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CURRENT CRITIQUES OF CRIMINAL POLICY

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Several sources prompt this article: the *New Zealand Law Journal* reporting on the proposals for Court organisation emanating from the Seminar of the Wellington District Law Society (see [1974] NZLJ 145); the statement by Dr Martyn Finlay, Minister of Justice, endorsing community treatment of convicted offenders as against traditional confinement to prison (and further elaborated by Mr Gordon Orr, the new Secretary for Justice), and the reported finding by the New Zealand Department of Social Welfare, that of all Maori boys now 10 years old, 50 percent would appear before the juvenile Courts of New Zealand by the time they had reached the age of 17.

While in New Zealand the writer was privileged—thanks to the generosity of Dr Finlay—to read a pre-publication copy of Allan Nixon's, *A Child's Guide to Crime*" (AH & AW Reed) which treats this and related criminal justice matters from a point of view closely paralleling that of this writer*(a)*.

For what little comfort may be found in it, the fact is that the questions being asked in New Zealand concerning the efficacy of current dealing with delinquency and crime are echoed around the world. In the same way all countries (except Japan) each year confront a higher incidence of crime, with a concomitant increased ingredient of violence.

The Secretary-General of the United Nations, in an unprecedented special address to the 1972 session of the General Assembly*(b)*, reported the universality of these phenomena. He deplored the rash of international kidnappings, sky-jackings, thefts and assassinations and he warned of the disastrous effect, especially in developing countries, of the enormous burden which crime placed on the economy. He stressed the need for programmes of greater efficacy in resisting the rising tide of crime and for heightened efforts on the international and national level.

It may therefore, be pertinent to consider several areas in which concern is today being voiced, in the hope of contributing something which is not only necessarily critical, but also, hopefully, constructive.

"Diversion" is a concept much to the fore these days when the criminal justice system comes under review. Designed for a less complex time, involving today far too many persons—defendants as well as operating personnel—the system is admitted on all sides to be failing, and in some places to have ground almost to a complete halt.

Reported criminal acts are everywhere acknowledged to represent one-half or less of all actual criminal events. For whatever reasons, "dark" or "hidden" criminality masks from public view (or official cognisance) a greater

(a) Cf "Prisons Inside-Out," Cambridge, Mass, Ballinger Publishing Co, 1974, which describes advanced programmes in the criminal justice field in more than a score of countries (including New Zealand) and in many of the states and provinces of the United States and Canada.

(b) "Crime Prevention and Control", Note by the Secretary-General, New York, United Nations, 19 October 1972, Document No A/8844.

number of acts against persons or property than the totality of those offences which come to official attention. To compound the difficulty, "crimes known to the police" are cleared by arrest in discouragingly small percentage of instance—one-quarter or less in the area of burglary and larceny in some jurisdictions.

The Courts (where those who are ultimately apprehended are given their day), suffer from delay, a scarcity of competent Judges, inadequacies in legal aid services. Clogged calendars result, and jails in many places are crowded to beyond capacity. The conclusion is widespread that the traditional penal institution no longer measures up to the task confronting it.

Of no other major institution in Western society is it being said—as it is being said of the criminal process—that the more people are kept out of it, the less ineffectively will it be expected to function.

Traditionally the first line of defence, the police are today getting involved in basic crime prevention programmes, such as Youth Aid to be found in New Zealand and in many other jurisdictions throughout the world. Police are involved directly with children and young people in the places where they congregate; constables aim at becoming acquainted with youths and at referring to available community resources those who have obvious problems requiring assistance.

These enlightened police programmes acknowledge a wider involvement in delinquency by young people than is reflected in Court arraignments or criminal statistics. We confront a situation today in many parts of the world where a very substantial majority of young people freely admit to involvement in activities for which they could have been arrested. Therefore, when police intervene before an official complaint has been filed or a referral made to a children's Court, many children can be saved from an early stigma and spared from a continuing life of crime—and an official criminal record—as a result.

At the Court level, diversionary programmes which are now in effect in many jurisdictions permit the accused voluntarily to accept a programme of work, education or treatment of a medical or psychological nature in exchange for a waiver of a plea—for the nonce—and a continuance of his case. If he satisfactorily completes the programme suggested by the Court (and accepted by him) the defendant comes before the Court at the end of three or six months, at which time the complaint is withdrawn and he goes forth without any record.

Similarly with bail. Where investigation reveals that the ties of an accused with family, job and neighbourhood are sufficiently strong to assure his appearance in Court, he may be placed on bail on his own recognisance, or that of lawyer, employer or minister, thus permitting him to continue work and family life without disruption, sparing the accused a gaol experience, and a gaol an additional inmate*(c)*.

Economic penalties—particularly for economic crimes—are increasingly applied in lieu of imprisonment. Fines and restitution recompense the Court and the victim, penalise in the same area of property where the accused transgressed, and save both convicted offender and society the necessity and expense of confinement. In New Zealand with close to 100 percent employment, this would appear a most appropriate penalty, especially with the virtual abolition of sentences of confinement for periods of six months or less.

Where the earning power of the convicted offender is used as the basis for fixing of the fine, Courts can mete out truly equitable sentences: A defendant earning five times more than one who may have committed the same offence would, for example, forfeit five days pay, where the latter would forfeit only one.

New Zealand's array of non-traditional penal sanctions: halfway houses, periodic detention, borstal and open prisons, is to be commended. In the light of Dr Finlay's endorsement of dealing with offenders in the community, readers of the *Journal* may be interested to learn that for the past two years in my home State of Massachusetts, institutions for juveniles no longer exist. Prior to May 1972, seven state and county training schools housed an average population of more than 1,000 boys and girls, at annual per capita costs in excess of US$10,000. By a determined effort that can only be described as surgical, these institutions were closed over a six months' period. The boys and girls were returned to their own homes (where most of them would have wound up ultimately in any case); some were placed in hostels and halfway houses, single and group foster homes, private secondary boarding schools and some even on

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(c) Cf "Is Change Needed? Alternatives to Economically-Based Bail," in *Wagon Mound*, No 21, 1973, pp 12-14.

university campuses under the oversight of paid undergraduate "advocates"*(d)*.

Of 1,000 in custody, less than 5 percent—45 in all—were considered too dangerous to be released into the community. Special facilities were created for these boys which provided intensive care in a psychotherapeutic milieu and with a staff containing several young ex-convicts, who had themselves gone the traditional criminal route but had somehow turned the corner and were desirous of helping their younger counterparts. The figure of five percent, as constituting the truly "dangerous" young offenders, has a direct bearing on the penal system of New Zealand, as it has on the United States. For it calls into most serious question our present attitude toward what is termed "maximum security", and challenges us to justify the retention of so many adult felons in close confinement.

New Zealand's experience at Paremoremo Prison in 1971, leading to the excellent reports by that sterling Ombudsman, Sir Guy Powles*(e)*, replicates that of many prisons in other places in the world—Britain, Sweden, Australia, the United States. In the many interviews held by the writer with criminal justice officials in Wellington—probation officers, police, Judges, prison administrators and periodic detention personnel, the highest estimate given as to how many men presently confined were truly "dangerous", was 20. The lowest, and I hope I am not abusing a confidence, was that cited by Mr Bob Murphy at the Casa Loma detention centre at Lower Hutt—"Two percent," said he. Perhaps he had youths in mind rather than adults.

Considerations such as these give cause to wonder as to the exact degree to which our prisons actually "create" crime by holding offenders too tightly and too long. Texas hands down the longest sentences—and has the largest percentage of its male population in prison—of any state in my country.

Here in New Zealand, between 1970 and 1974, the borstal at Arohata has seen it misconduct reports go down from 859 to 32 and its absconders drop from 10 to 0 when the average term of confinement was reduced from 12 months to 6, and the number of residents went from 78 to 54*(f)*.

Lest readers at this point be led to believe that Massachusetts is unique in its programme of de-institutionalisation, (although we *are* unique in having been the only state of 50 to have voted against Richard Nixon in the presidential election of 1972), it should be added that Illinois is presently engaged in the same kind of programme for its delinquent youth. At the adult level, Maine, Wisconsin, and Hawaii are currently committed to a drastic reduction of their prison population.

To bring the subject "down under", the Minister of Justice of New South Wales has recently stated that 73 percent of all convicted offenders in his state are out in the community, 27 percent confined—the precise opposite of the situation that prevailed there five years ago*(g)*.

In recognition of this trend, it is interesting to observe that Canberra, faced with the need now to create a correctional system for the Australian Capital Territory, is searching the world for alternatives to traditional penal methods. Like the developing countries, the ACT is asking itself—and rightly—why it should start a peno-correctional system de novo by building fixed institutions at a time when the rest of the world is scrapping these vestigial remnants of a by-gone era and replacing them with community-based facilities. The ACT is to be both commended for its bold experimental approach, and encouraged. The Territory has an unprecedented opportunity to teach the world how a humane and truly planful government can go forward from the point of today's foremost development, instead of recapitulating the errors of the evolutionary past. The end result may well prove to be an example of enlightened penology on as grand and harmonious a scale as is the planned community of Canberra itself.

The definition of what constitutes a "crime" is today under more critical re-examination than at any time in the past 200 years. The traditional offences of public drunkenness, prostitution and sexual deviation—including homosexual acts between consenting adults—gambling, vagrancy, abortion are gradually going by the board. As the influence of religion wanes, the acts which it condemned or proscribed are likewise being reduced.

(d) A detailed description of how this was accomplished may be found in "Closing Correctional Institutions", Y Bakal, Ed, Lexington, Mass, Heath-Lexington Books, 1973.

(e) "Report by Sir Guy Powles and Mr LGH Sinclair into Various Matters Pertaining to Paremoremo Prison", Auckland, 21 January 1972 (dup) and "Auckland Prison (Paremoremo): A Report", Wellington, 15 March 1973.

(f) Report of the Acting Superintendent, April 1974.

(g) Sydney Morning Herald, 27 April 1974.

At the juvenile level, truancy, waywardness, stubbornness and incorrigibility are coming more and more to be seen as the result of parental neglect or downright cruelty, with effects on all children thus victimised. So that the conditions labelled "dependency" and "delinquency" are viewed as twin—both in their causation and in the social measures necessary for their treatment and correction.

Our societies are rightly disturbed by "crime in the streets". The degree to which this may be the result or the reflection of crimes on a far broader scale, committed by political and economic leaders, merits serious examination. If against the totality of the traditional offences are weighed the crimes against humanity on the widest scale represented by nuclear explosion, wars against unarmed peoples, industrial processes, corruption in high places, and the uneven distribution of wealth within nations and between nations, which are the more truly disruptive of national and international well-being and harmony? From the Council of Europe comes the recommendation that:

> "The definition of crime should be confined to acts genuinely disturbing the life of society. Such acts as shop-lifting and issuing worthless cheques should not be seen as real crime, while such things as pollution, and the invasion of privacy should be. They stressed the relativity of the very concept of offence, which varies according to place, time and the status of the person concerned, and suggested that the moralistic attitude to crime be replaced by an objective consideration of the interests of society"*(h)*.

