The New Zealand
LAW JOURNAL

20 MAY 1975 No 9

VIGILANCE OR VIGILANTES?

The proposal for a Human Rights Commission as outlined in the National Party Policy Statement No 3 can only be described as an example of thoroughly confused and muddled thinking.

The basic objective, that with governmental and administrative power continually expanding "it is essential that a continuous effort is made to protect the rights of the individual," is unarguable.

However the proposal as announced by Mr Muldoon after a meeting of his party's Dominion Policy Committee could conceivably merely add to the sum total of administrative power and erode yet further the rights that require protection.

Proposed is the expansion of the Ombudsman's office into a Human Rights Commission with the added powers to investigate complaints against "incfficiency, maladministration, inequity and discrimination in the fields of government departments and organisations, local organisations, industrial associations and unions, race, sex and religion".

The role of the Ombudsman is now quite clearly established: he is to investigate a specific complaint against a specific organisation (as defined in the Act) in a specific situation.

He operates within defined limits and does his best to ensure that broadly acceptable guidelines are followed:

This is very different from the second situation where the policy would draw him into fields without defined limits, without commonly accepted standards and without specific cases.

In summary, the Ombudsman at present operates (and very effectively) to see that the status quo functions properly in specific cases. The new fields sought to be appended to his office involve his propounding general changes to the status quo.

The fused concept could only work if there was a Bill of Rights, with the Ombudsman ensuring that the statutory rights were not infringed. He would then have defined limits and standards to impose.

However nowhere is there a proposal for any such Bill of Rights to fill the vacuum left by the policy statement.

If there is to be none, then the Ombudsman should be left with his role in local and national government, and any Human Rights Commission ought to be an entirely separate organisation to fulfil a very different role.

Over the years Sir Guy Powles has built the office of the Ombudsman into a respected national institution, and to have that office involved in propounding (say) whether a doctor has declined to prescribe contraceptives on the grounds of his own religion and is thus infringing the human rights of his patient, inevitably is to destroy much of that carefully won public confidence—and in an age when confidence in institutions is needed perhaps as never before.

Further, the policy statement even goes on to turn the Human Rights Commission, and so the Ombudsman, into a union-bashing device for it is to investigate inefficiency and maladministration in the management and conduct of industrial unions and associations.

This is a remarkably selective area for its proposed operations. Presumably the board of Ford Motors and of Comalco would resist intrusion into their management and conduct, and so too the unions. And with recent events in mind, it is as well to note that democratic rights (at least as defined by some members) can as easily be trampled on in the Khandallah sub-branch of the National Party as in Kawerau. Is then the Human Rights commission to have jurisdiction over political parties

and particularly over the way in which the National Party chooses its parliamentary candidates?

It is one thing to argue that the rights of the individual must "continue" to be as fully protected by the rule of law as possible. It is quite another to provide such rules. The "Commission" appears to be an attempt to by-pass the provision of rules.

The Ombudsman's office is operating well. As far as the public is concerned it would be a severe loss if these proposals are implemented.

There are numerous precedents in other countries for a general investigative commission to examine and report on areas in which general discrimination or breaches of what it considers are human rights are occurring.

Clearly the general aims of the framers of the proposal could be met by following these precedents once they have allowed the sawdust of Kawerau to settle and to not cloud their vision.

JEREMY POPE

COMMONWEALTH LAW MINISTERS' MEETING

The recent meeting of law ministers of the Commonwealth at Largos was attended by law ministers, Attorneys-General and other ministers and officials from twenty-six countries, including a delegation from New Zealand, led by Dr A M Finlay QC.

The meeting considered the report of the Commonwealth Secretary-General on the activities conducted by the Secretariat in the legal field since the last meeting of law ministers held in London in January 1973. Ministers warmly commended the manner in which the Commonwealth Secretariat had carried out the recommendations made by law ministers at the London meeting. They expressed particular satisfaction with the scheme for the training of legislative draftsmen in four regions of the Commonwealth, the significant progress made in improving the machinery for the exchange of information and material on subjects of interest to Commonwealth members, and the production of the first issues of the Commonwealth Law Bulletin. Ministers recommended that the activities of the Secretariat in these three areas should be continued and wherever possible intensified.

The meeting also discussed the report of the Review Committee on Commonwealth legal co-operation appointed by the Secretary-General at the request of ministers to examine existing forms of co-operation and to recommend improvements. The report traced the growth of Commonwealth co-operation in recent years. Ministers congratulated the authors, and agreed that it contained a number of valuable suggestions for strengthening and improving legal co-operation which should be followed up to the extent that resources permit. The meeting agreed that the assistance provided by the Commonwealth Legal Advisory Service of the British Institute of International and Comparative Law should continue, but in regard to the functions of the Service, discussions should be held between the Secretariat and the British Institute of International and Comparative Law to co-ordinate their respective activities in order to avoid duplication.

Intra-Commonwealth relations in the field of the reciprocal enforcement of judgments, arbitral awards and maintenance orders were discussed with the ministers acknowledging the value of the preliminary study of these subjects commissioned by the Secretariat, recommending that this work be continued and completed, and calling for a comprehensive report, including recommendations, for consideration by governments.

The meeting agreed that international co-operation should be intensified in the administration of justice. Reference was made to extradition, following up assets held abroad by bankrupts, service of process in other countries, and the increasingly sophisticated manipulation and movement of funds across national boundaries for cimminal purposes. The Secretariat was invited to consider the scope for wider intra-Commonwealth co-operation in these matters.

The meeting further considered the effects on international economic relations of legislation on patents, trade-marks and industrial designs. Commonwealth African countries which have been exploring the possibility of regional co-operation in this connection expressed concern over the inadequacy of existing laws and arrangements on industrial property in facilitating economic development. With a view to harmonisation and modernisation of legislation,

where appropriate, on a matter so vital to the special needs of developing countries, the Secretary-General was asked to prepare expert studies of the subject, arrange, if necessary, a meeting of appropriate officials in consultation with Commonwealth governments and report with recommendations to ministers at their next meeting.

Ministers exchanged ideas and experiences on a wide range of subjects of common concern, including the individual's right of privacy, effective and just bail procedures, and legal aid. They also exchanged views on interesting developments in penology and considered procedures for the quick and cheap settlement of small claims.

The meeting noted the very real problems faced by a number of Commonwealth countries, as revealed in the report before it, in the timely preparation and publication of law reports. The ministers noted the extensive arrangements which now exist for the exchange of working papers and reports among law reform agencies throughout the Commonwealth. They recommended that the Secretary-General, in consultation with the appropriate authorities in member countries, should explore further possibilities of co-operation in these areas.

The Canadian Minister of Justice suggested that the next meeting of Commonwealth Law Ministers might take place in Canada; the ministers welcomed this prospect for 1977.

A CONSTITUTIONAL CONUNDRUM

D B COLLINS, *an Honours student at Victoria University, considers the complications created by legislative oversight when the minimum voting age was reduced to 18 years.*

The Electoral Amendment Act 1974 must pose an enticing challenge to any latter-day Mr Simpson*(a)*, for it seems clear that the Electoral Amendment Act 1974 was not passed by the statutory requisite majority of 75 percent of all the members of the House of Representatives. Based on average attendance at this time of day it is unlikely that 65 members of the House of Representatives were present at the passing of the Bill, although no official record was kept.

The Electoral Amendment Bill was read for the second and third time (conjointly) sometime between 3.20 pm and 3.40 pm on Thursday, 19 September 1974. The Accountant for the House of Representatives has advised that 78 individual members entered on to the floor of the House during the course of Thursday, 19 September*(b)*. There is, however, no evidence to suggest that 75 percent of all the members were on the floor of the House at the conclusion of the third reading*(c)*. Nor is there any evidence to suggest that 75 percent of all the members were even within the precincts or within hearing of the bells when the Bill was passed.

Section 2 (2) of the Electoral Amendment Act 1974 was introduced to amend s 99 (e) of the principal Act. The purpose of the Bill was to extend the voting franchise to 18 year olds. There was not a great deal of debate in the House on this point because it was well known to be the policy of the Government*(d)*, and it had received the endorsement of the opposition. By s 189 (1) (e) of the Electoral Act 1956, s 99 (3) is a reserved provision, and accordingly cannot be repealed or amended unless:

(a) it is passed by a majority of 75 percent of all the members of the House of Representatives, or

(b) it has been passed by a national referendum.

The reason for introducing the amendment in mid-September was the necessity for the Sydenham by-election, following the death of the Right Hon N E Kirk. Introducing the Bill for its First Reading, the Minister of Justice acknowledged that it was regrettable that the amendment had to be introduced in a rather more hurried manner than he would have wanted and so he invited the House "to give

(a) Renowned for his ingenuity in *Simpson v Attorney-General* [1955] NZLR 271.

(b) A record of the total number present for each day is kept by the Accountant so that those members present can be paid their attendance allowance.

(c) Because the Bill was passed unanimously there is no division record. Furthermore there is no statement in *Hansard* by the Speaker on the number who actually passed the Bill.

(d) See "1972 Election Manifesto" (NZLP) "Constitutional"—the first paragraph of which reads: "A Labour Government will introduce legislation to lower the voting age to 18."

the Bill rather more expedition than normally attaches to legislation"*(e)*.

However the urgency of the occasion hardly explains the failure to keep an official record of the number who voted after the Third Reading. The Government Whips' diary merely confirms the Accountant's statistics that 49 members of the Government and approximately 29 of the Opposition entered on to the floor of the House during that sitting day.

Nor is this the first occasion on which an official record has not been kept of the number who voted to reduce the age of franchise. On 20 August 1969 the Electoral Amendment Bill 1969 was read for a third time*(f)*. This amendment was passed to enable 20-year olds to vote in the 1969 and subsequent general elections, but again there is no evidence to suggest that on that occasion the amendment was passed by the necessary number.

When amendments are made to the Australian Constitution it is incumbent upon the Speaker to declare that in accordance with the required provision*(g)* the requisite number of members have voted in favour of the Bill so that it can be determined with absolute certainty whether or not the Act has been validly passed*(h)*. Such a procedure should be adopted in this country.

If a modern-day version of Mr Simpson were to emerge and challenge the validity of the Electoral Amendment Act 1974 (thereby questioning the validity of the Sydenham by-election, and perhaps even the forthcoming general election) then two arguments present themselves.

(1) That, unlike the House of Commons, a member of the New Zealand House of Representatives must be on the floor of the House in order to vote. And there were insufficient to comply with s 189 (2).

(2) That it is sufficient for a member to be within the hearing of the bells, and that even then there were (perhaps) less than 75 percent of all the members of the House of Representatives within the hearing of the bells at the time the Bill was passed.

Neither, of course, would succeed.

Even if 75 percent of all the members of the House of Representatives did not pass the amendment, the amendment would still be valid. At the time the Governor-General gave his assent to the Bill on 21 September, Parliament impliedly repealed s 189 (2) of the Electoral Act 1956 simply by passing an amendment in a manner inconsistent with the provisions of a principal Act. Parliament cannot be said to be acting unconstitutionally by virtue of its passing legislation inconsistent with a specific Act*(i)*. This proposition, too, accords with the basic constitutional principle that one Parliament cannot derogate from the sovereignty of a later Parliament.

Even if the legal solution is a simple one, the fact that this situation should have ever arisen (let alone have arisen twice) is a poor reflection on our legislative procedures—at least with regard to constitutional matters, where more careful attention could be expected. Accordingly, it is urged that the Standing Orders of the House of Representatives be amended to make it incumbent upon the Speaker to declare as a matter of record whether or not an amendment to a reserved provision has been passed by the requisite majority.

(e) Hansard Report 4266—18 September 1974.

(f) Hansard Report 2107—20 August 1969.

(g) The Commonwealth of Australia Constitution Act 1900, s 128.

(h) Hence the Speaker addressed the Australian House of Representatives in the following manner: "As this is a Bill to amend the Constitution, the provisions of s 128 of the Constitution must be observed . . . Although there is no dissentient voice and a division has not been called for, it is desirable that the names of those members present agreeing to the third reading should be recorded." Australian Parliamentary Debates P.3641 22 November 1973.

