations 1968, Amendment No. 3 (S.R. 1973/148)
Chatham Islands Dues Regulations 1951, Amendment No. 10 (S.R. 1973/125)
Civil Aviation Charges Regulations 1965, Amendment No. 8 (S.R. 1973/126)
Civil Aviation Regulations 1953, Amendment No. 18 (S.R. 1973/158)
Consumer Information (Quantity) Notice 1973 (S.R. 1973/139)
Cremation Regulations 1973 (S.R. 1973/154)
Customs Tariff Amendment Order (No. 3) 1973 (S.R. 1973/132)
Customs Tariff Amendment Order (No. 9) 1973 (S.R. 1973/149)
Customs Tariff Amendment Order (No. 13) 1973 (S.R. 1973/133)
Dairy Board (Means of Determining Prices) Order 1973 (S.R. 1973/138)
Dairy Produce Levy Regulations 1973 (S.R. 1973/143)
Dairy Produce Superannuation Levy Regulations 1973 (S.R. 1973/144)
Diplomatic Privileges (South Pacific Bureau for Economic Co-operation) Order 1973 (S.R. 1973/134).
First Aid (Factories) Regulations 1966, Amendment No. 1 (S.R. 1973/152)
Freshwater Fish Farming Regulations 1972, Amendment No. 1 (S.R. 1973/147)
Game (Packing and Export) Regulations 1967, Amendment No. 2 (S.R. 1973/116)
Meat Levy Regulations 1973 (S.R. 1973/117)
Meat Regulations 1969, Amendment No. 3 (S.R. 1973/118)
Medical Practitioners (Higher Overseas Qualifications) Order 1973 (S.R. 1973/159)
Medical Practitioners (Registration of Specialists) Regulations 1971, Amendment No. 4 (S.R. 1973/160).
Milk Production and Supply Regulations 1973 (S.R. 1973/145)
Milk Regulations 1973 (S.R. 1973/150)
Minimum Wage Order 1937 (S.R. 1973/119)
Motor Vehicle Insurance (Third-Party Risks) Regulations 1963, Amendment No. 11 (S.R. 1973/140).
New Zealand-Australia Free Trade Agreement Order 1973 (S.R. 1973/156)
New Zealand-Australia Free Trade Agreement Order (No. 2) 1973 (S.R. 1973/161)
New Zealand-Australia Free Trade Agreement Order (No. 3) 1973 (S.R. 1973/162)
New Zealand-Australia Free Trade Agreement Order (No. 4) 1973 (S.R. 1973/163)
Post Office Staff Regulations 1951, Amendment No. 28 (S.R. 1973/164)

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CASE AND COMMENT

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

Tort—Negligence—Liability for Negligent Statement

Since the decision of the House of Lords in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465, the principles laid down in that case that in certain circumstances a person can be liable for making negligent statements knowing that they may be relied on to the financial detriment of the person placing reliance on the statement, have been accepted in most Commonwealth jurisdictions, and there is a considerable volume of case law on the subject. (In New Zealand see, in particular, *Jones* v. *Still* [1965] N.Z.L.R. 1071; *Dimond Manufacturing Co. Ltd.* v. *Hamilton* [1969] N.Z.L.R. 609, and *Gordon & Anor.* v. *Moen & Dunsford Ltd.* [1971] N.Z.L.R. 526). The recent judgment of Cooke J. in the Supreme Court in *Day* v. *Ost* (the unreported judgment was delivered on 14 March 1973) may be, however, the first time that the question of liability in this area of negligence has been considered since the Privy Council (on appeal from the High Court of Australia) narrowed the principle to a certain degree in *MLC Assurance Co. Ltd.* v. *Evatt* [1971] A.C. 793.

In the present case a problem arose for Mr Justice Cooke in that the defendant had left for Australia and was in fact unrepresented. This fact involved the learned Judge in having to test the admissibility and the fallibility of some of the plaintiff's evidence.

The plaintiff was a blocklayer and plasterer whose tender for a fixed price in respect of work on a block of flats was accepted by the head contractor. The plaintiff began work, but when he had been paid nothing he decided not to carry on; however, he was subsequently invited by the defendant, the architect employed by the owners, to his office. There the plaintiff was asked by the defendant to resume work, assured that he would receive a progress payment of $1,000 and told that there were ample funds available to meet the balance of his price. Relying on that statement the plaintiff resumed and completed his part of the work. He did in fact receive the sum of $1,000, and his share of the monies available under the Wages Protection and Contractors' Liens Act 1939, but he never received any more.

The plaintiff therefore brought his action for the sums owing to him for the work he had done after he had acted in reliance on the statements made by the defendant. He based his action on the principles enunciated in the *Hedley Byrne* case, as modified by the later *M.L.C.* case. The learned Judge had no difficulty in finding all the necessary ingredients to show the existence of a duty of care proved. There was clearly reliance on statements made by the defendant in his professional capacity as the architect employed on the building project (the making of statements of this type would be part of the normal activity of an architect in the course of his work). It was possible in Mr Justice Cooke's view to see that the defendant himself had a financial interest in the plaintiff's placing reliance on his assurances, since it was clearly in the defendant's interests to get the building finished since his own fees would depend on its completion. The learned Judge therefore held that the plaintiff was entitled to assume that the defendant had the necessary skills and that his advice could be relied upon.

After considering the evidence Cooke J. found that it was proved on the balance of probabilities that if the defendant had checked with reasonable care, he would have found that there were in fact insufficient monies available to pay all the sums owing, and that therefore the defendant's representations amounted to negligence.

In assessing the award of damages the learned Judge followed the principle applied in another *Hedley Byrne* case, namely *W. B. Anderson & Sons Ltd.* v. *Rhodes (Liverpool) Ltd.* [1967] 2 All E.R. 850.

This judgment is an interesting one for a number of reasons, but not least because it shows that, in spite of fears which have been expressed in some quarters, there will still be cases where a defendant will be held liable for making a negligent statement knowing that it will in all probability be relied upon to the plaintiff's financial detriment.

M.A.V.

Evidence — Admissibility — Confidentiality of Records — Law Enforcement Information System

Official consideration is being given to matters involving the confidentiality of public records by two committees, one concerned with

revision of the Statistics Act 1955 and another with the drafting of computer privacy legislation. For this reason the judgment given in the Supreme Court in Wellington on a preliminary point in *Bonner* v. *Karamea Shipping Co. Ltd.* (13 March 1973) is of considerable interest. A subpoena *duces tecum* had been issued to the Assistant District Superintendent, Department of Labour, to give evidence in a personal injuries claim. The Department did not raise any question of Crown privilege but moved for directions as to whether the Labour Department Act 1954, s. 13 (1), prevented such evidence being given. The provision states that:

> "No information obtained by the Minister or by any officer or employee of the Department under any of the powers confered by this Act or by any regulations made under this Act shall be communicated to any person or made use of except for the purposes of this Act."

The Court relied upon two principles in the decision of the Court of Appeal in *R.* v. *Beynon* [1963] N.Z.L.R. 635. First, the fundamental obligation of witnesses to give evidence relevant to the proceedings in Courts of law, unless some recognised privilege applies, is not to be overridden except by clear statutory language. Second, a prohibition of the giving of "information" will not readily be construed as extending to testimony.

The Court distinguished three cases in which the terms and context of the legislation differed materially from s. 13 (1) (*Auckland Hotel and Restaurant Employees' Industrial Union of Workers* v. *Pagni* (1915) 17 G.L.R. 311: *Hiroa Mariu* v. *Hutt Timber and Hardware Co. Ltd.* [1950] N.Z.L.R. 458: *Eggers* v. *E. D. Wilson Construction (Nelson) Ltd.* [1964] N.Z.L.R. 901). *Beynon* requires that questions of the present kind should be approached on the broad postulate that Parliament should not be taken to have meant to shut out relevant evidence unless it has said so either expressly or by fair implication. A reference to the communicating or making use of information should not be interpreted as extending to testimony. The Court specifically stated that *Pagni, Hiroa Mariu* and *Eggers* should be treated as authoritative unless and until expressly overruled by the Court of Appeal.

It may be concluded that if the information stored in the Law Enforcement Information System is to be effectively safeguarded by statute from production in evidence in civil cases, the relevant section of the proposed legislation will have to be drafted in the clearest manner to avoid the presumption in *Beynon*.

F.M.A.

Inadmissible hearsay

As every practitioner realises, the rule against hearsay evidence has almost infinite exceptions (or so it seems). Many times when admission is refused at the front door the desired result can be achieved by simply trying another entrance, since evidence considered inadmissible for one purpose may be admissible for another. In the recent case of *R.* v. *H.* (22 December 1972), however, the Court of Appeal raises some interesting limitations as far as the source of corroborating evidence is concerned. The appeal concerned a situation where inadmissible hearsay in the form of a victim's out-of-Court statements were first refused admission on their own right and then later introduced both as corroboration for another witness's testimony and also as background information that the police gave to the accused before he made a statement.

