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ALTERNATIVES TO IMPRISONMENT

An edited version of an address by the Minister of Justice, DR A M FINLAY QC *to the District Conference of Rotary International at Masterton.*

First of all how different are people in prisons from all or any of us? The answer is—very little. I saw some American studies recently which indicated that of a large sample of individuals with no criminal records more than 80 percent had admitted to undetected offences, including mainly fraud and tax evasion, to say nothing of motor offences, but 50 percent acknowledged theft, malicious damage and other more than minor offences, both against the person and against property and if, putting aside academic researches of that nature, you were to visit any of our prisons you would find very little difference between the inmates and officers, apart from the clothes: and in case you think this implies downgrading the staff I could add that if you or I were added to the general assembly without outer distinguishing marks it would be very difficult for any other visitor to determine who was what.

Perhaps a good starting point, and certainly a respectable starting point, is to quote Winston Churchill who, as long ago as 1910, told the House of Commons:

> "The mood and temper of the public with regard to the treatment of crime and criminals is one of the unfailing tests of the civilisation of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal against the state: a constant heart-searching by all charged with the duty of punishment: a desire and an eagerness to rehabilitate . . . tireless efforts towards the discovery of creative and regenerative processes; unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols which mark and measure the stored up strength of a nation . . . proof of the living virtue in it."

Imprisonment is for us today the ultimate in criminal punishment. There was a time when it was far from being the last resort and such devices as flogging, hanging and transportation were common criminal sanctions. One would like to be able to say those days are gone for ever but the sad reality is that in many parts of the world torture has reappeared as an instrument of deliberate policy, and not just designed for the extraction of so-called "confessions" but also as a punishment for crime. On the assumption that two wrongs do not make a right it is hard to justify any form of punishment unless it has a corresponding benefit either to the individual or to society. Different theories have prevailed throughout the ages as a justification for imprisonment and these are implicit in the very names—penitentiary, house of correction, reformatory, penal servitude, and so on, and these mainly reflect an attitude to the individual offender. At one time it was thought that arduous and unremitting labour would turn his thoughts away from crime, and others thought segregation, solitude and silence would induce penitence. More latterly the expressed emphasis has been on rehabilitation. I myself must confess to having little faith in any of these remedies and it is for this reason that I prefer to seek out other methods of redress, or community responses, to the commission of crime. I am not alone in this view and indeed think it is shared by most of those who have had practical experience of prison administra-

tion. I came across an article on long sentences in the English *Sunday Times* only recently which contained the following passage:

> "The idea that 'rehabilitation' is truly possible has been given up in Whitehall as an unrealistic hope. The causes of crime being found so complex, the recidivist rate staying much the same whatever methods of punishment are used—these have dispelled any serious attempts to reform the criminal."

Enthusiasm for penal reform is rather dampened by the realisation that whatever the regime adopted in different countries and at different times—whether harsh or mild, punitive or remedial, collectively repressive or individually enlightened—there seems to be a stubborn, irreducible rate of recidivism. One must however continue to be buoyed up by adding "according to the knowledge now available to us".

Even blunter is this statement by an Oxford professor of law:

> "In some cases reform may be brought about by a change of heart which may be either sudden or the outcome of reflection; in other cases the erstwhile offender simply drifts out of crime through the acquisition of other interests or mere maturation. The change of heart, acquisition of other interests, or maturation, can, and no doubt sometimes does, occur in prison; but they are much more likely to occur outside owing, for example, to the influence of a friend, the guidance of a probation officer, membership of a sympathetic group, matrimony or change of employment. The chances of deterioration in prison are at least as great as those of reform; surely the most realistic approach is to regard the rehabilitative changes mentioned in this lecture as aimed primarily at the prevention of deterioration. If analogies have to be drawn, prisons are more like cold storage depots than either therapeutic communities or training institutions."

In other words, the best that can be hoped of them is that they keep offenders out of circulation for the time being.

If it contributes little to reformation does imprisonment deter? And as to that again I entertain grave doubts. The truth is that deterrents have little effect on unpremeditated offences and even for those which are planned it is discouraging to reflect that when picking of pockets was a capital crime in Britain one of the most fertile arenas in which the trade was plied was at public executions. Perhaps you are beginning to think that I am making out a case against punishment as a whole, but that is by no means the case. There is currently showing, to popular applause in American cinemas a film based on the proposition that punishment for violence in the streets is insufficient and which invites the public to take the law into its own hands. The dangers of this are obvious and far outweigh any disappointment I may have at the ineffectiveness of conventional criminal remedies. Adequate remedies there must be, therefore, to assuage the public conscience to meet its need for revenge and retribution, and to satisfy the urge, present in all of us, but stronger in some than others, to match eye for eye and tooth for tooth. I must be quite candid and tell you that in setting up the proposed sentence of corrective training of three or six months, to be served in fairly rigorous conditions, I have not been unmindful of community demands.

We have become civilised—or if you like softened—however, to this extent that we now send people to prison as a punishment and not for punishment. The deprivation of liberty is a realistic end in itself—that of removing an offender from the possibility of renewing his onslaught on society for a stated period. The question is can we achieve as much by something short of complete 24-hour a day custody which costs the community something over $10,000 a year in direct or indirect charges for the average prisoner—or are there other means that may serve as well? In the first place it is to be noted that we resort to imprisonment much more freely than do other comparable countries—something like four times as much, for instance, as does Holland, notwithstanding that we have much more generous provisions for bailing persons on remand. The lifestyles of the two countries are similar and the only difference between us that I have been able to detect is that many of the Dutch Judges and Magistrates—the men who have the power to sentence people to imprisonment—were themselves prisoners of the Nazis during the years of occupation. I am not suggesting that an essential qualification for promotion to the Bench should be a period behind bars—although I know of American experiments where Judges did just that, with somewhat startling results—but it is a fact that we do tend to throw our judicial officers into the deep end and hope that both for their own sake and for others they can swim.

I do not think the full range of alternatives open to the Courts is fully appreciated by the public (and I am bound to say that it is only

recently that the Courts themselves are beginning to resort to them as freely as I would like). The next rung down from complete detention is, of course, partial detention, or as it is called, periodic or weekend detention. This was pioneered in New Zealand and has been a great success and much imitated overseas. It has a number of advantages of which the greatest is the fact that it deprives a person not of his liberty but of his privileges—the time he finds dearest to him and which he most resents giving up but which can be sacrificed with the least economic cost to himself, his family and the community. Originally the work done was all group-oriented, the first involving all the occupants of each detention centre in restoring the dilapidated buildings we deliberately sought for this purpose. Then smaller groups were formed, still working as a team, but now partly because work that can readily be done in this way is not always easy to find, more and more attention is being given to individuals working *for* individuals, with minimal or indeed no supervision. In the main this consists of handyman activities on behalf of pensioners and other disadvantaged citizens, and I am happy to tell you that although we embarked on this relationship with some trepidation it has proved to be free of incident and indeed has provided an unexpected but most rewarding bonus. We have found that in a number—I am not going to say a great number—but one may safely say significant number of cases—a lasting relationship has sprung up between offender and beneficiary. It seems that in each other, two lonely people have found someone who was needed—on the part of the older person, in replacement of departed friends: on the part of the young offender, very possibly for the first time in his life—and I am sure this has done much more to assist in the rehabilitation of individuals than any term of imprisonment. Incidentally in some of the notes the district governor supplied me I note the question asked by a son of his father—"Who am I dad?" Well I can tell you how many prisoners and detainees would answer that, and it would be by saying, "I am a worthless failure". That so often is what he has been told both from the Bench individually and by society collectively, and on any objective basis such an assessment would probably be true. For all his braggadocio, however, he is often very soft and uncertain inside and as long as the individual continues to share that view subjectively there is little hope for change or improvement, and a relationship such as I have mentioned may very well be the first step to his not only becoming worthy but seeing some evidence of worth in his own eyes.

