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DIVERTING FIRST OFFENDERS

At the Hamilton District Law Society's recent seminar at Wairakei, the writer (whose brief was to try to provoke comment, if not thought) said: "I'd like to suggest to you that much of the work our Courts perform is totally irrelevant to life and certainly to the parties before them . . . For instance, the trial of a shoplifter. Did she take it? With what intention? Was it oversight, inadvertence, deliberate? Did she possess the necessary mens rea?

"All this is past history. Not until conviction (if, indeed, even then) does anyone bother to ask 'How does she come to be in this position?' 'What help and support does she or might she need?' 'Is there any way in which society can see that she doesn't find herself in these circumstances again?'

"Surely there is room for many of the lesser charges brought today to be dealt with informally. Many, of course, are — with a stern word from a constable or through the auspices of Youth Aid. But where a decision is made to prosecute it is frequently the result of either the police thinking they haven't been able to make any impression on an informal basis, or (and perhaps quite rightly) thinking that a matter is too grave for them simply to ignore it.

"Couldn't many of these cases in some way be adjourned into the Department of Social Welfare on the basis that if the Department felt it had been able to deal with and resolve the situation revealed by the charge, the charge would simply be withdrawn or dismissed? And if it felt it was getting nowhere, the defendant could be brought back into Court and dealt with then? Certainly individual rights would have to be preserved, but this would be a simple nuts and bolts exercise. The end result would be that the role of the Courts would be very much more constructive than it is at present."

Without in any way trying to link the two (save that the writer's thoughts developed in conversation with the noted Boston criminologist, Dr Ben Alpers), not five days later an Act was passed in the State of Massachusetts establishing just such a procedure to divert selected offenders from the Courts to programmes of community supervision and service.

Salient features are:

(1) The diversion is made without plea and only for young persons making maiden Court appearances.

(2) Defendants must be approved by probation officers before they are diverted.

(3) Such diversion can only be made with a defendant's consent.

(4) Where a diversion has been made, the case is adjourned for up to 90 days. The probation officer can then report successful completion of a programme, or request (again only with consent) a further period of up to 90 days.

(5) Where a report indicates successful completion of a programme by a defendant, the Court *may* dismiss the original charges pending. If not, the Court *may*, on the basis of the report or on the basis of subsequent charges, resume the criminal proceedings.

(6) The prosecution has a right of objection to any such diversion, and to any proposed dismissal of original charges.

(7) If proceedings are resumed, no admissions made by the defendant in the preparation of the reports is admissible in evidence against him.

The Act is an interesting document, and copies have been sent to the Minister of Justice and certain Magistrates with a known interest in reform in this area. Hopefully those not at Wairakei will forgive the quote—and those who were can consider themselves brought up to date for, as far as can be recalled, none took exception to the kite that was being flown.

JEREMY POPE

THE "OUTSIDE MAN"

When Marie Schee succeeded in her action in the Municipal Court of the City of Los Angeles against Otto and Jenneieve Steuer, she no doubt derived some comfort from the fact that her attorneys had had the foresight to levy upon all of the right, title, and interests of the Steurs in certain real estate. Those attorneys, Wingert & Bewley, thereupon issued execution and arranged for a sale of the real estate by the Marshal of the City of Los Angeles on 29 June 1938. At the sale the attorneys, though not exactly in the same league as How & Hummel, purchased the property on behalf of Marie Schee, paying for it the full amount of the unpaid portion of the judgment. So far, so good.

Losing no time to clear their liabilities, the unsuccessful judgment debtors, the Steuers, sought an order from the Municipal Court that satisfaction of the judgment should be entered in the Court records by reason of the levy, execution, and sale. The Municipal Court made the order sought. But there was something radically wrong with the transaction. Marie Schee had never given her attorneys any authority to buy the property. She immediately appealed to the Appellate Department of the Superior Court of Los Angeles County to have the order reversed, but failed. The validity of the sale was upheld.

The property so unwillingly acquired must have possessed some of the attributes of a damnosa hereditas, because Marie Schee came back to the attack. In fresh proceedings she claimed to be entitled in equity to have the purchase at auction set aside. This time her argument rested squarely on the impropriety of her attorney's conduct in bidding in at the auction sale without her authority. The full report of the decision rejecting her attack on the validity of the sale is enshrined in the California law reports: see *Schee v Marshal of the Los Angeles Municipal Court and Steuer* 56 CA 2d, Second Dis, Div One (1942), but one paragraph stands out from the rest as having more than passing interest:

"It is alleged in substance by plaintiff that at and prior to the date of sale, which was June 29, 1938, *a young attorney, Richard Nixon, was occasionally employed by the firm of Wingert and Bewley as their 'outside man' which fact was unknown to plaintiff;* that said Nixon appeared in connection with the matters pertaining to the execution and sale and "bid in" the real property involved, in the name of plaintiff. It is further alleged in substance that plaintiff was *without knowledge of any of the steps taken by Nixon, who it is alleged acted without authority from plaintiff.*"

G P BARTON

CONTROL COMPUTERS SAY JURISTS

The computer in general, and the proposed Justice Data Bank at Wanganui in particular, poses problems as to privacy that are causing deep concern to the New Zealand Section of the International Commission of Jurists.

The Chairman of the Council, Mr G E Bisson, has called for full information about the Wanganui centre to be made public, both to ensure that the public is aware of precisely what is going on, and to enable the Council to give the proposal its proper consideration.

"The Council has for some years been most active in the field of privacy," said Mr Bisson. "Draft bills have been submitted to successive Ministers of Justice, and we have gathered a considerable body of opinion on the topic."

He said that the Council is anxious to make its expertise available to the Government (the Section comprises a number of distinguished New Zealand Judges and lawyers).

"There is an established need to control the computer era by legislation," Mr Bisson concluded. "Time is against us, as plans daily multiply for the use of computers in increasingly sensitive areas."

BILLS BEFORE PARLIAMENT

Agricultural Pests Destruction Amendment
Agricultural Workers Amendment
Agriculture (Emergency) Regulations Confirmation
Annual Holidays Amendment
Antiquities
Appropriation
Arms Amendment
Broadcasting Amendment
Chattels Transfer Amendment
Cinematograph Films Amendment
Commerce
Crimes Amendment
Criminal Justice Amendment (No 2)
Drugs (Prevention of Misuse)
Education Amendment (No 2)
Education Amendment (No 3)
Finance (No 2)
Government Railways Amendment
Historic Places Amendment
Hospitals Amendment
Inland Revenue Department
Insurance Companies' Deposits Amendment
Investment Bonds
Joint Consultation in Industry
Joint Family Homes Amendment
Joint Family Homes Amendment No 2
Joint Family Homes Amendment (No 3)
Judicature Amendment
Land and Income Tax Amendment (No 2)
Land and Income Tax (Annual)
Legal Aid Amendment
Life Insurance Amendment
Local Government
Magistrates' Courts Amendment
Maori Affairs Amendment
Marine and Power Engineers' Institute Industrial Disputes
Moneylenders Amendment
Municipal Corporations Amendment No 2
National Parks Amendment
Neighbourhood Noise Control
Penal Institutions Amendment
Petroleum Amendment
Pork Industry
Post Office Amendment
Primary Products Marketing Regulations Confirmation
Property Law Amendment
Public Works Amendment (No 2)
Queen Elizabeth The Second Arts Council of New Zealand
Right to Confidentiality
Soil Conservation and Rivers Control Amendment
Statutes Amendment
Superannuation Amendment
Tourist Hotel Corporation
Transport Amendment
Trustee Savings Banks Amendment
Waitaki Lakes Recreation Area
Women's Rights of Employment
Cornish Companies Management
Counties Amendment
Customs Acts Amendment
Customs Orders Confirmation
Dangerous Goods
Defence Amendment
Education Amendment
Electoral Amendment
Estate and Gift Duties Amendment
Estate and Gift Duties Amendment (No. 2)
Farm Ownership Savings
Fire Services Amendment
Government Railways Amendment
Harbour Pilotage Emergency
Harbours Amendment
Hire Purchase Amendment
Home Ownership Savings
Housing Corporation
Imprest Supply
Imprest Supply (No 2)
Land and Income Tax Amendment
Licensing Amendment
Licensing Trusts Amendment
Local Elections and Polls Amendment
Marine Pollution
Municipal Corporations Amendment
New Zealand Export-Import Corporation
New Zealand Superannuation
Ngarimu V.C. and 28th (Maori) Battalion Memorial Scholarship Fund Amendment
Niue Amendment
Niue Constitution
Perpetuities Amendment
Physiotherapy Amendment
Private Investigators and Security Guards
Public Works Amendment
Rates Rebate Amendment
Royal Titles
Rural Banking and Finance Corporation
Sale of Liquor Amendment
Sales Tax
Sales Tax Amendment
Scientific and Industrial Research
Social Security Amendment
Stamp and Cheque Duties Amendment
Time
Tobacco Growing Industry
Trustee Amendment
Unit Trusts Amendment
War Pensions Amendment
Wheat Research Levy

STATUTES ENACTED

Animals Amendment
Building Societies Amendment
Commonwealth Games Symbol Protection

REGULATIONS

Regulations Gazetted from 12 September to 3 October 1974 are as follows:

Amusement Devices Regulations 1968, Amendment No 1 (SR 1974/238)

Berryfruit Levy Act Extension Order 1974 (SR 1974/237)

Customs Tariff (Composite) Amendment Order (No 2) 1974 (SR 1974/233)

(Continued on page 455)

SUMMARY OF RECENT LAW

ARBITRATION

Summary enforcement of part of award—Court has a discretionary jurisdiction under the Arbitrtaion Act 1908, s 13, and the Arbitration Amendment Act 1938, s 12, to give leave for summary enforcement of part of an award only—Discretion exercised as to order for costs only, in particular circumstances—*Selby v Whitbread* [1917] 1 KB 736, 748 and *Bunting & Co Ltd v Otago Brush Co Ltd* (1913) 32 NZLR 1057 referred to. *Rankin v Carson* (Supreme Court, Wellington. 2 September 1974 (M 267/73). Cooke J).

BILLS OF EXCHANGE

Indorsement of stolen cheque—Stolen cheque cashed in respondent's firm by unauthorised person representing himself as named payee—Respondent had required the person to write his name and address on the back of the cheque—Held not to be an indorsement as the element of "animo indorsandi" was lacking—The signature on the back was not intended to transfer the property in the cheque—Value had been given in good faith—*Jones v Gordon* 2 App Cas 616, 628 followed—Appeal dismissed—Bills of Exchange Act 1908, ss 24 (1), 30 and 32. *C J McFadden & Sons v Beath & Co Ltd* (Supreme Court, Christchurch. 10 September 1974 (M 139/74). Roper J).

COMPANY

Fraudulent preference—Winding up—Held, s 309 of the Companies Act 1955 should be read as referring to s 56 of the Insolvency Act 1967 rather than s 79 (1) of the Bankruptcy Act 1908—Acts Interpretation Act 1924, s 21. *In re Eskay Metalware Ltd (In Liquidation)* (Supreme Court, Christchurch. 12 September 1974 (M 153/72). Macarthur J.

CRIMINAL LAW

Animals protection—Omission of proper and sufficient shelter must be proved to be conscious or wilful and not merely inadvertent or negligent—*Hyams v DPP* [1974] 2 All ER 41 referred to—Animals Protection Act 1960, s 3 (b)—Favourable comments on practice of including in the case stated copies of the Magistrate's decision and the notes of evidence, provided that the essential elements prescribed in s 107 (3) of the Summary Proceedings Act 1957 are otherwise present in the case stated. *Mackenzie v Hawkins* (Supreme Court, Timaru. 16 August 1974 (GR 14/74). Casey J).

Perjury—corroboration where conflicting statements—Crimes Act 1961, s 112, construed as declaratory of the common law thus limiting the need for corroboration to proof of the falsity of the statement alleged to be false—two contradictory sworn statements made by accused—Independent and separate evidence of informant—No corroboration as unable to prove the truth of earlier contradictory statements. *Taylor v Manu* (Supreme Court, Christchurch. 4 September 1974 (T 44/74). Casey J).

ESTATE AND GIFT DUTIES

Advance to residuary beneficiary a "gift"—Life tenant who consents to an advancement of capital to a residuary beneficiary by a trustee pursuant to Trustee Act 1956, s 41, thereby makes a gift within the meaning of the Estate and Gift Duties Act 1968—*Ex parte Sitwell* (1888) 21 QBD 466 applied *Stannus v Commissioner of Stamp Duties* [1947] NZLR 1, *In re Davis's Settlement Trusts* [1950] NZLR 255 and *Re Marshall* [1965] NZLR 851 considered—*Grimwade v Federal Commissioner of Taxation* (1949) 78 CLR 199 distinguished. *Carmody v Commissioner of Inland Revenue* (Supreme Court, Wellington. 3 September 1974 (M 125/74). Cooke J).

HUSBAND AND WIFE

Family benefit to be taken into account—Maintenance—Family benefit payments received by a wife must be taken into account in assessing the need for maintenance—*Higgie v Higgie* [1970] NZLR 1066, 1068 referred to—Domestic Proceedings Act 1968, s 35 (1) (d)—Social Security Act 1964, s 39 (1). *Andreassend v Andreassend* (Supreme Court, Christchurch. 4 September 1974 (M276/74). Roper J).

PRACTICE AND PROCEDURE

Leave to appeal to Court of Appeal—"question of law" must be the same—Leave to appeal to the Court of Appeal pursuant to s 144 of the Summary Proceedings Act 1957 refused—Appellant's appeal to the Supreme Court on a point of law decided in his favour but conviction amended by substituting a similar offence—Held, the exercise of the Court's discretion pursuant to s 132 and an award of costs against the appellant are not "questions of law arising in any general appeal"—The question raised in the appeal to the Court of Appeal must be the question involved in the appeal to the Supreme Court. *Algie v Police* (Supreme Court, Masterton. 16 September 1974 (M 4/74). O'Regan J).

Motion for new trial limited to damages—Personal injuries—Jury award for general damages appeared to include no provision for future economic loss—Award low but not out of all proportion—No misdirection—*Smith v Manchester Corporation (The Times,* 11 June 1974) distinguished. *Simpson v Extruded Products Ltd* (Supreme Court, Wellington. 6 September 1974 (A 175/72). Beattie J).

REAL PROPERTY

Land effectively subdivided when plan deposited—Where "any subdivision of land" in s 38 (1) (c) of the Town and Country Planning Act 1953 is undertaken by means of a survey and the deposit of a plan, the land is effectively subdivided when the plan is deposited—A resolution prohibiting subdivision validly passed by the Council but not communicated before the plan was deposited could not later be enforced by the District Land Registrar

lodging caveats under s 211 (d) of the Land Transfer Act 1952 and preventing registration on the ground that the dealings were improper. *Waitemata v Expans Holdings Ltd & Ors* (Court of Appeal, Wellington. 9 September 1974 (CA 26/73). McCarthy P, Richmond and Haslam JJ).