The Fifth United Nations Crime Congress to be held in Toronto in September 1975, will undoubtedly give consideration to some of these questions. It will, at the same time, provide a splendid opportunity for New Zealand to report on the recent progress it has made in dealing with some of these problems, consistent with the leadership for which it is universally regarded, as the acknowledged pioneer in all areas of social concern and human betterment.

(h) "The Changing Perception of Deviance and its Implications for Criminal Policy", Ninth Conference of Directors of Criminological Research Institutes. Strasbourg, 5 April 1972, doc no DPC/CDIR (72) 2 (Revised).

PRISON OFFICER TRAINING COLLEGE, TRENTHAM

The Minister of Justice, the Hon Dr Martyn Finlay, said that tenders will be called shortly for the construction of a new Prison Officers Training college. The college will be near Wi Tako Prison at Trentham.

Dr Finlay, in announcing this, said that the new college would replace temporary facilities provided at the present Wi Tako Prison and the temporary Cadet School accommodation at Wellington Prison. The department's training programme had been handicapped by the lack of reasonable facilities for the training of staff for the prison service, including prison officer cadets. The cadet scheme had been in operation for eight years and for the whole of that time had been carried out in temporary accommodation.

The new facility will comprise a two storey hostel of 40 bedrooms, together with the normal recreational and study facilities, classrooms and library and an administration unit. The scheme has been designed for expansion should further accommodation and facilities be necessary in the future. Dr Finlay expected the college to be completed by late 1976, ready for use in the 1977 year.

The provision of full training facilities is necessary to have staff properly trained for their present duties as well as to enable New Zealand to keep abreast of modern developments in the treatment of offenders and provide the highly trained staff requisite to the demands of the future. It was important, Dr Finlay said, to recognise that the success or otherwise of penal measures depended almost entirely upon the officers who had to implement them. The prison officer's job was becoming increasingly more demanding (and rewarding) and it was necessary to ensure that first class practical and theoretical training was provided. Indeed staff training was the essential foundation for future progress.

A Conservative profession?—So who says the law is a Conservative profession? Why, of the 98 barristers and solicitors elected to the present British House of Commons, fully 37 are aligned to Labour.

"BOOZE BARNS", VIOLENT OFFENDING AND IDENTITY CARDS

An edited version of a speech delivered by the Minister of Justice, the HON MARTYN FINLAY *QC, to the annual conference of the Hotel Association.*

I share your association's concern at the amount of physical violence *on* licensed Premises. Not only does this violence endanger the safety of employees and members of the public but it invades and disrupts the quiet enjoyment of the ordinary decent citizen, and drives him away from the places where violence occurs. This in turn lowers the general standard of patrons of these places and the situation can go from bad to worse.

On the possibility of strengthening the existing powers to exclude troublemakers I have an open mind but it would be a mistake to expect very much from this. A licensee or manager can already refuse to serve those who are or who have been in the past violent, quarrelsome, insulting or disorderly, and he can order them off the premises. It is an offence not to comply with such an order.

I suspect that this power is not exercised nearly as often as it might be. I do not altogether blame licensees for their reluctance but what I want to point out is that the same reluctance is likely to exist—and for the same reasons—whatever additional powers are conferred.

I understand evidence of the difficulties involved was given to a closed session of the Royal Commission on Liquor. I have been informed that this revealed a horrifying situation prevailing in some licensed premises and one that I have been invited—indeed challenged—to witness for myself. This I am ready to accept but I must give notice that if I witness a situation that the licensee either cannot or will not control then I will be driven to seek some other means of ensuring control and if, as is said, even the police cannot control certain premises on certain occasions then serious consideration must be given to whether the public interest does not require something more drastic. In fact it would be good for all of us—for me, for you and for the public—if I were to be blunt and explicit and state that I would not be averse to the amendment of the Sale of Liquor Act that would authorise the temporary closing of licensed premises in situations of repeated disorderly behaviour if this continues to disfigure and disrupt our urban life.

I congratulate you on the banning from Auckland bars of quart bottles of beer, the most fiendishly mutilating weapon of this generation; and the most dangerous because of its accessibility. I note that some suggest pint bottles are just as dangerous, but I disagree and believe this would be a worthwhile experiment. In my opinion however, it does not go far enough and relates to only one of the problems I spoke of—that of violence *in* bars. You also have responsibility for violence *from* bars, and little good will be achieved if, after disarming a drinking and near drunken thug inside, you turn him on the loose with a carton or so of ammunition, generally in the company of like minded (or should I say like mindless) ilk.

As to a "cooling off" period of closing bars for an hour or two in the early evening, I say no more than that I have an open mind and prefer to await the views of the Royal Commission before which the suggestion was fully canvassed. It is a well intended proposal carrying the commendation of long established practice in England but our circumstances do not parallel theirs, and I fear that, again without some off-sales limitation, it would tend to shift boozing and brawling to the streets, public places and parks.

It is appropriate to remind you that where violence or disorder does occur the available penalties under the law are by no means light. Conviction for assault under the Police Offences Act, without any aggravating circumstances, carries a maximum penalty of six months' imprisonment. Mere disorderly behaviour without actual violence renders the offender liable to 3 months' imprisonment. If there is intent to injure, the maximum term of imprisonment goes up to three years. For all this range of offences and others periodic detention is also available. This may seem to some of you a "soft option" but I can assure you that many of those who commit these sort of offences much prefer a short prison sentence to the prospect of losing their weekend leisure—and

their chance to visit hotels—for a period of some months.

The truth is that while we cannot dispense with heavy maximum penalties for these spontaneous and mindless acts of violence, their ability to prevent violence is very limited indeed. A little common sense suggests that those who become disorderly, violent or vicious after too many drinks are not going to be thinking of what they might get if they are convicted. They are simply not in a state to weigh the consequences of their behaviour in any rational way—the present moment is all that they can see. So it does not much matter whether the possible sentence is three months or three years, the deterrent factor is just not operating.

In these circumstances the main point of a prison sentence of any length, and I concede it is not without its importance, is to take the culprits out of circulation for a while. Certainly it is not likely to wean either them or their mates away from violence. Something much deeper is needed for that.

We therefore have to look much harder at the causes of violent offending. Obviously in the situations that develop in or around licensed premises alcohol must take a large share of the blame. Regrettably, so long as liquor is available in our community there will be some who abuse it at the expense of themselves and their fellow citizens. Our people have intimated repeatedly that prohibition of consumption of alcohol is unacceptable and of course the vast majority of us do use alcoholic liquor in moderation and without harming ourselves and our fellow men. Our laws must therefore be framed so that the scope for abuse is reduced as far as practicable whereas opportunities for moderate and incidental drinking are enlarged. Certainly I do not believe that the very large and anonymous taverns—which have not unjustly been called "booze barns"—are conducive to orderly behaviour or abstemious drinking. However, we have the Royal Commission pondering this issue and I will not say any more about it on this occasion.

Finally I want to say something about the question of identity cards. Undoubtedly they have some advantages and might just help you with some of the problems I have been mentioning, though a drinker's age has little relevance to his state of drunkenness, except that I suppose the younger he is, the sooner he reaches it. But I approach with a deep and instinctive dislike any proposal to require citizens to carry identity cards, however good the motives. To force every adult—and it is adults we are talking about—to have with him a piece of paper bearing his photograph and perhaps other information about him, is to my belief incompatible with our concepts of privacy and freedom. In fact, although doubtless not in intention, the moves to introduce such things are part of a pressure for the increasing regimentation and documentation of the individual in the supposed interest of convenience and efficiency. We can easily buy convenience and efficiency at too high a price.

As matters stand, in the context you are concerned with, a hotel and tavern employee can query anyone who he thinks may be under the minimum age. If he is not satisfied of a patron's age he can refuse to serve him. This may involve the patron in producing some evidence of his age and I do not object to that at all. But to go further would in my opinion be quite wrong.

LAWASIA NOTES

Conference luncheon—The New Zealand committee of Lawasia will hold a luncheon reception on Saturday, 5 April in the James Cook Hotel as part of the 16th Triennial Conference. All practitioners and their wives attending the conference will be invited to attend. The New Zealand Law Society has extended invitations to the conference to the President, Secretary-General, Vice-President, executive members and treasurer of Lawasia. It is anticipated that one of these overseas Lawasia officers will address the delegates attending the luncheon.

Tokyo in September—The fourth Lawasia conference will be held in Tokyo during the period 13-18 September 1975. Although the programme has not been finally settled, topics that have been proposed for discussion are:

Labour law, strikes and lockouts.
Foreign investment.
Admission to the practice of law.
Law and population.
Company law—protection of investors.
Mutual protection of industrial property in Asian and South Pacific countries.
Extradition.

The travel committee of the New Zealand Law Society has already considered travel arrangements for the conference and is planning some arrangements significantly different from the usual tourist run through Asia.

DAVID TOMPKINS

ABORTION IN PERSPECTIVE—II

BARRIE LITTLEWOOD *concludes his review the first part of which appeared at* [1974] *NZLR 488.*

Vehement opposition to reform is offered by those who claim that abortion is murder. But abortion is not murder, it is abortion; just as manslaughter is not murder, it is manslaughter. For those, however, who do not wish to be drawn into a semantic word game or to be ensnarled in lawyers' quibbles, but still feel that there is something inherently sinful about destroying the foetus (even at the mother's request and from humanitarian motives) an enquiry is warranted into the history of the theological objection.

The common law rule, noted earlier, that life begins at quickening, corresponded in broad terms with the theory of the medieval Church. St Augustine distinguished the 'formed' embryo from the unformed, holding that abortion of the latter should be punished by a fine only, whereas destruction of the formed embryo was murder punishable with death. The distinction was followed eight centuries later, when Gratianus, in his codification of the canon law published about 1140, held that abortion was not murder if the foetus had not yet been infused with a soul. He did not indicate the point of time at which such animation is deemed to occur but it was widely accepted that it took place on the 40th day in the case of a male foetus and the 80th day in the case of a female foetus. Thus, Pope Innocent III (1198-1216) was able to advise a monk, who caused his mistress to abort, that this was not irregular if the foetus was not vivified. (Norman St John-Stevas, *The Right to Life,* Hodder & Stoughton 1963; Glanville Williams, op cit, p 143; J T Noonan, *Contraception,* Harvard University Press 1965.) Similarly, St Thomas Aquinas worked out a doctrine of "mediate animation", according to which, in short, the first life of the embryo is vegetative, but when some semblance of human shape and the essential organs are present a sensitive principal replaces the vegetative. (T A Wassmer SJ, *The Catholic World* 206 (1) 57-61 (1967). The mediate animation theory was replaced in the 17th century by the immediate animation theory, according to which the soul arrives at the very moment when conception is brought about by the impregnation of the ovum by the male sperm.