(i) *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 KB 733; *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590.

OFFICERS OF THE WELLINGTON DISTRICT LAW SOCIETY

At the Society's Annual General Meeting, the following Officers were elected to the Council for 1975:

President: Mr M J O'Brien QC.

Vice-President: Mr P T Young.

Treasurer: Mr I L McKay.

Council: Messrs M F Dunphy, A A T Ellis, M Hardie Boys, B D Inglis, A G Keesing, P E Martyn, K T Matthews, C G Pottinger, I L M Richardson, F M Shanahan, G W Watson (Wairarapa).

Less masterful?—Lord Denning, commenting on the power in the Solicitors (Amendment) Bill to computerise the roll of solicitors: 'Now, instead of being the Master of the Rolls, I am to be the "Keeper of the Computer" ': *Hansard* (Lords), 30 April, as quoted in *The Solictors' Journal*.

FREEDOM FROM FREEDOM OF CONTRACT

Is there developing a doctrine of "abuse of bargaining power"? A L TERRY of the University of Canterbury suggests that there is.

Freedom of Contract and Standard Forms

> "If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the Courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with freedom of contract."

When Sir George Jessell MR delivered this statement 100 years ago in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465 he was merely giving judicial utterance to one of the fundamental and underlying assumptions of the law—that of freedom of contract. This doctrine, nurtured by the philosophies of Maine, Mill and Bentham and by the principle of laissez-faire, supported by the idea of consensus ad idem, and practised in the market place, fitted the practical and theoretical requirements of the nineteenth century law of contract.

Three recent English cases*(a)* however cast doubt on the firmly entrenched principles of freedom and sanctity of contract that, subject to the restraints of legality, parties are free to enter whatever contracts they desire on whatever terms they desire and are free from interference by the courts when the contract is made.

Once again, the instrument that brought into focus the injustice that can be wrought by a rigid adherence to these doctrines was the standard form contract. The perils of the standard form have been well documented elsewhere*(b)*. They are the inevitable by-product of a standardised society and do have distinct and undoubted virtues*(c)*. However, of the essence of the standard form contract is the absence of real bargaining power in one party. If drawn in an enlightened manner this is no disadvantage (in practice if not in theory) and standard forms incorporating the settled practices of a trade that have been thrashed out of years of commercial practice are the best examples*(d)*. But when the stronger party takes an unfair advantage of his bargaining power the standard form contract becomes a contract of adhesion. It is in this area that the "pathetic contrast"*(e)* between the traditional textbook approach (adhering to the doctrine of freedom of contract) and commercial reality (where to adhere to freedom of contract can be to perpetrate injustice) can be most clearly seen.

There have been indications in the past*(f)* that the Judges have agreed with Parry's observation that ". . . the time is fast approaching when the whole structure of contract law with its preconceived ideas and nineteenth century doctrines has become so rigid and static that it cannot be expected to bear on all fronts the stresses and strains of modern economic pressures"*(g)*. But, in the absence of a statutory tribunal to vet standard forms*(h)* and without statutory authority to strike down contrac-

---

(a) Lloyds Bank Ltd v Bundy [1974] 3 All ER 757; *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616; *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 All ER 237.

(b) See for example: Kessler, "Contracts of Adhesion—Some Thoughts about Freedom of Contract" (1943) 43 Columbia LR 629; Friedman, "Freedom of Contract" (1967) 2 Ottawa LR 1; Bright J, "Contracts of Adhesion and Exemption Clauses" (1967) 41 ALJ 261; Baker, "The Freedom to Contract without Liability" 1971 CLP 53; Sales, "Standard Form Contracts" (1953) 16 MLR 318; Wilson, "Freedom of Contract and Adhesion Contracts" (1965) ICLQ 172.

(c) The most obvious advantages are convenience, certainty, saving time and trouble in bargaining, facilitating planning, tailoring the law to specific fields and "reducing human wear and tear, cheapening administration, and serving the ultimate consumer (see Llewellyn (1939) 52 MLR 700 at 701).

(d) See Lord Diplock in *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 624. See also, for example, The Official Standard Hire Purchase Agreement of the New Zealand Retailers' Federation (Inc) which was drafted in consultation with the Consumer Council. (Consumer Magazine [No 86 at p 166] praises it for its brevity, clarity and fairness).

(e) The phrase is Professor Friedmann's in *Law in a Changing Society* (2nd ed) at 89.

(f) For example: Lord Reid in *Suisse Atlantique* [1966] 2 All ER 61 at 76; Lord Denning in *John Lee and Son (Grantham) Ltd v Railway Executive* [1949] 2 All ER 581 at 584 and see Fridman, op cit.

(g) The Sanctity of Contracts in English Law, 25.

(h) As in Israel. See (1966) 66 Columbia LR 1340.

tual clauses that are unconscionable(*i*), the common law courts have been hesitant to interfere with freedom of contract. Where the Courts have interfered they have not regarded themselves as having jurisdiction to face the problem of disparity of bargaining power squarely, and instead have attacked it haphazardly. The treatment of the exclusion clause is possibly the best example. The Courts have developed many devices for striking down exclusion clauses, but none of these attack the root cause—that one party was so contractually inferior that he had no option but to submit to the contract imposed on him(*j*).

The opinion of Lord Denning in *John Lee & Son (Grantham) Ltd v Railway Executive* [1949] 2 All ER 581, 584 that an unreasonably onerous term in a standard form contract would not be enforced by the Courts for "There is the vigilance of the common law which, while allowing freedom of contract watches to see that it is not abuse", has not been incorporated into the law as a doctrine of general applicability(*k*). It has been argued that it is too late for the Courts to assume such a jurisdiction, or that this is the function of Parliament, but the three English cases, like the *John Lee* case take a much more robust approach to the problems caused by abuse of bargaining power, and could, to the optimistic observer, be interpreted as laying the foundations for a doctrine of abuse of contract. These cases seem to be propounding that where inequality of bargaining power operates to the manifest unfairness of the weaker party, the common law, is not so bound to the theoretical basis of freedom of contract that it is powerless to give a remedy.

The retreat from freedom of contract

(i) *Lloyds Bank v Bundy*—The action in *Lloyds Bank Ltd v Bundy* [1974] 3 All ER 757 was set in Broadchalke, ". . . one of the most pleasing villages in England". The facts as narrated by Lord Denning were that "Old Herbert Bundy, the defendant, was a farmer there. His home was at Yew Tree Farm. It went back for 300 years. This family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank up to the very hilt. Not to borrow money for himself, but for the sake of his son. Now the bank have come down on him. They have foreclosed. They want him out of Yew Tree Farm and to sell it. They have brought this action against him for possession. Going out means ruin for him." Herbert Bundy appealed to the Court of Appeal against County Court decision ordering him to give up Yew Tree Farm to the bank.

Herbert Bundy had guaranteed his son's company's overdraft and executed charges over the farm to the bank to secure that sum on three separate occasions. In 1966 there was a guarantee and charge for £1500 and in May 1969 a further guarantee for £5000 and a further charge for £6000. The assistant bank manager left the papers with Bundy for consideration suggesting he seek legal advice. His lawyer advised him that £5000 was the utmost he could sink into his son's affairs as the farm was worth only £10,000 but Bundy nevertheless executed the further guarantee and charge. In November 1969 the son's business was in dire straits and a new assistant manager told Bundy that the bank would support his son's company only if he gave a guarantee of £11,000 and executed a further charge on the house to the total of £11,000. The forms had already been filled in, and the assistant manager witnessed them then and there. The forms were not left for Bundy's consideration and he had no independent advice.

Lord Denning examined five categories where the Courts will set aside a contract because "as a matter of common fairness it is not right that the strong should be allowed to push the weak to the wall" (at p 763). The exceptional and separate categories he examined were duress of goods, unconscionable transaction, undue influence, undue pressure, and salvage agreements. From these old, isolated and exceptional equitable categories Lord Denning found the common thread with which to unite them in inequality of bargaining power: "English Law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires or by his own ignorance or infirmity, coupled with undue [but not necessarily wrongful] influence or pressures brought to bear on him by or for the benefit of the others" (at p 765).

This principle is wider and of more general application than any of the categories from which it was gleaned(*l*). The factors noted by Lord Denning in allowing Bundy's appeal

---

(*i*) As in the Uniform Commercial Code, s 2-302.

(*j*) At least an exclusion clause gives the Court a peg on which to hang a possible remedy which harsh clauses or meagre consideration may not.

(*k*) See Baker, op cit at 73.

give some indication of the relevant considerations to be applied if this principle were to be incorporated into the body of the law. Inadequate consideration, a relationship of trust and confidence, a conflict of interest, an absence of independent advice, all weighed heavily with Lord Denning in his decision to allow the appeal. Exactly what considerations will take a contract made under conditions of unequal bargaining powers out of the vast range of commercial transactions entered into every day, and exactly what circumstances combine to amount to "inequality of bargaining power such as to merit the intervention of the court" (at p 763), cannot be anticipated with any degre of confidence. But as the Lord Denning's principle stands it is wide enough to enter the arena of the typical everyday consumer transaction where harsh and unreasonable terms are frequently imposed and vicious exclusion clauses are often included.

Sir Eric Sachs (with whom Cairns LJ agreed) expressed himself as being sympathetic with Lord Denning's views but preferred to base his finding for the appellant squarely within the third category mentioned as a separate case by Lord Denning—undue influence in a relationship of trust and confidence(m). In *Allcard v Skinner* (1887) 36 Ch D 145, 17, Cotton LJ described two classes of cases where the doctrine of undue influence applied. The first class is undue influence per se ("where the person acts as the mere puppet of the dominator"). The second does not rest on the performance of any wrongful act but simply "on the ground of public policy and to prevent the relations which existed between the parties and the influence arising therefrom being abused". As expressed by Sir Eric Sachs this class depends on the concept that "once the special relationship [of trust and confidence] has been shown to exist, no benefit can be retained from the transaction unless it has been positively established that the duty of fiduciary care has been entirely fulfilled" (at p 768). Of the essence is the absence of "an independent and informed judgment" and "full, free and informed thought"*(n)*. It was conceded by counsel for the bank that it was possible for a bank to be under this relationship of trust and confidence. Sir Eric Sachs found on a 'meticulous examination' that a relationship of trust and confidence did exist in this case, thus bringing it within the second class in *Allcard v Skinner,* and that on the special facts of the case that duty had been broken (at p 772).

(ii) *The restraint of trade cases*—The facts *of Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 and *Clifford Davis Management Ltd v WEA Records Ltd* [1975] I All ER 237 (decided a week later than *Macaulay*) were almost identical. Both concerned composers who had entered into standard form contracts with publishers giving them all the fruits of their songwriting talents during the period of the agreement. The appellant publisher in *Macaulay* had appealed to the House of Lords from the Court of Appeal's finding that the agreement was contrary to public policy and void, and the plaintiff publisher in *Clifford Davis* spught an interim injunction from the Court of Appeal restraining the defendants from infringing his copyright under the agreement. It was held in both cases*(o)* that the agreements were unenforceable. Briefly, the effect of the agreements was that the composers were bound to assign to the publishers for a period of five years (which could be extended by the publishers to ten years) the world copyright in all compositions. If the songs were published or recorded, royalties were payable, but under the agreements the publishers were not bound to exploit the works. The composers were not able to recover copyright of works not exploited.

In both *Macaulay* and *Clifford Davis* the category into which the agreements fitted is not clear. Lord Diplock in *Macaulay* assumed without discussion that it was a "contract in restraint of trade" but Lord Reid in *Macaulay* and Lord Denning in *Clifford Davis* appear to regard it as a contract "restrictive of trade". In any event whatever status was accorded the agreement it fell to be justified under the well established tests of reasonableness*(p)*.