I want to quote a heart-warming letter that was recently passed on to me by a Magistrate from the head of a religious order which operates a home for the aged:

> "I would like to thank your organisation for allowing us to benefit from your periodic detention clients—if that is the correct term of reference!
>
> "In our home for the aged we do not employ male staff and therefore appreciate this help very much indeed.
>
> "The many calls made on these young men have ranged from the singularly unpleasant one of clearing the filtration bed and septic tank area—to all aspects of gardening and mowing of lawns. They have erected shelving—repaired and serviced items of equipment—laid pipes for drainage—cleaned windows, floors, cars etc etc, and all tasks have been performed willingly and in a good spirit.
>
> "We are grateful to Mr Walters for sending us those co-operative and pleasant members of his group, because not one has yet presented anything but the willing and generous worker. Some have even offered to come back to do voluntary work!!
>
> "Please convey our gratitude to all concerned with the project."

The next step is that of probation, often regarded as an "easy option". It need not be, particularly when it is coupled with some form of social work of the type done collectively in periodic detention hostels. More and more Magistrates in districts where such centres do not exist (and they are now to be found in most towns with more than 20,000 population) are using this imaginatively and beneficially—though I suspect we were getting pretty close to the edge when one of them required a youth who had in the course of a disorderly scene addressed the police as pigs to spend some weekends at a pig farm familiarising himself with the real thing. It also empowers the Court not only to put offenders off the road but to deprive them of possession or even ownership of motor vehicles in proper cases. I hope to couple it, for those who have not been "inside" before, with a suspended sentence which would enable the Court to expose an offender to "a taste" of imprisonment, just to show him what total deprivation of liberty is like if he backslides.

In between these different forms of restricting or limiting the freedom of an individual are

a number of other recourses. There are probation hostels to accommodate some, but by no means all of those, to whom probation cannot be granted because of their unsatisfactory living conditions. There are pre-release hostels and post-release hostels, both designed to bridge the great gap, or to express it more realistically, scale the high fence, that separates the unreal artificial world of prison and the daily decision-making work-finding life of the community generally. Attempts to overcome this difficulty are also contributed to by release to work whereby a prisoner goes off each day to a job found for him and returns to the prison in the evening. This is a useful device but requires the "inmate" to lead a double life, which is always the cause of strain and tension whether it refers to a domestic situation or the one I have in mind. In the prison setting it means the inmate is out by the day and in by night —half a prisoner and half a civilian. At work he is under an artificial veil of silence as to his home life and back at the prison he is under constant pressure to smuggle in forbidden articles. We find that if we extend it to any more than the last six months of a man's sentence it ceases to be beneficial. Compassionate leave is now being granted more freely and while I admit that it involves risks it does no more than anticipate the inevitable return of the prisoner to the community and is of some help in maintaining family life and other links with the real world.

These are all, however, variations on a familiar theme, and what I am looking for is new directions. A frequent criticism is that in our concern for the offender we overlook the victim and it has this amount of truth that there is not a great deal we can do for him. However we can and should do more. The only mode of compensation known to the law is money and this is all we can offer the victim. In the case of a physical injury this is little enough but the inadequate Criminal Injuries Act has now been merged in the accident compensation scheme generally. In addition to this I am proposing to extend the powers of the Court to order fines imposed for unprovoked violence either to the person or to property to be paid to the victim. In the case of property damage we can offer restitution, though all too frequently the offender is without means, having no job and squandered or dissipated the proceeds of his offence. There is, however, some ground for believing that more should be done to ensure that an offender who can pay, is *made* to pay for the damage done by him, and I have asked for a report on whether all avenues by which assets—eg motorcycles—could be traced are exhaustively and effectively explored. Notwithstanding the difficulty of this situation I still think we could do more and I have asked by department to prepare some scheme whereby restitution orders should remain in effect and available to the victim for much longer than they are at the present. More active steps I think could also be taken to enforce them during any period of probation. The object of all this is of course to give greater time and scope for the victim to recoup his losses and to have some economic hold over the offender. This could well be enlarged by some procedure for sequestering all the assets of an offender, whether by making him bankrupt or otherwise, and a continuing right to make compulsory deductions from his earnings.

These, then, are some of the things we are doing, and some of the things we would like to do, in providing alternatives to the negative regime of imprisonment. That has always seemed to me an admission of failure, a confession that, despairing any hope of curing or resolving a problem, all that is left is to hide it away out of sight, hoping it will go away.

HAMILTON DISTRICT LAW SOCIETY OFFICERS

At the Annual General Meeting of the Hamilton District Law Society, the following officers were elected:

President: Mr A L Hassall

Vice-President: Mr N L Strawbridge

Treasurer: Mr A D Richardson

Council Members: Messrs J E S Allen, E O K Blaikie, J D Clancy, J G Dillon, D V Henderson, G R Joyce, B D Kay, B J Paterson, J R Powell.

New Zealand Law Society Council Members: Messrs A L Hassall and N L Strawbridge.

The power of prayer? "In its prayer the plaintiff claimed interest from the date of issue of the writ, 7 June 1974, to 'the day of judgment' at 20 percent—the rate provided in the hire purchase agreement for moneys in respect of which default has been made. At first sight, this appears to be a claim to a higher tribunal." O'Regan J in *AGH Finance Ltd v Alan Murrell Motors Ltd* (Supreme Court, Wellington; 2 May 1975).

CASE AND COMMENT

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

Approbation of voidable marriage

Olsen v Olsen (the judgment of Somers J was delivered on 18 April last) is a decision of importance in the context of voidable marriages. The case was an undefended petition for dissolution on the ground of non-consummation owing to the incapacity or wilful refusal of the respondent wife to consummate the marriage. The spouses married on 31 March 1973 and they parted in mid-February 1974. The petition was dated 16 December 1974 and the evidence clearly showed the wife to have wilfully refused to consummate the marriage. His Honour would not have hesitated to grant the decree sought "were it not that after the parties separated in February 1974, at a time when refusal to consummate was not only known to the petitioner but was the reason for the unhappiness that led to the separation, the parties after consulting solicitors, entered into a deed of separation dated 13th March 1974." His Honour reserved his decision "to consider whether this was not such an approbation of the marriage as to preclude the granting of a decree".