Ownership—Resulting trust to extent of respective contributions—Plaintiff the registered owner of properties in which the defendant claimed a half interest—De facto relationship had existed between the parties—Both had over a period of years contributed cash and labour—Document acknowledging that the defendant had a half interest in the land and one describing the parties as "lender" and "borrower" found not to be contractual documents—Held that there was a resulting trust for the plaintiff and defendant in proportion to the extent of their respective contributions—*Cooke v Head* [1972] 2 All ER 38, 41 (CA) followed. *Fraser v Gough* (Supreme Court, Wellington. 30 August 1974 (A 179/72). White J).

SOLICITOR AND CLIENT

Breach of professional duty—Option to purchase farm land expressed an "offer" contained in 1967 *sharemilking agreement*—Defendants failed to lodge a declaration or obtain consent under the Land Settlement Promotion and Land Acquisition Act 1952—Option exercised in 1969—Land immediately sold—Tax liability incurred under s 88 (1) (c) of the Land and Income Tax Act 1954—Oversight incurable—No power to extend time for obtaining consent—*Hartnell v Headifen & Ors* [1970] NZLR 809 referred to—Plaintiff not expected to mitigate loss by applying under s 7 of the Illegal Contracts Act 1970 as unlikely that the Court in its discretion would have validated the option—Direct relationship between defendants' failure and ultimate assessment of additional tax—Principles in *A G Healing & Co Ltd v CIR* [1964] NZLR 222 applicable to tax claim if option had been valid, determining liability as at 1967 at which time there was no question of resale. *Morgan v Beck & Pope* (Supreme Court, Wellington. 2 September 1974 (A 619/73). Quilliam J).

LIVING IT DOWN LIVES ON

A question for written answer was set down for reply in the House of Representatives on 4 September. As the House was then adjourned owing to the death of the Prime Minister, the answer was released to the press.

Mr T J Young (Govt, Hutt) to ask the Minister of Justice: Has he seen the article "Living it Down" in the *New Zealand Law Journal* of 6 August, and will he implement a process to protect citizens from having previous convictions mentioned against them in any legal proceedings several years after any sentence or other penalty resulting from that conviction has been fulfilled?

The Hon Dr A M Finlay (Minister of Justice) answered: The article in question advocates a proposal to which I am very sympathetic and have said so publicly both before and after the address of Mr Justice Beattie upon which the article is based. The problem of expunging old criminal convictions is, however, not one that admits to a ready, simple and universal solution. In some circumstances particular convictions do remain relevant and to pretend that they did not occur may cause real difficulties. The private Members Bill prepared by a Committee chaired by Lord Gardiner and recently introduced into the House of Commons has aroused a great deal of controversy which has been aired in the British press and elsewhere. While most participants have sympathised with the objectives of the Bill they have pointed to various practical difficulties including the moral problem that it would create a legal duty to tell an untruth even on oath. A brief reference to these appeared locally in an article in the *Sunday Herald* for 1 September. My own inclination is to study the further progress of this Bill through the British Parliament and then give the whole matter further consideration.

[Note: The Bill had been enacted in early August. It does not "create a legal duty to tell an untruth"; it extends a privilege of which a person may avail himself whereby he need not, if he does not want to, reveal a "lived-down" conviction. This is done by deeming a question as to "past convictions" to relate only to "past convictions which have not been lived down"—a question which, of course, must be answered honestly. JDP]

On 11 September Dr Finlay was questioned by Kevin Hume on the *Checkpoint* current affairs programme and asked if his doubts centred on administrative and legal difficulties:

Dr Finlay: It's not the administrative difficulties, it's the practical consequences. The moral dilemma that many people have pointed to is making it a legal duty to tell an untruth—even on oath. That disturbs quite a number of people, and it was not only Bishops of the

Church that participated in some of the correspondence I've read in the London press.

The other, more important, thing is that *some* convictions, however ancient, still do have relevance in certain circumstances. One agrees that it's quite wrong to drag up from the past for an ulterior motive, or for no particular important purpose, the fact that a person has had a conviction (eg, when he's a witness in a civil action and in an attempt to attack his credibility—that's clearly a case for some consideration). But some positions for which a person is applying and where his capacity and suitability for them is in question, the fact that he *has* had a conviction of a particular kind may be of very considerable relevance.

Hume: You seem to be denying the importance or even the efficacy of rehabilitation—of the fact that once a person has been convicted and served his sentence it is penalty enough without his having to suffer for the rest of his life the social consequences of that previous action?

Dr Finlay: That's true. While a crime is expiated by the punishment imposed, it is still a fact that the person concerned has at any rate been caught out in the commission of some offence. He may be no worse and no greater moral or other danger to the community than some other person who has been lucky enough not to get found out but is no less guilty. Yet the fact remains that there is on that man's record an instance of his doing something against the criminal law.

If this is a serious offence—let's take a sexual offence—it may be a matter that an intending employer in a sensitive area would want to know about and ought to know about, however long ago it occurred. The weight to be given to it diminishes with the passage of years, and something that happened a year ago is of much more importance than something which happened 20 years ago. But even 20 years ago, its happening is *still* a matter of *some* relevance. To deny all possibility of it coming to the notice of a prospective employer is to tempt fate a little.

Hume: Could not a sliding scale get round some of these problems?

Dr Finlay: That was the approach of Lord Gardiner but you've told me that the Act's final form was very different. (NOTE: A strike in HMSO is delaying the printing of British legislation—see [1974] NZLJ 424.)

Hume: I understand the British legislation as amended now creates a tort of malicious disclosure rather than a crime.

Dr Finlay: I think that's much more practicable. It leaves it to the individual injured to take up an injury done to him and causes a person who is likely to cause him that injury to think whether the reason for disclosure is sufficiently important to warrant him making it. I presume that the Act will have some provision to say that on a proper occasion and for sufficient reason a conviction may be disclosed, but the person who discloses it would have the burden of proving that the occasion was one of such importance. If it takes something of that course I would be very sympathetic to it.

Hume: Would there not be difficulties in this approach because it would depend on the individual who has been wronged bringing up the question of his own conviction again—when he may be wanting all to forget about it?

Dr Finlay: He would do so only after someone *had* made such a disclosure. The Act will say, I expect, "reveal these facts if you want to do so at your peril—and if you do it improperly then you are exposed to a suit for civil damages." That approach seems at first glance to have a good deal of merit in it.

Hume: If you're leaning towards this alternative, how soon will it be before we can expect some sort of legislative stamp on it?

Dr Finlay: Just as soon as I can have a look at the British Act and see exactly what it says.

Lawyers have piles?—Members of the legal profession have overtaken doctors as New Zealand's top income earners. This is shown in the latest returns for self-employed incomes from the Department of Statistics.

Although figures relate to the year ended March 1973, they show that legal practitioners reached an average income of $16,800 a year. Medical practitioners, including surgeons, specialists, and physicians, in the same period had an average income of $16,300—$500 less than the average of the legal profession.

In the previous year—March, 1972—the medical men had an average annual income of $14,450, compared with $14,000 for legal men.

Next in the list of top income earners came dentists, with an average for the March, 1973, year of $11,500, followed by public accountants with $11,150. Top among other self-employed groups were sheepfarmers, who had an average of $6,700 a year.

PROPOSALS FOR PACIFIC LAW CENTRE

GUY POWLES *and* JEREMY FORDHAM *give an outline of the centre proposed in [1974] NZLJ 377.*

Concept

Provision of expertise not otherwise available. Basis for co-operation in the provision of services and the exchange of ideas in areas such as Courts, law reform and legal education. To serve the states and territories of the South and Central Pacific Region.

Services

Envisaged initially are the provision of:

(1) A focal point for contact with useful and appropriately qualified people within and outside the region.

(2) Assistance with law reform as requested.

(3) Law drafting assistance.

(4) Studies and programmes of consultation of regional interest. For example, investigation and consultation directed towards the establishment of a regional "Court of Appeal" could be promoted by studies carried out and papers presented by the Centre—for the benefit of the governments interested and of the region as a whole.

(5) Library—to include all regional written law and an annotating service, the results of research and other work of the Centre and relevant publications.

Structure and Staffing

The Centre must be compact and practical and should involve the minimum of internal administration consistent with prompt and accurate communication. Based centrally (Suva appears the obvious choice) but not structurally associated with any one government or university.

Staff: (a) One lawyer (but preferably two), engaged as fully as possible in field work. (b) One well-qualified secretary/librarian.

Constitution

An independent, incorporated body of which the foundation membership might include governments, educational institutions and professional bodies in the region.

A board or committee to be responsible for staffing and policy decisions.

Finance

Invitations will be sent to all sympathetic governments, bodies and persons to subscribe to the capital and current costs.

Initial capital will be required for establishment of office/library and recruitment of staff.

Current expenditure to cover salaries, rent, travelling and office/library expenses may be in the vicinity of $A50,000 per annum.

To be viable, the Centre must be assured of continuing financial support.

Summary

This concept, although not new, was discussed in the context of a paper by Dr J Northey of Auckland University at the First Fiji Law Convention in July 1974 and received considerable support. Some of the difficulties of the region giving rise to the call for a Centre such as this are:

(a) Insufficient resources, manpower and finance in the individual states and territories.

(b) Co-existence of sometimes incompatible and inadequately understood customary and introduced legal systems.

(c) Inadequacies of language both in English and local languages in the articulation of concepts needed to write appropriate laws and in the practical administration of justice.

(d) Isolation.

(Continued from page 451)

Developing Countries Tariff Order 1972, Amendment No 1 (SR 1974/231)

Meat Regulations 1969, Amendment No 6 (SR 1974/234)

New Zealand Daylight Time Order 1974 (SR 1974/240)

Periodic Detention Order (No 4) 1974 (SR 1974/239)

Plant Varieties Act Commencement Order 1974 (SR 1974/235)

Toheroa Regulations 1955, Amendment No 13 (SR 1974/236)

Work Centre (Dunedin) Notice 1974 (SR 1974/232)

Work Centre (Epsom) Notice 1974 (SR 1974/241)

TAXATION OF BETTING WINNINGS— THE NEW ZEALAND GAMBLER'S ARMAGEDDON

Having regard to the extensive nature of horse racing and punting in New Zealand, one would expect there to be a veritable flood of cases coming before the Courts on the relationship between betting winnings and income tax. This has not been so. The scarcity of authorities is not because punters never win, nor, on the other hand, that few wish to deduct losses incurred in this activity. Neither, as any self-respecting lawyer or accountant would realise, is it due to the benevolent attitude of the Commissioner of Inland Revenue. The sole reason for the lack of cases is that over the last 50 years the Courts in general have adopted a very restrictive approach in this area of the law.

It is extremely difficult to determine any "principles" as such from judgments delivered in Commonwealth jurisdictions. Judicial comment has invariably been "covered" by statements to the effect that each case is to be decided on its own facts. From even a cursory reading of the authorities one can, however, discern the one important trend. Namely, that in dealing with betting cases the Courts have generally drawn a clear line between those cases in which *the taxpayer has any connections with the racing industry outside his actual betting,* ie, as owner(*a*), trainer(*b*) or bookmaker(*c*), and those in which the taxpayer falls into the category of *a pure bettor.* Needless to say, the majority of New Zealand decisions fall into this pattern. The judgment of Cooke J in *Duggan v CIR* [1973] 1 NZLR 682 would, however, appear to give some hope to the Commissioner and indicates that the New Zealand Courts are prepared to ignore Commonwealth authority and adopt a more realistic approach of their own. In short, it may be that in the future many "pure punters" will find their activities under the scrutiny of the Inland Revenue officers.

The traditional Commonwealth jurisprudence

Perhaps the single most important decision given in the field of betting gains is that of Rowlatt J in *Graham v Green* (1925) 9 TC 509. Graham, who had hardly any other income apart from a small amount of bank interest, had been engaged in betting on an extremely successful scale for a number of years. He did not attend race meetings often but bet very frequently from his home by way of telegraph. On appeal from an assessment by the Commissioner, Rowlatt J held that the taxpayer was not carrying on a trade or profession of betting and was therefore not taxable on his winnings. His Lorship appeared to base his decision on the premise that a bet had an inherently irrational nature and it was, consequently, not possible for a punter to so organise his wagering so as to constitute it a trade. "There is," said Rowlatt J, "no tax on a habit" (at p 314) (*d*).

The reasoning in *Graham v Green* was not automatically applied. In the very same year the English Court of Appeal(*e*) expressly reserved for consideration the question of assessability of pure betting winnings. Nevertheless, despite the reservations of the Court of Appeal, it is quite clear in England(*f*), Canada(*g*) and Australia(*h*) that where the assessment is upon a taxpayer who has no other connections with racing, the Courts have taken the approach that he should not be taxable on his winnings. Correspondingly, in such circumstances nor should a taxpayer's claim for the deduction of betting expenses be allowed.

The problem is not that other Commonwealth jurisdictions have blindly accepted the rational of Rowlatt J in *Graham v Green.* Indeed, the contrary would appear to be the case(*i*). In theory, there remains today no obstacle to a Court assessing the pure punter on his winnings in appropriate circumstances. In practice,

(*a*) *Knight v CT* (1928) 28 NSW (SR) 523.
(*b*) *Holt v CT* (1929) 3 ALJ 68.
(*c*) *Vandenberg v CT* (NSW) 50 WN 238.
(*d*) Compare *Partridge v Mallandaine* 2 TC 179. A bookmaker is assessable on the profits from placing bets.
(*e*) *Cooper v. Stubbs* (1925) 10 TC 29.
(*f*) *Graham v Green,* supra, *Ryall v Hoare* 8 TC 521.
(*g*) *MNR v Morden* (1961) CTC 484; *Hammond v MNR* (1971) CTC.
(*h*) *Jones v FCT* (1932) 6 ALJ 202; *Langford v FCT* 6 AITR 140. Only one case has been found where an Australian Court has suggested that a pure punter might be assessable: see *Hines v FCT* (1952) 5 AITRA 305, 318.
(*i*) *Jones v FCT,* supra, 17, 18, per Evatt J.

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The Red Cross is born of a desire to bring assistance to those in need without discrimination as to nationality, race, religious beliefs, class or political opinions. As one of 121 National Societies throughout the world, the N.Z. Red Cross Society actively pursues a welfare role through its voluntary members, working from Kaitaia to the Bluff. Included among its activities are:

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★ Meals on Wheels.
★ Hospital services.
★ Blood Bank assistance.
★ First Aid and Home Nursing training.
★ The training and development of youth.
★ Welfare services in the home and in aid of those in need.