The appellant had been convicted by a Supreme Court jury of two charges of indecently assaulting his *de facto* daughters. During the trial, the eight-year-old daughter clearly implicated the appellant, but she needed her testimony corroborated due to her age and the nature of the charges. The trial testimony of the six-year-old daughter failed to live up to the Crown's expectations in that it did not sufficiently imply guilty conduct on the appellant's part, so two of her out-of-Court statements to her mother were allowed into evidence and relied on by the Crown as corroboration for the elder daughter's testimony. The statements were not admissible in their own right, either as part of the *res gestae* or as a fresh complaint to the mother, since they both occurred the next day.

Delivering the judgment of the Court, Turner P. initially makes it clear that each of the child victims can corroborate each other as to the alleged assaults and that they are not to be considered accomplices to the acts of the perpetrator. The recent case of *D.P.P.* v. *Hester* [1972] 2 All E.R. 1056 is cited and followed. He then goes on to condemn the method of corroboration in this case, stating that the eight-year-old's testimony, ". . . should not be reinforced by a side-wind introducing supporting material from an inadmissible source". While it cannot be said that the conviction was ultimately quashed for this reason alone, it is plain that the learned justice considers the evidence improperly admitted before the jury.

But, as the Court says, ". . . a more unfortunate incident was to follow", and this was the second way in which the same victim's statements were brought into evidence. A police officer testified concerning an interview he had with the appellant in which he related to the appellant, at his request, statements that both the girls had made about him. In response to these accusations appellant made no incriminating statements, but once again inadmissible hearsay was before the jury and relied on by the Crown for corroboration. If an incriminating statement had been made, then perhaps the full context of the interrogation could have been introduced, but here there was no admission or confession, hence no reason to introduce the accused's reply at all, let alone the accusation that was made to him. Turner P., on behalf of the entire Court, repeats its determination not to allow the police to introduce evidence for the Crown by making accusations to a suspect and then, in spite of no damaging reply, repeating what they said in front of the jury as if it were relevant evidence.

Due to the fact that the trial Judge directed the jury's attention to these improperly admitted statements as possible corroborating evidence, the Court of Appeal felt that it had no option but to quash the conviction and order a new trial, since the inadmissible hearsay was the only real evidence of corroboration.

M.W.D.

Real estate agent — Commission — Contract "subject to finance"—Agent's failure to secure deposit promptly.

McLennan v. *Wolfsohn* (Supreme Court, Wellington, No. M93/72, hearing 5 February 1973) presented a number of interesting questions in connection with the entitlement of a real estate agent to his commission where he commits a breach of duty which causes the vendor no loss.

Vendor and purchaser had entered into an agreement on the standard R.E.I.N.Z. form for the sale and purchase of land. The agreement contained the usual clause appointing plaintiff as vendor's agent "to effectuate such sale". It further provided that deposit of $2,900 had been paid "as is hereby acknowledged" and provided that the balance of the purchase money should be paid in cash, subject to purchaser arranging satisfactory mortgage finance within 21 days. In fact purchaser did not at that stage pay the deposit. Nevertheless, vendor's solicitor wrote to purchaser's solicitor giving insurance particulars, and requesting him to advise as soon as finance was available because vendor was purchasing another property. Purchaser replied advising that he had applied for a building society loan and would advise vendor as soon as anything was heard from the society. Shortly afterwards, being in some financial difficulties because one of his major debtors had defaulted, vendor decided not to continue with the sale and requested purchaser to "treat the contract as at an end". This purchaser refused to do and before the expiration of the 21 day period advised vendor that the necessary finance had been obtained. At about the same time, vendor purported to rescind on the ground that no deposit had been paid as required by the agreement. Purchaser immediately paid the deposit to plaintiff agent, but upon vendor's instructions, the agent returned it to purchaser. The agent now sued vendor for his commission.

Cooke J. affirmed a judgment of W. J. Mitchell Esq., S.M., for plaintiff, finding the agent entitled to his commission. His Honour held commission was payable if:

(1) The agent had procured a binding contract of purchase, on terms within the scope of his authority, to be entered into by a person approved by the vendor; and

(2) The agent had substantially performed his duties.

The first condition was indisputable here, and although the agent had been in breach of his duty in not collecting the deposit at the time the conditional contract was made, no loss had been occasioned by the vendor by such breach. Payment of the deposit had been made some three weeks late when vendor made an issue of it. Thus the agent had substantially performed his duties.

This holding is one of the interesting features of the judgment, but some other matters call for comment:

(1) His Honour confirmed that the somewhat stricter view of the *prima facie* entitlement of a land agent for commission held in England, viz., no commission unless the contract goes to completion or unless vendor wrongfully repudiates, does not obtain in this country. The view in *Latter* v. *Parsons* (1906) 26 N.Z.L.R. 645 that under a simple authority to sell the agent is entitled to his commission as soon as he has procured a person approved by the vendor to enter into a binding contract was confirmed. This aspect will be returned to in (4) below.

(2) It is not clear from the judgment exactly what made the contract "binding" for these

purposes. In *Scott* v. *Rania* [1966] N.Z.L.R. 527, it was held that a similar "subject to finance" clause amounted to a condition precedent to the formation of a binding contract, so that until finance was arranged no binding contract existed. This appears to be the way in which the learned Magistrate approached the matter, and although Cooke J. does not expressly advert to this aspect in his judgment, he does not dissent from the Magistrate's approach. With respect, whatever the validity of criticism levelled against the majority's view in *Scott* v. *Rania* as between vendor and purchaser, the finding that this sort of clause constitutes a condition precedent makes complete sense in the context of a land agent's entitlement to commission. Of course, whether or not a provision amounts to a condition precedent to formation or a condition subsequent or something intermediate is a question of construction of the individual contract, and it is undoubtedly to the credit of the real estate profession in this country that no litigation has been reported on whether the agent is entitled to commission where an originally binding contract is for some reason avoided without vendor's default. The fair view must surely be that no commission ought to be payable unless a binding contract came into existence and was not terminated by the operation of a condition subsequent or by vendor's default: cf. *Blake & Co.* v. *Sohn* [1969] 1 W.L.R. 1412.

(3) Although his Honour did not apparently find it necessary to decide this, it appears clear that the condition precedent was here fulfilled, thereby creating an unconditional contract. Immediately finance was obtained, the contract became unconditional without the need to notify vendor (*Dunsford* v. *Tate,* unreported, July 22 1971, Supreme Court, Auckland; No. A. 861/71). In any event notice was given before vendor's attempted withdrawal for purchaser's failure to pay the deposit. Cooke J. commented that in his view vendor could not insist upon failure to pay the deposit as conduct entitling him to rescind, since vendor had, by encouraging purchaser to find the necessary finance, lulled him into false security concerning the deposit.

(4) The learned Judge's view that the agent owed a duty in respect of the deposit is particularly interesting. The wording of the R.E.I.N.Z. form (which curiously enough, appears more appropriate to the situation where vendor has signed first or where the parties sign in one another's presence) stated that receipt of the deposit was thereby acknowledged. Although no provision expressly imposed any sort of duty on the agent in respect of the deposit, his Honour held in disagreement with the Magistrate that, by the agent's inviting vendor to sign the document in this form, vendor was entitled to assume that the agent had "seen" to the deposit. The deposit was particularly important in a "subject to finance" agreement, since it was an earnest that vendor would make reasonable efforts to raise finance.

The implications of this holding are far-reaching. Presumably the duty refered to is a specific aspect of the agent's general duty to use reasonable care and skill in looking after his principal's interests. If the agent is under this specific duty to collect the deposit, his vendor principal must have a corresponding right to sue him for a breach of this duty which causes vendor loss. It is doubtful whether this is the general understanding of either vendor or agent in a typical transaction such as this one. Vendor looks to purchaser to pay the deposit and does not expect to be able to sue the agent in the event no deposit is paid. His Honour's own reluctance to impose this specific duty on the agent is revealed by the varying ways in which he formulates the nature of the duty. At one juncture, he states that agent's duty is "to collect the deposit or to see that it was paid", normally at the time the conditional contract was executed. At another juncture he says the agent was in breach of duty in not collecting the deposit "or at least informing the vendor that he had not done so and seeking instructions". This last alternative seems more in accord with the parties' understanding of the content of an agent's general duty to use reasonable care and skill in looking after his principal's interests in this sort of transaction, and also more in accord with such authorities as *Herdman* v. *C. Dickinson & Co. Ltd.* [1929] N.Z.L.R. 432 and *Dawson* v. *Braund* [1949] N.Z.L.R. 29 (both cited by his Honour).

These difficulties appear to spring from the desire to have what his Honour calls "a clear, workable rule" based on *Latter* v. *Parsons* (1906) 26 N.Z.L.R. 645 that, given a binding contract secured through his instrumentality an agent is unconcerned with subsequent developments such as non-completion or non-payment of the deposit. *Latter* v. *Parsons,* however, recognised that the agent's commission may well be subject to further special conditions depending upon the true construction of the contract of agency. It should be noted that no Judge in *Latter* v. *Parsons* specifically refers to the question of breach of duty. This exception appears

to have been utilised in New Zealand as a means of steering a *via media* between the express words of *Latter* v. *Parsons* and a reluctance on the part of some Judges to allow commission where a sale has gone off without vendor's default and without any deposit being paid.

