The New Zealand
LAW JOURNAL

3 February 1976 No 2

INTER ALIA

Trends in legal education

At p 39 we record remarks made by Dr B D Inglis at a farewell dinner organised by the Victoria University Law Faculty. In them he notes a disturbing trend that greatly increasing numbers of law students are staying at university for the whole duration of their degree courses.

This Dr Inglis notes as a matter of concern for two reasons. First, the students themselves are denied the leavening which practical work and application bring to the souffle of academia. Second, the lecturers are not anchored to reality by a student body familiar with the market place.

Deepening this cleavage between theory and practice Dr Inglis notes an increasing tendency for Law Faculty staff not to be actively engaged in the practice of law.

While for students it is irksome in the extreme to find lecturers absent as they answer the summons of the Courts, nonetheless it is to their benefit that their lecturers do so.

More than this, there is a very real need for greater flexibility to develop between the practising and the teaching professions so that particularly senior practitioners can enjoy an interchange between the realms and so bridge the at-present-increasing gulf that separates those who teach how and those who actually do.

Exercise in intolerance

Apart from its questionable legality (which is undetermined at the time of writing), the new Government's decision to use the Trespass Act 1968 to remove a group of Maori land protesters from Parliament grounds on Christmas Eve revived an unhappiness between dissenters and establishment which should have been finally buried in 1972.

For some months the protesters had been allowed to remain with their tent "embassy", but not actually to camp or live in the grounds. This had been achieved after days of tactful diplomacy between the Maoris and the Acting Speaker, Mr Jonathan Hunt, but at no stage was it ever suggested by the previous Government that the right of peaceful assembly itself was at issue. The question was simply confined to the action of the protesters in excluding the public from parts of the grounds, namely their tent sites. They were never asked to go, simply requested to remove their tents.

So the protesters remained. Far from exhibiting signs of lawlessness, the grounds enjoyed a degree of tranquility and tidiness they have at times lacked. Even the defacement of the Beehive extension stopped, the vandals apparently thwarted by the protesters' presence.

And now they have been removed. Peacefully, lawfully, and with quiet dignity the protesters were making their point in what had been an essentially democratic and totally acceptable form of protest. The Government, by resorting to the Trespass Act, sought to create a breach of the law in circumstances where previously there had been none, and then went on to seize on that self-created breach as a pretext for wholesale arrests. In essence the demonstrators were given the option of abandoning their protest, or continuing it and being arrested.

Just what the future of our democracy can be when an inoffensive and law-abiding assembly can provoke such a heavy-handed response is a question only the future can answer. The assembly was, television viewers were told, "untidy" – but in what way and to whom viewers were left to judge for themselves. It was a "splinter group",

and apparently some of the principal group supported their removal. So what? Just as the main body had a right to make its point, so too has any splinter group with or without the main body's permission.

If a newly-elected Government with a massive majority can feel so insecure, how can the governed ever hope for any formal guarantees of what they can justly claim as fundamental democratic rights?

The events of Christmas Eve 1975 perceptibly diminished the freedoms of all New Zealanders.

JEREMY POPE

MR JUSTICE HASLAM RETIRES

At the request of the New Zealand Law Society and the Wellington District Law Society, a special sitting of Mr Justice Haslam's Court was held on 18 December last, to enable the Bar to express its gratitude to Sir Alec, for his long career both in practice and on the Bench.

On behalf of the Attorney-General, Mr P Wilkinson, the Solicitor-General, Mr R C Savage QC addressed his Honour and a crowded courtroom. He noted that Sir Alec had completed nearly 19 years as Judge of the Supreme Court.

"I appear as the Junior Law Officer – the Attorney–General regrets that due to the demands of many public duties which have been but recently cast upon him he is unable to be present – and so as a Law Officer I represent the profession throughout New Zealand and I speak, too, for the Government and the community, "he continued. "So with that triple tongue may I convey to your Honour our thanks for the long and faithful service that you have rendered as one of Her Majesty's Judges. But your Honour's service to this country has not been only as a Judge. There have been many other fields. As reference will doubtless be made by others to your services to the Law Society – and they were manifold – I will mention first that not least amongst your services to this country was that given in war. A Corporal Haslam went to the Middle East and a Captain returned and the New Zealand Law Journal of 1946 contains an article upon the work of the Legal Department of the 2nd NZEF which includes references to your services to it during part of the time you served in the Middle East.

"Perhaps I might mention, too, your interest in education which has been marked throughout your career and demonstrated by your many years of service as a member of the Council of Legal Education and the Rhodes Scholarship Selection Committee. Your Honour's distinguished career as a scholar and an athlete, who later became a Rhodes scholar, made your contribution particularly valuable in these areas.

"During your service as a Judge your courtesy was noted to all who took seriously their conduct of a case; who observed the proper etiquette and demeanour of a barrister of this Court, which is the heir to the practice of a code of conduct which reaches back much further than our colonial beginnings. There are counsel who have appeared in your Court who have anticipated the experience with apprehension having learned of your standards. Those who failed to measure up to them were made aware of it, but those who met them were grateful for the lessons that they had learned from your requirements.

"I believe that you are to return to Christchurch and I understand you are to take a part among the teaching staff of the Law Faculty of Canterbury University. That will not be a new experience for you since you were a member of it before your appointment as a Judge. But I suspect it may be a rather different place from the one it was 25 years ago. I gather that on one Friday evening then a man who is now an eminent practitioner attended, on his way to a ball, one of your lectures attired in a dinner jacket. I am sure no-one here will be surprised to learn that you remarked upon his dress and told him that he would have to make a choice between his social activities and your classes. I doubt if you will be troubled with dinner jacketed students today!

"If it be that your Honour is to return to some academic pursuits then perhaps I might be forgiven for noting that your Honour would be one of the few of the profession today whose scholarship is such that you could also have entered it 100 years ago. In 1875, according to the Colonial Law Journal, the examination papers for barristers – which I note in passing were then prescribed by the Chief Justice – included, apart from legal subjects and English, papers on the history of Greece and Rome as well as the Greek and Latin languages.

"May I end by saying you take with you the good wishes of the Government to Lady Haslam

and yourself for good health and a long and happy retirement," Mr Savage concluded.

Speaking on behalf of the New Zealand Law Society, the President, Mr Lester Castle, said that Sir Alec's impending retirement as one of Her Majesty's Judges brought to a close a further chapter in a career of distinction in many and varied fields of endeavour but foremost in and for the law.

"We do not overlook that you are perhaps the doyen in New Zealand of those Rhodes scholars who chose law as their calling and, in so choosing, you have played an important and responsible role in Law Society affairs at both the local and national level," he said. "You were President of the Canterbury District Law Society 1952/53; you were a member of the Council of the New Zealand Law Society not only during your presidency but also prior and subsequent thereto. It is noteworthy that you were the first South Islander (by adoption) to be elected as a Vice-President of the New Zealand Law Society and that you served the Society and all its members in that office for three years.

"An athlete of no mean ability, your Honour has undertaken the less spectacular but no less important tasks involved in sport administration. Just as you served Canterbury University College in general, and embryo lawyers in particular, as a lecturer over a period of 14 years (save whilst on active service overseas), so too did you co-relate those interests as a long-serving member of the Council of Legal Education and as a member of the New Zealand University Senate.

"With respect, you have a gift, not given to many, of mental and physical vigour enlivened by frankness in speech and governed by courtesy in behaviour. Throughout your life one discerns participation and involvement in so many spheres – in short, you have lived a 'full life'. In the years to come, we know your integrity, wisdom and abilities will be invested in full measure in all that you choose to undertake. The profession throughout New Zealand which it is my privilege to represent today, and the district societies throughout our country – in particular the Canterbury Society – congratulate you on your achievements and wish you and Lady Haslam a rewarding retirement, which is your just due," Mr Castle concluded.

On behalf of the Wellington District Law Society, its President, Mr M J O'Brien Q C noted that Sir Alec had come to Wellington from Christchurch. "You were known to us then as a Rhodes Scholar, as an officer of the Canterbury and New Zealand Law Societies, and as a prominent member of the Christchurch Bar," Mr O'Brien continued. "Over the last 18 years we have come to know you a great deal better; and it is fitting today that I address your Honour on behalf of those who have most frequently appeared before you in your judicial life, and indeed on behalf of the entire profession in this district.

"That Your Honour was destined for distinction from an early age was apparent from your career at Canterbury University College, as it was then known. There you won the Gold Medal of the Canterbury District Law Society, and represented the University in debate. Your ability to express the glories of the English language in felicitous terms was recalled by the Public Orator on the occasion of your being granted the degree of Honorary Doctor of Laws at the Centenial celebrations of your old University. That award was, according to the citation and, if I may respectfully say so, fittingly made, for your contributions to legal scholarship and education, for your distinction as a lawyer, and for your upholding of the dignity of the Bench. The Public Orator quoted from a profile produced by an unknown contemporary in the Canterbury College Review in the 1920s, when that fellow student wrote of you as follows:

> 'Blackstone and Coke and Stephen his light reading Gab-gifted he; I don't think he is needing a course in speaking; he arrived by luck, with blarney stone, not silver spoon to suck.'

From that beginning, to graduation as Master of Laws with first class honours, your Honour proceeded to Oxford where in due course you were awarded the Degrees of Bachelor of Civil Law and Doctor of Philosophy, the latter on the presentation of a thesis, later published in book form, entitled *The Law Relating to Trade Combinations.*

"The Public Orator further commented that 'the only criticism that one has heard of this book is that it came 25 years before its time. It was, for its day, unusual in a work of British law for its discussion of the relevance of American anti-trust legislation, and Australian and New Zealand law in the same field.' He might, in addition, have said that it was unusual also for its discussion of Continental law in this field. The last paragraph or two of the thesis were indeed prophetic. In those paragraphs, your Honour concluded a discussion of possible developments in the law relating to the control of trade combinations among manufacturers and employers by foreshadowing trade practices, control of prices, and monopolies legislation which was to emerge in this country, and in other English speaking countries, several decades later – although that was no doubt a startling proposition to the readers of this thesis in the early 1930s.

"The first reported judgment of your Honour's appears in [1958] NZLR 97 – namely the case of *Prior v Wellington United Warehousemen and Bulk Store Employees Industrial Union of Workers.* That was a case involving the disqualification by a union executive of a man nominated for union office. The result was that Mr Prior was granted an injunction requiring the union executive to allow him to be a candidate in a union election. That such a case should be the subject of your Honour's first reported judgment was an interesting coincidence, because its subject matter was not far distant from the subject matter of part of the thesis to which I have referred.

"And so, after distinguished practice in Christchurch, to Wellington, where you have been resident since your appointment. All of us who have practised regularly in the Wellington Courts during the last 18 years have appeared before Your Honour. All have profited by the experience. I say that because in Your Honour's Court there was no room for sloppiness of presentation or appearance or manner. There was also, in the difficult case, a legal and intellectual joust of high quality. In such cases, the result was reflected in the judgments which were delivered in your Honour's Court – judgments which, however, did not lack human qualities.

"As to my comment that there was no room for sloppiness in presentation, I am reminded of the day when one of my learned friends, sitting in this Court today, was presenting an argument which was uncharacteristically expressed in a rather loose way. The judicial admonition directed to him was: 'Cerebrate, Mr X, cerebrate.'

"Your Honour's intolerance of sloppiness in appearance and manner was well known. At times it was not kindly received and, I am sure that it is no secret on this side of the library door that it was often the subject of robing room comment. I am equally sure that, on reflection, the recipients of admonitions in that area for the most part accepted that the judicial observations were often justified.