(l) Lord Denning's principle appears to be a revival and an extension of his second category—"unconscionable transactions" which, he stated, "extended to all cases where an unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker" (at 764). However this principle had a more limited application and was based not on mere inequality of bargaining power but on substantial unfairness being obtained through the poverty, uneducated ignorance, infirmity, need or distress of the weaker party. (See the cases cited by Lord Denning (*Fry v Lane* (1888) 40 ChD 312, *Morrison v Coast Finance Ltd* (1965) 55 DLR (2d) 710, and *Knupp v Bell* (1968) 67 DLR (2d) 256) and see *Anson's Law of Contract* (23rd ed) at 254 and the cases cited therein.)

(m) This indeed was Lord Denning's alternative basis for the decision, and his abuse of contract principle can therefore be regarded as obiter dicta.

(n) At 768, citing Cotton LJ and Lord Evershed MR in *Zamet v Hyman* [1961] 3 All ER 933 at 938.

(o) Judgments in *Macaulay* were delivered by Lords Reid and Diplock and in *Clifford Davis* by Lord Denning MR.

Since the *Nordenfelt* case*(q)* it has been settled law that such restraints must be justified, and justification can be shown if the agreement is reasonable (a) in the interests of the contracting parties, and (b) in the interests of the public. The interests of the parties has been the important consideration in past cases*(r)* and the application of this test has depended on the answers to two questions: "What is it that the covenantee is entitled to protect, and to what extent is he entitled to protect it?"*(s)*

In the past then, once the covenantee has shown a legitimate interest worthy of protection, justification has been shown in the reasonableness of the restrictions. Reasonableness has been a question of time of restraint, area over which restraint operates, scope of the restraint—an objective investigation as to the extent of, and need for, the restraint*(t)*. *Macaulay* and *Clifford Davis* however have gone much further than this. Restraint of trade reasonableness is no longer simply a question of time, place, area, scope, but involves an inquiry into the fairness of the transaction—an assessment of the relative bargaining power of the parties. The onus in justifying a contract made with superior bargaining power is much more difficult to discharge.

Schroeder Music Publishing Co Ltd v Macaulay—The tenor of the judgments in both cases is unmistakably that the Court is concerned that the freedom that each party theoretically has to contract on their own is not abused by a party with superior bargaining power. Lord Diplock in *Macaulay* concluded that "In order to determine whether this case is one in which [the Court can relieve the promisor of his contractual promises] what your Lordships have in fact been doing has been to assess the relative bargaining power of the [parties] and to decide whether the publisher had used his superior bargaining power to extract from the song writer promises that were unfairly onerous to him" (at p 623).

Most of Lord Diplock's short judgment is devoted to a general discussion of standard form contracts. His Lordship distinguishes two forms of standard form contracts. The acceptable variety sets out the terms on which 'mercantile transactions of common occurrence are to be carried out and which have been settled over the years by negotiations by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade' (at p. 624). Of these standard form contracts Lord Diplock says that, "if fairness of reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable".

Unacceptable however, to Lord Diplock, is the other more notorious standard form contract of comparatively modern origin. "It is the result of the concentration of particular kinds of business in relatively few hands. The ticket cases in the 19th century provide what are probably the first example. The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: "If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it" (at p 624).

Lord Reid's judgment is more conservative, but abuse of bargaining power is nevertheless the crux of his decision. The agreement was

---

(p) The exact status of the agreement is not important as the result is the same. As Lord Pearce said in *Esso Petroleum Co Ltd v Harpers Garage (Stourport) Ltd* [1968] AC 269 at 328-9: "If during the contract one of the parties is too unilaterally fettered so that the contract loses its character of a contract for the regulation and promotion of trade and acquires the predominant character of a contract in restraint of trade . . . the rationale of *Young v Timmins* (1831) 1 Cr & J 331 comes into play and the question whether it is reasonable arises".

Lord Reid in *Macaulay* impliedly applies this when he says: "Normally the doctrine of restraint of trade has no application to such restrictions: they require no justification. But if contractual restrictions appear to be unnecessary or to be reasonably capable of enforcement in an oppressive manner, then they must be justified before they can be enforced" (at 622).

(q) Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd [1894] AC 535.

(r) Ultimately this rests on public policy. See Lord Pearce in the *Esso Petroleum* case, op cit, at 324: "There is not, as some cases seem to suggest, a separation between what is reasonable on grounds of public policy and what is reasonable between the parties. There is one broad question—is it in the interests of the community that this restraint should, as between the parties, be held to be reasonable and enforceable". (But see Lord Diplock in *Macaulay* at 623).

(s) See Anson op cit at 339.

(t) See for example: *M & S Drapers v Reynolds* [1957] 1 WLR 9; *Mason v Provident Clothing and Supply Co* [1913] AC 724.

not 'made freely by parties bargaining on equal terms' or 'moulded under the pressures of negotiation, competition and public opinion'*(u)* and consequently Lord Reid held he 'need not consider whether in any circumstances it would be possible to justify such a one-sided argument. It is sufficient to say that such evidence as there is, falls far short of justification'*(v)*. Obviously justification of a "one-sided agreement" is, therefore, much more difficult to show than justification where the parties are on equal terms.

Clifford Davis Management Ltd v WEA Records Ltd—In *Clifford Davis*, Lord Denning (with whom Browne LJ agreed) was satisfied there was a prima facie case for striking down the agreement. He regarded the House of Lords in *Macaulay* as affording support for his principle*(w)* formulated in Bundy: ". . . the parties [in *Macaulay*] had not met on equal terms. The one was so strong in bargaining power, and the other so weak that, as a matter of common fairness it was not right that the strong be allowed to push the weak to the wall" (at p 240). Manifestly unfair terms, grossly inadequate consideration, absence of independent advice, and a "gravely impaired bargaining position" were all factors that combined to render the agreement unenforceable. Another factor that influenced Lord Denning was what could be called "the mechanics" of the agreement. The form was cyclostyled, very long, full of legal terms and phrases and it was assumed by Lord Denning that the blanks had been filled in and the agreement signed without it being read through or explained to him. These circumstances amounted to what Lord Denning calls "undue influences or pressures, brought to bear on the composers by or for the benefit of the manager" (at p 241) and were factors in refusing to enforce the agreement. As in *Bundy*, Lord Denning suggests that independent advice may save the agreement. 'The composer had no lawyer and no legal advisors. It seems to me that if the publisher wished to exact such onerous terms or to drive so unconscionable a bargain, he ought to have seen that the composer had independent advice' (at p 241).

A doctrine of abuse of bargaining power

These three cases can be explained as three isolated examples of established principles. However inequality of bargaining power has become incorporated into the rationes decidendi of the restraint of trade cases and has correspondingly extended the established principles, and the strong dicta in each case as to the abuse of bargaining power could be ignored by only the most timorous souls. It is possible to regard these short judgments as three significant steps in the development of a doctrine of abuse of contract. The extent and application of such a principle is for later cases to determine. These three cases have provided the opportunity for the development of this principle and the factors discussed by Lords Denning, Diplock and Reid provide its foundations. Inequality of bargaining power associated with factors such as inadequate consideration, manifestly unfair terms, absence of independent advice, special relationship (of trust, confidence or dependence) and burdensome form of the agreement would appear to be the embryonic considerations.

The problems raised by burdensome agreements exacted through superior bargaining strength have no easy solutions*(x)*. Indeed questions of economic and social fairness, as Baker points out*(y)*, may not be proper questions of law or fact at all but rather of political opinion and pure morality. What is clear however is that traditional contractual principles are not appropriate to the particular problems of modern standard form contracting. Freedom of contract operates over two fronts which German, but not English, jurisprudence recognises: the freedom to enter into a transaction (the abschlussfreiheit), and the freedom to codetermine the terms (the gestaltungsfreiheit). With the latter absent in standard-form contracting there can be no real freedom of con-

---

(u) These terms were used by Lord Pearce and Lord Wilberforce in the *Esso Petroleum* case at 323 and 332 respectively in the context that agreements so made are not restraints of trade and do not require justification; but they did not state that the converse applied or enlarge on what results when agreements are not freely made.

Although indications are given in the *Esso Petroleum* case of a trend which has been developed in *Macaulay* and *Clifford Davis* the tenor of that case is that the Courts should not lightly interfere with contracts. (See Lord Morris at 306 "The policy of the law is to uphold freedom of contract . . .")

(v) At 622, 623. Compare this statement with what his Lordship said in the *Esso Petroleum* case where the inquiry was to ". . . ascertain what were the legitimate interests of the appellants which they were entitled to protect, and then to see whether these restraints were more than adequate for that purpose". Disparity of bargaining power was not a consideration there: the agreements were struck down as unreasonable restraints on the liberty of trade rather than being struck down as unreasonable abuse of contract (which appears to be the primary consideration after *Macaulay* and *Clifford Davis*).

(w) The word "principle" is Lord Denning's.

(x) See the articles cited in footnote *(b)*.

(y) 1971 CLP 53 at 78.

tract and public policy could have enabled the Courts to strike down such contracts. The opportunity has never been taken however, and it has periodically been regretted that the common law in the sphere of contract law has not "continued to display its customary ability to adapt itself to changing conditions"*(z)*.

However, there is increasing recognition that individuals subjected to standard form contracts are a special class. There has been a discernible trend away from freedom of contract*(a)*, and the vigour of the common law may have been underestimated. If, as Lord Denning urges, the separate and exceptional cases where public policy will presently strike down an unfair bargain are assimilated into a general principle with "inequality of bargaining power" or "abuse of contract" or "economic duress" as its basis, the courts would still be able to reiterate that they have "never interfered with contracts merely by reason of their being foolish or improvident"*(b)* but they would be able to give relief where the unbalanced bargain is a direct result of disparity of bargaining power.

The Courts are increasingly controlling contracts in a haphazard way and there are significant areas where, under the guise of interpretation, public policy, contractual intention and unconscionable contract, they interfere in contractual relations and substitute more reasonable provisions or strike down unreasonable ones. An independent doctrine, not associated with or dependent upon the usual vitiating factors (undue influence, mistake, misrepresentation, fraud, incapacity) but based on interference with contractual freedom is more a development or a rationalisation than a novelty. When the disparity of economic strength and resources associated with standard form contracts and the absence of "the ordinary interplay of forces"*(c)* allows "the strong to push the weak to the wall" public policy would be well served by such a new principle. It was said over 300 years ago that "when the nature of things changes the rules of law must change too"*(d)*. Perhaps this time has now come.

(z) Gower (1967) 30 MLR 259.
(a) See Fridman (1967) 2 Ottawa LR 629.
(b) *Stockloser v Johnson* [1954] 1 QB 476 at 495 per Romer LJ.
(c) The phrase is Lord Denning's (in *Bundy* at p 763).
(d) *Davies v Powell* (1737) Willes 46.

COFFEE BREAK

Should there be greater use of Justices in Magistrates' Courts? Or would this erode the envied professionalism of the Bench? JAMES MORTON *pondered a possible extension of the English procedure, in the* New Law Journal.

"I don't know why they're retiring," said Richard Howard. He stood leaning against the wall of the warrant officer's room warming his hands around a cup of coffee. "If ever there was an open and shut case this is it. They can't find them not guilty, even with your persuasiveness."

"Coffee", said Nicholson, the defending solicitor, "Same as we are. They're probably deciding the penalty at the same time."

"It wouldn't surprise me in the least", said Howard. "I was here a week ago when some poor devil was brought in charged with an offensive weapon. Absolute nutter. He went on and on apologising for not having shaved and how he had a collection of stones he'd picked up in the gutter and polished. The one the police found him with was his favourite apparently. He carried it around everywhere with him. He'd no convictions and was unrepresented. He rabbitted on and on until at last the chairman said 'Smith, you have said enough to clear yourself—we find you guilty.' "

Nicholson laughed, "Do you remember the man who was chairman here about five years ago?" Howard shook his head. "Well, he had a nasty trick of saying to defendants 'We think there's a doubt in this case—but you're not getting the benefit of it.' "

"I suppose with education for magistrates it doesn't happen now," said Howard.