Having analysed the deed, his Honour cited the well-known principles laid down by the House of Lords in *G v M* (1885) 10 App Cas 171. He pointed out that these principles were referred to *B v B* [1954] NZLR 358 (CA) and in *L v L* [1954] NZLR 386 in each of which nullity decrees (as they then were) were refused. He also referred to *Hitchings v Hitchings* and *Copham v Copham*, both unreported cases referred to in *Rayden on Divorce* (11th ed) at p 300. The learned Judge then turned to a consideration of *Tindall v Tindall* [1953] P 63 (CA) and *G v G* [1961] P 87 and cited the following passage from the judgment of Birkett LJ in the *Tindall* case (at p 77):

> "The question is: what is an approbation that makes it inequitable and contrary to public policy to allow her now to assert the invalidity of the marriage? Is there conduct here that ought to estop her from having the remedy which she now seeks? If she is debarred from the remedy by her acts and conduct, will that course be in accordance with substantial justice . . . I think the test is this: in the light of all the known circumstances of the case—the proved incapacity of the husband, the nature of the married life, the effect of granting or withholding the remedy sought and the plain approbation of the marriage with knowledge of the facts and the law, and all the other circumstances—is it contrary to public policy that the wife's prayer should be granted?"

Somers J pointed out that s 18 (3) of the Matrimonial Proceedings Act 1963, (which provides that the Court may refuse a decree if, in its opinion, the grant of a decree would in the circumstances of the case be unjust or contrary to public policy) was of considerable consequence". He continued thus:

> "The reference to justice and public policy owes its derivation, in my view, to *G v M* (supra) and the cases which follow it. The recent English cases mentioned above—viz, *Tindall v Tindall* (supra) and *G v G* (supra) adopt just such criteria. But in *G v G* (supra) Phillimore J said, contrary to Sachs J in *Scott v Scott* (*orse Fone*) [1959] P 103, that if having applied the test in *G v M* (supra) the Court concludes it would be inequitable and contrary to public policy to grant a decree there was no residual discretion. I think s 18 (3) although in a negative form confers such a residual discretion."

His Honour assumed that the petitioner knew both the facts and the law when he entered into the agreement to separate and concluded that, in all the circumstances, neither equity nor public policy required him to refuse a decree nisi and he pronounced one accordingly.

It is useful to compare with this the English Court of Appeal decision in *Pettit v Pettit* [1963] P 177, where a nullity decree was refused.

PRHW

"2,000 Cypriot Virgins Headed for Australia —About 2,000 virgins from Cyprus will emigrate to Australia, according to a Government minister here.

"Australia is considered a safe place for them to come to," Labour Minister Clyde Cameron told a building union conference here Monday. (From the *Japan Times*, 15 October 1974, and submitted as the best news story of the year.)

EUROCURRENCY LOANS

TERRY MCFADGEN, *recently returned from London where he was involved in banking operations, discusses Eurocurrency loans from a New Zealand viewpoint.*

Over the past 18 months the frequency of borrowings by local companies on the London Eurocurrency market has increased significantly. Whilst historically the New Zealand Government has regularly borrowed in this market it has now become a viable source of finance for our major companies also. (Figures released by the Reserve Bank in April 1975 indicate that private borrowings approved in 1974-75 totalled $422 millions.) Its particular attractions are the availability of large capital sums, flexible borrowing arrangements and, at present, relatively low interest rates. The movement in favour of the London market has also been accelerated by the development of merchant banking facilities in New Zealand and by the tight local liquidity situation. Moreover, in a period where many Western economies are in difficulty, the credit rating of New Zealand companies has remained high and New Zealand corporate credits have been actively sought by some overseas banks. The purpose of this brief article is to explain the organisation of the London Eurocurrency market and the legal structure of Eurocurrency loan agreements. Of course, these two questions are closely inter-related. In the first section below the general nature of the Eurocurrency market and of Eurocurrency loan agreements is discussed and in the second section the principal terms of a typical Eurocurrency loan agreement are reviewed in more detail from a borrower's perspective.

1. General aspects

The type of loan most readily available to New Zealand borrowers is commonly described as a "syndicated floating rate Eurocurrency loan". In addition, the loan may be described as offering a "multi currency option" or an "interest period option" or both, or alternatively, a "revolving credit facility". For the purposes of introducing this subject it is helpful to examine each of these descriptive terms in turn.

(a) *"Eurocurrency"*

The names "Eurodollar" (being a reference to US dollars) and "Eurocurrency" (a generic term referring to any foreign currency available in London) have become common parlance in financial circles. However, legally speaking there is no such thing as a "Eurodollar" or a "Eurocurrency". A Eurodollar is no more nor less than a US dollar deposited with a bank in London. Its unique characteristic is that because it is deposited outside its country of issue it is beyond the jurisdiction of the US Federal Reserve Bank and, at the same time, is also free from the control of the Bank of England, at least as far as borrowers not resident in England are concerned. These US dollars and the other foreign currencies deposited in London (but not sterling) form a unique pool of funds in that they may be lent to foreign borrowers without compliance with English Exchange Control regulations or with any regulations imposed by the central bank of the country issuing the currency. This enables funds to be lent and borrowed with a minimum of cost and inconvenience and it is assumed by many to be the principal reason for the growth of the London market in recent years.

It is important to note at the outset that the banks in London do not normally lend to foreign borrowers out of their own resources. Instead, they borrow the funds required to make a particular loan from other banks in London at the current market rate of interest for interbank transactions (a process known in banking circles as "purchasing a deposit"). This system of interbank borrowing and lending (the "interbank market" as it is known) is so organised that funds can be borrowed for periods of 1 day, 7 days, 1 month, 3, 6 and occasionally 12 months but generally not longer. The rate of interest payable by the borrowing bank varies according to the length of this period and the currency involved. One consequence of this method of operation is that when a loan is made to a foreign borrower the banks will be obliged to refinance the principal amount advanced at regular intervals, paying a new rate of interest on the occasion of each renewal. This peculiarity is at the root of many of the special provisions found in Eurocurrency loan agreements.

As a matter of custom the length of the period for which funds are borrowed is known

as an "interest period" (because the rate of interest will depend almost entirely on the length of this period) and the last day of each Interest Period is known as a "rollover date" (because on this date the loan will be "rolled over" into the next interest period). These terms are almost universally used in loan agreements and, for convenience, are used throughout this paper.

(b) *"Syndicated"*

The loan will be syndicated in the sense that the total principal sum will be subscribed by a number of banks normally referred to in the agreement as the "participating banks" or just the "participants". Each of the participating banks will sign the loan agreement and will be severally liable for a portion of the principal amount. The number in the syndicate may range from two or three banks in the case of a small loan up to 50 or 60 banks in very large loans.

Normally the syndicate will be headed by a bank known as the "managing" or "lead" bank which has been responsible for negotiating the principal terms of the loan with the borrower (before the syndicate is organised) and which assumes responsibility for organising the participating banks, instructing solicitors, and handling a variety of administrative tasks. For its services the managing bank receives a flat fee, normally payable upon the signing up of the documents, known as a "management fee". Depending on the size of the syndicate and the nature of the loan this fee may range between $20,000 and $70,000. At an early stage the managing bank normally enters into a brief form of agreement with the borrower (known as a "commitment letter") wherein the basic terms of the proposed loan are recorded, and the managing bank agrees to make the loan subject to being able to organise a syndicate for that part of the loan not subscribed for by the managing bank.

