The New Zealand
LAW JOURNAL

16 DECEMBER 1975 No 23

INTER ALIA

Towards a Neighbourhood Law Centre

The proposal from the New Zealand Law Society to the Minister of Justice that a pilot Neighbourhood Law Centre be established in the Auckland area marks a significant development in the provision of legal services in this country.

While the proposal has a lot of support, it is probably fair to say that some practitioners have reservations as to the wisdom of the move.

Yet it has become increasingly plain that there is a vast well of untapped need for legal services; untapped for reasons of ignorance, fear and expense. It has also become increasingly obvious, if experience in other countries is any guide, that unless the profession as a whole takes an initiative we run the risk of something being done to us, rather than by us.

We need to look no further than across the Tasman to see the problems that can flow from intransigence—and surely it is better to be master of one's destiny than a beggar at the door of Government.

Self-interest is, of course, never a convincing reason for any type of professional action. A profession, truly described, is primarily dedicated to serving the affairs of others. But although the proposal happens to be in the best interests of the profession, it is much more important in the public interest that the independence of the profession be preserved.

Such independence is both protected and enhanced by the proposal.

The alternative, which sooner or later would have to be faced, is a state legal service that, as one Government agency, would offer to litigate with other Government agencies under the aegis of yet another, the Justice Department.

Clearly the public interest would, at the very least, be imperilled by such an arrangement, and the independence that is our touchstone could be seriously eroded. Furthermore, personal problems are too individual and too private to be drawn into the domain of the state.

It is plain, therefore, that, whatever the personal misgivings, the larger interest is best served by the Law Society's bold initiative.

That there will be problems is undoubted. Funding, areas of work, advertising, modes of charging clients (if at all), geographical location—these are only some of the areas of uncertainty.

Yet the scheme, properly administered, should be complementary to private practices, not in competition with them. This would ensure that the public interest is served by the extending of legal services into areas of unmet need, rather than merely diverting present and economic work from the private to the public sector.

It may be that battle will ultimately have to be done on the question of whether, in times of legal aid and a move towards egalatarianism, the "user pays" principle has a true place in governing the provision of legal services. The Law Society's proposal, by reaching out to the economically disadvantaged, can help the argument in favour of the status quo. It certainly in no way undermines it.

JEREMY POPE

Consultancy defined—"I am happy to be back in the profession with the rather high sounding title of 'consultant partner'—which only means that I am a part time practitioner doing the jobs that my partners have put aside to do when they have the kind of spare time which never occurs."—SIR JOHN MARSHALL

CHRISTMAS MESSAGE TO THE PROFESSION

From the Hon. A M Finlay QC

This Christmas message, written before the Great Divide of 29 November, is naturally based on certain assumptions. One of those assumptions—the others need go unspoken—is that the world has Turned the Corner, and things are looking up again. Well, I hope they are, but it would be idle to expect a great leap forward. By the time this is read, people may have become tired of hearing it said that New Zealand has done better than any comparable country in the general economic downturn, but it remains true. The very circumstances that led to adversity being transmitted here with less intensity than elsewhere may retard our participation in any general recovery. It is the privilege of few to enjoy the best of all possible worlds.

However, if Christmas does not bring total peace on earth and good will to men, let's hope December and the New Year will see more good will between men and a surcease to vilification.

Lawyers, accustomed to words as productive tools, and vehicles for the communication of facts and ideas, but not vessels empty of all but abuse, will welcome this. Accordingly, with no ulterior purpose and with no concealed significance or meaning, I do no more than wish all in the profession a prosperous and peaceful year in 1976. I will, I hope, be asking Parliament to give its attention to several matters which will be important to the general public but of special interest to lawyers, and I will look forward, as usual, to their helpful and penetrating comments—and their equally pertinent criticism.

Signature
Attorney-General's Office,
18 November 1975.

CASE AND COMMENT

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

"Void" meaning "voidable"

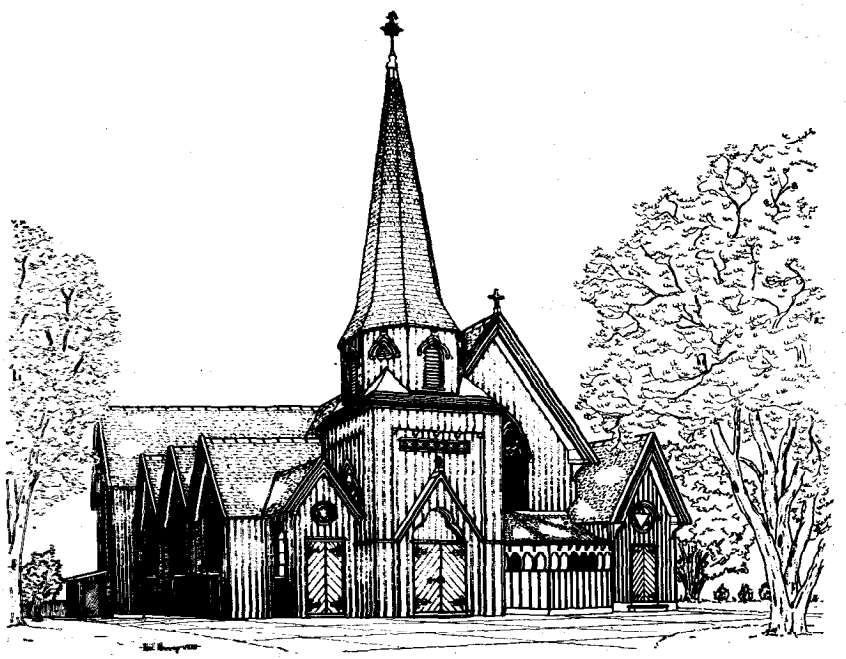
When the English Law Commission had occasion, recently, to consider whether "gazumping" could or should be prevented by a change in the English "subject to contract" system of land purchase, they rejected outright the use of standard form conditional contracts. Their main objections were that to give adequate protection to the parties by the use of common forms would involve first, the use of extremely complex conditions and secondly, the ever-present risk of disputes as to the interpretation and application of those conditions.

That there is some point in these objections is illustrated by the decision of the Court of Appeal in *Barton v Russell* (judgment 7 July 1975), yet another case involving a "subject to finance" clause. The clause was contained in a common form agreement for sale and purchase which was said to be the joint product of the Auckland District Law Society and the Real Estate Institute of New Zealand. The passage principally at issue stated that if finance had not been "arranged" by the date fixed in the clause, "this agreement" should be "void".

It was argued for the vendor that the word "void" meant what it appeared to say and that the agreement had terminated on the expiry of the time limit. For the purchaser, on the other hand, it was argued that the word "void" meant "voidable" and that, in any event, the vendor had on equitable principles lost any right he might have had to take advantage of the clause.

Though it may well be that those responsible for the drafting of this particular common form agreement for sale and purchase intended that the agreement should terminate automatically on the expiry of the time within which finance was to be arranged, the word "void" notoriously can mean "voidable". Just as importantly, every contract, whether in common form or not, has

May the joy and peace of Christmas remain with you throughout the New Year.



The Publishers and Editor of the New Zealand Law Journal join in wishing subscribers a Happy Christmas.

Neil Harrap's sketch is used with the kind permission of the Friends of Old St. Paul's Society Inc.

to be interpreted in the light of the circumstances surrounding its making. In *Barton v Russell,* the agreement for sale and purchase incorporated an undertaking by the vendor to continue the construction of a dwelling on the land to be transferred. In the light of this, the Court of Appeal though it most unlikely that the parties intended, if the obtaining of finance were delayed beyond the appointed day, that the contract should come automatically to an end, notwithstanding that there might be part performance by one or both. Though the Court made no attempt to categorise the "subject to finance" agreement as a condition precedent or subsequent, the reference in the clause to "this agreement" and the presence of the building contract could be taken to indicate a condition subsequent. And, where the word "void" appears in a condition subsequent, it is usually interpreted as meaning voidable (eg *NZ Shipping Co v Société des Ateliers et Chantiers de France* [1919] AC 1).

The other main point in *Barton v Russell* arose because, while the common form stipulated that the "subject to finance" clause might be varied by the purchaser by notice in writing, the purchaser by his solicitors had purported to waive it orally. This oral waiver had apparently been accepted by the vendor. He had thereafter acted as though the contract were absolute and had accepted an additional payment towards the purchase price.

Relying principally on the judgment of Lord Denning MR in *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53, the Court held that either by way of estoppel, or on more general principles of fair conduct, the vendor could not resile from the position he had adopted.

Whatever its juridical basis, the result of this finding is that, notwithstanding the presence in a common form agreement for sale and purchase of a right to waive the "subject to finance" conditions by notice in writing, a merely oral waiver will be effective, at least if the vendor appears to accept it and the purchaser thereafter acts to his detriment.

As a result of *Barton v Russell,* it is understood, a redraft of the common form agreement used in that case is being considered. But whether any redraft can prevent continued litigation of "subject to finance" clauses may be doubted. The real problem lies elsewhere, in the local practice under which the parties to agreements for sale and purchase can be committed to contracts filled in by laymen, before their solicitors have had a chance to peruse them. The present writer has already suggested (at [1975] NZLJ 123) that that problem needs to be solved by a statutory "cooling-off" period.

BC

Incorporation of terms in common form

If asked, many contract students would say that written conditions can form no part of a contract concluded before the conditions were brought to the attention of the party to be bound (*Olley v Marlborough Court Ltd* [1949] 1 KB 532) unless that party was, or ought to have been, already aware of them through a prior course of dealing (*Spurling v Bradshaw* [1956] 1 WLR 461). To be accurate, though, such a statement needs to be qualified.

In the first place, the fact that a party does not know the actual contents of a document until after he has entered into the contract does not prevent that document forming the basis of the contract. How else could parties be bound, as they are, by tickets, insurance policies and a host of other agreements which either are not available to them at the time they contract or, if available, they do not bother to read? It is true that prior notice must be given of the existence of the document, or be rendered unnecessary by the special or imputed knowledge of the other party but, unless requested, there is no such need to give notice of its terms. On this point therefore, the law was, with respect, more accurately stated by Mocatta J at first instance in *Thornton v Shoe Lane Parking Ltd* [1971] 1 QB 163 than it was by Lord Denning MR in the Court of Appeal. The crucial question is whether the parties contracted on the basis of the document, whatever its contents might be. Though, even here, a further qualification is necessary, because there is some authority for the view that, in such cases, a party would not ordinarily be taken to have assented to terms in an unseen document which were unusual or which he could not reasonably have expected it to contain.

