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PRIVACY AND THE LAW: 1984 IS NOW

Events during the past few months have thrown into stark relief a number of basic issues concerning the role of law in regulating privacy interests. To name a few we have Watergate and its vast political consequences for the American people, the Lambton Affair in England, Dr Edwards' recently unsuccessful defamation action against *Truth* in Wellington, and the use of an eavesdropping device during an internal investigation by the Auckland police.

Of the common law jurisdictions it is only in the United States and two of the Canadian Provinces (British Columbia and Manitoba) that a general cause of civil liability is recognised for invasions of privacy interests. In Britain several attempts to create such a cause of action by legislation have failed and in New Zealand, after a fair period of study a report has been brought down by a subcommittee of the Law Revision Commission which confines its recommendations to situations of privacy invasion through misuse of computers, though a parliamentary subcommittee is also examining the role of privacy protection in a more general sense.

At first sight this would seem to be a most peculiar point to begin creating the legal framework for protection of privacy interests. But it is consistent with the way in which the common law itself has developed. The common law is quick to recognise and protect against attacks on a man's property interests and physical integrity. Thus where "privacy interests" intersect with property interests attacks on them may be protected. We have such illustrations as appropriation of likeness or trade name for profit where damages and injunctive remedies can be claimed. The highly developed American law of privacy has used as an authoritative basis for its doctrines the English decision of *Gee* v. *Pritchard* (1818) 2 Swan 402 where an injunction was granted to prevent the disclosure of confidential and private material in letters written to the defendant by the plaintiff. The defendant had made copies of the letters before returning them and the court held that an injunction lay to protect the defendant's *property* right in the letters.

In the case of computers the analogy between the common law's concern to protect property interests which may coincide with privacy interests and the New Zealand law reformers' desire to regulate their use is striking. One rationale for computer regulation is simply that existing property and expectation interests would otherwise be threatened.

The common law has not been oblivious to the need for privacy protection but has also shied clear of formulating any general rule granting such protection or even attempting to define what privacy is(*a*). Instead, the judicial technique is to attempt to fit invasions of privacy into other recognisable causes of action. For example the racing tout who stands on a public thoroughfare and clocks the time of race horses visible therefrom on adjoining land is found liable in trespass (*Hickman* v. *Maisey* [1900] 1 Q.B. 752 (C.A.)), the chocolate company displaying a likeness of a well known amateur golfer with a packet of chocolate in his pocket is liable in defamation for the "innuendo" that the player was paid for his likeness (*Tolley* v. *Fry* [1931] A.C. 333), and damages in trespass were awarded where the defendant had secretly installed a microphone over the marital bed of the plaintiff (*Sheen* v. *Clegg* (1961) *London Daily Telegraph* 22 June).

Why does the common law fail to lay down a general principle of protection against invasion of privacy and why do law reformers confine themselves to the finite issue of regulation of data compilation systems?(*b*). There seems to me to be two reasons for this. The first I have already referred to: computer regulation is concerned with protecting interests that are broadly of a proprietary nature, whether actual or anticipated. Data systems regulation is not inconsistent with the common law's property-orientation. There may be a secondary underlying concern based on antipathy towards dossier systems generally. But this in turn may itself be based on the realisation that such systems form the basis of employment and membership in social groups. The second is that "privacy" is a most elusive concept. It has been variously defined as: "the right to be let alone, the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity . . . it is the right to an inviolate personality"(*c*); "it is a zero-relationship between persons or groups in the sense that it is constituted by the absence of interaction or communication or perception in contexts in which such interaction is possible" (*d*); and, in the words of Herbert Marcuse(*e*) "there is an idea of a private space in which man may become and remain himself".

This last, which is not really a definition, is in my view the basis of the privacy concept(*f*). It can be traced through our culture from the works of Shakespeare to the Greek philosophers. It is of critical significance not merely in demarcating the proper limits of interaction between men in society but between men and the state itself. The boundary between the public and private spheres of interest will shift as society alters. In a totalitarian society privacy zones may be minimal or conceivably non-existent vis á vis individuals and the state, but in a democracy such zones are enlarged and may be the foundation of other freedoms that are granted legal protection, e.g. the law of search, seizure and arrest.

The notion of privacy zones or private space is essentially derived from the Greek view of the nature of man. In the words of the New Zealand Law Revision Commission Report: "It is recognised that to preserve the human dignity of the individual and his effective freedom to develop and exercise the full human personality, there must be an area reserved to himself where he can be free from unwanted observations of others"(*g*). When we imprison a person an essential element of the punishment is not merely loss of freedom of movement but privacy-loss.

It is this concern with human dignity that runs through George Orwell's novel *1984*. You will recall that Winstone Smith became conscious of the telescreen with its never-sleeping ear: "They [the Thought Police] could spy on one night and day, but if you kept your head you could still outwit them. With all their cleverness they had never mastered the secret of finding out what another human being was thinking". In his friend Julia's view "they can't get inside you".

But Winstone and Julia had reckoned without the tenacity and technology of the modern state. When captured and taken to the Ministry of Love Winstone realised after his torture that the "Thought Police" had watched him like a beetle under a magnifying glass. There was no physical act, no word spoken aloud, that they had not noticed, *no train of thought that they had not been able to infer.*

In the words of O'Brien, the party-functionary, technocrat and torturer: "We . . . control life . . . we create human nature".

Finally, by being threatened with his phobia of rats Winstone surrendered his "dignity" and betrayed Julia to the state. The state filled his private space. The party triumphed because knowledge is the key to power and successful invasion of a person's private space will enable the invader to manipulate that person.

How then are we to determine what types of privacy invasion should be tolerated by members of society as distinct from those that should not and rendered actionable? The American and Canadian experience shows us that Professor Prosser's "functional approach" is the one likely to be adopted under any statutory test

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(*a*) Other than the United States which also has a constitutional basis for its legal development.

(*b*) The same has happened in Queensland: Invasion of Privacy Act, 1971, No. 50.

(*c*) *Hamilton* v. *Lumberman's Mutual Casualty Co.* (1955) 82, 50, 20, 61 (C.A. Louisiana).

(*d*) Shils, "Privacy: Its Constitution and Vicissitudes", (1966) 31 Law & Contemporary Problems 281.

(*e*) *One Dimensional Man* (1964) 10.

(*f*) It is notable that Dr Morison op. cit. at 13 notes the futility of attempting to "define" privacy. Instead be regards it as a "condition" rather than a right.

(*g*) N.Z. Law Revision Report of Subcommittee on Computer Data Banks and Privacy (April 1973), 68.

based on a tort law system(*h*). He analysed the case law and concluded that there were at least four basic interests that the law in that country protects: intrusions upon the plaintiff's physical seclusion or solitude(*i*), public disclosure of private facts(*j*), publicity which places the plaintiff in a false light(*k*) and appropriation for the defendant's benefit of the plaintiff's name or likeness(*l*).

Apart from the last type of case the test the courts have applied in ascertaining whether or not the interference is actionable is that of "reasonableness". This is an objective and elastic yardstick that merely grants the trier of fact the right to resort to currently accepted standards of morality when examining the defendant's conduct. It is noticeable, also, that the only two general Commonwealth privacy statutes(*m*) granting protection for invasions of privacy use the same test.

In addition to Prosser's categories of actionable invasions of privacy others have emerged as a result of modern technology. These include (1) "Data Surveillance"(*n*). This is the unreasonable use of information collections concerning individuals and groups in the community. In this country the proposed Law Enforcement Information Service Computer has been subjected to considerable criticism by commentators(*o*). Their concern is varied: (i) There is always the possibility that the information may be misclassified, (ii) creating a central storage unit instantly accessible to subscribers facilitates access to a wider group than formerly existed and (iii) information released by a computer system tends to take on the quality of accuracy, whereas in fact it may be entirely misleading, inadequate or based on false data. But at least one thing is clear and has been taken up by the Law Revision Commission in its report on this matter: access to information contained in data banks must be made available to those who appear in them. There must also be the machinery to regulate such data banks and ensure that false information is changed or removed and that abusive practices are stopped(*p*).

(2) "Psychological surveillance (*q*). These include the use of personality testing programmes for job-suitability; the resort to the polygraph in adducing evidence and, more sinister perhaps, the use of narco-analysis in law enforcement situations.

Why am I of the opinion that 1984 is now? I think that Orwell, in depicting the clash between individuals and the super-state, was attempting to portray a basic condition of human needs. So long as basic privacy zones remain unpenetrated man's dignity can overcome external forces threatening him. But penetrate that core zone of privacy and man as an autonomous individual is lost. Today the means of destroying our individual autonomy is in the hands of the state and other groups in the community. As Professor Westin has said(*r*):

> "A technological breakthrough in techniques of physical surveillance now makes it possible for government agents and private persons to penetrate the privacy of homes, offices and vehicles; to survey individuals moving about in public places; and to monitor the basic channels of communication by telephone, telegraph, radio, television and

(*h*) *Privacy*, (1960) 48 California L. Rev. 383.

(*i*) For example, peering through a partly open window watching the occupants of the room engaging in intimacies: Mr Levy's action in the Lambton Affair.

(*j*) See Brandeis and Warren, "The Right to Privacy", (1890) 4 Harv. L. Rev. 193; consider also the actual publication of the "Lambton" facts. A good illustration is *Melvin* v. *Reid* where the producers of a film on the life of a reformed prostitute who had been acquitted of murder were held liable to her. The film "The Red Kimono" was made seven years after the events concerned.

(*k*) *Tolley* v. *Fry, supra,* where the well-known amateur golfer had his amateur status threatened by the misleading advertisement.

(*l*) A classic case is *Krouse* v. *Chrysler Canada Ltd. et al* [1972] 2 O.R. 133 (H. Ct) where damages were awarded to a professional football player for using his likeness in a competition without his permission. A unique feature of this case is that in an earlier motion to strike the action out on the ground that it was advanced on the basis of an invasion of privacy, the motion was refused: *Krouse* v. *Chrysler Canada Ltd. et al* [1970] 3 O.R. 135. But judgment for the plaintiff in the subsequent case was not stated to be based on any privacy principle, other than the already protected interest in protection of a property interest in one's likeness. Krouse was in the habit, as a professional, of selling the use of his likeness for advertising purposes.

(*m*) The British Columbia and Manitoba Acts, *supra.*

(*n*) See Westin, "Science, Privacy and Freedom" (1966) 66 Col. L. Rex. 1003 and the same author's *Privacy and Freedom* (1971); Countryman, "The Diminishing Right to Privacy: The Personal Dossier and the Computer", (1971) 49 Texas L. Rev. 837, reprinted (1971) 23 Harvard Law Bulletin 8.

(*o*) See, for example, Auburn, "A Law Enforcement Information System", [1972] N.Z.L.J. 409; Pope, "The Death Knell of Privacy", [1972] N.Z.L.J. 441.

(*p*) This has been done in the Manitoba Personal Investigations Act, S.M. 1971, C.23.

(*q*) See Westin, op. cit., Ch. 6.

(*r*) Westin, *Privacy and Freedom,* at 365.

data line. Most of the hardware for this physical surveillance is cheap, readily available to the general public, relatively easy to install, and not presently illegal to own. . . ."

The notion of privacy is really a facet of the wider notion of freedom, in the same way as one person's freedom may be another's chains so too one person's privacy may restrict another's freedom of speech or action. It is an entirely relative matter. Although we may condemn the principal actors in the recent Lambton scandal few would quarrel with the view that the newspapers that published the details should have done so. Lambton's position as a high ranking public official involved in matters of state security rendered him particularly vulnerable to pressures that the community could not tolerate. Perhaps the style of publication was offensive but in that case the public interest would override Lambton's own interest in privacy. Perhaps if Lambton had merely been a minor member of the Royal Family whose only public functions were to open bazaars and attend tea-parties his privacy interest would override whatever public interest existed.

There are a number of examples of dignitary interests already receiving legal protection. The law of defamation is merely one: this illustration, as is reflected in recent comment in the news media, reveals too, how relative such a law must be to function properly. Many of the rules of libel and slander were structured by the common law in excess of one hundred and fifty years ago and are inappropriate to modern conditions(*s*). Any statutory protection of privacy interests must be sufficiently elastic to shift with changing social norms.