The N.Z. Red Cross Society's assistance internationally is widespread and varied. Among its projects:

★ Immediate financial and material assistance in times of disaster overseas.
★ The sponsorship of Medical Teams in disaster areas as, for example, Ethiopia.
★ Field Force Officers working with New Zealand troops overseas.
★ A scholarship for the training in New Zealand of nurses from Asia or the South Pacific.
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The ever-increasing work of the New Zealand Red Cross Society is financed by public support and by legacies and bequests.

NEW ZEALAND RED CROSS SOCIETY (INC.),
RED CROSS HOUSE, 14 HILL STREET, P.O. Box 12-140,
WELLINGTON, 1.

however, such an approach has been precluded by the decisions of appellate Courts which have disallowed the assessments of many gamblers who fall quite outside this amateur category. Thus, in *Martin v FCT* (1953) 90 CLR 470, the leading Australian decision, the taxpayer had been betting for over three years. During this time he had owned and trained horses. In total his bets, over half of which were successful, numbered more than 600, and while generally they were never more than $100, he occasionally outlayed up to $500. Yet, the High Court upheld the taxpayer's appeal:

> "The definition of income from personal exertion includes the proceeds of a business carried on by the taxpayer, but the pursuit of a pastime, however vigorous the pursuit may be, does not usually amount to the carrying on of a business, and gains or losses made in such pursuit are not usually considered to be assessable income or allowable deductions in computing the taxable income of a taxpayer. The onus . . . is on the appellant to satisfy the Court that the extent to which he indulged in betting and racing and breeding horses was not so considerable and systematic and organised that it could be said to exceed the activities of a keen follower of the turf and amount to the carrying on of a business" (at p 479).

Their Honours found the taxpayer had, in fact, dispelled this onus.

Apart from the fact that it is with some surprise that one finds that the activities of Martin were typical of the average racegoer(*j*), this decision, by its implicit acceptance of the principles outlined in the English cases, has for all intents and purposes made it impossible to hold in Australia that the winnings of a taxpayer unconnected with the racing industry constitute assessable income(*k*). This is the case regardless of how substantial his establishment or organisation is. Neither the size of the amount invested(*l*), nor those received will make any difference(*m*). Nor does it appear to be of particular significance that these betting winnings constitute the taxpayer's sole means of livelihood(*n*). One is forced to conclude from the comments in *Martin's* case that this evidence is unimportant because such substantial betting operations are typical of the Australian punter.

The New Zealand position

The position in New Zealand has never been as clear cut as that in other jurisdictions. It was not until 1952 that the problem of assessing the pure punter came before an appellate Court. Prior to that the only reported decisions were Magistrates' Courts cases. These decisions followed the pattern established by the Australian authorities. In *Z v CT* (1948) 5 MCD 652(*o*) it was held that the profits arising from betting transactions were liable to taxation; and in *A v CT* (1950) 7 MCD 26(*p*) it was held that they were not. The facts of these cases are illuminating in light of the previous discussion. In *Z's* case the taxpayer was, or had been, a racehorse owner and it appears he was also a bookmaker's agent. In *A's* case, on the other hand, he was a butcher's assistant with no proprietary or vocational interest in racing and the Magistrate accordingly distinguished the earlier decision on the facts.

That the authorities in England and Australia relating to the mere punter might not be followed in New Zealand was indicated, however, in the Court of Appeal decision in *CT v McFarlane* [1952] NZLR 348. The case itself was decided on facts which are unimportant in the present context. What is significant is that all three members of the Court made comments in the course of judgment which impliedly criticised the trend of overseas decisions. The most pertinent passage is to be found in the judgment of Stanton J:

> "An analysis of the cases cited in *Gunn's Commonwealth Income Tax Law and Practice,* 3rd ed, shows that, where a systematic bettor was regarded as making an income, he was a horseowner, trainer, bookmaker, or otherwise associated with racing, though not every taxpayer in that position was so treated. It is difficult on any logical ground to justify the distinction between systematic betting by a mere punter with no racing background and similar betting by a person associated with racing activities, and it may be that, although it has been accepted and acted upon in several cases, this question will have to be considered if and when it arises" (at p 376).

One would have thought that this strong dicta pointed to the possibility that the English and Australian authorities might not be followed in New Zealand. Nevertheless, up until

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(*j*) See 17 CTBR (NS) Case 8.
(*k*) See the comments in *Langford v FCT,* supra, 145, per Webb J.
(*l*) *Jones v FCT,* supra.
(*m*) *Langford v FCT,* supra.
(*n*) *Martin v FCT,* supra; *Graham v Green,* supra.
(*o*) See also *M v CT* 45 MCR 133.
(*p*) See also *B v CT* 45 MCR 74.

the end of 1972, subsequent local decisions seem to be notable only for their misunderstanding of the Court of Appeal's comments. In 2 NZTBR Case 45, although possibly coming to the correct decision ultimately, the Board seemed to have little difficulty in reaching the conclusion that the taxpayer, being a pure punter, should not be assessable. More importantly, in the Supreme Court decision of *Vuleta v CIR* [1962] NZLR 325, much the same approach was taken by Henry J. Here, the taxpayer had formerly been a bookmaker but had retired in 1953. From that date on, apart from an initial loss of $4,000 in 1953 and a loss of $2,500 in 1959, he had had annual winnings ranging from $13,000 to $3,000. Henry J allowed the taxpayer's appeal against assessment, holding that the latter did not carry on the business of betting, that the profits were not derived from a profit-making scheme under s 88 (1) (c) of the Act, and that they were not income in nature at all. His Honour's lack of acceptance of the Court of Appeal's sentiments is indicated by his comment that were it not for the taxpayer's previous association with gambling as an occupation he would have had even less hesitation in deciding the betting winnings were not assessable income! (at p 330).

The judgment of Cooke J in the recent case of *Duggan v CIR* (supra), however, offers renewed hope of an independent approach by local Courts. The facts in *Duggan* were far less convincing than those in the *Vuleta* decision: The taxpayer carried on business as a wool and skin buyer and sought to explain away an extra $27,000 which had accrued to him over eight years. Virtually no records were kept of his supposed wagers, and the taxpayer had no system except for annotations in his casebook. Of particular relevance to the present discussion is the fact that he had no present or past association with racing apart from his betting.

On the facts presented in evidence Cooke J was not prepared to accept the taxpayer's explanation that the $27,000 represented winnings from bets placed on the TAB. His Honour left no doubt, however, as to what his conclusion would have been if he had believed the taxpayer's story:

> "In case it should be any consolation to the objector for his defeat in that way on the onus of proof, I would add that had I accepted his story of race winnings to the full I would have been prepared to hold that it would still not avail him" (supra, at p 686).

His Honour then proceeded to deal with the assessability of betting winnings at length, and it is submitted, with a clarity that has been generally lacking in earlier decisions in this field. Relying on the dicta quoted above from *CT v McFarlane*, Cooke J expressed the firm opinion that he could rely on s 88 (1) (g) (*q*) of the Act to uphold the Commissioner's assessment. Quite correctly proceeding on the basis that the subsection had an application independent from the other provisions in s 88(*r*), he held that income should, when undefined, be regarded as being used in its ordinary and natural sense. Accordingly, it was very difficult to avoid the conclusion that the dominant aim of the taxpayer was that of making an income gain from his betting. Alternatively, his Honour suggested, he could have found the taxpayer was carrying on the business of betting (at p 687).

The evidence, which Cooke J held would be sufficient to assess the taxpayer, was in fact far less than what has been held necessary for assessment in previous cases. Notwithstanding, it is suggested that the conclusion drawn by his Honour (at p 686) from an analysis of the taxpayer's regular betting, the adoption of some system, frequent attendance at the races at weekday as opposed to weekend meetings, the mixing of his race winnings with the income of his business and the large extent to which he and his family were allegedly dependent on the proceeds for day-to-day living expenses, is far more realistic than those reached on other occasions by his Australian and New Zealand brethren. Who, it is submitted, could honestly say that such activities are typical of the average race goer in New Zealand? It may be that they are indeed typical of the normal successful professional gambler; but this is merely begging the question, for surely such a person should normally be taxed on his winnings!

Having regard to the completeness of his discussion, it is a little surprising that Cooke J did not refer to either *Vuleta* or the comments of F B Adams J in *McFarlane's* case. As stated, in the former Henry J discussed both the presence of a business of betting and whether the winnings of the taxpayer represented income at all. He came to the opposite conclusion of Cooke J on the facts. Even more strange, while quoting from the judgments in the Court of Appeal decision, Cooke J did not refer to

(*q*) Section 88 (1) (g), Land and Income Tax Act 1954. "Income from any other source whatsoever."

(*r*) *Re Keane* 2 ATR 534.

passages which lent direct support to his own approach. The following extract was particularly in point:

"I suspect that, in some of the decisions, undue emphasis may have been put on 'organisation' or in the necessity for finding something in the nature of a business. *It may well be that the true distinction is between betting for sport or pastime and betting for the purposes of producing an income.* It seems clear that gambling for sport or pastime does not produce taxable income, but the idea that, where betting is indulged in as a means of producing an income, the profits or gains derived therefrom are not to be taxed except under special conditions not applicable to other forms of income is not one that should be lightly accepted." ([1952] NZLR 348, 382-383 per F B Adams J.)

It is therefore submitted that the position as to the pure punter in New Zealand is as follows. Unlike Australia, Canada and England, the approach taken by local Courts is by no means unanimous and it appears that such a taxpayer could be assessed on his winnings on at least two bases. First, there is strong obiter dicta in the Court of Appeal decision of *McFarlane v CT* that suggests that the mere punter may, in appropriate circumstances, be held to be carrying on a business of betting. Secondly, on the authority of obiter dicta in the same case and the well reasoned comments of Cooke J in *Duggan's* case, it appears likely that the taxpayer who bets so frequently and in such circumstances that he could be termed a professional gambler in the normal sense of the word, could be held to have derived assessable income under s 88 (1) (g). It is not necessary in such a case that the taxpayer be carrying on a betting business.

Some theoretical and practical considerations

Any discussion of the taxation of betting winnings must attempt some rationale of the Courts' reluctance to uphold more readily the Commissioner's assessments or to allow taxpayers' claims for deductions. Although Cooke J in *Duggan v CIR* made a valiant attempt to reconcile his decision with that of *Graham v Green*, it is clear by virtue of Rowlatt J's comparison between betting and betting gains and gifts in the latter case, that the learned Judge regarded betting winnings in general as being capital in nature; apparently because of their essential irrationality. This reasoning also permeates the judgments in many of the Australian cases dealing with the liability for tax of the mere punter.

This attitude is, it is suggested, patently fallacious and belies the evidence that has been presented to these Courts. It should be obvious that those who derive a living from gambling develop an expertise in assessing their opportunities for profit which is far from irrational in its basis. It is submitted, in fact, that for those "in the game" there is little, if any, difference between assessing the bloodlines and tips of the racing industry and those of the more speculative stocks and shares. The latter have been held for some time to constitute, in appropriate circumstances, the subject-matter of a business(*s*). Indeed, speculating in futures on the stock market constituted gambling at common law!(*t*)

It thus appears that there is no matter of principle which prevents a Court assessing taxpayers on their betting winnings. In the writer's opinion such gains cannot, as a class of profits, be distinguished from the general concepts of income. On the contrary:

". . . they have a natural correspondence with income in the sense that they are capable of recurring from time to time, they are sought for with an expenditure of effort that varies from the considerable to the negligible, and no capital is exhausted in the usual sense in obtaining them(*u*).

Indeed, until the decision in *Graham v Green* the Revenue in England used to make a practice of assessing the gains of taxpayers who bet regularly enough to be classified as a professional gambler. This, it is submitted, should be the position today(*v*).

There are any amount of factors the Courts can look to in coming to a conclusion on the tax liability of the pure punter. Amongst these are the frequency and regularity of his betting, the amount in relation to his total income that is expended on this source, and the nature of his returns. Regard should also be had as to whether the taxpayer has come to expect a return from his "investment" and to what extent the taxpayer and his family depend on the return for their day-to-day living expenses. All these factors come down, it is suggested, to one fundamental question: "Was

(*s*) *Cooper v Stubbs*, supra; *Townsend v Grundy* 16 TC 140.
(*t*) *Universal Stock Exchange v Strachan* [1896] AC 166; *Thacker v Hardy* 4 QBD 685.
(*u*) United Kingdom *Royal Commission on the Taxation of Profits and Income*. Cmnd 974, p 84.
(*v*) Idem.

the element of sport or pastime or amusement the dominant or main factor in the taxpayer's betting activities or was his aim to make a regular profit?" Were the Courts to adopt a realistic approach to this question one suspects that we would see many more punters before the Courts than in the last 50 years.

Perhaps, however, it is the practical considerations against taxing income from such a source which have outweighed theoretical principles of assessment. There is, indeed, some force in the argument that neither the Commissioner nor the taxpayer is very keen to bring a test case before an appellate Court; the Revenue because they presumably are aware of the fact that by far the majority of punters make a loss, and the taxpayer because, while losing at the present time and without doubt interested in deducting his losses, believes, in the teeth of experience, that one day he will make a non-taxable profit.

It is suggested that the Revenue's fears are for a start based on an unsound factual premise: namely, that all punters, or a large majority, would fall into an assessable class. The fact of the matter is that in probably 95 percent of the cases where a taxpayer tried to deduct his losses from gambling, one would expect a Court to classify his activities as only a sport or pastime. Accordingly, a change in tax status would occur in very few cases.

Even were this not so, it is suggested that the prospect of thousands of valid claims for the deduction of betting losses can easily be countered. The position of the betting taxpayer is determined by the treatment given to losses in the general scheme of taxation. The problem could readily be solved by allowing the punter only to deduct losses from income arising from the same source, ie, his betting gains. It could be said that such an approach is inequitable, in that one aspect of taxation is being isolated for special treatment. The answer to such a comment is simply that betting involves a unique problem so far as onus and evidence is concerned and that it may be deserving of special treatment to ease the potential administrative problems.

The one practical argument that does carry some force is that Courts in New Zealand should be reluctant to impose what is, in effect, double taxation. Winnings which result from bets placed at the TAB are taxed at source and it could be said that it would be wrong to impose an additional tax. While admitting that this point has some validity, it is suggested that it is by no means conclusive. Many professional gamblers still operate through what is, in New Zealand, an illegal bookmaking system. Moreover, one might well ask whether such a tax would place the taxpayer assessed in a position different from that of the shareholder in a company? Certainly, it is doubtful whether the possibility of provision for taxation at source is sufficient evidence to argue, as has been done, that the Legislature is implying that betting winnings should not be taxable(*w*).