In the second place, the fact that performance may already have commenced does not by itself mean that a contract must already have been concluded. There are cases in the books where a contract has been held to apply retrospectively to work done before the contract was concluded (eg *Trollope & Colls v Atomic Power Construction* [1963] 1 WLR 333). Once again, the determinant is, and indeed has to be, the intention of the parties.

In the third place, the fact that the parties may have agreed on terms does not necessarily imply that they have concluded a contract.

There is nothing to prevent a prior agreement as to the terms of a contract which will be concluded at a later date. The vital element here is intention to contract and in such cases the parties ought not to be saddled with liability unawares.

What prompts these thoughts is the recent judgment of Mahon J in *Anselmi and Templeton Farms v Animal Breeding Services* (Supreme Court, 8 August 1975). In that case, the plaintiff had gone to an artificial insemination centre and arranged for it to take two bulls. At this meeting, the financial terms were agreed between the parties. When the bulls were delivered to the centre on a later occasion, the plaintiff signed a contract in respect of the one bull but left after perusing, but not signing, a contract in respect of the other. The defendant company's common form of contract contained a clause which would have excluded the liability of the defendant company for injury to the bulls while they were in their custody. And, as it happened, an injury did occur to the bull in respect of which no contract had been signed.

Mahon J held that in the circumstances the defendant company was not protected by the exception clause and that, since it was unable to show an absence of negligence on its part, it was liable for $4,250 being the value of the bull at the time of the injury, less the amount received by the plaintiff on its sale to a meatworks Everything turned, then, on whether the exception clause were part of the contract between the plaintiff and the defendant. It is submitted that, on ordinary principles, the answer to that question would depend on whether it was contemplated by the parties that the contract between them would be on the company's normal common form, with or without amendments. If it were, the significance of the plaintiff's failure to sign the contract document would depend very much on the circumstances of that failure. If, knowing the defendant's intention to contract only on the terms of its common form contract, the plaintiff had gone away without either signing the document or attempting to negotiate different terms, his act of leaving the bull with the defendant would prima facie have been an acceptance of the terms in the common form.

As to the first point, Mahon J said in his judgment that it was nowhere suggested in the evidence that the contractual terms of the bailment were to be further negotiated or confirmed at the time of the delivery or that acceptance of possession was to be contingent upon settlement or confirmation of contractual conditions. In his view the contract had been concluded at the initial meeting and the bailment completed by the delivery of the bull to the defendant's premises. On this finding, the defendant would have had to show a variation of contract if his exception clause defence were to succeed. In this connection there is an apparent inconsistency in the judgment. At an early stage, it is stated that in relation to the second bull the plaintiff commenced to fill out, but did not complete, the defendant company's common form but, later, it is stated that the conditions were never proffered to him in relation to that bull. The learned Judge held, presumably on this latter basis, that no variation had been concluded.

The moral of this case would seem to be that a party intending to rely on a common form ought to tell the other party, during the course of negotiations, that any contract which might result will be on the terms of the common form. On the other hand, provided he does this, it ought not by itself to be fatal to his case that the other party has no actual knowledge of the contents of the common form, always assuming they are not too unusual. Nor, unless the case is one where a signature is required by some rule of law, ought it to be fatal to his case that, in the event, the other party does not sign the common form. The effect of such a failure would have to be assessed in the light of all the circumstances under which it occurred. The failure to sign would be irrevelant if some other form of acceptance were found to have occurred.

BC

Humanising lawyers—In our universities the students who give the most trouble are generally those who are studying or who profess to be studying sociology or political science. Law students, on the other hand, are generally law abiding. God forbid that it should be otherwise; but I sometimes think that a slight admixture of the heady wine of the social sciences with the sober diet of the law might not come amiss. It may be that the changes in the legal scene of which I have spoken may encourage a slightly broader approach to legal education. Then the law course in our universities might become what the classical course which I took and enjoyed so much years ago used to be—a truly humane discipline. LORD CROSS OF CHELSEA to the 18th Australian Legal Convention (1975) 49 ALJ 314.

IT COULD HAPPEN HERE

The recent revocation by the Australian Governor-General (Sir John Kerr) of the Commission of Appointment of the Prime Minister (Mr Gough Whitlam) and the subsequent comment of the Rt Hon W E Rowling that it is "very unlikely" that a Governor-General would be able to dismiss a New Zealand Prime Minister have focussed some attention on the question of whether the Crown in New Zealand could ever exercise the reserve power of dismissing a ministry. MR DONALD STEVENS, *an Upper Hutt practitioner, discusses the position.*

Appointment to ministerial office is made by the Crown in New Zealand pursuant to either prerogative or statutory authority. In a number of cases Acts of Parliament in respect to a department of State make provision for the appointment by the Governor-General of a member of the Executive Council as the minister concerned*(a)*. Always the appointment is expressed to be at the pleasure of the Governor-General. In all other cases the appointment has its base in the royal prerogative with the prerogative power in question being delegated to the Governor-General by Clause VII of the Royal Letters Patent of 1917*(b)*. Appointment to the Executive Council is in every case an exercise of prerogative authority*(c)*.

The Letters Patent also purport to authorise the Governor-General to exercise the power of dismissing from office any person appointed thereto by the Crown (this could most likely only apply to appointments made pursuant to prerogative authority)*(d)*. Clause IX of the instrument reads:

> The Governor-General may, so far as We Ourselves lawfully may, upon sufficient cause to him appearing, remove from his office, or suspend from the exercise of the same, any person exercising any office or place within the Dominion under or by virtue of any commission or Warrant granted, or which may be granted, by Us, in Our name or under Our authority.

The essential difference between the dismissal of a ministry*(e)* and the dismissal of other officers is that the latter will be carried out on ministerial advice whereas the former will not, although the Crown in dismissing a ministry must be able to appointment new ministers who will accept responsibility for its action ex post facto.

It is now a well-established convention of the constitution that the Crown in exercising any executive power will do so on the advice of its ministers and the question of no small delicacy is whether it may in some cases, notwithstanding this well-entrenched convention, dismiss its ministers*(f)*. Mr Rowling appears to feel that the Governor-General could not in New Zealand do so essentially because this country "does not have a constitution" (presumably he meant a written one) "and only has a single house"*(g)*. With respect it is submitted that it is conceivable, notwithstanding the above factors, that circumstances could develop in which the Crown would not only have to consider, but might be under a duty, to exercise the dismissal power.

A discussion of this question falls under two heads:

1. The dismissal of ministers whose supporters form a minority in the House of Representatives; and
2. The dismissal of ministers who enjoy the support of a majority of the members of the House.

In respect to the first head it can be stated quite emphatically that the Crown has the power to dismiss a prime minister who has been defeated

(a) See, eg s 3. Foreign Affairs Act 1943.
(b) *New Zealand Gazette*, 24 April, 1919, p 1213.
(c) Clause V 1917 Letters Patent.
(d) Apart from ministers of the Crown (with the exception of those whose appointment is provided for by legislation) and members of the Executive Council the only officers appointed under the prerogative authority are the Solicitor-General and ambassadors. The latter are not appointed in New Zealand by the Governor-General (cf Australia and Canada) but by the Queen.
(e) The Crown may, of course, dismiss a minister on the Prime Minister's advice, but could not dismiss an individual minister (other than the Prime Minister) without such advice. A dismissal of the Prime Minister would have the effect of terminating the appointment of the whole ministry. The Prime Minister's resignation has the same effect, but apparently his death does not.
(f) The dismissal of ministers is to be distinguished from a refusal to accord the royal assent or to dissolve the Parliament on the basis that the first involves the Crown in initiating affrmative action while the second and third involve a declining to act although both could be expected to result in the ministry's resignation.
(g) *Evening Post*, 12 November 1975.

in a general election and who refuses to resign, provided an alternative government with the prospect of Parliamentary support is available to assume responsibility for the Crown's action. If this were not the case, any discussion on the discretionary powers of the Crown would be quite worthless and the Crown would be little more than a nodding automaton. In exercising such a power the Queen or her representative would be ensuring that the will of the people was given its just and proper expression. However, Her Majesty or her Governor-General must afford a defeated Prime Minister a reasonable opportunity to ascertain whether he can obtain sufficient support in the House to maintain his government in office. This course the Queen followed after the February 1974 British general election when Mr Heath endeavoured to obtain Liberal support for his Conservative government. If the position is in doubt the Crown must not act pending a clarification of the Parliamentary situation for otherwise it could not be certain that the alternative government had parliamentary support*(h)*.

Turning to the case of a government which has maintained itself in office but is then defeated in the House, it is fairly clear that the Crown should not dismiss such a ministry unless the defeat in the House is on a specific motion of no confidence or on a matter that the Prime Minister has indicated will be regarded as a vote of confidence or involves the rejection of an appropriation measure. The simple reason for this is that a government defeat on any other matter does not in itself indicate that the Government has lost the confidence of the House. However, it is a recognised convention that a government will resign or advise dissolution in the event of the rejection by the House (the lower House in a bi-cameral Parliament based on the Westminster system*(i)*) of supply or of the passage of a motion of no-confidence, and if it does not the Crown should dismiss it. It may be added that it is generally accepted that the Crown is under a duty to ensure that supply is obtained for the functioning of the civil service*(j)*. If the ministry cannot obtain this, and appears not likely to be able to obtain it in the near future, and will neither resign nor advise dissolution, then the Queen or her representative must exercise the dismissal power. New ministers must be obtained to accept the formal responsibility and if they are unable to obtain a majority in the House the Crown's act will have amounted to a forced dissolution.

Far more caution is required in considering the circumstances which might be seen as justifying a decision on the part of the Crown to dismiss a ministry which commands the confidence of the House of Representatives. Such action would amount to a forced dissolution as the new ministers necessary to accept responsibility for the Crown's action would not have the support of a majority of the House. The justification of the dismissal power in this case (if indeed, it is accepted that it does exist) is to be found in the Crown's position as the final guardian of the Constitution. Early writers were prepared to concede a very wide measure of authority to a governor as is seen from the writings of Todd who expressed his view that the Crown had the right of appealing

> at all times from a ministry (strong it may be) in the possession of the confidence of the existing Parliament to the electorate whose decision must ultimately prevail,

and

> it is the bounden duty of a Governor to dismiss his ministers, if he believes their policy to be injurious to the public interests or their conduct to be such, in their official capacity, that he can no longer act with them harmoniously for the public good.*(k)*

Todd, however, was dealing with the British

(h) This question was discussed in Britain in February 1974 when the Queen was accused by one member of Parliament of "conniving with . . . Edward Heath to keep the Conservatives in power"—*Dominion*, 4 March 1974.