Latter v. *Parsons* appears to have been taken too literally on many occasions, including, it is submitted, the instant case. In modern times, very little ought to be required to give rise to the presumed intention of the parties that a condition of the agent's commission is the obtaining of a binding contract *and* a deposit. This is indicated by cases such as *Herdman* v. *C. Dickinson & Co. Ltd.* [1929] N.Z.L.R. 432 and *Columbus* v. *Williamson & Co. Ltd.* [1969] N.Z.L.R. 708. This conclusion can be reached by the following reasoning. An agent's entitlement to commission depends upon the true construction of his written authority as subsequently modified. If the written authority in describing the property for sale refers to a deposit, the parties ought generally be considered to have intended no commission to be payable unless the agent obtains a binding contract *and* the stipulated deposit, *Progressive Agency* v. *Bennett* [1929] N.Z.L.R. 100. This must equally be considered their intention where

(a) there is no original written authority, but the agent's authorisation springs from the normal authority clause in the agreement for sale and purchase and that agreement provides for a deposit to be paid to vendor or his agent: *Columbus* v. *Williamson & Co. Ltd. (supra);* or

(b) the original written authority is silent on the question of deposit, but the subsequent agreement for sale and purchase providing for a deposit can be said to amount to a variation of the terms of the agency contract in requiring payment of the deposit as a precondition to entitlement for commission.

In so far as *Dawson* v. *Braund* [1949] N.Z.L.R. 29 can be said to be in conflict with these propositions, it must be held confined to its own particular facts.

If *McLennan* is viewed in this way, the agent was plainly entitled to succeed. He in fact did receive the deposit, thereby perfecting his inchoate right to commission. His subsequent return of the deposit in accordance with his principal's instructions could not change that position. If vendor defaults after tender of the deposit or before agent has had a reasonable opportunity to collect the deposit or where vendor has not insisted upon prompt payment of the deposit before his default, he must be taken to have waived this precondition to agent's remuneration. He should not be allowed to take advantage of a state of things which his default has produced: *Scott* v. *Rania (supra),* at 534.

(5) His Honour's decision that the breach of the agent's duty, assuming that such a duty existed, did not prevent him succeeding in his action seems plainly right. An agent's breach of duty not involving *mala fides* or loss to his principal ought not to disentitle him from commission: *Harrods Ltd* v. *Lemon* [1931] 2 K.B. 157. The analogy of this situation with the doctrine of substantial performance is particularly apposite.

D.V.

REGULATIONS GAZETTED

(Continued from page 282)

Price Freeze Regulations (No. 2) 1973, Amendment No. 8 (S.R. 1973/127)
Price Freeze Regulations (No. 3) 1973 (S.R. 1973/136)
Public Service Regulations 1964, Amendment No. 6 (S.R. 1973/151)
Public Trust Office Regulations 1958, Amendment No. 7 (S.R. 1973/165)
Rent Review Regulations 1972, Amendment No. 1 (S.R. 1973/152)
Rock Lobster Regulations 1969, Amendment No. 4 (S.R. 1973/131)
Sale of Liquor Regulations 1963, Amendment No. 4 (S.R. 1973/120)
Shipping (Manning of Fishing Boats) Notice 1973 (S.R. 1973/124)
Shipping (Manning of Fishing Boats) Notice 1973, Amendment No. 1 (S.R. 1973/135)
Stabilisation of Prices Regulations 1972, Amendment No. 3 (S.R. 1973/137)
Stabilisation of Prices Regulations 1972, Amendment No. 4 (S.R. 1973/153)
State Services Salary Order (No. 4) 1973 (S.R. 1973/121)
Submarine Cables and Pipelines Protection Order 1973 (S.R. 1973/146)
Therapeutic Drugs (Permitted Sales) Regulations 1972, Amendment No. 2 (S.R. 1973/166)
Timber Industry Training Centre Advisory Committee Regulations 1966, Amendment No. 1 (S.R. 1973/129)
Timber Preservation Regulations 1955, Amendment No. 4 (S.R. 1973/157)
Town and Country Planning Regulations 1960 (Reprint) (S.R. 1973/123)
Traffic Regulations 1956, Amendment No. 25 (S.R. 1973/130)
Transport Amendment Act Commencement Order 1973 (S.R. 1973/167)
Transport Amendment Act Expiry Order 1973 (S.R. 1973/168)
Transport (Urban Passenger Services) Regulations 1973 (S.R. 1973/169)
Workers' Compensation Order 1969, Amendment No. 4 (S.R. 1973/122)

WHITHER JUDICIAL PRECEDENT

By SIR WILFRID SIM, Q.C.

This article is addressed to the subject of the following of Judicial Precedent on which there have been some recent interesting pronouncements; and to pass the topic in review.

It is appropriate to begin the discussion with a quotation from a recent judgment delivered in the English Court of Appeal. The Master of the Rolls, Lord Denning, said:

> "The Judge (of first instance) said that he felt constrained by the law to refuse an injunction. But that is too narrow a view of the principles of law. It has overlooked the fundamental principle that whenever a man has a right, the law should give a remedy. The Latin maxim is *ubi jus ibi remedium*. The principle enables us to step over the trip-wires of previous cases and to bring the law into accord with the needs of today."

This occurs in *Hill* v. *C. A. Parsons Ltd.* [1972] Ch. 305, 316 (C.A.).

There is nothing qualified about this, nothing ambiguous; the "trip wires of previous cases" is an arresting expression, and would in its thoroughness seek to dispel judicial restraint.

The line of thought is, of course, not new as coming from the learned Master of the Rolls, but appears to be an advance from previous pronouncements.

In *Gallie* v. *Lee* [1969] 1 All E.R. 1062, a case concerned with the English Court of Appeal's right to over-rule its own decision, where Lord Justices Russell and Salmon denied the right to do so, but Lord Denning held a contrary view. "It is very very rare that we will go against a previous decision of our own, but if it is clearly shown to be erroneous we should be able to put it right." A set of circumstances, of course, differing a little from the more general occasion when a precedent may be scrapped whichever forum is doing the scrapping, and whichever is being scrapped, as may be thought desirable. The "very very rare" is, however, suggestive of caution.

There is also the recent occasion when the House of Lords had something interesting to say on what were apparently thought the unrestrained statements of the Master of the Rolls. The latter had had occasion to remark in *Broome* v. *Cassell & Co. Ltd.* [1971] 2 All E.R. 187 (C.A.), at p. 202a, "The difficulties presented by *Rookes* v. *Barnard* (the House of Lords judgment in [1964] A.C. 1129) are so great that until the House of Lords has considered the problem again, Judges should direct juries in accordance with the law as it was understood before *Rookes* v. *Barnard*". The other members of the Court (Salmon and Phillimore L.JJ.) seem to have adopted the view so expressed (see pp. 208 c and 214 j). To this their Lordships in *Cassell & Co. Ltd.* v. *Broome* [1972] A.C. 1027; [1972] 1 All E.R. 801, although upholding upon different grounds the Court of Appeal decision, have commented:

> "Decisions of the House of Lords are binding on the Court of Appeal and it is not open to that Court to advise Judges to ignore decisions of the House on the ground that they were decided *per incuriam* or are unworkable". (The citation is from the headnote to the All England Report.)

To return to the arresting citation, first mentioned above, *Hill* v. *C. A. Parsons Ltd.* occurred in the English Court of Appeal where a majority judgment (Denning M.R. and Sachs L.J.) granted an interim injunction to a dismissed servant against employers, upon a wrongful determination of his contract (and thereby in substance would grant specific performance of a contract for personal services), the decision being against what was strongly submitted to be denied by law. The injunction in form was to restrain the employer from acting upon the irregular dismissal, which would still leave the plaintiff an employee *vis-á-vis* his employer. Stamp L.J. dissented in the Court of Appeal, and the majority judgment in that Court reversed Brightman J. as of first instance, who had held that there was no power to grant such relief.

The fundamental facts were that Hill, the dismissed servant, was a good and loyal servant of the defendant; a chartered engineer, aged 63, due to retire in two years' time at 65. His salary was £3,000 a year, and soon to be raised; he was a member of the employers' pension scheme, and to serve his full time had an important bearing on his pension rights. He was served with one month's notice of dismissal, which was ac-

knowledged by all parties to be too short and therefore bad, under any circumstances. The reason for the dismissal, which the employers regretted, was that the plaintiff had refused to comply with a newly added condition of his employment that he, with other employees, should join a certain industrial union, referred to as DATA, which had obtained an agreement with the employers that all members of the technical staff should so join within a certain time.

Collateral considerations entered in but are not of importance for the present examination of essentials. These were fairly lengthy discussion on whether or not an irregular notice can terminate employment, if not accepted by the employee; interesting surmise upon the effect of an Industrial Relations Act which was to come into operation just later than the date of the irregular notice, and which in the particular circumstances would have precluded the above mentioned industrial agreement, and in any case have prevented dismissal on the ground which had precipitated the dismissal. The root of the case was the question of law as to whether the Court had power to make an order which, in substance, would contemplate at the hearing, an order for Specific Performance of a contract for personal services.