The loan agreement will appoint the managing bank or one of the participating banks as agent to disburse and collect payments of principal and interest on behalf of the other members of the syndicate and to fix interest rates at the commencement of each interest period. The agreement will incorporate provisions specifying the limits of the agent bank's authority and providing indemnities in favour of the agent from the other participating banks.

(c) *"Floating rate"*

Because the lending banks will be obliged to refinance their principal at the end of each interest period by reborrowing funds in the interbank market (thereupon paying a new rate of interest) a new rate of borrowing must be set under the loan agreement upon each rollover date to reflect the increased or decreased cost to the banks of their funds. In this sense the interest rate "floats". For convenience the rate of interest specified in the loan agreement is expressed as a particular margin (anything ranging from one half percent in the case of first class governmental borrowers up to $2\frac{1}{2}$ percent or 3 percent for corporate borrowers) above the rate at which the banks acquire their funds for the Interest Period in question. This latter rate is commonly known as the "LIBO rate" (being a shorthand reference to "London interbank offered rate").

(d) *"Multi currency option"*

In addition to US dollars there is a reasonably large pool of funds of various foreign currencies which are normally available for borrowing by banks on the interbank market (in particular Deutschmarks, Swiss francs and French francs.) The rates of interest in respect of these various currencies may differ from time to time depending on market factors and it is to a borrower's advantage (if properly advised by its financial adviser) to have the right to designate which of these currencies its loan is to be denominated in during any particular interest period. This right is known as a "multi currency option".

Although the loan may be denominated in one or other foreign currency from time to time, this is of notional significance only (ie in the sense that it is only relevant for the purpose of calculating interest) and no funds are passed between the banks and the borrower when the option is exercised. The loan to the New Zealand borrower will normally be disbursed in NZ dollars upon commencement (the amount of NZ dollars being the equivalent at the date of disbursement of the Eurocurrency advanced, converted at the rate of exchange prevailing on that date) and no funds will pass between the parties again until repayment commences. When repayment is made, the currency of payment will again be NZ dollars, this time being the equivalent of the Eurocurrency amount owing, calculated using the rate of exchange prevailing on the date of repayment. The principal purpose of this arrangement is to ensure that the banks do not incur any losses through fluctuations in currency exchange rates. When the borrower elects to have the loan denomi-

nated in a particular currency the banks simply borrow that particular currency for a particular Interest Period and repay it on maturity. When the borrower makes repayment the banks are assured that the amount they receive will be exactly the amount they require to satisfy their commitment under their interbank loan. On the other hand, this procedure does involve the borrower in some risk. The nature of this risk is elaborated in section 2 below.

As far as the mechanics of the option are concerned the normal provision requires the borrower to exercise his election as to which of the available Eurocurrencies he wishes the banks to borrow, five or six working days prior to the relevant rollover date. With this advance warning the banks are able to repay their outstanding interbank loans and to reborrow in the currency designated by the borrower.

It may also be possible to get an option to borrow domestic US dollars, in which case the interest rate will be set by reference to US domestic rates, not the LIBO rate. This option, whilst of considerable benefit to the borrower, is only available (and even then not always) if all the banks in the syndicate are US domiciled.

(e) *"Interest period option"*

An "interest period option" entitles the borrower to specify the length of each successive Interest Period. In practice this usually means that the borrower can choose between periods of 1, 3 or 6 months. As the rates of interest in respect of these periods fluctuate from time to time according to market conditions, the borrower is, in effect, able to make a judgment as to future interest rate movements by borrowing "short" or borrowing "long". If the borrower predicts market movements accurately it reduces interest costs to a minimum. Conversely, if its judgment is astray, interest costs are increased.

Mechanically, the option works in the same fashion as the multicurrency option. The borrower is required to advise the agent bank at least five working days prior to each rollover date, of the length selected for the interest period about to commence. With this warning the banks are able to borrow funds on the interbank market having a maturity equal to the length of the period selected by the borrower.

(f) *"Revolving credit facility"*

Banks are often willing to make available a revolving credit facility where an upper borrowing limit is imposed but the borrower is otherwise free to borrow and to repay funds at the end of any interest period. If the amount of the loan is being reduced on a particular rollover date then the banks simply repay their outstanding borrowings and do not re-purchase funds for the next period. Conversely, if the borrowing is being increased the banks purchase additional funds at the then current rate on that rollover date. A revolving credit facility may be available in its pure form or, more commonly, fused with a term loan arrangement whereby after say one year the revolving credit facility terminates and the loan continues as a conventional term loan. A related option known as "delayed drawdown" or "standby facility" enables the borrower to call on the funds in successive instalments (known as "tranches") over a period of say, 12 months. In all of these variants the borrower is usually obliged to pay a fee known as a "commitment fee" equal to $\frac{1}{2}$ percent of the amount undrawn from time to time.

By way of summary so far, it might be useful to set out the basic terms of a "typical" Eurocurrency agreement, as they might be recorded in the commitment letter between the borrower and the managing bank. This example incorporates a multi-currency and interest period option and provides for delayed drawdown:

Principal amount—Up to US $20,000,000 (or equivalent in any Eurocurrency, borrower to have option to select currency upon drawdown and upon any rollover date subject to availability as determined by banks).

Interest—One and a half percent over LIBO for first two years of loan, increasing to 2 percent over LIBO for last three years. Interest payable in arrear on each rollover date without deduction.

Drawdown—Loan available for drawdown for period of six months after signature of documents. Loan may be drawn in amounts of $5,000,000 or integral multiples thereof on any rollover date.

Repayment—Loan to be repaid in full within five years, repayment to commence three years after last drawdown and to be made in four semi-annual instalments of equal amount on successive rollover dates.

Management fee—$20,000 payable on signature of documents.

Commitment fee—Commitment fee of ½ percent payable on amount of loan undrawn from time to time. Fee to be payable from date of the acceptance of this letter.

Optional prepayment—Borrower to have the option to repay in multiples of $500,000 on any rollover date (after two years) subject to 30 days prior notice and payment of a termination fee equal to ½ percent of the amount prepaid. Prepayments to be applied against payments due in inverse order of maturity.

Legal expenses—All for borrower's account.

2 The principal terms of the loan agreement

Eurocurrency loan agreements take a form which has been largely settled by custom. Many of the normal terms, eg the representations and warranties, events of default and the security provisions are substantially the same as the equivalent provisions found in domestic loan agreements and debentures. Consequently they call for no special comment. In addition, there are a number of special provisions dealing with governing law, submission to jurisdiction, notices and alike which are customary in all international contracts. Again, these do not call for detailed discussion. However, in addition to these more or less standard terms there are a number of special terms which are peculiar to Eurocurrency agreements and which are of particular importance to the borrower and their legal advisers. It is important that the implications of these provisions are fully understood and that they are scrutinized with care. Often, there is some ground for negotiation as to their precise scope.

