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INTER ALIA

Pacific Forum

The Pacific Forum at Porirua organised recently by the Wellington Young Lawyers represents an initiative the significance of which it is too early to judge. Certainly to gather 500 to a seminar, including Mr Justice O'Regan, Sir Guy Powles, Dr Martyn Finlay QC, several Magistrates, Members of Parliament both present and aspiring, Mr Lester Castle and over 100 practitioners was no minor achievement. Yet the law came to listen and to learn, and it was in this educative role that perhaps the greatest benefits have accrued.

The voices of the Island community leaders, from Samoa, the Cooks, Niue, the Tokelaus, Fiji and Tonga, were at times strident but generally conciliatory, and the palangi present certainly came away with a heightened awareness of the problems faced by these migrant communities.

None demurred from Mr M J O'Brien QC when he stated that we must all live under the one law, and all would have agreed with his rider that how individuals are dealt with under that law can be quite another matter altogether.

The emphasis was on legal services, translation services, simplicity of Court procedures, pre-education for intending migrants, further education when they arrive and, above all, for the Court to be able to communicate with the Islanders it has to deal with and to be aware of how the customs of their home island groups may have contributed to their offending.

The challenge to the profession is not limited to the communication of rights and obligations to the Polynesian Islanders, but involves their knowing about and understanding the Islanders' way of life. Unless one accepts that the New Zealand attitude should be "conform, or get out" (as one speaker summmarised it) a heightened awareness is called for. Hopefully the JOURNAL will be able to play its part in this by publishing relevant articles from time to time.

Migration

The Pacific Forum included a study group on cultural interaction which stressed that our migration patterns and policies are breaking up the Islanders' concept of the extended family. It noted that in cases of criminal behaviour the penalty imposed by a Court is often minor compared to the sense of shame felt by the whole family group.

The group observed that when the extended family is broken up, this essential self-disciplining factor is lost and concluded that Government migration policies should be studied in this light. Further, housing authorities should be encouraged to build larger homes so that where there are elements of an extended family group here, they can be housed together.

Alcohol and the Islander

The Forum also looked at the problems of alcohol and the Pacific Islander against the background of remarks made by Mr Justice Speight in the Supreme Court at Auckland only two days before.

There seemed to be an overwhelming consensus that the problem is not only grave but is in reality a palangi (or pakeha) problem.

Given the dimensions of the New Zealand appetite for alcohol and the pattern of our drinking habits, it would indeed be astonishing if the migrating Pacific Islander, coming as he does from a community given to moderation, was other than completely out of his depth.

Presenting the conclusions of his study group,

Mr Martin Dawson noted only half in jest that the minority group with an alcohol problem in Australia seemed to be comprised of New Zealanders.

Research into the country's alcohol problem was seen as a possible solution, and the plenary session urged immediate implementation of the Royal Commission's recommendation that a Liquor Advisory Council be established.

JEREMY POPE

REALISING EQUALITY

An edited version of an address by the HON MR JUSTICE O'REGAN *to the Pacific Forum held recently at Porirua.*

Our New Zealand society has in the last generation undergone very marked changes. In that time it has become a multi-racial society. Those of us who grew up and were trained in the society which preceded it, and who in our various vocations served and serviced it, gave little thought to the changes that were required in our attitudes, in our thinking and indeed in the breadth and depth and in the nature of our services to the communities of the fifties and sixties and now the seventies. But the generation which came to adulthood during those changes in our society saw those needs, and what is more set about to meet them, and in doing that have brought to their elders a realisation and an appreciation of those needs. The elders and leaders of the Pacific Islands communities have also seen the extent of those needs, and today we witness the collaboration of both in what I am sure is a fruitful enterprise. A rudimentary concept of the law in a society such as ours is that it provides a formal guarantee of equality of treatment to each and every citizen. I ask you to note that I said a 'formal guarantee of equality of treatment' to each and all. I have no doubt that our legal system does provide that. But it is idle to speak of equality of treatment and guarantees of equal treatment to all when there are members of our community, who have difficulties with the first language of the community, or are unfamiliar with our institutions, or with the concepts of rights and duties which the born New Zealander gains during his education and gets from familiarity with people and institutions. It is idle so to speak when there are members of our community who, when visited with a wrong or beset with a social problem, or who when confronted by an apparent breach of the rules which govern society, do not know where to turn to have wrongs righted or to find protection and support. The very presence of such a large number of lawyers today demonstrates that they are ready to do their part in meeting such needs. I am sure that your association with them today will bring you to realise that they are not a remote distant people but are modestly dedicated to serving when such needs arise. They are accustomed to dealing with problems big and small of the members of the community. Indeed, the difficulties and problems of people are the very core of their vocation. They for their part, will, through this meeting come to learn more of the areas in your new way of life which occasion difficulty and they will take an appreciation on how differences between the cultures in which you were reared and those of the society of which you are now a part, affect your lives and the living of them.

Our legal system is structured to meet the needs of all people. With state-funded legal aid schemes, lack of means is no longer a bar to the righting of wrongs or to the protection and assistance of those in trouble. The Courts, as far as human fallability allows, are there to do justice for all manner of men. The need is then to provide information, avenues of communication, and ready access to persons and agencies, to the lawyer, to the counsellor, to the welfare worker, all of whom can see to it that legal rights and formal guarantees become realities. May I conclude by expressing admiration to all those who have laboured to bring this day to fruition. I will not name names but I'll gather them all in you, Mr Chairman, and express my admiration and appreciation.

Long odds—The Race Relations Conciliator was asked—with touching faith in its linguistic skill—to name a kennel (or dog-breeding establishment). The Office obliged by suggesting "Kuriroa", meaning "long dog", because the founding stud animals were dachshunds.

CASE AND COMMENT

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

Maintenance after divorce

Fletcher v Fletcher is a decision of great importance to practitioners. Wilson J gave judgment on 22 August last.

This was an application for ancillary relief by the respondent wife in which she claimed permanent maintenance and a capital sum. The parties had been divorced at the end of 1974, not having lived together for about 20 years. The facts need not detain us. Having refused to make an order for a capital sum, however, his Honour stated:

"With regard to the question of permanent maintenance, there is a subsisting and valid order for maintenance in the Magistrate's Court. If I make an order here, it would simply mean that all proceedings in future would have to be taken in this Court with its attendant expense and possibly greater delay. That may be avoided by filing the order in the Magistrate's Court. Frankly, I see no point in it. Why should this Court make an order when there is a subsisting one by a Court of competent jurisdiction? The Judges have consistently set their faces against doing so. It only encourages extra expense and sometimes extra delay; as a matter of policy it ought to be discouraged. Accordingly I do not propose to make an order for permanent maintenance, the substantial reason being that she has not proved the need for it because she has a valid and enforceable order at present.

"The application is therefore dismissed, and that means that the whole application for ancillary relief is dismissed. There will be no order for costs."

This constitutes a stern reminder to those practising in the divorce Courts.

P R H W

A new look at the authenticated signature fiction:

The judgment of Wilson J in *Sturt v McInnes* [1974] 1 NZLR 929 is a valuable re-examination of the principles relating to that development in the law of contract which has become generally known as "the authenticated signature fiction" and is therefore of considerable importance to conveyancing practitioners.

The development of the fiction ranges over a century and a half of decisions of the English Courts. Section 4 of the Statute of Frauds 1677 (UK) contained a provision substantially the same as s 2 (2) of the Contracts Enforcement Act 1956 (NZ) that no contract for the sale of land "shall be enforceable by action unless the contract or some memorandum or note thereof is in writing and is signed by the party to be charged therewith or by some other person lawfully authorised by him".

As the name implies, and as is stated in the Statute of Frauds, its object was the "prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and the subornation of perjury". The need for such a provision in 1677 becomes clearer if it is remembered that at that time the parties to an action could not testify.

However, it became apparent that section 4 of the Statute could be used by an unscrupulous party to a contract to knowingly break a bargain for his own benefit and to the detriment of the other party. The authenticated signature fiction and the doctrine of part performance were both developed by the Courts of Equity in an effort to prevent such an abuse of the terms of Section 4 of the Statute.

From a careful consideration of the line of English cases on the point, starting with *Schneider v Norris* (1814) 2 M & S 286; 105 ER 388, his Honour elicited the following conditions precedent to application of the fiction:

"(1) The contract, or the memorandum containing the terms of contract, must have been prepared by the party sought to be charged, or by his agent duly authorised in that behalf, and must have that party's name written or printed on it.

"(2) It must be handed or sent by that party, or his authorised agent, to the other party for that other party to sign.

"(3) It must be shown, either from the form of the document or from the surrounding circumstances, that it is not intended to be signed by anyone other than the party to whom it is sent and that, when signed by him, it shall constitute a complete and binding contract between the parties". (page 733, line 54 and page 734, lines 1-10)

Two recent New Zealand Supreme Court decisions were then considered: *Bilsland v Terry* [1972] NZLR 43, and *Short v Graeme Marsh Ltd* [1974] 1 NZLR 722. In both these cases the authenticated signature fiction was applied to enable the Court to find that s 2 (2) of the Contracts Enforcement Act 1956 had been complied with so that enforceable contracts existed, notwithstanding the fact that in neither case had the third condition been fulfilled. That is, in both cases there was no evidence that the parties did not intend that no further signature would be required. Wilson J declined to follow these two cases, and, with respect, his exhaustive discussion of the English authorities, leaves no doubt now that the three conditions set out in his judgment and reproduced above correctly represent the present state of the law.

The facts in *Sturt v McInnes* were as follows: The applicant entered into negotiations (on behalf of himself and his wife) with a Mrs Sutcliffe (on behalf of herself and her co-executrix, Mrs McInnes) for the purchase of a house property situated in a desirable residential suburb of Auckland, owned by the Cramp estate and struck an oral agreement with her for the sale and purchase of the property at the price of $40,000, subject only to the granting of probate to the executrixes. It was submitted that on 5 July 1973, Mrs Sutcliffe telephoned Mr Sturt, informed him that probate had been granted and asked him "to proceed with purchase arrangements." Mr Sturt averred that on Friday 6 July 1973 he telephoned a Mr Petch who was the salesman employed by the real estate agent acting for the vendors and asked him to draft the necessary sale agreement. The evidence was that Mr Petch later that day telephoned him informing him that he (Petch) had confirmed the terms of sale for incorporation in the agreement with the vendors and their solicitor. The agreement was prepared by Mr Petch, uplifted by Mr Sturt, and signed by him and Mrs Sturt the same day. At some time before the agreement was signed a clause was inserted, at the request of Mr Sturt, making the agreement subject to the purchasers being able to arrange the necessary finance by 27 July 1973 to enable them to complete the transaction. This was not a term of the oral agreement between the parties, and on the basis of the evidence it was held that the condition was inserted without the authority of the vendors. It had been arranged by Mr Sturt with the agent that the agreement would be returned to him for execution by the vendors on the following Monday, 9 July, but, on Sunday 8 July, Mrs McInnes informed Mr Sturt that she and Mrs Sutcliffe had signed an agreement to sell the property to another person for $42,000. The agreement was therefore never signed by or on behalf of the vendors. Mr Sturt and his wife lodged a caveat against the title to the property claiming an estate or interest under and by virtue of the agreement for sale and purchase. They subsequently received notice under s 145 of the Land Transfer Act 1952 that application had been made for registration of an interest affecting the estate or interest protected by the caveat. Within 14 days of receiving that notice, they filed an application for an order that the caveat should not be deemed to have lapsed. The decision in *Sturt v McInnes,* therefore, is on an application under s 145 of the Land Transfer Act 1952, and, while the major part of the judgment concerns the enforceability of the agreement for sale and purchase, it also contains a useful summary of Wilson J's interpretation of the requirements for an application under that section.