(i) The question of whether the convention extends to the case of a government unable to get supply voted by an upper house is at the heart of the current constitutional controversy in Australia. The Governor-General thought that it did. In his written explanation of his decision dated 11 November 1975 (*Dominion*, 12 November 1975) he recorded his view that "when . . . an Upper House possesses the power to reject a money bill including an appropriation bill, and exercises the power by denying supply, the principle that a government which has been denied supply by the Parliament should resign or go to an election must still apply—it is a necessary consequence of parliamentary control of appropriation and expenditure and of the expectation that the ordinary and necessary services of government will continue to be provided". This view will be criticised on the basis that it is the lower House only which should make or unmake a government and that the step taken by the Governor-General will create a dangerous precedent encouraging opposition parties with Senate majorities to bring down a government at will, perhaps destining Australia to an existence on a diet of dissolutions.

(j) Sir John Kerr had no doubt on this point—see his statement of 11 November 1975.

(k) Parliamentary Government in the British Colonies (2nd ed) 615.

colonies and very likely did not intend his remarks to be seen as applying to the position of the Sovereign in Britain. His views must now be seen as of little other than historical interest. Dicey was of the view that the Crown could dismiss ministers with a parliamentary majority and force a dissolution if there is "fair reason to suppose that the opinion of the House is not the opinion of the electors"*(l)* while Dr A B Keith thought that the power reposed in the Crown but was restricted to possible employment in cases where it was "necessary for giving the will of the people its just course"*(m)*. This necessity could arise in regard to "vital" and "irreparable" decisions on foreign policy, or "serious . . . domestic strife". The power could similarly to used to dismiss a cabinet which attempted to "cling to office by prolonging the duration of Parliament, or to govern without Parliament".*(n)*

However, a number of eminent authorities dispute that the power exists at all. Professor K J Scott described it as having "fallen into desuetude"*(o)*, and it has variously been declared to be "as dead as the dodo"*(p)* and "completely lost"*(q)* Lord Rosebery saw such as exercise of power as "unconstitutional and a *coup d'etat*"*(r)* while Professor Laski*(s)* would not admit of the power's existence and Dawson would have none of it. Dawson claimed that the Queen "has become an automaton with no public will of her own", that the Prime Minister's advice may not be refused and that in recent years "practically all authorities have agreed" that the Governor-General's independent action had become a relic of history".*(t)*

In his recent work*(u)* Professor Markesinis considers it necessary to

> make clear from the outset that a royal or forced dissolution is obsolete. The last time a dissolution emanated from the Sovereign's personal initiative was in 1834 and this should speak for itself.*(v)*

Professor Markesinis appears to have overlooked the dismissal of the Premier of New South Wales by the Governor of that State in 1932*(w)* and it is submitted with respect that the thesis that a power becomes atrophied with disuse is, in the absence of other relevant factors, difficult to maintain. The power of dismissal has never been exercised in New Zealand and not called upon in Britain for 140 years for the reason that circumstances have not during that time justified its use, but it would be surprising if this factor alone could establish that the power is not available.

It is submitted that the true position is to be found somewhere between the extreme stances of Professor Dicey and the school represented by Dr Markesinis, and that the view of Dr Keith with certain qualifications proves rather attractive. It appeared so in 1955 to the Chief Justice of Pakistan, Muhammad Munir, who was called upon in *Federation of Pakistan and Others(x) v Moulvi Tamizuddin Khan* and *Special Reference No. 1 of 1955(y)* to consider the action of the Governor-General in dissolving an Assembly which was held to be continuing illegally. His Excellency acted following the receipt of "repeated representations from and resolution passed by public bodies . . . against the unrepresentative character of the Assembly". The Chief Justice saw the dissolving of the Assembly as "not only legal, but the performance of a clear constitutional obligation" and expressed his view that "every democratic constitution" whether written or unwritten gave the Head of State the power to dissolve in critical circumstances.*(z)*

An earlier view of a similar nature was expressed by Dr Eugene Forsey in 1943 when he observed that

> The danger of royal absolutism is past; but the danger of Cabinet absolutism, even of the Prime Ministerial absolutism is present and growing. Against that danger the reserve power of the Crown, and especially the power to force . . . dissolution is in some instances the only constitutional safeguard. The Crown is more than a quaint survival . . . it is an absolutely essential part of the parliamentary system. In certain circumstances, the

---

(l) A V Dicey, *The Law of the Constitution* (8 ed) 431-2.
(m) A B Keith, *The King and the Imperial Crown.*
(n) Ibid.
(o) Scott, *The New Zealand Constitution* (1962), 85.
(p) Sir I Jennings, *Cabinet Government* (1959), 400.
(q) R H S Crossman, M.P. in Introduction to Walter Bagehot's *English Constitution* (Collins 1963), 17.
(r) Quoted by Dr Evatt, *The King and His Dominion Governors* (1967 ed), 95.
(s) Laski, *The Crisis and the Constitution,* 31.
(t) 6 *Dalhousie Review,* 333.
(u) B S Markesinis, *The Theory and Practice of the Dissolution of Parliament* (1972).
(v) Idem. 115.
(w) For a discussion of this case see Evatt op cit 163 ff.
(x) See the judgment reported in full in Jennings, *Constitutional Problems in Pakistan* (1957), 87.
(y) Idem 290.
(z) Ibid.

> Crown alone can preserve the constitution, or ensure that if it is to be changed it shall be only by the deliberate will of the people.*(a)*

With respect it is submitted that the view of Muhammad Munir, CJ and Dr Forsey has a considerable amount to commend it. Can any objection really be taken to a constitution which enables the Head of State in very critical circumstances to dismiss a ministry and refer a grave matter to the electorate? Doubtless the power could only be exercised in the most extreme of circumstances when the Crown was satisfied that the constitution itself was endangered or government measures were being implemented or were about to be implemented without electoral sanction which would have grave or disastrous and irreparable national consequences. An attempt to extend the life of Parliament without electoral sanction or to abolish parliamentary democracy would clearly amount to a subversion of the constitution and would justify the Crown in acting. Is it really suggested by those who refuse to admit of the existence of the reserve power that the Crown could not dismiss a government which was attending to the imposition of a totalitarian system of government without electoral mandate? It is suggested that the interests of the people —the political sovereign—require that the power be considered to be still capable of exercise.

It is rather difficult to undertake a discussion of this power without a brief reference to one other of the so-called reserve powers, namely the power to withhold the royal assent from legislation. No Bill has ever been refused assent in New Zealand, and in Britain no Sovereign has refused the royal assent since 1707 when Queen Anne rejected the Scottish Militia Bill. This is a power which is also described by many authorities as being obsolete.*(b)* However, Muhammad Munir, CJ did not subscribe to this view. He noted that in normal circumstances the Governor-General could not possibly refuse assent other than on the advice of the ministry. He thought that if the constitution is functioning properly and in its true spirit the Governor-General will not need to and will not be able to refuse assent, but at the same time he could conceive of extreme cases in which he had no doubt that it would be the duty of the Governor-General to withhhold assent. Such a case would be an attempt to indefinitely prolong the life of Parliament.*(c)* This also is a power which should not be regarded as having been rendered obsolete merely by virtue of disuse. Indeed it may well be suggested that the power has been reinforced by the abolition of the Legislative Council. In the British context Lord Lansdowne was

> strong on the theory that since the Parliament Act has destroyed the power hitherto inherent in the House of Lords to kill a Bill and compel an election that power now belonged to the Crown alone.*(d)*.

This is equally applicable to New Zealand as a result of the removal of the second chamber —the opportunity for "sober second thought". In very critical extreme cases it may have to be the Crown which acts as the last stronghold of the Constitution. This reserve power is mentioned here because in cases in which the constitution is to be subverted or grave and irreparable national consequences occasioned without electoral sanction by means of legislation the Governor-General may be able to avoid dismissing a ministry and merely refuse assent to the Bill. Similarly, if a like consequence were to occur as a result of action in-Council the Crown could simply decline to accept the advice to act.*(e)* In such a case the ministry could well resign and the matter would be referred to the electorate without the dismissal power being exercised. Though a government bent on violating the constitution may not be anxious to resign and the dismissal power may prove its value in such a situation. Furthermore there may be cases where the damage is being done not by legislation or Order in Council but by Cabinet or ministerial direction. The dismissal power would be the only reserve power applicable in such a case.

(a) Forsey, Dissolution of Parliament (1943), 259.

(b) See, eg Scott op cit 85 and Jennings, *Cabinet Government* (1959), 400.

(c) Moulvi Tamizuddin Khans' case reported Jennings, Constitutional Problems in Pakistan (1957), 118. Sir Paul Hasluck the predecessor of the present Australian Governor-General considered that the power to refuse assent was not an empty form and was still outstanding to be used on extreme occasions—see transcript of William Queale Memorial Lecture delivered to the University of Adelaide on 24 October 1972.

(d) J A Spender and Asquith, *Life of Lord Oxford and Asquith* ii, 26.

(e) Several authorities have considered the question of whether the Crown may refuse to accept advice to act unlawfully. This was the primary point at issue in an assessment of the action in 1932 of the Governor of New South Wales in dismissing the ministry. See Evatt op cit 163 ff for a consideration of that case. Most authorities now appear to agree that the Governor-General in most cases, should not decline to act if there is a tribunal with jurisdiction to determine the legality or otherwise of the Crown's act—see the discussion by Evatt.

Of course the great difficulty in dealing with a discussion such as this is not in formulating clear cases which would justify an exercise of reserve powers but rather in assessing the merits of less clear cases. Dr Forsey lists a number of instances which he thinks might justify an exercise of the power, one of which is a proposed change, without electoral mandate, from private to social ownership (or vice versa) of the means of production. Some may see this as imminent irreparable national disaster, others will not. More recently in Britain, on the eve of that country's entry into the European Economic Community, some discussion centred on whether the Queen could have insisted that the question of entry into the community be referred to the electorate and in the absence of the Prime Minister agreeing to tender advice accordingly whether the Queen could have dismissed him. The expression of different points of view on whether Her Majesty would have been entitled so to act on such an issue illustrates the great difficulties the Crown will encounter when never the suggestion that it should exercise this reserve power arises.