It is accordingly submitted that there is no reason why betting gains should escape liability to taxation in appropriate circumstances, either on theoretical or practical grounds. It is, moreover, the writer's opinion that in general the Courts throughout the Commonwealth have been incorrect in adopting a conservative approach in respect of assessing the mere punter. The future and proper approach by the New Zealand Courts must be that demonstrated by the judgment of Cooke J in *Duggan's* case and the obiter dicta of the Court of Appeal in *McFarlane's* case. One strongly suspects that on some occasion in the very near future the local Courts will in fact decisively choose not to follow those English, Australian and Canadian authorities which have adopted contrary reasoning.

B G HANSEN

(*w*) *CT v McFarlane*, supra, 372, per Gresson P.

THE LAW

The Law is a stern, austere lady,
Proudly erect on her dais of power,
Man-endowed with the power of liberty,
And often the end to life itself.
She who embarks defiant behind the armour of the written word,
Enforcing man-made statute of sometimes the absurd,
Reluctant to relent,
But always ready to be wooed,
By reason and eloquence and human element,
So that Justice takes the place of written word,
From the very plinth on which she stands,
And thus it be
And may it for ever be,
That in a world of turmoil and deceit
Mercy will find its place,
Over-riding precedent and the written code,
And always justice will be done.

GEORGE JOSEPH

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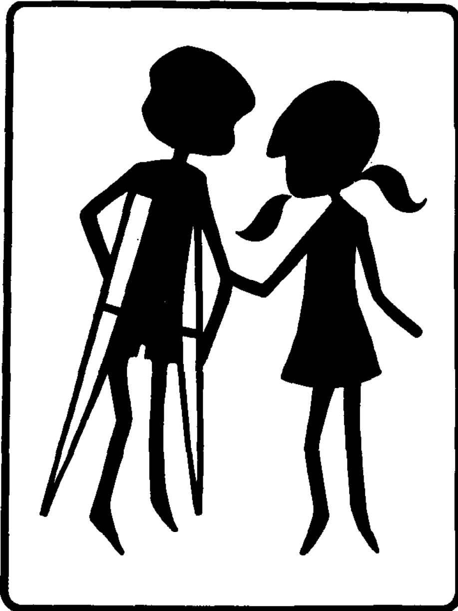

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Any further information is readily available at all Branches and sub-centres where visitors interested in seeing the Society in action are always welcome.

DISPUTES : A CAREENING—Part Three

The third in a series of four articles, by MR M D MALLOY. *Earlier articles appeared at [1974] NZLJ 302 and 364.*

LAW

We are accustomed to the notion that law supplies a means of settling disputes. For civil and matrimonial arguments, this idea is taken for granted. The use of marriage counsellors is an additive, not a substitute; we hope that they may solve a few problems before a stage is reached when they are insoluble by mediation processes. In the area of international relations, a common approach involves the development and enforcement of international law. What is this method on which we lean to resolve disputes both between individuals and groups? How does it arise? What are its behavioural roots? Can we begin to analyse and understand it in the quantitative terms which have proved so useful to science?

Some notions of the nature and origin of law are patent nonsense. Some "explanations" boil down to a definition of law in terms of its breaches. Rousseau suggested some prehistorical social contract. One Freudian follower sees law as basically a taboo preventing undue variation in sexual behaviour.[18] Accident and ritual have been suggested as an explanation for a lawful relationship between the peace pipes of Indians and peace itself.[14] Ideas such as these are worthless, for they lack any empirical backing.

Law is a social phenomenon. It seems to apply to relatively enduring groups—for example, nations, cities, partnerships, societies, companies and marriages. Casual observation suggests that language plays a significant role. It seems to involve a pattern in the adaptation of the individual as fundamental as habit.

Learning develops habits under the influence of something like reward. During the course of learning, both in animals and man, behavourial deviation from some kind of recurring pattern progressively diminishes. More and more, some kind of non-thinking (ie, non-deliberative) mechanism takes over. Hebb[8] suggests the formation of a functional cell assembly in the brain to explain the kind of automatic linkage of movements involved in habits such as walking, piano-playing, shaving, etc.

Something like this seems to occur when groups are formed and proceed to negotiate and codify a pattern of relationships among themselves. Initially, attention is paid to the range of possible behavioural patterns; pros and cons pertaining to the possible patterns are weighed; a decision is made and codified, and the written record is then typically buried in a safe and apparently forgotten. Not, however, ignored. It seems that the real point of the exercise is to achieve a consensus and, when this has been achieved, behaviour thereafter tends to adhere increasingly to this pattern.

Theorising on the characteristics of law-observant behaviour is premature in terms of completed experimental work. On the other hand, the complexity of the problem and of the data so far collected render some form of theorising, however tentative, an important aid in bringing about some order in the data. From the experimental work with naive groups it is possible to develop a perspective which is con-consistent with the pack-hunting notion of zoologists.[20, 23, 24, 22]

The studies were summarised and reviewed by Sherif in 1966.[21]

Three separate experiments were carried out at campsites in Connecticut and Oklahoma. The subjects were all boys selected from stable, white, Protestant families from the middle socio-economic level. All were healthy, well adjusted in school and neighbourhood, and with no record of disturbed behaviour.

The boys were chosen from different schools and neighbourhoods to eliminate the possibility of previous acquaintance or personal ties. They did not know that the various situations in which they found themselves had been carefully contrived for experimental purposes. They were subjected to constant surveillance by people who were apparently camp staff. All recording of observations was done out of their sight.

In the first experiment, the boys were initially housed together and friendship patterns based on common interests were allowed to form. These patterns were then disrupted by assign-

ing the boys to different houses. By means of games, prize contingencies and camp activities of various kinds, the patterns of interaction between groups and within groups could be studied. Inter-group conflict was experimentally developed and dissipated. Role playing within groups and shifts in role were manipulated by changing goals, tasks and inter-group relations.

From the experiments it emerged that interaction in pleasant activities was conducive to the formation of friendships based on liking and interest. Forming groups by assigning boys to different cabins was *of itself* sufficient to break most of those friendships—more than half of the friendship choices shifted from personal preference to within-group preference. Group structure and group norms of behaviour were products of interaction in activities aimed at attaining highly attractive goals and requiring the carrying out of interdependent tasks.

Associated with the developing organisation and local customs were signs of "we" feeling and pride in joint accomplishment. Those who did not help group activities, or who attempted to frustrate such activities were subjected to attempted correction. Over time, deviant behaviour tended to diminish with decreasing need for correction. Each group tended to develop its own culture, with physical aspects of the environment and shared experience prominent components. It was found that cultural, physical and economic differences and neurotic or unstable tendencies did not necessarily lead to intergroup conflict, hostile attitudes and stereotyped images of out-groups. The sufficient condition for such behaviour to emerge was the existence of two groups competing for goals that only one group could attain. Associated with rising intergroup conflict were increasing within-group co-operation and changes in relationship. Contact between hostile groups in pleasant situations had no effect in reducing conflict. What did reduce conflict was the experimental introduction of superordinate goals, attractive to each group, but attainable *only* on the basis of co-operation of *both* groups. Moreover, repeated co-operative activity was found necessary to reduce intergroup hostility to a low level. Associated with intergroup co-operative activity were increasing contacts of a social and planning nature, increased interest in information about the out-group, exchange of members for specific tasks and a widening of spheres of action of the leaders.

These findings on the effects of introducing superordinate goals are interesting from many points of view. Seen in an international context they suggest that Churchill was wrong if, in his remark that "jaw-jaw is better than war-war", he thought that international conferences would *of themselves* have a positive influence in reducing hostility. They also suggest that the important role of the United Nations as a contributory to peace is not the General Assembly or the Security Council but the various special, working agencies, all aiming at goals of common international interest. Within a national context, the findings also suggest a broad strategy for reducing class, religious, racial and industrial conflict.

Sherif's studies are interesting in terms of *group* manipulation but they pose questions for the individual. How does an individual come to adopt specific norms? What events maintain within-norm behaviour? Deviant behaviour was punished. Was this the key to norm observance? Tentatively, we may agree that law-observant behaviour represents a form of normative behaviour in Sherif's sense. Granted that we may be able to point to some of the factors tending to produce observant behaviour, it does not follow that the same factors will exert the same degree of influence in maintaining observance of both state law and primary group norms.

The gut issue for observance is whether the key factor is some kind of positive payoff for observance or avoidance of punishment for deviation. At the survey level, the embarrassing frequency of recidivism suggests that imprisonment has little, if any, effect on decreasing crime.

The figures only *suggest* this; they do not prove the point or, indeed any other point. In part this is because law enforcement procedures are imperfect in securing convictions for criminal behaviour. Hence, an unknowable proportion of released prisoners may offend subsequently but avoid detection. Secondly, survey methods can never *establish* any cause-and-effect relationship. They may suggest one. Proof can only be obtained if the relevant factors are experimentally manipulated one at a time.

Experiments with humans and animals cast doubts on the precise conditions under which punishment has an effect on behaviour and how long that effect will last when punishment is removed. On the other hand, the evidence for some kind of "reward" or reinforcement is overwhelming. It is no longer a question of whether it works. A vast amount of data has now been accumulated recording in considerable detail the wide ranges of behaviours, reinforcements and contingencies enabling behavi-

our to be shaped under environmental control.

One experiment will be cited as an example of the differing effects of reward and punishment. Sorting of IBM cards was tested with a group of 102 women undergraduates, half being tested under monetary reward conditions and the other half under monetary fine. Five work periods of four minutes each were used. During each rest period reward subjects were paid 50c for their previous effort and five subjects lost 50c for not working fast enough. Prior to the last trial each group was urged to work faster but was told that no reward or fine would follow the trial. During each of the first four trials each of the groups showed an improvement in its performance, but with a margin consistently favouring the reward group. During the final trial the reward group continued to improve but the performance of the fine group deteriorated.[28] The major problem of what is meant when "law and order" is used as an issue thus seems to boil down to finding a way by which something equivalent to the positive "reward" condition in this experiment can be discovered for adaptation in a broader social context.

An important contribution to clarity of thinking on the observance problem has come from Kelman[12, 13] Enactment of a law is akin to a host of similar events such as raising children, brainwashing a victim, advertising soap or advising a client. Commonly, some more or less permanent change in habit is sought. All may be described as attempts to bring about social influence.

Kelman suggests that three separate processes may be involved in achieving this end:

(a) *Compliance.* When this happens a subject conforms with the direction of influence in a message because the author is in a position to dispense reward for conformity or to punish for deviance. When conformity is motivated only by the hope of gaining a reward or by the need to avoid punishment, we would expect it to continue only so long as the author is aware of the subject's conformity. An example is the soldier doing the bare minimum to comply with an order from a disliked NCO. Always present is the possibility of "dumb insolence" and the probability of non-conformity in the absence of surveillance.

(b) *Identification.* This happens when a subject conforms in order to maintain a relationship with the author which the subject views as of importance. Although the presence of the author is not viewed as essential to support the change in behaviour, the subject must reproduce something of the relationship between himself and the author in a new context to fit his altered perspective. Kelman views the change as something encapsulated and to the side of the subject's values and not as something fully integrated within the subject's value system. If compliance can be viewed as primarily a change in the subject's public (ie observable) behaviour, identification can be viewed as a change in both public and private (ie non-observable) behaviour. Whether Kelman's distinction between compliance and identification represents a real difference in the way a subject perceives a situation of possible influence remains a matter of some doubt. In one experiment, for example, models of different sexes were seen by children *controlling* reward, *receiving* rewards and in subordinate roles. Testing for imitative behaviour, the children tended to imitate the controlling model, regardless of sex.[2]

(c) *Internalisation.* This is proposed to represent the change brought about when the content of a message is accepted into and becomes part of a subject's value system. The subject conforms, not because of reward or punishment or the personality of the author, but because of the intrinsic characteristics of the message. Internalisation may be regarded as both a change in public behaviour and a complete change in private behaviour rather than the partial change implicit in identification.

In terms of Kelman's analysis, the problem of any positive steps to increase conformity would seem primarily to revolve around method of bringing about interalisation.

The recent experimental evidence has tended to support Kelman's analysis[19] but subject to allowance for a "sleeper" effect. Some studies have shown that recall of the content of a message and the effect of that message on opinion change are not directly related. It is possible for recall to be low and amount of opinion change high. It is also possible for individuals showing least recall to reveal the greatest amount of influence. These kinds of results have been interpreted in terms of a "sleeper" effect emerging to some extent independently of the learning situation.[9, 17, 27]

Behaviourists have suggested a number of explanations for habit development. All the concepts have their weaknesses. Some of the concepts relate to issues like motivation which may be non-issues if the problem of understanding behaviour is looked at in terms of its direction rather than in terms of getting it

started. Recently, an attempt has been made to resolve some of the problems by using as a model the concepts of servo-mechanisms and feedback control.[1] The basic ideas stem from engineering practice in the area of what we now call cybernetics. The ancestral line goes back to Alexandria in the 3rd century BC when a Greek mechanician named Ktesebios invented a float chamber to control the rate of inflow in a water clock.[16] For process work in the automated factories of today we have servo-mechanisms triggered by highly efficient sensor devices such as refractometry, infra-red analyser and gas chromatology.[11] All these devices are based on the principle of feedback loops such that part of the output of an active system returns in a loop to modulate input and continuing performance. Recent concepts of the organisation of the brain include the idea that feedback loops maintain some kind of steady state in the organism.[15]

Annett points out that the same kind of servo-mechanism mediates opposing muscle contraction and relaxation and proprioceptive feedback from the musculature and joints supplying information on forces resisting movement such as limb weight, friction, inertia, etc. Extending this principle to behaviour, Annett suggests that all events having an effect on responses can be subsumed in the concept of knowledge of results. Sense organs play the same role as that of the sensors in mechanical systems—they detect relevant information which is relayed to a decision point and then, if required, effects a change in behaviour, or, if supportive, tends to reinforce ongoing behaviour.

When this principle is understood, it becomes possible to increase the efficiency of adaptation of an individual, human or animal, by supplying an additional and more sensitive feedback loop. This has been done in a host of experiments, including some relating to the development of wasted muscle tissue in crippled humans. Poor design in such loops has been found to be an important factor in the impairment of driver efficiency through the inadequate visual engineering of cars.[10] To sum up, in designing his ingenious mechanical servo-mechanisms, it appears that man has unknowingly adapted principles of his own internal organisation and habit formation to a different situation.