(a) *The interest provision*

The essence of this provision is that the borrower agrees to pay interest at a specified margin above the rate that the banks pay for their funds for the relevant interest period. Interest is payable in arrear at the end of the period but the rate is fixed at the commencement. Rates are always quoted in the interbank market for effect two business days after the date of quotation.

A typical interest provision in an agreement with a multi-currency and an interest period option might read as follows:

> "The borrower shall pay interest on the principal amount of the loan outstanding from time to time. Interest shall be payable in arrear at the end of each interest period and shall be computed in respect of the actual number of days elapsed on the basis of a three hundred and sixty day year. The rate of interest shall be one percent (1%) above the rate at which deposits of the relevant amount for a period equal to the relevant interest period and in the relevant currency are obtainable by first class banks in the London interbank market at 11 am London time two business days prior to the commencement of the interest period for which such rate will apply".

Alternatively, the provision instead of referring to the rate obtainable by "first class banks" may require the agent to average the rate quoted to selected members of the syndicate (often referred to as the "reference banks"). In this case the relevant part of the clause might read ". . . one percent (1%) above the arithmetic mean (rounded upwards to the nearest $\frac{1}{8}$th of one percent) of the respective rates notified to the agent by the reference banks as the rate at which they are respectively able to obtain deposits of the relevant amount for a period equal to the relevant interest period in the London interbank market . . . etc."

Whichever method is utilised (and the latter is now more common) it is important to bear in mind that the rates quoted to member banks of the syndicate will not necessarily be the same. There may be as many as three slightly differing rates quoted, dependent upon the size, status and general credit worthiness of the bank concerned. If the interest clause is left vague, or if the rate is set by reference to the rate quoted to the smaller banks in the syndicate, the result may well be that the borrower will pay a higher rate of interest than it would if more substantial banks were chosen as reference banks.

(b) *The "change in circumstances" clause*

To some extent the Eurocurrency market continues to flourish by the indulgence of various regulatory authorities. Certainly, the rates of interest could be affected very quickly by regulatory action from a number of sources. Moreover, the market relies heavily upon the fact that funds will be recycled into the market as excess funds accumulate. (For example, several months ago there was concern that the great "petrodollar" surplus might not find its way back into the market.) Lending banks do not assume these risks themselves but pass them on to the borrower in terms of the so called "change of circumstances" clause in the loan agreement.

The clause contains two main elements. First, it provides that if by reason of any change in

any applicable law or government regulation (in particular any change in reserve requirements imposed by any central bank having authority over any lending bank) the cost of funds to any of the banks is increased by an amount the affected bank deems material, then that bank will be entitled to pass that cost on to the borrower immediately. The borrower is often given an option to repay the loan in advance of the maturity in these circumstances. Practically speaking the principal risks in this area are that the Bank of England or one of the other central banks may intervene by imposing further reserve requirements (ie debt/asset ratios) on the banks which would effectively lower their borrowing base, or that the American authorities will endeavour to impose a special tax on interest earned by the American domiciled banks.

Secondly, the clause will contain a provision to protect the banks against the contingency that Eurocurrencies will no longer be available for borrowing by the banks on a particular rollover date. (In other words against the contingency that the interbank market has dried up.) This particular provision takes a variety of forms and no settled wording has yet emerged. However, a typical provision provides that if in the opinion of the borrowing banks "adequate and fair means do not exist for determining the rate of interest on the loan on any rollover date" then the borrower and the banks shall confer with a view to arranging an alternative source of funds but if no agreement can be reached within 30 days then the banks' obligations are deemed to be at an end and the borrower will be obliged to repay all outstanding advances. In practice, if the bank or banks concerned are domiciled in the USA the loan should be able to be continued in US dollars at the rate of interest applicable to US domestic loans. Some loan agreements include a specific provision to this effect. However, this possibility aside the risk must normally be borne entirely by the borrower.

(c) *The multi currency option*

As noted above, the lending banks do not take any risk of loss through changing rates of exchange as the borrower's obligation is always to repay the loan in the currency in which it is for the time being denominated. As far as a New Zealand borrower is concerned, this means that (unless it has earnings overseas) it must repay an amount in New Zealand dollars which is the equivalent of the Eurocurrency obligation at the date of payment. Similar provisions apply to the payment of interest. In consequence, if between the time of disbursement and the time of repayment (or the payment of interest) there is any fluctuation in the value of the New Zealand dollar against the currency in which the loan is denominated the New Zealand borrower stands to suffer a loss (if NZ dollars depreciate in value) or make a gain (if NZ dollars appreciate in value). This balance of risks is normally not negotiable and considering the present unstable international economic situation, places a very real risk on the shoulders of the New Zealand borrower. Moreover, there is some doubt as to whether an industrial company could claim any losses of this nature as a deduction against income for tax purposes.

The danger of exchange losses could be mitigated to a large extent if New Zealand borrowers were able to "buy forward" in the foreign currency market, sufficient funds to cover their future liabilities. However, to date the terms upon which the Reserve Bank of New Zealand has permitted these purchases are so unfavourable as to be commercially impractical.

The banks will also be concerned to ensure that the extent of their overall liability under the loan does not become enlarged when a borrower makes a change from one currency to another, as a result of changes in rates of exchange. To prevent this occurring the multi currency option customarily provides that when a change is made from one currency to another, the amount re-advanced shall be the equivalent not of the amount of the loan at the date of that re-advance, but of the initial amount of the loan. This initial amount is often referred to as the "initial dollar amount". Alternatively, the equivalent amount may be calculated at the date of the conversion but the borrower will be obliged to repay a percentage amount of the new advance if it exceeds the original amount of the loan by a specified percentage, usually 5 or 10 percent.

(d) *Overseas investment commission approval —withholding tax*

As the borrowing is made outside New Zealand the prior approval of the Overseas Investment Commission will be required pursuant to reg 3 (a) of the Overseas Investment Regulations 1974. The formal consent of the Reserve Bank is also required. In terms of current policy these permissions are readily available (except to property development and finance companies) provided the loan is at least for

one year and the funds are transferred to New Zealand through the banking system.

In so far as the loan document is concerned, a provision will normally be inserted making it a condition precedent that the appropriate approvals be obtained and appropriate evidence of such approvals be delivered to the banks. Also, local counsel will be asked to opine that all necessary governmental and reserve bank approvals be delivered to the banks.

Until recently, Eurocurrency borrowers were faced with a tax difficulty in that non-resident withholding tax was payable on interest remitted to the foreign banks (and by virtue of s 148 (2) of the Land and Income Tax Act 1954, banks are deemed to be resident in New Zealand only if the "head office" is situated here). This difficulty gave birth to so-called "back to back loans" whereby a New Zealand bank lent the funds in question to the New Zealand borrower and in turn the New Zealand bank was funded by the overseas syndicate, there being no privity of contract between the New Zealand borrower and the overseas syndicate. This device (which was of doubtful efficacy anyway) has outlived its usefulness as the Minister of Finance recently announced that the government will in future consider exemption from withholding tax under s 86 of the Land and Income Tax Act 1954. Companies were advised that a request for the exemption should be made at the time of application to the Overseas Investment Commission for consent to borrow.