The consequences to the Crown flowing from an unsuccessful exercise of the power*(f)* are sufficiently serious to ensure that the power is retained in reserve for use only on an occasion sufficiently serious to call it forth. This is illustrated by the 1834 dismissal of Lord Melbourne by William IV. The Conservative leader, Sir Robert Peel, took office and assumed responsibility for the King's action but as his party did not enjoy majority support in the Commons a general election was necessary and at that Peel was defeated. The king was consequently compelled to recall Melbourne to office, the result of the exercise being "from the King's point of view singularly unsatisfactory".*(g)* Marriott accurately described an adverse electoral verdict as creating a situation "almost intolerable":

> The position of the King would be that of a master who has given notice to servants and has been compelled by circumstances to retain them on their own terms.*(h)*

Anson recites Queen Victoria's view that:

> to use this instrument (forced dissolution) and be defeated is a thing most lowering to the Crown and hurtful to the country.*(i)*

It would not be surprising if relations between the Monarch or the Governor-General and a dismissed government returned to office proved not to be happy and indeed a governor-general could expect the Prime Minister to request his resignation or obtain the withdrawal of his commission of appointment.*(j)*

The conclusion must be that the Crown in contemplating an exercise of the dismissal power must be satisfied that the situation seen as justifying the step is so critical that the Queen or the Governor-General will be justified in imperilling the position of the Crown by intervening. Moreover the Crown must feel very confident that the electorate will almost certainly vindicate its stand. If it is in any doubt then this is prima facie evidence that it should stay its hand.

The result is that the power to fire a government is a valuable weapon in the Crown's arsenal. It may only be used on the rarest of occasions, but its use may be the means of saving the constitution itself. Indeed even the knowledge of the power's existence may suffice. Perhaps it can be suggested to Mr Rowling and others who question the power's survival that constitutions are designed not only to protect the interest of ministers and the legislature, but also the interests of the people.

(f) The power is unsuccessfully exercised if the dismissed ministry is returned to office in the ensuing election, though in the recent Australian case Sir John Kerr would probably regard the exercise as successful even if Whitlam is returned to office as it resulted in supply being obtained.

(g) Evatt op cit, 80.

(h) Marriott, The Mechanism of the Modern State (1927), ii 32.

(i) Letter to Lord John Russell—quoted Evatt op cit 262.

(j) Mr Whitlam has already indicated that while God may save the Queen "nothing will save the Governor-General"—*Dominion*, 12 November 1975. The Governor-General is appointed to and removed from office by the Queen on the advice of the Prime Minister with the normal rules relating to the exercise of executive powers on ministerial advice applying. Hence the Governor-General has no security of tenure. It is by no means satisfactory that the Governor-General should be in the position where his own continuance in office depends on the electorate vindicating his stand; but that is another matter. The New South Wales electorate in 1932 returned the government which had taken the place of the ousted ministry and Sir Philip Game saw the remainder of his term of office out.

Priorities—"Students of the (Mayor) Beame team point out that this is just the kind of situation in which the Mayor likes to dig in his heels; earlier this year, he agreed to generous new contracts with the firemen and the sanitation men, which will cost the city millions, but refused to intervene in a strike by Legal Aid lawyers who were asking for a total of a couple of hundred thousand". The *New Yorker* (18 November 1974).

SOME THOUGHTS ON BAIL

NIGEL HAMPTON, *a Christchurch practitioner, writes the first of two articles which have their origin in current discussion in the Garden City.*

There would (or should) be little dissension from what I consider to be the three major principles which should be borne in mind when considering any bail system. These are as follows:

(a) The maximum number of accused persons who can with reasonable safety be released before their trial should be released.

(b) There should be adequate and effective communication of information concerning the accused between those who have that information (or can obtain it) and the Bench which is to make the bail decision.

(c) A bail system should bring with it, so far as is possible in an arbitrary system (and any bail scheme is such), equality and consistency and there should be eg no discrimination against individuals or groups for reasons unconnected with suitability or otherwise as to bail; there should be protection so far as possible against the prejudices and eccentricities of individual Courts; and it should prevent the use of punitive remands and prevent the abuse of using remands in custody to achieve pleas of guilty (as researches overseas have shown that the man in custody is indeed more likely to plead guilty than the man who has been bailed).

Present situation

One must look to ss 318 and 319 of the Crimes Act 1961 and ss 45 to 59 (inclusive) of the Summary Proceedings Act 1957.

There are three categories of bail in New Zealand:

(a) If charged under ss 73, 76 or 78 of the Crimes Act 1961 (relating to treason and communicating secrets) then bail shall be granted only by order of the Governor-General or a Judge of the Supreme Court.

(b) Every person is bailable as of right when charged with an offence:

(i) which is not punishable by death or imprisonment;

(ii) which carries liability for a maximum term of imprisonment for a term of less than three years (except for assaults on a child or by a male on a female) with the proviso that if the offence with which he is charged is punishable by imprisonment and the person charged has previously been convicted of an offence which was punishable by death or imprisonment then he is not bailable as of right.

(iii) one of the 12 offences listed in s 319 (3) of the Crimes Act which carry liability for imprisonment for more than three years subject again to the proviso as above;

(c) Everyone who is charged with any offence and is not bailable as of right (as defined above) is bailable at the discretion of the Court.

It is in the discretionary bail area that the greatest number of problems occur and injustices (in terms of the three principles outlined at the start of this article) are made manifest.

The various and varied cases over the years in common law jurisdictions, concerning discretionary bail and the principles to be applied by a Court in exercising that discretion, have considered and sometimes accepted and sometimes rejected the following factors:

(1) Whether it is probable that the accused person will appear at his trial;

(2) The weight or strength of the prosecution evidence;

(3) The nature of the crime charged;

(4) The possible severity of the punishment which may be imposed;

(5) It is improper to use remands in custody to obtain further information about, and indeed from, the accused person;

(6) It is improper to use remands in custody as a means in effect of punishing the accused person.

The possibilities of conviction.

(8) The likelihood of re-offending whilst on bail;

(9) Character of accused (and his past convictions) are relevant;

(10) The likelihood of the accused tampering with evidence of or witnesses if he is on bail;

(11) In the absence of evidence that the accused will probably not surrender to bail the presumption of innocence entitles an accused person to be released on bail.

See in particular *In re Robinson* (1854) 2 LJQB 286; *In re R* [1944] NZLR 19; and *R v Vincent and Spring* [1950] NZLR 653. Certain of the factors listed above are, it is submitted, quite clearly irrelevant to the question of bail. It would seem that Courts considering bail, from time to time and in a quite haphazard fashion, have moved way from the principles which were originally enunciated in the case of *In re Robinson* and which were, in summary, as follows (see Coleridge J at p 287):

(i) The test whether bail should be allowed is whether it is probable the accused will appear at the trial;

(ii) In applying that test the Court will not look to the character or behaviour of the accused at any particular time but will be guided by (a) the nature of the crime charged, (b) the probability of a conviction (ie the strength of the evidence) and (c) the severity of the punishment that may be imposed.

Even those principles, or at least the three basic guide lines (and particularly the second one) it is submitted are not, or should not be, of particular relevance to the question in issue.

There has in very recent times been a decision of Fox J in Australia in the case of *Burton v R* (1974) 3 ACTR 77 where these principles on discretionary bail were succinctly stated:

(1) Ordinarily bail should be granted. It is for the prosecution to make a clear and positive case for refusal. The prosecution must give specific reasons for opposing bail.

(2) The primary issue to be considered by the Court is whether or not the accused person will attend at his trial. The Court is to apply the test of a reasonable likelihood that he will attend.

(3) It is not normally an adverse factor that the possibility exists that the accused person may commit a crime while on bail. This factor is only important where the consequences of any crime he commits while on bail may be so serious and have such widespread effect that bail should be refused.

(4) The primary purpose of bail is to secure the presence of an alleged offender at trial. It is not to constitute advance punishment for presumed guilt.

But the overall picture is confusing and the variety of reasons which one comes across being used by prosecutors as reasons for opposing bail, and being accepted by Magistrates as being reasons for declining bail, are not strictly (or in some cases indeed at all) relevant to the question in issue; certainly in my submission equality and consistency in our present bail system is lacking.

Before turning to a proposed formulation of new rules as to categories of bail and the factors which should be considered by the Courts (and in laying down such factors in legislation then that might, hopefully, remove so far as possible some of the inequalities and provide something more like consistency), I would like to go on and briefly outline the present position with regard sureties on bail. In effect the entering into of a bail bond by a surety or sureties is really the sanction or force provided by the Law to ensure that an accused person appears at his trial ie if he does not appear then those sureties who have entered into bail bonds will face estreatment proceedings—their money will be taken from them. This means that the sureties are put under pressure to ensure that they produce the body at trial because in effect our present system, historically, is a release of the accused person from the custody of the law into the custody of his sureties and they can seize him and hand him back into the custody of the law at any time thereby discharging their own obligations and they are, as I have said, bound to produce him at trial. (That may have had some real meaning in days of coaches and foot travel; but what now of jet aeroplanes and suchlike.)

The provision as to sureties is contained in s 49 (2) of the Summary Proceedings Act 1975 which enables the accused person to be released on bail with or without sureties at the discretion of the Court subject to the condition that the accused person attend at the adjourned hearing and subject also to any other condition imposed under s 49 (1) as to reporting to the Police as a condition of bail.

"Excessive bail ought not to be required"—see the Bill of Rights (1688) (1 Will and Mar Sess 2c 2) s 1. It has been decided that the only enquiries which can be made by the Court as to sureties are confined to (i) whether the surety is of sufficient means to answer the bond; (ii) ensuring that the surety being proffered is not an infant, or a person in custody or a person whom the accused person has agreed to indemnify (because that latter would take away the power of the law—there would then be no sense of obligation in the surety to take steps to make sure the accused person

appeared at his trial). If the Court is satisfied with the pecuniary sufficiency of the surety then it cannot reject a surety because of eg his character or political opinion.

Despite that sureties and conditions as to sureties have been abused and still are abused in New Zealand. It is commonplace still to hear imposed by Magistrates the condition that sureties are to be approved by the Police. There is simply no power in our law for that to be done and it is against authorities going back a very long way. In addition one hears from time to time conditions being imposed on bail such as where the person should reside. The law as it at present stands does not give power to make such conditions. The only conditions that can be imposed are as to sureties and as to reporting.

On the latter aspect, ie as to reporting to the police whilst on bail, it is interesting to note the comment that has been made in recent times by high ranking officers in the police force that the reporting provisions are "overused" by the Courts and that, in any event, such provision is out of touch with the realities and practicalities of today's world with means of transport (particularly to Australia) being as varied and as fast as they are. The fact that the police (who are really in effect the only major prosecutors in New Zealand) consider such a major portion of our present bail system to be outmoded is perhaps a further indication that the whole bail system structure should be looked at afresh.