"Of course, this kind of observation was not all one way. I recall the occasion when one member of the profession in this City, now the holder of a judicial office in another place, was walking along Kinross Street at a quite early hour of a sunny summer morning, on his way to his office. At the same time, Your Honour was at the bottom of the steps leading up to No 9, engaged in the non-judicial act of picking up the day's supply of milk. Your Honour, in characteristically jovial fashion, called out to this gentleman: 'Good morning, it's nice to see you on your way to work so bright and early.' That gentleman looked up from the street. He observed that your Honour was attired in dressing gown and pyjamas. He made the appropriate retort: 'I don't know that I can see you, Sir.'

"Referring to the intellectual joust and the quality of judgments delivered, I recall first the occasion of a difficult three day case in the field of nuisance and negligence. In the course of argument, all the well known cases were traversed. High-powered though the debate was, it was enlivened by such shafts as your Honour's observation that you wondered whether the well-known case of *Bolton v Stone* would have been decided differently by the House of Lords, if the projectile in question had been a baseball rather than a cricket ball.

"We recall also *Re Empire Building Ltd* [1972] NZLR 683. The issue related to whether or not there had been oppression of minority shareholders. At p 691, your Honour cited Lord Simon's classic remark, made in 1941, in the *Crofter Handwoven Harris Tweed* case when he said: 'The action of a single tyrant may be more potent to inflict suffering on the Continent of Europe than a combination of less powerful persons.'

Your Honour's own particular contribution appears at p 692 in the following words: 'Oh! it is excellent to have a giant's strength; but it is tyrannous to use it like a giant.' That extract from *Measure for Measure* made the point succintly.

"Now you are to return to the City of the Plains to live out your retirement – a retirement which we all hope will not be one where your rare talents are lost entirely to the law and the community, amid the cultivation of roses. You leave us tomorrow bearing the best wishes and good will of the Society which I represent. You leave us with a host of individual recollections.

"A parting of this nature can scarcely escape being tinged with sadness. The Public Orator referred to your love of the Latin language and, incidentally, to your love of A A Milne, Pooh and Piglet, and the fact that your Honour preferred to read the adventures of these characters in the version entitled *Winnie Ille Pooh.*

Mr O'Brien concluded: "May I conclude by adapting the words of Catullus on a more sad occasion when he spoke thus of his brother:

> Atque in perpetuum: ave atque vale – and foreever, hale and farewell."

Sir Alec Haslam then replied in the following terms:

"May I express my profound appreciation for the tributes that have been paid to me to-day, and thank the members of the Bar for the honour that each has done me by appearance at this ceremony.

"We are all fortunate in belonging to the brotherhood of the law. I therefore do not take

this occasion as an exclusively personal compliment, for we are meeting in the association of a fraternity, enlivened, enriched, and we hope refined by the leavening of the sorority of the profession.

The years have passed quickly since I first came among you, and it is difficult for me to realise that my working life as a lawyer, covering a period of more than half a century, has now come to an end.

"I shall miss the friendliness and support of many of my colleagues, although, for its part as an institution, the Bench, after dropping the dead limb with hardly a tremor, will continue its mysterious life as if the rugged branch had never been.

"I hope that the Bar will remember me as a Judge who demanded a high standard, and, by example, tried to set one. After my retirement, perhaps at times a gentler image will supervene in your recollections, for having shed the nimbus of judicial authority, I shall still be hovering in the wings, benignly watching over your labours.

"The strains and responsibilities imposed on the Judges have levied their toll since I first came on the Bench. In general, I suggest that there is much to be said in favour of selecting Judges at an age that enables the appointee to look forward to retirement in the comforting hope of leisured years to follow.

"Again, the English practice which entitles a Judge to retire after 15 years of service, and thereafter to enjoy his rights to full superannuation, might with advantage, be examined in this country.

If I may quote the French philosopher, Montaigne:

> 'I speak truth, not so much as I would, but so much as I dare. And I dare more as I grow older.'

"Because of my seniority, I have recently been less harassed with circuit travelling than formerly, but in that respect my brethren in Wellington have been over-burdened for too long. If one considers the terms of appointment defining the duration of judicial office, one might conclude that the local Judges attain perpetual power by means of perpetual motion.

For those of us who, favoured by fate, last out our time in office, a period of readjustment must follow so strenuous a life. Once he steps down, what then should an incumbent do to acclimatise himself to the Indian summer of a trial Judge – perhaps frosty, but one hopes kindly.

"After leaving the Bench, that great common lawyer, Lord Blackburn, spent 20 years reading French romances. With a proclivity for mislaying his keys, Mr Justice Maule developed an alarming skill in picking locks with a wire. In his Surrey garden, a judicial friend of mine, shortly to retire from the High Court of England, has copied the Roman Legions during their occupation of Ancient Britain. He cultivates the grape, and assures me that the first sample of the fermented product is of potent merchantable quality.

"Such versatility suggests that there is no need to languish in boredom.

"May I mention a problem which concerned us during my Chairmanship of the Council of Legal Education and is now being examined as well by the New Zealand Law Society. It arises from the danger inherent in an examination system which means that every law student who has completed the prescribed course is automatically entitled to admission as a barrister and solicitor.

"We know that of these, whatever their academic achievements, many are fitted neither by nature nor by attainment, to appear before the higher Courts. Even the most adaptable and promising can benefit from systematic tuition from their elders at the Bar.

"Throughout the English speaking world, more attention is being paid to the need for practical instruction of law graduates to supplement the experience of office work. I read that in Australia they speak of 'skills courses'. Here we sometimes say 'clinical training'.

"If tuition in the practical aspects of the profession's activities is to be usefully given, only a seasoned and experienced practitioner can impart the message, and even from him, its adequate formulation will require both time and effort beforehand.

"I know that a good deal of valuable work in this field is being carried out throughout the country, but I suggest that the leaders of the profession might try to take an even more active share, and thus, ensure every young practitioner who wishes to appear as a barrister, does not venture to play the role of advocate in the quest for justice, without appreciating the importance of thorough preparation of his case, of competent presentation of the facts and of the law, and throughout of dignified and pleasing deportment. The need is perhaps most urgent for juniors in offices lacking a common law tradition.

"Shortly before his death earlier this year, Lord Reid commented that modern advocacy showed a decline in what he termed 'the art of persuasion'. He disclaimed recommending a relapse into meretricious rhetoric, but rejected the compliment to Judges in general that we are all beyond being influenced by subtle and attractive modes of speech.

"In tastes and in temperament, Judges differ

among themselves as much as do any other group of men, but individually or collectively, most of them are grateful if they experience the pleasure of polished forensic delivery in a difficult case. On this topic his Lordship added one final word of advice: 'Every barrister must learn to get his best point across within the first 20 minutes, for *any* Judge will listen to him for that time.'

"Before concluding, I wish to thank those of the Court officials, of the Police officers on duty in my Court and all my Associates who have helped me during my term of office in the discharge of my official tasks.

"And so I take my leave of you. I wish prosperity and success to all members of the Bar who have complimented me today by their attendance.

"I trust that within the next few minutes I shall have the privilege of thanking each of you individually.

"And now, Mr Registrar, for the last time, my Court will stand adjourned."

SIR BASIL? OR MR ARTHUR?

DONALD STEVENS, *an Upper Hutt practitioner, suggests that hereditary titles have no legal standing New Zealand*

About twice a year, and generally following the release of the Royal Honours list, expressions of dissatisfaction are heard from certain quarters concerning the conferral of titles. These titles are seen by some as perpetuating the class structure and as being out of place in the mythical egalitarian society. Less frequently the use of hereditary titles in New Zealand is criticised, but rather surprisingly very little attention was directed to the use of a baronetcy by a member of the last Labour government. However, at least one correspondent to the Editor of the *Dominion* felt it inappropriate for a Labour minister to employ a title "enjoyed by a mere accident of birth" *(a)*. "Pax Britannica" asked whether "the Labour Party, ostensibly a classless movement, [found] it inconsistent with its philosophy to nurture in its midst a man who employs an anachronistic title which does nothing but reinforce those artificial social distinctions to which the Labour movement from its inception has been opposed" *(b)*.

As early as 1919 opposition to hereditary titles was widely based in Canada and in the same year the Canadian Parliament in an address to the King requested that every hereditary honour enjoyed by a person domiciled or ordinarily resident in Canada should be made to determine at his death *(c)*. This proposal would have required legislation *(d)* but none was ever enacted *(e)*.

It is submitted that no such legislation would now be necessary as British hereditary titles no longer have legal standing in Canada or in New Zealand. This view is based in the status of each country and it is thus necessary to briefly refer to the current constitutional status of New Zealand. During the currency of the inter se doctrine when the Crown was regarded as indivisible throughout the Empire there could be no doubt that a peerage or baronetcy was a title to be recognised in all parts of the Empire. With the decline of the inter se doctrine and the acceptance of the concept of the divisible Crown the status of the Dominions altered. In the 1930s the Canadian government considered the style "Dominion" to be inappropriate to that country *(f)* and following the Second World War the External Affairs Department in New Zealand advised the Prime Minister that the title "Dominion" should be dropped in respect to New Zealand *(g)*. The difficulty at that time was seen to be the Royal Proclamation of 9 September 1907 which declared New Zealand to

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(a) *Dominion*, 16 July 1974.
(b) ibid
(c) see AB Keith, *Responsible Government in the Dominions* (1928), 1021
(d) 7 Halsbury's Laws of England (3rd ed), 298
(e) Presumably legislative action by the British Parliament. Certainly the Canadian Parliament would not have been competent then or now to extinguish titles existing in the sovereignty of the United Kingdom, though it could prevent their recognition in Canada.
(f) See M Ollivier, KC, *Problems of Canadian Sovereignty* (1945) 316.
(g) GA Wood, "The Former 'Dominion of New Zealand' " (July 1974) 26 *Political Science* 2, 5.

be a Dominion. It is now submitted that this Proclamation ceased to have effect in 1953 with the passage by the New Zealand Parliament of the Royal Titles Act. The Royal Style and Title prescribed in that Act for use in relation to New Zealand refers to Her Majesty as Queen "of the United Kingdom, New Zealand *(h)* and her *Other Realms* . . ." *(c)*. By providing this formula Parliament gave expression to New Zealand's status as a Realm, a synonym of kingdom and a rank traditionally regarded as superior to that of dominion. The Act must be viewed as impliedly revoking the 1907 Proclamation. It might also be mentioned that the Queen in providing by Royal Warrants for the Vietnam Medal *(j)* and the Queen's Service Order *(k)* refers to "Our Realm of New Zealand" *(l)*.

Having noted the country's status, consideration is now to be given to the position in one realm of a title created in the sovereignty of another. Lord Atkinson gave his attention to this matter when speaking in the House of Lords in *Lord Advocate v Walker Trustees* [1912] AC 95. His Lordship noted that before the two Acts of Union *(m)* the Sovereigns from James I to Anne could as the Sovereigns of England confer English honours and dignities by patent under the Great Seal of England, as Sovereigns of Ireland confer Irish honours and dignities under the Great Seal of Ireland and similarly as Sovereigns of Scotland confer Scottish honours and dignities under the Great Seal of Scotland. A peerage in each case was local to the Kingdom in which it was created *(n)*. An examination of the Letters Patent creating hereditary titles confirms this view. They employ a wording *(o)* which entitles a beneficiary of the royal bounty to "enjoy and use all the rights privileges pre-eminences immunities and advantages to the degree of a Baron (viscount, earl, baronet etc, as appropriate) duly and of right belonging which other Barons (or as appropriate) of *Our United Kingdomm (p)* have heretofore used and enjoyed" etc (the emphasis is mine). In the case of peerages a titleholder "possess[es] a seat place and voice in the Parliaments and Public Assemblies and Councils of Us Our heirs and successors within Our United Kingdom . . ." *(q)*. This must clearly localise the title to the United Kingdom. Similarly baronetcies have always been expressed as being created in the sovereignty of a particular country. English baronets were created between 1611–1707, Irish ones between 1618–1801 while baronets of Nova Scotia were created between 1625 and 1707. After 1707 and until 1801 baronet's titles were stated to be of Great Britain and after 1801 they were created as United Kingdom titles *(r)*.