The precise date of animation is of crucial importance to Catholics. It was St Fulgentius who, in the 6th century, had taught that every little child who has begun to live in its mother's womb and has there died, or who, having just been born, has passed away from the world without the sacrament of holy baptism, must be punished by the eternal torture of undying fire—not, indeed, for its own sins but by the inexorable condemnation of original sin inherited from its forbears. Accordingly it is enjoined by Canon 747 that all living embryos, of whatever age, must be baptised. This raises the question, according to more than one Catholic theologian, whether each menstrual discharge (occurring after sufficiently recent sexual intercourse) should be baptised, for it might contain a fertilized ovum. Research scientists have found that about one conception in three aborts spontaneously. If the immediate animation theory is valid then a search would have to be made in the menstrual flow, "to see if there were not some germ there, or, better still, we ought to pour baptismal water on this blood, taking care that the water should penetrate everywhere, and pronouncing sub conditione the baptismal words". (Westermarck, *The Origin and Development of the Moral Ideas,* cited in 2 MLR 131; Wassmer, op cit; Canon Henry de Dorlodot in Messenger (ed) *Theology and Evolution,* London, 1949.)

Basing himself on these and other considerations Fr Wassmer SJ argues for a return to the position of St Thomas. He points out the problem of explaining—if the immediate animation theory be true—how one fertilised ovum can split into two or more parts which develop into identical twins; and concludes, logically, with the suggestion that the theory of mediate animation might well be used "in difficult moral cases where abortion is suggested by ethically responsible persons".

In 1869 the 40 and 80 day theory was officially abolished by the church and abortion was declared unlawful in all cases. It was again prohibited by a papal encyclical of 29 October 1951, according to which abortion can never be permitted, even for therapeutic purposes, whether before or after quickening. Much unwelcome publicity ensued, as a result of which His Holiness explained, on 28 November 1951, that the prohibition extended only to a "direct"

killing. "Direct" in this usage means "intended" as distinct from "unintended although foreseen". The doctrine of unintended killing permits a Catholic surgeon to perform a hysterectomy on a pregnant woman, where it can be justified without reference to her pregnancy. Cancer is an obvious example. The foetus in such a case cannot survive, but its death is considered indirect.

At this point we find the modern Catholic emphasis lies less on the foetus's deprivation of baptism, than on the sin of directly causing its death, a sin which Roman Catholics equate with murder or at least reckon to be ejusdem generis. Either way, the objection is based on the theory of immediate animation, a theory which though officially recognised in 1869 has not been the subject of an ex cathedra declaration. Until debate within the Church is debarred by such a pronouncement there will presumably be many Catholics who feel as does Fr Wassmer, that it may not be prudential for Catholics to try to impose their traditional answers on other citizens by way of a general law. Fr R F Drinnan SJ has questioned the wisdom of Catholic clerical spokesmen at the highest level continuing to intervene in the political order and to state dogmatically that no change whatsoever can be morally permissible. No one disputes the right of a Catholic prelate to speak out about the morality of any question, but Fr Drinnan submits that episcopal statements going beyond the morality of abortion and entering into the question of jurisprudence or the best legal arrangements are inappropriate intrusions in a pluralistic society by an ecclesiastical official who wrongly assumes that he can pronounce a moral and uniform position for his church on a legal-political question. (R F Drinnan SJ, *Commonweal,* 17 April 1970.)

Whilst it is the official belief of the Roman Catholic Church that the moment of conception, or cell impregnation, is the moment of ensoulment, not all opponents of law reform, nor all Catholic priests, seem to accept this view unreservedly. The views of Fr Wassmer have already been mentioned. Sir William liley ((1971) *A Case Against Abortion,* Whitcombe & Tombs) has stated that: "Genetically, mother and baby are separate individuals from conception. One hour after the sperm has penetrated the ovum the nuclei of the two cells have fused and the genetic instructions from one parent have met the complementary instructions from the other parent to establish the whole design, the inheritance of a new person .... Over a span of seven or eight days this ... ball of cells traverses the Fallopian tube to reach the uterus. There the young individual, in command of his environment and destiny with a tenacious purpose, implants in the spongy lining and with a display of physiological power suppresses his mother's menstrual period." Sir William does not disclose any scientific evidence that supports the proposition that this "ball of cells" becomes an "individual in command of his environment" or that indicates the precise moment of metamorphosis. Elsewhere, however, he is reported to have said that for all practical purposes a baby exists once implantation occurs in the womb. (*NZ Herald,* 24 May 1971.) We might enquire, from a scientific viewpoint, as to the basis of this "practical" distinction, which is apparently observed some seven or eight days later than the "genetically separate" quality that arises at conception.

In the light of Sir William's published views it is not clear whether he would agree with those Catholic moralists (eg Wassmer, op cit) who permit a woman to use a douche after rape as late as 10 hours after the assault; within that period conception has been known to take place but implantation is presumably impossible.

The law in question is, as we have seen, a criminal enactment. Leaving theological speculations aside, one may demur at the extent to which objectors holding Catholic or similar views are entitled to look to the common law for the general enforcement of their private morality. Those who would make a criminal out of everyone who does not adhere to some previously decreed moral code must face the objection that making a crime of every sin may actually weaken the moral motive owing to the difficulty that the ordinary citizen will have in distinguishing between them, and a tendency to substitute the one for the other. The sanctions of the criminal law included the burning of women at a time when witchcraft was thought to be so intolerable that society did not debate the morality of the punishment. By modern notions witchcraft may be less a sin than a joke. There is no clamour to restore to the criminal code the offence, say, of adultery, formerly known as criminal conversation, although it is probably more widely held to be immoral than abortion induced after rape. Again, the crime of attempted suicide was deleted in 1961, but without strong objection from those who, judging by their

attitude to abortion, might be expected to regard it as homicide of a culpable variety.

The sternest opponents of abortion law reform are equally uncompromising in their attitude to contraception. The position of the Roman Catholic Church is too well known to need elaboration. One might expect a body with the name of the Society for the Protection of the Unborn Child to show some desire for a reduction in the number of unwanted pregnancies but it refrains from advocating any extension in the availability, knowledge and techniques of birth control.

The attitude of the Anglican Church appears to be less inflexible. To be sure, the Bishop of Southwark in 1913 thought that sexual intercourse was only justified if the procreation of children was intended—otherwise it was "mere gratification"—and that continence might have to be practised even if it meant breaking up a marriage; and a few years earlier the Lambeth Conference denounced birth control as "preventive abortion", recommending that all contraceptives be prohibited by law and their advocates prosecuted (as reported by Flann Campbell in *Population Studies,* 14 (2), 1960); and as late as 1930 the Bishop of St Albans, whilst admitting that abstinence might be difficult and even cause neurosis, left that it was the heroic way, since birth control was "repellent, degrading and wrong". The battle of these bishops against the growing permissiveness of their Church was a lost cause, for the 1958 Lambeth Conference unanimously declared that the planning of the number and frequency of children is a right and important factor in Christian (and presumably non-Christian?) family life.

Judging by this example of a moral revolution achieved within the Anglican Church in less than 50 years, it seems not too much to hope that the Catholic Church will similarly revise its attitude to abortion before the 20th century expires.

Other New Zealand churches are already moving on the issue. In the last three years the Baptist, Presbyterian and Methodist Churches have adopted quite liberal policies on the question of abortion. Even within the Catholic Church there can be changes of emphasis, leading ultimately, perhaps, to a reversal of policy. We may note, for example, the shift away from the condemnation of usury; and, in the context of abortion, the shift from the deprivation-of-baptism position to the abortion-is-murder position. The Catholic objection to contraception is based on the notion that contraception infringes the natural law. However, the Catholic Encyclopaedia of 1907 added the further objection that small families reduce industrial production; whilst the 1922 edition alleged that the "unnatural and immoral principles" of the growing birth control movement would cause "grave physical and moral disorders" such as fibroid tumours, sterility, neurasthenia, loss of mutual self-respect, infidelity, separation and divorce. (Cited by A W Sulloway, *Birth Control and Catholic Doctrine,* Beacon Press, Boston, 1959.) Presumably the theologians would not place as much stress on these aspects today.

The topic of sterilisation provides an example of old prejudices dying, but dying hard, and dying hardest among the ecclesiastical and judicial establishments. The Catholic Church will not countenance voluntary sterilisation unless medically indicated to cure a disease already present in the patient—sterility in such a case is reckoned to be the indirect consequence of, say, the removal of the fallopian tubes if this is the only means of curing a disease. If, however, the same operation is proposed for a patient to prevent her becoming pregnant, where she is so diseased that pregnancy would be a direct danger to her life, such is prohibited by Catholic teaching; it is said that sexual intercourse is not a necessity and that she can adequately safeguard her future by abstention.

Similarly Denning MR felt able to say (*Bravery v Bravery* [1954] 3 All ER 59) that sterilisation was plainly injurious to the public interest, for it enabled a man to have the pleasure of sexual intercourse without shouldering the responsibility attached to it. It was degrading to the man himself, and it was injurious to his wife, to say nothing of the way it opened to licentiousness. It was, he said, illegal even though consented to. On his own grounds Lord Denning's view seems inconsistent with his clear approval, given in the same judgment, of contraception; and as he gave no authority he has been criticised by Glanville Williams. Meantime, in the overwhelmingly Catholic country of Puerto Rico, voluntary sterilisation has been widely practised for the past 50 years. As the operation needs to be confessed but once it presents itself to the Catholic populace as a birth control technique with obvious advantages compared with contraception. Massive contraception and sterilisation programmes are now being debated for the underprivileged areas of the globe, notably in India, and it would seem odd for Western Civilisation to deny itself on moral

grounds a procedure which it recommends for the Third World.

The Catholic objection—and probably Lord Denning's—is rooted in the notion that non-procreative sex is wicked and that interference with the procreative function offends against the natural law. Yet this view no longer enjoys unquestioning acceptance amongst all Catholics, as appears from the Church's modern experience in the case of contraception, so it seems reasonable to assume that as contraceptive practices slowly gain acceptance within the Catholic community, the objection to sterilisation will wane similarly.