Annett's notion was probably conceived with particular reference to the relationship between a human or an animal to its physical environment. Nevertheless, it seems to be of direct relevance to social behaviour if we assume that, for an individual, interaction with another will involve some kind of predictable response from that other—in other words, influence. The effect of previous learning on the part of that other will predispose him to perceive and respond to behaviour *within some norm*. It is only this kind of behaviour which conveys meaning unequivocably. Hence feedback loops to the actor will tend to provide positive evidence of influence if behaviour is within the bounds of the other's norms and negative information of irrelevant or lack of response if his behaviour is outside these norms. An example comes from dialects in spoken English. Some very broad dialects are incomprehensible to some listeners, while standard English is likely to be readily understood by the same listeners. Thus, continuing social interaction can be expected to produce a strong tendency to maintain behaviour within social norms. The explanatory principle could be described shortly as the cybernetics of influence. Directly supporting experimental evidence is lacking. However, influence as an effect has been studied experimentally. It has been found that influence varies with group attractiveness, sex, religious affiliation, subject anonymity, group success or failure and instructions.[3] The lawful nature of the relationships thus observed experimentally is consistent with suggesting feedback loops of influence as a mechanism in developing normative behaviour.

One way of looking at behaviour is in terms of variance and predictability. The young of any species, such as kittens, puppies and babies, show a large repertoire of random and unpredictable behaviour within, of course, limits imposed by the physical characteristics of the species. An old cat, by contrast, shows a stable and predictable pattern of preferred sleeping spots. An old dog has his regular pad. An old man has his repertoire of anecdotes which he will repeat if he can find a listener. All show predictable, stereotyped patterns. We can thus view the pattern of maturation as including a change of variance in behaviour from high to low. In other words, under the influence of habit, which in turn is influenced by the environment, behaviour becomes selective and inhibited. Some patterns are reinforced and strengthened. Others are not reinforced and drop out. Perhaps this tendency to achieve consistency in behaviour merely reflects a universal process whereby, with maturation, behaviour is progressively brought under environmental control.

The *shape* of normative behaviour, as distinct from its originating and maintaining conditions, seems primarily referable to membership of groups. The fundamental and universal characteristics of the originating and maintaining conditions suggest that all humans will develop normative behaviour. Hence, we can expect that the existence of differing kinds of groups within a finite area such as that included in a sovereign state will be associated with stable and predictable differences in normative behaviour.

The studies of group behaviour point up how readily humans form groups which in different ways compete with one another. History is full of accounts of such rivalries. Warfare has commonly developed around groupings determined by tribe, religion, state, race and class. The nature of inter-group differences, which at any given time determines primacy, may be linked to Sherif's notion of group goal attainment, such that shifts in importance of goals may be linked to shifts in the shape of inter-group conflict. In other words, something akin to fashion may determine the form of human conflict.

Against this background, law within a state could be viewed as that component of its normative behaviour which the dominant group or groups in the State for the time being will enforce by using state sanctions. This view of law is akin to that of Karl Marx, who saw law simply as a device used by capitalists to maintain a position of dominance. It departs from Marx's ideas, however, by pointing to the role of fashion in determining primacy in inter-group conflict and by adding the notion of group alliances as a factor in dominance. Because such alliances in an historical time dimension may be unstable, we have the possibility of an unstable component in the law. This may not be obvious within the time scale of an individual life.

Viewing law in terms of normative behaviour of dominant groups, implies the possibility that to members of non-dominant groups, law may seem to contain an irrational element. A host of anecdotal comment elaborates this point. If law represents the norms of dominant groups, it follows that the norms of non-dominant groups will, if inconsistent, tend to be associated with law-deviant behaviour. Consistent with this is the everyday observation that non-dominant groups supply a proportion of prison populations greater than what would be expected on a chance basis. Examples includes Maoris in New Zealand, Aborigines in Australia, Negroes in the United States and blacks and coloureds in South Africa. In all of these countries, the group definition is racial. In Britain, by contrast, the significant group definition is class. A significantly greater proportion of the lower class becomes prison inmates.[5] In this shift from race to class we seem to have an example of the hypothesised shift of group-line fashion.

Viewing law in terms of group norms suggests a correlative view of deviance: that is, a shift from emphasis on the individual to emphasis on the nature of the groups to which he belongs. This shift involves a major departure from the orientation of a large number of theoreticians from Lombroso in the 1860s to Eysenck today. Inasmuch as the experimental evidence has failed to support the formulations of the individual theorists, their positions are, on the most optimistic view, at risk. There is nothing new in the idea of group norms as an explanation of deviant behaviour. Durkheim[6] and Sutherland[26] have both put forward sociological theories involving the concept of a criminal as a normal person living in a normal society. As could be expected, such theories have been attacked on the grounds that they fail to take into account individual differences[7] and the emotional origin of some relevant responses[4].

In the context of the sociological theories and their critics, it is possible to make several comments on group norms:

(a) The group norm perspective may lead to a theory of law in general, rather than to a theory of criminal behaviour.

(b) A group nor mperspective suggests that there may be no such problems as is inherent in the notion of criminality. We may more simply try to account for the dominance within a state of a particular group or set of groups.

(c) The group norm perspective does not purport to account for conforming and deviant behaviour. It leaves out of consideration, for example, influences such as stress, individual differences in stress reaction, individual dominance striving, the problem of the sociopath and boredom.

(d) The social learning mechanism suggests a possible explanation for initial interest in joining a group. If an individual is exposed to another who is viewed as someone of prestige and therefore as a potential model, the observer may tend to take an interest in and possibly to join a group of which the model is a member. Hence, something like random factors in a limited geographical area (ie exposure to

possible models) may determine group membership.

(e) Individual differences may relate to subtle factors which are not apparent to superficial observation. If an individual is simultaneously a member of different groups, sampling his behaviour without reference to such groups may produce problems. Suppose that a young man is a member of a strict Protestant religious group and also of a sports group. In situation A (which has some similarity to his religious group experience) the young man may conform to religious group norms while in situation B (which he somehow relates to sports group experience) he may conform to sports group norms. An independent observer might well rate situations A and B as highly similar and hence might find himself unable to comprehend the subject's differing behaviour.

(f) The group norm perspective suggests that changes in law may stem from slow changes in norms within a dominant group and to shifts in inter-group relationships. Any major and sudden shift in such relationships becomes a revolution.

(g) According to the perspective suggested here, prisoners as a group would be expected to develop their own norms of behaviour. Because they are likely to perceive their group as threatened by society in the form of warders, these norms may tend to be rigid.

A view of the law based on group norms suggests a perspective for reform. What *size* of group should determine norm formation? More and more humans are forced to see themselves as dwellers in a single small planet. World shrinkage has accompanied population growth and the development of high-speed transport and communication. Less and less can we afford to tolerate the kind of intergroup conflict which boils down to contemporary tribalism. Survival and the quality of living both seem to hinge increasingly on all men perceiving themselves as fundamentally members of the same group, seeking to attain the same goal (inhabiting a supportive and attractive environment) and obliged to adopt compatible norms. From this perspective, legal provisions linked to some form of tribal gamesmanship are wholly bad.

The idea that group norms may provide the biological foundations for the law of the nation-state is theoretically useful if (and only if) it brings order to a large number of observations by abstraction and generalisation; is in a form which permits deduction; and can be shown to be consistent with any such deduction through observation. Scientifically, the only way to check this consistency is to express the deduction in the form of a hypothesis which can be tested by controlled experiment done in such a way that either the experimental hypothesis or its opposite (the null hypothesis) is supported by the data. This kind of scientific enterprise has not as yet been attempted for law-related behaviour. The group norm perspective of law thus lacks experimental support and has the status of a hunch.

However, even a hunch can be checked to discover whether it is consistent with survey data. This kind of check is mainly of negative value. It may prove that the hunch is wrong, even if it cannot produce evidence positively supporting the hunch. If group norms supply the grassroots of law, we would expect them to show up in the coded laws of a nation-state. The statutes of New Zealand were reprinted in 1957 and that year thus supplied a set of books complete in themselves in recording the then current statute law. They, therefore, present a convenient opportunity for studying the statute law of a small state in a classificatory and simple quantitative sense. The print covered 16 volumes and 14,104 pages. The statutes in the first 5½ volumes covering 4,933 pages were selected as a sample for examination. This sample comprised 34.98 percent of the whole, and covered 152 Acts.

The Acts were examined in terms of goals and methods. It was found that typically the goal of a statute was unitary—only the rare one showed a multiplicity of goals. By contrast, multiple methods were common. The major goals in order of frequency were:—

(a) *Normative.* Sixty Acts, or 39.47 percent, had as their object the establishment of behavioural norms. Examples include banking, relations with aliens, broadcasting, working bush, burying the dead, rewarding social service, operating companies, defining crime, etc. By "norms" is meant the prescription of a particular way of doing something which would be done anyway.

(b) *Protective.* The protection of humans from a wide variety of threats was the apparent goal of thirty-five, or 23.03 percent of the Acts. Examples of threat include poisonous honey, dangerous lifts, cranes and bush-working machinery, assault, dangerous drugs, unqualified dentists, explosives, poisonous spirits, attack by dogs, dangerous factories, etc.

(c) *Economic.* A series of Acts (33, or 21.71 percent) are concerned with positive steps to

promote the welfare of citizens, with emphasis on economic factors and some form of sharing of the burden which the hazards of life may bestow upon individuals. Threats dealt with included possible loss arising from the purchase of fertiliser, the wilfulness of testators, the selfishness of straying husbands, abandonment by relatives, and plagiarisation. Loss sharing is seen in compensation for accidental death and in contributory negligence.

In contrast to these major goals some 3 percent of the statutes dealt with the settlement of disputes. These involved the setting-up of relevant methods such as arbitration and declaratory judgments. Research and education in this area were not covered by statute. So far as quantitative statute law is concerned, the settlement of disputes seems to be a minor interest.

The methods of statute law contain a surprising variety and number (twenty in the sample used). Prominent among them is, of course, punishment—51.97 percent of the statutes inspected. Defining ways of controlling the behaviour of others is the second most frequent with 48.03 percent. The third most frequent method is recognition (42.76 percent). This does seem surprising. This method accepts that a mere declaration of a state of affairs, when embodied in statute form, will be sufficient to ensure appropriate behaviour. Those affected include the Courts, departmental officials, ambassadors and the public (eg holiday observance, titles, causes of death).

The relevant frequencies of both goals and the methods of the statute law as found in the sample studied are given in Figures 1 and 2 respectively. It may be noticed that some activities (eg organisation, norms, education, information storage, revenue collection) appear as both goals and methods but typically with different frequencies. It seems that statute law probably reflects roughly the values, prejudices, history and stereotypes of the electorate. As a method, research seems to be of minor importance and, typically, subordinate to some other method such as health department organisation, or forestry development.

Our glance at statute law suggests that some 40 percent of the goals and some 5 percent of the methods relate to normative behaviour. This is consistent with the idea that functional groups, including the state, provide the matrix within which the feedback of influence develops norms. Law seems to represent an aspect of behaviour derived from group-induced norms and stored in coded form, which is now used for other purposes. Parliament seems interested in using the format of law as gestures aimed at pleasing groups in the electorate, regardless of whether those gestures achieve anything. On the face of it, some of the goals appear to be in conflict with each other. Most of the methods seem inappropriate. No systematic method of eliminating inappropriate statutes and of checking the effectiveness of statutes is apparent.

Our glance at group norms suggests the existence of an important distinction between within-group and between-group behaviour. If norms and their derivative, law-observant behaviour, are within-group phenomena, then we would expect them to be relevant to disputes between members of the same group but not to be relevant in the same way and to the same extent to disputes between groups. What comprises a group? In the world of today, the organisation seems to be the equivalent of the earlier geographical units (nomad tribe, village and town). The organisation is a functional group in the sense that its "members are differentiated as to their responsibilities for the task of achieving a common goal".[25] Except to the extent that groups, including organisations, are members of other, more embracing groups, between-group disputes do not appear to be amenable to law-mediated settlement. This fundamental problem may be at the heart of a great deal of dissatisfaction with the methods of the law in relation to disputes. Quite apart from difficulties inherent in antiquated trial procedures, it may be that law as a tool has been called upon to do a job which it is inherently unable to do. If between-group tensions develop greater centrifugal force than is possessed by the centripetal force of supra-group norms, then the attempt to use those norms in disputes between the groups could tend in the direction of disintegration of the larger society.

Increasingly, industrial disputes are recognised as not being suitable for the Courts. International law is only a name—as a device for solving international disputes it is irrelevant. Significant results stem from negotiations. These aside, the practices of the law play a major role in the settlement of disputes. Within its area of recognised decision-making the law in general, like trial procedure, shows no sign of concern for assessing effectiveness, or for improving performance. Neither survey nor experimental testing of method exist. It seems that with the defeat of the King's prerogative in England, the vigour of the law as

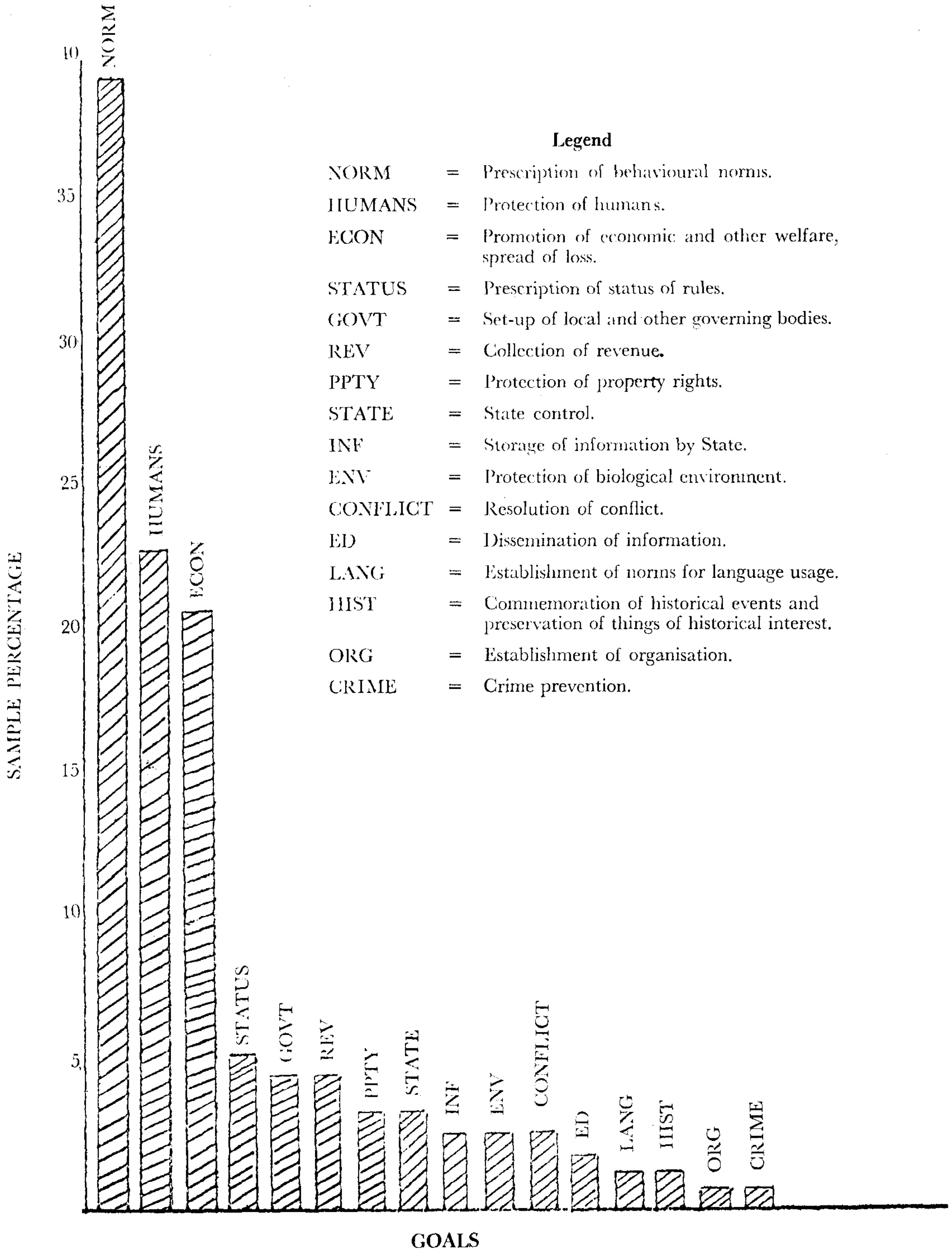

Fig 1. Relative frequency of goals of NZ statutes, 1957.