Possible remedies

Bearing in mind the three principles mentioned earlier on:

(1) A revision of the present s 51 of the Summary Proceedings Act 1957 (which deals with police bail) to provide that where any person is charged with an offence for which he is bailable, whether as of right or at discretion, and who has been arrested without warrant and brought into the custody of a constable in charge of a Police Station or watchhouse then, in the discretion of that constable he may take the bail bond of that person being guided in the exercise of his discretion by the presumption and the factors which will be mentioned later in this article as governing the question of bail by a Court at discretion. There has been greater use made of police bail in more recent times but it is suggested that further resort to such a provision could be made.

(2) There are two categories of bail as follows: (a) Bailable as of right which should be extended to include

(i) all offences not punishable by death or imprisonment; and

(ii) any offence which carries a maximum term of imprisonment of five years or less and provided that the accused person has never previously been sentenced by any Court in New Zealand to any form of detention (whether juvenile or adult work centres, detention centre, borstal or imprisonment).

(b) In every other case to be bailable at discretion.

(3) In considering the exercise of its discretion on bail a Court should have regard only to:

(a) A presumption of law in favour of bail (ie in effect giving some meaning to our otherwise mythical presumption of innocence);

(b) (i) the primary test should be the reasonable likelihood that the accused person will attend at his trial;

(ii) it is for the prosecutor to give specific reasons for opposing bail;

(iii) the only other (and lesser) factors which the Court could have regard to are: (i) the nature of the offence charged; (ii) the reasonable likelihood that the accused person might commit a crime whilst on bail where the consequences of such crime could be so serious as to warrant the setting aside of the presumption in favour of bail and refusing bail (that would cover the sort of instance where the prosecution could make out a positive case eg that the accused person is reasonably likely to interfere or tamper with evidence and/or witnesses).

(Those rules it is suggested would do away with such irrelevancies as are considered now from time to time such as the strength of the evidence, the likelihood of conviction, severity of punishment which is likely to follow, the remand being sought by the prosecution to obtain further information and such things as punitive remands.)

(4) The total abolition of what I suggest is the archaic system of sureties which in theory anyhow, favours the well off, who can find persons who have the money to go surety

on their behalf. The disadvantaged are even more disadvantaged under such a system, ie if they could find someone to go surety anyhow then the likelihood of that person having the moneys to substantiate a bail bond are not good. What tends to happen is that the bail bond and surety system is abused because bonds are entered into by persons who have not a prayer of being able to afford the amount which they sign for. When a system is being abused it needs reform.

The reform suggested is a simple one—abolish the present surety system and replace it with a sanction over the accused person himself namely the creation of a substantive and substantial offence of absconding from, or whilst on, bail.

(5) Better and more adequate information should be provided to the Court considering the question of bail. It used to be a totally and brutally lopsided system when an accused person first appeared in a Magistrate's Court. It was a case of the police prosecutor (the accuser) v the mute and overawed (the defendant) and really that was a no-contest. That situation has led in recent times in the United Kingdom to calls for a duty solicitor to assist in this regard; and on the basis of New Zealand experience with duty solicitors in the very recent past, it would seem that there has been some evening out of the situation, namely, that further information is being provided to Magistrates on the question of bail and from that they are better able to come to a reasoned decision in the exercise of the discretion. But to take the guess work out of it as much as possible there is a need for more information so that the factors mentioned above, and which govern discretionary bail, can be weighed up as against the presumption in favour of bail. In some United States jurisdictions very sophisticated "points score systems" which have the object of assessing in a quasi-scientific way the factors which make a man a good or a bad bail risk have been in operation. It would seem that such schemes are based on detailed researches which have been carried out to determine the factors in a man's police record, employment record, residential record and family background which make appearance or non-appearance in Court to answer bail the likely result. I do not advocate such here but more could be done, perhaps through duty solicitors, to provide a better detailed bail information sheet to be completed by the accused person and the duty solicitor and which would be introduced in all Courts in New Zealand. The suggestions at the duty solicitor National Workshop that there be the provision and the standardisation of interview and information sheets so that movement in the right direction is coming in any event.

(6) The establishment, at least in the larger cities of bail hostels or, in smaller centres, bail beds in existing welfare hostels, such hostels and/or beds to be State financed or subsidised. Too frequently it is the case that the police will oppose bail successfully on the basis that the accused person (often on a comparatively minor charge) has "no fixed abode". That from any viewpoint is not strictly one of the factors to be considered in the discretionary grant of bail. Yet it is given effect to. Should there not be some place where such persons can go? (And now see the editorial note just published in (1975) Crim L R at p 57 on the Sheffield bail hostel!)

OBITUARY

G R Watters

One of the most respected leaders of the Waimate community, Geoffrey Ross Watters died recently, aged 75.

Mr Watters moved to Waimate in the 1920's where he set up a law firm with Mr A C Middleton, now known as Messrs Wilson Watters Henderson & MacGeorge.

Mr Watters was born in Milton and received his primary education at the Roslyn Primary School in Dunedin and the Ashburton Borough School, where he was dux in 1912.

He graduated from Otago University with a Bachelor of Arts and a degree in law in 1922.

He was a member of the Waimate Primary School Committee from 1936 to 1948 and then in 1943 the Waimate High School Board. He was associated with the board for nearly 20 years and at one stage was chairman.

He gave 27 years of unbroken service to the Waimate Borough Council and was involved with the local branch of the Plunket Society for 37 years.

Mr Watters was a keen sportsman and became president of the Waimate Tennis Club and secretary of the Tennis Association.

He unofficially retired at the end of 1970 with his partner Mr T A Wilson but retained his interest in the firm and continued to work as a legal clerk.

Mr Watters is survived by two sons.

FAMILY COURTS FOR QUEBEC

On 3 February 1975 the Quebec Committee on Family Court presented to the President of the Civil Code Revision Office its "Report on the Family Court". The Committee put up no less than 93 recommendations in its 314-page Report. PROFESSOR P R H WEBB *provides an analysis.*

First, the Committee (which did not consist wholly of lawyers) reviewed the deficiencies and shortcomings of the existing system, starting with the premise that: "Until now, the Court has handled marital conflict cases by merely determining the rights and obligations of the persons concerned when the marriage is deemed to have failed, without attempting to find an adequate solution for the real problem underlying the breakdown" (at p 2). The Committee felt that the Courts' traditional role needed to be "redefined" with special reference to family and child problems and that the Courts' goals "must be broadened and better adapted to our new social conditions" (at p 3). The justification of this attitude is amply borne out by the gloomy statistics to be found on p 8 et seq and the stark appraisal of social and judicial services available to Quebec families (at p 12 et seq). It would appear that as many as five different Courts have sometimes conflicting jurisdiction in family law matters (p 15-19) and that there are varying conceptions of family justice (p 19-25). It seems also to have been appreciated that the adversary system in a family law situation is a failure (pp 25-27). The Committee concluded that, following its study of the current situation, as their structures and present concepts of family justice now stand, neither the Superior Court nor the Social Welfare Court, which hear most cases regarding children or families, adequately meet the needs of those called to appear before them (at p 249).

In its second chapter, the Committee defines the objectives sought in the administration of family justice, having regard to the partiality, inappropriate or even contradictory solutions currently offered. It noted that this was "due to division of jurisdiction, rigidity of the adversary system, lack of co-ordination and inadequate collaboration between psycho-social and legal family services" (at p 31). The Committee, anxious to ensure that "comprehensive, effective and dynamic justice is provided," enumerated nine goals (at pp 32-33) which the Courts should aim for:

(1) To humanise and personalise the legal process in family matters;

(2) To make the legal system and auxiliary Court services accessible and efficient;

(3) To reach settlements which take the interest and rights of each family member into account;

(4) To create an atmosphere favourable to calm and dignified settlement of family conflicts;

(5) To appraise the conflict in all its aspects and identify the underlying problems;

(6) To prevent permanent breaks, whenever possible, and promote conciliation of the parties in conflict;

(7) To enforce Court decisions more efficiently;

(8) To promote self assessment of the Court system with a view to making changes in structure and substantive law, when necessary;

(9) To make the Court open to the community so as to obtain the interest and the confidence of the general public.

To meet the above criteria the Committee recommended (at p 249) that a Family Court be created in Quebec with jurisdiction in all family matters and that it should be presided over by specialised Judges, assisted by specialised auxiliary services and governed by procedural rules specifically adapted to the nature of family conflicts. The Court would thus assume both legal and social responsibilities while essentially retaining its status of a Court of justice.

The third chapter is devoted to the jurisdiction of the proposed new Family Court, commencing with a section (pp 43-46) on the concept of family law and the content thereof. Evidently at an earlier stage thought had been given to setting up a Family Division and a Child Division (see pp 47-48), but this did not become a recommendation in the end (ibid). It is suggested that the new Family Court should be established with exclusive original jurisdiction in first instance in matters of family law and that it should include two administrative sections, viz civil and penal.

The civil section would have jurisdiction over the following matters:

A. Relations between consorts: marriage, separation as to bed and board, divorce, annulment or nullity of marriage, recourse in cases of disagreement between consorts, recourse for

support, reciprocal execution of maintenance orders, dissolution of matrimonial regimes, judicial separation as to property, conventional modifications to matrimonial regimes, protection of the family residence (at p 55).

B. Relations between parents and children: repudiation and contestation of paternity, judicial acknowledgment of paternity or maternity, lying-in costs, recourse for support following acknowledgment of paternity or maternity, adoption, custody of children, obligation to support children, legal dispensation by reason of age for marriage, parental authority and tutorship of persons of minor age.

C. Other matters: judicial youth protection, protection of incapable persons of full age, protection of the mentally ill, absence, relations between de facto consorts, civil status, changes of name made under the provisions of the Civil Code respecting correction of records and registers of civil status, and filiation, or under the Adoption Act, habeas corpus to recover custody of a child of minor age, the law on successions, and any other matter attributed to the Court by special statute.

As to penal matters, the Court would be seised of certain offences committed by an adult, viz, refusal to support, incest, sexual intercourse with step-daughter or adoptive daughter, father, mother or tutor who causes defilement, corruption of children endangering morals, abandonment of a child, serious acts of violence between consorts or between parents and children, abduction of a female under 16, abduction of a child under 14 and theft by a consort, while living apart, of an object belonging to his spouse. As far as offences by a child are concerned, there would sometimes be jurisdiction under the juvenile delinquency legislation. The Court would also deal with offences against provincial statutes or municipal by-laws committed by children under 18. Reference should be made to Recommendations 6 and 7 (pp 58, 252).

There is a lengthy (pp 59-114) Chapter IV. The Committee realised that the creation of a Quebec family Court with civil, criminal and penal jurisdiction in both federal and provincial matters posed various constitutional problems. These will be of interest to constitutional lawyers rather than family lawyers, but it was clearly right to include this Chapter, which is entitled "The Family Court and the Constitutional Problem".