One Catholic writer has pointed to the example of Nazi Germany, where compulsory sterilisation was utilised for the attempted annihilation of the Jewish race. (St John-Stevas, op cit.) To argue from this example that voluntary sterilisation is the thin edge of the wedge leading to wholesale compulsory sterilisation is as helpful as to argue against the permissiveness of the present gaming law on the ground that it might lead one day to the State's compelling all citizens to patronise the TAB. The reference to Nazi Germany is unfortunate, and betrays a failure to note the difference between humanitarianism and Nazism. As soon as Hitler took power he closed all family planning centres, for according to him "The use of contraceptives means a violation of Nature, a degradation of womanhood, motherhood and love; ... Nazi ideals ... demand that the practice of abortion ... shall be exterminated with a strong hand. Women, inflamed by Marxist propaganda, claim the right to bear children only when they desire. First—furs, radio, new furniture, then perhaps one child." This was part of the Nazi campaign to promote the growth of the master race. In 1938 a case was reported of a Jewish couple who had attempted to procure an abortion but were acquitted on the ground that the relevant section of the German Criminal Code was intended for the protection of the progeny of the Aryan race, which was defending itself against the Jewish race, and laws passed for the protection of the German people could not be used for the protection of Jews. (2 Modern Law Review 116, 228.)

Those who do not share with the Roman Church the view that voluntary abortion is always wrong, are irrational if they persist in believing it is only immoral sometimes, depending on the circumstances. For if some circumstances can make it right, what are the circumstances that make it wrong? If we hold, say, that it is immoral unless done on medical advice we are confusing morality with medicine. This may be a good reason for not reforming the law along the lines of the English Abortion Act 1967. Under that statute, a doctor may lawfully perform an abortion if two doctors (not necessarily including himself) are of the opinion formed in good faith:

(a) that the continuance of the pregnancy would involve risk to the woman's life or injury to the physical or mental health of herself or of any existing children of her family greater than if the pregnancy were terminated, or

(b) that there is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Of the abortions now being lawfully performed in England, 80 percent are covered by paragraph (a). The risk to health need be neither grave nor immediate; but the act provides that if a doctor forms the bona fide opinion that an abortion is immediately necessary to save the patient's life or to prevent grave permanent injury to her physical or mental health the opinion of another practitioner is not required. Any doctor with a conscientious objection to abortion is exempted from the obligation of performing it, except where necessary to save the patient's life or to prevent grave permanent injury to her physical or mental health.

According to the Lane Report (April 1964) one consequence of the British reform is that the incidence of illegal abortion has considerably decreased. Evidence for this was found in a reduction of abortion deaths from all causes, a reduction in septic abortions admitted to hospitals and a reduction in the number of prosecutions for illegal abortion.

So far as the occurrence of illegal abortion in New Zealand is concerned, a recent study by W A P Facer ([1974] NZLJ 337) has produced an annual estimate of 6,500 successful and 11,000 attempted abortions. The majority of women aborting were married.

It is apparent that only a minute proportion of illegal abortions is ever detected. It must presumably be at least as hard to procure a lawful termination in New Zealand as it was in England before 1967. There seems no warrant for assuming that the law is being enforced here any more effectively than it was in England. Nor do the opponents of reform claim

that it is. Dr H P Dunn, a prominent opponent of abortion law reform, refers to what he calls the common assumption "that it is necessary to legalize abortion if we are to reduce the numbers of criminal abortions", and claims that *in no other criminal activity* has it been suggested that ordinary citizens, much less the members of the medical profession, should take over from criminals because they do the job so much better. (*What's wrong with Abortion?* ACTS Publication, Melbourne, 1970.) This statement is so sweeping that it is not hard to find an exception to disprove it: New Zealand's experience of the sale of liquor in restaurants has been such that most people feel this particular job is done better now that it is not being done by criminals.

The existence of laws which are not enforced and which do not command a wide measure of respect among the populace has a malign influence upon society. In Melbourne there have been recent disclosures of protection rackets—lucrative arrangements between the corrupt police and private abortionists. (*Auckland Star,* 1 August 1970.)

Doubtless there will be many for whom, even if they have read this far, the subject of abortion arouses rather more emotion than is likely to be displaced by these comments. We may assume that in their view human personality commences not at birth, nor with viability at the 24th week, but at least from the moment of implantation in the spongy tissue of the womb, if not a week earlier at the moment of impact between the male and female cells; and that such people derive but little consolation from the fact that, by reason of consideration for the mother's safety, few doctors would ever perform an abortion after the 12th week. As these views are generally inarticulate we cannot tell whether those who hold them are offended by the reluctance of the police to invoke s 185 of the Crimes Act, under which a woman performing or seeking an abortion on herself can be gaoled for seven years; or whether they disapprove of the usual sentence of probation which is imposed in the few cases that do come before the Courts (*Crime in New Zealand,* p 295), and which itself is society's acknowledgement that a woman who will undergo the risk of an illegal abortion is deserving of help rather than punishment. It is hard to see any logical basis for the view that the law as it happens to stand at the moment represents the nearest possible approach to legislative perfection.

Opponents of reform do not confine themselves to the life-begins-at-conception argument. For example, Sir William Liley is reported to have said that the fact that it is cheap and easy to kill a foetus does not make it right. (*NZ Herald,* 24 May 1971.) Perhaps he should have said "the fact that it *could be* cheap and easy"—for it is surely notorious that abortions are at present more readily procurable by the rich than by the poor. Still, accepting for the purpose of the argument his assurance of the cheapness and easiness of the operation, there seems no reason to disagree with his proposition: it would be just as logical to assert that abortion is "right" if it is dear and difficult. In common with other opponents of reform, Sir William's objection seems to be directed against the morality of abortion as such rather than against the existing state of the criminal law. Those who hold that voluntary abortion is always wrong have every right to that belief and every right to express it. Nor are their beliefs challenged in any way, for the only question is whether the criminal law should be reformed.

Other arguments against reform are not lacking. It is said that widespread abortion will lead to a frightening drop in population, but it is not clear whether all those who hold this view are opposed to contraception, or to measures for the stamping out of fornication. Nor is it easy to see why *you* should have the right to send *me* to prison because in my private life I am doing things which offend against your notions of population control. And, to put the issue on a more utilitarian level, growth population policies might have more success if they are implemented by, say, offering financial rewards for parturition and childbearing, than by imposing criminal sanctions against private methods of birth control. Nor does the argument give due recognition to the simple fact that the pleasures of the human female are not confined to her sexual activities, but extend through pregnancy and parturition to the joy of child-bearing and motherhood, a natural joy which can be facilitated and encouraged; the outlook is indeed bleak if the survival of the human race is seen to depend on invoking the criminal law against all women who refuse to parturiate.

The chief remaining argument against reform is based upon the supposed immorality of allowing anyone to "demand to be absolved from the consequences of their acts". This seems to be an echo of the Augustinian view that all sexual activity, both in and out of marriage, is illicit unless accompanied by an intention

to procreate. Yet, the full rigour of the ancient view appears to be modified by Sir William Liley who would evidently permit sexual intercourse without the intention to procreate, provided the parties make careful arrangements beforehand. If, shortly after, a douche is administered, or an abortifacient, it is not clear whether what he condemns is the original act of careless sexual intercourse or the subsequent attempt to "be absolved from the consequences". He speaks of pregnancy as "a statistically predictable consequence of sexual intercourse" and therefore, it seems, he proposes criminal sanctions against those whose private lives deviate from the statistical norm. It is claimed that "nowhere else in the entire field of criminal or civil law can any one demand to be absolved from the consequences of their act". Fortunately, this is rubbish, for in, say, the field of torts, strict liability has been reduced almost to vanishing point; in the field of contract the common law has for centuries exempted minors from liability and allowed a locus poenitentiae in cases of illegality; s 42 of the Criminal Justice Act 1954 is invoked daily to absolve from all responsibility those who, but for that section, must be treated as criminals, and the law relating to companies and bankruptcy makes it easy to escape the consequences of myriads of liabilities. The argument is, however, irrelevant, since the question in issue is not what the law is, but what it ought to be.

Similarly, Dr Dunn argues against getting rid of pregnancy on request, for then "no sexual restrictions will remain". Contraception is condemned alongside abortion, in which regard he is doubtless more consistent than Sir William Liley. He complains that divorce and adultery are respectable, that premarital intercourse is normal, and that homosexuality is acceptable in sophisticated society. From these premises Dr Dunn argues for stricter moral attitudes, without which he sees a revolution which "will inevitably destroy innocent lives, break down marriages, lead to chaos and suffering in society, and foster violence". No evidence is offered, however, as to the way in which a revision in moral standards is to be achieved through the medium of the criminal law. Nor does Dr Dunn argue for harsher criminal punishments than these currently being imposed. His complaint that the pill has removed fear from casual intercourse is not accompanied by any comment on what the pill has achieved for married couples; the constant presence of fear is evidently advocated as a salutary thing. If such arguments were logical their authors would have to take account of factors not mentioned, whereas no account is taken of casual negligence, stupidity or feeble-mindedness or of merely the possibility of failure to achieve a satisfactory degree of statistical accuracy in determining the "consequence of their acts" by means of, say, the use of the rhythm method of birth control; no attempt is made to justify the morality of making the unwanted child the instrument of punishment for its mother's carelessness; nor are we told whether fear of consequences should be enhanced by the closing down of clinics treating venereal disease. Above all, the argument seems to proceed on the basis that carelessness, improvidence, ignorance, or even financial inability to obtain contraceptives, should be punished in married and unmarried couples alike.

Both obstetricians write movingly of the human characteristics of the foetus. Unlike Fr Wassmer, Dr Dunn declines to be influenced by his Church's former teaching of the theory of inanimate formation, which is now, he says, naive: he says that those who deny to the foetus, from the very moment of conception, the inalienable right to human life are "lacking in imagination". Without denying that the lack of a certain kind of imagination is what disables many non-Catholics from following the theological dialectic concerning the origin of the soul, one may be permitted to doubt whether a vivid imagination is necessarily the best starting point for a discussion of the present issue, which is the proper context of the criminal law. Dr Dunn, whilst relying chiefly on the theological point, goes on to argue for the retention of the existing criminal law, as a protection for the foetus's inalienable right to live, from the existence of another legal rule which, he says, allows a foetus to sue for damages. Even if such a rule were to be found among the laws relating to damages claims, it is hard to see what this has to do with not altering the law relating to abortions.