In *Lord Advocate v Walker Trustees* Lord Atkinson went on to approve dicta found in two English cases decided before the union of England and Scotland. As both countries were separate kingdoms presided over by the same monarch the decisions in both cases have a particular relevance today. Littleton J, in *Sir John Douglas's* case

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(h) The new style and title provided for by the Royal Titles Act 1974 omits the reference to the United Kingdom, declaring the Queen to be "Queen of New Zealand and Her Other Realms. . . ."

(i) Indeed even earlier the Governor-General's proclamation on the occasion of Her Majesty's accession proclaimed the Queen to have become "Queen of this realm and of all her other realms and territories" – (1952) New Zealand Gazette, 195

(j) SR 1968/141

(k) SR 1975/200

(l) The view that the Commonwealth Realms are "kingdoms in their own right" is supported by Professor McGilligan – see Ewart, *The British Commonwealth of Nations.* Also Soward, *The Changing Commonwealth* (1950), 3–4. In *Harris v Minister of the Interior* (1952) (2) SA 428 Van Den Heever, J referred to "the Kingdom of South Africa".

(m) England with Scotland in 1707 and Great Britain with Ireland in 1801

(n) [1912] AC 98. Lord Atkinson drew a distinction here with the rank of knight which he held to be "not in any sense a local title . . . . but an order of chivalry recognisable in every part of the King's dominions and differs in that respect altogether from an earldom conferred by the king as Sovereign of the Kingdom of Scotland" – page 98 of the Report. Certainly the creation of a Knight Bachelor in New Zealand must be seen as now involving an exercise of the Queen's Prerogatives in the sovereignty of New Zealand. Knighthood in an order of chivalry has never been regarded as pertaining to any particular kingdom and it has been the prerogatives of the sovereign in the Empire that have been relied upon to create the Orders of Chivalry.

(o) See Crown Office Rules (No 1) Order 1927. SR & O Rev III, p 1013 ff

(p) The rights and privileges were those attaching to English title holders until 1707, from then until 1801 the titles were created in the sovereignty of Great Britain and thereafter the United Kingdom.

(q) See eg Baron's patent Form 5 Crown Office Rules (No 1) Order 1927. SR & O Rev III p 1015.

(r) 29 Halsbury's Laws of England (3rd ed) 264. It might also be noted that such titles have always been created by Letters Patent passed under the Great Seal of the appropriate country.

observed *(s)*:

> "the plaintiff is an earl in Scotland, but not in England and if our sovereign Lord the King grant to a duke of France a safe conduct .... to enter into his realm, if the duke cometh ..... and is to sue an action here he ought not to name himself duke, for he is not a duke in this land, but only in France."

The judge cited the *Earl of Richmond's* case *(t)* in which it was held: "... an earl of another nation or kingdom is no earl (to be so named in legal proceedings) within this realm" *(u)*.

Hence no distinction is to be drawn between titles conferred by a foreign sovereign and peerages and baronetcies conferred by our Monarch but in the sovereignty of another realm. It would seem to follow from this that a United Kingdom peerage or baronetcy is not a peerage or baronetcy in New Zealand and that while the holder may enjoy the title in the United Kingdom he has implicit in the title no legal right to employ it in the Queen's Realms elsewhere. This conclusion and the authorities are reinforced by the creation of New Zealand citizenship in 1948 *(v)*. Prior to the Act of Union the English Court in *Calvin's* case had held that a Scottish subject was an English subject because of the common allegiance, but the Courts would not hold a Scottish peer to be a peer in England. As, however, a United Kingdom citizen is not a New Zealand citizen by virtue of the common allegiance a fortiori a British peer or baronet is not a New Zealand peer or baronet. The conclusion is that there is a number of people in New Zealand *(w)* (and in Canada and Australia) using British peerages and baronetcies which, in strict point of law, have no standing outside of the United Kingdom *(x)*.

The fact that the New Zealand, Canadian or Australian governments have previously recognised these titles does not alter this conclusion for the Court in the *Douglas* case held that although the King in his Letters Patent of safe conduct referred to a French duke by his title this did not entitle him to use the title in England as "..... that appellation maketh him no duke" *(y)*.

There is, however, at least one case in New Zealand of a baronetcy being conferred on the original title holder for services rendered to New Zealand and it must be considered whether this baronetcy is in a different position from others held by New Zealanders. Was the prerogative called upon to create the title the royal prerogative in respect to New Zealand? It is submitted that it makes little difference where the services are rendered as the Letters Patent creating the title create the original holder and his heirs and successors baronets of the United Kingdom and this should be conclusive. There are numerous persons in Britain and beyond holding hereditary titles conferred originally for services rendered in India but it is very doubtful indeed that the Indian government would regard these titles as having any standing in the sovereignty of India.

Having established that British baronetcies and peerages, like foreign titles *(z)*, are not recognised by law in New Zealand it must follow that a person inheriting such a title must have the same right to apply to the Queen for a licence to use it as a person inheriting a foreign title has. It has always been the case that a subject of the Crown inheriting or having conferred upon him a foreign title must obtain the Monarch's consent to enable the title to enjoy legal standing in the realm *(a)*. Such an application from a New Zealander would originally have been dealt with by the Sovereign on the advice of British Ministers, but today the Queen exercises this prerogative in respect to New Zealanders on the advice of her New Zealand Ministers.

It can safely be assumed that no New Zealander inheriting a British baronetcy or peerage has ever applied for consent to use it because such a course prior to the growth of the doctrine of the divisible Crown was never thought to be necessary.

(s) YB 20 E IV 6 cited in *Calvin's* case 7 Co Rep 156 16a; 77 ER 377, 395–6

(t) 11 E 3 Fitz Brief 473; 9 Co 117 b

(u) ibid

(v) British Nationality and New Zealand Citizenship Act 1948.

(w) 13 baronets and three barons – see *Who's Who in New Zealand.*

(x) At common law a person may call himself by any title or name he pleases and there is no law against a person purporting to hold a title provided it is not for the purposes of obtaining pecuniary advantage by false pretences. A title's lack of legal standing in New Zealand probably means no more than that it may not be employed in legal proceedings and should not be recognised in dealings with the government. Otherwise the sanction is essentially a social one, though this may be significant in the circles in which persons claiming to enjoy hereditary titles may mix.

(y) 7 Co Rep 156, 16a; 77 ER 377, 395–6.

(z) *29 Halsburys' Laws of England* (3rd ed) 270

(a) The rule may have its origins in an incident which occurred at the Court of Elizabeth I when a courtier was imprudent enough to wear the insignia of a Spanish decoration awarded to him. The Queen tore it from his neck with the words "No dog of mine shall wear a foreign collar."

It is submitted that it would now be necessary for the Queen to deal with such an application on the advice of her New Zealand Ministers or to authorise her Governor-General to deal with an application in like fashion.

The result is that it will be for New Zealand Governments to decide whether in this area "artificial social distinctions" are to be further reinforced.

THE PRIVY COUNCIL'S NEW APPROACH TO SECTION 108

GEOFF HARLEY, LLB (Hons), *of the Victoria University Law faculty questions the Board's approach in* Ashton v CIR (1975) 1 TRNZ 190.

The Privy Council's judgment in *Ashton v CIR* (1975) 1 TRNZ 190 was delivered by Viscount Dilhorne. From it comes the proposition that Parliament's revision of s 108 by s 9 of the Land and Income Tax Amendment Act (No 2) 1974 has, in some respects, been a dis-service to the Revenue. The revision resulted from McCarthy P's terse request made in the course of his judgment in *CIR v Gerard* [1974] 2 NZLR 279. During the debate of the new section the then Minister of Justice, the Hon AM Finlay, said, referring to *Gerard's* case (1974 NZPD 4193):

> "So on the admission of the appellant it was nothing but a device to avoid taxation, and legislation to deal with this is what the members of the Court of Appeal described as getting into a fiscal fantasy. I suggest it is legal fantasy if what is admitted to be a device to avoid taxation cannot be seen for exactly what it is and treated as such . . . I myself am far from satisfied as to the correctness of the decision."

As if in answer to the Minister's query, the *Ashton* judgment has made a radical departure from the law as it has developed since *Elmiger v CIR* [1967] NZLR 161. The long accepted *Newton* test [1958] AC 450 (JC) and the subsequent modification of it in *Mangin v CIR* [1971] NZLR 591 (JC) are contradicted. There is a full treatment of the development of the law on s 108 in ILM Richardson's "And Now the New Section 108" [1974] NZLJ 560, 561–3. It is only necessary to detail Viscount Dilhorne's judgment and how it has changed the previously accepted principles.

A remarkable feature of Viscount Dilhorne's judgment is that it refers only to one New Zealand case – *Mangin v CIR* – when obviously a substantial part of the taxpayer's appeal was based on the issues which have caused substantial trouble in New Zealand Courts. Viscount Dilhorne made no mention whatever of any of these issues and of the conflict of authority between Turner J in *Wisheart v CIR* [1972] NZLR 319 and *Ashton's* case in the Court of Appeal ([1974] 2 NZLR 321). Of itself this is a substantial criticism of the judgment. As New Zealand's highest Court the Judicial Committee commands great power. With that power is a responsibility to provide guidance to the New Zealand Courts and potential litigants on the issues arising in the case before the Board. Some of the issues critical to the appeal in *Ashton's* case were not mentioned. It would seem likely that New Zealand Courts will now be faced with interpreting the *Ashton* judgment.

The issues

The facts of *Ashton's* case are fully stated by McCarthy P in the Court of Appeal and again by Viscount Dilhorne. It is necessary to review them only in the course of setting out the grounds of appeal. Ashton and Wheelans were accountants in partnership. They had, as a source of income, an arrangement with some finance companies whereby the accountants received commissions and office charges for organising and overseeing finance deals. The arrangement was altered. The commissions and charges became payable to the family trusts of the taxpayers. Mr Ashton and a solicitor were trustees for Mr Wheelans' family trust and vice versa.

In the Supreme Court the taxpayers gave evidence. Clearly this persuaded Wilson J that the taxpayers' dominant purpose was not tax avoidance. The evidence was that Ashton had suffered a critical illness. This prompted both partners to make provision for their families following their deaths. The Court of Appeal reversed Wilson J. The Court held that the taxpayer's evidence was irrelevant. When the taxpayer's purposes were examined *objectively* – and the Court said that was the correct test – it was clear that tax avoidance was the dominant purpose and the *Mangin* "sole or principle" purpose test was met. Accordingly section 108 operated to avoid the arrangement.

This conclusion immediately gave rise to the reconstruction question and focused attention on *CIR v Gerard* and *Wisheart's* case. As Mr Richardson said in his article (p 562):

> "In *Mangin* . . . the Privy Council drew attention to the gap in the old s 108. It was a destructive provision only and assisted the Commissioner only if following annihilation of the arrangements voided by the section a taxable situation was disclosed".