"I reckon that's a bit of a pious hope," replied Nicholson. "A friend of mine's aunt has just become a magistrate down Surrey-Hampshire way. She arrived at the Court the first time, went into the Magistrates' room and found a couple of them sitting working out the penalties. She looked at her watch saw it was nine-thirty and had a terrible moment thinking it had stopped. 'Am I late?' she asks in a panic,

'Oh no,' says one of them, 'we find this saves time. Now then Brown's up for poaching, this'll be his third conviction in 12 months. He'll just have to go to prison don't you agree?' "

"I was talking to one the other day," said Howard, "and she maintained that the justices never knew if a man had convictions. As if once they've heard two cases they can't work out why an advocate doesn't put in his client's character."

Nicholson poured himself another coffee. "It more or less works you know. If you have a decent clerk then they can't do much harm."

"If," said Howard, "that's the word. You're as likely as not to get a typist in some Courts and try telling her about inadmissible evidence. She'll think it's a film with Richard Burton." He paused a moment. "Still if you think the system works there's no reason why you couldn't extend it to the medical profession."

"How are you going to do that?" asked Nicholson with some interest.

"Well," said Howard with a degree of improvisation," there are so many complaints about patients waiting a long time before they go into hospital and not enough doctors to attend them when they do, that my idea would be to get lay people to assist."

"Oh," said Nicholson with interest, "who?"

"It would only be in areas where there were not enough doctors, not in the main towns. Local celebrities would be recruited. You know the sort of person, someone who helped the party that won the last election, a footballer who'd never been sent off, the local darts champion, that sort of person. There'd be at least two at a time and if the operation was a 'family' one then there'd have to be one woman present and assisting."

"But they're not going to know anything about medicine," protested Nicholson.

"That's where the professional assistance comes in. There's going to have to be a qualified doctor or at least a fourth year medical student to assist. A man who doesn't like the G.P. sort of practice, or one who wanted to be a surgeon and didn't quite make it, perhaps someone who's semi-retired. He can tell them the difference between the aorta and the vulva, and which bone is which."

"Are you going to let them do any sort of operation?"

"Not at first. They'd have to do small things to start with—bonesetting, kneecap removals, operations for piles, that sort of thing. In bigger cases they'll be allowed to do a small exploratory operation to determine whether the patient requires major surgery."

"What do they do then?"

"Oh they sew them up and send them off to hospital in a city such as Birmingham or Manchester."

"Won't they get fed up with the smaller stuff?"

"In time there's no doubt they will. They'll want to be in on the big time that's certain. They'll be guiding Christian Barnard's hand in a few years."

"Won't there be a public outcry against your scheme?" asked Nicholson, putting down his coffee cup.

"Oh no," replied Howard, "firstly it won't be public knowledge for a time until the operation, so to speak, is a success, and the first few patients have recovered. From then on people will be able to apply to be special practitioners or S.P.s as they'll be known. It'll be a bit of a social status. If the worst comes to the worst we can tell the public it'll only be for a short time like an extra tax on petrol. As soon as something happens, which it never does, the tax'll be removed. People will get used to it, I expect, just as if you made the six hundred or so tallest men in Britain M.P.s some will be quite good at it."

"But you really are meddling in people's lives," said Nicholson.

"No-one who matters will care. They'll all say 'I've never been in a hospital in my life. It's something that happens to other people.' "

"Gentlemen," said the warrant officer, "they're returning now."

OFFICERS OF THE LAW SOCIETY OF THE DISTRICT OF HAWKE'S BAY

The following officers and council members were elected for 1975 by:

President: Mr A K Monagan.

Vice-President: Mr P M MacCallum.

Secretary: Mr G G McKay.

Council: Messrs B S Devine, G M Cowley, J D Donovan, R G Gallen, B Grossman, T G Twist, P von Dadelszen.

No enemies of society—"In our system of jurisprudence there is no offence known as being an enemy of society. . . . The correct principle of sentencing is to sentence for the offence which is charged and on the facts proved or admitted. Lord Justice Lawton in *R v King & Simpkins* (1973) 57 Cr App R 696.

THE LAWYER AND THE COMMUNITY
Part ix—Do we need a law centre or neighbourhood law office in New Zealand?

Whilst the advice and referral service offered through Citizens' Advice Bureaux in New Zealand goes some of the way towards bridging the gulf between the lawyer and the community, it has real disadvantages.

- It can only provide a limited range of legal services.
- Having to rely on the voluntary help of busy lawyers makes administration difficult.
- That clients have to be referred to another lawyer is unsatisfactory.
- Lawyers have only a limited opportunity to build a close association with and win the confidence of the local community.
- The lawyers lack the time to devote to such important ancillary activities as public education, publicizing the service, forming pressure groups to press for law reform.

Michael Zander in "Lawyers and the Public Interest" points out the considerable advantages of a Neighbourhood law office.

"The chief advantage of the neighbourhood law firm is that by going positively into the community and by holding itself out to be the champion of the poor it seems to offer a hope of breaking down the apathy and ignorance which may be largely responsible for the fact that most ordinary people fail to use lawyers. Whereas solicitors tend too often to congregate in affluent areas, these firms can be put where they are needed. By handling cases from start to finish, they can avoid the danger that clients will get lost in the process of being referred. The prestige of the service can attract a higher calibre lawyer than is normally found in the slums. Indeed, the work of the NLOs is likely to improve the image of the whole legal profession and thereby also attract more young people to become lawyers."

Other benefits to be gained from setting up a neighbourhood law office are:

(a) Procedures and documentation can be standardized giving advantages in time and efficiency and consequently lower cost per matter.

(b) Para-legal personnel and trained volunteers can undertake a good deal of the routine work. Social workers can be employed to assist with interviewing, completing legal aid forms, marriage counselling, advising as to the Social Security benefits—the lawyers can concentrate on specifically legal matters and the Court appearances.

(c) A neighbourhood law office will quickly build up a fund of experience in dealing with the rights of the disadvantaged. In England, knowledge gained through neighbourhood legal firms is being made available to private law firms through the LAG bulletin.

(d) A neighbourhood law office can embark upon an active public education programme—going out into the community, sheets, running articles in local papers, speaking to groups, devising information

(e) A neighbourhood law office can work in close liaison with social agencies such as Department of Social Welfare, Marriage Guidance Councils, Citizens' Advice Bureaux, Society for Protection of Home and Family, Solo Parents' Association, Married Women's Association. At the moment there is a great deal of duplication of effort and lack of co-ordination. A woman seeking maintenance often has to give identical personal details to a voluntary organization or Citizens' Advice Bureau, a lawyer and one or more officials of the Department of Social Welfare.

(f) A neighbourhood law office not having to make a profit, can concentrate on giving the best possible community service.

Advice?—Sir,—We have recently been consulted by a woman seeking advice regarding her matrimonial problems. She works for one of the largest joint stock banks. We were asked to telephone her at her place of work, which we did and when we asked for her particular extension a voice at the other end said, "Reconciliations". We were wondering whether the banks are diversifying to this extent.—Yours faithfully, OSMOND GAUNT & ROSE, 349 Regents Park Road, London, N3 1DH.

[A letter to the *Guardian Gazette*.]

LOOKING AT MATRIMONIAL PROPERTY

A background paper prepared by the Public Issues Committee of the Auckland District Law Society. *It comprises Messrs K G MacCormick (convener), D F Dugdale, J A Farmer, T N McFadges, A P Randerson, J H Wallace QC, A W Young and Dr D Vaver.*

When a marriage breaks up the wife may (Depending on such factors as her conduct, her needs and her husband's ability to pay) be entitled to maintenance. In some circumstances she may in addition be entitled to a capital sum. (Sometimes a husband may be entitled to bring a capital claim against his wife, but typically it is the wife who is the claimant.) Our law in relation to such capital claims is at present in important respect uncertain, and some would say unjust. The question of just what our law of matrimonial property should be is too important to be left to the lawyers. It is important that the issues involved should be understood by the public at large.

It can be argued that the law should make no provision for capital claims by a wife on marriage break-up. If you make it too tough for husbands, so one argument runs, men will steer clear of matrimony, particularly at a time when little or no social stigma attaches to cohabitation without matrimony. Then too it can be contended that provision for capital claims by wives runs counter to the essential stance of the women's liberationists, namely that women would do better to stand on their own feet than be economic appendages of their husbands. Some cynics point out that under the present provisions of the Domestic Proceedings Act a determined wife can easily create sufficient disharmony in the home to get a separation order (which entitles her two years later to a divorce) and that it does nothing for the institution of marriage if wives are tempted so to misbehave by the prospect of a capital endowment at the expense of their unfortunate husbands. Probably however majority opinion accepts the justice of wives' capital claims, particularly in cases where the wife has made a direct contribution to the asset in which on break-up of the marriage she seeks a share.

But to say that on a marriage ending a wife should be entitled to make a capital claim leaves unanswered the more difficult question of just how such claim should be calculated. There are two basic ways in which legislatures in different parts of the world have gone about assessing a wife's share. One is to examine each individual case and try to work out what is fair in the particular circumstances. The other is to say that in every case a wife simply because she is a wife is entitled to some fixed percentage either of the husband's assets, or of the combined assets of the husband and the wife, or of the increment, the amount by which the combined assets of the husband and the wife have increased since the marriage.

The fixed percentage approach is undoubtedly more certain than the alternative method. But certainty can be bought at too dear a price, and there is an obvious injustice in treating in exactly the same way the wife who pitches in and actively helps her husband (by milking the cows for example or serving in the milk-bar dairy) and the idle woman who fritters her days playing bridge or overspending in expensive boutiques. Nor it is just to confer the same rights on a wife where the marriage breaks up after six months as where it breaks up after thirty years.

The system of judging each individual instance according to the wife's actual contribution avoids such anomalies. But how exactly is her contribution to be defined? It is easy enough where the wife has contributed cash to the asset or labour to the business. But should not a wife be regarded as equally making a contribution where by her thrifty and conscientious devotion to the duties of a housewife and mother she has enabled her husband to pursue his fortune unimpeded by domestic distractions? "The cock bird" (in the words of one English Judge) "can feather his nest precisely because he is not required to spend most of his time sitting on it". And there are other problems. How are windfalls (a legacy to the husband for example) to be treated? And (it may be argued) where a long subsisting marriage breaks up is it really possible to trace the contributions of the respective spouses?

It is broadly true to say that before the passing of the Matrimonial Property Act 1963 there was in New Zealand no provision for a wife to make a capital claim except in the relatively unusual situation where should could establish a direct financial contribution. Sometimes of course she could hold her husband to ransom, by threatening (under the then law) to prevent his obtaining a divorce, or (in the days when some disgrace was thought to attach to the

public disclosure of sexual irregularities) as the price of agreeing to a divorce on some ground other than adultery. Similarly the wife whose husband, often for tax reasons, had put assets in her name would be not without some bargaining strength. But most wives went without.

The 1963 statute changed all that. By it a previous provision designed to provide a quick and informal procedure for determining financial disputes between husband and wife was altered to provide that the Judge or Magistrate deciding such disputes might make "such order . . . as appears just" notwithstanding that the claimant had made no cash contribution to the asset in question. It has been suggested that this profound change in the law was "sneaked through" the legislature. Certainly there is nothing in the words of the Members of Parliament who took part in the debates on the Bill to indicate that they were aware that they were taking part in a social revolution. But in a very real sense they were, for since that act came into force on most marriage breakdowns the wife makes a capital claim.

The 1963 statute with some subsequent tinkerings by way of legislative amendment remains in force today, and can fairly be said to have settled down after some initial uncertainties as a useful instrument of justice. But some injustices remain. Different Judges have different ideas of what as a matter of social policy is fair, some markedly favouring wives and some husbands. This is no criticism of the Judges for the extremely general terms of the statute leave them no alternative but to apply their own values, but it is unfortunate when the outcome of a case depends on which Judge the parties happen to strike. There are difficulties because of differences in relation to the matrimonial home between the provisions of Matrimonial Property Act and those of the act governing divorce, the Matrimonial Proceedings Act. In a case decided in May 1971 the Court of Appeal dropped a bombshell when it ruled that the approach of some Judges of considering all the husband's assets then awarding the wife a share was wrong. The Court ruled that it was necessary to consider the wife's contribution if any to each particular asset. And there are difficulties resulting from the Act's roundabout (some would say devious) approach, the fact that although the Act confers substantive right on wives it does not really come out and say so, but merely pretends to be laying down rules to determine disputes.