Enough, perhaps, has been said to indicate that the arguments presented in favour of the existing law are not always free from emotionalism, nor from imaginary concept. Sometimes they are positively misleading. Not all obstetricians would, for example, agree with Dr Dunn's view that an abortion performed within the first three months by a professional surgeon involves the mother in risks of haemorrhage, infection and perforation of the uterus, and that the operation is almost always

more hazardous than continuation of the pregnancy. If this were so, then no doubt a surgeon embarking upon an operation attended by such risks would expose himself to an action for damages for negligence, if not to disciplinary action at the hands of his own profession. Dr Dunn devotes a whole paragraph to the problems of performing an abortion after the fourth month; we are told that this involves a hysterectomy done by Caesarean section. Such an operation performed after the foetus becomes viable is governed by s 182 of the Crimes Act and presumably no responsible surgeon would perform it unless it were really necessary for the preservation of the mother's life. An intriguing piece of information disclosed by Dr Dunn is that he personally has had under his care 1250 unmarried mothers aged from 12 to 47, many of them victims of rape and incest; all were safely delivered and the babies adopted. "Out of tragedy comes some good and life begins anew." If they were all adopted, then obviously Dr Dunn's experience was not typical, and it is not clear what inference is intended to be drawn from his statistics. The argument based on the invigorating moral value of fear, or on the irresponsibility of people who demand to be absolved from the consequences of their acts is presented as if it were of general validity, and would presumably be applied, say, in the case of a raped 13-year old, or in the case of a promiscuous idiot, just as it would be applied to anyone else. Dr Dunn suggests that there are no psychiatric grounds for the termination of pregnancy—presumably even for 13-year olds—but not all psychiatrists would agree. As proof of his sincerity in these matters Dr Dunn tells how he offers to help those mothers who have rubella in pregnancy. Where rubella is contracted within the first four weeks there is about a 60 percent chance of her offspring being deformed. As neither the law nor the Catholic conscience will permit abortion on this ground Dr Dunn offers to take the child off the parents' hands at birth and to assume personal responsibility for it. By this means he would "save the child from destruction", but this claim is misleading, because what saves the "child" from destruction is not Dr Dunn's personal intervention but the existing state of the criminal law which he supports. His comment is, not suprisingly, that his offer has never been accepted.

Another good reason for not adopting the English type of reform is that it assumes that the woman is incompetent to make her own decision, even after receiving medical advice, and that the making of a valid and presumably moral decision is the exclusive prerogative of the medical profession, or at least that the members of that profession are in some mystical way better equipped than pregnant women to make moral decisions. The criteria laid down in the English statute, although framed with as much precision as parliament is capable of, still leave room for differences of interpretation according to the subjective approach of the medical practitioners who happen to be consulted. If the first two consulted refuse to sanction the operation, or if they disagree, then the patient may trail disconsolately from surgery to surgery, perhaps not finding a sympathetic practitioner until it is too late for the operation to be performed with safety. The suggestion that some form of panel or quasi-judicial procedure should be established so as to relieve the medical profession of the embarrassment of having to make these decisions, is open to objections on bureaucratic grounds; nor would it diminish the humiliation and affront to the dignity of womanhood of arrogating to a tribunal what could equally be the woman's own decision. Such a tribunal, if it were established, might well produce bizarre results. Suppose, for example, the tribunal were given power by law to authorise abortion in case of rape (which, incidentally, is not provided for by the English statute). The first and most obvious anomaly that would arise would be that the tribunal would have to arrive at its findings before the culprit could be brought to trial. But suppose the woman were married and living happily with her husband; the tribunal would then have to embark on the ticklish question of deciding whether to allow her an abortion before anyone can say whether the child is her husband's. If the child is safely delivered and blood tests then exclude the husband as the father, as they would in a fraction of the cases, is she then entitled to a delayed abortion? Examples like this indicate the absurdities and anomalies that can result from a too cautious or half-hearted amendment to the existing laws.

It can fairly be said that an onus lies on those proposing a legislative change, to establish the need for what they propose. In the case however of a penal enactment, a special consideration applies: it affects the liberty of the subject. In a society structured on the principles of liberal democracy it is axiomatic that there ought to be no derogation from individual freedom without good cause. The

present abortion law renders doctors and other citizens liable to terms of imprisonment of up to 14 years, or fines of unlimited amount, or both. Religious beliefs and private value-judgements, albeit sincerely held, as to whether abortion is good, bad, desirable, undesirable and so forth, are irrelevant to this basic principle that a penal enactment should be discarded if there is no valid reason for its retention.

No one is better aware than the members of the legal profession that there are too many laws. There seems no real reason why ss 183 to 186 of the Crimes Act should not be repealed. If this is thought too sweeping, on the ground that it would open the door to unqualified operators and charlatans, creating thereby an even greater public health hazard than at present, attention is drawn to the Medical Practitioners Act 1968 which penalises anyone practising surgery or medicine without the appropriate qualifications. True, the maximum penalty under that Act is a $50 fine. It would be odd to enact that unqualified practitioners of abortion should be liable to 14 years' jail, compared with a fine of $50 for unqualified practitioners of neurosurgery, and there seems no warrant for making special provision for the former. Whether there is a case for stiffer maximum penalties under the Medical Practitioners Act is beyond the scope of this paper.

REOPENING HIRE PURCHASE TRANSACTIONS

Cases concerned with the exercise of the Court's jurisdiction to re-open a hire purchase transaction on the ground that it was harsh and unconscionable are rare birds indeed(*a*). This is surprising in view of the allegations of sharp practice in this area that are frequently encountered. The sole reported New Zealand decision on this power, as given by s 8 of the Hire Purchase Agreements Act 1939, is *Foley Motors Ltd v McGhee*(*b*) in which Richmond J held that the exclusion of the implied conditions as to quality and fitness was not, at least on the facts before him, harsh and unconscionable(*c*).

The recent judgment of Cooke J in *Hall and Anor v Machinery House Ltd*(*d*) raises a number of interesting points on the extent of the jurisdiction given by the section and its manner of exercise. On 31 July 1969, the plaintiffs entered into an agreement with the defendant. Under its provisions, the plaintiffs agreed to buy certain logging equipment for $14,000 from the defendant on hire purchase terms. They also agreed to supply the defendant with an average of not less than 400,000 feet of timber per month, which the defendant, to their knowledge, proposed to resell to Japanese buyers. The deposit for the purchase of the equipment was to be paid in logs and, for the instalments, the defendant was to be entitled to deduct 40 cents from the agreed purchase price of every 100 feet of timber supplied.

The plaintiffs were the mother and the wife of an undischarged bankrupt. They were clearly parties to the agreement primarily for convenience, since the bankrupt was the person responsible for the management of the active side of the logging business, which the family had carried on for about 18 months. The agreement was negotiated by the bankrupt. During the 9 months that the agreement operated, the plaintiffs supplied only about one third of their timber quota. The defendant terminated the agreement and repossessed the equipment. The plaintiffs now claimed for moneys due to them under s 3 (1) of the Hire Purchase Agreements Act 1939 and the defendant counter-claimed for damages for loss of profits resulting from the plaintiffs' failure to meet their quota.

His Honour assessed the plaintiffs' entitlement on their claim at $3,456. With regard to the counterclaim, he held that the damages prima facie recoverable under the rules in *Hadley v Baxendale* amounted to $11,869. However, the defendant had clearly and properly mitigated its loss, but on the evidence before the Court it was impossible to make an accurate assessment of the net financial effect of the steps taken. His Honour observed: "Were it not for the jurisdiction under s 8 of the Hire Purchase Agreements Act 1939, the

(*a*) See Trebilcock, "Reopening Hire Purchase Transactions" (1968) 41 ALJ 424, where a similar observation is made in the Australian context.

(*b*) [1970] NZLR 649.

(*c*) See the note by Coote in (1971) 4 NZULR 293.

(*d*) 5 August 1974. Supreme Court, Hamilton. A 37/72.

case would be in an unsatisfactory position." With respect, despite s 8 the case was in an unsatisfactory position. All that the evidence appears to show is that the defendant definitely *was* entitled to *some* damages but definitely *was not* entitled to *all* the damages claimed. The defendant, of course, bore the burden of proving the quantum of its loss, but his Honour considered that the cross-examination for the plaintiffs had not put this aspect in issue in a sufficiently specific way. Whatever be the practical objections to adjourning the case for further evidence to be called, it is submitted that it is wrong in principle to exercise the power given by the section to vary existing rights without first being in a position to know much more precisely what those rights are. Such precision may well not be necessary where it is felt that a party should have no rights at all, but it would seem essential where a mere variation is contemplated.

In order to succeed in their application under s 8, the plaintiffs had to show two things: firstly, that the jurisdiction to re-open applied to the whole transaction and not merely the hire-purchase part of it and, secondly, that the transaction was "harsh and unconscionable". The Court will then decide what relief it is prepared to grant. These three steps will be considered in turn.

(1) *Jurisdiction.* His Honour accepted that, while the expression "transaction" may well be wider than "hire purchase agreement", it was the transaction of hire purchase that was referred to by the section, and that "to establish that a transaction is harsh and unconscionable, the stigma must be shown to attach to the transaction in a respect relating to the rights or obligations of one or other of the parties in the capacity of either vendor or purchaser under a hire purchase agreement".

But, as his Honour clearly recognised, this was a principle far more easily to be stated in the abstract than to be applied to facts such as those in the instant case. "It was all part-and-parcel of one arrangement, and I do not regard severance as realistic or reasonably practicable. Further, even if the hire purchase elements could be severed, they must include the provisions for deposit and instalments." The provisions of s 8 (2) empowering the Court to revise "any agreement made . . . in connection with the transaction" were of no assistance to the plaintiffs in this regard since, as his Honour noted, the powers given by s 8 (2) do not apply unless the Court has first been satisfied that the transaction is harsh and unconscionable in terms of s 8 (1).

The section would seem to place the Court in an almost impossible position when considering an agreement such as the instant one. There is clearly no question of the section applying to a bare timber supply agreement, yet equally clearly the logging equipment agreement was a hire purchase agreement in terms of the Act. It is the combination of the two that causes the difficulties. Counsel for the defendant gave the example of an agreement which embraced the hire purchase of a chattel and the lease of a house. Although his Honour expressed no opinion on the point, it would seem that such an agreement demands severance. On the other hand, where, for example, second hand goods are traded-in as part of the deposit under a hire purchase agreement, the price allowed for those goods should certainly be a factor in considering whether the transaction was harsh and unconscionable(*e*). The instant case falls somewhere between these two extremes.

(2) *Harsh and unconscionable.* Cooke J stated simply that he was applying the "tests stated by Richmond J in the *Foley Motors* case and in the authorities there cited". What are these tests and authorities? The basic approach of Richmond J in that case was, understandably, that "the authorities, as to the meaning of the words 'harsh and unconscionable', decided in relation to money-lending cases, are of real assistance in the context of the Hire Purchase Agreements Act". He continued:

> "It will suffice if I adopt *for the purposes of the present appeal*(*f*) Lord Macnaghten's explanation of the phrase 'harsh and unconscionable' as meaning 'unreasonable and not in accordance with the ordinary rules of fair dealing' (*Samuel v Newbold* [1906] AC 461, 470). The purpose of the legislation is to prevent oppression; *Bigeni v Drummond* (1955) 71 W N (NSW) 242, 246; *Birstins v Associated Securities Ltd* (1960) 77 W N (NSW) 877, 878. These were both cases decided under a similar section in the Hire Purchase Agreements Act 1941-1955 (NSW). I also think that *in the present case*(*f*) the transaction should be judged in the light of the circumstances as they existed at the time and, importantly, of the knowledge which

(*e*) Cf *Toft v Custom Credit Corporation Ltd,* unrep. (South Australian Local Court), cited by Trebilcock, op cit.