It was on this basis that *Gerard* succeeded. On avoidance of the arrangement the taxpayer never was left with money in his hands or having passed through them. In *Ashton's* case there were additional difficulties for the Commissioner. The money was in the hands of the trustees: in *Ashton's* case it was with Wheelans and the solicitor and was spent by them. The additional question involved *Wisheart's* case. There Turner J said that s 108 only applied to transactions to which the taxpayer was legally a party. Again, to take Ashton's position; his family trust was settled by Mr Wheelans. Mr Ashton settled Mr Wheelans' family trust. This meant that neither taxpayer was a legal party to his own family's trust. On this basis the taxpayers contended that the trusts could not be voided. The Court of Appeal rejected the party argument. Even so, the taxpayers contended, there was no taxable situation on which the Commissioner might make an assessment without reconstruction. It was common ground that the old accountancy firm of Ashton and Wheelans had been dissolved. A new partnership was formed between Ashton Wheelans and one Hegan. For there to be a taxable situation which excluded Hegan the Commissioner had to show that, in relation to the office charges, there was a separate joint agreement outside the partnership between Ashton and Wheelans. There was no such agreement.

Five substantial questions thus arose on the appeal to the Privy Council. Each was decided against the taxpayers in the Court of Appeal. Those questions were:

(1) whether taxpayer's evidence is admissible and relevant to explain the purposes of the arrangement;

(2) whether or not the test was objective or subjective, was the taxpayers' dominant purpose referrable to ordinary business or family dealing;

In the alternative, did the Court of Appeal's decision amount to unauthorised and unjustified reconstruction because:

(3) neither taxpayer was a legal party to his family's trust and there was, therefore, no arrangement subject to s 108; *Wisheart's* case;

(4) (a) in view of the dissolution of the old firm of Ashton and Wheelans there had to be assumed a separate joint arrangement between Ashton and and Wheelans in relation to the office charges; such assumption being forbidden in *Mangin* as reconstruction;

(b) neither taxpayer received his trust's income; nor did it pass through his hands as in *Mangin's* case itself.

Taxpayer's evidence

There is some authority supporting the taxpayer's contention that taxpayer's evidence is relevant; that the word "purpose" has a mental element. As Lord Devlin said in *Chandler v DPP* [1962] 3 All ER 142, 155B (HL): "I have no doubt that ['purpose'] is subjective. A purpose must exist in the mind. It cannot exist anywhere else." McCarthy P in *Ashton* relied on *Newton's* case where Lord Denning said [1958] AC 450, 465–466 (JC): "In applying the section, you must by the very words of it, look at the arrangement *itself* and see which is *its* effect – which it does – irrespective of the motives of the persons who made it. . . . In order to bring the arrangement within the section you must be able to predictate – by looking at the overt acts by which it was implemented – that it was implemented in that particular way so as to avoid tax." But as Turner P said in *McKay v CIR* [1973] 1 NZLR 592, 598: "But [the *Newton* test] is not to be read as meaning that once the existence and terms of an arrangement are proved, nothing else but the facts of its implementation may be looked at to see whether the arrangement is one which offends . . ." Indeed McCarthy P appeared to rely on taxpayer's evidence in *Martin v CIR* (1973) 3 ATR 707 and in *Ashton's* case itself. In *Ashton* the learned Judge said (p 326): "In particular this piece of Mr Ashton's evidence is of some importance."

His Honour relied on the evidence to draw an inference adverse to the taxpayer. In *Martin's* case, McCarthy P said (p 709):

> "It is not surprising having regard to the features of the evidence . . . and to the plainly unsatisfactory reasons which the appellant gave in evidence for not proceeding with the plan . . . that [the Judge below], felt unable to accept the appellant's testimony . . ." " . . . I think that credibility was fundamentally involved in the basic conclusions . . ."

The approach of Cooke J in *Loader v CIR* [1974] 2 NZLR 472, reflects the approach contended for by the taxpayers. That learned Judge, having detailed the taxpayer's evidence and the inferences to be drawn said (p 477): "On the authorities,

however, the question is not a subjective one, or at any rate not exclusively so."

His Honour then turned to the question of implementation concluding that while there was a clear element of tax saving in the scheme that was not the principal purpose. His Honour took the view that the arrangement was desirable irrespective of tax advantages and so upheld the taxpayers. Viscount Dilhorne met this submission thus:

> "In the Court of Appeal McCarthy P . . . held that the test to be applied in relation to s 108 was objective and that the purpose of an arrangement must be determined by what the transaction effects. 'Motive' McCarthy P said was irrelevant. In their Lordships' opinion [the view] expressed by McCarthy P [is correct]."

His Lordship based this conclusion on two propositions. Firstly, he turned to the text of the section itself. Section 108 applies to contracts, agreements or arrangements. These may be wholly in writing or there may be oral aspects. Accordingly, said Viscount Dilhorne:

> "When it appears that any part of it was oral, evidence is properly admissible to determine its terms, and when such evidence is given, it may not be easy to separate evidence relating to the terms of the contract, agreement or arrangement from evidence as to the purpose of the parties to it but it does not follow that their evidence as to their purpose is relevant to the question whether s 108 does or does not apply."

Secondly, his Lordship considered the words "purpose or effect". It will be recalled that the Privy Council in *Mangin's* case – Viscount Dilhorne being one of the majority – formulated the "sole or principle" purpose test. The word "effect" has always been treated as surplusage. No New Zealand case has been concerned with it. When referring to the 1974 amendment Richardson said ([1974] NZLJ 560, 564-5):

> "It might have been desirable for the sake of clarity to have defined 'purpose' in terms of the meaning accorded to it in *Newton* and subsequent cases, namely, the end in view or object of the arrangement . . . Finally, in view of the reading down by the Australian and New Zealand Courts of the word 'effect' in the old section, one wonders what purpose is met by its retention in the new section."

Viscount Dilhorne changed all this saying:

> "If an arrangement has a particular purpose, then that will be its intended effect. If it has a particular effect, then that will be its purpose and oral evidence to show that it has a different purpose or different effect to what is shown by the arrangement itself is irrelevant to the determination of the question whether the arrangement has [the purpose or effect of avoiding tax]."

This passage was prefaced by a lengthy extract from Lord Denning's judgment in *Newton's* case. Viscount Dilhorne expressly approved the passage where Lord Denning said "purpose" meant not motive but the effect which it is sought to achieve – *the end in view.* Viscount Dilhorne expressed similar views in his judgment for the House of Lords in *Mills v Inland Revenue Commissioners* [1975] AC 38. Their Lordships unanimously agreed with Viscount Dilhorne in reversing the Court of Appeal – led by Lord Denning MR. That case concerned actress Hayley Mills. The issue was whether a child of 13 could be said to have provided funds for "purpose of the settlement" of which she was sole beneficiary. *Mills's* case was not referred to by Viscount Dilhorne in *Ashton* but it does provide some illumination. In *Mills* Viscount Dilhorne said (p 52):

> "I do not agree with Lord Denning that the word 'purpose' in this section connotes a mental element . . . I do not myself think that it assists to consider whether the question he posed is to be answered objectively or subjectively . . . Where it is shown that funds have been provided for a settlement, a very strong inference is to be drawn that they were provided for that purpose, an inference which will be rebutted if it is established that they were provided for another purpose."

In the Court of Appeal in *Mills's* case Lord Denning MR relied on what he had said in *Newton's* case to support his view that 'purpose' had a mental element. Lord Denning relied on exactly the same phrase in *Mills* – "the end in view" – that Viscount Dilhorne approved in *Ashton's* case. In *Mills* Lord Denning held that since Hayley Mills had no understanding of what was done she could not be said to have a "purpose" at all. It is difficult to see how exactly the same phrase from *Newton's* case can lead to such different results. It is submitted that Viscount Dilhorne's statement cited above contemplates taxpayer's evidence as to his purpose: how else can the "strong inference" be rebutted? There would seem to be a logical inconsistency between what Viscount Dilhorne said in *Mills* and *Ashton* on this basis also.

The "Sole or Principal Purpose" Test:

In *Ashton's* case the taxpayers sought to explain their arrangement in terms of ordinary business or family dealing. The object of the explanation was to satisfy the Court that, while tax saving was one purpose, it was not the dominant purpose. This explains the following

passage in Viscount Dilhorne's judgment: "[Counsel] in opening this appeal said that he would not dispute that one of the purposes and effects of the arrangement made . . . was to avoid the incidence of tax." Counsel obviously disputed that it was the dominant purpose as required by *Mangin v CIR.* Yet Viscount Dilhorne considered this concession to be fatal to the appellant's case. His Lordship restated the "sole or principal" purpose expressly adopted by the majority in *Mangin,* which included Viscount Dilhorne, thus:

> " . . . it matters not what other purposes or effects it might have; section 108 applies. . . . An arrangement which can properly be regarded as an ordinary business or family dealing is not to be regarded as entered into for the purpose or to have the effect of tax avoidance even though that ordinary dealing may result in less tax being paid . . . Tax avoidance is not the purpose of such a transaction (see per Lord Donovan in *Mangin v IRC* [1971] AC 739 at p 751)."

As indicated, *Mangin* adopted the "principal" purpose test. That formulation was applied by New Zealand Courts in the post-*Mangin* cases. The view expressed by Viscount Dilhorne is inconsistent with that formulation. His Lordship's judgment is capable of two interpretations – both of which are inconsistent with *Mangin* – which have never been contended for by the Revenue. If a taxpayer has several objects in view, one of which is tax avoidance, section 108 operates. In *Mangin* it was held that tax avoidance had to be seen as being the principal purpose before section 108 would operate. Further, what of the taxpayer who has several purposes in mind with tax savings being acknowledged as one, but nevertheless, incidental purpose? This was the situation in *Loader v CIR.* Viscount Dilhorne seems to have rejected the approach taken in *Mangin* in such circumstances. His judgment was that where a taxpayer *effects* an arrangement for any purpose which *results* in tax saving he is presumed to have intended that result and the section operates. That this is what Viscount Dilhorne meant is determined from the preceding statement: if an arrangement has the effect of tax avoidance, then that will be its purpose and contradictory oral evidence is irrelevant.

Even more difficult is Viscount Dilhorne's approach to "ordinary business or family dealing". In *Mangin,* Lord Donovan explained the phrase (p 598):

> "In their Lordships' view this passage . . . does not mean that every transaction having as one of its ingredients some tax saving feature thereby becomes caught . . . If a bona fide business transaction can be carried through in two ways, one involving less liability to tax than the other, their Lordships do not think s 108 can properly be invoked to declare the transaction wholly or partly void merely because the way involving less tax is chosen."

Under the 1974 amendment this approach is slightly modified. The new section makes it clear that tax avoidance as a "merely incidental purpose or effect" is not caught. The new section provides, however, that where the taxpayer's arrangement has several purposes, one being tax avoidance but not being the sole or principal purpose, it is nevertheless caught. In his article Richardson put it (p 565):

> " . . . where there is a tax avoidance purpose present other than a merely incidental purpose the arrangement is void whether or not *other* purposes are referable to ordinary business or family dealing."

Viscount Dilhorne's approach is capable of two interpretations. It can be viewed from this statement:

> "[Counsel] . . . said that he would not dispute that one of the purposes and effects of the arrangement made . . . was to avoid the incidence of tax. If that was, as in their Lordships' view it clearly was, one purpose and one effect of the arrangement, it matters not what other purposes or effects it might have; s 108 applies."

This approach was never contended for by the Revenue on the old section. It would appear, however, that Viscount Dilhorne regarded the old section as being identical in this respect to the new. This means that the new section gave the Commissioner no power which was not already implicit in the old. His Lordship's view goes beyond the *Mangin* "sole or principal purpose test" which the new section undoubtedly modified. Viscount Dilhorne modified it also and made it broader. His Lordship's judgment appears to go even further than the new section. It seems that the new section's express saving – a merely incidental purpose of tax saving – is a *limitation* on the operation of the old section. His judgment was that, where a taxpayer effects an arrangement for any purpose which has the result of tax saving, the taxpayer is presumed to have intended that result and the section operates because tax savings was one of the purposes.