(e) *Problems arising out of debenture trust deeds*

If the borrower has mortgaged its assets under a debenture trust need in the customary form a number of problems may arise. First, the debenture trust deed will probably contain an "interest cover" provision which places a limit on additional borrowing by providing that the interest on existing term liabilities plus the interest on any loan that is contemplated must not exceed more than a certain percentage of the company's annual profits—in other words a cash flow limitation. However, whilst the formula can readily be worked with respect to a fixed interest loan, it is theoretically impossible to work the formula with any accuracy on a floating rate advance. No one knows what the LIBO rate will be in six months, or twelve months' time and an auditor giving a certificate in these circumstances must make assumptions regarding interest rates which may or may not be accurate.

Secondly, the debenture will contain limits on the borrower's overall debt/liability ratio. Here the question of exchange risk is relevant because it appears that the contingent liability faced by borrowers in this respect would not be brought into this calculation. One might question whether this is a reasonable and fair approach as far as the debenture holders are concerned.

Further, the lending banks may require the issue to them of debenture stock as security for advances. The question then arises of which currency the stock should be issued in. If issued in New Zealand currency, then the security will prove insufficient if there is a devaluation of the NZ dollar. Even if issued in a foreign currency this problem remains because if there is a multi currency option the borrower will be changing from currency to currency at regular intervals and it will not be practical to reissue stock on each occasion. Moreover, there may be some doubt as to whether most New Zealand debenture trust deeds permit the issue of stock in a foreign currency—particularly as any payment will ultimately have to be made in New Zealand dollars. One solution in these circumstances is to issue debenture stock in New Zealand dollars in an amount equal to say 110 percent of the initial amount of the loan, thus giving the lender some additional protection.

All of these problems are essentially problems which have arisen because debenture trust deeds as currently drafted do not contemplate foreign currency borrowings on the large scale that has now become common. Draughtsmen involved in this area could do well to give consideration to how the debentures might be amended to remove these obstacles.

(f) *The legal opinion*

The lending syndicate will normally require a written opinion from a New Zealand law firm confirming that the agreement is legally sound as far as local law is concerned. This is standard practice whatever the domicile of the borrower and the general purport of these opinions has become fairly settled by custom. In particular, local counsel will normally be asked to opine that they have perused the agreement, all relevant governmental permissions and authorities and have satisfied themselves that the agreement is "fully valid and binding in accordance with its terms". In addition, counsel may be asked to opine as to various specific aspects of the agreement such as the incidence of taxation and stamp duty, the validity of any known claims against the borrower etc.

Firms asked to give these opinions should consider very carefully their precise terms. To some extent these terms are negotiable. Not infrequently local counsel have been asked to give opinions in terms which are wider than those that would be accepted by experienced international banking counsel. It ought to be borne in mind that heavy reliance will be placed upon the legal opinion by the lending banks (indeed it is often regarded as the cornerstone of the syndicate's security). The "opinion" will in effect be treated as a solicitor's certificate. In particular, the question of qualifications to the opinion ought to be considered very carefully. Normally, all assumptions should be spelt out clearly. (For example, the question of which law might govern a particular issue if the matter came into dispute, the extent to which signatures and documents and registers perused have been assumed to be genuine and complete, and the extent to which bankruptcy laws might affect the conclusions reached). An article which discusses the legal effect of this type of opinion and the type of qualifications that are appropriate is to be found in the April 1973 volume of the American Bar Association publication *The Business Lawyer*.

Conclusion

Eurocurrency loans differ in several important respects from domestic bank loans. Despite their many advantages their attractiveness will be limited for some borrowers by the unavailability of fixed rates of interest, their relatively short term, the exchange risk element and the general risks associated with borrowing in the London bank market. Whether the disadvantages outweigh the advantages will no doubt depend on a variety of circumstances peculiar to each individual borrower. However, prominent amongst these considerations will be an assessment of to what extent the borrower is confident that he and his financial advisers can accurately assess international and local interest and currency value changes so that the borrower can take advantage of his right to elect currencies and interest periods. In addition, an assessment must be made of the extent to which the international financial situation (and the London bank market in particular) will continue to remain relatively stable and funds will continue to be recycled in an orderly manner. New Zealand borrowers will want to know from their legal advisers precisely where the loan document allocates risks in these respects.

JURISTS' MAY MEETING

The Council of the New Zealand Section of the International Commission of Jurists held its most recent meeting in Wellington on 1 May. Among matters considered was an invitation from the International Commission of Jurists in Geneva to recommend New Zealand lawyers who would be prepared to assist in a study of Martial Law in the Philippines, and to attend trials in that country as ICJ observers if necessary. The Council welcomed the opportunity to participate in the study and has recommended its Chairman, Mr G E Bisson of Napier, and a member, Mr P G Hillyer QC of Auckland, as lawyers prepared to attend trials in the Philippines. The Council also resolved to advise the International Commission of Jurists in Geneva of its general interest in offering members on a volunteer basis for the purpose of attending appropriate trials in the Pacific Region.

Local matters discussed included the current review of the Official Secrets Act and a report on a "Written Constitution for New Zealand". Sub-committees were set up to consider these matters further. The Section had presented submissions to the Parliamentary Committee on the Treaty of Waitangi Bill, and was represented at the hearing by Dr D E Paterson, a member of the Council. The Section is also to write to the Minister of Internal Affairs, drawing his attention to the unsatisfactory discretions which govern the issue and withdrawal of passports. He is to be informed that the right to leave and re-enter one's country is regarded as a basic human right, and be invited to initiate the necessary amendments to the Passports Act 1946.

D J WHITE

Contempt defined—". . . That whenever the solicitors . . . or the clerks to solicitors in an action happen to meet each other . . . and one or other loses his temper . . . that is contempt of Court." *Re Clements and the Republic of Costa Rica v Erlanger* (1877) 46 LJ Ch 375.

UNLOCKING THE TURNTABLE

MRS MARGARET VENNELL *looks at the effect of accident compensation on occupiers' liability.*

In the not too distant past the liability and the duties of an occupier in relation to those who came upon his land depended on the status of the entrant. It will be remembered that the duty to non-contractual entrants depended on whether the entrant was an "invitee" (to whom the highest duty was owed; but what form that duty exactly took was far from clear)(*a*), or a "licensee" (to whom a lesser duty was owed). What the distinction between an invitee and a licensee was was also far from clear, but by 1956, Lord Justice Denning (as he then was) thought that decisions of the Courts had resulted in the distinction being virtually abolished(*b*). An entrant might also be a contractual visitor, to whom the duty owed depended on the interpretation which could be placed on the express or implied terms in the appropriate contract.

The position of these categories of visitors was alleviated by the enactment of the Occupiers' Liability Act 1962, which abolished the different duties owed to invitees and licensees(*c*). A further provision of the Act also conferred the "common duty of care" (which is that applied to "lawful visitors") on contractual visitors where the duty depends on an implied term in the contract(*d*).