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Medical Research Saves Lives

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From its Government grant, and from donations and bequests, the Medical Research Council supports active research into diseases of the endocrine glands, coronary attacks, cancer, infectious diseases, the effects of drugs including alcohol and marihuana, dental caries, immunology and tissue transplantation, to name only a few of the many subjects under investigation in New Zealand. The presence of this research work within our hospitals and universities contributes significantly to the high standard of our medical care. It is essential that the work should be intensified if we are to maintain progress in the years ahead.

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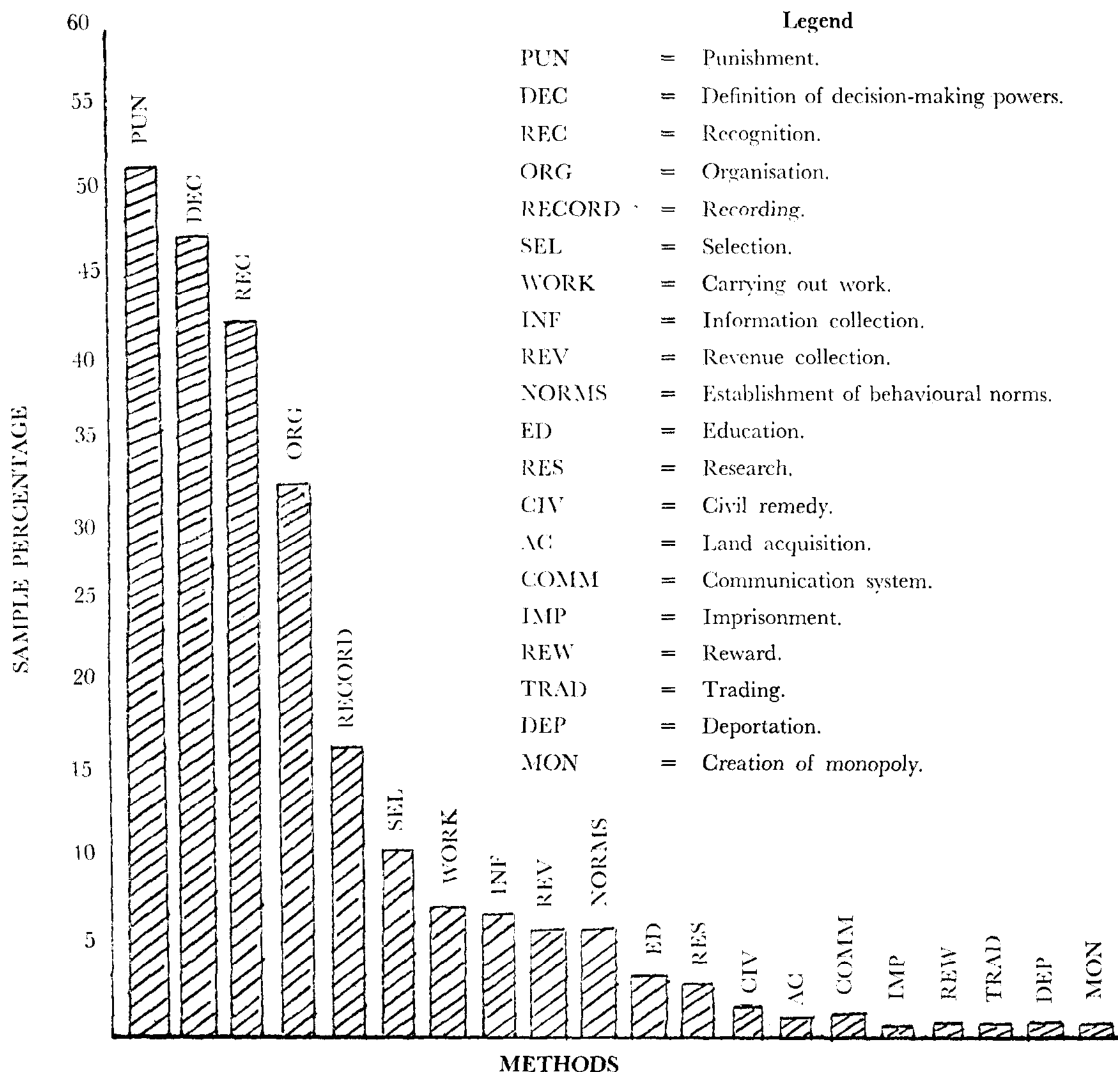

Fig 2. Relative frequency of methods of NZ statutes, 1957.

an instrument of change reached its climax, and with the extinction of equity as a separate jurisdiction, its death. Other disciplines may have something to contribute. If they do, it seems desirable for that effort to be made in co-operation with legal practitioners, for practitioners have a wealth of experience which could be wasted if, through lack of contact, research efforts do not make the best possible use of it.

Lying vaguely in the background of legal education is jurisprudence. This is a theoretical study of legal principles and practices mixed with a little philosophy and a few popular notions of factors influencing human behaviour. It is irrelevant to the professional work of most lawyers. Nevertheless, it could be suggested that this discipline might provide some assistance in developing a different approach to the resolution of conflict. The logic, method and results of the scientific studies discussed all seem to indicate that only an empirical discipline can provide mediators with a usable tool. Jurisprudence knows nothing of empiricism in this sense. In the world of the scholar, jurisprudence has a special niche reserved for itself —the museum shelf.

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YOUNG LAWYERS WAKE UP TO ICJ

Young lawyers are waking up to the vital role played in New Zealand by the New Zealand Section of the International Commission of Jurists. So said the Chairman of the Commission's Council recently, Mr G E Bisson of Napier. He pointed to a number of applications for membership from younger lawyers and to the recent election of three of them to the Council.

"We are an organisation that can and does get things done," said Mr Bisson. "Until now our name has probably intimidated many from joining, but I think more and more the profession is realising that we stand for the Rule of Law in New Zealand and, indeed, throughout the world.

"We are not a conservative organisation," said Mr Bisson, who at the Annual General Meeting was forthright in his condemnation of recent legislative amendments in South Africa.

"We stand between authoritarian government and the people. Today, as politics both nationally and internationally are polarising to an extent not seen for many years, our role is becoming all the more important. Logically, every lawyer in New Zealand should belong to us—if only to demonstrate in a modest way his belief in a system based on the Rule of Law."

Membership (subscription $2.10 per annum plus $2.25 for the publications, if required) is open to all lawyers, law students, law teachers and others with an interest in furthering the Rule of Law. Enquiries should be addressed to D J White Esq, Secretary, New Zealand Section, International Commission of Jurists, P O Box 499, Wellington.

A social function is being planned for the forthcoming Conference of the New Zealand Law Society which will give all members, and others who are interested the opportunity to meet.

FOOTBRAWL

Looking back over previous contributions, I realise that my reputation as a prophet must be abysmally low. A forecast of a bumper Tory majority in February, followed not long after a stern prediction that the football season could not endure beyond Christmas, are among some of my prognostications.

Both miserably wrong; but I'm willing to assert that yet another football season must surely perish before its allotted span. Just one month old, this season has seen its first murder on the terraces—a 14 year-old boy stabbed by an opposing supporter. Throughout the country, fans, particularly those of Manchester United, bring terror and destruction wherever they go.

Plans have been put forward at government level, revolving round an inane scheme to allow into football grounds only those "young supporters" who carry identity cards. Quite what good this will do is difficult to discern. The Football league has also weighed in by meting out what they believe to be stiff sentences to offenders on the field of play. One Billy Bremner (known to many Britons in New Zealand I'm sure) who has a record of unbridled savagery and thuggery unrivalled by anyone since Ivan the Terrible, was given a suspension of six weeks and a fine of £500 for an act of murderous violence in a charity (!) game. And that after receiving £40,000 in a benefit match. He should, of course, have been banned for life and publicly disembowelled.

The law relating to any kind of public disorder is quite adequate, given a proper number of policemen. But I think there is an answer, more effective than barriers, moats and identity cards, which is never mooted because too many powerful interests are affected. In short, football, other than a statement of results, should be barred from the television screen. It used to be too easy an answer to blame hooliganism on the box, but it is beginning to seem the right answer. Such a ban would drive off, too, the semi-literate mumblings of footballers and managers alike. Lacking the visual element, radio has become less important, but it should be confined to broadcasting live matches and, again, statements of results.

The papers are more difficult. But the unbelievably banal sensationalism of the popular press leads no one to doubt that some form of remedy must be applied. Since it is hardly possible to stop the press printing their sensationalist nonsense, it might be an answer to prohibit sensationalist presentment. In other words, outlaw banner headlines, indeed all headlines altogether. And another thing: all articles and columns appearing under a footballer's name must be written by him down to the last full-stop. That would dry up that drivel in some thirty minutes, since most of our modern footballers can barely do up their boot-laces.

So you think these suggestions are loony: all I can reply is that desperate diseases require desperate remedies.

Another set of loony suggestions (which really *are* loony this time), have oozed out of one Major-General Walker and a group of Tory backbenchers. The former has been actively canvassing, urged on yet again by our sensation-seeking media, a civilian army to look after essential services *when* (not if) this country eventually collapses altogether as an industrial democracy. The latter have endorsed these aims and have even urged a schoolchildren's militia to control young hooligans. Incidentally, they all claim to be non-political in their leanings (I welcome "artisans", said the Major-General), but they *do* seem to see a threat coming from the unions and the communists-under-the-beds.

The chilling nature of these suggestions could be dismissed if made by someone not so close to the corridors of power. But they come from Members of Parliament and a man who (incredibly) was a NATO commander. It is frightening thus to realise the unbelievably low standard of those who control our lives. As used to be said in 1968 about the candidacy of Spiro Agnew for Vice-President: "It would be funny if it was not so serious".

R G LAWSON

A Lawyer's Lot—"All my friends and my more personal clients are always telling me how stupid I am to work as hard as I do, until I am doing a job for them. At that stage they act as if they were my only client and as if I spent my whole day on the golf course. . . ." 'NIL DESPERANDUM' in the *Solicitors Journal*.

CALLS ON SHARES PAID IN ADVANCE

This note deals with three decisions on the effect of Art 21 of Table A in the Third Schedule to the Companies Act 1955. Two of these are recent Supreme Court decisions (*Re Spinneywood Construction Ltd (In Liq),* in which the judgment of Mahon J was delivered on 27 November 1973, and *Re Cut Price Meats Ltd,* in which the judgment of O'Regan J was delivered on 18 February 1974); the third is *Rex Davis (Auckland) Ltd (In Liq) v R L Davis* (CA 24/69), an unreported decision of the Court of Appeal. It also deals with dicta in *Re Spinneywood Construction Ltd* on the formalities necessary for making a call in a private company.

By s 68 (b) a company may, if authorised by its articles, accept from any member the whole or a part of the amount remaining unpaid on any shares held by him, although no part of that amount has been called up. And by s 22 (2) of the Act, insofar as a company has not modified or excluded the articles contained in Table A, they are deemed to apply to the company. Article 21 of Table A is in these terms:

> "The directors may, if they think fit, receive from any member willing to advance the same all or any part of the money uncalled and unpaid upon any shares held by him and upon all or any part of the money so advanced may (until the same would but for the advance, become payable) pay interest at such rate not exceeding (unless the company in general meeting shall otherwise direct) 6 per cent per annum as may be agreed upon between the directors and the member paying the sum in advance."

This method of company finance has been described by Kay LJ in *Lock v Queensland Investment and Land Mortgage Company* as being of great advantage to the company "because if they borrowed from outsiders, the money borrowed might be recalled and the company would have to repay it; but borrowing it from shareholders, they are not bound to repay the capital" ([1896] 1 Ch D 397, 407). Thus it is of the essence of such an advance that it cannot be returned to the shareholders as if it were an ordinary loan; they cannot require repayment until the liquidation of the company (*London and Northern Steamship Co Ltd v Farmer* (1914) III LT 204). One would have thought, therefore, that any monies in the company's hands, which were being treated in the company's books as being repayable, were ex hypothesi incapable of also being treated as having been advanced under Art 21. And in the context of "one-man" private companies, one might also think that the true construction of the words "if they think fit" in Art 21 would have necessitated the directors having considered this form of company finance to be advantageous. Further, since the power to receive payment of calls in advance is a fiduciary power, a director is bound to exercise it bona fide for the benefit of the company (*Sykes' Case* (1872) LR 13 Eq 255; Buckley, 13th ed, p 806). Where, therefore, a director of a one-man company has forwarded monies to his company and there is no evidence of his having considered the matter, that director will find himself on the horns of a dilemma: either he will have received the money under Art 21 and be in breach of his fiduciary duty to the company or he will not be in breach of duty to the company but will not have received the money under Art 21. Where, on the other hand, there is some minute recording the fact that the directors did resolve to accept monies under Art 21, it will be presumed, until the contrary is proved, that the director did act bona fide for the benefit of the company.

The Spinneywood Case

Spinneywood Construction Ltd was a typical one-man private limited liability company, the leading shareholder having subscribed for 999 of the 1000 $1 shares and his wife for the other. The company went into voluntary liquidation after just under three years' trading, and the liquidator made a call on the shareholders, who disputed their liability, contending that the capital for which they had subscribed was fully paid up. Hence this application before Mahon J for an order varying the list of contributors settled by the liquidator.