Because of the existence of such problems there was established in 1969 a special committee to consider matrimonial property. The committee comprises the present Deputy Secretary for Justice and another departmental officer, and two nominees of the New Zealand Law Society. The committee's unanimous report was presented to the Minister of Justice in June 1972. "We are satisfied" said the committee "that there is need to enact as soon as possible a single, clear and comprehensive statute to regulate matrimonial property in New Zealand". The committee favoured the continuation of the approach of the existing law under which each individual case is looked at on its merits rather than any fixed percentage approach. The committee believed that the fairest system was the one which the Court of Appeal in its 1971 decision ruled not permissible under the present Act, namely that all the assets acquired by the parties since the marriage other than by inheritance or gift should be considered in a global way and a fair apportionment between husband and wife determined.

Now it can be fairly said that this report does not solve all the problems. In particular the difficulties of uncertainty and unpredictability and of differences between Judge and Judge remain. Indeed these difficulties are probably made even greater by the global approach advocated, simply because it is impossible for such an approach to be at all precise. Clearly however something must be done about the matrimonial property legislation, and if there were to be a statute along the lines of the committee's recommendations no doubt fairly settled rules would eventually emerge just as they have under the Family Protection Act.

But despite the clear note of urgency in the committee's report nothing further has been officially heard of a new matrimonial property statute. Nor has any explanation been offered for the delay. Not only this, but a curious amendment to the Joint Family Homes Act enacted last year appears to throw over the approach of examining each individual case in favour of a fixed percentage approach. The effect of that statute is that if a property settled as a joint family home is sold or if the settlement is cancelled the proceeds belong to husband and wife equally, even though the husband (or the wife) originally provided all the money. So that if a husband on his marriage buys a house for $50,000 and (perhaps because of the potential death duty saving involved) settles it as a joint family home only to have his bride elope twelve months later with the milkman she is entitled come what may to half the value of the house when it is sold or ceases to be a joint family home. To most if not all lawyers the reason for this

arbitrary change in the law is unfathomable, though a reference to *Hansard* suggests that both the Minister of Justice and the opposition spokesman had been mislead as to the Bill's effect.

Lawyers then are concerned at the lack of action on the report of the special committee. They are concerned at the bizarre and potentially unjust provisions of the 1974 amendment to the Joint Family Homes Act.

The most important point of all however is this. The law as to matrimonial property has far reaching effects, not only on the financial position of the parties to a broken marriage but also in the long run on the status of women, the future of the institution of marriage and thus on the whole fabric of society. The question of what the law of matrimonial property should be is therefore the concern not just of lawyers but of every citizen.

[NOTE: This statement was prepared before the judgment decision of Roper J in *Sullivan v Sullivan* came to the knowledge of the Committee. Butterworth's CURRENT LAW at para 603 (1 April 1975) notes the case as deciding that general matrimonial property provisions over-ride the amendment to the Joint Family Homes Act.]

The Minister replied: I am grateful to the Public Issues Committee of the Auckland district Law Society for the interest it has displayed in matrimonial property law and for the background paper they have issued. I am a little surprised that they did not discuss this with me or my Department as had they done so some errors of fact could have been eliminated from the report. In the first place it is not correct to say that "nothing further has been officially heard of a new matrimonial property statute" in terms of a recommendation made by a special committee in 1972. On the contrary, I have on several occasions accepted the need for this and in the very Hansard passage they quote in their report they should have noted that I said this—"A Matrimonial Property Bill is in an advanced stage of preparation but not quite mature enough for introduction to the House". I do not conceal my disappointment at the time this has taken to prepare but it has proved rather complex and I hope to have it ready for early presentation during this session.

Contrary to what is said in the Public Issues Committee's report, s 7 of the Joint Family Homes Amendment Act No 3 (1974) does not conflict with the recommendations of the earlier special committee. That Committee did favour the "global approach" which was struck down by the Court of Appeal in a case which would have gone to the Privy Council but for the death of one of the parties, but it also added that "special attention should still be paid to the matrimonial home". The section requires the proceeds of a sale of a joint family home to be divided equally between the spouses regardless of their individual contributions and the same principle applies on a cancellation of registration of the home. It remains open for the parties themselves to exclude its operation and in any case it does not over-rule the power of the Court to displace the presumption of equality where it concludes that this would be unjust. The 1974 section was an interim measure only, and designed to operate only when the parties failed to indicate some contrary arrangement.

CONFERENCE LOST AND FOUND

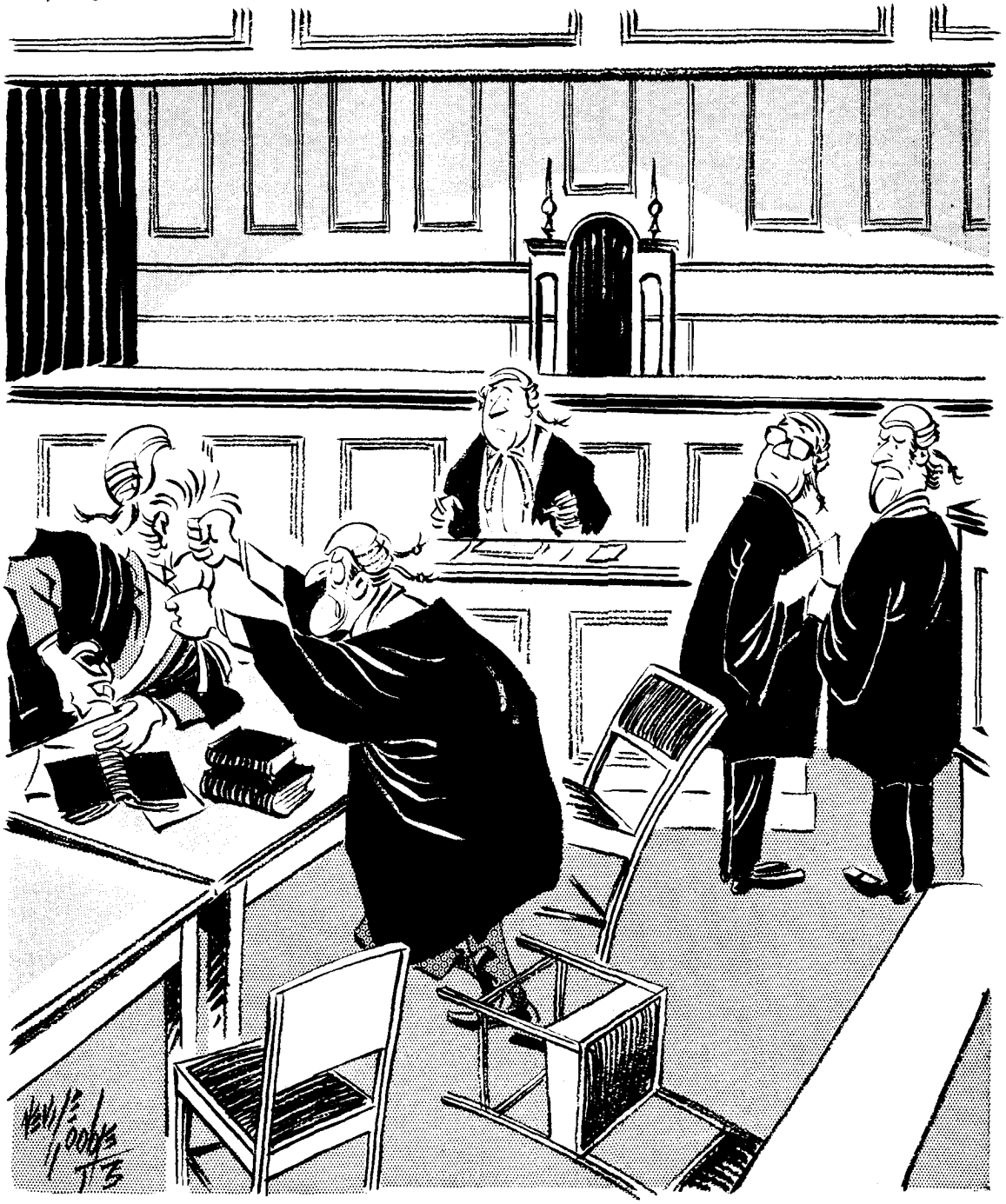
The 1975 New Zealand Law Society Conference Secretaries ask claimants and finders of the following items to contact them urgently (tel Wellington 43-940 or 554-138): *Lost:* gold bracelet set with diamonds and sapphires; one black-and-white cufflink; one pair black horn-rimmed white-trimmed men's spectacles. *Found:* One lady's gold watch with black strap (at opening reception); one diamante earing (at ball); one black "Heritage" cloth man's raincoat (after concert).

A need for change?—"The principal defect of the industrial way of life with its ethos of expansion is that it is not sustainable. Its termination within the lifetime of someone born today is inevitable—unless it continues to be sustained for a while longer by an entrenched minority at the cost of imposing great suffering on the rest of mankind. We can be certain, however, that sooner or later it will end (only the precise time and circumstances are in doubt), and that it will do so in one of two ways: either against our will, in a succession of famines, epidemics, social crises and wars; or because we want it to—because we wish to create a society which will not impose hardship and cruelty upon our children—in a succession of thoughtful, humane and measured changes."

From the introduction to *A Blueprint for Survival* by Edward Goldsmith, Robert Allan, Michael Allaby, John Davull, and Sam Lawrence.

"A FUNNY THING HAPPENED ON THE WAY TO COURT THIS MORNING": 17

Drafted by Scilicet *Engrossed by Neville Lodge*



"Old Brumble was always a bad loser!"