In the modern western state, such as New Zealand, we are constantly surveyed, assessed and, in the place of a less delicate term directed, by identifiable groups in the community. These include government, commercial interests and labour organisations as well as the news media itself(*t*).

How are we to control or regulate such activities assuming we decide that we should? I suggest that the common law cannot develop as rapidly as modern social conditions demand. We must look to the Legislature for the appropriate remedy. I would also suggest that the most effective way of tackling the matter is to create separate civil and criminal causes of action(*u*). In this way the very worst classes of privacy-invasion involving use of mechanical or electronic devices may be rendered an offence in the same way that physical surveillance by night is such under the Police Offences Act 1927, s. 3 (x), or unauthorised "tapping" is an offence under the Post Office Act(*v*). These and the other classes of privacy-invasion should also give rise to an action for damages—even though the victim can show no real loss in a material sense. As well, data surveillance situations, as has been proposed by the Law Revision Commission, should be brought within the control of an independent agency. I would not, however, confine my recommendation to computer situations since the same basic concerns can be levelled at manually compiled and operated data systems. But, just as Toffler(*w*) perceives the need for the creation of a technological ombudsman to "receive, investigate and act on complaints having to do with the irresponsible application of technology", I suggest the need is most pressing in relation to computerised data surveillance which, after all, is merely one small aspect of the technological explosion.

We have the legislative tools to regulate the privacy breakdown in modern society. Whether or not we do avert the 1984 syndrome, however, will largely depend on the news media, the impact of our moral philosophers and of course our legislators. The law as presently constituted cannot do it.

PETER BURNS(*x*).

(*s*) See, for example, Palmer "Politics and Defamation—A Case of Kiwi Humbug", [1972] N.Z.L.J. 265.

(*t*) In British Columbia, for example, the spur to the privacy legislation arose out of a jurisdictional conflict between rival unions whereby the meetings of one in a hotel were "bugged" by another.

(*u*) Amalgamated legislation has already been proposed in Canada: Federal Protection of Privacy Bill, 3rd sess. 1970-71. Not yet enacted. In his report to the New South Wales Parliament, Dr Morison suggests setting up an administrative system of protection based on a "Privacy Commission". This could be a viable alternative to the tort action if the Commission had the power to award damages.

(*v*) See reg. 61 of the Telephone Regulations 1968 (S.R. 1968/234), made pursuant to s. 112 of the Post Office Act 1959.

(*w*) *Future Shock*, 390-392.

(*x*) Visiting Professor of Law at Otago University.

An Enlightened Monarch—In 1859 Queen Victoria wrote to the Lord Chancellor of the day saying, "The Queen wishes to ask the Lord Chancellor whether no steps can be taken to prevent publicity of the proceedings before the new Divorce Court." Lord Campbell attempted a measure, but failed.

SUMMARY OF RECENT LAW

ATTORNEY-GENERAL—WRITTEN CONSENT TO ACTION

Effect of—Whether consent restricts right of plaintiff to join additional defendant—Whether consent obtained—Australian Industries Preservation Act 1906-1950 (Com), s. 11 (1). High Court—Original jurisdiction—Action only maintainable in that jurisdiction—Whether action barred by State statute of limitation—Whether statute given extended meaning by Commonwealth Judiciary Act to bar such action—Australian Industries Preservation Act 1906-1950 (Com), s. 11 (1); Judiciary Act 1903-1966 (Com), s. 79; Limitation of Actions Act 1936 (SA), s. 37. Issue-estoppel—Whether raised against an assessment in excess of sum originally sued for in subsequent action between same parties—Whether action to recover treble damages pursuant to statute estopped by prior action for damages—Australian Industries Preservation Act 1906-1950 (Com), s. 11 (1). Plaintiff brought an action against the five defendants in the original jurisdiction of the High Court claiming treble damages pursuant to s.11 (1) of the Australian Industries Preservation Act 1906-1950 (Com). It was subsequently revealed that the fourth defendant, Philips Electrical Pty. Ltd., was not the correct defendant but that a related company was, namely Philips Industries Pty. Ltd. Consequently, Philips Industries was substituted by leave in place of Philips Electrical and Philips Industries (hereinafter "the defendant") filed a defence. Such defence claimed, *inter alia,* (1) that the written consent of the Attorney-General had not been obtained prior to the initiation of proceedings against it; (2) that the cause of action was statute barred; and (3) that an action brought by the plaintiff against the defendant in 1965 for breach of contract created an issue-estoppel between the parties to preclude the instant cause of action. As to (1): s. 14 (2) of the Australian Industries Preservation Act which applies to actions brought by persons (including a corporation) other than the Attorney-General (or some person authorised by him) provides that no other proceeding shall be instituted without the written consent of the Attorney-General. The written consent of the Attorney-General had been obtained prior to the institution of the proceedings against the original five defendants on 25 January 1967, and written consent to the joinder of Philips Industries as a defendant was obtained on 24 January 1972, that is, prior to the sealing of the amended writ and statement of claim on 1 March 1972. The defendant's statement of defence by paragraph 26 (to which the plaintiff demurred) challenged the satisfaction of that condition precedent by saying, in effect, that the Attorney-General's consent to institution of proceedings against the defendant (as opposed to Philips Electrical) had not been obtained on 27 January 1967—the date of the institution of the original proceedings prior to the amended writ and statement of claim. The plaintiff's reply (which was the subject of the defendant's demurrer) contended that the consent of the Attorney-General on 24 January 1972 prior to the adding of Philips Industries as a defendant on 1 March 1972 fulfilled the condition precedent enacted by s. 14 (2). As to (2): the defendant claimed by paragraph 27 of the defence that the plaintiff's cause of action accrued prior to 1967 and that the defendant did not become a party until after the service of the amended writ in 1972, and consequently s. 37 of the Limitation of Actions Act 1936 (SA) applied to defeat the plaintiff's claim. This section bars all actions for penalties, damages or sums of money given to any party by any statute unless commenced within two years next after the cause of action accrued. Section 37 was pleaded as a bar on the basis that it is a law of South Australia which is applicable by virtue of s. 79 of the Judiciary Act 1903-1960 (Com). Section 79 provides in substance, *inter alia,* that the laws of each State, including the laws relating to procedure, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all courts exercising federal jurisdiction in that State in all cases to which they are applicable. The plaintiff demurred to this defence on the ground that s. 37 does not apply to proceedings instituted under the Australian Industries Protection Act and that therefore paragraph 27 did not disclose a good defence. As to (3): paragraph 28 of the defence was a plea of issue-estoppel (to which the plaintiff demurred) to preclude the plaintiff from recovering more than $6000 damages on the basis that the plaintiff had already recovered a judgment for $3000 in 1965 against the defendant for breach of contract in 1961, the breach of contract being failure to deliver ballast to the plaintiff, such ballast being that referred to in the plaintiff's instant statement of claim. From this it followed that the plaintiff could not recover more than $6000, which was the difference between three times the amount of damages ascertained in the previous action, that is $9000, and the amount already recovered in that action, namely $3000. *Held,* as to (1): The plaintiff's demurrer to paragraph 26 of the defence would be allowed and the defendant's demurrer to paragraph 2 (b) of the plaintiff's reply would be overruled (*per curiam*) because (per McTiernan and Gibbs, JJ): (i) the effect of the Attorney-General's consent intended by s. 14 (2) of the Australian Industries Preservation Act is to make the plaintiff competent under that section to initiate or set on foot the proceeding; (ii) where the Attorney-General has given his consent pursuant to s. 14 (2) such consent does not operate to restrict a right of the plaintiff to join a party as a defendant, if the Attorney-General has consented to his doing so; (iii) the joinder of a party in conformity with the procedure of the Court may properly be described as instituting the proceeding against such party; (iv) the consent of the Attorney-General first endorsed on a writ by which a proceeding has been commenced remains effective for the purposes of s. 14 (2); (v) a defendant who seeks dismissal of a proceeding on the ground that it was instituted without the consent which s. 14 (2) requires must show that at the time when the proceeding was instituted against him the Attorney-General had not given the required consent; (vi) in this case the Attorney-General had properly applied s. 14 (2) by giving his consent, when he did so, to instituting the present action against the defendant. As to (2): The plaintiff's demurrer to

paragraph 27 of the defence would be allowed (per McTiernan, Walsh and Gibbs JJ; Menzies and Mason JJ dissenting): (i) a proceeding under s. 11 (1) of the Australian Industries Preservation Act is not an action which falls within the terms of s. 37 of the Limitation of Actions Act 1936 (SA); (ii) s. 79 of the Judiciary Act 1903-1966 (Com) does not enable a defendant in an action under s. 11 (1) of the Australian Industries Preservation Act to plead that that action is barred by s. 37 of the Limitation of Actions Act 1936 (SA), as s. 79 does not give such an extended meaning to s. 37 so as to include such actions. As to (3): The plaintiff's demurrer to paragraph 28 of the defence would be allowed (*per curiam*) because (per McTiernan J): (i) the adjudication of a court in a previous action awarding a plaintiff damages does not raise an estoppel against an assessment in excess of that sum; (ii) an action to recover treble damages for injury caused by acts and things which are offences against the Australian Industries Preservation Act was not assessable in the previous action and consequently no issue-estoppel was raised by that previous action. *John Robertson and Co. Ltd. (in liq.)* v. *Philips Industries Pty. Ltd. (Fourth Defendant) and Others* (1973) 1 A.L.R. 21.

BAILMENT—WAREHOUSEMAN

General possessory lien—Common law lien—Custom and usage—Statutory right of lien—Warehousemen's Liens Act 1938 (Qld), ss. 3, 4, 5, 6, 8—Disposal of Uncollected Goods Act of 1967 (Qld), s. 24—Acts Interpretation Act of 1954 (Qld), s. 20 (1) (a). On 23 March 1972 C went into receivership. Prior to that date C was indebted to M in respect of charges for cartage and storage by M of C's goods. In May 1972 M had in its Brisbane warehouse goods the property of C. M, fearing the insolvency of C, refused to deliver up the goods. C sued to recover them. M by way of defence relied upon a general possessory lien over the goods, said to arise either as a matter of common law or by custom and usage and enuring to M in M's capacity as a warehouseman. No claim was made to a lien arising under contract. Evidence was given for M by two experienced warehousemen and by the managing director of M that they had in many cases asserted a general lien on goods deposited with them. This evidence was undisputed. Between 1938 and 1967 claims to a warehouseman's lien were sometimes disputed but never, apparently, litigated. *Held, per totam curiam* (affirming the trial judge), M was not entitled to the lien claimed, because (i) per Menzies and Stephen JJ: At common law there was no general right of warehousemen to a possessory lien. (ii) M could not succeed except by satisfactory proof of some actual custom entitling it to a possessory lien. (*Bock* v. *Gorrissen* (1860) 2 De G., F. & J. 434; *Hatton* v. *Car Maintenance Co. Ltd.* [1915] 1 Ch. 621; [1911-13] All E.R. Rep. 890; *Kilners Ltd.* v. *John Dawson Investment Trust Ltd.* (1935) 35 S.R. (N.S.W.) 274, applied.) (iii) The alleged existence of a usage is a question of fact and like all other customs must be strictly proved: it must be so notorious that everybody in the trade enters into a contract with that usage as an implied term: it must be uniform as well as reasonable and it must have quite as much certainty as the written contract itself. (*Nelson* v. *Dahl* (1879) 12 Ch. D. 568; *Thornley* v. *Tilley* (1925) 36 C.L.R. 1; 31 A.L.R. 291; *Anderson* v. *Wadey* (1899) 20 L.R. (N.S.W.) 412, applied.) (iv) The learned trial Judge had concluded correctly that the evidence of custom was insufficient. (v) Per Gibbs J: If the common law did confer upon a warehouseman a right to a general lien upon chattels deposited with him for all moneys owed to him by the owner of those chattels, which it was not necessary to decide, then such a right was extinguished when the Warehousemen's Liens Act of 1938 (Qld) was enacted; and although that Act was later repealed by s. 24 of the Disposal of Uncollected Goods Act of 1967 (Qld) that repeal did not revive the common law right to a warehouseman's lien, assuming that such right had existed. (vi) Per Gibbs J, agreeing with Stephen J: The burden of proving a custom which is so notorious that everybody in the trade contracts on the basis that it forms a term of the contract is a difficult burden to discharge; and the trial Judge was not shown to be wrong in concluding on the evidence that M failed to discharge that burden of proof. *Majeau Carrying Co. Pty. Ltd.* v. *Coastal Rutile Ltd.* (1973) 1 A.L.R. 1.