This extension is also contrary to *Mangin's* explanation of "ordinary business or family dealing" on which Viscount Dilhorne purported to rely. Viscount Dilhorne considered that the first step in applying the section was whether the arrangement was such ordinary dealing. If it is to be so regarded, then, said his Lordship, the arrangement is not to be construed as having been

entered into for the purpose or to have the effect of tax avoidance. The immediate question arising is, Why Not? His Lordship earlier said that *the effect* of an arrangement is what determines its purpose. If the effect is to avoid tax, then that is the purpose and the arrangement is caught. It does not matter what other purposes or effects the arrangement might have. The only solution to this dilemma is that such ordinary dealing cannot involve tax consequences. In *Mangin,* the Privy Council clearly recognised that business dealing especially must involve tax consequences and that must be correct. The *Mangin* approach was that an arrangement having *the effect* of avoiding income tax must be referable to business or family dealing. If it cannot be so referred there is an inference that tax avoidance was its principle purpose and the section operates. It is submitted that Viscount Dilhorne overlooked the dominant purpose test and consequently misapplied the judgment of the Privy Council in *Mangin.*

His Lordship's judgment causes further difficulties when one considers what is "ordinary business or family dealing". The judgment offers no guidance except that it is implicit that tax savings resulting from the arrangement determine its purpose and accordingly the arrangement is void. As McCarthy P pointed out in *Gerard's* case, however, s 108 cannot be applied literally. The Commissioner has always agreed that such an application would strike at genuine transactions. Viscount Dilhorne seems to have crossed that line and has gone even beyond the 1974 amendment. Prima facie, whenever a taxpayer changes his affairs so that, in the end, his tax liability is reduced, section 108 will operate.

Viscount Dilhorne also rejected a long-standing consideration for determining whether a taxpayer's purpose was tax avoidance. His Lordship said of the *Newton* "predication" test:

> "If Lord Denning meant that one can derive guidance as to the purpose or effect of the arrangement from the conduct of the parties after it has been made their Lordships cannot agree."

Viscount Dihorne cited a decision of the House of Lords in a contracts case to support this view. Certainly it is settled that parties' intentions in contractual settings can only be determined from prior negotiations and the contract itself. However, the analogy between interpretation of contracts and tax arrangements is not apt; indeed it is contrary to Viscount Dilhorne's own terms of reference. With contracts the Courts are concerned with the parties' intentions. With s 108 his Lordship held that the test was objective; motive or intention was irrelevant. A more substantial criticism is that his Lordship's view does not give full weight to the language of the section. The section refers to arrangements which have the purpose or effect of saving income tax. To determine whether the section is applicable the very first question is whether the arrangement actually effects tax saving. That, of course, necessarily requires a comparison between the taxpayer's position prior to the arrangement and subsequent to it. Further, New Zealand Courts have regarded subsequent conduct as a very important consideration. In *Elmiger v CIR* North P said (p 179): "There was no change in the practical operation of the partnership business . . .". Both Turner and McCarthy JJ expressed similar views. (p 184, 188–9). It was decisive in *Marx v CIR* [1970] NZLR 182 which was followed by *Mangin's* case. In *Marx,* North P said (p 192), Turner and McCarthy JJ agreeing (pp 211, 217):

> "Plainly what the appellants were engaged in doing was to set up temporary trusts solely for the purpose of gaining for themselves and the members of their families a tax advantage . . . There was no real change . . . in the practical operation of the farming ventures. The appellants did all the work and retained the ownership of their respective farms. Each appellant controlled the bank account . . ."

The Legal Party Argument

In *Wisheart's* case Turner J held that s 108 could not apply where the taxpayer was not a legal party to the arrangement. In *Udy v CIR* [1972] NZLR 714, 720, the Chief Justice refused to follow Turner J. Wild CJ held there was no clear majority in *Wisheart's* case. Subsequently this issue arose again in *Ashton's* case where the Court of Appeal agreed with the learned Chief Justice. As indicated, the issue arose because neither taxpayer was a legal party to the creation or operation of his family's trust. The Privy Council did not refer to this issue at all. It would seem implicit, in the result, that the Board agreed with the Court of Appeal in *Ashton's* case and the Chief Justice in *Udy.*

Annihilation and Reconstruction

It was here, perhaps, that the appellant's case was strongest. The taxpayers never received or had the money passing through their hands. Consider Ashton's family trust. Mr Wheelans was the settlor, and with the solicitor, the two were the trustees. The finance companies sent the office charges by monthly cheque. The cheque named each of Ashton, Wheelans and the solicitor as payees. The amount received was divided in half. Each half was paid into the bank account of each family trust. Thus if section 108 operated and the trusts were avoided, on what basis did the finance company

commissions become payable to the persons named as trustees? If, too, as claimed by the Crown, their appointment by the finance companies to do the work was void, did it not follow that they were not beneficially entitled themselves to the sums received but held them on a resulting trust for the finance companies, as Wilson J had suggested in the Supreme Court? Again, the solicitor's name was on the cheques. He, too, had to be ignored in order that Ashton and Wheelans were left with the money.

Viscount Dilhorne relied on *Peate v Commissioner of Taxation* [1967] 1 AC 308 (JC) in an attempt to overcome these reconstruction problems. In *Mangin,* Lord Donovan said that s 108 gave no indication as to what would happen once the arrangement was voided. His Lordship added (p 597):

> " . . . Judges have been compelled to search for an interpretation which would make the section both workable and just. In doing so they inevitably approach the line where interpretation ceases and legislation begins – a line which they may not cross. . . . What is needed is simply a provision to the effect that where s 108 applies the taxpayer shall be deemed to have derived the income which he would have derived but for the . . . arrangement avoided . ."

In *Wisheart's* case North P interpreted this to mean (p 326):

> " . . . yet I think it must now be accepted that in view of all their Lordships who sat in *Mangin's* case what was said in *Peate's* case really amounted to legislating . . . I draw this inference because the suggested amendment to s 108 closely follows the way the majority of their Lordships expressed themselves in *Peate's* case."

It remains to be said that Viscount Dilhorne delivered the majority judgment in *Peate's* case; Lord Donovan delivered the dissenting opinion. In *Ashton's* case, Viscount Dilhorne considered *Peate's* case to be similar. His Lordship said of *Peate's* case: " . . . it was held that an agreement to dissolve a partnership being avoided, the Commissioner was entitled to treat the partnership as continuing . . .". As North P indicated, it is to be doubted that the Commissioner was "entitled" to treat the partnership as continuing. In any event, *Ashton's* case was quite different. The Commissioner accepted all along that the Ashton and Wheelans partnership was dissolved and that a new one, with a third partner, was created. Viscount Dilhorne said: "The 'office charges' continued to be received by the appellants . . ." With respect, that is a distortion of the facts. The office charges were received by the appellant and the solicitor jointly and, if at all, each appellant received the other's share. The joint receipt of, for example, Ashton's "share" by Wheelans and the solicitor is overlooked. Viscount Dilhorne ignored the solicitor on the basis that he played no part in earning the income in question. His Lordship went even further, saying:

> "While s 108 does not enable income not in fact derived to be deemed to have been derived, in this case no deeming arises. The office charges were in fact received by the appellants . . ."

This aspect involves ignoring the new partner and the new partnership. If Viscount Dilhorne was correct in being able to ignore the solicitor – who in fact received the money jointly – and in swapping over Ashton from the Wheelans share he actually held with the solicitor to his own and vice-versa how can Ashton and Wheelans still be "a partnership" when it was always accepted that their partnership had been dissolved? A separate joint agreement as to the office charges did not, in fact, exist. The only way is to ignore the new partner and the solicitor and if that is not "deeming" it is difficult to see what is. His Lordship seems to do exactly what he agreed could not be done in *Mangin* and that is to allow the Commissioner or reconstruct without an enabling provision. On his Lordship's approach it would appear that *CIR v Gerard* was wrongly decided. The reconstruction provision in the 1974 amendment seems to be surplusage.

Could it be that Viscount Dilhorne was wrong?

Continuing education – Emma was not a classroom behaviour problem during her one year at Matamata College. While a pleasant student she was restless and unreliable. While at Arohata she developed an interest in the Maori language and took Form IV typing and Secondary English.

The following succinct verse was written by Emma last year:

The Hotel, Man Car, Into Bar, Bought Bottle, Open Throttle, Felt Nifty, Pass Fifty, Hit Pole,
Poor Soul, Doctor Nurse, Coffin Hearse,
Amen. Extract from probation report.

TRENDS IN LEGAL EDUCATION

DR BD INGLIS *has resigned his Chair in English and New Zealand Law at Victoria University and is continuing his practice as a barrister in Wellington.*

At a farewell dinner organised by the Victoria University Law Faculty, Dr Inglis (a) had this to say about legal education:

A University is a special kind of community which is dedicated to the search for truth and integrity: that is the common aim that every member of that community, students and faculties, share. It is not like a school, where the main aim is to pass on information. A University is a community of scholars, with a constant interchange of information and ideas.

I wonder how many of our students realise just how much they teach us; for we all realise, I think, that all of us in a University are learning all the time – it is a never-ending process. I can think at this moment of a number of students who, without perhaps realising it, taught me new ways of looking at aspects within my own fields of interest. They have, in the end, probably taught me very much more than I have taught them.

The Law Faculty is big business now, with an enormous, amorphous, anonymous mass of students, and because it provides the professional qualification for the majority of its students it obviously cannot confine itself to the theory of law: it must deal with the practical working of the law as well. And there has been one development during the last few years that is disturbing – it is that so many law students now are staying on at the University full-time for the whole of their degree course.

It is disturbing in a particular respect, from the point of view of the quality of teaching. When there were many more part-time students than there are now, most of them knew enough from their office experience of how the law actually operates in practice to provide a balance with some of the more esoteric flights of fancy that they might have found in the lecture-room. And some of the more vocal of those part-time students were perfectly capable of coming out with some pungent and well-chosen phrases that could put their lecturers on their guard against taking off too readily into the intellectual stratosphere.

I think we need to remember that a University can tend to be a rather insulated community: it can so easily become inward-looking and believe it is an end in itself. A University community scarcely reflects the community at large. And that tendency of isolation from the thinking of the ordinary citizen can so easily lead to that kind of one-eyed intellectual arrogance that the ordinary citizen so resents.

It is one thing to put out clever theories which enthrall an audience of captive students: that gives the lecturer a secure sense of infallibility. But it is quite another thing to have those theories tested against the harshness of practical reality. And practical realities can sometimes find it hard to filter through the insulation of University walls.

That is what makes it so important for law students, or commerce students, or for any student who is qualifying for a career in practice, to make sure he gets strong doses of practical reality while he is studying for his qualification.

That leads me to say what a pity it is that in the Law Faculty of the future we are going to see so few members getting involved in the actual practice of law. It is a great lesson in humility for an academic lawyer to have his favourite legal theory rubbished by a Court because it bears no relation to the facts that have emerged. It is a great lesson in humility to have to stand up – not before an uncritical audience of respectful students, but before a tribunal that will be actively and visibly impatient with loose thinking, sloppy reasoning, or an unrealistic or pedantic approach.

Nothing I have said is to be interpreted as applying to the members of this Law Faculty, or to any other Law Faculty; but these are matters which I believe have to be kept in the forefront of any thinking about the future of legal education in our Universities.

(a) Dr Inglis is a member of the Council of the Wellington District Law Society, and the Chairman of its committee on Practical Training of Law Graduates.

Calling a spade a spade? – "I hope counsel for the plaintiff will not think that I have been discourteous to him if I say that it seems to me that this is an obvious 'try-on'." Goddard LCJ in *Hargreaves v Bretherton* [1958] 3 All ER 122.