Chapter V is devoted to the organisation of the Family Court. It considers the work and personality of the ideal Judge. The Committee's Recommendation 8 is to the effect that the family Court Judge be chosen from lawyers who have been practising for at least 10 years and should also possess personal and human qualities and aptitudes enabling him to act as conciliator. Any knowledge of disciplines complementary to family law, especially sociology, psychology, criminology or any experience acquired in various social services should be taken into consideration in choosing a Judge. Recommendation 9 suggests that one of the principal criteria be specialisation in family law or, at least, a considerable interest in problems relater to children and families (see pp 118-119, 253). Further training is also urged: see p 119, as is rotation of Judges between the civil and penal sections of the Court. The role of the Chief Justice, the management of the Court's business, the duties of co-ordination and training of personnel are examined (pp 120-122).

The Committee advocated also the appointment of an official called a "mediator" (pp 124, 255). He would take cognisance in first instance of provisional and accessory measures in matters of separation as to bed and board, divorce and annulment (pp 125, 255). He would be empowered to obtain all information useful for a fair and enlightened appraisal of the various factors in each case (ibid). He would be chosen from among lawyers and notaries who specialise in family law and have been practising for at least five years (pp 126, 256).

The Committee also felt that the presence of a lawyer would be essential in the Court in order to ensure proper administration of family justice and respect of the rights of the parties (p 127 et seq, 256). Accordingly a number of recommendations follow concerning the right to legal counsel (pp 127-132, 257), the qualities required of lawyers (pp 127-128) and the role of lawyers (p 133 et seq, 256 et seq). It is envisaged that there be special auxiliary services. These are

(1) The Admission Service (p 136 et seq, 258 et seq).

(2) The Family Counselling Service (p 150 et seq, 260 et seq). This would be attached to the Family Court but would operate independently and would be "geographically separated from the Court itself, without being too far removed from it" (at p 153). (See also Recommendations 71-74).

(3) The Investigation Service (p 156 et seq, 262).

(4) The Clinical Service (p 161 et seq, 263).

(5) The Probation Service and Child Services (p 164 et seq, 263-264).

(6) The Support Collection Service (p 167 et seq, 265-266).

Provision is also made for a Co-ordinating Committee to exercise a general oversight over the whole structure (pp 173-174; 266).

The sixth and last chapter deals with procedure before the Family Court. Some of the recommendations are particularly interesting to read. Recommendation 65 proposes that even in the absence of formal proceedings for separation as to bed and board or divorce, either spouse should be allowed to bring family problems before the Admission Service by affidavit and request the assistance of the Court's family counselling service (see at pp 197, 234). In Recommendation 67 it is proposed that the designation of parties in family matters be made less contentious. "To this end, a motion to institute such proceedings could be entitled: 'The Family of A and B'." (see at pp 199-200; 235 and also pp 227, 241). Recommendation 77 states that the Court should be authorised to order a social investigation or an expert medical opinion, even on its own initiative and that the investigator or medical expert involved be designated by the Court, and the expenses borne by the State (pp 214, 238). Confidentiality is preserved: see pp 222-223 and Recommendation 82, which applies in both civil and criminal cases).

The well-reasoned Report is thoroughly scholarly and should be welcomed by those interested in family law reform, especially those who would advocate the setting up of family Courts in New Zealand. For them close study of the Report is a very definite "must".

JUST WHAT OFFENCE DOES A PARTY COMMIT?

MR ROBERT S CHAMBERS, *until recently Judges' Clerk at Auckland, is now at Oxford on a Rhodes Scholarship.*

A short decision by the Court of Appeal is worthy of comment because of its practical implications in criminal trials where a "party" is charged. In *R v McKewen (No 2)* [1974] 1 NZLR 626 the facts were these. Robson was found guilty of murdering her 16-month-old baby. McKewen was also charged with that murder. It was not alleged that he actually committed the murder. It was alleged that he incited or counselled Robson to commit it. He too was found guilty. He appealed. The Court of Appeal held that the trial Judge, McMullin J, had directed the jury wrongly. But they applied the proviso.

It is submitted with respect that the Court of Appeal was wrong in holding that McMullin J misdirected the jury. The part of His Honour's summing up which they criticised was:

> "Therefore, a verdict of not guilty against Charron Robson means a verdict of not guilty against Murray McKewen. But . . . if you found murder proved against Sharron Robson, then in the case of Murray McKewen you have got to look at the additional ingredient or element in this case; that is, that in his case it is alleged that he was party to the offence of murder by counselling, inciting, procuring."

And further:

> "But if you find murder against Sharron proved, then you look and see whether you are satisfied beyond reasonable doubt that he did in fact give this encouragement to her to kill the child by drowning and that he intended her to act upon that encouragement. If you find that proved plus murder against Sharron Robson, the proper verdict against him would be guilty."

McCarthy P said (at p 628):

> "But it is complained that when he came to deal with the charge as it related to each in turn, and after he had discussed the evidence admissible against Robson to prove that she had murdered the child, the Judge turned the jury's attention, in the case of McKewen, solely, or at least principally, to the issue whether he had incited Robson to her course of action and failed to direct them that, in the event of their concluding that a case of murder was made out against Robson, they still had to consider whether on the charge against the appellant it was proved on evidence *admissible against him* that Robson had murdered their son."

McCarthy P held that the complaint was well made. With the greatest respect, it is submitted that it was not.

This submission is based on the nature of the offence committed by a party. It involves a consideration of s 66 (1) of the Crimes Act 1961. Paragraph (a) deals with those who actually commit the offence charged. But paras (b), (c), and (d) are, in effect, "deeming" provisions. They say that a person who aids, abets, encourages, or incites an offence commits the offence charged. Of course, someone who encourages A to assault B does not *in fact* assault B himself. But para. (d) says he does. It deems it. Thus, by these artificial means, a woman may be guilty of rape and the offence of driving while disqualified may be committed by a person other than the driver*(a)*. In fact, in 7 Geo 4, c 64, s 9 in 1826, it was stated that every accessory before the fact "shall be deemed to be guilty of felony . . . and may be indicted and convicted of a substantive felony"*(b)*.

What must be proved under para (d) is the inciting, counselling, or procuring; that is the unlawful act. Once that is proved, and once it is established that the offence took place, the counsellor falls within para (d) and is deemed to be guilty of the offence he incited and counselled. That the offence he incited took place is a prerequisite to the jury's being able to inquire into the real question: did the accused incite, counsel, or procure A to assault B?

The fact that A assaulted B can be established in any way at all. It must, of course, be established to secure a conviction under s 66 (1)*(c)*. But it is no different from any other pre-condition of fact which must be established before guilt on the real issue can be determined. Before one can be found guilty of rape under s 128 of the Crimes Act, it must be established that the accused is a "male person". Before one can be liable under s 52 (1) (a) of the Police Offences Act 1927, it must be shown that the person has previously been convicted as an idle and disorderly person. These are simply pre-conditions of fact required for any particular offence. In our case, the pre-condition for the offence of inciting Robson to murder the baby (which offence is deemed to be the offence of murdering the baby) is that Robson murdered the baby. That can surely be proved in any way, eg by Robson's admitting that she murdered the baby, by showing on all the evidence that she killed him. Once that is established, then the jury has to consider whether McKewen, the accessory, incited. In considering this, regard can be had only to evidence admissible against him.

A jury ought to have approached the problem thus.

Question 1: Did Robson murder the baby?

If "no"*(d)*, then McKewen could not be guilty of murder, because one cannot be a party to an offence which has never been committed (see *R v Harrison* [1941] NZLR 354).

If "yes", then the condition precedent for entering into an inquiry as to McKewen's guilt, by virtue of s 66 (1) (d), would be established. This would lead to a further question.

Question 2: On the evidence admissible against him, did McKewen encourage Robson to kill the baby by drowning, and did he intend her to act upon that encouragement?

Robson's statement would be inadmissible against McKewen when considering whether or not he had encouraged her, as he was not present when she made it.

This approach was carefully followed by McMullin J in his direction to the jury. In particular, he gave the standard warning to the jury about accepting the uncorroborated evidence of one accomplice against another. Further, he directed the jury that an unsworn statement made by one person is evidence against that person only. His Honour said:

> "Well, the law is this, that a statement made by one person out of Court but in the presence of the other is not evidence against the other; it is only evidence against the maker of it and it is not evidence against the other unless that other by his words or conduct adopts it. So if A out of Court say [sic], "I did it and B was with me" and B nods his head and says, "Yes, I admit that" or by some other remarks or conduct shows that he agrees with what A has said, then that is evidence against B as well. But, if he remains silent or doesn't signify his acquiescence in that statement, it is not evidence against him."

It is to be stressed that this interpretation of the nature of the offence committed by a party involves no exception to the ordinary rule that statements made out of Court by one person are admissible against only that person. The real offence committed by a party is the aiding or abetting or inciting, as the case may be. That may be proved only by evidence admissible

---

(a) See all the cases listed in Adams, *Criminal Law in New Zealand* (2nd ed), para 637.

(b) See Stephen's *History of the Criminal Law*, Vol II, p 235.

(c) If A counsels B to assault C, but the assault does not take place, A may be liable under s 311 (2), but not under s 66 (1).

(d) Presumably it would have been "no" on the grounds of accident or automatism.

against the party. But the fact that the offence which the party aided, abetted, or incited was committed may be established by any relevant evidence*(e)*.

Common sense dictates that this must be right. If the Court of Appeal's judgment was correct, a jury could find that A assaulted B and that C incited A to assault B. And yet C would still have to be acquitted if it was not proved on evidence admissible against him that A assaulted B. In one breath, the jury would be saying that it had been proved that A assaulted B. In the next, they would be saying that it had not been proved that A assaulted B. Regardless of how conscientious any juror may be, he will rebel against that sort of Alice in Wonderland logic.

The Court of Appeal cited no authority at all for this part of its judgment. It is submitted that the passages cited by McCarthy P from *R v Merriman* [1973] AC 584 and from *Phipson on Evidence* 11th ed para 797 are quite correct. Where it is suggested with respect that the Court of Appeal was wrong is in the nature of the offence to be established against McKewen.