CORPORATIONS—CONTRACTS

Incorporated society executing instruments of security under seal—Rules re affixing seal not complied with—Instruments invalid—"Without notice" of irregularity—Property Law Act 1952, s. 5. Real property and chattels real—Property Law Acts—Seal affixed irregularly—Bona fide purchaser for value "without notice" of irregularity—Constructive notice —Property Law Act 1952, s. 5. The validity of four instruments by way of security given by a club incorporated under the Incorporated Societies Act 1908 was challenged. All were under the common seal of the club but none of them had been signed by two members of the committee and countersigned by the secretary as required by the rules. *Held,* 1. From the point of view of the club none of the instruments by way of security was binding because the formalities required by the rules regarding the affixing of the seal had not been observed. 2. The well established rule applicable to incorporated companies that persons contracting with a company are fixed with constructive notice of the contents of its registered documents applies to incorporated societies. (*Progress Advertising (N.Z.) Ltd.* v. *Auckland Licensed Victuallers Union* [1957] N.Z.L.R. 1207, referred to.) 3. The lenders were not entitled to rely on the supposed exercise of powers of the existence of which they were not aware and concerning which they did not enquire at the time of taking the securities. (*Houghton & Co.* v. *Nothard, Lowe & Wills Ltd.* [1927] 1 K.B. 246, 266 and *Rama Corporation Ltd.* v. *Proved Tin & General Investments Ltd.* [1952] 2 Q.B. 147, 149-150; [1952] 1 All E.R. 554, 556, applied.) 4 The expression "without notice" in s. 5 of the Property Law Act 1952 does not mean "without express notice". (*Langley* v. *Delmonte & Patience Ltd.* [1933] N.Z.L.R. 77, 107-108; [1933] G.L.R. 94, 104, applied.) *Broadlands Finance Ltd.* v. *Gisborne Aero Club Inc.* (*In liquidation*); *Broadlands Finance (Waikato) Ltd.* v. *Gisborne Aero Club Inc.* (*In Liquidation*) and *Aero Engine Services Ltd.* (Supreme Court, Gisborne. 4 May; 15 June 1973. Wild CJ).

DAIRY INDUSTRY—SALE OF MILK

Application for permission to sell milk for town supply—Associations of milk producers autonomous. Courts—Milk Authority—No responsibility on milk board to ensure that any particular person has fair opportunity of supplying milk for town supply—Milk

board arbitrator in disputes within milk industry—Association of milk producers autonomous as to membership—Milk Act 1967, ss. 54, 54A, 57. Practice—Extraordinary Remedies—Proceedings commenced for prerogative writ to be treated and disposed of as an application for review—Judicature Amendment Act 1972, s. 6. The plaintiff applied to the New Zealand Milk Board for permission to supply milk to either of two named associations of milk producers, one of which had refused the plaintiff membership, and the other (of which the plaintiff was a member) had refused the plaintiff a share or quota of the milk for town supply required by that company, The two named associations, with two other associations, formed the Auckland Committee of Supply, the supply association for the Auckland Milk District, and the only body through which milk could be provided for town supply in the district by virtue of s. 54 of the Milk Act 1967. The milk board refused to deal with the plaintiff's application to it, taking the view that town supply allocations were outside the board's functions. On on application for review the plaintiff sought to compel the milk board to hear and determine its application. *Held,* 1. Associations of milk producers are autonomous bodies and have the right to decide who shall become members of them. 2. There is no legal or moral responsibility on the milk board to ensure that any particular producer of milk has a fair opportunity of supplying milk for town supply. 3. Under s. 57 of the Milk Act 1967 the Legislature has designated the milk board as an arbitrator to deal with disputes between the various persons or corporations concerned in the milk industry as a whole, except when such dispute should properly be dealt with in a Court of law, or is of a trivial nature not meriting an inquiry. *Brigham's Creek Farms Ltd.* v. *New Zealand Milk Board* (Supreme Court, Auckland. 11, 12, 13 June 1973. Wilson J.).

DEFAMATION—TELEVISION INTERVIEW

Imputation—Fair comment on matter of public interest—Truth and public benefit—Defamation Act 1901-1909 (N.S.W.), s. 6 (1); Defamation Act 1958 (N.S.W.), ss. 5, 16, 17. The plaintiff claimed damages for defamation alleged to have occurred in statements by the defendant Walsh in a television interview broadcast by the defendant Commission. As against the defendant Walsh publication was only proved in the A.C.T., N.S.W. and Victoria, and, as the defendants were sued as joint tortfeasors and not separately, any claim in respect of publication in the remaining States was abandoned. For the same reason, no claim was made in respect of certain preliminary matter in the programme, to which Walsh had not been a party. It was agreed that the defendants would not be liable for publication in any particular jurisdiction, if a defence existed according to the law of that jurisdiction. The claim was based on two defamatory imputations alleged to result from what was said at the interview. The first was that the plaintiff, as Prime Minister, instructed one of his Ministers, Mr Fraser, to issue a false denial of a story that the plaintiff knew to be true. The second was that the plaintiff wanted to discredit his Cabinet colleague, Mr Fraser, and that this involved a suggestion of deceptiveness, in that the plaintiff had seen a story and let it pass but immediately on publication had issued a denial of its truth. *Held,* (i) As to the first imputation, although not particularly serious, the matter was defamatory and not true. The plaintiff was therefore entitled to succeed on this issue as to publication in the A.C.T. and Victoria, where truth was a necessary element in the defence. Under the law of N.S.W., it was a defence if defamatory matter was published in good faith in the course of discussion of some subject of public interest and if any comment on it was fair. It was not necessary that the defamatory matter be true. His Honour considered that, as to publication in N.S.W., this defence succeeded. (ii) As to the second imputation, there were differences in the law of the various jurisdictions. In Victoria, it was a defence if the facts were true and the comment was fair. In the A.C.T., it was also necessary that publication should have been for the public benefit. In N.S.W., statutory codification had not affected the availability of the defence of truth, public benefit and fair comment. His Honour considered that the defamatory matter complained of in respect of this imputation was fair comment on a matter of public interest and that the factual basis for the comment was true. The defence succeeded on this issue as to publication in all jurisdictions. Damages were assessed at $7500 and the defendants were ordered to pay half the plaintiff's costs. (*Gardiner* v. *John Fairfax & Sons Pty. Ltd.* (1942) 42 S.R. (N.S.W.) 171; *Lewis* v. *Daily Telegraph Ltd.* [1964] A.C. 234; [1963] 2 All E.R. 151; *Davis* v. *Shepstone* (1886) 11 App. Cas. 187; [1886-90] All E.R. Rep. 404, considered.) *Gorten* v. *Australian Broadcasting Commission and Walsh* (1973) 1 A.C.T.R. 6.

ESTATE DUTY—WILL APPOINTING EXECUTORS

Agreement to sell interest in property to two of the executors—Deposit paid and balance payable on demand—Subsequent agreement to pay by annual instalments with balance payable on 30 days' written notice—Whether debts should be given discounted value—Whether rights to give notice requiring payment exercisable by executors—Estate Duty Assessment Act 1914-1970 (Com). In August 1969 the deceased, Cyril Howard Robbins, made a will appointing his wife, his daughter, and his son his executors and trustees. The will gave his residuary estate upon trust for his wife during her life and after her death upon trust for all his children, subject to their surviving him for 28 days. It had not been altered or revoked when he died on 1 February 1970. As well as the children named as executors, another daughter and another son took shares in the residuary estate. By one of two agreements dated 19 August 1969, the deceased agreed to sell to his wife and four children in equal shares a half share in certain property at Mandurah, Western Australia, for $65,000 on $20,000 deposit, the balance payable interest free on demand. This agreement stipulated that the expression "the Vendor . . . shall include his executor administrator and transferees". An agreement dated 19 September 1969 varying the terms of payment provided that the balance was to be paid on 30 days' written notice "given by the vendor", and that annual instalments of not less than $600, beginning on 1 September 1970, were to be paid. Failing payment by the due date as notified, interest at seven per cent in respect of the period was to be paid, commencing on the date of expiration of the written notice. The agreement further provided that the purchasers could pay the consideration in full at any time. The second agreement dated 19 August 1969 provided that the deceased would sell the remaining half of the Mandurah property to a company for $65,000, on $6000 deposit, the balance payable as to $4000 on 1 February 1970 and $55,000 by half-yearly instalments of $1250 and the balance on 1 August 1979. The expres-

sion "the Vendor" was given the same meaning as in the other August agreement. Another agreement dated 19 September 1969 recited that the deceased agreed to sell to his wife and to his four children in certain stated proportions: (a) his interest in the second agreement dated 19 August valued at $59,295 being $59,000 balance of principal and $295 interest; and (b) his half share in another property at Mosman Park in Western Australia. The total price for the properties of $73,795, was apportioned as to $59,295 in respect of item (a) and as to $14,500 in respect of item (b). The terms of payment were similar to those outlined in the first of the September agreements. The deceased at no time gave notice to the purchasers requiring payment in respect of either September agreement. The Commissioner assessed values of $45,000 and $73,795 on the two properties for estate duty purposes, and the executors objected, claiming that the values should be $8858 and $16,874, on the ground that the rights to give notice requiring payment were not exercisable by them after the deceased's death. It was agreed that if the executors were not so entitled, the values determined by the Commissioner should stand. The Commissioner contended that as the loan was expressed to be made by the deceased "under his own hand" to the borrowers, a construction that precluded an agent, although not the executors, from calling in the outstanding amounts was warranted and that the debts should therefore be given their face values. *Held,* dismissing the appeal: That (i) the executors could give a notice requiring payment in full of the outstanding amount; (ii) the decisions in *Bray* v. *Federal Commissioner of Taxation* (1968) 117 C.L.R. 349 and *Bone* v. *Commissioner of Stamp Duties (N.S.W.)* [1972] 2 N.S.W.L.R. 651; 3 A.T.R. 392, could be distinguished because in those cases the expression "lender" was not expressed to include "executor administrator and assigns". *Robbins and Others* v. *Federal Commissioner of Taxation* (1973) 1 A.L.R. 13.