On the question of the enforceability of the contract, the decision reached was that it was clear that it was contemplated by both parties that the vendors should also sign the written agreement for sale and purchase, i.e., the third condition of those set out in the judgment as being necessary before the authenticated signature fiction could be applied had not been fulfilled. His Honour chose to follow the English authorities and concluded that, because of this, the contract was not enforceable, and refused the order sought.

However, his decision has as an alternative basis, the fact that the written agreement contained a "subject to finance" clause which was not a term of the oral agreement and the insertion of which had not been agreed to by the vendors. It would, therefore, still be possible to argue that the decision in *Sturt v McInnes* could be distinguished, if a case where the terms of the written agreement exactly expressed the oral agreement between the parties came before the Court, and it is respectfully submitted that a Court, faced with such a decision, could choose to follow *Bilsland v Terry* and *Short v Graeme Marsh Ltd.*

But, as we see it, and with respect, it would be difficult to disregard Wilson J's competent analysis of the English cases, or to dispute the validity of the conclusions which he has drawn from that analysis.

J C V and J A B O'K

English Cases Contributed by the Faculty of Law, University of Canterbury

Issue estoppel in the criminal law

For some time there have been doubts as to whether the doctrine of issue estoppel has any application in the criminal law (apart from the extent to which the doctrine is reflected in the special pleas available in New Zealand pursuant to sections 358 and 359 of the Crimes Act 1961). Some writers have been inclined to the view that dicta of the majority of the House of Lords in *Connelly v DPP* [1963] 3 All ER 510 establish that the doctrine does apply to the criminal law, at least to the extent that it may be relied upon by a defendant (eg Spencer-Bower and Turner, *Res Judicata* (2nd ed) 283-290), but others have been reluctant to concede this (eg Lanham, "Issue Estoppel in the English Criminal Law" [1970] Crim LR 428; Adams, *Criminal Law and Practice in New Zealand* (2nd ed), paras 2881-2883).

The critics of the doctrine emphasise that it may be extremely difficult, and will often be impossible, to identify what issue or issues have been determined in favour of an accused when a jury returns a general verdict of acquittal. Indeed, in some cases juries no doubt acquit for extra-legal reasons so that as a matter of fact no relevant issue is decided in favour of the accused. Furthermore, because the rule concerning the burden of proof requires an acquittal whenever there is a reasonable doubt on any essential question, it may be disputed whether the mere fact of acquittal should be regarded as conclusively establishing a particular issue in favour of an accused; and any such extension of the principles of estoppel may also be resisted on the ground that the doctrine may lead to injustice in that it has the effect of barring an allegation no matter how true it may be.

On the other hand, there are arguments in favour of the application of the doctrine: it promotes the object of finality to litigation, it tends to prevent undue harassment of a defendant and should encourage the prosecutor to be careful in preparing and presenting his initial case, and it prevents different tribunals returning inconsistent verdicts (Friedland, *Double Jeopardy* (1969), 117-118).

There are decisions of the High Court of Australia, the Supreme Court of Canada, and the Supreme Court of the United States supporting the application of the doctrine in favour of an accused (*Mraz (No 2)* (1956) 96 CLR 62; *Wilkes* (1948) 77 CLR 511, 518; *Feeley* (1963) 40 DLR (2d) 563; *Sealfon v US* 332 US 575 (1948)), and some support for this may be gained from the judgment of the Privy Council in *Sambasivam v Public Prosecutor, Federation of Malaysia* [1950] AC 458. More recently, in *R v Hogan* [1974] 2 All ER 142 Lawson J reviewed the authorities and, having noted that the relevant English authorities were not entirely consistent, concluded that "issue estoppel does apply between the Crown and the defendant in criminal proceedings". But *Hogan* is particularly noteworthy because Lawson J also held that as in civil proceedings the doctrine applied "with mutuality", so that it could be relied upon by the Crown as well as by the defendant. This appears to be the first time that this issue has actually arisen (cf the doubts of Lord Devlin in *Connelly v D P P* [1964] AC 1254, 1343) and although the conclusion may appear somewhat harsh it is an entirely logical one if the doctrine is to be available to the defendant; moreover, the case for applying the doctrine in favour of the Crown is strengthened by the fact that in the earlier proceedings the Crown, unlike the defendant, will have had to prove the issues beyond a reasonable doubt. Lawson J also held that in deciding whether any particular issue or issues had been determined in the previous proceedings the Court was not confined to the formal record of the charge and verdict, but should also look to what the evidence in fact was and what issues were in fact left to the jury. This approach has been adopted in all the jurisdictions where the doctrine has been applied. Although it may result in a difficult process of analysis, which is often likely to fail to reveal any particular issue as having been decided, yet it would seem to be the only possible approach if the doctrine is to have any practical utility outside cases already covered by the special pleas. In *Hogan* the defendant in the first trial had been charged with causing grievous bodily harm with intent to cause grievous bodily harm. At that trial the defendant raised the issue of self-defence, but was nevertheless convicted. Thus, it was plain that the jury had determined: (1) that the victim suffered grievous bodily harm, (2) that that had been inflicted by the defendant who had intended to inflict such harm, and (3) that the defendant had not acted in self-defence (indeed, Lawson J appears to accept

that, for the purpose of issue estoppel, the conviction should be taken to show that all defences which could have been available to such a charge had been negatived, regardless of which ones the defendant had actually relied upon—at least where the offence was defined as doing something "without lawful excuse"). About a month after this conviction the victim had died and the defendant was then charged with murder, this charge being based on the allegation that death had resulted from the offence he had already been convicted of. The result of Lawson J's conclusion that the Crown was entitled to rely on issue estoppel was that the above three factors were held to be conclusively established against the defendant in the murder trial. This effectively left only two issues for the jury in that trial: had the defendant's conduct caused death and had the prosecution negatived the partial defence of provocation—neither of these questions had been, or could have been, in issue in the earlier trial. The jury proceeded to acquit the defendant, and one may speculate as to whether this might have resulted from irritation at being told that most of the real issues were not for them to consider. It may be added that in New Zealand the second indictment in a case such as *Hogan* would be effectively barred by the particular extension of the pleas of autrefois acquit and autrefois convict which is found in s 359 (3) of the Crimes Act 1961.

Hogan has now been approved and applied by the English Court of Appeal in *R v Humphrys* [1975] 2 All ER 1023. This decision is more orthodox in that the doctrine was successfully relied upon by a defendant, but it is another rather special case in that the Court applied the doctrine to effectively bar a charge of perjury based on evidence the defendant gave in the earlier proceedings. In *Humphrys* the defendant had first been charged with driving while disqualified. At the trial it was admitted that the defendant was disqualified at the relevant time and a police constable gave evidence identifying the defendant as having been seen by the constable driving on a particular day. The defendant then gave evidence that he had not driven on that day, or at any time during that year. He was acquitted. Subsequently, the prosecution acquired further evidence suggesting the defendant had in fact been guilty and the defendant was then charged with perjury. In the process of seeking to establish this charge the police constable was again called to give evidence and gave precisely the same evidence as before concerning the defendant's alleged driving: in the result the defendant was convicted of perjury. The Court of Appeal held that the doctrine of issue estoppel applied to the criminal law. From an examination of the earlier proceedings it was clear (and the prosecution agreed) that the only issue that the jury had been left to decide was whether the defendant had indeed been driving on the day in question. The verdict showed that the jury could not have been satisfied that the defendant had been driving at that time: that issue had been pronounced upon in proceedings between the same parties as were now before the Court, and the result was that it was not open to the prosecution to seek once again to prove this allegation. Thus, the Court concluded, the police constable's evidence directed to establishing it was inadmissible and the perjury conviction had to be quashed.

Although the Court expresses its conclusions as being based on the inadmissibility of evidence which is inconsistent with the earlier determination, it would seem that the reasoning of the Court also leads to the conclusion that the prosecution was barred from alleging that the defendant lied when he denied driving on the occasion in question, for it is apparent that that issue must also have been determined in his favour in the earlier trial: it is hardly realistic to attempt to distinguish that issue from the issue of whether he in fact drove or not.

In reaching its conclusion the Court of Appeal rejected an argument that even if issue estoppel was generally applicable in the criminal law, yet it should not apply to bar a perjury charge—to allow the defence in such a case would be contrary to public policy. The Court took the view that in the absence of any authority to support such an exception it should be left to Parliament or the House of Lords to consider whether public policy required it.

In fact it would appear that there have been occasions in England where perjury charges have succeeded in situations which seem indistinguishable from *Humphrys*, although it does not appear that the question of a possible estoppel was raised: see *R v Tilsley* (1938) 3 Journal of Criminal Law 40; Glanville Williams, *The Proof of Guilt* (3rd ed), 67-69. Moreover, in this country there is at least one recent case where the Supreme Court has held, after argument on the point, that issue estoppel can provide no defence to a charge of perjury in such a situation, even if it may be available in other contexts in the criminal law: *R v*

Morrison (unreported, SC, Christchurch, 13 September 1974, Roper J; see Summary of Recent Law [1974] NZLJ 482).

The arguments in favour of a special exception in the case of perjury seem to be that it is wrong in principle to allow the defendant immunity when he succeeds in avoiding punishment for one crime by committing another, that it will encourage perjury, and that it would frustrate the object which Parliament had in providing for the punishment of perjury (cf Friedland, *Double Jeopardy* (1969), 157-160). Against this it may be said that an accused has a powerful incentive to perjure himself, which is often likely to negate any effect the risk of subsequent proceedings might have, and Parliament's object is only "frustrated" in a very particular class of case: when it is the accused himself who gives evidence in his own trial and it is plain that in acquitting him the jury must have accepted that his evidence might be true. Furthermore, the decision in *Humphrys* might not be an unmixed blessing to defendants: assuming that *Hogan* is correct it would seem to follow that an accused who is convicted after having given exculpatory testimony would have no defence to a subsequent charge of perjury (Cp *R v Wookey* (1899) 63 JP 409 where such a charge was brought and the issue was left to the jury to decide, but this was long before issue estoppel had raised its difficult head). However, it is no doubt true that charges of perjury in such cases will continue to be even more unusual than in cases where the accused has been acquitted in the first trial.