MORE ABOUT "SOLICITOR'S APPROVAL" AGREEMENTS

PROFESSOR BRIAN COOTE *of Auckland University discusses the topic in the light of Frampton and Moir v McCully* [1975] BUTTERWORTHS CURRENT LAW para 1359

The New Zealand system of land sales, under which the parties tend to sign first and investigate later, has resulted in frequent recourse to conditional contracts, the condition most often seen being the "subject to finance" clause. But since finance, though important, is by no means the only matter in respect of which protection is desirable, there seems recently to have been increasing use of clauses which make a sale and purchase "subject to my solicitor's approval". These clauses were discussed by Mr AP Molloy in an article in [1974] NZLJ 214 and very recently one such clause came before the Court of Appeal in *Frampton and Moir v McCully* (judgment 21 October 1975). The purpose of this present article is to try to take the discussion of "solicitor's approval" clauses a little further.

An essential preliminary point is that the application of a "solicitor's approval" clause involves the interpretation and construction of the clause itself and of the contract in which it appears. Notoriously, a decision on the meaning of words in one contract cannot be taken to be decisive of their meaning in another contract. All that an article such as the present one can hope to do is attempt to identify the issues likely to arise. The precise application of a particular clause can only be determined in the light of the words used, the context in which they appear and the circumstances which surrounded their use. The ultimate determinant must be the intention of the parties in the particular case. But that having been said, a certain amount of assistance can nevertheless be gained from the reported cases.

"Solicitor's approval" conditions can be attached to an offer, to an acceptance, or to an apparent contract. It is proposed to deal with them in that order.

Attached to the offer

In *Buhrer v Tweedie* [1973] 1 NZLR 517, the condition "subject to final approval by my solicitors" was attached to what was expressed to be an acceptance but what was in content a counter-offer. Wilson J held that the counter-offer was incapable of acceptance before approval by the solicitors had been given. Because, in the absence of consideration, an unaccepted offer binds neither party, both were free to withdraw, at least until approval had been given by the solicitor. On this last point, though, Wilson J (at 519) went rather further and indicated (obiter) that approval by the solicitor would do no more than open the way to the offeror to make a further, this time firm, offer. No reason was given for this proposition and, with respect, it is submitted that a more natural interpretation of an offer subject to solicitor's approval would be that, on approval being given, and the condition fulfilled, the offer would without more become absolute and hence, unless and until withdrawn, capable of acceptance.

For present purposes, though, the important finding was that the condition made an offer incapable of acceptance, at least until approval had been given. Since neither party could in such a case be bound until acceptance, two consequences would follow. The first, already mentioned, is that either party could resile. The second is that it would be immaterial on what grounds or with what motives the solicitor might refuse his approval. Clearly, if the client himself were free to withdraw his offer, he would equally be free to instruct his solicitor to achieve the same result by withholding consent.

Attached to the acceptance

The recent Court of Appeal decision, *Frampton and Moir v McCully* (supra), dealt with a "solicitor's approval" clause attached to a purported acceptance. Once again, it was held that, until the solicitor had given his approval, neither party could be bound. Predictably in view of that holding, it was further held that it would be a sufficient ground for the solicitor's withholding approval that he had been so instructed by his client. The ground actually given for this result was a concession by counsel in the case. The justification for the concession, it is submitted, would be that until the solicitor's approval had been given no contract and hence no obligations, even of a conditional kind, could exist. The Court of Appeal appear to have placed some importance on the fact that, in the clause before them, the solicitor concerned was named and on the further fact that he was a trustee for the offeree and, as such, the fee simple holder. But though those facts no doubt helped to determine that it was the

purported acceptance rather than the contract which was conditional on the solicitor's approval, it is submitted that they could have no relevance to the grounds on which the solicitor's discretion might be exercised. As has already been mentioned, the client's freedom to dictate his solicitor's approval or disapproval would follow from the absence of any contract or obligation.

To recapitulate, the effect of a "subject to solicitor's approval" clause when it conditions either offer or acceptance, is to prevent the offer or acceptance operating as such, at least until the condition is fulfilled. The consequence of this is that, there being no contract, neither party can be bound, at least until approval has been given. Accordingly, the grounds upon which approval is given or withheld are legally irrelevant.

Attached to the agreement

Buhrer v Tweedie and *Frampton and Moir v McCully* both emanated from Christchurch and turned on the use of a form under which the details of the agreement were stated as an offer to which was appended a short form of acceptance. Even when the Christchurch form is used, a "solicitor's approval" clause can attach to the agreement as a whole, rather than to the offer or the acceptance (*Robin v R T Shields & Co Ltd and Boote* noted [1974] NZLJ 384). But where, as in some other parts of the country, the offer is the submission to the offeree of a signed form of agreement for sale and purchase which the offeree accepts by signing, the chances are rather greater that a "solicitor's approval" clause will appear to attach to the agreement as a whole. Once that is established, it would seem on the cases rather more difficult to determine the exact status of the agreement. Broadly speaking, two alternatives are possible. The one is that a contract has been entered into which is presently binding, albeit conditionally on approval being given, as appears to have been the case in *Robin v R T Shields & Co Ltd and Boote* (supra). The other is that the agreement amounts at most to an "option" exercisable at the will of the party whose solicitor is to approve. In the latter case, there can be no concluded contract of sale and purchase unless and until approval is given. If the agreement is of the first kind it falls within that class of contract of which *Smallman v Smallman* [1972] Fam 25 is a good example, which is conditioned on the act of a third party. In *Smallman's* case, the required act was approval by the Court. In these cases, the third party (here the solicitor) is required to act or exercise independent judgment and is not subject to dictation by his client. By contrast, under the "option" type of case (clearly envisaged in *Marten v Whale* [1917] 2 KB 480) the discretion is ultimately the client's, and the grounds on which the solicitor grants or withholds approval, and in particular whether or not at the dictation of his client, can be no concern of the other party. In this second type of case, unless the "option" is actually paid for, there can be no present consideration and no present contract of any kind (see eg, *Thorby v Goldberg* (1964) 112 CLR 597, 605; *Godecke v Kirwan* [1973] 1 ALR 457, 469; *Stocks v Arrowsmith* (1964) 38 ALJR 288). To use an expression employed by the Court of Appeal in *Frampton and Moir v McCully,* until approval the apparent contract is a mere brutum fulmen. (Cf *Graham & Scott (Southgate) Ltd v Oxlade* [1950] 1 All ER 856; *Astra Trust Ltd v Williams* [1969] 1 Lloyd's Rep 81: if "subject to satisfactory survey" makes the purchaser the arbiter of what is satisfactory, there is no binding contract.) The one possible way of ensuring a present contract would be to subject the client himself to objective standards on the analogy, say, of contracts of sale subject to the buyer's approval. Ordinarily a buyer "on approval" is free to reject for any reason he pleases *(Berry & Son v Star Brush Co* (1915) 31 TLR 603) but if the parties so intend, the buyer's right to reject may be limited to rejecting on reasonable grounds *(Stadhard v Lee* (1863) 3 B & S 364, 372).

Whether an apparent agreement subject to solicitor's approval falls within one or other of these two classes is, of course, a question of interpretation and construction. But something does seem to turn on whether the solicitor is required to approve the agreement as a whole on the one hand, or a mere part of it on the other.

If the parties have to all outward appearances concluded a contract, leaving relatively minor matters for approval by a solicitor, it seems not unnatural to suppose that a presently binding contract was in fact intended. If that is so, it would follow that the solicitor must have been intended to exercise independent judgment since, for the reasons already given, if he were bound to follow his client's instructions, there could be no contract. Into this category fall the cases on solicitor's approval cited by Mr Molloy in the article already referred to. In those cases the solicitor is seen as someone exercising judgment independently of his client. The client is bound to appoint a solicitor and to consult him in good faith and the solicitor's approval must be at least a bona fide exercise of his discretion to approve *(Marten v Whale* (supra), 487). In some of the cases, the requirements have been pitched rather higher. The exercise of the discretion must not be so unreasonable as not to amount to an exercise *(Casey v Leith* [1937] 2 All ER 533) or even, in one case, the discretion must be exercised reason-

ably *(Hudson v Buck* (1877) 7 Ch D 683). The exact limits must of course be a matter of interpretation in each case. An analogy can be drawn, here, with cases in which it has been left to the solicitors for one of the parties to settle the terms and conditions to be incorporated in a subsequent written document. Here, too, the solicitor must reach an independent judgment (*Axelsen v O'Brien* (1949) 80 CLR 219; *Godecke v Kirwan* (supra) 468) since if he were bound to follow his client's instructions there could be no contract *(Godecke v Kirwan* (supra) 469). Clauses where the solicitor's approval is required only for the "form" of the contract would also fall within this class.

But when the entire agreement, or some essential part of it, falls to be approved by the solicitor, the position may well be rather different. The indications of a presently binding contract would be weaker. Moreover, the very fact that the entire contract was subject to approval would so increase the range of matters to be considered by the solicitor as to make it difficult to require and ensure the application by him of objective criteria. It is hardly surprising, therefore, to find that in *Henning v Ramsay* (1963) 81 W N part 1 (NSW) 71, the majority of the Court of Appeal of New South Wales concluded that the words "subject to purchasers' solicitor's approval of contract" meant that the document in which they appeared had no operation as a contract unless and until approval were given (at 75) and that the parties had never enter into any concluded contract (at 74). That being so, for reasons similar to those given in *Frampton and Moir v McCully,* there could, on such a finding, be no constraints on the solicitors concerned, and nothing to prevent their withholding approval simply on the ground that their clients has instructed them to do so.

It cannot be said that the mere fact that a solicitor's approval is required of the whole contract in itself necessarily indicates the absence of a presently binding, albeit conditional, contract. But if the parties are to be presently bound it can only be on the basis that the solicitor is to act independently in giving or withholding approval. Whether, in so doing, he must act reasonably or merely bona fide falls to be determined by the contract.

Conclusion

It is believed that parties wanting to make their dealings subject to the approval of a solicitor should bear in mind the following propositions. 1 The effect of any condition is a matter of interpretation and construction. This puts a premium on accurate drafting, and the parties would be well advised to obtain professional assistance.
2 If the parties wish to achieve a presently binding conditional contract, they should attach the "solicitor's approval" term to the contract rather than to the offer or acceptance. And the chances of their achieving a present contract will be increased if the condition is attached to specific aspects rather than to the contract as a whole.
3 If what the parties desire is not a present contract but an arrangement from which one or other or both of them may withdraw at will, they would be well advised to say so explicitly. And, in a case where it is the purchaser who desires to retain freedom of action, there would seem to be advantages for both parties in the use, instead, of a straight-out form of option. The convenience of the conditional contract form can, in the event, prove to be an illusion.

Brotherly Affection To the end of his life my father resolutely ignored my uncle's increasing fame, although at various times, such as Willie's eightieth birthday, it became quite difficult to do so. One day my father received a letter addressed to Viscount Somerset Maugham. We opened the letter and found that it was intended for Willie, so he sent it to the Villa Mauresque with a tart covering note.

I was greatly disturbed by the letter you sent on to me (Willie replied by the next post). I know exactly what it is going to be. Shakespeare and Bacon all over again. Posterity will say that as an eminent lawyer and Lord Chancellor it was impossible for you to acknowledge that you had written plays and novels under your own name, so they were produced and published under the insignificant name of your younger brother. I was in my father's sitting-room when this letter arrived. "I detect a distinctly unpleasant flavour about Willie's remarks", by father commented. "I think I shall feel myself obliged to make some suitable reply." And indeed he did reply – in words to this effect:

Dear Willie,

You may well be right in thinking that you write like Sharespeare. Certainly I have noticed during these last few months an adulation of your name in the more vulgar portions of the popular press. But one word of brotherly advice. Do not attempt the sonnets. From *Escape from the Shadows* by Robin Maugham

MY LAST CASE

The final instalment of the late E M MACKERSEY'S *reminiscences.*

Like my first case ([1975] NZLJ 137), that which led to my last appearance in the Supreme Court had some unusual if not unique features.