INJUNCTION—INTERLOCUTORY INJUNCTION

Payment of mortgage debt in to Court—Power of Court to do complete justice. Mortgages—Power of sale—Duties of mortgagee. Contract of sale by mortgagee—Grounds for restraining completion—Necessity to set sale aside—Real Property Ordinance 1925-1963 (A.C.T.), s. 94 (2). B the registered proprietor of certain land in the A.C.T. under the Real Property Ordinance 1925-1961 (A.C.T.) mortgaged it to A.S.L. and then defaulted. In exercise of its power of sale A.S.L. arranged a public auction. Before the date fixed for the auction XL indicated that it might pay out the mortgage debt which was approximately $120,000 or bid up to $150,000 at the auction, but A.S.L. sold to an agent for Shell by private treaty for $120,000, the reserve fixed for the auction. The sale was not manifestly at an undervalue. A.S.L. did not inform Shell of XL's attitude or make any attempt to induce XL and Shell to compete. Before the sale was completed B and his wife, his guarantor, sued for a declaration that the sale was not a *bona fide* exercise of the power of sale and for consequential relief and deposited in Court securities for the mortgage debt. Section 94 (2) of the Ordinance provides, so far as is relevant: "All sales, contracts, matters and things made, done or executed in pursuance of the last preceding sub-section shall be as valid and effective as if the mortgagor . . . had made, done or executed them." The trial Judge made the declaration sought and enjoined ASL but not Shell from completing the sale. He also ordered that ASL not be entitled to interest upon the mortgage debt after the deposit of the securities except the interest upon the securities. ASL and Shell appealed. *Held, per curiam*: A mortgagee exercising his power of sale has a duty to exercise it in good faith. *Kennedy* v. *De Trafford* [1897] A.C. 180; [1895-9] All E.R. Rep. 408; *Barns* v. *Queensland National Bank Ltd.* (1906) 3 C.L.R. 925; 12 A.L.R. 238; *Pendlebury* v. *Colonial Mutual Life Assurance Society Ltd.* (1912) 13 C.L.R. 676; 18 A.L.R. 124, followed.) *Quaere*: Whether a mortgagee exercising his power of sale also has a duty to take reasonable precautions to obtain a proper price. The appeals would be dismissed because (per Walsh and Mason JJ.; Menzies J. dissenting.) (i) Under the circumstances the mortgagee was in breach of his duty to act in good faith. (ii) Per Walsh and Mason JJ.: No principle by which disputes as to priority between conflicting claims to land are resolved operates to postpone the right of a mortgagor to that of a purchaser from a mortgagee exercising his power of sale. (*Abigail* v. *Lapin* [1934] A.C. 491; [1934] All E.R. Rep. 720; *Latec Investments Ltd.* v. *Hotel Terrigal Ltd. (in Liq.)* (1965) 113 C.L.R. 265; [1966] A.L.R. 775; *Breskvar* v. *Wall* (1971) 46 A.L.J.R. 68; [1972] A.L.R. 205, distinguished.) (iii) Section 94 (2) does not give a purchaser from a mortgagee exercising a power of sale more protection than he would have under the general law. (*Brigers* v. *Orr* (1932) 32 S.R. (N.S.W.) 634; 49 W.N. (N.S.W.) 214, considered.) (iv) An injunction should be granted to restrain Shell, the purchaser from completing the sale. (v) It is not necessary to make an order setting aside the contract of sale before an injunction may be granted to restrain its completion. (vi) The Supreme Court of the A.C.T. has power to make an order for payment of the mortgage debt into Court upon such terms and conditions as it thinks proper in the circumstances to ensure that the object of doing justice between the parties is achieved. Per Walsh J.: A contract by the mortgagee to sell the property is binding, before completion, upon the mortgagor unless it is proved that the mortgagee exercised his power of sale in bad faith. (*Waring (Lord)* v. *London and Manchester Assurance Co. Ltd.* [1935] Ch. 310; [1934] All E.R. Rep. 642; *Property & Bloodstock Ltd.* v. *Emerton* [1968] 1 Ch. 94; [1967] 3 All E.R. 321, approved. *Davis* v. *Taylor* (1948) 48 S.R. (N.S.W.) 514; 65 W.N. (N.S.W.) 209, doubted.) *Forsyth and Another* v. *Blundell and Others; Associated Securities Ltd.* v. *Blundell and Others* (1973) 1 A.L.R. 68.

MURDER—AUTOMATISM

Insanity—When verdict of not guilty on ground of insanity open—Provocation—Lunacy Act 1898 (N.S.W.), s. 65 (2). The accused had caused the death of a young woman with whom he had been intimately associated, by stabbing her many times. He was charged with murder. The defence was that when the death occurred the accused was not conscious or aware of what he was doing, or able at the time to control his actions. The Crown contended that the issue of insanity should be left to the jury. On behalf of the accused it was argued that he was not suffering from a disease of the mind, but that the killing had not been done with intent or voluntarily. The Crown also contended that, as there was evidence of insanity, the issue of "sane automatism" should not be left to the jury. Psychiatrists called for the defence

WELLINGTON POLYTECHNIC
NEW ZEALAND CERTIFICATE IN LAW

The attention of members of the profession is drawn to this new certificate designed to enhance the competence of clerks engaged in the day-to-day work of a legal office, and who wish to be trained as legal executives.

Wellington Polytechnic will hold classes in the following subjects which comprise the third year of a projected five-year programme.

Introduction to the Legal System—3 hours per week

Introduction to Legal Office Practice—1 hour per week

Property Law and Practice—2 hours per week.

Students coming straight from school will be required to produce evidence of an adequate educational standard but mature students with legal office experience will receive substantial exemptions. Subject to demand, classes will be held both during the day and evening and it is hoped that the profession will encourage their staffs to attend by some day-release concessions.

Enrolments will be taken on Friday, 8 February, and classes will begin in the week commencing 18 February.

Further details may be obtained from Mr G. L. Sowerbutts, LL.B., B.Com. or Mr J. J. Hubbard, LL.B. at Wellington Polytechnic, Private Bag, Wellington (Phone 50-559).

deposed that the accused had not known the nature and quality of his acts, and had not known that they were wrong. *Held*: (i) The evidence raised the question of insanity, which should be left to the jury, notwithstanding the objection of counsel for the accused. (ii) There was evidence that the act was not voluntary, on which the jury could find "automatism" without finding that it was attributable to a disease of the mind. (iii) The effect of s. 65 (2) of the Lunacy Act 1898 (N.S.W.) (which governed the case in the A.C.T., and which provided for a special finding by the jury where the accused could be acquitted on the ground of insanity), was that the prosecution must prove that the accused had committed the act charged, not that he had committed a crime. (iv) It was not necessary for insanity to be proved beyond reasonable doubt, but only on the balance of probabilities. Whether there was a degree of provocation which could justify a verdict of manslaughter was left to the jury. (*Bratty* v. *Attorney-General for Northern Ireland* [1961] 3 All E.R. 523; [1963] A.C. 386; *R.* v. *Tsigos* [1964-5] N.S.W.R. 1607; *R.* v. *Cottle* [1958] N.Z.L.R. 999; *Felstead* v. *R.* [1914] A.C. 534; [1914-15] All E.R. Rep. 41; *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462; [1935] All E.R. Rep. 1, considered.) *R.* v. *Pantelic* (1973) 1 A.C.T.R. 1.

TRANSPORT AND TRANSPORT LICENSING—OFFENCES

Dangerous driving—Driving caused by emergency—Transport Act 1962, s. 57 (c). The appellant motor cyclists had driven in excess of the speed limit, passed vehicles in the area of an intersection, and driven in excess of 30 mph without safety helmets. They contended that they had been following two cars, that the rearmost car had turned into the left-hand kerb and that, as they were passing it, it veered out again causing them to accelerate and cross the centre line to avoid an accident. On appeal against convictions for dangerous driving contrary to s. 57 (c) of the Transport Act 1962, *Held,* The offence of dangerous driving is not an absolute offence. In order to convict, the situation viewed objectively, must have been dangerous and there must be fault on the part of the driver, namely driving in a manner below the standard of care or skill of a competent and experienced driver. (*R.* v. *Gosney* [1971] 3 All E.R. 220, applied.) *Transport Ministry* v. *McIntosh*; *Transport Ministry* v. *Leishman* (Supreme Court, Wellington. 18 April 1973. Cooke J.).

CATCHLINES OF RECENT JUDGMENTS

Contract—Action for specific performance—Ostensible authority of solicitor to complete agreement for sale and purchase of land. *Hanham* v. *Moffatt and Others* (Supreme Court, Christchurch. 1973, 13 November. Roper J.).

Husband and Wife—Application under Matrimonial Property Act 1963—Time at which value of assessed interest to be fixed—*Edwards* v. *Edwards* [1970] N.Z.L.R. 858 considered. *Knox* v. *Knox* (Supreme Court, Christchurch. 1973, 15 November. Roper J.).

Nuisance—Fumes causing or aggravating asthma—Liability to the abnormally sensitive. *Murphy* v. *Dominion Yarns and Fabrics Ltd.* (Supreme Court, Christchurch. 1973, 7 November. Roper J.).

Practice—Certiorari and mandamus—Application to quash whole valuation roll—Defences of "exclusive code", "duty of Valuer-General to act judicially", "locus standi" and "delay" considered. *Anderson* v. *Valuer-General* (Supreme Court, Christchurch. 1973, 6 September. Roper J.).

Practice—Local Authorities (Petroleum Tax) Act 1970—Application for review of decisions of Administering Committee of "tax area"—Section 19 and definition of "rate revenue" considered. *Malvern and Ellesmere Counties* v. *Administering Committee of Christchurch Tax Area and Others* (Supreme Court, Christchurch. 1973, 13 November. Roper J.).

Practice—Reciprocal Enforcement of Judgments Act 1934—Application for registration in New Zealand of order for costs made in favour of legally aided party in Victoria—Whether registration contrary to public policy. *Connor* v. *Connor & Another* (Supreme Court, Christchurch. 1973, 7 September. Roper J.).

Practice—Security for costs pursuant to Companies Act 1955, s. 467, where plaintiff in liquidation—Principles applicable. *Belfast Caravans Ltd. (In Liquidation)* v. *Ashby Bergh & Co. Ltd.* (Supreme Court, Christchurch. 1973, 8 November. Roper J.).

Any practitioner wish wishes to obtain a copy of a judgment mentioned above may do so by applying to the Registrar of the appropriate Court.

NEW QUEEN'S COUNSEL

A Palmerston North Barrister, Mr Harold Stewart Lusk, has been appointed Queen's Counsel.

Born at Auckland Mr Lusk received his early education at King's School and King's College. He studied at Merton College, Oxford, from 1937 until the outbreak of war in September 1939, returning there on leave of absence from the Royal New Zealand Air Force in 1945. He graduated Master of Arts at Oxford at the end of the war and was called to the English bar by the Middle Temple early in 1946 when he returned to New Zealand and was admitted as a Barrister and Solicitor at Auckland, and entered the firm of Wallace and McLean.

In 1954 Mr Lusk joined Mr J. A. McBride in partnership at Palmerston North following the elevation of Mr. Justice McGregor to the Supreme Court bench. He practised in partnership until the end of 1970 since when he has practised as a Barrister only.

Mr Lusk is President of the Manawatu District Law Society.

POLICE AND PUBLIC DISORDER

A statement from the Minister of Justice,
DR A. M. FINLAY, Q.C.

Two small but very significant changes in the criminal law will give the Police greater powers to deal with situations that are likely to lead to public disorder. The first is the rewording of section 86 of the Crimes Act dealing with unlawful assemblies. The present old-fashioned language, speaking of "disturbing the peace tumultuously", harked back to an earlier age and for many years this section was little used. Recently it had been pressed into service and successful prosecutions resulted but there was still some uncertainty about the meaning and extent of the language used. The new wording is as follows:

"An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that the persons so assembled—

"(a) Will use violence against persons or property in that neighbourhood or elsewhere; or

"(b) Will, by that assembly, needlessly and without reasonable cause provoke other persons to use violence against persons or property in that neighbourhood:

Provided that no one shall be deemed to provoke other persons needlessly and without reasonable cause by doing or saying anything that he is lawfully entitled to do or say."

This substitutes for the rather nebulous concept "disturbing the peace tumultuously" the plain and simple words "use violence against persons or property".

Paragraph (a) makes it clear that where persons are led by the conduct of an assembly of three or more to have a genuine and reasonable apprehension that the assembly will use violence against persons or property in that neighbourhood or elsewhere, the members of the assembly may be charged with a criminal offence.

Paragraph (b) goes somewhat further and deals with a situation which could be triggered off by the behaviour of an assembly of three or more and the members of that assembly may be apprehended if there is a reasonable fear that they will provoke others to resort to such violence. It may, at first glance, seem odd and even unjust that one group of individuals should be held responsible for what it is feared another may do. I am satisfied however that this provision rests on adequate safeguards and I stress that all of the following essential ingredients must be proved to constitute the offence:

(1) An assembly of three or more with a common intent;
(2) Some outward behaviour on their part causing other persons to fear that certain events will take place;
(3) That this fear is based on reasonable grounds;
(4) That the behaviour involved causes fear that it will *needlessly* and *unreasonably* provoke others to violence.

An additional safeguard is contained in a proviso which says that no one shall be deemed to provoke other persons needlessly and without reasonable cause if all he is doing is something that he is lawfully entitled to do or say. This specifically acknowledges the right of peaceful and orderly demonstration.

These provisions will strengthen the powers of the Police to deal with some ugly situations which have recently become all too familiar in our cities. Some typical examples are:

(1) Those who set out to invade and disrupt other areas or descend on and take over restaurants;
(2) Groups taking over hotel bars, intimidating staff and other patrons;
(3) Gang clashes and retaliations;
(4) Organised gate-crashing at private parties.