G F O (See also p 703)

Rape by mistake and secondary parties

In *D P P v Morgan* [1975] 2 All ER 347 the House of Lords held that it is a defence to a charge of rape that the defendant honestly but mistakenly believed the victim was consenting even though there were no reasonable grounds for that belief. No doubt such cases will be very rare but that they may occur is apparent from the subsequent decision in *R v Cogan* [1975] 2 All ER 1059; this is also of interest in that it deals with the criminal liability of a person who deliberately procures the act of intercourse.

The facts in *Cogan* bore some similarity to the defendants' story in *Morgan* in that the alleged mistake was again induced by the victim's husband. On the day before the incident the victim's husband, Leak, had severely beaten his wife after she had refused to give him some money. The next day Leak brought Cogan home with him, both of them having been drinking. Leak ordered his wife to undress and he asked Cogan if he wanted to have intercourse with her; Cogan declined but, after Leak had had intercourse with her in Cogan's presence he accepted a further such invitation from Leak. Leak remained in the room and throughout the episode the victim neither struggled nor protested, although she was sobbing. The Court of Appeal held that there was ample evidence that the victim did not in fact consent to any of this; she had merely submitted because she was frightened of what Leak might do. Furthermore, it was apparent that Leak knew this and, indeed, he had admitted that he had intended that his wife be raped by Cogan "in order to punish her for past misconduct". In New Zealand this would seem to be a case where it would be open to a jury to find that rape had been committed because there had been sexual intercourse "with consent extorted by fear of bodily harm or threats" (s 128 (1) (b) of the Crimes Act 1961).

As a result of these events Cogan was charged with rape and Leak with having aided and abetted "the said offence". At the trial Cogan gave evidence to the effect that he had thought the victim had consented, this belief being attributed to "what he had heard from her husband about her", and the effect of the drink he had consumed (the element of intoxication will now raise few special problems: *R v Kamipeli*, unreported, 6 June 1975, New Zealand Court of Appeal; *R v Sheehan* [1975] 2 All ER 960 (CA)). The jury returned verdicts of guilty against both defendants, but at the time of the trial leave had been given for the appeal to the House of Lords in *Morgan*, so the trial Judge obtained from the jury an explanation of their verdict in respect of Cogan. They said that he had believed the victim was consenting but that he had had no reasonable grounds for such belief. The inevitable result of this was that Cogan's conviction was quashed by the Court of Appeal.

The Court then had to consider the position of Leak. No one would suggest that his case had any merits. He had deliberately induced Cogan to have sexual intercourse with his wife, knowing she did not consent; he had known what the case against him was and the facts supporting that case had been proved. The Court commented that in these circumstances it would be more than anomolous if Leak was entitled to an acquittal merely because Cogan was: "it would be an affront to justice and to

the common sense of ordinary folk" [1975] 2 All ER 1059, 1063 per Lawton LJ.

Nevertheless, there was a technical problem. Cogan had not only been acquitted: facts had been found showing that he was innocent of the offence charged. Could Leak be convicted on a count charging him as a secondary party to an offence allegedly committed by Cogan when the facts showed that neither Cogan nor anyone else actually committed the offence?

There was the added complication that Leak was the victim's husband, but the Court had no difficulty disposing of this. As under the Crimes Act the husband's common law immunity from conviction for the rape of his wife is confined to his own act of intercourse, there being no basis for any presumption of consent in any other case (Hale, *1 Pleas of the Crown* 629; Crimes Act 1961, s 128 (3)). Thus, it has long been the law that a husband can be convicted as a secondary party to the rape of his wife by another (*Audley, Earl of Castlehaven* (1631) 3 St Tr 401: a clear case where the indictment was for the rape of the accused's wife by "holding her by force, while one of his minions forcibly, against her will, had carnal knowledge of her.").

The Court of Appeal concluded that Cogan's innocence did not affect Leak's conviction. Two rather different lines of reasoning were used to achieve this result. Firstly, it was said that Leak had set out to achieve the actus reus of the offence (sexual intercourse without the female's consent) and had persuaded Cogan "to use his body as the instrument for the necessary physical act". Cogan was ignorant of an essential circumstance and was thus an "innocent agent", with the result that, in the old terminology of the law, Leak was "a principal in the first degree". Leak could have been charged as a principal and it would be wrong to allow him to go free merely because he had been charged as an "aider and abettor": "convictions should not be upset because of mere technicalities of pleading in an indictment", [1975] 2 All ER 1059, 1062 per Lawton LJ.

Alternatively, the Court suggested that even though Cogan was "innocent of rape", yet nevertheless "the wife had been raped", that fact was "clear", or, at least, "no one outside a Court of law would say that she had not been". Here the suggestion seems to be that even if a person can be convicted on a count of aiding and abetting only if the alleged offence has actually been committed, yet for the purpose of this rule that "offence" is committed if the actus reus is effected, and notwithstanding any lack of mens rea on the part of the alleged principal. The Court seems to accept that it might be different if the alleged principal was innocent because in law he was incapable of committing the offence, as in the case of young children at common law: [1975] 2 All ER 1059, 1061-1062, where *Walters v Lunt* [1951] 2 All ER 645 is distinguished.

Of course, these two lines of reasoning lead to the same result, and the second approach would only be needed if it were accepted that a defendant's conviction can only be sustained if his mode of participation in the alleged offence is accurately described in the indictment. On the other hand, it may be noted that the second approach is effectively one propounded in Smith and Hogan, *Criminal Law* (3rd ed), 106-109. It is there suggested that the doctrine of innocent agency should not be extended to certain offences because an indictment framed in a way which suggests that the defendant was the principal offender would be misleading or could even be described as "quite plainly untrue". For example, if a defendant abetted the offence of bigamy by encouraging two people to marry, they being ignorant of the fact that one of them was already married, it would be untrue to allege that the defendant actually committed the offence, for he did not marry anyone. To avoid such fiction, which seems to be inherent in the innocent agency principle, Smith and Hogan suggest that the deliberate abetting of an actus reus is always an offence and should be charged as such (ie it should be charged as abetting). This is suggested as "a more elegant solution", although it may be noted that it also involves a fiction because it suggests that someone other than the defendant has committed an offence, which is not true. The authorities do not provide really clear guidance on this question. In the nineteenth century defendants alleged to be responsible for felonies as a result of the activities of innocent agents could be convicted on counts charging them as principals in the first degree, but not on counts charging them as aiders and abettors; and this was because the agent was not himself guilty (eg *Tyler* (1838) 8 C & P 616; 173 ER 643; *Michael* (1840) 9 C & P 356; 173 ER 867; *Manley* (1844) 1 Cox CC 104). At the same time convictions were upheld in innocent agency cases even though the counts were misleading in that they were so framed as to suggest that the defendant had himself done the acts constituting the offence (eg *Bannen* (1844) 2 Mood

309; 169 ER 123; *Valler* (1844) 1 Cox CC 84; *Michael,* supra; cf *Butt* (1884) 15 Cox CC 564). On the other hand, the modern case of *Bourne* (1952) 36 Cr App R 125 provides support for the Smith and Hogan approach in that the defendant's conviction on a count charging the abetting of the offence of bestiality was affirmed even though the person allegedly abetted would have been entitled to an acquittal because she acted under compulsion from the defendant.

Cogan suggests that the short answer to these doubts is that it does not really matter how the count is framed, provided the defendant has fair notice of the case he has to answer. There can be few quibbles with this conclusion, which is the same as that arrived at by a Rhodesian Court in *R v D* 1969 (2) SA 591 (App Div) where the charge and the facts were essentially the same as in *Cogan*. The substantial ruling in *Cogan,* to the effect that the innocence of the principal actor provided the procurer with no defence, also seems to be perfectly acceptable, although it may be noted that the English Courts appear to take a rather different view when the person actually effecting the actus reus is guilty of some offence. In that case it has been held that a secondary party can not be guilty of a more serious offence than the principal, even though the secondary party may have acted with an intention appropriate to the more serious offence, provided, at least, that the secondary party was not present when the actus reus was effected: *R v Richards (Isabelle)* [1973] 3 All ER 1088; criticised by Professor Smith, [1974] Crim LR 96.

The extent to which *Cogan* will apply in New Zealand might be disputed. There can be little doubt that a mere error in the manner in which a defendant's participation in an offence is described in the indictment will not avail him: it is usually unnecessary for a count to state how a defendant became a party to the alleged offence (s 343 of the Crimes Act 1961), and a count is not vitiated merely because it contains insufficient detail of the conduct to be proved against a defendant (s 329 (4)). Furthermore, even if it was thought that a count did misdescribe a defendant's mode of participation it is likely that that alone would not prejudice him so that on any appeal against conviction the proviso could be applied, and any such variance between the proof and the charge could doubtless be cured by amendment by the trial Judge or the Court of Appeal (s 335).

Rather more difficulty may be encountered in New Zealand when it is sought to explain how a defendant in a case like *Cogan* can be held criminally responsible for conduct which few would suggest should be other than criminal. The difficulty lies in the fact that there is no provision of universal application in the Crimes Act 1961 which is really apt to deal with cases where innocent agents are knowingly employed. Where a person is entitled to an acquittal on the grounds of infancy or insanity, the liability of other parties to the "offence" is expressly preserved by ss 21, 22 and 23. It may even be that a person with a defence under these sections remains in theory guilty of an offence, although immune from conviction, at least when the infancy or insanity does not in fact result in the absence of some intention or knowledge which is an element of the offence charged (cf Adams, *Criminal Law and Practice in New Zealand* (2nd ed), paras 388-391). Certainly, the defence of compulsion in section 24 is so worded as to suggest that conclusion, so the same result as in *Bourne* could readily be arrived at here. But there is no statutory provision giving a similarly clear answer when a defendant realises his agent is innocent of any offence simply because he is labouring under ignorance of some fact or mistake.