The Occupiers' Liability Act was not a code, however, and it gave no consideration to the duties owed to another class of entrant, namely, the trespasser(*e*). The law relating to trespassers has therefore been in a state of great confusion. Some of the confusion stems from the House of Lords decision in *Robert Addie and Sons (Collieries) Ltd v Dumbreck* [1927] AC 358 in which Viscount Hailsham LC formulated the rigid rule that an occupier will, virtually, only be liable to a trespasser if he acts with reckless disregard to his presence.

> "Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser" (ibid, 365).

Because this rule was thought to be unduly harsh, numerous ways of avoiding its rigid effects were developed by Courts throughout the Commonwealth(*f*). On occasions the Courts went so far as to say the question was nothing to do with occupiers' liability at all, and instead to find liability under the general law of negligence(*g*) clearly because the law was so complicated. The New Zealand Torts and General Law Reform Committee recommended a change in the law relating to occupiers' liability to trespassers, so that an occupier should owe a duty to a "protected" trespasser "to take such care as in all the circumstances is reasonable not to expose him to any danger existing on the premises"(*h*). This suggested reform would be comparable with, although different from, the

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(a) Indermaur v Dawe (1866) LR 1CP 274.

(b) Slater v Clay Cross Co Ltd [1956] 2 QB 264 at 269-270.

(c) Section 4 (1) An occupier of premises owes the same duty (the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise. (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there. This Act is still in force, and has not been repealed by the Accident Compensation Act 1972.

(d) Section 7, and by s 5 to third parties to a contract.

(e) In Scotland a different view was taken and the provisions of the Occupiers' Liability (Scotland) Act 1960 apply to all visitors lawful and trespassers alike. The duty owed to these entrants is to take "such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger": s 2 (1).

(f) For an analysis of the different ways developed to avoid the rule in *Addie's* case, see Vennell, M.A., "Occupiers' and Non-Occupiers' Duty Towards Trespassers" [1972] NZLJ 161.

(g) McCarthy v Wellington City [1966] NZLR 481. This is a peripheral case since the injured child had not actually himself been a trespasser. *Munnings v Hydro-Electric Commission* [1971] 45 ALJR 378.

(h) "Occupiers' Liability to Trespassers"—Report of the Torts and General Law Reform Committee of New Zealand, 1970, pp 7-8.

provisions in the Occupiers' Liability (Scotland) Act 1960.

Although reform in the terms suggesteds by the Law Reform Committee's report has never been enacted, reform has in fact taken place in a somewhat unusual fashion. This reform is found in s 5 of the Accident Compensation Act 1972 (as amended by s 5 of the Accident Compensation Amendment Act (No 2) 1973 (*i*). This section (inter alia) provides a code for personal injuries by accident in New Zealand, and declares that "no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment."

Whilst the Accident Compensation Act has rightly been hailed as a great and far-reaching piece of social legislation, in the area of occupiers' liability (whether to lawful visitors or trespassers), it can be regarded as a step backwards. For here we have the situation in which, in respect of lawful visitors an occupier owes to them the "common duty of care" and in respect of trespassers in most circumstances a duty (albeit a lesser duty) will also be owed(*j*). But by virtue of s 5 these duties are completely unenforceable since the claim for damages is abolished.

Admittedly many academics have said that the existence of a tort claim is no deterrent(*k*), and in any event the victims do not necessarily obtain any or all of the damages awarded. The provision of either a penal sanction, or a claim by right of subrogation by the Accident Compensation Commission could both be ways to solve the problem of the "empty" duties. There may be other ways. But at the present time we have on the statute book an Occupiers' Liability Act which appears to be unenforceable(*l*).

That this has occurred at a point of time when the strictness of *Addie's* rule has been abrogated by both the House of Lords and the Privy Council (on appeal from the High Court of Australia) in creating for trespassers a duty of "common humanity"(*m*) raises interesting considerations. It would seem that in New Zealand in the absence of any specific sanction an occupier can act with reckless disregard to the presence of trespassers and, what is even more astounding, to the presence of his lawful visitors. The railway company need no longer have any concern for its unlocked turntable, or its heap of cinders (glowing underneath), the electric power board need not worry about the condition of its power lines or other installations, and even the writer of this article need give no thought to the dripping pipe which makes the path slippery and dangerous for her lawful visitors(*n*).

There is, however, one small glimmer of hope for the victim of the careless or reckless occupier. This is to be found in Part II of the Accident Compensation Act 1972 which deals with prevention and rehabilitation, and provides for the establishment of a safety division(*o*). It may well be that the Commission's Safety Division can police the factory floor and the large organisation and may be able to prevent the classic turntable type accident, but it is this writer's contention that, in the area of occupier's liability, the facets of accident are so wide that (even if the danger is appreciated

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(i) Section 5 (1)-(7). This Act does not specifically refer to, or repeal the Occupiers' Liability Act 1962.

(j) This may now be the duty of "common humanity". See *British Railways Board v Herrington* [1972] AC 877 and *Cooper v Southern Portland Cement Co Ltd* [1974] 2 WLR 152; [1974] 1 All ER 87.

(k) For example Atiyah, *Accidents, Compensation* and the Law, Weidenfeld and Nicholson (London 1970).

(l) There is the general provision in s 107 of the Crimes Act 1961 which makes it an offence (punishable by imprisonment for a term not exceeding one year), for any person without lawful excuse, to contravene any enactment by wilfully doing any act which it forbids, or by omitting to do any act which it requires to be done. This section can be used where no other sanction is provided, but proof of "wilfulness" is very different from proof of a failure to meet the required standard of care in tort. In any event it would only be available in respect of those visitors covered by the Occupiers' Liability Act, and would not cover those who fail in any duty owed to trespassers.

(m) What the content of the duty of "common humanity" is is not entirely clear, nor is it entirely clear how it differs from the common duty of care laid down by the Occupiers' Liability Act. See "Occupiers—Duty to Trespassers" [1974] CLJ 202 (a note by J R Spencer). Certainly it may have subjective elements but from the trespasser's point of view it cannot be described as "harsh" in its effect.

(n) Prior to the coming into force of the Accident Compensation Act 1972, the occupier's insurer might have provided some form of sanction but this has now disappeared along with liability.

(o) Sections 43-47. Section 43 enacts that: "(1) It shall be a matter of prime importance for the Commission to take an active and co-ordinating role in the promotion of safety in all the different areas where accidents can occur in New Zealand. (2) In so promoting safety the Commission shall be concerned to—(a) Avoid human suffering; and (b) Prevent wastage of manpower, and so assist efficiency and productivity."

to a degree) it will only be after an accident has occurred that the Safety Division will come onto the scene. Admittedly the members will be specially trained to appreciate danger, but in an unfamiliar situation will danger be necessarily apparent? Would a safety inspector necessarily have appreciated the danger to a third party (the innocent playmate) from the locked safe filled with detonators in the rough remote gulley between Johnsonville and Khandallah?(*p*)