McCarthy P refused to follow Bridge J's direction in *R v Quick; R v Paddison* [1973] 3 All ER 347. Paddison and Quick were both charged with assault, Paddison on the basis that he aided and abetted Quick. There were three charges. One was a joint charge. The second was a charge against Quick. The third was a charge against Paddison. Quick pleaded guilty to assault on count 2. In summing up against Paddison, Bridge J said that, as Quick had pleaded guilty to assaulting X, there was no issue to be tried as to whether there had been an assault. The only question was whether Paddison had aided and abetted. The jury found that he had. He was convicted of assault under count 1. Both Paddison and Quick appealed. Lawson LJ said at p 351, bearing in mind that Quick pleaded guilty only to count 2 and not count 1:

> "Before the decision of the House of Lords in *Director of Public Prosecutions v Merriman* the verdict against Paddison on count 1 might have caused difficulties; but we are satisfied that as a result of that case the verdict can stand in law despite the fact that no verdict against Quick was taken on it."

It is submitted that that case is directly on point. Bridge J and the Court of Appeal obviously realised the real nature of the offence committed by a party. Bridge J's direction was not criticised.

It is submitted with respect that McMullin J's direction to the jury was unimpeachable, and in accordance both with the true nature of that "deeming provision", s 66 (1), and with common sense.

(e) Of course, in deciding whether the principal is guilty of that offence, the jury must consider only the evidence admissible against that principal.

THE DIFFERENCE

"What is a Solicitor?" my daughter asked,
"And what is a Barrister?" demanded my son,
"And what is the difference twixt two?"—
Chorus from enquiring minds,
Pater Familias, dilemma faced.
He, accustomed to the maelstrom
Of Freudian ids and egos
And leather-bound volumes of Ogden and Purcell,
Puzzled indeed by the logic of the young—
At last an answer.
(Not without the timbre of a little doubt)
"Does the leopard change his spots? And
"What is the breach twixt baboon and chimp?—
Are not monkeys all the same?
"The vulture and the dove, the skies do share
"The angry pike, the kindly trout
"Share vast rivers and limpid lakes,
"The lion and the deer
"Both live content on God given sward
"The humped camel with his load of hate
"Rolls his ways on desert sands
"Shared with gentle hare."
"What is the difference?" urges my son.
"Tis the millenium of voice and pen," I reply,
"The difference
"The same as doth separate the alligator from crocedile
"Sharing the swamp of eternal doubt."

GEORGE JOSEPH

No light matter—"I am now enjoying my third attempt to become a lawyer. What I believe is the most difficult is not to find out what the law is, but to charge the kind of fee which my partners assure me is now expected . . . but I'm learning fast."—SIR JOHN MARSHALL.

From the mouth of babes—Schoolboy voter-to-be on *Nationwide*: "There are some very good politicians. There's just this lack of decisive policy."

LEGAL LITERATURE

Guide to the Family Law Act 1975, by Professor P E Nygh LLM (Syd) SJD (Mich), Professor of law, Macquarie University. Butterworths (Sydney), 1975. xvi + 162, incl index. Reviewed by Professor P R H Webb.

The publisher's "blurb" states that the new Australian Family Law Act of 1975 "has made some fundamental changes to existing law and the way the legislation is to be administered. The abolition of the concept of 'fault' in matrimonial disputes and the reduction of the grounds for divorce to one, are merely the best-publicised of the many and far reaching changes, some of which are of greater significance. Another very important change is the unification of the law relating to maintenance, custody and matrimonial property on an Australia-wide basis". Many readers of this excellent work will already be aware that, under s 48 of the Family Law Act the one and only ground for dissolution of marriage is the irretrievable breakdown of marriage and that such breakdown can be established only by satisfying the Court that the spouses separated and thereafter lived separate and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for dissolution of marriage.

The "blurb" continues thus: "Generally the purpose of the Act is to modernise and 'humanise' the law, to allow the law more accurately to reflect contemporary conduct and social usages, and to streamline its procedures and reduce their cost. This book is intended as an introduction to the Act. It examines the new law and contrasts it with the old, placing it in its proper legal, social and historical context. . . ." Professor Nygh is to be highly congratulated on his speed and expertise in producing this book: the 1975 Act cannot have been out for long when he completed his writing. In his preface he remarks that the Act "has been hailed by some as the most advanced legislation of its type in the Common Law world," and that "Others see it as implying the downfall of the institution of marriage and the end of western civilization," and that his book "does not seek out to praise or to bury the Act but to explain, and where necessary, to interpret it." The book should be of immense interest to those concerned with family law reform in this country, to comparative lawyers and to practitioners faced with problems involving the application of Australian law. The author does, however, say in his preface that the book "is not intended as a practice book" since this would not be possible at a time when the Family Court has not yet been constituted and the forms have not yet been settled. It is hoped that such a book will follow in the not too distant future. No doubt such a book will maintain the very high standard of the volume under review and the reviewer can only conclude by offering his best wishes for the preparation and publication of this promised textbook and his admiration for the present introductory guide.

Then and Now: 1799-1974. Commemorating 175 Years of Law Bookselling and Publishing. Edited by Peter Allsop. (London: Sweet & Maxwell. 1974. xii and 219 pp (no index).) Reviewed by A C Brassington.

The legal profession in New Zealand is undergoing many changes, but one which is frequently overlooked is the virtual abolition of Latin and Roman Law from the education of our young lawyers. Too much has been lost. Now, as the young become middle-aged, some of them are beginning to realise the extent of their deprivation, for such indeed it is. Another matter which should be of concern is the disappearance of old law books from the offices of practitioners. Pressure on space, high rental, and sometimes ignorance have been the destructive forces.

These and other considerations should lead to a warm welcome for "Then and Now", a history of the legal publishing firm of Sweet and Maxwell, celebrating the 175th anniversary of its foundation at 3 Chancery Lane, Fleet Street. The development of law publishing is the main theme of this book. Its perusal can evoke in the lawyer that nostalgia which arises when memories are stirred by the touch and sight of some long forgotten volume, or by the scent of tobacco and old leather.

Mr M W Maxwell, Chairman of the Company from 1953 to 1972, has contributed an extensive chapter dealing with the development of law publishing during the period 1799-1974, and there is a complementary chapter by John Burke and Peter Allsop, both of whom are barristers of Lincoln's Inn, reviewing the condition of law publishing at the present day.

Mr M W Maxwell has incorporated in his survey of his own company, some information

relating to the publishing firms of Stevens and Sons, and Butterworths. There is an interesting incidental mention of Charles Frederick Maxwell's establishment in 1869 of a business as a law-bookseller and publisher in Chancery Lane, Melbourne. The voyage from England took him 177 days. Mr Maxwell's chapter is particularly valuable because he records his personal knowledge gleaned from his father. No documentation has survived of the Sweet or Stevens businesses.

Messrs John Burke and Peter Allsop recount what they describe as "major works and old faithfuls", and the planning of the great modern works on local government, taxation, property and conveyancing, common law and commercial law, together with useful summaries of publishing ventures into criminal law, international law and the new law relating to the Common Market. Practitioners will note with interest the effect of successive devaluations on the cost of paper, once the cheapest item in the making of a book; the effect on prices of the increase in the volume of law, which involves so many more pages of text; and by way of compensation the important new market for law books, which are now increasingly required by other professions, government departments and administrators. But the authors stress that "the solid core of the market for law books remains the country solicitor, who has to rely on himself and his own library to a greater extent than his brethren in the cities and at the Bar". The whole chapter is essential reading for lawyers, and may ease the minds if not the pockets of this reluctant class of buyers.

But this book does much more than celebrate a notable anniversary in the life of a great publishing firm. The opening essay by Professor Owen Hood Phillips on "Legal Authors since 1800" is a massive and extensive contribution to the literature of the law. The sub-titles of the essay read like the battle-honours of a veteran army—Bentham and Austin, Benjamin, Maine, Pollock, Maitland, Anson, Dicey, Holdsworth and others of great distinction.

Human interest is not lacking. Serjeant Byles rides to the Courts on his white horse, known to the legal public as "Bills". Jarman, working in the open because of ill health, is found standing at a desk in the middle of a field with lawbooks strewn around him. Benjamin escapes from the defeated Confederate army to make his name in England as a leading counsel and writer. Professor Hood Phillips has the knowledge and the literary skill to draw lifelike vignettes of most of the writers, who emerge from the dusty past into brief life in these pages.

There are chapters on Commercial Law by Professor C M Schmitthoff, Common Law by Professor A W B Simpson, Constitutional Law by Professor J D B Mitchell, Criminal Law by Professor Brian Hogan, Local Government by Sir Desmond Heap, Procedure by Master I H Jacob, the Professions by Mr Tom Harper, Property and Equity by Mr Edward F George. He supplies the final paragraph in this book, in a witty passage which opens with the words "Conveyancing is a way of life."

In a book by many hands there is bound to be overlapping. Some omissions whether of a noteworthy author, or of a subject, are to be expected. Failure to provide an index tends to make it difficult to find and identify the occasional gap. But so much has been done, that it would be captious to complain. The authors have given of their best in their chosen subjects. This shows in their writing which stimulates and refreshes the readers. The book worthily commemorates a great firm, and its long and outstanding service to the law.

Getting together—It is singularly appropriate that this dinner should be held in this Student Union building. Funny expression that—whether it refers to the union between the student and the university or the union of one student with another I'm not sure. Many mothers complain that there is far too much union between students, and there is no need to give them a building to encourage it—Mr P G Hillyer QC at a Bar Dinner for Mr Justice Chilwell.

Magisterial service—(a letter in the *Solicitors' Journal*) — Sir, — Your contributors Derek Schofield and Stuart Baker wonder why there is not a greater number of solicitors eager to become magistrates' clerks. The reason is that as a Magistrates' clerk one is in constant contact throughout one's working life with undesirable characters from the lowest strata of society; sullen wretches, often of dreadful appearance and aggressive temperament who have no regard at all for the law; persons moreover who prove by their very presence in court that they have no worthwhile occupation to pursue and are probably unable to hold down a decent job. I refer of course to the Magistrates.

CORRESPONDENCE

Sir,

Maori land

The future of the Maori is not at all clear, and I think that that the two months march has exacerbated the tension now existing. The march up the East Coast will not, I think, help. I contributed some letters to newspapers with the intention of showing the weakness of the Maori position, then a period in hospital and slow recovery. I was too weak to be interested in the passing scene.

But I was shaken out of apathy by the contents of address given by Mr Ludbrook at the triennial gathering of the Law Society. The contribution of Judge Gesell was a performance where every word was weighted with significance in showing how the lawyers of USA have met the need when and where justice was strangled or suffocated. Then I turned to Mr Ludbrook's address. I confess that I was dreadfully depressed at reading his arguments, backed as they were by a multitude of authorities. I have read fairly widely on the Maori problem but it would seem that opposition to the British position was somehow smothered.

However, I wish to tell you a story in connection with my practice.