Section 311 (2) makes it an offence to unsuccessfully seek to procure another to commit "any offence", which term is defined in s 2 as "any act or omission for which any one can be punished . . ." It seems clear that a defendant does not fall within this provision if he realises or believes that the agent he incites lacks some knowledge required for the offence allegedly incited: cf *Curr* [1967] 1 All ER 478; Smith and Hogan, *Criminal Law* (3rd ed), 174; Adams, op cit, para 2375. A somewhat similar problem arises if it is sought to attach liability pursuant to the provisions relating to secondary parties in section 66. There can certainly be no liability under that section where the actus reus of the alleged offence is not committed (*R v Bowern* (1915) 34 NZLR 696), but the wording of section 66 goes further and in terms strikes only at secondary parties to "an offence" committed by another. If this is correct reliance has to be placed on s 66 (1) (a) which renders liable everyone who "actually commits the offence". It has been assumed that the common law doctrine of innocent agency can be applied to this provision: ie the Courts of this country can still apply the fiction that in law the innocent

agent's act is regarded as the act of the procurer (see Adams, op cit para 643; *Garrow and Willis's Criminal Law* (5th ed), 54; Burns, *Casebook in the Law of Crimes* (2nd ed), 263-264). Such a conclusion requires a considerable distortion of the words in s 66 (1) (a). For example, in a case such as *Cogan* the "offence" is rape; this necessarily involves the act of a male having sexual intercourse with a female without her consent (s 128 (1)), but a defendant does not "actually commit the offence", in any ordinary sense of those words, unless he is the one who actually has sexual intercourse. To impose liability in such a case as this would seem to require a process of "interpretation" which in substance amounts to rewriting the statute. But if a case akin to *Cogan* were to arise it would not be surprising to find the Judges willing to do this, and it would doubtless be explained on the basis that the terms of s 66 do not sufficiently disclose any intention to depart from the common law principles relating to innocent agents.

G F O

JURISTS' SEPTEMBER MEETING

The Council of the New Zealand Section of the International Commission of Jurists held its last meeting in Wellington on 11 September. This was the first meeting of the Council since the annual meeting in July and Mr G E Bisson of Napier and Mr A C Brassington of Christchurch were re-elected Chairman and Vice Chairman respectively.

The Council noted with great pleasure the unanimous election of Sir Guy Powles as one of the three new members of the International Commission of Jurists which was announced in Geneva on 29 July 1975. Membership of the Commission is confined to not more than 40 distinguished lawyers from all parts of the world. The last New Zealand member was the late Sir Leslie Monroe. The Council expressed its gratification at the election of Sir Guy Powles, particularly in view of his long association with, and support for, the New Zealand Section.

In the light of the recent decision of *Mihaka v R* (Unreported, 26 March 1975) in which Mr Justice O'Regan held that there was no right of appeal against either conviction or sentence for contempt of Court from the Magistrate's Court, the Council has written to the Attorney-General endorsing the Judge's view that there should be legislative intervention to overcome this anomaly and to provide a right of appeal. The Council considered that as it was not a politically contentious matter it could be dealt with as a matter of urgency.

On the Government's proposal to review the Offical Secrets Act legislation next year, the Council is writing to the Attorney-General asking that its interest in this legislation be recorded and also asking for the opportunity, as was afforded to it in the case of the Wanganui Computer Centre, to make comments before new legislation is finally prepared and introduced.

The Council is still considering the questions of a written constitution and a bill of rights.

The Council also decided that a letter be written urgently to the Prime Minister and the Attorney-General drawing attention to unease amongst members of the New Zealand Section to the Criminal Justice Amendment Bill (No 2) relating to the suppression of names of accused persons and suggesting a public review of the operation of the Bill at the expiration of 12 months to ensure that it has been working satisfactorily.

On the law of privacy Dr Paterson reported that he and the Secretary had attended the meeting of the Statutes Revision Committee on 10 September in support of the Section's written submissions on the Wanganui Computer Centre Bill. Dr Paterson reported that the submissions had been sympathetically received by the Attorney-General, and that the Government members of the Committee had not taken issue with the Section's suggestions.

Membership of the New Zealand Section is open to all interested lawyers in New Zealand and applications for membership should be addressed to the Secretary, Mr D J White, PO Box 59, Wellington.

ISSUE ESTOPPEL IN CRIMINAL PROCEEDINGS

JOHN MILLER, *a junior lecturer at the Victoria University of Wellington, argues that issue estoppel is available as a common law defence to criminal proceeding in New Zealand.*
(See also note by G F O on p 699)

Issue estoppel, is one aspect of res judicata in the criminal law and the name given to the proposition that "once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again"(*a*).

A clear example of the operation of issue estoppel in a criminal case is provided by the Australian case of *R v Flood* [1956] Tas SR 95. There a prisoner undergoing sentence in a penal institution was charged with crimes which were alleged to have been committed outside the prison during his legal confinement. It was contended that he committed the offences while unlawfully absent from the prison at night. He was first tried for the offence of escaping and while the jury were considering their verdict on that count a second trial was commenced for the substantive offences alleged to have been committed during the escape. In the middle of the second trial however, and much to the consternation of the Crown, the first jury returned a verdict of not guilty on the charge of escaping. The Judge invoked the doctrine of issue estoppel and ruled that the Crown was estopped in the second trial from alleging that the prisoner had escaped, as that issue had already been distinctly determined in the prisoner's favour by the first trial. The jury was directed to return a verdict of not guilty, as proof of the escape was essential in the second trial to establish opportunity to commit the substantive offences charged.

Another example of the operation of issue estoppel is the Canadian case of *R v Gill* (1962) 38 CR 122. There, the accused was charged with killing his son by criminal negligence. The case arose out of a shotgun blast which killed the accused's wife and son. He had previously been acquitted of killing his wife, his defence being that he was in the process of cleaning his gun when it accidently went off. The jury at the trial or killing his wife had held that his act did not constitute criminal negligence. He was, however, found guilty at the second trial of killing his son by criminal negligence. The Quebec Court of Appeal quashed his conviction on the grounds that it was an infringement of the doctrine of issue estoppel to allow the Crown to fight the issue of criminal negligence all over again when it had already been determined in the accused's favour by the first jury.

In both of the above cases the plea of autrefois acquit was rejected because the charges were not identical in each trial and it could not be said that the accused had been in jeopardy on the first trial to the charges in which they were in jeopardy on the second trial(*b*).

Issue estoppel thus differs from the autrefois pleas in that it does not have these restrictions. On the other hand there are two main restrictions on the operation of the doctrine of issue estoppel which are not placed on the autrefois pleas. These restrictions are that the issues raised for determination in the second trial must be the same as the issues conclusively determined in the first trial. Secondly the parties to both trials must be the same(*c*).

Thus both these aspects of res judicata complement each other. If the autrefois pleas are not available then issue estoppel may well be and vice versa.

Yet in criminal proceedings in New Zealand only the autrefois pleas are usually raised; the doctrine of issue estoppel is almost completely disregarded.

There are several explanations for this. The principal one is perhaps that the doctrine of issue estoppel is still developing and there are problems (which will be discussed later) concerning its scope and application. However these problems have not disuaded criminal Courts in other jurisdictions from accepting the doctrine.

It has been applied in the highest Courts of Canada(*d*), the United States(*e*) and Australia(*f*). The Privy Council applied it in an

(*a*) *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, 640 per Lord Denning.

(*b*) The position in New Zealand is similar; see s 358 of the Crimes Act 1961.

(*c*) *Re a Medical Practitioner* [1959] NZLR 784.

appeal from Malaya in 1950(*g*) and it was recognised (but the circumstances did not require it to be applied) by the House of Lords in *Connelly v D P P* (*h*). It has now been applied in England in *R v Hogan* [1974] 2 All ER 142(*i*).

Issue estoppel has long enjoyed acceptance in civil proceedings overseas (although the actual term is comparatively new)(*j*) and it is clearly available in civil proceedings in New Zealand(*k*). In criminal proceedings however there appears to have been only two cases in New Zealand in which the doctrine has been considered. These are *Re a Medical Practitioner* [1959] NZLR 784 and *R v Morrison* (T 47/74 Supreme Court Christchurch 13/9/74 (unreported)). In the former case a medical practioner who had been acquitted in the Supreme Court of indecently assaulting a patient sought to prevent the members of an Investigation Committee appointed under the Medical Practitioners Act 1950 from investigating a complaint of infamous conduct based on the same alleged indecent assault. In the Supreme Court (reported at [1959] NZLR 301) McGregor J decided that the proceedings were in the nature of criminal or quasi criminal proceedings and that the parties were the same, ie the Crown and the doctor in both proceedings(*l*). He accepted counsel's submission that issue estoppel applied and the plaintiff was granted a declaration, that the issue whether or not the plaintiff did indecently assault the patient was res judicata in the proceedings before the Medical Council. However this judgment was reversed in the Court of Appeal on the grounds firstly, that the parties were not the same(*m*) and secondly, that there could not be identity with the issues in the second proceedings because the issues in the latter proceeding had not even been formulated. The interesting point about the judgments in this case is that they proceed on the basis that issue estoppel(*n*) is available in criminal proceedings in New Zealand(*o*).

In *R v Morrison* the accused was charged with perjury. The facts of the case were that Morrison in a previous trial had been found not guilty on a charge of theft. At his trial the accused's defence had been one of alibi which was confirmed by a witness. Subsequently the witness was charged and pleaded guilty to perjury concerning his confirmation of the accused's alibi. The accused was then charged with perjury and found guilty. His counsel then made a belated application pursuant to s 347 (3) of the Crimes Act 1961 for the accused's discharge on the ground that the doctrine of issue estoppel applied. His argument was that the crucial issue in the first trial was one of alibi and this issue must have been resolved in the accused's favour because he was acquitted. Consequently that same issue which was again crucial in the second trial could not be reconsidered by the second jury.

Roper J rejected the argument. He said "it is unnecessary for me to decide whether the doctrine of issue estoppel is available in the criminal law of New Zealand or, if it is, whether there was sufficient isolation and determination of the fact here in dispute by the first jury's verdict of not guilty to found a plea of issue estoppel, for I am of the firm opinion that if the plea is available in New Zealand, and there has here been a sufficient determination of the disputed fact, which I doubt, the plea could never be available to inhibit an inquiry into possible perjury"(*p*). The problem of issue estoppel and its application to perjury will be considered later. It is clear from this judgment however that there is still some doubt about the availability of issue estoppel in New Zealand criminal proceedings in spite of the Court of Appeal's implied approval of the doctrine.

(*d*) ***R v Feeley, McDermott and Wright*** [1963] 3 CCC 201 recognised but not applied on the facts of that case; ***Kienapple v The Queen*** [1974] 15 CCC 524. The concept is usually referred to as res judicata in Canada.

(*e*) ***Sealfon v US*** 332 US 575 (1948); ***US v Oppenheimer*** 242 US 85 (1916). The concept is usually referred to as collateral estoppel or res judicata in the US.

(*f*) ***R v Wilkes*** (1948) 77 CLR 511; ***Mraz v The Queen (No 2)*** (1956) 96 CLR 62.

(*g*) ***Sambasivam v Public Prosecutor, Federation of Malaya*** [1950] AC 458.

(*h*) [1964] 1 AC 1254 but see the strong criticisms of Lord Devlin at pp 1345-6.

(*i*) Affirmed and applied in ***R v Humphrys*** [1975] 2 All ER 1023 (CCA).

(*j*) ***Carl Zeiss Stiftung v Rayner N Keeler Ltd (No 2)*** [1967] 1 AC 853, 913 per Lord Reid.