Argument and judgments range at length over the whole topic, and in the ultimate line up, emphasise the principle of not ordering an injunction which could involve Specific Performance of such a contract for personal services. The general principle seems to have been accepted on both sides, but *quare* was the list of exceptions closed? If this was the case should the Court now make another exception. The whole crux is reflected in the majority ruling as above cited, and the "trip wires of previous cases" were to go.

Leave to appeal to the House of Lords was refused (see [1972] 1 Ch. 325).

The decision (although a majority only) is binding on the English Court of Appeal and Lower English Courts, unless of course it is vulnerable under one of the grounds formulated by the House of Lords in *Young* v. *Bristol Aeroplane* [1946] A.C. 163; [1946] 1 All E.R. 98, affirming the Court of Appeal as reported in [1944] 1 K.B. 718; [1944] 2 All E.R. 293.

In *Whitwood Chemical Co.* v. *Hardman* [1891] 2 Ch. 416, 426-428, Lindley L.J. had said authoritatively that for an injunction to be granted in the case of an agreement for personal services (which in effect would be specific performance) it was for the plaintiff to show that the case fell within some recognised exception to the general rule that the Court will not decree performance of such a contract. The minority Judge (Stamp L.J.) formulated his objection to finding any exception or authority to make the Order along these lines (at p. 322 of [1972] 1 Ch.):

> "No authority has been cited to us throwing the slightest doubt upon the statement of principle laid down by Lindley L.J. which has always been followed and become deeply embedded in the law. It has been followed again and again, and in *Keetch* v. *London Passenger Board,* 'The Times', September 20, 1946, which bore some likeness to the present case.
>
> "And at p. 325: I, like Wynn Parry J. in *Keetch* v. *London Passenger Transport Board,* would follow the sure and safe guide propounded by Lindley L.J. in *Whitwood Chemical Co.* v. *Hardman.*"

With respect, his Lordship might have added his own previous decision of *Page One Records Ltd.* v. *Britton* [1967] 3 All E.R. 822; [1968] 1 W.L.R. 1157 where an interlocutory injunction was also refused in a theatrical case somewhat similar to the New Zealand case of *Sudholz* v. *Nelson* (cited *infra*) and the order denied *inter alia* because the law was to deny specific performance of contracts for personal service. The judgment of Stamp J. (as he then was) had not been appealed against; although it was the subject of judicial observation in *Denmark Ltd.* v. *Boscobel, etc., Ltd.* [1968] 3 All E.R. 513, 516; [1968] 3 W.L.R. 841 (C.A.), but in a way not affecting the instant issue of decreeing specific performance for personal services.

The question for the legal philosopher could be whether the invocation to boldly disregard "the trip wires of previous cases" represents the birth of new genius in the law, or is it an influence emanating from the general permissiveness (almost now a synonym for disorder) which pervades social life today in various directions, e.g., in the whole field of morals. This is also part of the changing times which are given as the reason or justification for progressive ideas in the law.

A picturesque political or social illustration, near at home, is the change made in Australia, or reported to be imminent, of substituting the colourful "Waltzing Matilda" for the time honoured "God Save the Queen"; dispelling, one might think, the "trip wires" of loyalty and affection for the Throne which have been a sheet anchor in the unity of British people.

The question of how far the Courts should

go in judicial legislation received ventilation recently and considerable guidance from the House of Lords in *Myers* v. *Director of Public Prosecutions* [1965] A.C. 1001; [1964] 2 All E.R. 881. That was a case where the Court of Appeal, on an appeal against a conviction, had approved of the admission of certain evidence as a new exception to the hearsay rule. The House of Lords, however, in a majority judgment (Lords Reid, Morris of Borth-y-Gest, and Lord Hodson, with Lords Pearce and Donovan dissenting) held that the evidence should not have been accepted as admissible but upheld the conviction on the grounds of other adequate evidence which could have justified the verdict. The urge to allow the added exception to the hearsay rule was great, since the controversial evidence was of a force and quality to establish without equivocation that the defence was a lie. Lord Reid, while accepting that the common law must be developed to meet the changing economic conditions and habits of thought, and that he would not be deterred by expressions of opinion in the House of Lords in old cases, affirmed:

> "There are limits to what we can do or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations; that must be left to legislation" (p. 1021 F. of the A.C. Report).

His Lordship had previously made the observation that since the decision of *Sugden* v. *Lord St. Leonards* (1876) 1 P.D. 154 C.A. there appeared to be no case in which any new exception (to the hearsay rule) or any considerable extension of an existing exception had been approved.

Frequent citations can be found where eminent Judges have drawn the line between extending the law judicially and what in effect is judicial legislation. For instance, in *Paisner* v. *Goodrich* [1955] 2 Q.B.D. 362 Romer L.J., in refusing to depart from authority "with regret", added "unfortunate though it be I cannot myself see a legitimate means of escape". Denning L.J. in the same case expressed a dissenting opinion but seemingly based upon the view that the existing case did not come within the quoted precedent. In the above cited *Gallie* v. *Lee* [1969] 1 All E.R. 1062, Russell L.J. at p. 1076 stated "I am a firm believer in a system by which citizens and their advisers can have as much certainty as possible in ordering their affairs."

The House of Lords has itself pronounced authoritatively on the point of following its own decisions. In *Chancery Lane Safe Deposit and Offices Ltd.* v. *Inland Revenue Commissioners* [1966] A.C. 85, 111, we find affirmation of the general principle:

> "This House still regards itself as bound by the rule that it must not reverse or depart from a previous rule of the House."

Then we find its authoritative "Practice Statement (Judicial Precedent)" [1966] 1 W.L.R. 1234.

> "Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> "Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice, and while treating former decisions as normally binding, to depart from a previous decision when it appears right to do so.
>
> "In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.
>
> *"This announcement is not intended to affect the use of precedent elsewhere than in this House."*

The last paragraph does not appear in italics in the direction itself. In a later direction [1971] 2 All E.R. 159 it is directed that when the House is to be invited to depart from one of its own decisions this must be clearly stated in a separate paragraph of the case to which special attention must be drawn.

The subject of specific performance upon a contract for personal services has received attention in New Zealand. In *McBean and Pope (Manawatu) Limited* v. *Coley* [1966] N.Z.L.R. 309, the Court of Appeal there refused an injunction to restrain breach of an express negative covenant when to do so would lead indirectly to a decree of specific performance, or the making of an order that the employee must either remain idle or perform the positive part of the covenant. Neither the judgments nor arguments take notice of the earlier case of *Sudholz* v. *Nelson* [1922] N.Z.L.R. 710, where

Mr Justice Adams also refused an injunction directed to restrain a theatrical artist from performing elsewhere than with the parties with whom he was engaged to perform. The ground for refusal was that there was no negative covenant not to perform elsewhere, and *Lumley* v. *Wagner* 1 de J.M. & G. 604 was applied, "it being clear in that case", commented Adams J., "that the injunction would not have been granted in the absence of the express negative stipulation". The *Sudholz* judgment also affirms that it is as a rule, without exception, that the Court will not, at the instance of either party, decree specific performance of a contract of service. The question of enforcing the positive covenant was not submitted as arguable.

So far as New Zealand Court of Appeal is concerned it has the same freedom to adhere to precedent as it always has had; the above decision of the English Court of Appeal and the judgments with Lord Denning's liberating statement does not bind it in any way. It is also reasonable to expect that the above cited observation of the House of Lords with regard to the use of precedent "elsewhere than in this House" will receive the due respect that such authority must carry. Technically House of Lords judgments are not binding on New Zealand Courts, the Privy Council being our Master. This was emphasised with great clarity in the recent judgment in the Court of Appeal of *Bognuda* v. *Upton & Shearer* [1972] N.Z.L.R. 741 (C.A.). The judgments, however, leave no doubt, also, as to the respect which is, and will be, held for House of Lords pronouncements. A fairly recent illustration of a direct following of the House of Lords by the New Zealand Court of Appeal in preference to a single division decision of its own is *Smith* v. *Wellington Woollen Manufacturing Co. Ltd.* [1956] N.Z.L.R. 491, which followed the House of Lords decision in *British Transport Commission* v. *Gourley* [1955] 3 All E.R. 796 (concerning the taxability of potential earnings compensated in damages), and did not follow its own decision *contra* in *Union Steamship Co. of New Zealand* v. *Ramstad* [1950] N.Z.L.R. 716.

A summary of the New Zealand situation could be that the Court of Appeal has pronounced authoritatively as to the limited grounds upon which it will depart from its own previous decisions. To Privy Council decisions it has in the *Bognuda* case cited *supra* acknowledged its bound acceptance, and the will to adhere to House of Lords decisions. One might surmise with respect that it would be disposed generally to accept the wise observation of Lord Diplock at p. 1131 of *Broome* v. *Cassell & Co.* [1972] A.C. 1027, also cited above:

> "But the judicial system only works if someone is allowed to have the last word, and if that last word, once spoken is loyally accepted."

At least members of the Bar who have the responsibility of advising might hope so.

It has been the writer's privilege to practise at the New Zealand Bar for 60 continuous years (with the exception of five in World War 1) and if it is permissible, to express, with respect, any personal view on the foregoing controversy, it would be to come down firmly with the judicial plea for certainty in the law. At times one has felt (and expressed) the opinion, with a sense of pride, that in New Zealand the administration of justice is as strong and trust-inspiring as it has ever been in its history. The legal system, in other words, is intact; unlike shall we say the financial, or ecclesiastical systems, which appear (to the layman at least) to be in a whirl of confusion.