(*f*) Emphasis added.

the parties then had, or could by reasonable inquiry have had."(*g*)

Although Lord Macnaghten's explanation may well have been sufficient for the case before Richmond J, it does not necessarily follow, of course, that it is sufficient for all purposes. The House of Lords in *Samuel v Newbold* was careful not to attempt any exhaustive definition, but the cases under the Moneylenders Acts suggest that in general the moneylender must have taken deliberate advantage of the borrower's urgent financial need, ignorance or other weakness(*h*). The fact that the terms are severe does not of itself render the transaction harsh and unconscionable(*i*). The passage in *Bigeni v Drummond* referred to above is as follows:

> "I think . . . that the object of the legislation was to confer a remedy where through oppression, abuse of power or the unfair taking advantage of the necessities of another that other has entered into an agreement the terms of which are harsh and such as would be an affront to the conscience of an honest and right-thinking person."

The plaintiffs in the instant case based their claim on four grounds. Firstly, the agreement failed to provide in the event of repossession for a credit for the value of the deposit of logs. In view of the plaintiffs' overriding statutory entitlement to such a credit, Cooke J rejected this ground. The second was that the agreement required the plaintiffs to supply at their own expense $4,200 worth of logs as deposit on the same day as delivery of the equipment and by the day following the date of the agreement. Whilst recognising that the plaintiffs had employed subcontractors for long hauling in the past, and that in any event the defendant had waived compliance with this requirement, his Honour considered it to be an onerous provision.

The third and fourth grounds related to the linked matters of the log quota and payment of instalments. The plaintiffs' accountant, immediately on learning of the agreement, considered that it was incapable of fulfilment and sought to have it cancelled. The bankrupt, however, remained optimistic. Although the equipment was not always fully utilised towards meeting the quota, his Honour found that the major factor was the lack of cutting rights over timber of appropriate size and quantity and in an appropriate locality. "That lack would have been readily discoverable on enquiry before the contract was made." Against this background, he found that the quota provisions were onerous. He noted that the agreement, whilst protecting the defendant from liability for non-acceptance of logs in certain circumstances, contained no corresponding safeguard for the plaintiffs in the event of non-delivery. As a final point he noted that the combined effect of the deposit clause and quota provisions was that the plaintiffs could be required to pay off all moneys owing within a total of 8 months whereas the supply agreement was to continue for at least 2 years.

Considering all these matters together, he was satisfied that the agreement should be reopened. It is submitted with respect that his Honour perhaps too readily equated an "onerous" agreement with one that is "harsh and unconscionable". This was a commercial agreement. Both parties were seeking to profit from the agreement. One party made a bad bargain, but the weight of authority appears to suggest that rather more in the way of actual oppression is necessary before the transaction can be said to be harsh and unconscionalble. For example, it might well be otherwise had there been evidence of actual deception by the defendant. Again, had the plaintiffs' urgent need for the cutting equipment arisen from an existing obligation to perform another supply contract, it might well be regarded as a harsh and unconscionable transaction. The instant case appears to fall short of oppression of this nature.

Another aspect of the case which, on the face of it, is a little surprising is that the position of the plaintiffs and of the bankrupt appears to have been regarded as one and the same. Throughout his judgment, his Honour is concerned with the position of the bankrupt and the effect of the agreement vis-à-vis him. Yet the plaintiffs were, of course, not the bankrupt but his wife and mother. They alone were parties to the agreement. They alone would otherwise have been liable under it. It may well be that there were good practical reasons for counsel for the plaintiffs apparently not choosing to take this point. Nevertheless it seems strange that this should not have been at least alluded to as a relevant factor in determining whether the transaction was harsh and unconscionable.

(*g*) At p 651.

(*h*) See the cases cited in Pannam, *The Law of Moneylenders,* p 289-290; see also the illustrations given in *Samuel v Newbold* by Lord Loreburn at p 467 and Lord Macnaghten at p 470.

(*i*) See eg *Reading Trust Ltd v Spero* [1930] 1 KB 429 (CA).

(3) *Re-opening.* His Honour considered that the most equitable solution was to limit the damages recoverable on the counterclaim to the same amount as was recoverable on the claim. Against the background principle of freedom of contract, a power such as this has rarely been exercised with any great relish. All that can be done is to provide a result that is felt to be the most satisfactory in the circumstances. In the instant case, the task was made doubly difficult by the fact that, as mentioned earlier, the damages that the defendant would otherwise have been entitled to had not been capable of quantification. Factors that influenced his Honour were that the plaintiffs had no separate professional advice before signing, that this was an undischarged bankrupt's first venture with his own equipment, and that the prospect of liability to the defendant for lost profits was not specifically drawn to his attention.

Two final comments will be made. For agreements entered into after 1 August 1972, the relevant statute is, of course, the Hire Purchase Act 1971. By s 37 of that Act, the Court has similar powers of re-opening, although in a slightly expanded form. However, unlike the 1939 Act, the definition of hire purchase agreement in the later Act excludes agreements made "otherwise than at retail"(*j*). Had the agreement in the instant case been governed by the later Act, it may well be that no power to re-open would have existed.

The second comment is this. On the facts before him, his Honour rejected the plaintiffs' submission that the agreement was harsh and unconscionable in that it failed to inform them of their rights on repossession under s 3 (1) of the 1939 Act. The 1971 Act places considerable emphasis on disclosure. In a case governed by that Act, an argument along similar lines might meet with greater success. For example, typical hire purchase agreements in current use state expressly that in the event of repossession, all monies payable under the agreement shall "forthwith become due and payable"; there is merely a passing reference to the fact that the purchaser may have rights under the Act. The agreements contain the usual acknowledgments as to the purchaser having inspected the goods, relying on his own skill and judgment, no representations having been made by the vendor, etc, yet many of these may in fact be of no legal effect either under the principle of *Lowe v Lombank Ltd*(*k*) or s 39 of the Act. The agreements may expressly state that there are no implied conditions, with only a passing reference to the fact that this is subject to the provisions of the Act(*l*). Numerous other examples can be found.

C R CONNARD

(*j*) See the construction accorded to this phrase by the Court of Appeal in *Provident Life Assurance Co Ltd v Official Assignee* [1963] NZLR 961.

(*k*) [1960] 1 All ER 611.

(*l*) Clauses such as this are the subject of the first Reference by the Director of Fair Trading under the Fair Trading Act 1973 (UK)—see Strachan (1974) 124 New LJ 684.

NEW MAGISTRATE APPOINTED

The appointment of Mr M L Bradford of Browns Bay, Auckland as a Stipendiary Magistrate has been announced by the Minister of Justice, the Hon Dr Finlay Q C. Mr Bradford, who graduated LLB in 1961, has practised in Auckland and latterly at Browns Bay. As a law student he held the offices of President of the NZ University Law Students Association and the Law Student Faculty at Otago. For the past 9 years Mr Bradford has served as a member of the East Coast Bays Borough Council, the last 6 years as Mayor. He is also a member of the North Shore Drainage Board and on the Executive of both the Auckland Local Bodies and the North Shore Associations. Mr Bradford is married with 5 children 4 of whom are at school and his interests include outdoor bowls and sea fishing. He has taken up his appointment in Wellington.

Hair, here—In the immaculate, new Supreme Courthouse at Nelson, the architects have thoughtfully provided a "ladies" off the robing room as well as a "mens". Their concept of the lady barrister is however, open to inquiry as they have thoughtfully provided our female brethren with a shaving point.

Knees or no Knees?—There's a story going round that tells of a Wellington firm whose partners for some hours debated whether or not female staff should be permitted to wear trouser suits. The decision was no—but the girls wore them just the same. And with curious consequences. For the standard of work hasn't suffered; no clients have been frightened away; and the pregnancy rate shows no sign of change. Others, debating the distinctly un-Wellington topic of shorts for males, might well reflect on the precedent.

JUDICIAL INTERPRETATION OF "AN OFFENSIVE WEAPON"

by CHARLES CATO, *recently Judges' clerk at Auckland and now a Rhodes Scholar at Oxford.*

The decision of the English Court of Appeal in *R v Dayle* [1973] 3 All ER 1151 should be noted by those practitioners who have to defend clients charged under s 53A of the Police Offences Act 1927, the relevant provisions of which read:

"(1) Every person commits an offence who, without lawful authority or reasonable excuse, the proof of which shall be on him has with him in any public place any offensive weapon.

"(7) For the purposes of this section, the expression "offensive weapon" means any article made or altered for use for causing bodily injury or intended by the person having it with him for such use; but does not include any tool of trade in the possession of any person in the course of his employment or while he is going to or returning from work."

Our s 53A is similar to s 1 of the English Prevention of Crimes Act 1953, the relevant provisions of which are as follows:

"(1) Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence . . .

"(4) In this section . . . 'offensive weapon' means any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him."

The definition of an "offensive weapon" as contained in both Acts is very wide. It covers not only weapons which are offensive per se, or which are obviously manufactured for such use, but also articles which are capable of being used for innocent purposes but are carried with an evil intent. Unfortunately, prior to the decision of the Court of Criminal Appeal in *R v Dayle,* divergent opinions had developed as to when the section should operate so as to render an inoffensive article an offensive weapon.

The first case of importance is the decision of the Court of Criminal Appeal in *R v Jura* [1954] 1 All ER 696; [1954] 1 QB 503. There, the appellant, having gone to a shooting gallery, had proceeded to hire an air rifle from the proprietor in order to fire some shots at a target. Then, as a result of some dispute, he had turned in a fit of anger and had fired on his female companion, wounding her. He was convicted by a jury of the offence of carrying an offensive weapon in a public place. In the course of his direction to the jury, the trial Judge had said:

"His possession only becomes unlawful if, in your opinion, he turned the rifle deliberately upon the woman. Then immediately his possession of it becomes unlawful and he is in possession of an offensive weapon in a public place."

However, the Court of Criminal Appeal held that this direction was incorrect. In delivering the judgment of the Court, Lord Goddard C J had this to say (at p 506; 697):

"The appellant was not carrying this rifle without lawful excuse because he was at a shooting gallery where for the payment of a few pence people can amuse themselves by firing at a target. He was carrying the rifle for that purpose so he had an obvious excuse for carrying it. It was his use of the rifle which was unlawful and for which he might have been convicted of a felony. If a person having a rifle in his hand for a lawful purpose suddenly uses the rifle for an unlawful purpose, the Offences against the Person Act 1861 provides an appropriate punishment. The Act of 1953 is meant to deal with a person who goes out with an offensive weapon, it may be a cosh or knife, without any reasonable excuse."