(*k*) ***Craddocks Transport Ltd v Stuart*** [1970] NZLR 499 (CA).

(*l*) The Medical Practitioners Act 1950 requires that complaints are to be made to a Crown Solicitor and further steps are taken by the Solicitor-General.

(*m*) In the second proceedings although the duty prescribed by s 43 (c) of the Medical Practitioners Act was imposed on the Solicitor-General he did not represent the Crown in discharging that duty.

(*n*) The S C and C A used the explanations of Issue Estoppel given in the Australian cases of ***Wilkes*** and ***Mraz*** supra.

(*o*) The C A, however, did not consider the second proceedings to be criminal.

(*p*) On the grounds of public policy.

The explanation for this may well be the hostility of some New Zealand writers to its adoption here(*q*).

In particular, the late Sir Francis Adams thought that ". . . no good, and considerable harm, would result from acceptance of this doctrine in the criminal field"(*r*).

His reasons for this statement were mainly based on the difficulties involved in the application of the doctrine to criminal proceedings. These difficulties were:

(1) The difficulty of isolating the issues in criminal proceedings.

(2) The difficulty of a lack of a positive determination in criminal proceedings.

(3) The difficulty of allowing the prosecution as well as the defendant the benefit of issue estoppel.

Sir Francis also considered that ". . . the common law doctrine of autrefois acquit and autrefois convict, and the sections of our code based thereon, represent the form in which, and the extent to which, such questions (ie issue estoppel) are intended to be disposed of in criminal trials"(*s*). This comment however, overlooks the fact that in Canada there are almost identical codified provisions dealing with the autrefois pleas and yet issue estoppel still features prominently as a common law defence under the Canadian equivalent to Section 20 of our Crimes Act 1961(*s*).

The effect of s 20 will be considered later but for the moment the three difficulties envisaged by Sir Francis Adams call for examination and comment.

1 The first difficulty envisaged by Sir Francis Adams was that of isolating the issues. The main problem here is that in a criminal case there is no clear determination of specific issues by the jury as happens in civil cases. The general verdict of guilty or not guilty is the extent of a jury determination in a criminal case. There are also no detailed formal pleadings and therefore it is impossible to tell from the general verdict what issues have been decided in favour of the accused or the Crown. However, as mentioned beforehand these factors have not limited the Courts in other jurisdictions. The remedy that they have adopted is to go behind the general verdict to ascertain what issues must necessarily have been raised and determined to reach the verdict(*t*). The Courts have looked to "all the proceedings, including the statements of counsel, the evidence, admissions by the accused, the charge to the jury, the judge's notes, and the verdicts with respect to other accused persons"(*u*).

An example of the depth of analysis undertaken by a Court to ascertain what issues were necessarily raised and determined is provided by *Mraz v the Queen*. There the accused was charged with murder in that he caused the death of the deceased during or immediately after the commission of rape. He was acquitted of murder but convicted of manslaughter. This conviction was quashed on appeal by the High Court and a new trial refused. The Crown then commenced a prosecution for rape relying on the same evidence as before. Mraz pleaded not guilty and entered a special plea of issue estoppel but was nevertheless convicted(*v*). This conviction was quashed by the High Court of Australia. The High Court analysed the proceedings and found the following issues had been determined:

> "The verdict of the jury at the first trial acquitting Mraz of murder but convicting him of manslaughter meant that although he killed the deceased either (a) he did not rape her, or (b) if he did rape her that he did not kill her during or immediately after the rape for otherwise the jury would have found Mraz guilty of murder. Mraz was able to show that what had been in issue at the first trial was the allegation that he killed during or immediately after raping the deceased. Since the jury found by their verdict of manslaughter that he killed the deceased, and as there was no evidence that he did this some appreciable time after the alleged rape, it followed that the jury also found that he did not rape her. Hence the verdict of manslaughter was deemed to have been an acquittal of rape."

Another example of the depth of analysis is given by *R v Hogan* [1974] 2 All ER 142. In

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(*q*) F R Macken, "Issue Estoppel or Double Jeopardy" [1967] NZLJ 241, M Buist, "The Jurisprudence of Issue Estoppel" (1966) 2 NZULR 43, Adams, *Criminal Law and Practice* (2nd ed), p 738-9.

(*r*) Adams (op cit), para 2883.

(*s*) Section 7 (3) of the Canadian Criminal Code. See also *Kienapple v The Queen*, supra; *Gill v The Queen*, supra.

(*t*) *Mraz v The Queen (No 2)* (supra).

(*u*) M L Friedland, *Double Jeopardy*, p 134. For actual examples see *Brown v Robinson* (1960) 60 SR (NSW) 297; *R v Guzzo* 10 CCC (2d) 408; *R v Feeley McDermott & Wright*, supra.

(*v*) There is no report of the original trial but the appeal to the Court of Criminal Appeal is reported in (1956) 73 WN (NSW) 425. The majority there were of the opinion that the issue of rape had not really been determined by the High Court in the original trial.

this case Hogan had been charged with causing grievous bodily harm with intent. He had pleaded not guilty and raised the issue of self defence. He was convicted. His victim later died, he was then charged with murder, and he again pleaded not guilty. The question was whether it was open to Hogan to raise any of the issues which were in issue in the former trial, and which must have been conclusively determined against him by the guilty verdict. The Judge isolated the issues which he considered must have been raised and determined in the former trial to bring in a verdict of guilty. They were:

(1) That the victim suffered grievous bodily harm.
(2) That this was inflicted deliberately by the defendant.
(3) That this was inflicted without lawful excuse, thus negating the issue of self defence.
(4) That at the time when the grievous bodily harm was inflicted, the defendant intended to cause grievous bodily harm thus supplying the specific intent needed for a charge of murder.

Issue estoppel on the above matters prevented the defendant from raising these matters again. He was however permitted to raise matters not raised in the first trial such as provocation and causation.

This case was something of a new development in criminal issue estoppel as the Crown rather than the defence was relying on the doctrine. In previous cases it had always been the defendant. More will be said on this point later.

An example where issue estoppel was found to be inapplicable after analysing the proceedings was the case of *Connelly v D P P* [1964] 1 AC 1254. There a majority of the House of Lords considered that the circumstances did not allow issue estoppel to apply. The facts were that Connelly and three other men took part in an armed robbery in the course of which a man was shot and killed by one of his co-accused. Connelly was indicted for murder. His defence was (a) alibi and (b) if present he had no intent to murder. He was convicted but this was quashed on appeal because of a misdirection by the learned trial Judge. He was then indicted for robbery and raised, inter alia, a plea of issue estoppel. His argument was that the effect of the earlier proceedings was a determination that he was not present at the scene of the crime. The majority of the House of Lords recognized that issue estoppel could apply in criminal proceedings but did not in this case. When analysed it was clear that the issue of alibi had not been determined in Connelly's favour merely by his conviction being quashed on appeal. Lord Morris considered that although the quashing of the conviction had the same effect as a verdict of not guilty, the defence had been twofold (ie alibi and lack of intent) and at the trial a not guilty verdict did not establish which defence had succeeded.

It is of course much easier to isolate the issues where reasons are given for the decision in the first case. An example of this is *O'Mara v Litfin ex parte O'Mara* [1972] QWN 73. The facts of this case were that Litfin was charged with two offences. The first charge was one of dangerous driving. In dismissing the charge the Magistrate gave as his reason that he was not satisfied of the identity of the person who was driving the car at the relevant time. Litfin was then charged with driving without a licence at the same time and place involved in the first case. He pleaded that the issue of identification had been determined in his favour and that the prosecution was estopped from presenting evidence of identification in the second case. The Magistrate upheld the submission of issue estoppel and his decision was in turn upheld by the Supreme Court.

The second difficulty envisaged by Sir Francis Adams was the difficulty of a lack of positive determination in criminal proceedings. The problem here is that where there is a verdict of not guilty, how can it be said that any issues have really been determined. "The general verdict of not guilty decides nothing more than that there was a failure upon the part of the prosecution to establish all the necessary ingredients"(*w*). Because of the extent of the burden of proof resting on the prosecution the defence only has to raise a reasonable doubt for an acquittal, and as Lord Devlin asked "is it also to have the right to say that a fact which it has raised a reasonable doubt about is to be treated as conclusively established in its favour?"(*x*) But surely the answer to this objection must be affirmative, because, as a noted writer on the subject states, "the accused starts the trial under the mantle of the presumption of innocence. If he is acquitted, he should not be in a worse position than he was before his acquittal. Indeed, the very words used by

(*w*) *In re a Medical Practitioner* (supra), p 880.
(*x*) *Connelly*, supra, p 1346.

the jury, 'not guilty', indicate that an acquittal means more than a finding of a reasonable doubt"(*y*).

Lord MacDermott was in no doubt that an acquittal was a conclusive establishment of the verdict in the accused's favour. He said: "The effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim 'res judicata pro veritate accipitur' is no less applicable to criminal than to civil proceedings. Here the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any steps to challenge it at the second trial"(*z*).

The third difficulty is one of mutuality. The problem here is that since issue estoppel is available to both parties in a civil case it should also be available to the prosecution as well as the defence in a criminal case. Prior to *Hogan's* case all the recent cases dealing with issue estoppel concerned situations in which it was the accused and not the prosecution who were relying on issue estoppel. Consequently most of the statements of issue estoppel have been framed on the basis that it is a defence which only operates against the prosecution(*a*). Most writers(*b*) on the subject have agreed that *logically* the prosecution should also have the benefit of issue estoppel. Nevertheless they have all concluded that it should not as a matter of *practice* and the present writer agrees with this view. Friedland for example considers that it "would be contrary to the traditional policy of the criminal process to allow the Crown to use a previous determination as conclusive proof of a particular issue(*c*). The dangers of allowing the prosecution the benefit of issue estoppel are obvious. Issues decided against the accused in a previous minor case would stop him from raising those issues in a subsequent and perhaps more serious case(*d*). For example a man may plead guilty to a minor charge because it is not worth the time and expense of defending. Is he then estopped in subsequent more serious proceedings from raising issues taken to have been decided in the former case?

In *R v Hogan* the accused was prevented from raising issues decided against him in a previous trial. It was held in that case that issue estoppel *did* apply with mutuality and the Crown obtained the benefit of the doctrine. Consequently Hogan was unable in a trial for murder to raise any of the issues decided against him in the previous trial for causing grievous bodily harm to the same person. The learned Judge found it "difficult to conceive of any principle of estoppel between the parties which only operates unilaterally"(*e*). But with respect this overlooks the fact "that in its application to the criminal law the doctrine of estoppel is seen to undergo some modifications made expedient by the nature of the subject matter(*f*).

It remains to be seen whether this development will be accepted by higher English Courts.

In New Zealand the problem does not arise if it is accepted that issue estoppel is available as a common law defence through Section 20 of the Crimes Act 1961(*g*). Obviously such a defence is not available to the prosecution.