The writer would hope that the Courts will continue to express law with legitimate expansiveness, adhering to the checks and principles outlined *supra* by the House of Lords. Otherwise let change be by legislative process. The remedy, if one is needed to facilitate and expedite change, is to have that part of the legislative machinery, devoted to change in the law, ready with special facility and discharge. One remembers the New Zealand Law Revision Committee, which, with the excellent co-operation of the Hon. H. G. R. Mason as Chairman and Attorney-General, used to get recommendations through with facility and expedition. The new Law Revision Commission is cumbersome, and seems to involve unnecessary delays in debates and reports and sub-committees. When a strong need for legislative change is indicated by the highest legal minds in the country namely the Judges (and the occasions would not be numerous) there should be little need for discussion and delay. The unfortunate litigant who brought to light the necessity for legal change might on occasion miss out; but the earlier saying in the law still has significance, i.e. that "hard cases make bad law".

FATHER-DAUGHTER INCEST AND THE COURTS

If children are to be taught to love, assert themselves, allow themselves to be overtly dependent and offer nurturance to others, we as parents must love them, assert ourselves with them, let them need us and let ourselves need them.

Yet in loving, asserting ourselves and needing them we ought not exploit them.

Having and rearing children is a liberating experience; with them we have our childhood once more, without total immersion. We see once more the clouds of glory, prepared to enjoy, but not annex the regressive joys paraded before us. To the extent that we have hangups we may exploit our children as they grow, hopefully not too much.

Incest represents an extreme instance of the exploitation of children, not necessarily the worst. This paper concerns the destructive part played by our Courts of law and legal process that sets the seal on destructive aspects of that exploitation. It is not argued that we remove incest from the list of criminal offences—rather that we modify legal procedures for dealing with it so they meet the treatment needs of members of families where incest has occurred. This study concerns the type most usually brought to Court—sexual liaisons between father and daughter.

From 1966 to 1970, Freda Walker, John Horrocks and I interviewed 40 men convicted of incest. Six of these had had intercourse with their sisters, and two provided virtually no data.

The remaining men, 32 in number, were in middle and late middle age, convicted of having intercourse with at least one daughter, stepdaughter or (in two cases) granddaughter. They were serving sentences ranging from six months to six years (see Table 1), some sentences being astonishingly short if we consider the horror in which incest is said to be held. There seemed no consistent relationship between length of sentence and blatancy of exploitation of the victim—which suggests confusion or lack of information in the sentencing Magistrates or Judges.

Their arrival in prison was the end point of a process set going by denunciation by:

1. the victim, or
2. someone the victim had been talking to, or
3. a former victim, usually the elder sister of some current victim, or
4. the offender's wife, or
5. a friend of the family, or
6. a relative not in the primary family.

The usual sequence of events that followed was police prosecution, a guilty plea, suppression of the offender's name, remand for a Probation Officer's report, and a prison sentence. Seldom or never were any fathers who had pleaded guilty remanded for a psychiatric report.

In none of the 32 cases in this series was there any record of a family interview conducted along dynamic lines by any psychiatrist, psychotherapist or social worker. In no case did the Court show any constructive interest in the fortunes of mother or victim other than to remove husband and breadwinner to prison.

Of the 32 men we were able to maintain contact with about 10; the remainder either shunned further interviews as well as they could, or were transferred to other prisons.

In every case we were able to follow up there was continued strain between mother and daughter—as shown by struggles over the daughter's right to go out as she pleased at night, mother's acting out, daughter's acting out, or the mother's refusal to communicate in her letters anything about the daughter despite her husband's requests. We gained the impression that those daughters who left home at this time were behaving promiscuously, living with a man, or soon pregnant.

Now assuming that imprisonment of the father is a proper way of dealing with father-daughter incest, what kind of family would respond best to this treatment? I would suggest a family something like this:

The father of the house is a powerful, craggy-faced patriarch for whom the sexual rewards available in a normal marriage are not enough. By some blend of *droit de seigneur* and legerdemain he gains sexual access to one of his daughters.

Alternatively the father of the house loses access to his wife through death, separation or illness and has guilty resource to a daughter on one or two occasions, and gladly seeks a new mature partner, or welcome the recovery of his wife.

Alternatively the father is of extremely low intelligence, unable to tell the difference between right and wrong, living in squalid and crowded conditions.

The daughter, generally speaking, is horrified and revolted, experiences intense guilt, and soon tells someone what is going on, or spurns her father's advances.

If the wife is living at home, the daughter tells her, and the man's wife confronts and/or denounces him. Father and daughter thereupon guiltily relinquish their association.

Where the father refuses to give up approaching his children, mother and daughter take legal proceedings. He is convicted and imprisoned, expelled from the family in disgrace, and mother and daughter rear the remaining children hand in hand.

In contrast to these entrenched social myths I shall summarise Weiner's (1) review of psychiatric research on father-daughter incest based on studies from the United States, Canada, Britain and France, and New Zealand (2, 3, 4, 5, 6, 7). To help you assess the "low intelligence" hypothesis of incest, some common parameters of incestuous situations are plotted against the tested IQs (Ravens Progressive Matrices, Shipley-Hartford Scale) of the offenders. (Tables 1-5.)

Weiner's findings may be summarised, in part, as follows:

1. Incest happens far more often than is detected or reported. Any inferences made from any study (including this New Zealand one) may have limited generality, as the sample of offenders and victims is limited to convicted men.

2. Though the incestuous father may be influenced by the loss of his wife through illness, separation or death, father-daughter incest usually occurs in the unbroken home following sexual estrangement between husband and wife. (4, 7.)

3. Liaisons between father and daughter are protracted, not merely episodes. (3, 4, 7.)

4. The liaison is made possible and perpetuated by the collusion of at least three family members, mother, father and daughter. (3, 4, 7.)

5. The mothers are typically dependent and infantile women who foist adult responsibilities on their daughters and rush them toward maturity. They usually frustrate their husbands sexually while encouraging father-daughter intimacy. They either tolerate or deny the incestuous liaisons they promote, and seldom report them. (3, 7.)

6. The fathers have typically grown up amidst parental separation or death and have suffered a dearth of warmth and understanding in their developmental years; their incestuous behaviour is usually independent of general criminal tendencies and obvious psychological disturbance; however they are found to be psychosexually immature, and possess a remarkable ability to rationalise their exploitation of their girl children.

7. The daughters are typically precocious in reality mastery and learning, and are eager to assume adult roles. They are gratified by their father's attention and often use the liaison to express hostility to their mothers. They seldom resist or complain about their father's advances, and rarely experience guilt about them. (2, 5, 7.)

Girls who begin incest in adolescence often become promiscuous when the liaison is terminated.

If this account of the incestuous family has generality for the model New Zealand case it becomes urgently necessary for the Courts to reconsider their approach to these fathers and their families. How far can we confirm or disconfirm this account from local data? Let us once more go through the points made by Weiner:

1. *Incidence.* Weiner may be right about the relatively larger number of undetected cases of father-daughter incest, but we should have to approach doctors and Social Welfare Department officers to get useful figures.

2. *Incest usually occurs in the unbroken home . . .* (See Table 2.) In only seven of 32 family situations had the wife left home, six having walked out and one died. One other wife was in hospital for a protracted time when the offence occurred. Twenty-four of the 32 wives were living in the family home.

. . . following sexual estrangement between husband and wife. (See Table 2.) Of these 24 wives, 11 are known to have been sexually estranged from their husbands. The actual number is almost certainly higher. "Wayward", as used in Table 2, signifies that the wives were dominant in the marriage, came and went pretty well as they pleased, and did not feel any obligation to reliably mother their children or stay close to their husbands. Several

husbands adopted an entirely masochistic position *vis a vis* their wives.

3. *Liaisons between father and daughter are protracted, not merely episodes.* Little data. elicited. It was some time before most fathers would talk in detail about their relationships with their daughters. Of six men with whom I talked for several sessions, five had been having intercourse with one or more daughters fairly regularly for over a year. In each case the fathers considered the emotional attachment to be intense, loving and important for them. It is hard to believe that the daughters felt casually about such attachments.

4. *The liaison is made possible and perpetuated by the collusion of at least three family members, mother, father and daughter.* We did not explicitly ask the men in our series, "Did your wife know about this?", so we do not have very clear data.

Table 3 summarises the extent of our knowledge about collusion in this series. *"Yes"* means there was clearly collusion where it is applied to either mothers or daughters.

"Probably yes" as applied to mothers means it was hard for the interviewer to believe the mother did not know of the liaison; applied to daughters it means the interviewer felt that the daughter was likely to have participated in the self-deception necessary to preserve the family "secret".

"Perhaps no" as applied to mothers means the wife has been given the benefit of the doubt, there being no evidence for or against collusion on her part; applied to daughters it means they may have been victims in an innocent sense, e.g. three of the daughters were considered to be intellectually handicapped.

"No" as applied to mothers means that they quite probably were unsuspecting. It is assumed that a bald "no" could not apply to daughters.