Section 234 of the Maori Affairs Act 1953 states distinctly that any contract by a Maori affecting land shall be void *unless and until it is* confirmed by a Judge of the Maori Land Court. I filed papers in several dealings with land where the Maori vendors were not present in Court. I drew the Judge's attention to the section of the Act and argued that, before examining the purchaser's case, he was obliged to examine the vendor's position—land, family, health, house, etc and arrive at a decision to allow him or her to sell or lease or otherwise. "You cannot confirm a nullity," I said. He said, "I take no notice of that obligation". I interrogated the Chief Judge and two other puisne Judges. All were of the same view and practice. I wrote Mr Hanan, then Minister of Maori Affairs. He referred my letter to his office staff. They remitted my letter with a short note that I was not entitled to be worried. I was not satisfied, and worried Mr Hanan who wrote me that I had converted him and that, as he was preparing material for and amendment, he would take my representations into consideration. Then he died.

I had scouted around and had found that a British colony in Africa, being desirous of buying land from natives, had advertised its terms, one term of which was that the contract to sell would be binding as soon as it was signed but subject to its being disrupted at a sitting of a Court at a later day. If that had been the text of our Act, no trouble could have occurred.

The point came before the Court of Appeal in *Wilson v Herries* (1913) 16 GLR 188, where Edwards J (delivering the judgment of the Court) found that the negotiations for lease or purchase saved the practice of the Judges by setting up an inchoate contract. But, surely an inchoate contract is only the rudiments of a contract, but not a contract.

L A TAYLOR
Hawera.

[Mr Taylor is the Journal's most veteran correspondent and contributor. We are saddened to learn that he has not yet made a complete recovery from his illness, and plans to retire in the new year after 70 years in the law, 62 of them in sole practice. He takes our best wishes into retirement.—JEREMY POPE.]

Sir,

Pacific forum

I congratulate you for highlighting the Pacific Forum, the seminar on the Pacific Islanders and the Law, held at Porirua on September 13th 1975. You did bring out in general terms the ideas and the main features of the forum, many of which are important and worthwhile to be pursued. Although the act of participation and involvement in the seminar was a healthy sign of concern by those who were there, the big question is what can be done to achieve those ideas?

As co-sponsors of the Seminar with the Wellington Young Lawyers, the Wellington Regional Pacific Islands Advisory Council (hereinafter referred to as simply "the Pacific Council") is thankful to all those who participated to make that occasion an unqualified success. We have formed with the Young Lawyers an ad hoc joint committee to issue a publication concerning the Pacific Forum; we have drawn up priorities of the subject matters aired at the Forum; and we have appointed groups of sub-committees to follow up these priorities. We would like also to co-ordinate our work with other organisations who are concerned with the problems raised in the Pacific Forum.

The Pacific Council is not only concerned with identifying the areas of problems of its constituent ethnic groups, but also of contributing their vibrant and viril cultures, traditions, languages and usages to the lifestyle and way of life of New Zealand.

Yours faithfully,
NOA NAWALOWALO
Justice Sub-Committee of the
Pacific Council

Sir,

Legal Aid

It would seem that the mills of God are lightning fast when compared with the legal aid system.

On the 9 December 1974 an order for paternity and maintenance was made in favour of a legally aided applicant. The following day the appropriate bill of costs was rendered to the Secretary of the District Legal Aid Committee. On the 11 September 1975 the appropriate voucher was received from the Committee and this was duly signed and posted back on 15 September 1975. Payment was finally received on the 23 October 1975 a mere 45 weeks after the bill of costs was posted. There were no queries about the bill or any other matter relating to the application.

One can hardly say that the discount which has to be given on these matters is for prompt payment.

Yours faithfully,
G E GAY
Waihi.

FREE SPEECH A CONSTITUTIONAL RIGHT?

DR RICHARD LAWSON *continues his Occasional Notes from Britain.*

Although the heart and mind of the nation has (most properly) been occupied with the raging battle within the Guild of Professional Toastmasters on just when to call for the loyal toast (9-5 in favour of after the pudding), other more weighty questions have latterly been posed as to when or where things might be said or done.

Take, for example, the case of *Re X (a minor)* [1975] 1 All ER 697. X was the child of divorced parents. Some time after her father's death (the girl having been brought up by the mother) a friend of the father wrote a book, the first chapter of which purported to show the father as a man utterly depraved in his sexual activities.

X was psychologically fragile and highly strung. She had moreover, always been taught to respect her father's memory. The result was an application by X's stepfather to make X a ward of Court and for an injunction against publication of the offending passages in the book. Latey J recognised that the "freedom to publish is one of the most important freedoms and the Courts are jealous to preserve it": even so, he listened to the damage effects unrestrained publication was likely to have and concluded that the powers available to protect wards of Court extended to prohibiting publication of potentially harmful books in an appropriate case. This was such a case.

The matter proceeded to the Court of Appeal. There Lord Denning saw the application as, at heart, involving the whole issue of freedom of speech. While the offending passages in the book were truly offensive, freedom of speech, he recognised, "means freedom, not only for the statements of opinion of which we approve, but also for those of which we most heartily disapprove". Because of the "importance in a free society of the circulation of true information", the Master of the Rolls considered that wardship jurisdiction should not be extended to prevent publication.

Lord Denning did not appear to rule out an injunction in an appropriate case, though his judgment is far from explicit. Roskill LJ is much easier to analyse. His judgment contained these words: "There is in this country —and it is right that it should be restated in the clearest terms and never more so than at this stage in the 20th century—a right of free speech and a right of free publication. That right is at least as important—some may think more important—as the right of individuals, whether adults or minors, whether wards or not". But even he recognised that warship jurisdiction could extend to prohibit publication in an appropriate case. Only this was not such a case. Sir John Pennycuick endorsed in full the views of Roskill LJ.

So this was one of those curious cases where a limitation on free speech was permitted in principle if not in fact—a judgment which must also be made of the more notorious case of *Attorney-General v Jonathan Cape Ltd* [1975] 3 All ER 484.

As you will surely know, the late Dick Crossman had kept diaries recording his experiences as a cabinet minister in the Labour Government of 1964-70. After his death in 1974, a firm of publishers proposed to publish his diaries in a series of volumes. The *Sunday Times* published serialised extracts from the first volume. The Attorney-General sought permanent injunctions against both the publishers and newspaper.

My first reaction was that no possible legal ground existed to support the application. This view was seemingly justified when news came over the radio that the *Sunday Times* had successfully stood its ground.

But it was different when Lord Widgery's judgment became available. Deriving his argument from the celebrated *Prince Albert v Strange* (1841) 1 Mac & G 25, the Chief Justice approved an apparent "extension of the doctrine of confidence beyond commercial secrets". He concluded that a cabinet minister receiving information in confidence can be restrained by an injunction for unauthorised publication.

As for the doctrine of cabinet collective responsibility, Lord Widgery found it to be "an established feature of the English form of government", from which it followed that many matters preceding cabinet decisions may be regarded as confidential. He went on to say that, as the confidence is imposed for the better conduct of the Queen's business, it is a confidence which can be waived by the Queen and cannot be released by the members of the cabinet themselves".

Thus, another principle was established giv-

ing limit to the currency of free expression. But Lord Widgery recognised that volume 1 of the diaries, that part already serialised by the *Sunday Times*, dealt with matters some 10 years old, and that the lapse of time relieved the Court of its duty to restrain publication. Publication of volume 1, therefore, was to be allowed. It may be supposed that subsequent volumes will have to be reasonably out-of-date if they are to escape the judicially imposed restrictions on unfettered publication.

These curial dramas were played out against possibly a more significant struggle in the legislature. At its briefest, the fight is now on to pass the Trade Union and Labour Relations Bill before the session ends. Since it would compel newspaper editors to join the journalists' union, the fear has been expressed that editorial policy will eventually become the mere diktat of union policy and that editorial freedom will be the loser. It is also felt that the closed shop will deny editors the right to commission articles themselves as and when they want.

A secret ballot of the National Union of Journalists showed little desire to dictate editorial policy. This was not enough, however, for the House of Lords. In their Lordships' house, a press charter expressing an editor's right to be the arbiter of policy was inserted into the bill: breach of the charter would, at least, be "deemed to be contrary to public policy". The Commons does not object to the charter, merely the attempts to vest it even with the slightest degree of legal status. As the lower house sees it, the charter should be no more than yet another code of practice. So the Commons keeps deleting the amendments, the Lords keeps putting them back. Never yet has the Parliament Act 1949 (which allows the Commons ultimately to dispense with their Lordships' consent) been invoked. But the stage is set now for its first invocation.

What all this seems to prove (and this has never before appealed to me) is that some form of constitutional guarantee of free speech is to be found. Quite how one does it in the British constitution I know not, but someone ought to try. Then we would find student unions being deprived of the right they exercise these days to keep off the campus speakers whose views they oppose; and printers being obliged to print even material which reflects badly on them.

This Parliamentary tangle has apparently meant (though all is not yet lost) that the Hare Coursing Bill will lapse. This Bill, which will end the aristocratic torture of hares (who enjoy it, you know) for the sake of the privileged few and their mangy hounds. It is little pieces of law-making like this which make me believe that mankind is slowly and painfully kicking and clawing his way out of an age-old pit of savagery and cruelty.

THE GOWN

Cloth tarnished with tradition and age
Woven by Pitt and Quinn
Estab 1815
In Lincoln's Inn,
Weavers to their Majesties' Chancellors, Bishops and Learned Judges,
KCs' and QCs',
Even to the shoulders of lip-trembling Juniors.

The Gown,
Insignia of hard won accolade,
Toga of wisdom and the learned word.
Guinea pocket scorned by greater fees,
Recognising the worth of eloquence,
The dragging ribbon,
Once a response to the gentle pull
From anxious Junior
Warning of words too hastily said.

Tradition is an ageless thing
Abandoning with pride
Man's claim that posterity
To whom so much has been bequeathed
Shall seek nought for worthy inheritance
No 'heriditas damnosa', This
A bequest,
So readily abandoned
But always with the memory
That amongst the legends and created
By Parnell, Marshall Hall.
Hastings and Laski,
O'Connor and Greene
F E Smith of the golden tongue,
Levy, Casells Isaacs Reading to be,
Have carried too, the uneasy burden
On dark-shrouded shoulders,
Proud armour of warriors
Seeking to find, to prove
That the greatest legacy to posterity
Is the precedent of Truth,
The weapon that conquers all.

GEORGE JOSEPH

A Constructive Exercise—"I've got a three-year contract with N.B.C. that took six years to draft. If they ever fire me, I can live in it." *Bob Hope to the American Bar Association Dinner.*