The difficulties envisaged by Sir Francis Adams therefore are not insuperable and they have been overcome in other jurisdictions.

It is conceded however that the application of criminal issue estoppel is by no means clear cut and that there are many peripheral problems still to be solved. For example:

(1) It is not yet clear whether the prosecutors in both sets of proceedings must be the same in each case. Obviously the defendant will be the same in each case but the prosecutor may be a private individual in the first case and the police in the second case. Can an issue determined against the private prosecutor, estop the police in the second case? This point has not yet been decided but old cases(*h*) suggest that all prosecutors are identical. A related point is whether the difference between

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(*y*) Friedland (op cit), p 129; see also *R v Guzzo*, supra.

(*z*) *Sambasivam*, supra, p 479.

(*a*) eg *R v Wilkes*, supra. *R v Feeley McDermott & Wright*, supra.

(*b*) Friedland, supra, p 153, Lanham, supra, p 444, Spencer Bower & Turner, *Res Judicata*, p 287, 288; C Howard, "Res Judicata in the Criminal Law" (1961) MULR 101, 135, J R Forbes, "Short Circuiting the Criminal Trial" (1972) UQLJ 418, 425. R P Brittain, "Issue Estoppel v Defendant" (1974) NLJ p 819.

(*c*) Friedland (op cit), p 155.

(*d*) See Lord Reid making much the same point for civil proceedings in *Carlzeiss Stiftung*, supra, p 917.

(*e*) [1974] 2 All ER 142; p 154.

(*f*) Spencer Bower & Turner, *Res Judicata*, p 268.

(*g*) As it is in Canada under the equivalent Canadian Section.

summary and indictable proceedings is of any consequence. Again, this point has not yet been clearly decided but it would appear that it makes no difference(*i*).

(2) Issue estoppel has usually arisen in separate trials but in *R v Wilkes* the estoppel arose because of inconsistent verdicts in the same trial. While such inconsistencies do not seem to have unduly concerned the Courts in New Zealand, "juries do not act with complete harmony, or complete logic, in arriving at their verdicts"(*j*), it is submitted that issue estoppel should also apply in these situations.

A related point is the effect of an inconsistent verdict between participants in a crime. This again has not duly concerned the Courts unless there is an inconsistency in a matter of substance such as a conflicting finding of fact which would make it unjust for the inconsistent verdicts to stand(*k*). If there is such an inconsistency, the doctrine of issue estoppel would clearly apply.

(3) The problem of technical acquittals is another area which will require some clarification. If a conviction is quashed on appeal, what issues can be said to have been determined at the trial in the light of the appeal?(*l*) This was the situation in *Mraz* and *Connelly*; but if it is clearly remembered that issue estoppel only applies to issues necessarily raised and determined then few problems should arise. The real reason for the acquittal must be ascertained and technical acquittals should not be capable of founding an issue estoppel.

(4) The problem of issue estoppel and its application to perjury trials has given rise to some division in the American Courts(*m*). The Federal Courts will not permit a subsequent prosecution, but the State Courts generally will. It is submitted with respect that the decision by Roper J in *R v Morrison* not to allow the doctrine to apply to perjury is the better approach, on the grounds of public policy alone.

(5) Another difficulty is the terminology used in the overseas cases. Some will refer to res judicata, others issue estoppel, and others collateral estoppel. Whether or not they all refer to the same principle is on occasions difficult to decide(*n*). In addition there appears to be some difference of opinion in the basis for criminal issue estoppel(*o*).

These peripheral problems should not act as a deterrent to the acceptance of the principle of issue estoppel in criminal proceedings. They can be solved by the Courts as they develop the doctrine(*f*). Indeed Roper J has already developed the doctrine and solved the problem of issue estoppel and perjury trials.

The acceptance of the doctrine of issue estoppel far from doing "no good and considerable harm" would be of immense benefit in the appropriate cases.

These will be cases such as *Flood* and *Gill* where the plea of autrefois acquit has no application. Had the doctrine of issue estoppel not been applied in those cases there would have been inconsistent verdicts which would only serve to "undermine the administration of justice and to bring it into contempt and ridicule"(*q*).

This could of course be overcome by the Judge exercising his power under s 347 (3) of the Crimes Act and directing that the accused be discharged. If he is not prepared to take the step of applying the doctrine itself in exercising his discretion it is suggested that the Judge would find the doctrine of issue estoppel an invaluable guide in so doing. But why should the doctrine of issue estoppel not be applied in New Zealand? Why should the limited autrefois pleas be the only application of res judicata in the New Zealand Criminal law as Sir Francis Adams suggested? If issue estoppel is available in civil proceedings, it should be available in criminal proceedings. Surely criminal proceedings are just as—or more important—than civil proceedings. As Holmes J said (in answer to the prosecution contention that issue estoppel was only available in civil proceedings) "it cannot be that the safeguards of the person,

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(*h*) *Wemyss v Hopkins* (1875) LR 10 QB 378; *Petrie v Nuttall* (1856) 11 Ex 569; J R Forbes, 1972 UQLJ 418, 424, 425.

(*i*) *Brown v Robinson, supra; Clout v Hutchison* (1951) 51 SR (NSW) 32; C Howard (1961) MULR 101, 105. Cf M W Campbell, "Issue Estopped in Criminal Cases" (1974) 48 ALJ, p 469.

(*j*) *R v Keeley* [1962] NZLR 565, 567.

(*k*) *Sweetman v Industries & Commerce* [1970] NZLR 139.

(*l*) See Lord Devlin *Connelly v D P P*, supra, pp 1344, 1345.

(*m*) See "Perjury by Defendants: The Uses of Double Jeopardy and Collateral Estoppel" (1961) 74 Harv L Rev 752, 761.

(*n*) See for example *Kienapple v The Queen*, supra.

(*o*) *R v Wilkes*, supra, p 519, Friedland (op cit), p 118, C Howard (1961) MULR 108.

(*p*) Issue estoppel in civil proceedings is still being developed. See *Carl Zeiss Stifung* and *Craddocks Transport Ltd*, Supra.

(*q*) *R v Gushae* 13 CCC (2d) 101. Of course the jury in the second trial in *Flood's* case may have acquitted him as well, but it is an infringement of the doctrine of issue estoppel for the Crown even to raise the matter again.

so often and so rightly mentioned with solemn reverence are less than those that protect from a liability in debt"(r).

It is submitted therefore that the doctrine of issue estoppel is available as a common law defence in New Zealand Criminal Law. Accordingly, if it appears that the prosecution in criminal proceedings is attempting to raise and challenge an issue which has already been decided in the defendant's favour in previous criminal proceedings between the parties, a plea of issue estoppel(s) should be made and the subsequent proceedings thereby stopped.

(r) *US v Oppenhiemer*, supra, p 87. See also Lawton J, *Connelly*, supra, p 1267. "This doctrine (issue estoppel) arises commonly in civil cases, and it would be deplorable that a defence available in civil cases would not be available in identical circumstances in a criminal matter."

(s) As well as the autrefois pleas if applicable.

NEW ZEALAND SUPERANNUATION FUND

Payouts have already begun under the New Zealand Superannuation Scheme. MR A C LYNCH, *Solicitor to the Corporation, outlines the options available.*

It has been said, and it can be expected that it will be said increasingly over the next few weeks, that the New Zealand Superannuation Scheme is complex and confusing.

Such a glib statement no doubt will form the basis of charge and counter-charge by our political masters and those who aspire to become so.

It is hoped that in future articles the philosophy and the principles of superannuation and such charges of complexity and confusion can be examined.

In the meantime, superannuation is compulsory for all income earners (with certain exceptions) and it behoves the profession to whom the public turns for advice to know the alternatives available to employer and employee clients.

I propose in this article to outline the benefits available under the New Zealand Superannuation Scheme. It is hoped that the article will lead to a greater understanding of the Scheme and that it will assist the profession in advising its clients—both employer and employees.

It should be noted that private superannuation schemes also may purchase inflation-protected annuities for their retiring members from the Annuity Account of the New Zealand Superannuation Corporation and indeed many private superannuation schemes already have indicated their intention of doing so. These annuities will be paid subject to the same conditions as those paid to New Zealand Scheme annuitants.

It should also be noted that in this article (as in literature on superannuation generally) the terms "annuity" and "pension" are used interchangeably. The term "benefits" includes annuities, spouse's allowances and lump sum amounts paid in certain circumstances.

Finally, it is emphasised that what follows is a guide only and reference should be made in any particular case to the detailed statutory provisions of the Scheme contained in the New Zealand Superannuation Act and the New Zealand Superannuation Regulations 1974.

The New Zealand Superannuation Scheme is based on what is known as a "cash accumulation" principle which simply means that all contributions made by the member (including lump sum voluntary contributions) and those made by the member's employer are credited to an account in the name of the member, and each year interest is credited to this account. The total accumulated from these sources is used to provide a benefit to the contributor on his retirement. It should be noted that the total credit so accumulated provides not only an annuity for the contributor but also an allowance for an eligible spouse who survives the contributor, and, as mentioned earlier, both the annuity and the spouse's allowance are cost of living protected. Social Welfare benefits, including Universal Superannuation or, if appropriate, the means-tested Age Benefit, continue to be payable to the contributor on retirement as well as the benefits from the Scheme.

Choices available on electing to take a benefit:

When qualifying to receive a retiring benefit the following choices are available:

Annuity: The contributor may receive an annuity for life based on the total credit in his account.

Cash Payment plus Annuity: The contributor may elect to receive up to one quarter of his total credit in one lump sum, plus an annuity based on the balance then remaining.

Cash Refund: The contributor may receive a cash refund of the total amount remaining in his account if, after taking the "up to one quarter" lump sum payment, the balance is less than $2,000.

Examples of possible elections:

Total Credit	*You can take a cash payment Choice B of say*	*Total credit remaining to provide your annuity*
$	$	$
3500	NIL	3500
3500	500	3000
3500	875 (25% max)	2625
2666	NIL	2666
2666	500	2166
2666	667 (25% max)	1999*
2100	NIL	2100
2100	250	1850*
2100	525 (25% max)	1575*
1900	NIL	1900*

It should be noted that the contributor must exercise his option in writing, and that once an election is made it cannot be amended or revoked.

Benefits—Annuities: A contributor may elect to receive an annuity at any time between his 60th and 65th birthdays. The annuity is calculated according to age in years and complete months based on the following table:

Exact Age	*Amount of Annuity for each $1,000 credit used*	*Amount of Annuity for each $1 used*
	$	$
60	66.90	.06690
61	68.70	.06870
62	70.62	.07062
63	72.66	.72666
64	74.82	.07482
65	77.10	.07710

* If desired these amounts may be taken as cash refund as stated in Choice C. You will see that the maximum total credit you can take in cash is $2,666.

NOTE: The rates for intermediate months or for ages outside the above range can be made available on request.