RECENT ADMISSIONS

Barrister

McLinden, J V B	Wellington	21 Feb 1975

Barristers and solicitors

Agnew, V J F	Auckland	7 Feb 1975
Ah Keni, R	Dunedin	17 Dec 1974
Alexander, P H	Dunedin	17 Dec 1974
Anderson, S J	Dunedin	17 Dec 1974
Argus, A	Wellington	21 Feb 1975
Armstrong, R P	Blenheim	26 Feb 1975
Barlow, B G J	Auckland	7 Feb 1975
Barnett, J G B	Christchurch	7 Feb 1975
Barrett, J D	Auckland	20 Dec 1974
Beaven, A A	Auckland	7 Feb 1975
Bedo, E	Auckland	17 Feb 1975
Benzie, W G	Dunedin	17 Dec 1974
Billing, D P	Wellington	21 Feb 1975
Binsted, J C	Auckland	7 Feb 1975
Birdsey, N H	Auckland	7 Feb 1975
Black, M C	Auckland	7 Feb 1975
Bode, S L	Auckland	20 Dec 1974
Boreham, A D	Auckland	7 Feb 1975
Boshier, P F	Wellington	21 Feb 1975
Boyle, A M	Wellington	21 Feb 1975
Bright, T N	Wellington	21 Feb 1975
Brinsley, P S	Wellington	21 Feb 1975
Briscoe, J N	Rotorua	21 Feb 1975
Britten, B A	Wellington	21 Feb 1975
Brown, J	Wellington	21 Feb 1975
Brown, J M K	Auckland	7 Feb 1975
Budge, A M J	Auckland	7 Feb 1975
Burch, S R	Wellington	21 Feb 1975
Burgess, I R	Wanganui	28 Feb 1975
Burney, M J	Auckland	7 Feb 1975
Butler, P C	Auckland	7 Feb 1975
Callaghan, B P	Christchurch	7 Feb 1975
Carson, N W M	Wellington	21 Feb 1975
Chai, L C	Christchurch	7 Feb 1975
Chambers, R S	Auckland	7 Mar 1975
Checketts, R D	Dunedin	17 Dec 1974
Chin, H Y	Dunedin	17 Dec 1974
Chubb, S J	Christchurch	7 Feb 1975
Cleal, D P	Auckland	7 Feb 1975
Clearwater, J W	Dunedin	17 Dec 1974
Cochrane, D J	Wellington	21 Feb 1975
Cockcroft, G J	Wellington	21 Feb 1975
Collins, G R	Wellington	21 Feb 1975
Cook, P J	Auckland	7 Feb 1975
Cooper, M L G	Dunedin	17 Dec 1974
Cooper, R F	Wellington	21 Feb 1975
Corban, B P N	Auckland	7 Feb 1975
Costigan, P D	Christchurch	7 Feb 1975
Cottle, J H	Wellington	21 Feb 1975
Cranwell, M S	Auckland	7 Feb 1975
Cruickshank, J M	Auckland	7 Feb 1975
Cullen, K	Dunedin	17 Dec 1974
Cullen, P J	Wellington	21 Feb 1975
Dale, P J	Auckland	7 Feb 1975
Darlow, C R	Auckland	7 Feb 1975
Davison, P J	Auckland	7 Feb 1975
Dawson, B W	Auckland	7 Feb 1975
Day, M V	Auckland	7 Feb 1975
Day, W P P	Wellington	21 Feb 1975
Deeble, R P	Auckland	7 Feb 1975
Delany, J J	Wellington	21 Feb 1975
De Luca, P M	Auckland	7 Feb 1975
Dentice, P T	Wellington	21 Feb 1975
Devia, V L T	Auckland	20 Dec 1974
Dooley, P F	Christchurch	7 Feb 1975
Drennan, R F	Christchurch	7 Feb 1975
Earle, D A	Wellington	21 Feb 1975
Eccleton, W J	Auckland	7 Feb 1975
Eklund, G N	Auckland	7 Feb 1975
Ewen, K J	Auckland	7 Feb 1975
Ewen, M A	Auckland	7 Feb 1975
Ferguson, K C	Auckland	20 Dec 1974
Fitzgibbon, D C	Christchurch	7 Feb 1975
Flint, M	Auckland	7 Feb 1975
Francis, C W	Wellington	21 Feb 1975
Franks, S L	Wellington	21 Feb 1975
French, J A	Christchurch	7 Feb 1975
Gardiner, D R F	Wellington	21 Feb 1975
Gatward, A L	Auckland	20 Dec 1974
Gedye, C J	Auckland	7 Feb 1975
Gibson, B E	Auckland	7 Feb 1975
Glenn, R A	Wellington	21 Feb 1975
Graham, D J	Wellington	21 Feb 1975
Griffin, D J	Auckland	7 Feb 1975
Grigg, R J	Wellington	21 Feb 1975
Guise, A	Wellington	21 Feb 1975
Hales, K G	Christchurch	7 Feb 1975
Hamilton, H E S	Wellington	21 Feb 1975
Hancock, B R	Auckland	7 Feb 1975
Harborne, K W	Auckland	7 Feb 1975
Harding, J P	Wellington	21 Feb 1975
Harrison, D A	Auckland	7 Feb 1975
Hart, C P	Wellington	21 Feb 1975
Harvey, D G	Wanganui	28 Feb 1975
Hawken, W H	Auckland	7 Feb 1975
Hawkins, D G	Auckland	7 Feb 1975
Healy, S	Auckland	7 Feb 1975
Henare, D L	Auckland	20 Dec 1974
Henderson, A S	Auckland	7 Feb 1975
Henry, B P	Auckland	7 Feb 1975
Hetherington, W R	Auckland	7 Feb 1975
Hickling, J A	Wellington	21 Feb 1975
Hill, A F	Auckland	7 Mar 1975
Hill, A J	Blenheim	26 Feb 1975
Hill, D R	Auckland	7 Feb 1975
Hodgson, W L	Dunedin	17 Dec 1974
Hooper, P J	Auckland	7 Feb 1975
Horne, G D	Christchurch	7 Feb 1975
Howat, C J	Auckland	7 Mar 1975
Hughes, J D	Wellington	21 Feb 1975
Hunt, C E	Wellington	21 Feb 1975
Hunt, R A	Auckland	7 Feb 1975
Hutchinson, B H W	Auckland	7 Feb 1975
Jamieson, J P	Auckland	19 Dec 1974
Jewell, M P	Wellington	21 Feb 1975
Johnston, D A	Auckland	7 Feb 1975
Jones, M A	Hamilton	13 Feb 1975
Jordan, G C	Christchurch	7 Feb 1975
Kemps, P A T M	Auckland	7 Feb 1975
Kennedy, M A	Auckland	7 Feb 1975
Kiesanowski, A B	Christchurch	7 Feb 1975
Knowles, A A	Wellington	21 Feb 1975
Knowles, M J	Christchurch	7 Feb 1975

Knowsley, R G	Wellington	21 Feb 1975
Leather, G E	Christchurch	7 Feb 1975
Leith, P G	Christchurch	7 Feb 1975
Leloir, P E	Wellington	21 Feb 1975
Liddell, I D	Auckland	7 Feb 1975
List, R J C	Dunedin	17 Dec 1975
Lord, C N	Wellington	21 Feb 1975
Lynn, D M	Wellington	21 Feb 1975
McAskill, G S	Dunedin	17 Dec 1974
McCabe, P T	Wellington	21 Feb 1975
McCombe, H I M	Auckland	7 Feb 1975
McConnell, B R	Dunedin	17 Dec 1974
McDonald, D H	Wellington	21 Feb 1975
McFadden, N A	Christchurch	7 Feb 1975
McGlashen, J R	Christchurch	7 Feb 1975
McHardy, I A	Auckland	7 Feb 1975
McKenzie, G A	Wellington	21 Feb 1975
McLachlan, M D	Dunedin	17 Dec 1974
McLelland, G L	Dunedin	17 Dec 1974
McMahon, E J	Auckland	7 Feb 1975
Maguire, T B	Auckland	7 Feb 1975
Mallon, C A	Dunedin	17 Dec 1974
Mason, N D	Auckland	7 Feb 1975
Matawalu, S	Dunedin	17 Dec 1974
Mathews, P J	Dunedin	17 Dec 1974
Mathias, G J	Christchurch	7 Feb 1975
Matthews, C B	Wellington	21 Feb 1975
Merfield, P J	Auckland	7 Feb 1975
Milham, C J	Wanganui	28 Feb 1975
Millar, G S	Auckland	7 Feb 1975
Miller, A P	Auckand	7 Feb 1975
Miller, J M	Wellington	21 Feb 1975
Miller, L P L	Auckland	7 Feb 1975
Mitchell, I M	Christchurch	7 Feb 1975
Montague, T C	Wellington	21 Feb 1975
Murray, D N	Auckland	7 Feb 1975
Murray, J W	Wellington	21 Feb 1975
Nation, G H	Christchurch	7 Feb 1975
Needham, R A	Auckland	7 Feb 1975
Nicoll, C C A	Auckland	7 Feb 1975
Niu, L M	Auckland	7 Feb 1975
Northey, B M	Auckland	7 Feb 1975
O'Hagan, S J	Wellington	21 Feb 1975
Okkerse, M J S	Wellington	21 Feb 1975
O'Neale, M J	Wellington	21 Feb 1975
O'Regan, M B	Christchurch	7 Feb 1975
Pahl, D G	Dunedin	17 Dec 1974
Patail, A W	Christchurch	7 Feb 1975
Paterson, A D	Dunedin	17 Dec 1974
Patten, D J	Wellington	21 Feb 1975
Peters, W R	Auckland	7 Mar 1975
Philpott, B T	Wellington	21 Feb 1975
Powell, M G	Christchurch	7 Feb 1975
Prichard, V E	Auckland	7 Mar 1975
Pritchard, N M	Dunedin	17 Dec 1974
Purdie, I S	Auckland	7 Feb 1975
Rabuka, E V	Wellington	21 Feb 1975
Rae, R J	Wellington	21 Feb 1975
Reading, J S	Christchurch	7 Feb 1975
Rees-Thomas, K A	Wellington	21 Feb 1975
Reid, S C A	Auckland	7 Feb 1975
Rennie, G I	Wellington	21 Feb 1975
Retzlaff, H T	Auckland	20 Dec 1974
Rhodes, S G	Auckland	7 Feb 1975
Robinson, L M C	Christchurch	7 Feb 1975
Roche, M D	Auckland	7 Feb 1975
Rogers, A G V	Auckland	7 Feb 1975
Rogers, T M	Christchurch	7 Feb 1975
Rolfe, D R	Auckland	7 Feb 1975
Ronayne, J	Auckland	7 Feb 1975
Ryan, D P	Wellington	21 Feb 1975
Sampson, P J	Wellington	21 Feb 1975
Saunders, D	Christchurch	7 Feb 1975
Saunders, D J L	Christchurch	7 Feb 1975
Savage, A E	Wellington	21 Feb 1975
Shattock, M P	Auckland	7 Feb 1975
Sheehan, M C	Christchurch	7 Feb 1975
Shelton, D J	Wellington	21 Feb 1975
Sherriff, A G	Wellington	21 Feb 1975
Shirley, D M	Hamilton	13 Feb 1975
Simes, R S	Christchurch	7 Feb 1975
Simpson, H M	Auckland	7 Feb 1975
Skeates, G H	Auckland	7 Feb 1975
Skinner, P D	Auckland	7 Feb 1975
Smith, J R	Auckland	7 Feb 1975
Smith, R G	Auckland	7 Feb 1975
Smith, W A	Dunedin	17 Dec 1974
Sowman, I B	Auckland	7 Feb 1975
Stanton, C W	Auckland	7 Feb 1975
Stapleton, T G	Christchurch	7 Feb 1975
Steedman, F D	Christchurch	7 Feb 1975
Steele, H K C	Auckland	3 Mar 1975
Stone, D C	Wellington	21 Feb 1975
Stone, D K	Wellington	21 Feb 1975
Strahl, J R	Wellington	21 Feb 1975
Strong, M A	Dunedin	17 Dec 1974
Sturt, C E	Auckland	20 Dec 1974
Sullivan, B M	Wellington	21 Feb 1975
Sullivan, G J	Wellington	21 Feb 1975
Swan, J G	Wellington	21 Feb 1975
Swarbrick, R H	Hamilton	13 Feb 1975
Switzer, M J	Wellington	21 Feb 1975
Sygrove, C D	Wellington	21 Feb 1975
Takaram, A K	Auckland	20 Dec 1975
Tattersall, S S	Wellington	21 Feb 1975
Taylor, D J	Auckland	7 Feb 1975
Tegg, D C	Auckland	7 Feb 1975
Thornton, G R J	Hamilton	13 Feb 1975
Thwaite, D T	Auckland	7 Feb 1975
Tisdall, S C	Auckland	7 Feb 1975
Toomey, M F	Dunedin	17 Dec 1974
Trouson, D R	Wellington	21 Feb 1975
Twomey, T J	Christchurch	7 Feb 1975
Va'ai, A V S	Wellington	21 Feb 1975
Va'ai, R L	Auckland	7 Feb 1975
Vane, A F S	Auckland	7 Feb 1975
Varnham, S E A	Wellington	21 Feb 1975
Venturi, J C	Auckland	7 Feb 1975
Victor, P T K	Dunedin	17 Dec 1974
Vuletic, J P	Auckland	7 Feb 1975
Vuletic, P L	Auckland	7 Feb 1975
Wain, G B	Christchurch	7 Feb 1975
Walsh, N A	Christchurch	7 Feb 1975
Warren, P F T	Auckland	7 Feb 1975
Watson, D J	Christchurch	7 Feb 1975
Watson, J W	Hamilton	13 Feb 1975
Watson, L C	Christchurch	7 Feb 1975
Webb, G R	Wellington	21 Feb 1975
Weir, C J	Wellington	21 Feb 1975
Weir, P B	Auckland	7 Feb 1975
Wells, R R P	Auckland	7 Feb 1975
White, J F	Auckland	7 Feb 1975
Whitehouse, R H	Auckland	7 Feb 1975
Williams, A B	Christchurch	7 Feb 1975
Williams, R D	Christchurch	7 Feb 1975
Williamson, N H	Auckland	7 Feb 1975
Wilson, H F	Wellington	21 Feb 1975
Wilson, I N	Auckland	7 Feb 1975
Wilson, R J	Wellington	21 Feb 1975
Wiltshire, J R	Auckland	7 Feb 1975
Wong, D V K	Wellington	21 Feb 1975
Wood, C K	Auckland	7 Feb 1975
Wood, D A	Dunedin	17 Dec 1974