The material facts on which the contributories relied were as follows: (i) On 19 May 1971, which was shortly before the liquidation, the principal shareholder sent a letter to the company's accountants which stated that he had made advances to the company in the sum of $7,960 and had requested that this sum be

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set off against debts owed by him to the company. One of the debts he wished to be set off was $1,000 for unpaid share capital.

(ii) On 26 June 1972 the principal shareholder wrote to the liquidator of the company stating that he had made an advance of $1,000 on 24 December 1970 (ie, well before liquidation) which "could be deemed to be for the specific purpose of payment of the capital".

On these facts counsel for the shareholders argued:

(1) That the *letter* to the accountants constituted the calling up of capital by the company with a concurrent payment of that call by the direction that it was to be satisfied out of the company's greater debt to him.

(2) Alternatively that the $1,000 loan made to the company on 24 December 1970 had been received under the terms of Art 21 of Table A, as a payment of the total share capital in advance of calls.

The applicant's first argument was met by showing that far from the principal shareholder's account being in overall credit with the company, it was in fact in debit. Thus no set off in relation to the $1,000 share capital was possible. Mahon J therefore did not have to decide the very interesting point raised by counsel's argument—viz, that the letter to the accountants was in itself sufficient to be a call. But in an important obiter dictum his Honour did say that he was "inclined to think" that the letter to the accountants did have the effect of calling up the unpaid capital. Looking to the realities of the fact that this was a "one-man" company his Honour "would not be inclined" to insist upon proof of a written resolution unless the statute made such a formality a prerequisite of validity. And on the question of the statute his Honour remarked:

> "Section 362 of the Companies Act empowers resolutions of a private company to be made by entry in the minute book, but it does not follow that a resolution cannot equally be made by oral determination at an appropriate meeting of directors."

Whilst one can sympathise with his Honour's robust treatment of the *Salomon* principle (see *Salomon v Salomon Co Ltd* [1897] AC 22) it is submitted that it would be dangerous to rely on this dictum in any case not fought on identical fact situations. Two old English Court of Appeal cases are especially in point here. The first is *Johnson v Lyttle's Iron Agency* (1877) 5 Ch D 687, where the plaintiff was appealing against Lord Jessel's refusal to grant him an injunction preventing the forfeiture of his shares on the basis that no valid call had originally been made. The directors had passed a resolution that a call of $2 per share be made, and afterwards on the same day gave *verbal* instructions to the secretary to make the calls payable on a certain date. The plaintiff argued that the resolution was invalid because of the oral direction to the company's secretary. Lord Jessel's answer to this was strikingly similar to that of his Honour's in this case, for at p 690 of the report his Lordship said:

> "The objection is that there is no formal resolution entered in the book of directors appointing a day for the call . . . it is quite clear that the Act of Parliament does not require the day for the call to be named in the same resolution as the one by which the call is made . . . nor does the Act of Parliament require the day to be named by any particular formal act by the directors. No doubt it requires their sanction and authority but it does not require it to be made by a *formal* resolution put in that shape or by resolution entered in the minutes. It is sufficient if they direct it. What shall be sufficient evidence of direction is another matter" (emphasis added).

Thus Lord Jessel, like his Honour, was prepared as a matter of law to see a resolution passed in an informal way, whilst reserving the question of fact—whether any resolution had in fact been passed. In the Court of Appeal this view was challenged by James LJ, who at p 694 stressed the need for a *formal resolution*:

> ". . . I think that the time for the payment of the call could not properly be fixed by a mere verbal direction to the secretary: it ought to be fixed by a formal resolution of the directors."

The second case which has a bearing on his Honour's dictum is *Re Cawley* (1889) 42 Ch D 209, where a shareholder was applying for rectification of the register of shareholders contending that he was no longer a member of the company. The directors claimed that they had power under the articles to refuse to register the transfer of any shares of a member "indebted to the company in respect of calls . . ", and that the plaintiff was so indebted. The plaintiff replied that the resolution making a call on his shares was invalid as the "time" for payment was not fixed by the resolution but was subsequently inserted by the secretary. The Court of Appeal held that the call was an invalid one as neither the time for payment nor the place of payment had been fixed by the board. In an instructive passage Lord Esher says at p 228:

> "In order to make a call within the Articles of Association we must see what is necessary to be done to make a call. In the first place there must be a resolution by the directors. *They cannot do such a thing as make a call without a resolution* . . . there could be no valid call . . . until the time and place for its payment had been appointed by the Board." (Emphasis added.)

Lest it be thought that his decision was to be confined to the articles of the particular company, Lord Esher specifically said at p 236 of the report that he ". . . did not wish it to be supposed that (his) decision in this case rests only on the articles". Thus from the two English Court of Appeal decisions the following propositions may be adduced:

(1) That for any resolution for the calling up of share capital to be valid it must be a formal resolution passed by the board of directors.

(2) This is irrespective of the contents of the articles. How then does one approach his Honour's dictum in this decision? One point that may immediately be made in support of his Honour is that both *Johnson v Lyttle's Iron Agency* and *Re Cawley* were themselves decided on other points. Thus the propositions above are only dicta of the English Court of Appeal and not ratio. There is thus no reason why the point should not be analysed on principle.

As a matter of principle one might think that, in the absence of any formal procedure in the Act, the articles would have been the dominant consideration in determining the proper formalities for making a call.

The reason for this is that creditors are sufficiently protected by the provisions of s 130 (3) whereby the details of amounts paid up(*a*) on each class of shares are to be stated in the annual return of a private company (one of the few documents a private company does have to file in New Zealand!) and they are always at liberty to make further inquiries. The articles, of course, would be the dominant factor so far as the shareholders are concerned. Even where the articles state (as Art 16 of Table A does) that a call shall be deemed to have been made at the time when the *resolution* of the directors authorising the call was passed, that provision can be waived by the unanimous but informal agreement of the members (*Re Express Engineering Works Ltd* [1920] 1 Ch 466 (CA)). And in a "one-man" company how easy it would be to show a "unanimous" agreement of the members! On principle, whilst recognising the fact that one does have conflicting data, there is no reason why in a one-man company a call should not have been made in an informal manner. As Lord Jessel astutely pointed out: whether it was or not as a question of fact is another matter.

One final point on this part of his Honour's judgment must be made. His Honour is not saying that this is an appropriate method of making a call in all private companies. Recent authorities have tended to the view that every shareholder has a contractual right to have the articles observed (*Quin and Axtens v Salmon* [1909] AC 442, *Bamford v Bamford* [1970] Ch 272; *Wedderburn* 1957 CLJ 194, 1958 CLJ 93, cf *Macdougall v Gardiner* (1875) 1 Ch D 13, esp at p 23 per James LJ). If the articles state a procedure for the making of calls, the shareholder is entitled as a matter of contract to have that procedure adopted. And if it is not then as against him, the call is invalidly made. His Honour's dictum must be limited to the one-man company or at any rate where all the shareholders unanimously agree to waive their rights to insist on the formal procedure.

As to the applicant's second submission, the liquidator admitted that the $1,000 had been lent to the company on 24 December: but the evidence of the payment was the butt of a deposit slip which merely stated that payment had been a loan to the company. (Indeed it

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(*a*) I assume here that when directors receive money in advance of calls under Art 21 in respect of unpaid and uncalled shares, those shares are to be treated from that point onwards as fully paid. Some support for this view can be found in *Poole, Jackson and Whyte's case* (1878) 9 Ch D 322, where the directors' shares were treated as fully paid up by virtue of the payment under Art 21. On the other hand it is clear from *In re United Provident Assurance Co Ltd* [1910] 2 Ch 477 that the holders of partly-paid shares who have advanced money under Art 21 are for the purposes of class meetings a different class from holders of fully-paid shares. Also the articles usually state that advance payments which carry interest are not regarded for the purposes of dividens as sums paid on shares. (See Art 118, Table A.) Further, there are grave difficulties with certain passages in *Lock v Queensland & Co* [1896] AC 461, for both Lord Macnaghten and Lord Herschell say that interest is payable on such an advance because it is due to the shareholder "in the character of creditor, not in the character of shareholder". But as Sweet pointed out in an important note in 13 LQR 117, the logical consequence of this is to hold that in a winding up the shareholder is still liable for the amount uncalled on his shares. That surely cannot be right!

was one of a series of three $1,000 loans made to the company in a three-month period stretching from December 1970 to February 1971.) The question before his Honour was whether this loan was a payment in advance of unpaid and uncalled capital within Art 21. Mahon J held that the payment of the $1,000 to the company was not "earmarked in any way which would suggest a payment in terms of Art 21". In so doing he distinguished Henry J's decision in *Smith v Landreth Ltd* [1961] NZLR 572 (where a payment of £500 into a company's account was held to be a payment in advance of calls) because in that case there was evidence indicating that the purpose of the lodgment was to pay up half of his uncalled liabilities: in the present case the evidence was quite to the contrary.

It is evident that Mahon J takes the view that in order for there to be an advance of monies uncalled and unpaid on a member's shares within Art 21, the member must make it quite clear that it is not a mere loan but a payment in advance of uncalled share capital.

Re Cut Price Meats Ltd

This was an application by C to vary the list of contributories settled by the liquidator of the above-named company. C had agreed with T to form a company in which the respective shareholdings were to be 999:1001 $1 shares. C had insufficient funds to pay for his shares and borrowed the money from T by mortgaging his shares to him. T arranged for $2,000 to be paid into the company's bank account but was credited in the company's books as being owed $2,000 on his *personal* account with the company. At the date of the winding up order this was still the situation and there was no record of C's capital having been paid up (save for a sum of $1, which was recorded as having been called up in the minutes of the first meeting of shareholders). The report of his Honour's judgment is silent on a number of further matters which, it is submitted, could have been relevant:

(1) Whether C himself was a director of the above-named company.
(2) Whether T was a director of the company (though it seems one must assume he was).
(3) Whether the company's annual return stated anything which might indicate that the company had treated certain shares as fully paid.
(4) Whether any conscious decision had been taken by either T or C (if he was a director) to raise finance under Art 21 as opposed to other methods—ie, whether the directors "thought fit".
(5) Whether any interest had been agreed to be paid.

It is clear from his Honour's reference to *Re Smith and Landreth Ltd* [1961] NZLR 572 that his decision is based on Art 21 and in his Honour's opinion the facts were "on all fours" with *Re Smith and Landreth*. C had borrowed the amount required to pay up his share capital and had paid it to the company. There had been a mistake in the accountancy records but the Court was entitled to look behind those records to ascertain the true position if there was satisfactory evidence to the contrary. (As authority for this proposition his Honour cited *Re The New Zealand Pine Company, Ex parte Official Liquidator* (1898) 17 NZLR 257.) His Honour thought that in this case there was ample evidence and ordered that the applicant's name be removed from the list of contributories.

Rex Davis (Auckland) Ltd (In Liq) v R L Davis

Rex Davis (Auckland) Ltd. was a private limited liability company formed in 1966 to purchase the assets of another company. There were only two shareholders: RLD, the managing director, who subscribed 15,000 shares, and his wife, CD, who subscribed the remaining 5,000. There was a disastrous fire shortly after the company's incorporation as a result of which the company went into receivership and then into liquidator. The liquidator settled the list of contributories on the basis that the whole 20,000 shares were unpaid. A successful application was made before Speight J for the list of contributories to be varied and the liquidator now appealed against his Honour's order to the Court of Appeal (North P, Turner J, Haslam J).

The material facts on which RLD and CD relied in support of their contention that the shares had been paid up in accordance with Art 21 were as follows:

(1) An interview with the company's bank manager at which it was stated that the company's account would be financed by the provision of "fully-paid" share capital.
(2) The preparation of a draft set of minutes executed by the two directors, which were never officially placed in the minute book, but which recorded that all monies from the sale of RLD's property in Wellington, up to a maximum of

£10,000, would be lodged to the company's account on account of share capital.

The Court of Appeal's judgment was delivered by Haslam J. They thought that the above facts did constitute a payment in advance of calls within Art 21 because:

(a) The "draft" set of minutes was by virtue of s 459 of the Companies Act an effective minute. The two directors had therefore passed a formal resolution to accept the money as advances on uncalled capital, and as directors they could bind the company to receive money upon these terms. (Their Honours cited *Poole, Jackson and Whyte's* case, supra.)

(b) Further, the conduct of RLD and CD evidenced an intention not to treat this money as a mere loan which could be recovered from the company.

Both *Re Smith and Landreth* (supra) and *Re Bourdot* (1915) 17 GLR 320 were mentioned without comment since "little help can be obtained from other reported decisions under this section, because of the individual nature of the facts in each instance".

Given the fact that Art 21 is a defence by a shareholder to a claim by the liquidator in a case in which monies have been provided to the company whilst it was a going concern, there is surprisingly little common law authority, apart from these three recent decisions, as to what constitutes a payment under the article. Buckley, Paterson and Ednie, Gore-Browne, Palmer and Gower appear to be silent on the point; only Anderson and Dalglish refer to any common law authority. They cite three previous decisions on the point: *Re Bourdot* (1915) GLR 320, *Re Harding & Co Ltd* [1929] NZLR 338, and *Re Smith and Landreth* [1961] NZLR 572. In *Re Harding & Co Ltd* Herdman ACJ at p 346 refused to treat the advances as payments under Art 21 since "one would expect to find some stipulation about the payment of interest but none was to be discovered". In *Re Bourdot* (1915) 17 GLR 320, Denniston J refused to treat monies advanced to the company as payments made under Art 21 since "to obtain the benefit of that article some negotiation followed by agreement would be necessary. There is no record of any resolution or determination by the directors. . . ." His Honour added later in his judgment that the total want of compliance with the provisions of the Companies Act would lead him to doubt whether the shareholder and the directors ever had Art 21 in mind.

The third authority is *Re Smith and Landreth*; as this decision was distinguished in *Re Spinneywood* and applied in *Re Cut Price Meats Ltd* it may fairly be said to be the key decision. The evidence was that the company had received in cash the sum of £500 from Landreth on account of liability on his 1,000 shares—but no call had been made. The question which arose was as to the legal effect of such payment. Henry J held that the money had been received under Art 21, and that the applicant was entitled to require the liquidator to give him credit for £500. But the question may be asked why his Honour thought it necessary to invoke Art 21 at all? Why is a share only to be regarded as paid up if a call is made? There is no reason why his Honour could not have found that the shares were issued on the terms that £500 be paid immediately. By going behind the accounting records to ascertain the true position under the principle in *Re The New Zealand Pine Company, Ex parte Official Liquidator* (1898) 17 NZLR 257 he could equally have held that these shares were paid up to the extent of the cash consideration received. *Re Smith and Landreth* on this view ought not to be an authority on Art 21 at all. But even if it is to be regarded as an authority on Art 21, it was decided after an express finding of fact that the money had been advanced as capital and was to be appropriated to the payment up of Landreth's shares.