5. *The mothers are usually dependent and infantile women, etc.* No data. As in cases of child-beating, women are less likely to be challenged than men, other things being equal. Where incest is concerned, wives are left well alone.

6. *The fathers have typically grown up amidst parental separation or death* . . . Eleven of the 32 men may be said to have had deprived childhoods in the sense that (1) one or both parents died; (2) there were many transient or unreliable parental figures; or (3) they had early experiences of threatened object loss which appear to have left them prey to lifelong fears of abandonment. (See Table 4.)

And have suffered a dearth of warmth and understanding in their developmental years. From Table 4 it may also be seen that a further 15 of the men described their fathers as drunken, assaultive, authoritarian or otherwise threatening, while describing their mothers as gentle, depressed, especially loving or protective.

Each of these men appeared to have spent his childhood as a special son, closely attached to his mother, strongly cross-identified and threatened by the father's violence or intrusiveness in two ways, (1) fearing intrusion and hurt for themselves; and (2) fearing intrusion, hurt and hence object loss on behalf of their mothers. (It may be noted at this point that 19 of these men came from families of six or more children, eight from families of five or less. (See Table 4.) Of the 19 from large families 10 were eldest sons and four youngest sons. For the four remaining men the size of their family of origin was not known.)

. . . *they are found to be psychosexually immature* . . . Without going deeply into the psychopathology which might develop from the circumstances outlined immediately above one might hypothesise (1) primitive fear responses; (2) masochistic identification with the loved mother-victim; (3) identification with the father-aggressor; and (4) diffuse excitability ranging from terror to exaltation in close proximity to either women or men.

. . . *and possess a remarkable ability to rationalise their exploitation of their girl children.* You can say that again.

7. *The daughters are typically precocious in learning and reality mastery, and are eager to assume adult roles.* No data, with one exception where it was clear that any precocity resulted from strong parental and especially maternal pressure to be ever-giving and independent.

Girls who begin incest in adolescence often become promiscuous when the liaison is terminated. This seems to have been true for at least half the daughters we could ask the fathers about, i.e. true for about five daughters. There is no reason to assume that the daughters of men who would not talk further to us, or who were transferred to other prisons fared any better.

We can then talk of a modal incestuous family found in New Zealand that is not unlike families found overseas and dealt with in

a much more enlightened way than ours (e.g. in Canada).

In this family the father is aged between 35 and 50, the daughter involved between 12 and 16 years, there being sometimes two or three of the daughters serially involved. That is, where the first victim protests and begins to resist the father may turn to the next daughter. Sexual intercourse may have been occurring for a year, sometimes for several years.

His wife, who does not appear in Court, is sleeping apart from him; she is likely to be domineering and frustrated, arousing in her husband intense feelings of rage which he represses or takes out in hard work. His passivity and placating behaviour exacerbates her own frustration, often leading to sexual and aggressive acting-out on her part, some times to desertion in favour of another man.

The wife is rejecting of both husband and children and may collude in the offence by (1) forcing "adult" responsibility upon her pre-adolescent and adolescent daughters; (2) reversing the mother-daughter roles; (3) sexually rejecting the husband; and (4) covertly encouraging husband and daughter to come together.

The husband in turn has suffered childhood deprivation either by losing one or both parents or—more often—having spent his infancy and boyhood in a close, overprotected, narcissistic alliance with his mother, whose loss he fears to a violent, intrusive, assaultive Oedipal father.

He has grown up submissive in interpersonal relationships, introverted in style, broodingly quiet and intense, chronically afraid of losing those he loves, but unable to assert himself in an equal way with adults.

He may be extremely angry with his wife, but seeing her essentially as a "mother" propitiates her for fear of abandonment, and avoids intercourse. His sexual and aggressive needs find a safe outlet in immature girls, his daughters. His intense attachment to them appears to also be a means of holding together a family whose loss he also dreads.

At the time of the offending, father and daughter do not appear to feel guilt about their association.

Following exposure, and particularly the removal of the father to prison, all three parties appear to become intensely guilty about the massive damage to the family as a unit, the girl particularly being apparently unable to tolerate the guilt, the loss of the father's love and the emergence of the mother's defensive resentment or rage.

It is suggested that in the light of this objective, if incomplete account of the psychodynamics of incestuous families, priority be given to helping the families stay together and work through the grossly distorted relationships which exists within them.

To those who consider "punishing" the father first, I can only say that (1) overseas experience suggests treatment can bring these situations a long way toward a more adaptive resolution; (2) that removing the father from such families puts the victims still more at risk, e.g. they are likely to become promiscuous, bear children out of wedlock, or establish new family units where object relationships are distorted; (3) that there are often younger children whose adaptation is threatened by the removal of the father, if we accept the view that the wives in these families are likely to be rejecting mothers.

How, then, might we improve our management of these situations? There are improvements which could be made both at the level of medical practitioners and the level of the police.

First, it is suggested that if medical practitioners are consulted about incest within a family unit, they routinely refer the *family* to a psychiatrist for assessment. *All* members of the family known to be involved—husband, wife and daughter or daughters in the case of father-daughter liaisons—should attend. Any other approach will fail to confront the family with its shared responsibility to work toward better family adaptation. If possible arrangements should be made for family treatment. Prosecution should be considered only as a last resort, preferably with the mother taking the initiative.

Second, if the referral point is a complaint to the police (in which case, as I understand the position, the police must prosecute), it is suggested that the father be always remanded to a psychiatric hospital for examination with a legally enforceable requirement that the whole family be interviewed in depth. The aim of such interviews would be to see if a contract for family psychotherapy could be hammered out among family, psychotherapist and probation officer. It is my view that faced with the reality of family disruption many of these families would take the responsibility of entering treatment.

The snags in this approach are: (1) Magistrates have a wide discretion in these matters and could not be relied on to follow this rule

invariably without a change of law. In the nature of things Magistrates see only two or three cases each of this kind during their entire career on the bench, and they guard their freedom to run their Courts their own way very jealously. (2) The conviction of "incest" must be entered against the father's name, setting up a stigma for all the family at the outset of therapy. I personally consider that if charges are to be preferred they should be against both father and mother along the lines of "Wilful disregard for the wellbeing of a child" or "Permitting the sexual exploitation of a minor". (3) The number of authority figures—Magistrate, probation officer and psychotherapist—creates some confusion about who has control over what, and makes for vague contracts.

This kind of contract usually takes the form "that the offender is to receive such psychiatric treatment as the probation officer may from time to time direct". The problem is that the psychiatrist or psychotherapist is in charge of *treatment,* while the probation officer is in charge of the *offender.* The reluctance of psychiatrist and probation officer-Magistrate to get together in the planning stage and clarify who is directing what, who agreeing to what, on whose terms and with what powers tends to weaken the force and usefulness of the best agreement.

In short, any arrangement for family psychotherapy in these cases should retain an element of compulsion—but it should be in a form that will reinforce for the parents their responsibility for their children, and each other.

In this paper I have made some suggestions about the management of disclosed father-daughter incest. It may seem to you that a family problem involving perhaps six men each year (perhaps 30 people when we include wife and children) is of little consequence. I would predict, however, that a shifting of focus from punishment and banishment on the one hand, to treatment with focus on the dependent and loving needs of family members would make it easier for other families so placed to seek treatment.

It would also be a step forward in applying advances in our knowledge of family dynamics.

It is interesting to contemplate the dynamics of father-daughter incest, and examine the patterns of deprivation, revenge and retribution which follow in its wake.

It makes social sense, and is compassionate, to use our insights boldly to modify and challenge patterns of maladaptive behaviour which are not given by the gods, but man-made.

TABLE ONE

IQ level (Ravens Matrices 1938 and Shipley-Hartford Scale) plotted against length of sentence imposed on 32 incestuous fathers.

IQ Level	70-79	80-89	90-99	100-109	110-119	
Sentence in months						
6-12	1	2	—	5	1	9
13-24	4	2	—	3	1	10
25-36	1	1	1	1	2	6
37-48	—	1	2	2	1	6
49+	—	—	—	—	1	1
Total	6	6	3	11	6	32

TABLE TWO

Marital circumstances of incestuous fathers, plotted against IQ level.

(Brief summaries are intended to convey the feeling and style of marital interaction.)

70-79

1. "My wife cares more for the church crowd than me. She's always at the church."
2. Wife described as like his mother (both sound to be constricted personalities). Adores her? therefore his mother also?
3. Wife wayward, took no notice of what her husband said. Offender did not complain much anyway. Says his daughter blackmailed him into intercourse.
4. Separated from his *de facto* wife. His blood pressure 170/60.
5. Describes his wife as "big and masterful". They are sexually estranged.
6. Wife described as a shy, retiring woman. Sexual relationship was not discussed in the interview.

80-89

1. The wife went out to work, against his wishes, and he considers the relationship deteriorated from then on.
2. The wife is said to be an "embittered woman". He lashes out at times in frustration but generally does not show his anger.
3. The wife is wayward, angry and by description clearly hysteric in personal style. Walks out on the family whenever she feels like it. He suppresses his rage, does little about this.
4. His wife left him. No details available.
5. Previously married. Second wife clearly an hysterical character disorder, if anything provoked and maddened by his timid, propitiating response to her goings-on.
6. Wife is frigid and hostile. The patient is dominated by her and says he is sexually impotent. Got drunk often, and neglected his family.