With this case must be compared the decision of the Divisional Court in *Woodward v Koessler* [1958] 3 All ER 557. This was an appeal by way of case stated from the dismissal of an information laid under the Prevention of Crimes Act 1953. The respondent had been charged with having an offensive weapon, in this case a sheath knife, in a public place. It had been established that he and some companions had attempted to break into a building with an iron bar and the knife in question. A caretaker had approached, where upon the

respondent, knife in hand, went up to him in a threatening manner and made an intimidatory remark. The Justices were of the opinion that the youth had not been carrying an "offensive weapon" within the meaning of the statute.

Before the Divisional Court, it was contended on behalf of the prosecution that the knife was an offensive weapon *per se*, or alternatively, that there was a demonstrated intent to cause personal injury and this fell within the definition prescribed by subs (4) of s 1. On behalf of the respondent, it was contended that there was no evidence of intent to injure, and alternatively that any intent to injure shown by the conduct of the respondent towards the caretaker did not form part of his initial intention in carrying the knife. Although cited to the Court, *R v Jura* was not referred to in the judgment. Indeed, the Divisional Court, of whom Lord Goddard C J was a member, in upholding the appeal, appeared to depart from the view that the section was aimed more at suppressing the carriage of offensive weapons than at the use of such weapons.

The respondent's contention that there was no evidence to prove the existence of the necessary evil intent at the outset was unsuccessful. Rather, the Court inferred from the ultimate use of the article in an offensive manner that the intention to use it, in such a way, was present at the outset. On this point, Donovan J remarked:

> "Counsel for the accused founds himself on the words 'having it with', and says that the accused must be found to have taken the weapon out with him with the intention of causing injury. Counsel says that in this case the accused took it for the purpose of breaking into the cinema. I do not agree with that narrower interpretation of the words 'having it with him'. All that one has to do for the purpose of ascertaining what the intention is, is to look and see what use was in fact made of it. If it is found that the accused did in fact make use of it for the purpose of causing injury, he had it with him for that purpose."

This reasoning rightly received considerable academic criticism*(a)*. Merely because a person uses an article in an offensive manner does not necessarily mean that he carried such an article for this purpose from the outset. It may amount to persuasive evidence that he had such an intention; but it should not be regarded as conclusive of intent. Yet the approach adopted by the Court in *Woodward v Koessler* was expressly followed in the subsequent English decision of *R v Powell(b)* and also by a majority of the Full Court of South Australia in *Considine v Kirkpatrick(c)*.

However, entrenchment of this approach was recently halted by the Court of Criminal Appeal in *R v Dayle* [1973] 3 All ER 1151. In that case, the appellant had been charged inter alia with having offensive weapons, being a car jack and wheel brace, within the meaning of s 1 of the Prevention of Crimes Act 1953. During the Course of the fight, he had taken these articles from the boot of the car and, the Crown alleged, had committed an assault causing bodily harm. It followed from the *Woodward v Koessler* decision, so the Crown argued, that conviction on the offensive weapon charge should follow automatically. After two trials, the first at which he was acquitted on the offensive weapon charge, the appellant was eventually convicted on the assault charge. He, therefore, contended that in view of the way the prosecution case had proceeded, the verdict was so inconsistent that it should entitle him to have the assault conviction vacated.

The Court of Criminal Appeal agreed that the result was inconsistent and therefore upheld the appeal. In so doing, the Court criticised the dictum of Donovan J in *Woodward v Koessler* and approved the approach exhibited in *Jura's* case. Kelner Brown J, who gave the judgment of the Court, made these remarks (at p 1153):

> "The words 'use producing injury establishes an intent when carrying (the weapon)' unqualified, are not in the view of this Court a statement of the law applicable to all circumstances. Moreover, the words in *Woodward v Koessler* 'All that one has to do for the purpose of ascertaining what the intention is is to look and see what use was in fact made of it' are too widely expressed to be applicable in every case. In relation to those articles which are not made or adapted for

(a) See *Smith & Hogan on Criminal Law* (3rd ed, 1973) pp 318-319; *Harris on Criminal Law* (22nd ed, 1973) pp 292-295; also note the commentary in (1963) Crim LR 512.

(b) (1963) 113 LJ 643 (CCA), also noted (1963) crim LR 512; reference was also made to *Woodward v Koessler* by Winn J in *R v Edmonds* [1963] 2 QB 142 (CCA). The broad interpretation of s 1 of the English Act was carried to its ultimate extent in *Harrison v Thornton* (1966) 110 SJ 444 (Div Ct); but cf *R v Petrie* (1961) 45 Cr App R 72, where the narrow interpretation was preferred.

(c) [1971] SASR 83. Note: particularly the dissenting opinion of Bray CJ at 73-81.

use as offensive weapons in regard to which the onus remains on the Crown to establish the intention in the accused to use the article to injure, the jury must decide the issue of intent by reference to all the evidence, drawing such inferences from the evidence as appear proper in all the circumstances."

Further on, the same Judge said:

"The terms of s 1 (1) of the Prevention of Crime Act 1953 are apt to cover the case of a person who goes out with an offensive weapon without lawful authority or reasonable excuse and also the person who deliberately selects an article, such as the stone in *Harrison v Thornton* [1966] Crim LR 388, with the intention of using it as a weapon without such authority or excuse. But if an article (already possessed lawfully and for good reason) is used offensively to cause injury, such use does not necessarily prove the intent which the Crown must establish in respect of articles which are not offensive weapons per se. Each case must depend on its own facts."

Before concluding this discussion, reference must be made to the decision of Mahon J in *Smith v Police* [1974] 2 NZLR 32 for, in that case, the learned Judge anticipated the statement of law subsequently advanced by the Court of Criminal Appeal in *R v Dayle*.

Smith had been convicted on charges of disorderly behaviour, assaulting a policeman in the execution of his duty and carrying an offensive weapon under s 53A of the Police Offences Act 1927. He and his companions had been sitting down in a pie-cart about to have a meal when a suffle broke out primarily involving other persons in the pie-cart. The appellant stood up holding the table knife with which he had been about to commence eating, and moved towards the proprietor of the pie-cart brandishing his knife. He was restrained by other persons from reaching the proprietor.

Having reviewed the conflicting English authorities, the lengthy South Australian decision of *Considine v Kirkpatrick* [1971] SASR 83 and also two earlier unreported New Zealand decisions*(d)*, Mahon J concluded that the appellant, in brandishing the knife in the way described, was not guilty of carrying an offensive weapon within the meaning of s 53A of the Police Offences Act. In a statement, in similar terms to that of the Court of Criminal Appeal in *R v Dayle*, he said:

"It is ... my opinion that where the alleged 'offensive weapon' falls within the third of the categories designed by s 53A, it is not sufficient for the prosecution to rely solely upon the use or attempted use of the article as proving intent to injure if the evidence shows that there was prior possession of the article without that statutory intent. In such a case the prosecution must prove beyond reasonable doubt that before the assault or other incident relied upon the defendant had the weapon or article with him in a public place with intent to use it to cause bodily injury to some person, although the actual use of the article may no doubt be a fact to be considered, along with other facts or admissions, in determining whether the article was originally carried with the necessary intent. Innocent possession cannot in my view be transformed into guilty possession solely because of the subsequent use of the article in question. Such, in my opinion, is the proper interpretation of s 53A of the Police Offences Act in relation to the third category of offensive weapons, therein mentioned. The section is aimed not at the use of the offensive weapon, a matter covered elsewhere by the criminal law, but at their carriage in a public place." ([1974] 2 NZLR 32, 43.)

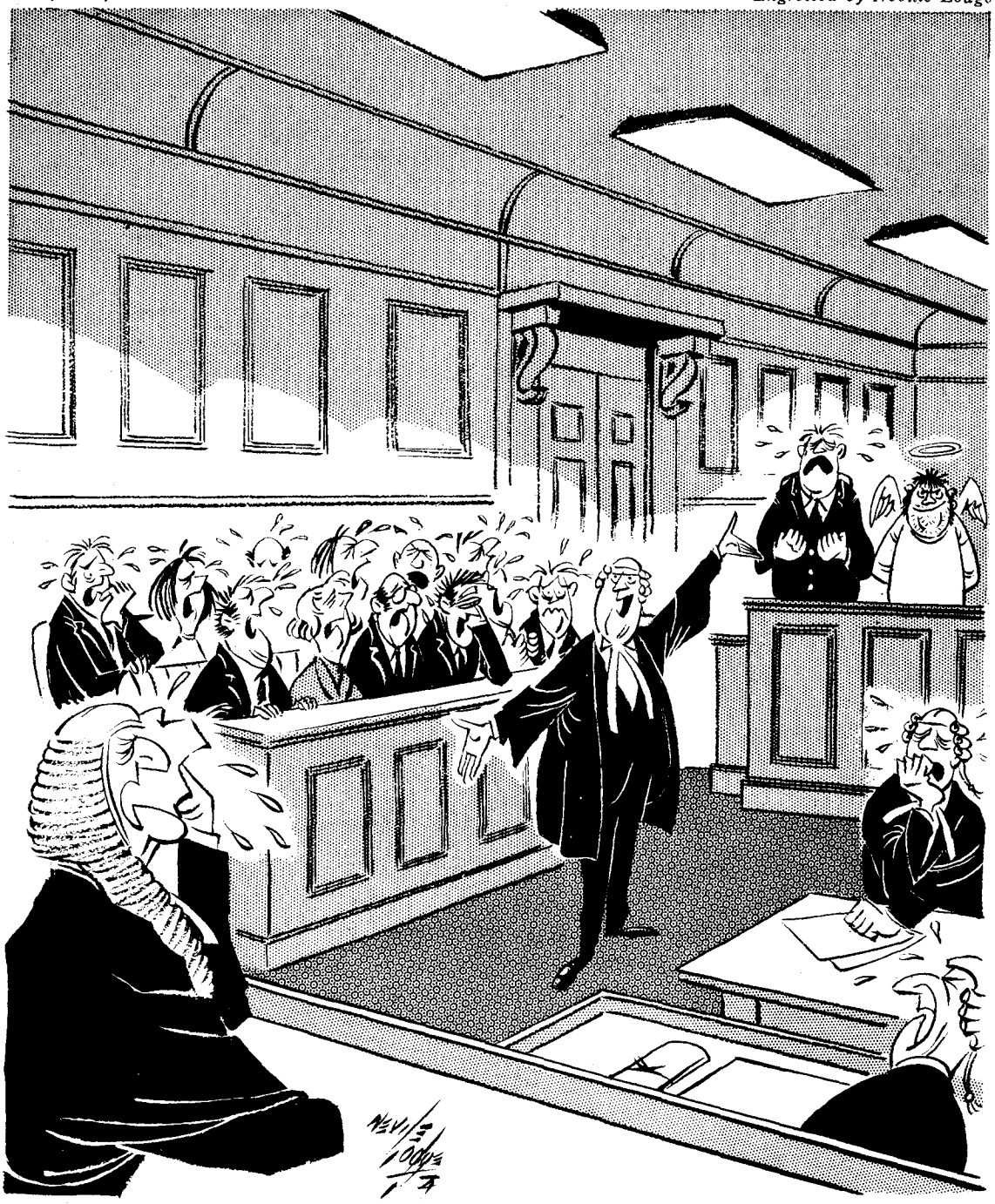
Hence, to summarise, where the article is per se offensive, or has been made or designed to cause bodily injury, the onus is on the defendant to show that he had lawful authority or reasonable excuse to carry the weapon. Where, however, the article is not in either of the foregoing categories, the onus is on the Crown to prove the necessary intent, and mere use of the article in an offensive manner is not sufficient evidence to discharge this burden. Therefore, where the prosecution has no other evidence of intent apart from the ultimate offensive use of an article, it should not rely on bringing a charge under the section in question but should concentrate on proceeding under other more appropriate provisions of our criminal law.