Benefits payable earlier than 60 or later than 65 years of age:

If the Board of Management of the Corporation considers it necessary or desirable because of the special nature of the contributor's occupation, approval may be given for payment of a benefit at earlier than 60 or later than 65 years of age.

Benefits payable earlier on grounds of ill-health or disablement:

If a contributor suffers mental or physical infirmity or disability which prevents his future gainful employment, the Board may approve payment of a benefit at any age.

Benefits payable on death of a single person:

Where a contributor who is single dies before having elected to receive an annuity, then half of his total credit will be paid to his estate.

Where a contributor who is single dies while in receipt of an annuity, the balance (if any) between half the amount of the total credit used to provide that annuity and the annuity payments already made, will be paid to his estate.

Benefits payable from voluntary contributions:

Voluntary contributions in any amount may be made at any time but the Board reserves the right to decline acceptance of any amount in excess of $2,000 in any one year.

Even where a contributor is already receiving an annuity for any reason, including ill-health, he may still obtain an increase in that annuity by making additional contributions. However, except on the grounds of ill-health, no additional benefit is payable until the contributor reaches 65 years of age, and at that stage the three choices referred to earlier are available to the contributor.

It may be noted that a contributor may make any number of lump sum voluntary contributions large or small, at regular or irregular intervals, at any time before he attains the age of 60 years.

Benefits—Allowances for eligible spouses:

Particular reference should be made to Section 66 of the Act which provides a special definition of the term "spouse". In summary, to qualify for a spouse's allowance, a man or a woman must satisfy one or other of the following conditions:

Either—have been married to a member of

the Scheme two years immediately prior to that person's death and the marriage had taken place before the deceased had attained the age of 65 years

or—have been married to a member immediately prior to that person's death and have a dependent child under the age of 16 years

The spouse's allowance is payable for the rest of his or her life or until remarriage. However if a deceased person was not in receipt of an annuity at the date of death, the surviving spouse is eligible for an allowance based on a proportion of the annuity to which the deceased would have been entitled at the date of his death. This is illustrated by the following table:

Age at Death	*Proportion*
up to 50	100%
51	95%
52	90%
53	85%
54	80%
55	75%
56	70%
57	65%
58	60%
59	55%
60 and older	50%

As an alternative, a spouse may elect not to take an annuity, in which case a lump sum may be paid to the estate of the deceased member as follows:

(a) if the deceased had been receiving an annuity the lump sum would be any balance remaining after deducting the annuity payments already made to the deceased from half the amount used to provide the deceased person's annuity; or

(b) if the deceased had not been receiving an annuity, the lump sum could be half the deceased person's total credit.

Where a spouse in receipt of an allowance either dies or remarries, then a lump sum may be paid to the spouse's estate or the spouse as follows:

The lump sum payment would be either:

(a) any balance remaining after deducting the total of the annuity and allowance payments already made from half the amount used to provide the annuity, or

(b) if no benefits have been paid, then half the total credit.

Cost of Living adjustments:

Annuities and spouse's allowances from the New Zealand Superannuation Fund are inincreased automatically in line with increase in the New Zealand Consumer's Price Index.

The first adjustment will be made in the April following the completion of a full year after receiving the initial benefit. Thereafter this adjustment will be made in April each year.

Application for a Benefit:

The Administrative Centre of the Corporation is situated in Dunedin and requests for application forms should be directed to that office. Depending on the particular circumstances, the following information may be needed to support an application:

Birth Certificate
Death Certificate
Marriage Certificate
Medical Certificate

Payment of Benefits:

Except where a person is already receiving an annuity, the Corporation will advise all persons shortly before they reach the age of 65 years about the options available to them.

Annuities and spouse's allowances are paid four-weekly in advance to the respective annuitant's or spouse's Post Office Savings Bank Account or Trading Bank Account or Trustee Savings Bank Account.

The annuity or allowance finishes at the end of the four-weekly payment period in which death occurs or the spouse remarries, and it will not be necessary to pay back any part of that payment.

In those cases where details of recent contributions to the New Zealand Scheme may have to be obtained from employers, there may be a delay between the time of application for an annuity or allowance and the time the first payment is made. Where this delay is more than eight weeks the Corporation will make advance payments to the annuitant or spouse. Further, where any such delay is causing hardship to the annuitant or spouse the period of eight weeks may be reduced accordingly.

Where a person in receipt of an annuity or an allowance intends to be absent overseas for more than two months it is advisable to give the Corporation preferably at least two months' notice prior to departure, for the reason that persons overseas are required to complete a survival certificate at six monthly intervals while overseas. Early advice to the Corporation in this respect will enable proper arrangements to be made to have this survival certificate sent by the Corporation to such persons and

will obviate any suspension of the annuity or allowance.

Where an annuitant or spouse requires the money paid overseas, appropriate arrangements must be made by the person with his or her Bank.

What happens about Tax:

All annuities and allowance are liable for PAYE tax deductions in the same way as salary or wages. All lump sum benefits are free of income tax.

When an application for a benefit is received, the Corporation will send to the applicant an IR12 tax Code Declaration which must be completed and returned before the first payment can be made.

Where an applicant wishes to have increased tax deductions made from the annuity or allowance this may be arranged by supplying the Corporation with the appropriate Special Tax Code available to the applicant on application to the Inland Revenue Department.

After the end of each financial year (31 March) the Corporation will send to all recipients of benefits from the Scheme a Tax deduction Certificate showing the gross annuity or allowance and the tax deductions made for that year.

Of course, the Corporation will need to know from time to time that persons are still eligible for a benefit. the IR Tax Code Declaration serves the dual purpose of establishing the person's code for taxation purposes and acting as an annual survival certificate. The necessity for the prompt return of this Declaration each year will be apparent.

AMNESTY AND THE RULE OF LAW

DAVID MCGILL *of Amnesty International's New Zealand Section writes of Amnesty's work. Membership inquiries should be addressed to the Secretary at PO Box 3597, Wellington.*

"Lawyers Protest Torture of Prisoners" was the heading on a story in last April's monthly Amnesty International Bulletin. The accompanying story encapsulates Amnesty's modus operandi:

"The Governing Junta of the Barcelona Bar Association," ran the story, "has protested the torture of prisoners recently arrested in that city. Pedro Moral Leon, Diego Romero Perez and Luis Guerrero Guijarro were arrested in mid-January under charges of being members of the Front d'Alliberement Catald, and a few days later had to be interned in hospitals as a result of torture. Senor Guerrero showed signs of a fractured skull, and Senor Mora is reported to have entered hospital close to death, having suffered cigarette burns, electric shocks, cuts with razor blades in the tongue and beatings of his genital organs.

"The Superior Chief of Police, Senor Apestegui, informed the Bar Association, Dr Miguel Casals Colldecarrera, that Senor Mora's bruises and lacerations had been caused by accidental falls during transport in custody. Senor Apestegui is reported to have said afterwards that the Bar Association was 'collaborating with the terrorists'.

"Thirty lawyers locked themselves inside the offices of the Bar Association to express their support for the attitude taken by the Governing Junta of the Bar Association."

The Amnesty bulletin concluded by suggesting letters to the Bar Association, particularly from colleagues abroad, would show support "for their courage in protesting the use of torture", and letters "courteously worded" to the Minister of Justice and the local police chief, inquiring about the legal situation and the prison conditions.

Amnesty realises that such letters to the authorities have not previously been heeded, but they form part of a campaign which continues to remind authorities that they are under scrutiny. Amnesty accepts that it has the burden of proving the allegations that the Spanish authorities have rejected. In neighbouring Portugal, Amnesty is currently engaged in the study of the undeniable evidence of past torture. For the present in Spain, Amnesty has Washington DC lawyer Thomas Jones visiting the relevant regions of the Basque area of Northern Spain, attempting to interview prisoners who allege torture, to raise the issue of the state of emergency current in that region, whereby detainees can be held for unlimited periods without access to any judicial procedure and in denial of the Spanish constitution's guarantee of the right of habeas corpus within 72 hours of arrest, and also to investigate the 40 or more

people facing the death penalty, which Amnesty opposes.

Amnesty began 14 years ago as an organisation set up in London to help people in prison for their beliefs. Increasingly, its 70,000 members in 65 countries find themselves involved in the arena of international law, and ways of making it effective at national level, of having accepted codes of conduct for medical, legal and police professions, of ensuring adequate international supervision.

Following its recent report on alleged abuses of prisoners on both the Israeli and Syrian sides, Amnesty has sought some revision of the Geneva Conventions to strengthen methods of international control and supervision. As the only unbiased international body investigating all alleged abuses of human rights, Amnesty has recently made its most significant step, the adoption by the United Nations General Assembly on November 6, 1974, of Resolution 3218 (XXIX), condemning "torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment", carried by 125-0, with Zaire abstaining. As with the abolition of slavery, the first move has to be public denunciation, the acceptance of a universal value.

From now on there will be considerable international pressure brought to bear wherever abuses can be identified. The real effect of international pressure was probably felt most forcibly in recent years in the case of the Greek Colonels. Through 1967 the Greek regime was able to dismiss the rumours of state use of torture in a systematic and regular fashion. In the December of 1967 Amnesty sent two lawyers to observe conditions. After one lawyer returned a second time, Amnesty reported nine named prisoners who said they had been tortured by falanga (beating the soles of the feet with thin metal rods) and electric shock. The regime said this was slander and part of "the communist conspiracy".

The following year a naval petty officer was reported to have died under torture, and then, on July 3, 1968, one of his colleagues, Gerassimos Notara, stood before a military Court and denounced his torturers, alleging beating, electroshock and water torture. This set a precedent, the first time a victim of torture had publicly denounced his torturers.

This was followed the next March by another historic precedent, a body of foreign jurists in Greece hearing evidence and confronting alleged torturers with their victims, one of them, a policeman, Fotinos, attempting to run from the room when he was so identified as a torturer. He had previously asked the judges whether they had to seek his government's permission for this; they rejected his appeal, thus placing international human rights above absolute national sovereignty.

The resultant expulsion of Greece from the Council of Europe did not stop the torture and remained at this stage no more than a moral victory. The newly installed Nixon administration continued to support the Greek regime, preferring to believe Prime Minister Papadopoulos assuring an American Congressman on his military word of honour to commit suicide if there was any of the torture claimed by such American magazines as "Look".

Amnesty continued to work with such bodies as the International Commission of Jurists and the International Association of Democratic Lawyers, sending observers and publicising case studies. They often found that those tortured could not persuade their fellow Greeks that torture had taken place, even though Greek citizens knew that torture and imprisonment was the penalty for dissent in the "Greece of Christian Greeks", as the Colonels put it. The Germans in the last war, the French in Algeria, the Americans in Vietnam, are recent examples of this doublethink. Most people mind their own business.