A further addition to the criminal law results from adding two new paragraphs to section 186 of the Summary Proceedings Act. This section enables people to be bound over to keep the peace and deals with three categories of offenders. The first two are normally invoked in home and adjoining-neighbour situations and are designed to deal more with nuisances than

really criminal situations. The third portion deals with threats to commit serious crimes and to these categories have now been added the offences of wounding with intent to do grievous bodily harm, injuring with intent, and common assault. The important one is the last one and those who publicly threaten to act in such a way which if carried out would constitute an assault, may be called upon to show cause why they should not be bound over, with or without sureties, to keep the peace. This means, in effect, that their conduct could be examined and if a Court was satisfied that the commission of an assault or other specified crime had been threatened the individual could solemnly be warned against the consequences of carrying out the threat and put on an additional penalty if he did in fact do so.

LAWSON LAWYERS

Dr R. G. Lawson writes from Britain

As a relief from the current strike by the electricians, not to mention the overtime ban by the miners, the wedding of Annanmark came as a welcome relief. The prospect of a long bleak and very dark winter seemed not so bad when attention could wander over a splendid scene of pageantry and tear-jerking, old-fashioned emotion.

But you needed a very strong stomach. The media flogged Annanmark endlessly; the press fought with itself to dredge up the most pointless trivia yet dreamt up by the human race (did you know that Mark could ride before he could walk, or that Anne could ride before she could walk?). When the wedding came, the emotion spent was probably as much relief as anything else: "as far away as New Zealand", the announcer chirrupped, "they're watching it live". The day also coincided with the declaration of a State of Emergency to combat the energy crisis.

Well, that, I thought, was that, until Charles bites the dust. Then, I read the headline "Mark lays down the law". Gloomily supposing this meant the obvious, I ploughed on. But it was not Phillips *M.* but Mark, Sir Robert, Britain's top cop. He had said that there were some lawyers who were worse than the crimmos they represented, and who employed crooked tactics to secure an acquittal.

A predictable response followed. "Names" demanded the Bar Association; "Libellous", said the Legal Association, forgetting what every fresher knows, that you (or, as Annanmark would say, 'one') cannot libel a group. There were few who were heard in Sir Robert's defence.

Yet the legal profession is under fire nowadays. In part, it stems from the grisly stories of Watergate, where John Mitchell and Herbert Kalmbach were ever without clean hands. In greater part, it derives from the wicked expense involved in seeing the most honest of lawyers. Again, we do have our bent lawyers, that is so; come to that, two policemen have recently been convicted of perjury.

But, whatever the cause, it cannot be denied that the legal profession and the general public are becoming ever more estranged. There has been of late, as I have said before, an abundance of meritorious consumer legislation. Yet few members of the public know about it, simply because a question to a lawyer is the remotest thing imaginable in the mind of an ordinary layman.

To get round this, the Minister of Consumer Affairs has said that advice centres will be set up in every High Street in the country. But what greater indictment could there be of the legal profession's total failure in its responsibility to the public? Worse is to come: the Fair Trading Act, passed a few months ago, expressly excludes the legal profession from its scope. All must be fair, but not the lawyers.

A prescient character in a Shakespeare play once urged that "the first thing we must do is kill all the lawyers". I would rather nationalise them, like the medical profession. A National Health Service seems now as natural as the rising sun, so why not a National Legal Service as well? It only requires an Act of Parliament. But then Parliaments are manned by lawyers; it would never see the light of day. If it did, it would rapidly be evaded, avoided and interpreted out of existence. But something must be done, otherwise our efforts in the Statute Book will, as some Judge once said, be "but writing in water".

DISCOVERY—A RE-EXAMINATION

The law does not in general require a party to disclose to the Court or the other party, evidence which is adverse to his case or helpful to his opponent(*a*). This characteristic feature of the adversary system has, of course, been considerably eroded by the rules relating to the discovery and inspection of documents and the delivery of interrogatories. Nonetheless it still colours the attitudes of the Courts in this area of the law. The common law has always regarded the discovery rules as unfortunate Chancery aberrations whose impact on a basically adversary system is to be kept to a minimum. There have been few attempts to isolate and examine the policy objectives underlying these or to inquire whether they adequately fulfil these objectives.

It is surely the function of any rules of procedure to limit the areas of conflict between the parties and to lessen the element of surprise at the trial. Again, by enabling a party to assess the strength of his opponent's case and the weaknesses of his own, settlements may be encouraged. At the very least a great deal of expensive Court time may be saved. If one accepts that the principle of non-disclosure is far from inviolate surely it is incumbent on the Courts to see that it is violated to good effect. How effective then are the existing discovery rules and how may they be strengthened?

Interrogatories

The present rules suffer from two limitations: Only another party to the action may be interrogated(*b*) and the interrogatories must be delivered and answered in writing.

So far as the first requirement is concerned, since a party may be required to answer potentially embarrassing questions before trial there seems no reason why his potential witnesses should be placed in a bettetr position. There is, after all, no property in a witness. Anyone can be subpoenaed to give evidence. Why then is compulsion before trial more unfair than compulsion at the trial itself? Indeed witnesses may even benefit from such a procedure. A preliminary examination may well indicate that their attendance at the trial would be pointless.

As to the second requirement, it is difficult to see any justification for it other than a historical one. (In Chancery all the proceedings were written. The examination of witnesses was usually carried out by a Court officer on the basis of questions submitted to him by the parties(*c*).)

Once the adversary system is tampered with by permitting pre-trial interrogation then that interrogation should be as effective as possible. This requires that it should be oral if the questioning party so desires(*d*). Unless drawn with superhuman skill, written interrogatories are easily evaded and ambiguities or evasions which could be clarified immediately at pre-trial examination can only be remedied by the expensive and time-consuming process of obtaining an order for further interrogatories or for an examination before the Registrar under R. 159. Indeed, given the existence of this rule which permit the oral examination of a party interrogated who fails to answer or answers insufficiently, there appears to be no compelling reason why the interrogation should not be oral in the first place.

An interesting example of an attempt to overcome these limitations is provided by the American *Federal Rules of Civil Procedure* which permit the taking of oral depositions before trial(*e*). Any person may be examined, not merely a party. Nor is it necessary to obtain the leave of the Court(*f*). The depositions are normally taken before a notary or Court appointed officer(*g*) but the parties are free to agree that they may be taken before any other

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(*a*) Unless the matter is heard *ex parte*. See *United Peoples Organisation* v. *Rakino Farms Ltd.* [1966] N.Z.L.R. 737.

(*b*) Or its officers in the case of a corporation. Code of Civil Procedure, R. 157. In fact only an "opposing" party may be interrogated, i.e., one between whom and the applicant there is some right to be adjusted. *Molloy* v. *Kilby* (1881) 15 Q.D. 162.

(*c*) Ayckbourn *"The New Chancery Practice"* London 1846 at p. 129.

(*d*) He may of course prefer to interrogate in writing since it will probably be cheaper. This at least seems to be the North American experience, see: *Grierson* v. *Osbourne Stadium Ltd.* [1933] 3 D.L.R. 598 and Note 75 Harv. L. Rev. 940 at 953.

(*e*) See R. 26. Similar rules are in force in many of the States and in some Canadian jurisdictions.

(*f*) Unless the deposition is sought to be taken within 20 days of the commencement of the action.

(*g*) Ibid., R. 28.

person or even that there be no presiding officer(*h*). Nor does it matter that the witness's answer would be inadmissible at the trial as insufficiently relevant. It is enough that the answer is "reasonably calculated to lead to the discovery of admissible evidence"(*i*). Clearly the rule is designed to permit questions which would be disallowed as "fishing" by New Zealand Courts, a term which seems incapable of precise definition and which is, in any case, based upon a distinction which is imprecise to say the least viz: those questions which are directed to ascertaining the facts on which an opponent bases his case (which are permissible) and those designed merely to discover "evidence of those facts" (which are forbidden)(*j*). In most of the cases where interrogatories have been struck out on this ground the real objection can be shown to lie elsewhere(*k*). The questions are often designed to discover the opponent's tactics at the trial(*l*). (A course which would not be permissible even under the American rules. Such questions do not relate to evidence at all.) Or they may seek the names of potential witnesses(*m*). Why such information should be kept from a party is not clear since he is free to interview any such witness. In any case exclusion seems to lead to over subtle distinctions. Thus it is permissible to ask "was X present?" at a particular transaction but not "who was present?". Often the questions are insufficiently precise(*n*), or require unnecessarily prolix answers(*o*), or are rhetorical in nature(*p*). These are matters of some importance if the interrogatories are written but are of little moment at an oral examination where presumably the question can be rephrased.

In any case, if a party objected that a question was unfair recourse could then be had to the Court. It is not suggested that this form of discovery be any less a discretionary remedy than any other. Answers which were incriminating, privileged or against the public interest need be no more admissible than they are now. Indeed, the *Federal Rules* explicitly provide for this contingency. It should not however be assumed that the criteria of admissibility at the trial and at the pre-trial examination should be the same. The questioning at the latter is both wider and narrower in scope than at the trial itself. Thus while "fishing" questions are normally permitted, questions going merely to credit are not(*q*).

Discovery and Production of Documents

The practice in New Zealand is that only documents which are or have been in the possession or power of a party can be discovered and the procedure is not available against a person who is neither a party nor can be made one at some future date(*r*). The Courts have resisted any extension of the rule to non parties, an attitude which has found expression in the recent case of *Norwich Pharmacal Ltd.* v. *Commissioners of Customs and Excise* (*s*). The owners of a drug patent sought to obtain the names of persons importing the drug in alleged infringement of the patent. They brought an action against the Commissioners claiming an order that they disclose the names of these importers so that proceedings might be taken against them. Unless they could obtain these names their patent was well nigh unenforceable since the drug was used in such small quantities as to be virtually untraceable.

They were unable to satisfy the Court of Appeal that the Commissioners were themselves infringers and so fell back on the old Chancery action for discovery. (They could not serve a *subpoena duces tecum* on the Commissioners until they commenced an action against the infringers which, of course, they could not do without the names.) The case clearly demonstrates the need for some form of discovery against a "mere witness". Yet the Court refused to make any such order, taking the view that:

> "It would be intolerable if an innocent person—without any interest in the case—were to be subjected to an action in Chancery

(*h*) Ibid., R. 29.
(*i*) See for example Hickman *v.* Taylor (1947) 329 U.S. 495. This is not so in Canada where the issues are confined to those raised by the pleadings: *St. Regis Timber Co.* v. *Lake Logging Co.* [1947] 3 D.L.R. 56; *Royal Bank* v. *Halo* (1961) 36 W.W.R. 690.
(*j*) *Attorney-General* v. *Gaskill* (1882) 20 Ch. D. 529.
(*k*) See the cases cited in *Sim's Practice and Procedure,* Vol. I, p. 124.
(*l*) See *Lever Bros.* v. *Associated Newspapers* [1907] 2 K.B. 626; *Canning* v. *Wilkie* (1913) 32 N.Z.L.R. 641.
(*m*) *Knapp* v. *Harvey* [1911] 2 K.B. 725.
(*n*) This seems to be the real basis of the decision in *Thompson* v. *Scheib* [1952] N.Z.L.R. 665.
(*o*) A party cannot be asked to narrate the details of a conversation though he can be asked to give a summary.
(*p*) As in *Hooton* v. *Dalby* [1907] 8 K.B. at p. 20.
(*q*) This is the Canadian position. See *Cook* v. *Cook* [1947] 2 D.L.R. 900.
(*r*) Nor will joinder for the purpose of obtaining discovery and nothing else be permitted.
(*s*) [1972] 3 All E.R. 813 (C.A.).

simply to get papers or information out of him"(*t*).

This is beside the point since such a person can be compelled to produce the documents at the trial, however "innocent". In what way then is discovery and production before trial more "intolerable". It would certainly be more efficient. Documents seen for the first time at the trial are next to useless unless they are clearly inculpatory. Proper use of the documents by the inquiring party may necessitate an adjournment. In any case a *subpoena duces tecum* is of little assistance unless the documents can be described with some degree of particularity(*u*). It is precisely this problem which discovery (as distinct from production) seeks to avoid.