In the two cases in which the duty of common humanity was found to exist, the defendants had both been aware to some extent of the likelihood of danger. In *British Railways Board v Herrington*(*q*) there was evidence that employees of the Board had been aware, for about seven weeks, that the fence which bordered the railway line (next to which ran the electrified line on which the small boy was injured) was in a dilapidated condition. Surely those employees had a duty to see that something was done (even though they failed to carry out their duty) and were in a better position to appreciate what should be done than a transient safety inspector. In Cooper's case(*r*) the company had been extending a sandhill on which railway sidings were to be built; in doing so they had allowed it to come within five feet of an uninsulated high voltage cable carried on poles at 20 feet above the ground. The appellants had realised the danger of bringing the sandhill close to the cable and in fact when the bank was about 12 feet from the cable the superintendent had ordered that no more sand was to be dumped so that the bank would not be built up further. The respondent was a 13 year old boy who was injured by coming into contact with the cable, the day before the cable would have been removed as a result of a request by the company to the county council. There was a situation in which the Privy Council found the duty of "common humanity" owed. In finding the duty to be present the Judicial Committee divided dangers in respect of which the duty is owed into two categories, those created by the occupier and those not created by him. If the danger has arisen on his land without his knowledge then the occupier can have no obligation to make inquiries or inspection; with regard to those of which he has knowledge but which he did not create, he cannot be expected to incur what in his case would amount to heavy expediture. But although the exact content of what he must do has not been expressed, if he created the danger he may have to do more.

In *Herrington's* case the presence of the danger had not been created but it had been appreciated; in *Cooper's* case it had been created *and* appreciated, and in both cases the occupier was found liable(*s*). In similar situations in New Zealand the occupier need do nothing whatever in the circumstances secure in the knowledge that *firstly* if anyone is injured *he* (the occupier) will not be held liable, and that *secondly* nothing need be done unless he is told to do so by a safety inspector(*t*). This surely means that if accidents are to be prevented the safety inspectors will need to be rather unique persons. In fact their attributes will need to be much greater than those of the *"reasonable man"*; the safety inspector will need a mind like a ferret, the wisdom of Ulysses, and seven-leagued boots(*u*) so that he can extend his investigation into every activity, into every corner of the kingdom, however remote(*v*). It means, too, that the safety inspector will not only need all these qualities, but if a programme of prevention is to be successful there will need to be many more safety inspectors than have presently been appointed. In addition the powers of the Accident Compensation Commissioner to deal with safety and prevention may need to be extended at least in practice (in theory they are already fairly wide); some means of enforcement of safety standards will need to be provided, so that we can truly adhere to the principle of "common humanity", rather than allow the situation to creep in in which an occupier would virtually have a licence to leave the turntable unlocked.

(p) McCarthy v Wellington City (supra n (g)), or did the Court of Appeal impose too harsh a burden of liability on the defendant occupier?

(q) Supra n *(j)*.

(r) Supra n *(j)*.

(s) In both cases if his purse had been smaller and his resources less the occupier might not have been found liable.

(t) Quaere whether such circumstances would in fact give rise to a claim for exemplary or at least aggravated damages.

(u) Cf *Hawkins v Coulsdon & Purley UDC* [1964] 1 QB 319, Romer LJ at p 341 discussing the attributes of the "reasonable man".

(v) The sandhill in *Cooper* was in a fairly remote part of New South Wales.

Which half is wrong? There is a bit of folklore that a Magistrate is presumed to know the law while a Supreme Court Judge is not. I would not rely on it, if I were you.—MR D J SULLIVAN SM.

CORRESPONDENCE

Proposed Marriage Contract—An Anguished Cry

Sir,

It is with alarm and despondency that I write. How long must women suffer the slings and arrows of outrageous fortune such as those (albeit unwittingly) launched by Pater Familias in [1975] NZLJ 167? Since that learned writer obviously does not understand the nature or quality of his act in drawing his "marriage contract" I beg leave to answer the "joke" on behalf of that half of humanity which has for centuries been laughed and ridiculed out of existence.

Sir, the joke is on us but with respect our sense of humour is beginning to resemble the ghastly smile of the Grim Reaper. If this sounds typically unsporting and apportions inappropriate gravity to a trivial matter, I must remind you of the question asked by Freud and echoed a million times since by men all around the world and seemingly accepted as a universal eternal mystery: "What does a woman want?"

If, Gentlemen, you will stifle your laughter for a moment and allow 50 percent of the population to wipe the forced smiles from their faces, they may find the breath and hopefully the courage to break silence and formulate an answer. We want the status of humanity. This has always been a question of the utmost gravity in its application to men.

Women "internalise" the joke (that is to say, they accept as truth the image of women that your male culture has painted and that image is accurately exemplified in Pater Familias' letter) and as a result they have no basis from which to deny your assumption. We lack your assurance that as people you may define yourselves (while you remain free to define us how you please) and we need your relative ability to control your lives, necessarily jettisonning our eternal role (imposed on us as you see fit) as Adam's Rib, the little woman, the ball and chain etc. Socialisation gains validity perhaps through economic reality as well as the role playing which reflects those sterile habits of thought about ourselves originating from and shared in this common (white male) culture. Pater Familias perpetuates an economic reality and social attitude which is extremely destructive to both sexes. It is no joke. In the form he has so wittily described, it not only exists as the cornerstone of our economy but in reality imprisons the majority of women in this country in a literal no-man's-land as unpaid domestic serfs with barely their bodies to call their own, much less their labour.

As long as men continue to write, talk about and treat us as jokes they dehumanise themselves, deny themselves a lighter load of responsibility, and most important, prevent us from establishing a legitimate claim to our status as people. In other words, no action for "personhood" will lie in the world outside the kitchen or typewriter, since the plaintiff has no standing there. The avenue of redress should not be denied for much longer. Suppose the "little woman" safely contained in the kitchen back home (as fondly imagined by Pater Familias), wageless backbone of the national economy, becomes finally convinced that her mild entreaties will never be taken seriously. Suppose she finally struggles to her feet, rejecting everything you presently hold dear. National chaos? At present the divorce rate is climbing and so is our social welfare bill. I can only urge Pater Familias to rethink the hilarity of his marriage contract.

Yours faithfully,

S C ABERNETHY

Levin.

The Jury

Sir,

As a zealous reformer ever looking for support for my crusades, I put forward the following suggestion for debate and action in every legal (and illegal) coffee shop down and up the country (and note the precedence of "down" proving that I have got my priorities right):

> Immediate amendments to be made to the Juries Act and the Judicature Act to bring about the decimalisation of juries thereby removing for ever those two obstinate and persuasive beggars [sic] who always hold out against me.

Yours faithfully,

NIGEL HAMPTON

Christchurch.

Selecting a jury—Now if you find that you've got friends on the jury, I think it's an insult to your friends to allow them on the jury. You are asking your friends in many cases to do something that is most unpalatable for them and is hardly proper for you to ask of a friend. If you have friends on the jury list tell the Crown, don't waste your six challenges—tell the Crown you've done your job. If you have six enemies on the jury also tell the Crown, but tell the Crown if you wish that they are your friends. I have been told that if you've exhausted all your challenges there is one way that you can get a friend on the jury and that is if your friend is called after you've exhausted all your challenges, you give a vociferous challenge and you are told by the Registrar "I am sorry Mr Whatever your Name is, your challenges are exhausted" you expire with disgust and your friend continues his journey to the jury box while the Crown leers at you.—MR W V GAZLEY to the Wellington Young Lawyers.