Woodbridge, D M	Wellington	21 Feb 1975	**Solicitors**		
Woodroffe, C J	Auckland	7 Feb 1975	Cropper, B M	Auckland	7 Mar 1975
Wordsworth, H J	Dunedin	17 Dec 1974	Deobhakta, A G	Auckland	30 Jan 1975
Yee, K M	Auckland	7 Feb 1975	Mohamed, Z K	Auckland	3 Feb 1975
Young, W G G A	Christchurch	7 Feb 1975	Patel, S R	Hamilton	13 Feb 1975

THEORY IN PRACTICE

STEPHEN GUEST, *a New Zealander studying in Britain, surveys the current state of analytical jurisprudence at Oxford.*

Why should the legal practitioner be interested in analytical jurisprudence? Why for that matter should anyone? I want to answer these questions by examining a recent trend in analytical jurisprudence here in the University of Oxford Faculty of Law. But before doing this I shall clarify the reasons I have for asking the above questions. There is a fairly widespread view, especially amongst those practising law, that the study of jurisprudence as a compulsory subject in the university law degree and thus as a requirement for admission of the profession is really no more, at best, than a time wasting luxury. Indeed, I do not think that I am being too daring to say that this dissatisfaction has spread to other subjects such as the study of international and constitutional law. But because it is the study of law in the most general terms, it is perhaps jurisprudence that is regarded as the esoteric legal subject par excellence. The feeling, if I gauge it correctly, is that it is a subject insufficiently related to reality to be of any practical use, the assumption being that all questions about law must be tied to practical reality. Add to this the common belief that "analytical" jurisprudence is the least profitable, driest field in jurisprudence, and one might begin to wonder what possible reason there could be for studying it (in fact one might wonder whether it really were a subject at all). Read, for example, the book review of the recent *Oxford Essays in Jurisprudence*(*a*) (a representative collection of writings by analytical jurists) by Lloyd of Hampstead.

> "The legal reader may come away from this series with a feeling of some disappointment that so much learning and dexterity has been employed in engendering a rather arid product. This feeling may be coupled with an uneasy presentiment that some at least of the leading exponents of jurisprudence in this country seem to have been moving perceptibly further into a realm of abstraction remote from the current preoccupations either of lawyers themselves or of the community as it is affected by or concerned with the problems of law in our society"(*b*).

This sort of disaffection has contributed to the contemporary movement, mostly outside Oxford (there is a recently formed unit for socio-legal studies), away from the "analysis" of legal concepts towards a study labelled "sociological jurisprudence" which has flourished widely in North America for some time. The underlying reason, as I see it, is this. Analytical jurisprudence is seen to tinker only with a collection of dry bones. Sociological jurisprudence, as it were, steps in to cover them with flesh. In this way, the law "filled in" with some "life" becomes the social and ethical reality which we would agree ought to be the proper object of study.

Why do I speak so rhetorically? It is because I think that the above account describes a common but incorrect belief. It hides a misconception over the insistence of analytical jurisprudence on conceptual analysis and underrates the importance of the relationship between theory and practice in law. The mistaken assumption is that the very object of conceptual inquiry, "the law," is essentially dead, being the interest only of a few morbid jurists. In what follows I wish to suggest that "the law" does not have to be viewed only as a set of dry bones, and that it is both proper and necessary for analytical jurisprudence to dissect the flesh as well. Some ground may, after all, be recoverable from the sociologists.

There is a lack of appreciation of the fact that some theory of law must figure in legal practice either by acting to influence its formation and development, or by describing it at some sufficiently explanatory level. If a theory is the defining characteristic of positivism, the existence of law is a question of fact, and this

(*a*) Second Series, ed A W B Simpson, OUP 1973.
(*b*) (1974) 90 LQR 130, 131.

of law does not, or cannot achieve this, then it is so much the worse for the *theory;* it must be discarded and replaced, or modified, whichever gives the necessary elucidation. In the same way, it does not do, as Professor P. B. A. Sim has remarked, to call a legal argument "academic" just because it somehow does not accord with courtroom realities, for the correct characterisation of such an argument is that it is *bad*(*c*).

What, then, is the connection between the theory and practice of law? The most important question in the relevant sense, facing the analytical jurist is "What is law?" and this is a question in which all those involved with the law are at least indirectly interested. Is it mere accident that a similar question is often asked by Judges and practising lawyers? In a practical situation, Judges and lawyers will want to know "the law" on whatever topic has arisen and, whether it is realised or not, their practical approach will be fashioned by some answer to the jurist's question. For example, for several hundred years, practical questions in physics were tackled against a background of Newtonian mechanics. But in time, certain problems proved insoluble in terms of that theory, and eventually it had to be modified (by Einstein) to accommodate an explanation of these problems.

But perhaps more importantly, legal education will also to an extent be influenced by the acceptance of certain theories of law. Part of the educating of lawyers is like teaching a person how to tie his shoelaces without giving him a chance to attempt the actual task itself. All lawyers are aware of the importance of practical experience in learning law, and that more than a mere knowledge of the rules is required. The reason for this is that learning to tie one's shoelaces, and learning how to argue legally, are both skills. If legal education is fashioned by a belief in a theory that does not provide an adequate explanation of these skills then, as before, the theory must be altered. To be both relevant and more specific, if a current tradition of legal thought and theory tells us that the salient feature of law is the existence of *rules,* and that a positivist model is our best view of a legal system, then the teaching of law will revolve about this. And does not such a theory already dominate our thinking?

It is my intention in this essay to centre upon a move away from rules as the important feature of law, and to examine a significant criticism of positivism as the correct legal theory. Space only requires me to concentrate on this particular aspect, for I shall limit my attention to Professor Ronald Dworkin's theory of law and relate it to the theory of law of Professor HLA Hart. It should not be taken from this that I ignore the valuable contributions of the Faculty's two other jurists, Dr J M Finnis and Dr J Raz. (I have listed some of their main writings below(*d*)). Nor is there any need for me to stress the general analytical approach that the members of the Oxford Faculty of Law have always taken to every legal subject.

Professor Dworkin was the successor to Hart to the Chair in Jurisprudence in Oxford in 1969(*e*). It will be remembered that Hart's book *The Concept of Law,* published in 1961, and by now familiar to most law students, is a refinement of positivism to the point where the major tenets of that theory have semed almost unassailable. In my opinion, Dworkin has advanced a damaging criticism of it, and has offered as an alternative, a theory which has certain important implications for legal practice and legal education. I shall set out the main points of Hart's theory and then show how Dworkin both criticises it and then develops his own theory.

The identification of law for Hart lies in the rule of recognition. A standard is a legal standard if it is valid according to the criteria contained in the rule of recognition(*f*). This rule is identified by the complex but concordant practice of the officials of a legal system. For example, one of the criteria contained in the rule of recognition is "What Crown in Parliament enacts is law." It does not make sense to ask for the validity of this rule, because this is the rule by which the validity of other rules is assessed. This presence is rather demonstrated by a description of current official practice. Since the existence of the rule of recognition is therefore a matter of fact, a fortiori the existence of all the other rules of the system is a matter of fact. Hence, and this

---

(*c*) *Legal Education in the Seventies,* Legal Research Foundation Pamphlet, 1971, 34.

(*d*) The best account of Finnis's views on the nature of law is in his essay "Revolutions and Continuity of Law" in *Oxford Essays in Jurisprudence* (op cit), 44. See especially his discussion on method in jurisprudence 70-76.

Raz's book, *The Concept of a Legal System,* OUP, 1970, contains very illuminating criticisms of Austin and Kelsen and introduces a new field for jurisprudential inquiry. See especially his examination of Hart's rule of recognition, 197-200.

(*e*) A graduate of Harvard Law School, Professor Dworkin practised in New York, and was a professor of law at Yale University, before coming to Oxford.

(*f*) Hart uses the terms "identity", "validity" and "existence" almost synonymously in this context. See *The Concept of Law,* 105, 107.

serves to distinguish statements about the existence of law from purely normative statements about what the law ought to be; the "is" and the "ought" remain separate. Pictured in this way, the role of the Judge and lawyer looks (as far as questions of law are concerned) philosophically straightforward. It is simply to gather facts. To find "the law" on any subject one finds certain relevant standards contained in statutes and the reports, checks them against the rule of recognition and presents them in the courtroom. Another way of saying it is that no substantive controversy can arise over what the law is for either a purported law is validated by the rule of recognition or it is not. (For the occurrence of a controversy would mean that the official practice was not concordant).

However, further questions always seem to be raised in any positivist analysis. How can one "argue away" the ethical element? We might expect to find this in the kind of acceptance there is of the rule of recognition(*g*). But unfortunately we are barred from asking *legal* questions about it, because of two areas of inquiry almost necessarily marked out by any positivist analysis(*h*). First there is that area of the law which consists of a collection of standards, all identifiable by a common identificatory mark (accordance with the rule of recognition). Since it is his function to identify the law, this area is the primary concern of the lawyer. Second, there is that area which involves questions about the status of the identificatory mark itself. This does not exist in a "void", but must somehow be fixed to some social or ethical "fact"; this phenomenon being a separate and non-legal object of study. (Somewhere this "fact" is contained in Kelsen's notion of "efficacy" and in Austin's idea of "habitual obedience").

The above is a much shortened account of Hart's answer to the problem of identifying the law. Before going on to examine Dworkin's criticism and subsequent theory it is important to note several consequences of this answer. One fault is that implicit in it is an unsatisfactory theory of adjudication. A central problem in jurisprudence (although not usually put in this way) is to explain how rights and duties become attached to series of words. Hart does provide an answer that appears to dispose of this problem. It is that legal rights and duties attach to those series of words which are issued in accordance with a rule of recognition. Since such things as sentences with "standard" meanings can be captured by some formal feature (say, issuance in accordance with provisions of the Wills Act), then the characterisation of some standard as law is possible. But what of those laws in which there is a range of meanings of a word or sentence? How can a rule of recognition account for the "open-textured" character of a legal rule? Of course we are all thanks to Hart, now aware of the "penumbra" of legal meaning. But he is led by his theory to assert that in the "penumbra" of law, a Judge has "law-creating power"(*i*), and it is important to understand the implications of this proposition.

It is now old hat that a Judge does not apply rules in the ((allegedly) Blackstonian fashion, and that judicial innovation occurs of some sort. Mechanical jurisprudence, as it has been called, is dead. However, the alternative is not in such a healthy state either. To admit openly that Judges legislate is to admit openly (and wrongly) that the principle of the separation of powers no longer exists within our legal system(*j*). Perhaps even worse, if Judges are seen to "create," instead of "find" the law in some cases, then it is to condone the idea that Judges should apply that law ex post facto to the unsuccessful party.

But underlying these more particular criticisms there is the following general one. This is that Hart concentrates his theory of law about those situations where the law is **clear** and uncontroversial (the "easy" cases) and in fact about those cases that hardly ever arise in court. His theory of law thus has little of practical import to Judges and lawyers, for most of the court cases involving questions of law are cases that arise in the penumbra of legal meaning. For example, what does Hart's theory instruct the counsel preparing a brief to support his client's claim that a pedal car is not a "vehicle" for the purposes of a statute prohibiting vehicles in the park? Under the theory, it would seem that the questions were essentially *extra-legal*. The exhortations of counsel would be aimed at the law-creating power of the Judge rather than at the establishment of his client's legal rights. If this is so, then it would mean that in these cases, anything, and therefore nothing, would count as a legal argument.

(*g*) See Hart's misgivings about this aspect of his rule of recognition in his book review of Fuller's *The Morality of Law*, in (1965) 78 Harvard LR 1281, at 1294.

(*h*) But see Finnis's article, op cit, especially 74-75.

(*i*) *The Concept of Law*, 141.

(*j*) Although the combined effect of ss 127, 128 and 129 of the Mining Act 1971 would appear to belie this.