90-99

1. Egotistical and narcissistic little man, nearly two decades older than his wife, "She's socially lower than me". He is presumably sexually estranged from his wife; certainly very hostile to her.
2. Wife was frequently unfaithful—offender was very angry, but did and said nothing.
3. Wayward wife. Husband very tense, and drinking a great deal. No sexual intercourse in the last two years.

100-109

1. Very resentful toward his wife, but terrified of losing her. Used to drink, but stopped after he hit her on one occasion.
2. Wayward, and then unfaithful wife, who left this offender two years ago to live with another man.
3. First wife left him. Second wife in hospital for a tubal ligation. This man grossly denies the offence, is angry and depressed.
4. Wife is wayward and domineering. Patient is angry, but responds in a passively compliant way. Both drink rather heavily.
5. First wife had been unfaithful and divorced him. Second wife in hospital with terminal illness.
6. A yelling, sexually-frustrated hysteric wife to whom the husband responded passively.
7. First wife unfaithful. Second wife unfaithful. Third wife *de facto*. This man committed his offence after the second wife left him "for comfort".
8. Wife was often unfaithful. Husband ex- extremely angry about this, but did nothing.

100-109

9. Husband felt he could not satisfy his wife, and was getting messages from her to that effect. Said he had genital anaesthesia in intercourse. Wife schizoid and inadequate.
10. Deserted by his wife. Husband "kept the family together", i.e. lived with the children.
11. Wife wayward and unfaithful, pregnant to another man. No intercourse between wife and husband for over six months prior to imprisonment.

110-119

1. Wife became pregnant almost at the menopause. Baby Rh negative and wife in hospital for a long time. Husband, who was terrified of abandonment at any time, more or less continually drunk, sexually deprived.
2. Wife left him, complaining of his sexual abnormality. Probably had been sexually involved with these two children many years —as far back as the Oedipal stage.
3. Wife unfaithful, but husband did not complain as he was afraid of losing her. Very angry, but held in his rage.

4. Wayward wife, who refused sexual intercourse.
5. Rejecting and somewhat hysterical wife, who found her husband's timidity, dependence, humility and propitiation repellent to her.
6. Domineering wife who often exploded in rages. Began to refuse intercourse when the husband was drinking. Husband cut down his drinking — it was not clear whether she then offered intercourse.

TABLE THREE

Summary of the evidence that (1) wives and (2) daughters colluded in maintaining the family "secret" for some months.

(1) Wives

Yes (clearly did collude)	3
Probably yes (hard to believe they didn't know)	7
Perhaps no (no information, wife given benefit of doubt)	11
No (wife was quite probably unsuspecting)	11

(2) Daughters

Yes (clearly did collude)	17
Probably yes (daughter likely to have gone along with self-deception necessary to preserve the family secret)	6
Perhaps no (daughters may have been innocent victims)	9
No (presumed not applicable)	

TABLE FOUR

Crucial details of offenders' families of origin, plotted against IQ levels; figures refer to birth order, e.g. 8/8—eighth of eight children.

70-79

2/4 Father described as a violent man and heavy drinker; mother as "nervous" and over-protective.

9/11 (Youngest son). The father was a bullying drunkard. The offender says he adored his mother.

8/8 (Youngest son). The father was harsh and authoritarian; the mother "gentle".

Birth order not known. Father and mother dead. Reared by a kuia whom he could never get on with.

2/12 Father was a quick-tempered man who drank, mother kind and attentive—"the love of his life".

5/9 Father described as "hard-working"; mother "firm".

80-89

6/9 Deprived childhood. He loved his mother very much, suppressed a lot of anger (for reasons unspecified) during his childhood.

1/9 (Oldest son). Reared in a rural area. "Everybody was kind to me".

3/11 Father was a harsh man, mother somewhat gentler.

1/1 Of father's first marriage—he had many parent surrogates in childhood. Was finally 1/6 of all his father's children. (Oldest son).

2/8 (Oldest son). Father was strong, tense and strict. Mother was rather domineering.

7/9 (Youngest son). Father was aged 45 years when the offender was born. Mother clearly schizoid or schizophrenic.

90-99

Birth order not known. Father stern, mother considered to be a borderline depressive woman—overprotective.

1/1 (Only son). Father never mentioned spontaneously. Very attached to mother.

1/2 (Older son). Father a gentle man, mother vigorous and masculine in personal style, kept him in constant fear of abandonment. He more like his father.

100-109

3/10 (Oldest son). Father had weak lungs from war injury; his health deteriorated when the offender was 11-12 years old. Mother was "jolly, well-loved".

1/6 (Oldest son). Little early material. Lifelong anxiety about separations.

2/7 (Oldest son). Regularly "pummelled" by his father. Always loved his mother—"could talk to her".

2/7 (Oldest son). Father a harsh, authoritarian man who was unfaithful to his wife. Mother was huge and over-protective, and pansified him.

4/5 Father was a huge, tense man, afraid of his own strength and rage. Mother was a bitter termagant who ruled her husband.

5/6 Father was a harsh man who saw the boy as a unit of labour. Mother was a "worrier" who related tenderly to her son.

7/7 (Youngest son). His own parents died when he was small. Reared from then on by adoptive parents.

3/3 (Youngest son). Father was a fanatically jealous man. Offender idealised his mother.

100-109

1/14 (Oldest son). Considers he was a self-centred child. No details elicited about his parents.

2/5 (Oldest son). Father a quiet and peace-loving man; mother forthright and stubborn.

1/6 (Oldest son). Father was harsh and authoritarian. Mother quiet and retiring.

(*a*) Prison psychologist, Palmerston North.

110-119

Birth order not known. Had quite a variety of parental figures. Step-father (mother's second marriage, made just before the boy's puberty) was brutal to mother and son.

2/7 (Oldest son). "I was belted often but there were no hidings". Mother much loved by her son.

1/7 (Oldest son). Father was "old fashioned" —mother the stronger of the two parents.

1/1 (Only son). Mother died when he was five years old. Reared by grandparents—father and grandfather died when he was about 15.

Birth order not known. Reared in an orphanage from 18 months to 15 years, spent much time in army and p.o.w. camps thereafter.

JOHN GAMBY(*a*).

A COMPLETE ACCOUNTING SYSTEM FOR SOLICITORS

The author, Mr M. D. Hurley, is a Systems Specialist with Armstrong and Springhall Ltd.

The accounting procedures in any legal office cover three ledgers and associated accounts:

the Trust ledger
the Disbursement or Debtors ledger
the Private or Office ledger
the Mortgage and Rent accounts.

The first two attract all transactions involving clients, while the third is the ledger which attracts all transactions from any source which have to do with the running of the practice.

Over the years various systems have been employed in legal offices throughout New Zealand. These could be said to fall into three main categories.

A system where:

1. A single card for each client should he appear in each ledger, i.e., a client could appear in either the Trust ledger or Disbursement ledger or both. A separate card would be maintained in each ledger. Where a client is involved in both ledgers continual Journal entries are used to switch transactions between ledgers. To establish a history, two cards must be looked at. Two sets of prime entry books are kept.

2. A single card on which both ledgers are maintained. The whole history of transactions is shown on this single card which is divided into the two areas—Trust and Disbursement. The operation of this system is to all intents and purposes the same as the first method except one card is used for all transactions. Two sets of prime entry books are kept.

3. The combining of both ledgers so that the one ledger card for each client for all transactions is maintained. Although the ledger is one, there are two parts to it—Trust and Debtors. The whole system is built around the one set of prime entry books. One cheque book, one receipt book, one Journal, as well as "Bills of Cost", Petty Cash Book, Toll Book, etc.

Let us look more closely at this last system.

Over the years all solicitors have taken meticulous care of Trust money. The Trust ledger has been kept—whether by manual methods or on an accounting machine—on a strict monthly balance system. This care has been brought about, partly because of the fact that Trust money belongs to clients, and partly because the balanced ledger must be provided in list form to the auditors, and the N.Z. Law Society notified within the first 10 working days following the end of the month.

However, the Disbursement ledger has caused a great deal of trouble, and there are many instances where the solicitor does not know the exact state of the ledger. In fact, many solicitors do not balance this ledger at any point of time.

The background accounting procedure is so indefinite in many cases that uncharged disbursements can, and do, run into many hundreds of dollars. This procedural weakness results in substantial amounts being overlooked and therefore unrecovered.

The "Combined System" has been designed to place the Disbursement side of the ledger under the same sound control as that existing on the Trust side. It has been formulated to make the accounting procedures of the office more efficient, to allow the administrative side of the practice to proceed with as little supervision as possible by a partner or partners, so that they are then enabled to fully devote their professional talents to the practice, leaving sound accounting procedures to the administration to safeguard the firm's and clients' money matters.

The basis of the system is centred around the establishment of a Firm account in the Trust ledger. This account is a true trust account in the name of the firm. On the installation of the system a balance is paid into this account by a firm's cheque through the Trust Receipt book. The amount of this balance is established in consultation with the auditor, and then becomes the minimum balance which must show in that account at the end of each day.