Conclusions

Though it would be idle to pretend that any clear guidelines emerge from the authorities, two propositions may be advanced:

(1) In order for money which has been advanced to a company to be treated as a payment in advance of calls under Art 21, it must be clear that the money was treated as being irrecoverable except on a winding up—ie, that the money was an advance of capital and not a mere loan; and

(2) If a shareholder was a director at the time of the receipt of the advance, he will have to show some resolution or determination by the directors to treat this money as a payment in advance of calls.

It is true that *Re Cut Price Meat Ltd* does not entirely square with the above propositions, but it is submitted that that decision can be explained on the basis that the applicant was not a director. His payment was a payment of a shareholder to the company's agent in full satisfaction of his liability as a shareholder on shares issued subject to immediate payment in

full. As in *Re Smith and Landreth*, there was no need to call in aid Art 21 at all.

From a practical standpoint the lessons to be learnt from these three decisions are clear. (1) If a shareholder with unpaid shares in a company is providing that company with additional finance, he would be well advised to consider the merits of utilising Art 21. From his point of view it means he is entitled to interest on his advance (even if the company has not made any profits and the interest has to be paid out of capital: *Lock v Queensland Investment and Land Mortgage Company* [1896] AC 461) and his shares are paid up to the extent of the advance. From the company's standpoint it is a useful method of company finance because of the irrevocable nature of the advance.

(2) If he does decide to advance the money to his company under Art 21, it should be made quite clear that it is not a mere loan but a payment within Art 21. If he is a director he will be well advised to enter it formally into the minute book, thereby complying with his statutory obligations under s 149 and protecting himself at one and the same time.

FRANCIS DAWSON

CHATTEL SECURITIES AND GENERAL CREDITORS

Where A has in his possession goods the property of or subject to a charge in favour of B, two classes of persons may be misled and suffer loss. There are the general creditors of A who may be so deceived by his borrowed or mortgaged plumes as to believe A a man of greater financial substance than in fact he is and who as a result of such belief may allow him credit or forbearance that would otherwise have been withheld. And there are the specific disponees, those to whom A (fraudulently concealing the rights of B) purports to assign or mortgage the goods.

One way of dealing with these problems is to provide a register of title to chattels. Such a register exists in the case of ships pursuant to Part XII of the Shipping and Seamen Act 1952, and has been advocated in the case of motor vehicles. But for most classes of chattels a register of title would be impossible and the solution generally adopted in common law countries is to provide a public register either of instruments affecting chattels or of notice of the existence of such instruments. In New Zealand the provision for such registration is currently contained in the Chattels Transfer Act 1924 and Part IV of the Companies Act 1955. (There is a corresponding provision in the Industrial and Provident Societies Amendment Act 1952, s 17, which it is unnecessary to discuss separately.)

It is generally accepted that the New Zealand statutory provisions are in various serious respects defective and that the time is long overdue for their replacement by a single new code. Plainly such a code should protect specific disponees by giving them priority (either immediately or on expiry of a specified registration period) over those claiming under unregistered instruments. Plainly too such a code should protect secured creditors who do register their instruments, for modern commerce requires a watertight system of granting security over chattels. What is less plain is the extent to which a system of registering instruments granting or reserving security over chattels should be concerned with the position of the general creditors of the debtor. It is with this question of policy (which is a fundamental one needing to be tackled before work on devising a new Code can begin) that this note is concerned.

The first English statute providing for the registration of bills of sale was enacted in 1854. The sole purpose of this statute and of its successor enacted in 1878 was to protect the general creditors of the debtor. The preamble to the Act of 1854 was in these words: "Whereas frauds are frequently committed upon Creditors by secret Bills of Sale of personal Chattels, whereby persons are enabled to keep up the Appearance of being in good Circumstances and possessed of Property and the Grantees or Holders of such Bills of Sale have the Power of taking possession of the Property of such Persons to the Exclusion of the rest of their Creditors . . . ". Under these statutes unregistered bills were void as against trustees in bankruptcy and execution creditors. The policy of these Acts was identical with the policy of the provision which had been a part of the English bankruptcy statutes since 1624 and which included among the assets to be divided among the creditors of a bankrupt not only the bankrupt's own assets but also chattels

in his possession in such circumstances that he was their reputed owner.

The first New Zealand statute (passed in 1856) was a faithful copying of the English Act of 1854. But while the New Zealand and English statutes have this ancestor in common our legislation is now markedly different from that in force in England. It is not proposed to trace the history of the New Zealand legislation (the best account is to be found in S A Reisenfeld, *The Quagmire of Chattels Security in New Zealand* (Auckland 1970)). It is sufficient for present purposes to note that at different times provisions have been added to protect specific disponees, and to protect secured creditors where (as in the case of securities over wool, growing crops and book debts) the common law was thought to be inadequate. One of the reasons the Chattels Transfer Act is such a mess is its history, the fact that what began life as a statute enacted to achieve one policy purpose, the protection of general creditors, has been adapted, and artlessly adapted at that, to serve two additional policy purposes: the protection of specific disponees and the protection of secured creditors.

The Chattels Transfer Act carries the protection of general creditors to its logical extreme by providing (unlike the English or any of the Australian statutes) for the registration of bailments. Unregistered instruments are void against assignees in bankruptcy, trustees of assignments for the benefit of creditors and execution creditors. On the other hand, unlike the Companies Act provision, the protection of general creditors is not carried to the extent of making registration compulsory; registration is no more than an optional extra protection. And the provisions of s 57 relating to customary hire purchase agreements which do not require registration to be good against third parties represent a considerable gap in the scheme of protection of both general creditors and specific disponees, a gap which in the case of specific disponees has proved troublesome.

The prime purpose of the Companies Act provisions is similarly to protect general creditors. Unregistered instruments are bad against liquidators. Moreover, unlike the Chattels Transfer Act position registration is compulsory; failure to register an instrument creating a charge over chattels is an offence. But although commentators generally regard it as axiomatic that public disclosure of instruments creating charges is essential for the protection of those dealing with companies it should not be overlooked that the protection the Act so confers on general creditors is far from perfect. Not all instruments creating charges (as the recent case of *Automobile Association (Canterbury) Inc v Australasian Secured Deposits Limited* [1973] 1 NZLR 417 reminds us) require registration. Except in the case of long-term agreements for sale and purchase of land there is no provision requiring registration of such instruments as conditional purchase agreements and hire purchase agreement which evidence not a charge created by the debtor company but a retention of title by the secured creditor. No provision analogous to the reputed ownership provision in bankruptcy law has ever applied to companies. Private companies (with exceptions the purpose of which is not creditor protection) are not obliged to file balance sheets or other financial information and the financial information provided by public companies may be long out of date by the time it is filed.

The present position, then, summarised in general terms, is that a prime purpose of the legislation providing for registration of instruments affecting chattels is to protect the general creditors of the possessor; but the schemes of protection adopted by the Chattels Transfer Act and the Companies Act are not identical and neither of them is comprehensive.

Now two committees appointed to review the law of bankruptcy, one by the President of the Board of Trade in the United Kingdom, which reported in 1955 (Cmnd 221, para 110), and one by the Attorney-General of the Commonwealth of Australia, which reported in 1962, both recommended the abolition of the reputed ownership provision in the bankruptcy statute on the grounds of its obsolescence, there being (in the words of the Australian committee) "little, if any, danger nowadays of a creditor being induced to give credit on the assumption that goods in the debtor's possession are his own property" (para 153). Those responsible for the recent review of New Zealand's bankruptcy law agreed with this view, and the reputed ownership provision (s 61 (c), Bankruptcy Act 1908) was not re-enacted in our Insolvency Act of 1967.

If it is correct (and surely it is correct) that today in our relatively homogenous society creditors in deciding whether to give credit are influenced little, if at all, by the assumption that goods in the debtor's possession are his own property, why should one of the objects of a system of registering instruments affecting chattels be the notification of the existence of such instruments to the general creditors of the debtor as distinct from specific disponees?

It may be argued in relation to companies that the mere fact that the disclosure of their financial position that the law requires of them is at present inadequate is no ground for subtracting from present requirements. But if the object is to require disclosure by companies of their general financial affairs there are far more systematic ways of going about this (requiring all private companies to file accounts, for example) than the hit-and-miss method of requiring registration of charges.

What follows from an acceptance that there is no real point in legislation governing the registration of instruments affecting chattels concerning itself with protecting the general creditors of the possessor of the chattels? The case for registration of notice of the existence of instruments rather than of the instruments themselves is strengthened, for all that is necessary to protect a specific disponee is that he should have sufficient notice to put him on his guard. There seems no need for any defeasance provision. More importantly there ceases to be any logical reason for avoiding unregistered instruments in favour of assignees in bankruptcy and liquidators. There would no longer be any reason for registration of charges over chattels created by companies being compulsory. And indeed it would be possible to replace the present systems under which there is a time limit for registration with a system under which the secured party could withhold registration for as long as he was prepared to take the risk of his interest being defeated by a subsequent specific disponee. It may be noted in this last connection that the form of order allowing registration out of time settled in the *Byers* case ((1905) 24 NZLR 903) affords no protection to general creditors.

The purpose of this note then has been to advance this argument. The only reason for the presence in existing codes governing the registration of instruments affecting chattels of provisions designed to protect general creditors as distinct from specific disponees is the belief that without the publicity that registration affords general creditors may be deceived by the debtor's possession of such chattels into thinking him richer than in fact he is. But whatever the historical position may have been, today decisions as to the granting of credit are or should be arrived at by rather more sophisticated processes. There is therefore no reason why those charged with framing a new code for the registration of chattels securities in New Zealand should include in such code provisions designed for the protection of general creditors.

D F DUGDALE

INCOMPREHENSIBLE LEGISLATION

An extract from an address given by HAROLD WHITE *of the Booksellers' Association of New Zealand to the Nelson City Luncheon Club on 26 August last.*

The proportion of the population with a higher reading age than fourteen is small. Accordingly anything that is of immediate concern to citizens should be written in a form that most can understand. This implies that all such material should require a reading age of no more than, say, twelve.

I do not know whether the Road Code requires a higher reading age here than in Britain, where it is 14, but you will need a reading age of 16 to read local body building bylaws or the Mountain Safety Handbook. In other words, far fewer than half of the people who should or must read these publications for the safety of themselves or the public are capable of reading them! I could go on and on. Who, amongst the purchasers of travel tickets or insurance, can understand the fine print which vitally affects them?

When we come to the law the situation is notoriously unsatisfactory. Ignorance of the law is no excuse and you can be jailed or heavily fined for your ignorance. Yet very few people outside the legal profession can understand most laws and bylaws—because they cannot "read" them. Much recent legislation cannot be understood by lawyers either. The typical sentence in our statutes and regulations has a hundred or more words and I have seen 370 words used to define a two word phrase—before you even get to the body of the law concerned.

No matter how complex the subject, there is no valid excuse for using incomprehensible language which baffles or oppresses the citizen; be he taxpayer, trade unionist, businessman, farmer or consumer. Some would say that the offence of the legislator who enacts incomprehensible law is as great as that of the offender against the law. I therefore offer a modest proposal for completely solving the problem. A committee of reading experts should be set up to review all legislation. Any statutes or regulations which require a reading age of more than 12 will be referred back to Parliament for redrafting to that reading level. Six months will be given to enable the offending material to be redrafted and re-enacted, failing which the same penalties for offences under the statutes or regulations concerned will be enforced against the Minister and departmental head responsible. Similarly with local government bylaws.

CORRESPONDENCE

A word's a word for a' that

Sir,

I have read with interest yet another treatise on "Indecent and Obscene" language ([1974] NZLJ 319). However, I find my interest bridled with some annoyance that it should take some 9 pages of erudite argument to say "isn't it about time the law caught up with reality and with the times?" This is one field where the Courts are left to interpret the modern idiom and surely by now it is time that the Courts did just that.

How often do we see the pantomime of an information being delicately shown to an accused to identify the "never to be spoken" words of alleged indecent and obscene language? How often does a Magistrate adopt a horrified expression at the same words blatantly bold in print, fix a glowering stare upon the cowering accused and overlooking that some doe-eyed 17 year old typist, undoubtedly unmoved and unimpressed, has typed the information; overlooking that practically every adult film and best-selling novel is splattered with such words; overlooking that such language is the norm in most public bars, virtually standard amongst labourers, accepted at work and at play by the masses; overlooking that the gentry are not averse to such "colourful" language at their cocktail parties; overlooking that such words are commonplace and unexceptional at most levels of learning; overlooking that 95 percent of the population have either used or heard such language without being "shocked" or offended; content to carry on without question the "precedent" of his "brethren", and with suitably stern countenance renders the hapless defendant speechless with those immortal words "fined $10 and costs".

When will some bold Magistrate or some enlightened Judge recognise that there is today no such thing as obscene and indecent language? This exists only for lawyers and little old ladies swinging binoculars.

Yours faithfully,

P J LYNCH
Whangarei

Parliamentary miscarriage

Sir,

It is ironic that exactly 10 days after the publication of the issue of the *Journal* in which appeared a comment by R G Lawson about the "obsolescence" of our laws ([1974] NZLJ 361), including our law as to abortion, there should be introduced into the New Zealand Parliament a private member's Bill that purports to add a further restriction to the conditions that now have to be met before an abortion is lawful.

From the emotional debate that preceded the introduction of the bill and the decision to set it down for second reading without referring it to a committee one may draw two conclusions.

The first is that in this country legislation with a restrictive aim is likely to have a much easier passage than legislation designed to give people a greater measure of freedom. Although the whole subject of homosexuality was thoroughly aired before the Petitions Committee only a few years ago, Mr V S Young's Crimes Amendment Bill was left to be introduced by an Opposition member and it has been referred to a committee to allow the public the opportunity to make submissions on it. The Hospitals Amendment Bill was introduced by a Government member, presumably with the concurrence of the majority of the Government caucus, but despite the fact that there has not previously been any consideration bv Parliament of the issues it raises, it was not referred to a committee following its first reading.

The second conclusion is that the views of the women of New Zealand, who are after all vitally affected by legislation relating to abortion, are of little concern to male politicians regardless of party.

Mr Young deserves congratulations for his stand in introducing a bill on the controversial subject of homosexuality.

One of those who contributed to the debate on the introduction of the Hospitals Amendment Bill, Mrs Batchelor, equally deserves congratulations for her speech in defence of freedom of conscience in the face of her admitted personal disapproval of abortion.

It is to be hoped that the Law Society will lend its support to any move to have this Bill referred to a committee for consideration.

Yours faithfully,

PATRICIA M WEBB
Wellington