(d) Hesson v Strong (1970) (M 91/70—Christchurch Registry) per Macarthur J, and his own in *Dinsdale v Police* (1972) (M 228/72—Auckland Registry).

Burglar Bill—In the field of burglary today, Bill Sykes, with his striped sweater and bag marked "swag", has been replaced by "a pleasant faced schoolboy probably aged between 10 and 13", who operates not at "dead of night", but more usually between two and six in the afternoon. *Police adviser on crime prevention.*

"A FUNNY THING HAPPENED ON THE WAY TO COURT THIS MORNING . . .": 15

Drafted by Scilicet *Engrossed by Neville Lodge*



Eloquence

CORRESPONDENCE

Incomprehensible Legislation

Sir,

Your article "Incomprehensible Legislation" appearing at [1974] NZLJ 479 being an extract from an address given by Mr Harold White of the Booksellers' Association of NZ, prompts me to forward a letter I sent to him.

Yours faithfully,
MARTYN FINLAY
Minister of Justice

"Dear Mr White,

"I can assure you that it is, and I am sure will continue to be, a fundamental principle and aim of the Parliamentary Counsel Office in the drafting of legislation that every Bill or regulation must be written in as simple a form as, consistent with accuracy, the complexity of the subject-matter will allow.

"It must be remembered that a Bill must not only do the job it is intended to do, but the draftsman must endeavour to anticipate every possible contingency and draft it in such a way that no one will be able, because of a defect in the drafting, to evade responsibility for any breach or obtain a benefit that he was not intended to have. As an eminent English lawyer once said—an Act must be written in such a form that not only must persons reading it in good faith be able to understand it but persons reading it in bad faith must not be able to misunderstand it.

"The question of expressing legislation in simple language has engaged the attention of experts for years, but the problem permits of no easy answer. But I question whether the position is as bad as many critics would have the public believe. The following extract is taken from an address on Public Administrators and Legislation by Elmer A Driedger, formerly Parliamentary Counsel in Canada, and a world authority on legislative drafting:

" 'Despite the popular notion to the contrary, a good draftsman does try to write a statute so that it can be understood by those to whom it is directed and those who have to administer it, and he does try to write it in plain, simple language. Admittedly, there are statutes that are complicated and difficult to comprehend, but the draftsman is not necessarily the culprit. Statutes are laws; they are intended to regulate human relationships. If those relationships are complicated, the laws to regulate them must be too. Atomic energy, the theory of relativity, modern astronomic theories, and scientific processes are complicated also. Could a scientist explain them so that every schoolboy will understand them? They can be explained in a popular way so that an intelligent reader can understand what they are about. But to those who have to apply them they have to be explained exactly and technically. So it is with law. A short simple explanation of any statute can easily be given so that any literate person can understand in a general way what it is all about, but that will not do for the law itself. The objective or policy of a Bill can be stated shortly and simply, and people wonder why it cannot be put into a statute that way. For example, the Income Tax Act imposes a tax on the incomes of individuals and corporations, but a law in those terms only would not bring a cent to the public treasury.'

"Dreidger goes on to illustrate his point by discussing the law of murder, as follows:

" 'The law of murder is a good illustration. Why cannot the law be stated as it is in the Ten Commandments—Thou shalt not kill? Could anything be plainer, could anything be simpler? Let us see.

" 'How safe would your life be if the Criminal Code said only that "Thou shalt not kill"? The Commandment is eminently satisfactory for a moral law, but it is not sufficiently precise for a criminal law. Here is what the Criminal Code does say. It defines homicide rather than killing. That narrows the law to killing a human being. Homicide is divided into two classes—culpable and non-culpable. Non-culpable homicide is not an offence. Culpable homicide is divided into three classes—murder, manslaughter and infanticide, and each of these terms is defined at length. Death caused by self-defence is justified in clearly defined circumstances.

" 'Four pages of statute are needed to convert the simple "Thou shalt not kill" into law. Would any person have it otherwise?'

"As an example of how an apparently simple statement can, when tested, be proved to be ambiguous, take the following reply which was given in the House of Commons by Mr Harold Macmillan to the question why legislation cannot be drafted in simple terms:

"'Let us take this sentence: "When John met his uncle in the street he took off his hat." That is a clear sentence, but it is capable of at least six different meanings.'

"I can assure you that I will continue to make every effort to see that our legislation is expressed in language as simple as its subject matter and complexity will allow, remembering the words of Sir Ernest Gowers that 'the English language is an imperfect instrument for attaining precision, and that drafting lies in the province of mathematics rather than of literature.'

Yours sincerely,
'MARTYN FINLAY'
Attorney-General"

THE STAMP COLLECTION

A brief and general guide to the non-philatelic solicitor suddenly confronted with the administration of an estate containing what might be a valuable stamp collection.

By R D SAMUEL, *a member of the Advisory and Valuations Committee of the NZ Philatelic Society. He is a Chartered Accountant and may be contacted at PO Box 394, Christchurch.*

If my experience is any guide, most solicitors faced with this problem will shut their eyes and hope that the collection will disappear. Sometimes it does.

Stamp collectors collect not only stamps. The study of "postal history" and the collection of covers and postal markings is an area which has a very large, and rapidly growing, following. Proper advice should be sought should you come into possession of any of the following:

- Collections or accumulations of mint or used postage stamps
- Postmarks
- Postal stationery (embossed envelopes, postcards, etc)
- Postcards and postcard albums (these were fashionable during the years 1903-1910)
- Accumulations of used envelopes (and they do not have to be very old either)
- Family correspondence
- Soldiers' (and sailors' and airmen's) mail
- Prisoner of war correspondence
- Fiscal stamps (including those used on legal documents)
- Philatelic books and magazines
- and anything else which looks like a stamp or a postal marking

Is it valuable?

A stamp collection may be a most valuable asset. Certainly a reliable valuation and informed opinion should be obtained before any decision is taken as to the sale or disposal of the collection.

Do not believe members of the family when they say the collection is (a) of great value, or (b) of little value. It is one of the facts of life that a stamp collector's family seldom has any real idea of the worth of his collection. The collector himself may have lost touch with current market prices and changes in collecting fashions, or he may have been a collector who took little note of the monetary aspects of the hobby. Again, a collector may well have given his family a deliberately false impression of the value of his collection, either a grossly inflated impression (as justification for having inadequate life insurance) or a deflated impression (to stifle criticism of his philatelic expenditure).

Stamp collecting fashions are changing continually and material which even a few years ago may have been consigned to the "junk box" may now be in keen demand. The "junk" could be worth more than the highly prized mounted collection, and often is.

Trustees should ensure that they have taken possession of the entire collection. In particular, boxes and envelopes of stamps and covers, catalogues, books, stamp magazines, and stock books should be treated with the same care as the (apparently) more interesting and attractive parts of the collection.

Storage

A stamp collection needs fresh air. Contrary to popular opinion, bank vaults and solicitors' strong rooms may be the *unsafest* places in which to house a stamp collection. True, the stamps may be safe from burglary but they could be seriously, and very rapidly, damaged by mois-

ture and humidity. In inspecting and valuing collections I am plagued with sheets of stamps stuck together, stamps stuck to album pages, rust, and even mildew. Other damage may be caused by sticky (literally) fingers, dust, ink, sunlight, spilt drinks, rats, mice, flies, and silverfish.

Do not deface anything

Postcards, envelopes, letters, etc, may be of interest to collectors. Do *not* tear the stamps or postal markings from the cards or envelopes, or obliterate or cut out names, addresses, or "personal" messages. Such action could render a valuable item worthless. Similarly, do not write on any stamp, or upon the selvedge of a block of sheet of stamps. Do not write anything upon any envelope, postcard, etc. Nothing is more frustrating than seeing a once attractive cover with "very rare" written across it in unremovable biro.

Although the condition of stamps and covers is important, I would emphasise that a poor looking item may still be of interest and that an opinion should still be obtained even where the item or accumulation is far from attractive. After all, the world's most valuable stamp is a very sickly specimen.

Disposal

The modern collector is inclined to have extremely limited or specialised interests, and, while one collector may express no interest at all in a certain item, another may consider it to be worth a small fortune. Dealers, too, may build up rather specialised businesses and, while there is a certain amount of philatelic material which is of interest to all dealers, other stamps may be sought only by the dealer who has a definite customer in mind or has a certain type of clientele.

The method of sale can have an important bearing upon the final realisation. While it is normal for a probate valuation to be made on the basis that the collection will be sold as one lot to one buyer, and for immediate cash, it may be more advisable to split the collection into small parcels (perhaps even to the extent of selling the stamps singly) and offer them to a variety of buyers. If the time available for the sale of the collection is a secondary consideration it may be worthwhile selling the stamps gradually over an extended period of, perhaps, two or thre years. At the same time, the temptation to "pick the eyes" from the collection must be avoided as this could result in the remaining material being difficult or impossible to sell.

A collection can be sold by private treaty, sale by tender, or by auction, to a dealer or dealers, or direct to collectors. The chosen method, or combination of methods, will depend upon a variety of factors and is a matter for expert judgment.

A Plaintiff's Prayer

Grant me to be a plaintiff, Lord,
And be it understood
I crave nought further of your grace
Than constant plaintiffhood.

In summertime let cricket balls
Upon my roof top lob;
May surgeon leave within my skin
An inoffensive swab.

Grant that on someone else's land
I fall and hurt my leg,
Or in a pub am served a beer
From slightly poisoned keg.

May some incautious enemy
My character indict;
May someone push me from a bank
Of not too great a height.

Grant me, O Lord, that in a bus
My head I chance to bump,
Or from a slowly moving train
Incontinently jump.

On Saturdays I follow sport
And, as I watch the game,
Let not too heavy objects strike
My profitable frame.

And every Sunday, in the church,
Thy praise be on my lip
(Perhaps upon the sacred floor
I may contrive to slip).

And from my growing hoard I'll make
Thee offering resplendent.
But save me, Lord, at any price
From being a defendant.

ALAN G CRAWFORD
(1973) 47 ALJ 409.