Throughout the course of the day's work—posting from the receipt book, the Journal, the Cheque book, the "Bills of Cost", the Petty Cash book, the Toll book, etc.—the balance of any client's account can, and does, move from the Trust side to the Debtor's side depending on the source and amounts of transactions recorded in a client's account. In other words, should a balance go from Trust to the Debtor side, this amount will be advanced by the firm from the firm's account where cash is involved. In theory each individual amount is advanced, but in practice the total of advances in any one posting run is made as one debit entry on the firm's account. Similarly, when a client's balance moves from the Debtors side to Trust, or is reduced on the Debtors side this will be recorded as a recovery for the firm. These recoveries are made from each individual client, but only in total as a credit posting to the firm's account. This procedure applies to the posting from other prime sources except for the "Bills of Cost" and the like. In this case, after the "Bills" have been posted the difference between the total of the "Bills" posted, and the total of Advances made, represents the total of recoveries made from the Trust ledger. This difference is posted as a credit to the Firm's Account.

When all postings from all sources have been completed for that day, the balance showing on the Frm's Account over and above the established minimum balance, represents recoveries made, and should be cleared from the Trust ledger into the firm's own Bank account. This is done by drawing a Trust cheque. However, there is a possibility that, on the rare occasion the nett result of the day's transactions could lead to a balance less than the established minimum. In this case a firm's cheque must be paid into the Trust Bank to bring the balance up to the minimum. Adopting this procedure ensures that only client's money rests in the Trust Bank Account each day, and that money recovered from client's is withdrawn daily for Partnership needs or Investments.

The background procedures are the same—or should be—for any system. Many improvements can be made to improve the flow of data through the system so that where possible the one writing will take care of all the recording necessary. As an example, the Trust cheque, when designed in the appropriate way, can be used both as cheque and receipt. When the cheque is returned to the office signed by the payee and matched with the original "cheque requisition", not only are the audit requirements satisfied, but those "cheque requisitions" still not matched at the end of the month can be used to determine the unpresented cheques for balance purposes. Other benefits, such as automatic notification of unpaid "Bills" for which account rendereds are produced from unpaid copies of Bills retained; automatic production of Fees charged each month; automatic production of Commission taken. Above all, the whole system, from the raising of the original transaction to the final posting of that transaction, the solicitor can be sure that all disbursements are charged, and that all recoverables are, in fact, automatically recovered for the Firm. Both ledgers are strictly kept under tight control daily because the Trust side of the ledger is in controlled balance with the Office side. This is not the pattern generally found to exist, mainly through lack of control features so economically available now.

The system is designed so that those accounts relevant to General or Private ledger, which attract transactions from the Trust and Debtors

ledgers, are maintained at the same time as the figures become available, that is at the end of a Trust posting run. Costs and Commission Accounts, Advances to Trust Account, Sundry Debtors, etc., are all updated from figures produced from the system daily and automatically balanced with the Trust side.

Carrying on the accounting application still further, provision is available to incorporate associated accounting work such as the Mortgage Ledger accounts both General and Nominee Company, as well as the Rent accounts if warranted.

With the introduction of the Mortgage accounts two further Trust Accounts are included. One for the Mortgagee for all Interest payments and one for the Mortgagor, who by arrangement pays by instalments. These instalment payments are held in Trust until Rest Date.

Mortgage debit notes are made out contemporaneously with the machine posting to each Mortgagor's account at any time prior to the Rest date. An extra copy of this debit note is filed alphabetically. The accounts clerk scrutinises at the collection period the relevant client's Trust accounts, and then prepares such General Journal or the Nominee Company Journal entries as may be necessary. These books of prime entry are then posted by machine into the relevant Mortgage accounts.

The posting is done basically similar to any Journal run where the Mortgagor is credited with the whole amount—Interest and Principal —with the Principal only reducing the balance, and the Mortgagee being debited with any principal. Where Interest only is paid the Principal outstanding will remain the same throughout the period of the Mortgage. Where several Mortgagees are involved with the one Mortgage, the interest is calculated on their holding and allocated to them in the Trust ledger, while principal is allocated to them by the solicitor by arrangement or in terms of the Mortgage.

When the system is properly installed, the benefits which accrue to the solicitor can mean that the system will virtually operate without supervisory cost, and will lead to an extremely efficient office where both practice and client benefit. It means that the solicitor can, in most cases, take on increasing work without the need to increase staff.

Savings in costs of administration, and ease with which personnel can be trained to undertake the whole of the legal accounting work are predominant features of the present updated mechanised system.

The Law Society through its accounting and advisory service has programmed the accounting procedures necessary to fully implement a complete mechanised accounting system.

The use of a mechanised system in the legal office is now no longer a luxury; it is a necessity.

CROWN SOLICITOR APPOINTED

The Attorney-General (Dr Finlay) has announced the appointment of Mr V. R. Jamieson as Crown Solicitor at Hamilton in place of Mr K. L. Sandford, who has resigned to become the first chairman of the Accident Compensation Commission. The new Crown Solicitor is a member of the firm Sandford, Jamieson, Almao. He assisted the former Crown Solicitor for several years in the Crown work at Hamilton.

In announcing the appointment Dr Finlay said that following the practice adopted elsewhere in recent years, a small panel of barristers practising in Hamilton will in due course be established who will be briefed from time to time in cases for hearing in the Supreme Court.

Mr Jamieson was born at Christchurch in 1932. He was educated at the Christchurch Boys' High School, the Mt. Albert Grammar School, and at the Canterbury and Victoria Universities. He was admitted as a barrister and solicitor in 1961. After service in the legal division of the Justice Department he joined his present firm in Hamilton and was admitted to partnership in 1965. Mr Jamieson was secretary of a Parliamentary Select Committee on Licensing in 1960, a member of the Criminal Law Committee of the Hamilton Law Society in 1966 and since 1971 has been a member of the Hamilton Legal Aid Committee. He is a circuit steward of the Hamilton East Circuit of the Methodist Church and chairman of the Hamilton Civic Choir. He is married with three children.

CORRESPONDENCE

Justice and Race

Sir,

In issue 8 of your 1973 volume ([1973] N.Z.L.R. 175) you published a Report from the Nelson Race Relations Action Group, headed in part "Justice and Race".

The article made direct reference to racist attitude on behalf of Magistrates and that Maoris receive justice less often than pakehas.

The Minister of Justice dealt with this matter in his address to the Magistrates at the opening of their Conference on 6 April last. This is what he said:

> "That has set me talking about social matters, I want from that to leap to another social question which is this, to give this loud and clear and emphatic refutation to charges that have been made of deliberate racial discrimination by the Magistracy in general or by any of them in particular. I think all such charges have been unwarranted and unworthy as well as being mischievous and I want to take this opportunity as I say, and it is one of the reasons why I agreed to the news media being here because I wanted to say it in public and for you to know that I am doing so and doing so with a great deal of emphasis."

Yours faithfully,

M. B. SCULLY,
Chairman,
Magistrates' Executive.

[As we noted when we published the Report, we consider the language used to be extravagant. The Report, we feel, plainly makes its case: namely, that the adversary system fails to operate effectively when one party is inadequately represented.

It is unfortunate that a short passage in the Report should have received such undue prominence and it was to place the matter in perspective that the Report was published in full. Mr Scully will appreciate that in view of the publicity given to this passage in the Report we could not have published an edited version.

The publishers, of course, as is their invariable practice, do not associate themselves at any time with opinions expressed in the JOURNAL.—Ed.]

Giving More Gold

Sir,

If I may be permitted to add a little more to the store of what is probably looked upon today as useless knowledge set out in my recent letter [1973] N.Z.L.J. 200. I have recently come in to possession of the *Reminiscences of Mr Serjeant Robinson,* which were published in London in 1889. He points out that on the creation of a Serjeant a number of gold rings (about 28) had to be bestowed by him on several persons of different grades, the Queen, the Chancellor, the Judges and possibly the Masters of the Common Pleas. Even the Chief Usher of that Court received one but it dwindled down to a hoop of not much greater breadth than a curtain ring and about one-tenth of its thickness. The Sovereign's ring was a very massive affair nearly an inch long with enamel in the middle and massive gold ends. On the former was engraved a motto specially chosen for the occasion. The Chancellor's and the Judge's rings were about a third of an inch in breadth but not very thick. Serjeant Robinson remarks that it was only the Queen's, the Lord Chancellor's and the Colt's which he personally inspected. The Colt was generally a young professional friend who attended the new Serjeant on his swearing-in and walked in (*pone*) behind his principal and it was said that the term "Colt" was merely a parody on the Latin word.

The new Serjeant knelt before the Chancellor, who pinned on the top of the Serjeant's wig the Coif (consisting of a patch of black silk with a white crimped border). The new Serjeant was thenceforth addressed by the Judges who were Serjeants as "Brother", but the relationship ended there. In Court the Judges were addressed as "My Lord" and in private as "Judge".

The remarks above from Serjeant Robinson's book fortify me in my opinion stated earlier that the phrase 'To give gold' meant no more than to give gold rings to the senior legal officers and the Sovereign.

Yours sincerely,

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Auckland.