It was concerned with charges of bookmaking against one Harry Kyle. Harry was a well known and generally popular citizen of Te Kuiti, where he had resided all his life. He was the proprietor of an established and successful contracting business. It was also well known locally that as a side-line he was prepared to "lay the odds". In short, he was Te Kuiti's local bookmaker.

Shortly before I was due to retire Harry Kyle walked into my office and handed me four summonses which charged him with carrying on the business of a bookmaker on three days in January and one day in February 1963.

In reference to the February charge, it appeared that on that day Kyle had been raided by the police who found him sitting at table speaking into a telephone. On the table was a betting book in which had been recorded what appeared to be particulars of bets on horses engaged in race meetings taking place that day. The police immediately upon arrival took over the telephone, and it appeared that they were successful in accepting from Kyle's unsuspecting clients some further bets on horses racing that day.

A complete search of the entire premises was carried out and amongst the further documents seized by the police were several alleged betting slips in reference to bets on race meetings on three separate days in January 1963.

The police had accordingly charged Kyle with the offence of carrying on the business of a bookmaker on four separate dates. From the information then supplied to me it did not appear that there was any prospect of a successful defence against the charge of carrying on the business of a bookmaker on the day of the actual police raid.

On first sight, however, it appeared to me that the evidence obtained by the police in reference to the three days in January fell short of the necessary proof to sustain a charge of bookmaking on these dates. I accordingly at once advised Kyle that he should plead guilty to the charge which referred to 2 February 1963, but that the other three charges should be contested, with which advice Kyle at once agreed. He then went on to tell me that he knew he must be convicted on at least one charge and the prospect of having to pay even a fairly substantial monetary penalty did not unduly worry him, but he pointed out to me at some length that what was causing the utmost concern to both himself, his wife, and the members of his family was the prospect of his having to suffer a term of imprisonment.

Kyle was then 63 years of age and was not in the best of health. As he went on with his story it became at once apparent that Kyle was in fact literally terrified of the prospect of going to gaol.

In September 1952 he had appeared before the Justice's Court at Te Kuiti on a bookmaking charge, to which he pleaded guilty and was duly convicted by the presiding Justices, Albert Dobson and P H Hughes, and fined the sum of one hundred pounds and costs.

In May 1953 he had again appeared before the Justice's Court at Te Kuiti on a further bookmaking charge, to which he pleaded guilty and was duly convicted by the presiding Justices, Albert Dobson and C J Riddle, and fined the sum of three hundred pounds and costs. On neither of these occasions was Kyle represented by counsel.

The position now, of course, was that he had to face the Court with two previous convictions.

I then got down from my bookshelf the Gaming Act and read out to Kyle the clause which dealt with penalties: as follows: for a first offence a fine not exceeding five hundred pounds; for a second offence, imprisonment for a term not exceeding 3 months; for a third or any subsequent offence, imprisonment for a term not exceeding 12 months.

The present summonses directed Kyle to appear before the Magistrate's Court at Te Kuiti and the presiding Magistrate at that Court was Mr Stewart Hardy, who was already somewhat notorious for the severity of his penalties.

The position, therefore, was that if Kyle was convicted on any one of the present charges this would be a third offence, and there appeared to be no escape from a term of imprisonment being imposed.

Kyle then said to me, "I have been told that there was something wrong about Albert Dobson's appointment as a JP". When I asked him where he

got this information, he said he was not able to disclose the source but insisted that it was reliable.

Mr Albert Dobson was well known to me. He had been carrying out the duties of a Coroner and Justice of the Peace for many years at Te Kuiti. His business premises were situated next door to my office and over the years I had taken numerous statutory declarations and sworn many affidavits before him, and I had also of course appeared before him as counsel in many cases in the Justice's Court when he was one of the two presiding JPs. The suggestion, therefore, that Albert Dobson was not a properly appointed Justice of the Peace appeared to me to be absurd, particularly in view of the fact that the source of this information was, as far as I was concerned, anonymous.

However, in view of the extreme importance of the matter should the information supplied to me by Kyle prove to be correct, it was of course necessary for me to carry out a thorough investigation, which I proceeded to do.

A search made by me at the Magistrate's Court of the Official Lists of all Justices of the Peace for New Zealand sent out by the Justice Department since the year 1930, showed to my amazement that Albert Dobson was first appointed a JP on 18 June 1954. This I could not understand as I well knew that he had in fact been sitting as a Justice of the Peace in the Te Kuiti Courts for some years before this date. However, this information did indicate that further investigation was required. As I well knew that Albert Dobson had for many years also been acting as a coroner at Te Kuiti, I then began a search of the records to ascertain his appointment to this position. This showed that Dobson was appointed a coroner on 26 October 1942, the appointment being made under the provisions of the Coroners Act 1908. It also appeared to be clear from the official records that Dobson continued to hold that appointment until some time after 9 May 1953, the date of the second conviction of Kyle on the bookmaking charge.

Section 5 of the Coroners Act 1908 provided that a coroner should by virtue of his office be also a Justice of the Peace for New Zealand.

At first sight this appeared to solve the mystery. At the dates of Kyle's two convictions in 1952 and 1953, Albert Dobson held the office of coroner and therefore under the provisions of the Coroners Act 1908, he was also on those two dates a Justice of the Peace.

The Coroners Act 1908, however, was repealed by the Coroners Act 1951. This enactment, which was a consolidating Act, came into force on 1 April 1952. A search of this Act showed that the provisions of s 5 of the 1908 Act had not been re-enacted in the same form in the 1951 Act, s 4 of which provided that a coroner *"for the purposes of this Act"* shall have the same powers, privileges, etc, as are possessed by a Justice of the Peace. This, of course, was a "find" indeed. The two sections were entirely different in effect.

Under the 1908 Act any coroner was by virtue of his office a Justice of the Peace for New Zealand. Under the 1951 Act a coroner, while acting as such, in holding inquests, etc, possessed the same powers and privileges as a Justice of the Peace. The Coroners Act 1951 did not in any shape or form authorise a coroner by virtue of his office to sit or act as a JP in any civil or criminal Court.

The position, therefore, was that from and after 1 April 1952 (the date the Coroners Act 1951 came into force) until 18 June 1954, when he was first appointed a Justice of the Peace under the Justices of the Peace Act, Albert Dobson had no right or authority in law to sit or preside in any Justices' Court, and of course it was during this period, namely on 27 September 1952 and on 9 May 1953, that this same Albert Dobson had acted as one of the "Justices" who presided in the Court which convicted and fined Harry Kyle on the two bookmaking charges in 1952 and 1953. Section 9 of the Justices of the Peace Act 1957 provided that any Act done by a Justice of the Peace after he ceased to hold that appointment should be void and of no effect.

It was now clear that these two convictions could not stand, both being made without jurisdiction.

I hastened to inform Kyle of the result of my investigations and that I intended to file without delay a motion in the Supreme Court, asking for an order quashing both convictions and, at the same time, I advised him that on these convictions being quashed by the Supreme Court, as I was confident they would be, then when he appeared before the Magistrate's Court on the present charges he would so appear as a statutory "first offender" and would therefore escape a prison sentence, which news was received by my client with relief and delight.

I then filed in the Supreme Court at Hamilton a motion to quash both convictions. The proceedings in the Magistrate's Court were then adjourned pending the result of the Supreme Court action.

This motion duly came on for hearing before the late Mr Justice Gresson. The Attorney-General, who was cited as first defendant, being represented by Mr D W McMullin (now Mr Justice McMullin), while Mr J D Bathgate appeared for the second defendant, Albert Dobson.

At the conclusion of my address, counsel for both defendants intimated to the Court that upon the facts which were not in dispute, they could not in law oppose the motion to quash the convictions.

Mr Justice Gresson accordingly made the order asked for in the motion and both convictions were duly quashed.

I now thought that it was at least worth while making an endeavour to obtain repayment from the Crown of the two fines and costs, amounting to the sum of four hundred pounds fifteen shillings, which my client had paid for the two now illegal convictions. The difficulty, of course, was that the limitation provisions contained in the Crown Proceedings Act would appear to be fatal to any action to recover moneys paid over 10 years ago. However it did appear that perhaps the Crown would consider that there was a moral obligation to refund moneys obtained as the result of what the Supreme Court had now declared to be illegal and void convictions.

I accordingly wrote to the Secretary of Justice, forwarding a sealed copy of Court Order quashing the convictions and requesting a refund of the moneys paid.

Somewhat to my surprise I received a prompt reply from Mr J L Robson, then Secretary for Justice, stating that a refund of the fines and costs was being arranged and that a cheque would be forwarded shortly. This cheque duly arrived. It was certainly a most satisfactory dividend.

The proceedings against Kyle then came on for hearing in the Magistrate's Court at Te Kuiti before the late Mr Stewart Hardy. As mentioned before, there were four charges against my client of carrying on the business of a bookmaker. A plea of guilty was entered in respect of one charge, the other three being defended. At the conclusion of the hearing the Magistrate dismissed one information but entered convictions on the remaining three charges, on which he imposed fines of two hundred and fifty pounds on each charge, making a total of seven hundred and fifty pounds.

As Harry Kyle was a "first offender", fines amounting to seven hundred and fifty pounds appeared to me to be "manifestly excessive". As I was now about to retire from practice I handed the file over to my partner Trevor Maxwell (now Mr T G Maxwell SM).

An appeal against sentence was lodged in the Supreme Court and duly came on for hearing before Mr Justice Woodhouse, who reduced the total fines from seven hundred and fifty pounds to the sum of one hundred pounds.

And so ended my last case. It certainly possessed some unusual if not unique features. In view of the fact that when I was first consulted by Harry Kyle it appeared certain that he faced a term of imprisonment, whereas the final result was that he was fined a total of one hundred pounds, after receiving a refund of four hundred pounds fifteen shillings from the Department of Justice. A conclusion which was highly satisfactory to my client and, if I may say so, not entirely without profit to the firm of Mackersey & Maxwell.

The case was perhaps unique in that the Department of Justice (no doubt by oversight) had permitted a very worthy citizen, Mr Albert Dobson, to preside in its Court at Te Kuiti for a period of over two years as a JP during which time he was not in fact or law a Justice of the Peace. How many illegal fines and other penalties he of course quite innocently imposed, I do not know. Perhaps on this aspect of the matter the least said the soonest mended.

Valedictory

When I retired from practice in 1963, it was just 40 years after I first came to Te Kuiti and joined the firm of Broadfoot & Finlay.

During that period I saw many changes in the King Country. As I have already said, when I first arrived in Te Kuiti the King Country was still a pioneer district. The "sly grog" trade was a big and highly profitable business and prosecutions for selling or keeping liquor for sale occupied a substantial proportion of the time of the then fortnightly sittings of the Magistrate's Court. This continued until about 1950, when the law was amended by Parliament and the granting of wholesale and retail liquor licences, together with club charters was legalised.

The farmers in the King Country in the early days had a great deal to contend with. In the late 1920s the noxious weed ragwort became a very serious menace. It was poisonous to livestock but did not take effect until some time after the weed had been consumed by the stock. As it became rampant throughout the King Country, the losses suffered by farmers reached large proportions, and what was probably more disastrous still, stock buyers from outside the King Country refused to purchase stock which had been grazed in that area. However, it was not long before the sturdy enterprising King Country farmers discovered that by heavily stocking their pastures with sheep when the ragwort plant was young and little more than a seedling (it was not then poisonous), they not only prevented the plant from seeding but in a short period, for all practical purposes, eliminated it altogether.