It would seem that only international influence can affect a regime—comment from people they cannot control. Although even that is uncertain. As late as February 1973, six young Greek lawyers managed to get a letter smuggled out about their plight in a military jail, arrested for defending students. Lawyers from England, America and Canada visited the Greek authorities, but were rudely dismissed.

Yet always the Greek Colonels, and to some extent the American State Department, felt obliged to respond to allegations whose existence they officially denied. The Greek regime knew no peace from such allegations until it finally collapsed; its rulers have now received a clemency they were never known to have exercised.

Amnesty attempts the gargantuan task of keeping the spotlight on all allegations of persecution and torture. Last year, it identified violations in 107 countries. It concentrated campaigns on five West African nations, and three have subsequently declared amnesties for political prisoners. Its current campaign is for the more than 55,000 persons detained in Indonesia without trial, many from as far back as 1965. There have been mass releases in

Greece, Portugal, Mozambique and South Vietnam, where Amnesty's estimate of 100,000 political prisoners under Thieu's regime proved more accurate than the 30,000 of diplomatic sources. Yet there is a disturbing scale of violations of human rights in Iraq, USSR, Spain, South Korea, Guatemala, South Africa, Uganda, Argentina, Uruguay, Morocco, Brazil and Iran, the last named having the highest rate of death penalties in the world and no valid system of civilian Courts. Iran has innumerable allegations of torture against it, such as nine men the authorities said were shot trying to escape, but others say died in prison from torture; their relatives have not been allowed access to their bodies.

Amnesty identifies such allegations and requests permission to investigate them by impartial authorities. It does not accept the state's right to do what it likes within its own borders. Human rights are everybody's business. Civilisation is surely the rule of law, not its abuse. Is it right that Madame Coelho Da Paz should suffer two weeks of torture at the hands of Brazilian authorities seeking the whereabouts of her son? Or that Vladimir Gershuni should be in a Soviet psychiatric hospital for condemning the Czechoslovak intervention, there dosed with haleperidol and aminazine so he cannot sleep. He has described the experience:

"You no sooner lie down than you want to get up; you no sooner take a step than you're longing to sit down; and if you sit down, you want to walk again—and there's nowhere to walk . . ."

Would you like to *try* to help him . . . eevn if you find you cannot? "No one shall be subjected," says Article Five of the Universal Declaration of Human Rights, "to torture or to cruel, inhuman, or degrading treatment or pain".

Lawyers framed that; will you help implement it?

CORRESPONDENCE

Sir,

re: Decentralisation

We enclose copy of letter received by us today. As the principal partner in the firm which wrote the letter is a man of some knowledge and authority, no doubt the information given away in the letter is strictly accurate although possibly not yet cleared for public release. However, it is nice to see coming events casting such prominent shadows before them.

Yours faithfully,
GORDON, SIMONSEN, GREGG & CO

"Dear Sirs,

Re: A L & A M
to Norwich Union Life Insurance Society

"On instruction from our client Society, we have uplifted the documents required to be produced to enable registration of the discharge of the second mortgage.

"We shall produce the title to the Land Transfer Office, Palmerston North.

Yours faithfully,
CASTLE & CASTLE.

Not disappointed—In an interim report, the Race Relations Conciliator records that a certain Australian, attracted by the Race Relations Conciliator's office sign, called on the assumption that he conciliated between jockeys and punters—but went away happily with an introduction to the Secretary of the Auckland Racing Club.

WATER QUALITY—AN ADDENDUM

Mr D A R Williams, whose paper on Water Law appeared at [1975] NZLJ 650 advises: "on 3 July 1975 Mr Justice Cooke delivered judgment in five appeals relating to the *Southland* and *Bay of Islands* cases. The series of judgments are of the greatest importance concerning standing to appeal and principles of classification. They will no doubt become required reading for lawyers involved with the Water and Soil Conservation Act 1967. Put shortly, Mr Justice Cooke has confirmed the principles of classification laid down by the No 1 Town and Country Planning Appeal Board but disagreed with the Board's interpretion of s 26G which relates to the question of status to appeal against final classifications. In this respect the statements under heading 9 (ii) in my paper are no longer accurate. His Honour Mr Justice Cooke adopted a more liberal approach to the question of standing."

How things go—Bob Richmond's got a beautiful car and doesn't know what sort of back axle he's got. Most of you are competent conveyancers and I suppose don't know how the Land Transfer Office works. MR WARRINGTON TAYLOR at a conveyancing seminar.

REFURBISHING THE RULE OF LAW

A summary of an address by the Chief Justice, SIR RICHARD WILD, president of the New Zealand section of the International Commission of Jurists, to the 1975 annual meeting.

Sir Richard Wild said that authority in all its forms was the subject of scrutiny and challenge today. No institution deserved to remain unchanged if it could not stand up to this scrutiny and challenge.

If we wanted to preserve a well ordered society the law must be upheld. Without law we were reduced to disorder. This was axiomatic. But it went deeper than that because only by respecting law and order could we satisfy basic instincts. First, there was the basic instinct for justice which induced the belief that right and not might was the true foundation of society.

Secondly, there was our basic instinct for liberty, which induced the belief in free will and not force as the proper basis for government.

Thirdly, it was manifest in both justice and liberty that powers and rights were not abused.

The first and second instincts were common to all freedom loving persons. For the third the world owed a great deal to the British. It was the genius of the British system of law which evolved checks and balance, rights and duties, powers and safeguards.

This was transplanted to America where the basis of the Constitution of the USA was the protection of the individual citizen who was not to be submerged in the interests of the State.

The three instincts comprised "the rule of law" which was the basic concept of the ICJ. "The rule of law" was familiar to all as a popular phrase, but not everyone understood what it meant. It meant the supremacy of regular law over arbitrary power. Everyone in authority must act in accordance with the law. All officials—Police, Traffic Officers, Boards, Tribunals, Ministers and Government—must not act beyond the powers given to them. If they did, then they infringed the rule of law.

There were four elements which the law should fulfill. First, the law must be just so that people would approve and comply with it. If people did not approve of the law, then it was bad. The process of law reform was important and the Section had its contribution to make. New Zealand had a proud record of law reform. Sometimes we had been too fast, other times too slow. In fields of social law such as homosexual law reform and therapeutic abortions some would say we were lagging behind. In other areas, such as compensation for accidental injury, we were well ahead. Respect for the law did not mean that it was above criticism. There should always be healthy criticism. The Courts and the Judges must be given public respect, but their decisions must always be open for discussion and criticism. The second element required of the law was that it must be certain and ascertainable. People must know where they stand. There were many complex laws. The welfare state produced more legislation and regulations. It was important to keep the law simple and easy to understand. In instances such as the Land and Income Tax Act it was not easy.

The third element was the independence of the Courts. This was a familiar phrase, but the independence of the Courts was a fundamental pillar of society often taken for granted.

The fourth element was that the judicial system must run smoothly. Justice was not ensured if it was not effectively available. Justice delayed was justice denied. Good organisation and administration were required. It was important to match the methods to the times.

There were some forces working towards the breakdown of the legal process itself. They argued that it was outdated, antidiluvian and unworkable. There was no evidence of these forces in New Zealand, but they were evident overseas. It was therefore essential and vital to refurbish the administration of the system of justice. These forces could be beaten by showing them that our system was best. Instances of these forces overseas were the Baader Meinhofs in Germany and the trial of the Angry Brigade at the Old Bailey. We must remind ourselves of the precepts behind the phrase "the rule of law" when we wish to maintain it. Our aim must be to refurbish the instruments by which it is maintained.

DOUGLAS WHITE

WHAT LIMITS TO PROTEST?

DR R G LAWSON *continues his Occasional Notes from Britain.*

I have never been entirely certain as to the permissible limits of protest. When the friends of George Davis sabotaged the Headingly test, instinctively I felt nothing but annoyance and resentment that the pleasure of myself and millions had thus been ruined.

The respite of 24 hours brought a different view. The crime reporter of *The Times* voiced his anger that such damage could have been done when nothing more was involved than an armed robbery, a shot policeman, a few thousand pounds and a 20 year sentence. Quite how one treats this abnoxious assertion I don't know. Perhaps its very nature is condemnation itself. What I do know is that if ever I am put away for 20 years for a crime I did not commit (and there are certain questions yet unanswered about George Davis's conviction) I hope the least my friends will do is dig up some piffling piece of grass.

Of course, the justification for the degree of protest is often an ex post facto rationalisation. If the grievance is removed, the level of protest was, in all the circumstances, fit and proper. Few would now condemn the suffragettes since we most of us now accept the propriety of what they sought. Few (perhaps a little more) would condemn everything done by the nineteenth century trade unionists, who at times did some pretty bloody things, since we now accept the right of workpeople to organise themselves as they wish. And those who loudly bray of the virtues of parliamentary democracy should remember their ancestors' supreme act of protest in decapitating king Charles I. In any case, if we care to recast the Second World War as a gigantic protest against the bestialities of Herr Hitler, we must also recall that thousands upon thousands of innocent German men, women and children had to die before this aim (and I say a very proper aim) was achieved. There is a passage in Koestler's *"Darkness at Noon"* where a character argues powerfully for executing a man whose errors of *administration* had increased the hardship of thousands. After all, he had done immense harm and so must be removed.

It is not really â propos of George Davis that I write these words, but the renewal of the Irish bombing in London. I write when the news of the Hilton Hotel bombing is but 30 minutes old. To be sure, the renewed sight of innocent bodies torn and savaged, of little children screaming in their bloodiest fear is the most repulsive to endure. Of course, if you ask me now whether I condemn those responsible, you know that I will say I do. But suppose that in 100 years' time, the IRA have their way and harmony at last is restored, what then will be the attitude? Will it be to say that, after all, perhaps this hideous campaign was justified?

The answer, of course, depends on the propriety of the republicans' aim. And on that, hardly anyone is qualified to speak since the argument is now so confused by the methods used. But since that is here and elsewhere perennially the problem, we succeed only in taking ourselves into a blind alley. The problem still taxes us on the legitimate bounds of protest. Should we allow a Hitler to trample over us because resistance will mean the death of innocents? Should we allow an (innocent?) man to remain in gaol because an effective campaign for his freedom means some considerable annoyance to others? Or should we content ourselves with talk in the almost certain knowledge that nothing will ever come of that? In an age when small groups can hold a majority to ransom, and terrorist groups can make themselves nuclear bombs, we have a very little time left to solve mankind's oldest dilemma.

The Mad Hatter—This litigation is but another example of the confused way in which business is conducted by so-called one man companies. By wearing his own hat and an unlimited number of corporate hats one person can, by use of the fiction of incorporation dart in and out of business arrangements with remarkable agility to the confusion of the business world, the parties involved and to the Court which is left with the challenging task of determining who wore whose hat and when. CHILWELL J in *Kenderdine v Robert Raymond Associates Ltd* [1975] 1 NZLR 300, 302.