The law does not then recognise any right of concealment, it merely makes interference with that right as inconvenient as possible for all concerned. One suspects that the real reason for the plaintiff's failure in the *Norwich Pharmacal* case was the form in which he was obliged to seek his remedy. Bringing an *action* for discovery against the "mere witness" would render the latter liable for costs if an order were made. Obviously such a procedure is unfair as well as cumbersome. If, however, a litigant were given a right to obtain discovery against such persons prior to trial then the costs would be minimal (and in any case should be borne by the person seeking discovery.) Again, in order to obviate any real injustice it could be provided that such discovery could only be obtained by order of the Court which could then weigh the applicant's need to know against the inconvenience caused to the person from whom production is sought. Such a procedure has long been followed in Scotland without any apparent ill effects(*v*).

I. G. EAGLES

(*t*) Ibid. at p. 817.

(*u*) *Lee* v. *Angas* (1866) L.R. 2 Eq. 59; *Soul* v. *I.R.C.* [1963] 1 W.L.R. 112.

(*v*) See RR. 95, 96 of the Court of Session and *Henderson* v. *McGowan* (1916) S.C. 821.

MEDICINE, MAN AND MORALS

Retiring Address of Mr M. J. O'Brien, Q.C., President of the Wellington Medico-Legal Society.

I intend to devote my address to a consideration of some of the matters related to medical practice with its legal, ethical and sociological problems; and medicine, law and human life, and to relate them in a general way to moral issues. Lest any of you think that I seek only to raise in another guise medical, moral or legal issues relating to such often-discussed questions as abortion and contraception, let me remind you that, with the rapid advance of medical science, there are many more problems which can be seen against similar backgrounds as to the nature and quality of human life. It behoves us to examine that advance and the direction of change against a background of principle. It is not the acquisition of greater knowledge which is at issue, it is the use to which that knowledge is put.

To take but one example of scientific advance and the issues relating to a possible change in practice (foreshadowed in Huxley's *Brave New World*) I understand that the process known as cloning may become scientifically possible before very long. That is the process whereby human cells of the desired quality are selected from males and females having those qualities, preserved and then grown in an artificial environment not once but many times, so that it becomes possible to breed a race of human beings with the so-called desirable qualities, without the intervention at all of the normal human procreative process. Assuming that this experimentation reaches the stage where what I have described can be done, then we must face the question whether we should allow or encourage the development of such a process, knowing full well that it can be developed if we want it to be developed. In passing, I note that there is now, in the United Kingdom, a Society for the Responsibility of Science—the principal object of which society is to ask, and try to answer, questions such as these.

You may think that a more frightening second or consequential question arises, namely, if it does become possible to pre-determine the nature of the human strain in this way, and to guarantee its survival and purity as a strain, should children be allowed to be born by the

normal method of procreation? That question may not be so fanciful as we think, if we were to answer yes to the first question. For instance, the plea for abortion law reform has sometimes been based on the suggested desirability of relieving human misery by allowing the termination of a pregnancy arising from rape or incest. I leave to one side that this raises the difficulty of the medical adviser determining whether or not there has been a rape. Any criminal lawyer present will know how difficult that often is. The rape and incest grounds do not appear to have formed a significant proportion of the grounds for termination of a pregnancy once abortion laws have changed.

It will also be remembered that another reason advanced by the advocates of abortion law reform, particularly in the United Kingdom, was to relieve the mental and economic pressures on a mother with a number of children, so that the quality of her life and the lives of the other children would be preserved. British statistics relating to abortions on unmarried mothers, and indeed successive abortions on the same people in that group, indicate that the new law is, to a large degree, serving a quite different purpose. Having thus accepted a breach of long acknowledged principle concerning the taking of human life, and the repeal of long-standing law, it is little wonder that we now more frequently hear the cry that abortion is a permissible and desirable method of population control—and a necessary method because it is said that the population of this planet is increasing at too large a rate, thus endangering the quality of the lives of those people now living on it. Once the old principle has gone, there is nothing logically to prevent such an extension.

Again, if one considers the case of State-directed birth control measures, the acceptance of those or other methods of population control has been followed, as in the State of Singapore, by the imposition of penalties on people having more than a certain number of children, by the withdrawal of welfare benefits in respect of those children, or services for the mother related to their birth. Again, strict logic may justify such a consequence.

Thus the question previously stated is not fanciful because with this same logic it can be argued that if we can guarantee the production of human beings with the most desired qualities, then we should prohibit birth by any other means.

I am not mentioning examples such as these simply for the purposes of raising an emotive base from which to proceed further. Indeed, I hope that what I will say tonight will be quite devoid of emotion. Nevertheless, the examples may be multiplied without very much difficulty. Eugenic societies have long since proposed compulsory sterilisation programmes.

In 1938 Professor Haldane, in his book *Heredity in Politics,* examined such a model sterilisation law that would have imposed sterilisation on "socially inadequate persons" including the feeble minded and insane; the criminalistic, including the delinquent and wayward; the inebriated, including drug addicts; the diseased (those with chronic infections and legally segregable diseases); the blind, the deaf or seriously hard of hearing; the deformed, including the crippled; and finally, the dependent, including orphans, ne'er-do-wells, the homeless, tramps and paupers. On this, Professor Haldane is content to remark that its scope would include Milton (blind) and Beethoven (deaf). He estimated that to prevent the birth of one child destined to schizophrenia in the next generation, we must sterilise about 16 schizophrenics and prevent the birth of 10 normal children(*a*).

In terms of the family structure a modern author recently wrote of possible developments in a widely publicised book (and I must quote at some length):

> "One simple thing they [that is, innovative minorities] will do is streamline the family. The typical pre-industrial family not only had a good many children, but numerous other dependants as well—grandparents, uncles, aunts, and cousins. Such extended families were well suited for survival in slow-paced agricultural societies. But such families are hard to transport or transplant. They are immobile.
>
> "Industrialism demanded masses of workers ready and able to move off the land in pursuit of jobs, and to move again whenever necessary. Thus the extended family gradually shed its excess weight and the so-called 'nuclear' family emerged—a stripped-down, portable family unit consisting only of parents and a small set of children. This new-style family, far more mobile than the traditional extended family, became the standard model in all the industrial countries.
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> "Super-industrialism, however, the next stage of eco-technological development, re-

(*a*) J. B. S. Haldane, *Heredity and Politics,* Allen and Unwin, pp. 16-17.

quires even higher mobility. Thus we may expect many among the people of the future to carry the streamlining process a step further by remaining childless, cutting the family down to its most elemental components, a man and a woman. Two people, perhaps with matched careers, will prove more efficient at navigating through education and social shoals, through job changes and geographic relocations, than the ordinary child-cluttered family. Indeed, anthropologist Margaret Mead has pointed out that we may already be moving towards a system under which, as she puts it, 'parenthood would be limited to a smaller number of families whose principal functions would be child rearing', leaving the rest of the population 'free to function—for the first time in history—as individuals'.

"A compromise may be the postponement of children, rather than childlessness. Men and women today are often torn in conflict between a commitment to career and a commitment to children. In the future, many couples will sidestep this problem by deferring the entire task of raising children until after retirement.

"This may strike people of the present as odd. Yet once child-bearing is broken away from its biological base, nothing more than tradition suggests having children at an early age. Why not wait, and buy your embryos later, after your work career is over? Thus childlnessness is likely to spread among young and middle-aged couples; sexagenarians who raise infants may be far more common. The post-retirement family could become a recognised social institution"(b).

Nineteen eighty-four is only 11 years away. The futuristic predictions of those who wrote a few decades ago in terms which we then regarded as fantastic do not now appear to be so.

The acquisition of greater knowledge represents a natural progression in the intellectual life of man. In today's world the accumulation of knowledge is increasing at an accelerating rate; and that, in turn, is producing a great and rapid change which, putting aside the question of the rightness or the desirability of particular change, can, as Toffler has suggested in the work from which I have already quoted, have other effects. At p. 311 he wrote:

"It is quite clearly impossible to accelerate the rate of change in society, or to raise the novelty ratio in society, without triggering significant changes in the body chemistry of the population. By stepping up the pace of scientific, technological and social change, we are tampering with the chemistry and biological stability of the human race."

He went on to say:

"There are, however, limits on adaptability. When we alter our life style, when we make and break relationships with things, places or people, when we move restlessly through the organisational geography of society, when we learn new information and ideas, we adapt, we live. Yet there are finite boundaries; we are not infinitely resilient. Each orientation response, each adaptive reaction exacts a price, wearing down the body's machinery bit by minute bit, until perceptible tissue damage results.

"Thus man remains in the end what he started as in the beginning; a biosystem with a limited capacity for change. When this capacity is overwhelmed, the consequence is future shock."

I therefore make no apology if some of the examples which I have quoted have provided a shock to those of you here present. If you want some shocks, read books such as *The Biological Time Bomb*. I think that we all should be aware that the sorts of change to which I have referred may already be occurring or may be about to occur if the direction of change is not altered.

Before returning to the possible limitations on the use of increasing medical/scientific knowledge, let me get right away from the fields of medicine and law. Rutherford's feat in splitting the atom was epoch-making. Subsequent developments in the field of nuclear physics have led both to the peaceful development of nuclear energy (and its harnessing for the benefit of mankind) on the one hand, and the development of stocks for the ultimate weapon of destruction on the other. If the question had been put to President Truman, as probably it was, in terms of whether atomic bombs should have been dropped on Hiroshima and Nagasaki, he would no doubt have answered, as in effect he did, that it was necessary to do this despite the enormous cost in human life that would be involved in the exercise, because of the greater saving in human life which would be involved if the United States forces did not have to continue their bloody progress from island to island towards mainland Japan. Such a question must always be asked in

(*b*) Alvin Toffler, *Future Shock*, (1970) Pan Books Edition (Third Printing 1972), pp. 222-223.

relation to weapons of war; and it is a moral question.

Indeed, the New Zealand case recently presented to the International Court of Justice was said to be based largely upon the moral issues arising through the alleged pollution of the atmosphere in the southern hemisphere by the continued explosion in that hemisphere of French nuclear devices. The destruction of human life in the context to which I have just referred can, perhaps, be justified sometimes in terms of numbers. For instance, President Truman may well have been justified in taking the view that the killing of X number of people by the dropping of two bombs, was a lesser evil than the death of the greater Y number of people if the war had continued. Leaving aside questions relating to war, the value of human life cannot, I suggest, be measured in terms of numbers. Genocide, for instance, increases the enormity or degree of the crime—it does not affect the nature of the crime itself, namely, the unlawful or the unjustified taking of life.

We see, then, that decisions such as President Truman took are what I have called moral decisions, decisions as to what *ought* to be done. You can call them whatever you like—for instance, ethical decisions, value judgments, and so on. Whatever you call them, they are decisions taken against the background of some standard which, for the sake of convenience, I will call morality.

I am not suggesting that civil law attempt to govern all acts which may be considered to be immoral. The proper role of civil law can be thus stated:

> "The civil law takes cognisance primarily of public acts. Private acts as such are outside its scope. However, there are certain private acts which have public consequences in so far as they affect the common good. These acts may rightly be subject to civil law. It may be, however, that the civil law cannot effectively control such acts without doing more harm to the common good than the acts themselves would do. In that case it may be necessary in the interests of the common good to tolerate without approving such acts. It has, for example, invariably been found that adultery or fornication (which, however private, have clear public consequences) cannot effectively be controlled by civil law without provoking greater evils" (*c*).

What I have just read is a statement made by a churchman consequent upon the publication of the Wolfenden Report. In the Christian view of morality and law there is nothing new about that, for as long ago as the 13th century one of the greatest thinkers of all times wrote this:

> "Human law is enacted for the community in general, and in the community the majority are not perfected in virtue. Therefore human law does not prohibit all the vices which those of special virtue avoid, but only the more serious vices, which the majority of people, with ordinary virtue, can avoid; and especially those vices which injure the common good and thus prohibition is necessary for the preservation of society . . . Human law aims to lead men to virtue, not all at once, but gradually. Therefore it does not require of the average imperfect man the standard of perfection attained by the virtuous; i.e., it does not prohibit everything that is sinful. If it did, the average imperfect man, unable to observe the law's requirements, might fall into complete lawlessness. The laws would come to be despised and, through contempt of law, men might become more depraved than ever" (*d*).

So wrote Aquinas.