Another serious menace was what was known as "bush sickness". Large areas of land, which had previously been covered with native bush, became

"sick". After stock had been grazed on these areas for some months they began to lose condition and if not moved to fresh grazing they eventually died. These bush sick areas appeared to be scattered indiscriminately throughout the King Country and included many thousands of acres and many farms had to be abandoned. There were also areas similarly affected in the Bay of Plenty and Rotorua districts.

Eventually the DSIR led by Ernest Marsden (later Sir Ernest) discovered that the whole trouble was due to a cobalt deficiency in the soil. The addition of a minute quantity of cobalt to the fertilizer effected a complete cure.

After these difficulties had been overcome we in the King Country, together with the rest of New Zealand, had to face the disastrous depression of the 1930s. This, of course, meant hard times for everybody, including the legal profession. However in 1936 the Mortgagors and Lessees Rehabilitation Act was passed. This authorised special "Relief Courts" known as Adjustment Commissions to reduce where necessary the mortgagors or lessees' liabilities to an amount which did not exceed their assets. This of course, particularly in a farming area, provided a considerable volume of work for solicitors. The fees for this work were necessarily small but for many legal firms practising in rural areas it provided a very welcome "relief". For myself, I can say that this work entailed my appearance before more than 200 sittings of the Adjustment Commissions.

In preparing applications for relief for farmers, solicitors found that they had to learn considerably more about farming than they ever knew before, and I soon acquired a considerable theoretical knowledge of the carrying capacity of farms' average butter-fat production per cow, lambing percentages, and generally how that mythical individual "the average efficient farmer" should farm and manage his land. In fact, as Te Kuiti was so dependent for its progress on the farming community, not only solicitors but most men in business there by reason of their frequent contacts with their farming clients, soon acquired some knowledge of farming problems as the following humourous incident will show. At a certain Te Kuiti Chamber of Commerce Annual dinner, the toast of "The Farming Community" was in the hands of a prominent local businessman, who in proposing this toast commenced his speech as follows: "Gentlemen, I now know quite a lot about farming and I have learnt it all since I came to Te Kuiti. When I first arrived here, so little did I know about farming that I always thought a hogget was a little pig".

However, in spite of the difficulties which the farmers in the King Country had to face during the early stages of its development, the area was rich in natural resources. It had an equitable climate, a highly fertile soil, and an evenly dispersed rainfall of about 60 inches per annum. The introduction of aerial topdressing just after the last war resulted in an amazing increase in the stock carrying capacity of all hill King Country farms. Before I left Te Kuiti the King Country was producing livestock equal to the best in New Zealand and its annual auction sales of pedigree stock, which sold at record prices, were attracting buyers from all over New Zealand and in some cases from overseas.

After I retired from practice in 1963, my wife and I remained in Te Kuiti for another two years. However, as our two married daughters were then living on the North Shore, Auckland, we – with very mixed feelings – decided in December 1965 to move to Takapuna.

During the 42 years that we spent in Te Kuiti my wife and I made many good friends, amongst both the town and country residents. We always both took a keen and active interest in local civic and community affairs, and when we left the Mayor and Councillors accorded us the signal honour of a civic farewell.

Where logic leads – Addicted as he himself is to generalisations, Druid is reluctant to take up another, on that other's generalisations. However, the Chief Superintendent of Police in charge of CID Kowloon is reported to have said publicly – a statement repeated in "Off Beat" – that: "Detecting crime is not as exciting as depicted on television . . . suspects do not self-incriminate when confronted by police officers – they invariably lie and deny".

The logical equation seems therefore to run –

Major premiss – Criminals invariably lie and deny when confronted by police officers.

Minor premiss – Ah Wong readily admitted being a member of a Triad Society when confronted by a police officer.

Ergo – Ah Wong is not a criminal.

Does the reader think there is something to be said in favour of this application of Western logic to an Eastern situation? 'DRUID' in the Newsletter of the Hong Kong Magistrates Association

OBITUARY

JA Bretherton Esq, SM

JA Bretherton resident Magistrate at Whangarei died early in November. At a sitting of the Magistrates Court in Whangarei on the 13th November, a tribute was paid to his memory by Mr JD Gerard who addressed the Court as Chairman of the Northland Law Association. Mr Gerard in addressing Mr Blackwood said that Mr Bretherton started practice on his own account in Christchurch in 1934, shortly after his admission as a barrister and solicitor, and continued in the same practice until his appointment to this bench in June 1970.

"His only absence from this practice was for the whole period of the second World War when he served with great distinction in Greece, North Africa and Italy in the Fourth and Sixth Field Regiments and the 14th Light Anti Aircraft Regiment of the New Zealand Artillery. He commanded the latter Regiment with the rank of Lieutenant Colonel. As a soldier he was renowned for his absolute bravery in action and his complete disregard for his own safety in carrying out his duties. He was, in fact, one of the characters of whom stories are still told, and were still being told by a distinguished band of former gunners who assembled in Whangarei for his funeral service. During his war service he was renowned for the immaculacy of his uniform, and this was an aspect of his character, as was his courage, which he brought with him to the Bench. It said much for his ability to adapt to the customs of his adopted Northland that in later years he acquiesced in the wearing of shorts by counsel in his Court.

"Mr Bretherton had interests that went well beyond the spheres of law and justice, although those were his prime concerns. He was a wide reader of all kinds of literature, not only in English but also in French and Russian. He was interested in and knowledgeable of the arts. His intellectual ability can be gauged by the fact that he was dux for two years of St Andrews and holder of the Lizzie Rathbone scholarship for classics at CUC.

The circuit Mr Bretherton was appointed to serve is a difficult one, because of the distances the resident Magistrate must travel, and the fact that he is too seldom able to discuss with other Magistrates the problems and responsibilities that confront him. Mr Bretherton had the ability to make decisions on his own and without delay.

"We ask your Worship to convey to your brother Magistrates our sympathy in the loss of your colleague, we offer Mrs Bretherton, who is sitting in Court today, our very sincere sympathy in the loss of her husband, and we offer his two sons, one of whom is with us today, and his two daughters our very sincere sympathy in the loss of their father," Mr Gerard concluded.

In replying Mr Blackwood said that he presided over the special sitting with a heavy heart, as although he had not had the advantage of knowing Mr Bretherton over a long period of years, in the much shorter time he had known him he had looked upon him not only as a colleague but as a friend.

"The late Mr Bretherton's legal career has extended over a period of more than 40 years. He qualified in 1934 and then practised very successfully in Christchurch (interrupted only by his war service) until his appointment to this Bench in June 1970. From 1951 to 1958 he was the Transport Licensing Authority for Canterbury and thus he brought to this Bench a wealth of experience, understanding and human knowledge gained through the rough and tumble of private practice, his service in the Armed Forces and his service in a quasi-judicial capacity as Transport Licensing Authority. A Magistrate is called upon every week to do justice to a very large number of people with differing problems, differing backgrounds and differing heritages, and the diversity of experience in the late Mr Bretherton's career equipped him extremely well to carry out that duty. It has long been recognised that the Whangarei circuit is a difficult one involving considerable travelling. John Bretherton discharged his duties in that circuit efficiently and well and no one could ever complain of delayed justice.

"A characteristic which I much admired about Mr Bretherton was his reaction to adversity. Some who become stricken with illness bemoan the fact to their families, their friends and their colleagues, and spend their remaining days feeling sorry for themselves. Mr Bretherton, although well aware that he was suffering from a terminal illness, remained cheerful to the end, never once to me or to my brethern complaining about his lot in life. He seemed determined to be thankful for each additional day he was given and to enjoy that day with the zest for living which was so much part of his personality. That quality alone is a rewarding

memory for those who were his friends and colleagues. At the last conference of Magistrates held in Wellington only last August, Mr Bretherton was present although he was not then well. I well remember his contribution to the discussions and the sharing of his experiences in the kindly, courteous and yet firm way which characterised his approach to life. John Bretherton was a gentle man, in the true sense of that word, and the Bench and this community are so much the poorer for his passing.

To you, Mrs Bretherton, and to the late Mr Bretherton's two sons and two daughters and their families, on behalf of all my colleagues on the Magisterial Bench, I extend our deep and continuing sympathy in the loss of a beloved husband and father".

Mr Gerard in his tribute said that the Canterbury and Auckland District Law Societies associated themselves with what he had said. I for my part should like to add a personal tribute. The late Mr Bretherton will be remembered with affection by many ex-gunners who served with him in the Middle East in the Second World War. He was affectionately known to many of the troops as "Maadi Lil" a nickname which was bestowed on him partly for his dress and partly for his accent. As to the former I have seen him step out of a truck in the middle of the Western Desert clad in corduroy trousers, a serge battle dress tunic, a coloured Royal Artillery "cap FS" (highly illegal) and an eye glass. To anyone who did not know him, he would have appeared, in the words of the old time British Army "a frightful twit", but those who had the fortune to serve with him knew that there was a very able and gallant officer beneath the self-imposed veneer.

The late Mr Bretherton was borne in Wellington on 2 June, 1911. He joined the second NZEF in 1940 and commanded E Troop of the 6th Field Regiment in 1940 and 1941. He served with distinction in Greece, where his battery was in action at Mt Olympus and Thermopylae. After his unit was withdrawn from Greece he served in the Western Desert as a battery commander with the 4th Field Regiment and was at various times a liaison officer to 69 Infantry Brigate (UK) and to the Free French Forces in Tunisia. For a period in 1942 he commanded the 14th Light Anti-aircraft Regiment at El Alamein. After the war he was Lieutenant Colonel in command of the Composite Anti-aircraft Regiment RNZA from 1948 to 1955 and was awarded the Efficiency Decoration. Many stories were told about John. It was said that he wore silk pyjamas in a slit trench in the desert and I am told by Doug Gerard that one of his last letters was to Ballantynes in Christchurch complaining of the quality of silk ties and handkerchiefs which had been sent to him. On one occasion a member of the gunner's mess at Papakura camp was heard to ask him what English public school he had been to and when John said that he had not been to any, he was then asked what University he went to, to which he retorted "Canterbury College". His questioner then said "Well how long have you been in New Zealand?" to which John replied "All my life". The questioner then gave up the cross examination saying "Well, all this accent of yours is sheer bloody affectation", and we were delighted to hear John reply in the purest Balliol accent "Absolutely, old boy".

WH Blyth

Not a case of knowing – "The fact is that there is not and never has been a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application." Lord Atkin in *Evans v Bartham* [1937] AC 473.

Silence in Court – It is, of course, always proper for a Judge – and it is his duty – to put questions with a view to elucidating an obscure answer or when he thinks that the witness has misunderstood a question put to him by counsel. If there are matters which the Judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put, he can, of course, take steps to see that the deficiency is made good. It is, I think, generally more convenient to do this when counsel has finished his questions or is passing to a new subject. It must always be borne in mind that the Judge does not know what is in counsel's brief and has not the same facilities as counsel for an effective examination-in-chief or cross-examination. In cross-examination, for instance, experienced counsel will see just as clearly as the Judge that, for example, a particular question will be a crucial one. But it is for counsel to decide at what stage he will put the question, and the whole strength of the cross-examination may be destroyed if the Judge, in his desire to get to what seems to him to be the crucial point, himself intervenes and prematurely puts the question himself. I think it desirable to throw out these suggestions in case they may be found helpful in the future. Lord Greene MR in *Yuill v Yuill* [1945] 1 All ER 183, 185.