I shall now turn to examine Dworkin's theory of law and legal rights. It is important here to approach the concept of law in an entirely open way, for it is remarkable to what extent the Anglo-American mind is set in a positivist mould. A useful approach is through Dworkin's own wide description of the concept of law: "the concept of the standards that provide for the rights and duties that a government has a duty to recognise and enforce, at least in principle, through the familiar institutions of Courts and police"(*k*). With this in mind, read his two important articles. These are "The Model of Rules"(*l*), reprinted under the title "Is Law a System of Rules?"(*m*), and "Social Rules and Legal Theory"(*n*), and they pay reading very carefully. (I have listed some of his other articles and indicated their importance in the footnotes(*o*)). It will be noticed that there are slight changes in emphasis, for I have supplemented my exegesis of these articles with notes I have taken from his lectures.

The first thing Dworkin does is simply to note the presence of legal *principles*. These are those standards such as the principle of freedom of contract, the principle of "salus populi suprema lex", or the principle that the courts will not permit themselves to be used as instruments of injustice. They are not rules and their origin lies not in particular decisions, but rather in "a sense of appropriateness developed in the profession and the public over time"(*p*). As Dworkin says, once they are pointed out to exist, we are suddenly aware of them all around us. Principles are different from rules for they carry a dimension of weight, and, because the weight a principle carries in any particular case will be a substantive matter, not one of form, principles cannot be identified by a rule of recognition(*q*). We cannot argue that principles cannot be "legal" principles for this reason alone, because this is to beg the question. "Since principles seem to play a role in arguments about legal obligation", says Dworkin, "a model that provides for the role has some initial advantage over one that excludes it, and the latter cannot properly be inveighed in its own support"(*r*).

It should be seen now the area of legal phenomena in which Dworkin is interested; for it is the area where the clear legal rules do not apply, and that which concerns the judge and the lawyer. The primary dissatisfaction is over Hart's analysis of judicial discretion, which allows legislative freedom to the Judge. Judges are not free, says Dworkin, to decide what they like, in the sense that any reason *at all* can count for their decision. They are only free to make any decision that they come to *stand*, which is a much weaker claim. The answer is that in those areas of litigation where no settled rules are applicable (the "hard" cases), a Judge is still *legally* bound by legal principles to come to certain decisions. Once this is agreed (for even Hart would now admit that his secondary rule of recognition imposes duties on Judges(*s*)), the interesting questions arise over what these duties are. What, for example, is the legal answer to the question whether a pedal car is a vehicle? The preliminary answer is that the correct decision cannot be *demonstrated*, but that arguments can be advanced on either side of the issue. Judges deciding either way might view their duties differently, but this amounts to no more than saying that duties are sometimes controversial, which is not such a startling claim for moral reasoning is replete with examples.

What does this analysis of judicial duty hold for the practising lawyer? The questions of practical importance are over the correct kinds of legal arguments that might be advanced to support purported legal rights. For in the hard cases, although the legal rights of the parties will be controversial, certain characteristic arguments will be relevant. The most powerful of these is that which establishes *consistency* with other reported decisions: this is explicit, for example, in the doctrine of judicial precedent. A strong argument supporting one's client's purported legal right is that to decide in his favour would be to decide consistently with other Judges in similar cases. But other arguments will be relevant also, especially those over the precise relationship between competing rights(*t*). To use Dworkin's phrases, the law in hard cases will often be "instinct-in" the decided cases, and

---

(*k*) "Social Rules and Legal Theory", (1972) 81 Yale LJ 855, 856.

(*l*) (1967) 35 UChLR 14.

(*m*) In *Essays in Legal Philosophy*, ed Summers, Blackwell, 1968, 25.

(*n*) Op cit.

(*o*) One article of some importance although unrelated to this essay, is "Lord Devlin and the Enforcement of Morals", (1966) 75 Yale LJ 986.

(*p*) "Is Law a System of Rules?", 54.

(*q*) Attempts to reduce principles to rules seem to me to be rather unhelpful, just because the distinction between them is a compelling one. See for example, Coval and Smith in "Some Structural Properties of Legal Decisions" [1973] Camb LJ 81.

(*r*) "Is Law a System of Rules?", 50.

(*s*) See Raz, *The Concept of a Legal System*, 199.

(*t*) See, for example, Dworkin's article, "Taking Rights Seriously" in *Oxford Essays in Jurisprudence*, op cit, 202.

one must "survey coolly" the settled rules. By this process a new principle or rule of law, applicable in the hard cases will be "extrapolated" (Dworkin's term) from the existing rules. The law reports abound with examples, a famous case such as *Donoghue v Stevenson* [1932] AC 562 being only one of many. Academic writings do also; a very good example is Warren and Brandeis's article "The Right to Privacy", where the authors "extrapolate" a legal right consistent with the relevant decided cases(*u*).

Does not the realisation that substantive issues are raised in the hard cases force us also to reconsider whether substantive issues are implicit in the easy cases? For example, no controversy exists over the proposition that judges must apply the law. A valid statute, with a "standard" meaning, is clearly law (outside revolutionary situations). What legal or political right is implicit here? It is the right, Dworkin says, that society has to the benefits of legislation. Since it is part of the Judge's duty to apply the statutes, then to step outside their clear meanings is to usurp the function of the Legislature and to underscore the part it plays in the political process(*v*).

If Dworkin's account is correct, then a more flexible and sophisticated basis is provided for courtroom reasoning, which extends past the relatively simple process of "unloading" cases (is this a frequent criticism of the inexperienced law graduate) or "arguing towards legislation" implicit in Hart's model of rules. If counsel are debating the differences in weight of respective principles, then there is a sound theoretical foundation for the adversary system in adjudicated disputes. Now it becomes the task of analytical jurisprudence to characterise and evaluate the relevant arguments and, by doing this, analytical jurisprudence will re-enter the arena of human affairs.

Let me note some other consequences of this theory. The first is that it *describes* in a more illuminating way than Hart what judges actually do. Judges in fact do not speak in "ought"-statements when they are determining a person's rights and duties. Take what is probably the most famous question ever asked in the law of tort, "Who, then, in law is my neighbour?"(*w*). Is it not rather cynical to suggest that Lord Atkin was "pretending" that there was an answer to this question, and that the question he was "really" asking was, "Who, then, in law *ought* to be my neighbour?"? But it cannot be correct to say that the law was already "decided" on this matter, because this case is held up as a paradigm of judicial innovation.

We can examine the assumption that Judges legislate from the normative aspect also. If Judges do in fact legislate, then ought they to do so? The first thing to note is that Judges are not the most suitable persons to create deliberate policy. Quite apart from their political isolation (always carefully maintained), they simply do not have access to the sort of information that is fed back to the executive through the political process. If the Judge were a legislator (say, an important extension to the Law Drafting Office), then his function would be different, and he would be expected to deal in matters with which he is not expected to deal with as a Judge. But, the second, and more important thing, is that judges have a unique role in our political institutions. This simply stems from the principle of the separation of powers. A Judge is concerned with *adjudication* and it is principles, rights, and, above all, *fairness*(*x*), not policies, which are peculiar to this role. The duties a Judge has are a function of the particular place the Judge occupies in the political structure(*y*).

It is often asserted that Judges do "make" or "declare" policy. But this is usually intended in a rather loose sense, meaning that Judges do not always "find" the law within the strict categories demarcated by legal rules. It is sometimes an invocation to bend (or even abandon) those rules. Read, for example, Lord Denning's judgment in the recent case of *Spartan Steel v Martin & Co* [1973] 1 QB 27. Was the defendant liable for the economic loss its employees had caused in negligently damaging an electricity cable? Lord Denning said that he would not attempt to follow the previous rules defining duty of care and remoteness of damage for these cases. "I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationships in hand, and see whether or not, *as a matter of policy*, economic loss should be recoverable" (at p 37; emphasis added). Such a statement on the

---

(*u*) (1890-1) 4 Harvard LR 193.

(*v*) *Fisher v Bell*, [1961] 1 QB 394 is a notable instance of this particular political right operating.

(*w*) *Donoghue v Stevenson*, op cit, 580.

(*x*) For, at least prima facie, to be fair is not always to act for the general good.

(*y*) See Dworkin's "Does Law Have a Function? A Comment on the Two-level Theory of Decision" in (1964-5) 74 Yale LJ 640. (Previously printed, in slightly different form, under the title "Wasserstrom: The Judicial Decision", in (1964) 75 Ethics 47). It is a critical review of Wassertstrom's book, *The Judicial Decision* (1961), the thesis of which is that utilitarianism is the proper theory with which to account for the correct judicial decision in hard cases.

face of it appears to be quite radical. But Lord Denning's words do not match his reasoning, for a large part of this has nothing to do with policy at all; it is rather about fairness. This is implicit in the reasons he gives for his decision. He argues, for example, that the defendant contractors were in the same position as electricity boards, who are excused liability in such circumstances. He also points out that everybody runs from these two grounds is surely that it would expectedly terminated. The inference to draw the risk of having their electricity supply uneconomic loss, because it would place them on an unequal status with other relevantly similar bodies(z).

An argument that is genuinely based on policy would (for example) be as follows. Imposing liability on the contractor would encourage business firms not to insure for possible economic loss caused through negligence. This would in turn cause a decline in the liquidity of the major insurance companies, which would mean a drop in the availability of loans for industrial development in the investment market. As a result the gross national product would suffer a slight drop. Therefore, on these purely utilitarian grounds, having little to do with fairness, the firm suffering the loss must be made to bear that loss. This line of reasoning would, of course, be a preposterous one for a judge to follow, and it should become clear from this example that the Judge's function is different: he is typically concerned with principles and rights, not policies and utilitarian goals.

The general outline of Dworkin's theory should now be seen. Legal rights are a species of political rights; namely, those political rights that are enforceable in a court of law. However, to say that legal rights are political rights does sound radical and it is important to understand just what this assertion embraces. It includes not only those political rights having to do with important issues raised at governmental levels, but also those covering the whole spectrum of rights. Should we view the question whether a pedal car is a vehicle in terms of a fringe case of a "real" law, or should we view it as a matter which centrally concerns legal debate over a range of issues? A man's rights will hang on such a question, just as much ts they will hang on the application of law in an easy case. But we can pick out examples all the way up the scale. One can imagine, for example, a case where the question is raised whether a foetus is a person. Look at the Watergate-related cases. All sorts of arguments arise here that seem both proper and "legal"; but from where do these arguments come? In what *rules* are they enshrined? It is because these cases are *hard* cases, and the reasoning is often a priori, that the arguments advance into the realms of political theory.

In an essay which has raised more questions than it has answered, I hope at least to have introduced especially to those practising law, a contemporary movement in analytical jurisprudence in the University of Oxford. A particular fault with the model of rules is that it does not sufficiently characterise the function or role of the Judge and lawyer. It behoves inexperienced counsel to state their client's purported rights in terms of black and white rules arranged roughly in hierarchical form. However, if this model is abandoned, a return to substantive reasoning becomes theoretically possible, as well as a move from the belief that the only alternative to positivism is natural law. Some of the ground staked out in advance by sociologists, if it is not to be given up to analytical jurisprudence, must at least be shared. Once it is appreciated that legal reasoning of this character is possible, only then is a theoretical basis provided for the complex and sophisticated legal reasoning that in fact does occur in the Courts.

(z) See the English *Listener*, 6 June 1974, 720, in which there is a discussion between Professor Dworkin, Lord Hailsham and John Vaizey, on whether the law should enforce equality.

Judges in jug—"The judiciary should have much greater knowledge of the effects of penal measures, and the scope of the recently introduced training in sentencing should be widened accordingly. The National College for the Judiciary of the United States, which trains newly elected Judges, has a programme on sentencing and corrections during which the Judges are jailed for 24 to 48 hours ... We strongly believe that this should be part of British Judges' training." So says the Howard League report, *Ill-Found Premises.*

Operation Clochemerle—The Secretary of State for the Environment revealed that in June 1972 his Department commissioned the Institute of Consumer Ergonomics "to investigate the suitability of the British lavatory seat". The project is "well advanced and should be completed by the end of the year". It has been carried out with a grant from public funds—from the Privy Purse, no doubt. *124 NLJ 563.*