To digress a little, there is an echo of this type of distinction to be found in the 20th century judgment of Turner J. in *R.* v. *Donnelly* [1970] N.Z.L.R. 980, 992, where in a case relating to the possibility of a person being convicted of an *attempt* to commit a crime in circumstances where it was physically impossible to *commit* the crime, he referred to "confusion between the ideas of sin and crime". He concluded by saying and, with repect, wisely:

> "Whether he may properly be condemned on such an account must, in my opinion, be left to the ultimate arbitrament of an Authority higher than this Court."

To return to a more relevant level, the medical profession has its own codes of ethics. For a recent example, in 1964 the British Medical Research Council laid down a standard relating to responsibility in investigation on human subjects—that is, ethical considerations relating to clinical research. This matter is fairly fully discussed in an article in (1964) 2 British Medical Journal, p. 178.

The law cannot effectively govern the considerations which affect whether or not we ought to pursue a particular course following

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(*c*) J. Heenan, Archbishop of Westminster, public statement.

(*d*) Summa, Theologica, 1-2, 96, 2.

the acquisition of further knowledge. Nevertheless the law can and should be influenced by such considerations when a decision is being taken as to whether the adoption of such a course has public consequences affecting the common good, and, therefore, justifying the intervention of law.

We come back to the question of the morality of the types of activity which I mentioned earlier; and I remind you that by morality I simply mean whether the activity *ought* to be engaged in or not.

One of the great anomalies in this situation of rapid change is that those who are the most vociferous advocates of some types of change seek to impose on society their particular view of morality, or perhaps their view that there is no such thing as morality, while at the same time decrying the view of others who would want to preserve something of what I may, for convenience sake, call the traditional morality, by saying that those latter people are seeking to impose their own moral views upon the community. For instance, it has been clear for some time that the regulation of the supply of contraceptives is beyond the power of individual State interference in the United States, because the United States Supreme Court regards such regulation as a violation of family and individual privacy. On the other hand the enormous resources of the Federal Treasury, implemented by matching State funds, are used to induce their use by millions of people —particularly the poor, the under-privileged and ethnic minorities—the female members of which groups are sometimes referred to by the proponents of such programmes as "target women". Thus, the supply of contraceptives is regarded as a private matter when it comes to its regulation, and a public matter when it comes to their induced or coerced use(*e*).

The same anomaly may arise as a result of certain aspects of the recent decision of the United States Supreme Court ruling as invalid State legislation restricting abortion rights on the basis that that is a private matter for the woman concerned. Incidentally, this type of argument as to rights over one's body could equally justify prostitution and its allied activities, such as the living off immoral earnings, now the subject of the criminal law.

To return to my present theme, it can be imagined that, before long, the resources of the State in the United States and elsewhere may well be mobilised to encourage, perhaps coercively, abortion as a means of population control as was the case in Japan after the war. Thus, the common law tradition which for centuries regarded abortion as a crime, subject to effective legal proscription, will be transformed into a practice to be stimulated, encouraged and fostered by Government as a new public virtue. People opposing such moves, on the basis of values relevant to the public good, will be derided for allegedly seeking to introduce private moral values into the public arena.

If one views morality (that is, what *ought* to be) as determinant of whether or not a particular course is followed, then the views of the widest variety of human beings and the research and contemplation of the widest range of thinkers should be considered before decisions are made.

I said at the outset that I was not proposing to develop any one particular topic in depth. I am not, for instance, going to propound a thesis as to whether, and, if so, in what circumstances, it is morally right to withdraw life-sustaining procedures from a patient who in some way or other is for the moment benefiting from them; but I do say that we should be careful not to adopt procedures simply because we are *able* to do so. We should be equally careful to preserve the sanctity of life, with all its many intellectual and emotional facets, a notion which has sustained civilisation as we and our forebears have known it, despite the fact that from time to time we and our forebears have temporarily reverted to barbarism of the type which we witnessed at Buchenwald and Dachau not so long ago.

If we accept that human life is different from animal life, whether because of the existence of what the Christian would call a soul, or the humanist would call reason, then the values forming the morality which governs human relationships and human activities must be on a different plane from those which govern our relationship with animals and our activities towards them. That consideration becomes very relevant when we think about questions of the sterilisation of the unfit, or the control of the human strain by eugenic procedures.

My object has been to open up lines of thought, rather than to offer conclusions applicable to given circumstances. A careful perusal of my script will not reveal the use of emotive language. Nevertheless, a human being is more than tissue, bone and liquid. He has intellectual

(*e*) Cf. Edward B. Hanify, Address to John Carroll Society, Washington D.C., 31 October 1972. Reported in *Osservatore Romano*, 21 December 1972, pp. 6-8.

power. He has emotions. If you have an emotive reaction to some of the scientific notions I have discussed, there is no cause for intellectual shame because of that. Such revulsion as some of you may feel is simply proof of the individuality of your human personality.

If I make any plea as to what should be the basis of any moral decision in relation to the topics I have mentioned, or related topics, it is this: Never forget the distinctiveness of the human personality — something which flows from man being conceived and born as a human being. It is only because of the rapid development of science, and its necessary and generally fruitful alliance with medicine, that we come to be talking about such matters at all. Unless we formulate and protect values, unless we remember that the philosophical development of man is a continuing process (and, consequently, past thought and experience is necessarily relevant) medical practice and legal norms can, in this era of scientific development and change, become divorced from the essential reality of human life. If so, science would become the master, not the servant, of mankind. The prostitution of the medical profession in Nazi Germany points to the results of such a happening.

In conclusion, it is interesting to observe how the mythology of quite different peoples often has so much in common. Prometheus defied the gods and stole fire from heaven so as to be as God on earth. If he is to use fire as power, such a thief must fight old moralities. Love and marriage, fatherhood and family must perish if that fight is to be won. Prometheus, for his trouble, was cruelly tortured. When speaking of this legend, a French professor once reminded his audience that it should not forget that the first thing that man did with fire was to make a hearth, and so to use the fire for his family(*f*).

Similarly, in Maori mythology, the mischievious Maui, having doused the fires on earth, descended to the underworld and stole fire from his ancestress Mahuika, until at last this subterranean goddess realised that she was being robbed of her power and started a conflagration which almost burned the entire earth. even boiling the pools. The gods of the sky, the hordes of Tawhirimatea, came to the rescue and the forces of rain and storm quelled the flames; but Maui, like Prometheus, was punished. Fire was preserved in the trees and thereafter was produced by rubbing two sticks together. The legend has a connotation of love in a marital setting. Elsdon Best's account of this myth is depicted in graphic form in a work held by the Dominion Museum, by showing a man and his wife working together to generate fire(*g*).

Fire too played a significant part in pagan times in Western Europe. Thus, newly born children were sacrificed to the god Baal. This cult spread through Western Europe, until finally overcome by the civilising influence of Christianity.

In all these examples, man conquered fire and harnessed its power. Thus he became civilised.

If the legal profession, long concerned with human liberty in its widest sense, and the medical profession, long concerned with the preservation of human life and the improvement of its physical and mental quality, were to lose a sense of values, mankind would be the poorer. On the other hand, doctors and lawyers can help man to remain civilised by formulating sound principles and by exercising influence to see that they are observed.

(*f*) Cf. Daly, *Moral Law and Life,* (1962) Clonmore and Reynolds Limited.

(*g*) Cf. Elsdon Best, *Tuhoe, Children of the Mist,* (1925) Thomas Avery and Sons Limited, pp. 794-797; E. Schwimmer, *The World of the Maori,* (1966) Reed, pp. 25-26.

Correction—"Domestic Proceedings Act 1968 —Wife's responsibilities to an ex-nuptial child" [1973] N.Z.L.J. 363. A line has been inadvertently omitted at the foot of the left-hand column. The missing line reads: "ceedings Act 1968. The wife had conceived a".

Ten dollar advice—A lawyer referral programme has been set up in Edmonton by the Alberta branch of the Canadian Bar Association. Under this programme, a person who has never used a lawyer before can phone an office in Edmonton and get the names of several lawyers specialising in a certain area. For $10 the client can meet with the lawyer, outline the problem, get some advice and costs. It's then up to the client to decide whether to use that particular lawyer. Robert S. Dinkel of Calgary, spokesman for the law society, said the Lawyer Referral Programme is designed to take some of the mystery out of hiring a lawyer. "If the Edmonton experiment is a success, we plan to extend it to other areas of the province," he said.

LAWASIA AND LEGAL AID

The second of MR M. F. CHILLWELL Q.C.'s *reports on the Third Lawasia Conference.*

The Committee on Legal Aid of the Third Lawasia conference held meetings on Monday, Tuesday and Wednesday, 16-18 July, under the Chairmanship of Mrs Duong Ngoc Chan (Vietnam) as Honorary Chairman and Professor Mochtar Kusumaatmadja as Executive Chairman.

Papers dealing with four topics, i.e.:

(1) The Function of Legal Aid in Developing Countries;
(2) Eligibility for Legal Aid;
(3) Participation of Students, Law Teachers and Practising Lawyers in Legal Aid, and
(4) Financing of Legal Aid

were presented by fourteen contributors, including Mr Derek G. P. Russell and Mr P. J. Downey of New Zealand.

On the basis of the papers presented to the meeting and the views expressed by the speakers and members of the audience, the Committee reached the following conclusions.

There was a general view that legal assistance to the poor should not merely be viewed as a matter of charity but as a matter of right, i.e. the right of the poor of legal redress for his grievances. Legal assistance should not be too narrowly defined.

The function of legal aid in a developing society was viewed to be as follows:

(1) The service function: serving the poor to obtain legal redress on equal terms with other members of society;
(2) The informative function: making the general public more aware of their legal rights;
(3) The reform function: legal aid if properly and responsibly conducted can play a useful role in the law reform process.

An appeal was made by a member of the legal profession that the legal aid programmes should get greater support from the legal profession.

The hope was expressed that the Government should support programmes for legal assistance to the poor.

A minority view was expressed by two speakers from the floor (Singapore and Sri Lanka) that the majority of speakers had placed too much emphasis on the poverty aspect of legal aid suggesting that instead the general availability and the quality of legal service provided should be emphasised.

The question of giving legal assistance to the poor raises the question of eligibility, i.e. who are entitled to benefit from legal aid?

The discussions revealed that although the adoption of a *means* test is desirable as legal aid on a significant scale would be difficult to administer without one, it is easier to adopt such a test in a more structured, developed society (Singapore, Australia, Japan) than in a developing country where the nature and structure of society may make it more difficult to define poverty.

A link was suggested between deprivation of legal redress or between availability of legal assistance and manpower available for legal aid programmes. Another link brought to the attention of the committee was the one between eligibility and the availability of funds.

On the merit test it was suggested that it should result in a vicious circle resulting in a situation unfavourable to the poor.

Various speakers elaborated on screening procedures and the determinations of eligibility which vary from country to country. It was stated that criteria for determining eligibility (i.e. the means test and merit test) are irrelevant to cases involving consultation and information only. For criminal cases the view was expressed that the merit test was also irrelevant.

On the participation of law students and teachers in Legal Aid a wide divergence of opinion emerged. Some members of the committee (Singapore, Malaysia, Indonesia, U.S.A.) were of the view that involvement of the law school in legal aid was legitimate and even beneficial for the student not only from the skills training point of view but also as a way to involve students in problems of the poor and of their society in general. It was emphasised that close supervision was necessary and the support of the members of the legal profession essential. A note of warning was

sounded by a committee member from Sri Lanka that care should be taken that the poor not be given inferior legal assistance, adding that in his opinion as far as Sri Lanka was concerned Legal Aid be best left to members of the legal profession. A speaker from the Republic of China doubted whether much could be expected from members of the private bar but besides their manpower support we can also expect their oral and financial support to legal aid programmes.

A great number of speakers from Australia accepted the usefulness of involving students in legal aid programmes as an aid to legal education. However, they did not accept that students should have final responsibility in consulting legal aid clients or in conducting their affairs. This is the responsibility of members of the legal profession who alone possess the necessary experience and skill. Further, legal aid clients should not feel that they are being given second rate legal assistance because they are receiving legal aid.

Other speakers expressed a different view stating that involvement of students could be accepted as long as the quality of the legal assistance given was not less than given to the non poor. The divergence of opinions revealed not only different social and political backgrounds but also different perceptions of the legal profession and its place in society.

The papers presented on the subject of *Financing Legal Aid* and the speakers dealt at great length on the subject discussing the various ways and sources of financing, i.e.:

(1) Public Funds
(2) Private Business (Corporations)
(3) Law Practitioners
(4) Private Foundations

Where public funding was available the mechanisms for its administration and supervision of its use were explained.

Some speakers explained that although in principle public funding might present problems, in actual fact government financing does not necessarily lead to government interference or lessen the independence of the profession in dealing with legal aid cases.

Several speakers from developing countries emphasised the importance of government support for legal aid programmes. An appeal was made that international organisations support legal assistance programmes for the poor. Fund raising efforts were mentioned as a means to secure funds for legal aid programmes.

Apart from the question of financial assistance to the poor, it was suggested that members of the legal profession should be reminded of their responsibilities to help the poor.

The meeting ended with an explanation by the Chairman of the Indonesian Advocates Association (PERADIN) that by law Indonesian members were obliged to assist the poor and have done so for decades. He further explained the close co-operation which exists between the advocates and programmes engaging law students in legal aid, but emphasised that in his view the role of students was supplementary only and that the final responsibility for the conduct of the affairs of legal aid clients lay with members of the legal profession.

At the final session when this report was formulated it was resolved that Lawasia appoint a Legal Aid standing committee representing all member countries of Lawasia to continue the study and exchange of information on Legal Aid for the benefit of all member countries.

MORE REFLECTIONS ON THE UNPOPULARITY OF SOLICITORS

I feel grave misgivings about the future of our branch of the legal profession, and suspect that in the form that it has existed during the last 200 years, it is passing away. *Tout cela a vécu,* as the French say. Conveyancing is on its way out. Socially it would be a good thing if people buying and selling houses needed only to attend at a Land Registry, fill up a form, pay a clerk a small fee and hand over a banker's draft; but until such a system is introduced the present arrangements should be operated by people who understand what they are doing, and they ought to be paid for it. Journalists and politicians who want reform in this respect should attack the system, not us. A great deal of litigation is uneconomic, and anyway the legal aid system is the beginning of a state of affairs when litigation and all its analogous activities will be a free service like national health, run mostly by minor civil servants who will be unqualified clerks; unqualified that is in the sense that they will not be admitted soli-

citors who have served articles. I cannot imagine that such an occupation will attract clever and ambitious young men and women. The standards will fall, but perhaps the common man does not need anything better. In theory, such a system is socially excellent. The old sneer that the Courts of this country are open to everyone, like the Ritz Hotel, is no longer true, unless your assets and income are 25p on the wrong side of the line drawn by the legal aid system. If they are, you dare not risk litigation for fear of being driven into bankruptcy. In fact there is one law for the poor and another for the relatively rich. A universal extension of the system would seem to be only a matter of time; and then, will not the great expense drive Parliament into taking the operation of the system away from practising solicitors and running it on the cheap by minor salaried officials?

Admirable, cry the reformers; but theory is not practice and idealism is not reality. The national health service creaks very harshly at times; and in a universal legal aid system (which after all is less important and basic than a health service where people's lives are at risk) I envisage that many people's rights will be lost or frustrated by inertia and inflexible procedure, by unfeeling and impatient minor officials, and above all, by the sheer pressure of too much work on inadequate staff.

Another point which I have in mind is the time lag which always occurs in these matters. These new arrangements are never set up or extended very quickly. If the attack on our living standards and our monopoly of certain types of work is successful, as it bids fair to be, and solicitors with smaller practices are driven out of business, many people during the interregnum between a private and a state service, and probably even afterwards, will find themselves at the mercy of a band of unqualified and uncontrolled cheats and charlatans. May I in this respect relate a cautionary tale?

I recall, from the now distant 1930s, the case of a naval commander, the younger son of a peer, who having little natural aptitude for business and no experience of it whatever (and, I may add, managing his private life and his love affairs with an even greater degree of incompetence), was always in difficulties over money and passed much of his life in lurching from one financial crisis to another in a manner which foreshadowed the course to be taken by the British economy after the war, which not long after the events that I relate was to break out. As one would expect in a noble family, its money, land, and possessions of all kinds were tied up in trusts, marriage settlements, resettlements, and entails, and guarded by all the antiquated and majestic defences of the Settled Land Acts. Being involved in divorce proceedings, and in trouble about alimony, the commander was living temporarily in a cheap hotel in London where he seems to have spent most of his time telephoning (from a coin operated public installation on the landing outside his room) the solicitors acting for the trustees, and trying to extract money from them. Accustomed no doubt to bellowing orders in a force nine gale, the commander had developed a voice which rendered the use of the telephone largely unnecessary to him, except perhaps in the rare event of his desiring to address someone in the Antipodes, and it was not long before everyone in the hotel was acquainted with his business.

One of the residents was a man who, in the legal proceedings which subsequently ensued, was described as an "agent". It was never established that this self-styled "agent" possessed any qualifications whatsoever, apart from being a very smart operator who had contrived to live on his wits for many years. He gained the confidence of the commander, undertook to manage his affairs, and to withdraw money from the family trust. After countless interviews, and 18 months of a correspondence which, in bulk at least, was beginning to overhaul Voltaire's 90 volumes, the agent had achieved nothing, apart from reducing the trustees' solicitors to a condition verging upon dementia. He then presented an enormous bill, and as the commander could not and would not pay, issued a writ. The agent lost his case. I do not propose to rehearse the details, having related the incident merely to exemplify the type of predator which is always lying in wait for unwary members of the general public, and which will, if many of us are driven out of practice by economic pressure, find large and fruitful fields to till.

In trying, by a process of extrapolation, to speculate usefully about the future (and when advising a son on the choice of a career one must endeavour to envisage conditions 30 to 40 years ahead), I think it is essential to look at the trends in public opinion and to ask: have they passed the point of no return? Have they reached such a degree of strength and gained so much momentum as to be irreversible and irresistible? If so, whether they are good or bad, reasonable or irrational, socially beneficial or undesirable, are questions of no importance whatsoever. Like a natural force, the climate of opinion is there and must be lived with. I

think the present trend is against us and is growing in strength. It is not merely that much of the public is hostile and the popular press spiteful and tendentious; it is because we have all been living in a social revolution since 1945 and the kind of society which is emerging seems to me to be inimical to solicitors, or at least to the traditional role we have played for so long. On the whole, we have existed to serve private enterprise, and as the area of private enterprise contracts, our opportunities and means of livelihood contract with it.

Trying to make an intelligent guess, I see: (1) all litigation, including matrimonial affairs, becoming a state service like the national health service, (2) a large extension of insurance to cover the field of tort, actions and counterclaims for instance being settled by the insurers on a knock-for-knock principle, so to speak, (3) all real property transactions conducted by clerks at land registries and (4) probably a large extension and simplification of the personal applications system in probate matters.

Let us consider for a moment what has happened to the private landlord, because it illustrates perfectly what I have said above about trends. The word had become a term of abuse, in the scale of vituperation somewhere near thief and far below prostitute. The reason why it should be considered commendable or at least not anti-social to invest in shares and government securities, but wicked to invest in house property for letting does not appear. When the investor in companies and government securities has paid tax on his dividends, he has the balance of his money without question, but the landlord after paying tax on his rents, has in addition for the last 50 years been forced to contribute a vast housing subsidy to the nation by reason of the rent restrictions legislation, and a minority has carried a burden which should have been borne by the community as a whole. The explanation is that the public has come to believe that so fundamental and indispensable a service as housing (apart from the owner occupier) ought not to be the subject of private profit or left to the administration of private enterprise, any more than fire prevention. I think the public is also coming to believe that, over a very large field, law also should be a public service, and should cost nothing, or not more than a nominal sum. The public may be right. Perhaps our grandchildren will consider private enterprise housing and private enterprise litigation as being quite as extraordinary and indefensible as we regard the private fire services of insurance companies 150 years ago, when each company had its own engines and firemen and let your house burn down and you and your family roast to death if your building did not exhibit a plaque showing that you were one of their policyholders.

What then will remain for us in the field of civil law? On the whole, I see solicitors in the future as (1) corporation lawyers and (2) occupying governmental and local governmental posts. Large international corporations will, I think, afford considerable scope for the clever and the enterprising, but I believe that the number of people entering the profession will be much reduced and will consist of a small university-trained élite. The family doctor has virtually disappeared. It is all group practices today, and off to the hospital with you if you have done anything worse than hit your thumb with a hammer. The family solicitor is obsolescent too.

I realise that the views above expressed are entirely personal and indeed perhaps highly idiosyncratic, but they represent the conclusions I have reached after much though and many years of observation, and such as they are (if I may borrow Gibbon's splendid phrase for so small an offering), "I now finally deliver them to the curiosity and candour of the public", or at least that part of the public which comprises our branch of the legal profession. I do so in the hope that they will provoke thought and controversy, and above all, suggestions about what we ought to do, and indeed what we are able to do, about our declining importance and diminishing social status.

A. G. SALMON
in *The Solicitors' Journal.*

CORRECTION

Our attention has been drawn to a typographical error at [1973] N.Z.L.J. 514, in the note "Sale to purchasers 'as trustees for a company to be formed' ". In the right-hand column, eight lines from the foot of the page, a sentence commences: "A comment of his Honour's worth nothing in this context is: . . ."

This sentence should read: "A comment of his Honour's worth noting in this context is: . . ."

Apologies for this error are extended both to Dr David Vaver, the author of the note, and to Mr Justice Wilson.

NEW ZEALAND LAW STUDENTS ASSOCIATION

The recent Council meeting of the New Zealand Law Students Association at Victoria University demonstrated not only law students' growing national approach to matters of common concern, but also their willingness, through the Association, to take a broad look at the function of law in our society.

Attending the meeting were two representatives of the Consumers Institute who, after outlining proposals for Small Claims Courts, secured the Association's endorsement of their efforts in this direction. The delegates voted their appreciation for the submissions on the Police Offences Act presented on behalf of the Association earlier this year, and noted the widespread approval of the NZLSA submissions on the Accident Compensation Bill late last year. The meeting was also told that the Association is now receiving for comment the working papers of the Law Revision Commission, and appreciation for the N.Z. Law Society's financial help for various projects of the Association was expressed.

The Association resolved: 1. To request representation on the Council of Legal Education, as can be provided for under s. 2 (3) of the Law Practitioners Amendment Act 1961. 2. To produce a careers booklet for law graduates. 3. To establish a working committee, chaired by the President, to publish a position paper on the provision of legal services in New Zealand, having as its basis the guarantee of legal advice as a welfare right.

Officers elected were James Clad from Auckland (President) and Steven Franks of Victoria (Vice-President). The May 1974 Conference of the Association will be held at the Auckland Law School.

"MUST" INSURANCE

"Must" insurance—Manitoba lawyers are broadening their insurance coverage to give the public and themselves greater protection. Peter Morse of Winnipeg, president of the Manitoba Law Society, announced that effective July 1 a $100,000 professional liability insurance policy will become compulsory for each Manitoba lawyer in private practice. Details of the plan, approved by Benchers of the Law Society, were announced at a news conference by Mr Morse and by Martin Freedman of Winnipeg, chairman of the Society's Errors and Omissions Insurance Commission. Mr Morse said the plan has not been established because of a flood of malpractice or professional negligence claims against Manitoba lawyers. He said it will be an addition to the present voluntary reimbursement fund set up by the legal profession to reimburse clients of lawyers who have misappropriated trust funds. "The insurance plan is simply group insurance at a lower cost because all lawyers in private practice will be enrolled," said Mr Morse. "Many lawyers have had their own insurance protection with a variety of companies on an individual basis, which will be replaced by the Law Society plan." Mr Morse said the Law Society felt the time had come to provide a more uniform and guaranteed plan of protection for both the public and lawyers, should a lawyer be held liable for an act of negligence which caused loss for one of his clients. "The laws of Canada are becoming so complex that it is becoming increasingly easy for a lawyer to make a mistake," said Mr Morse. "The insurance programme guarantees that the client has reasonable protection resulting from such an error if he suffers financial loss he will obtain adequate compensation."

In praise of law—"Human society has developed as the rule of law has spread from the family to the village, from the village to the tribe and then to the nation. Only as just and enforceable law has been accepted . . . has it been possible for people to live in peace and security with one another."—*Julius K. Nyerere,* President of Tanzania.