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INTER ALIA

Rule of law or rule by decree?

It is axiomatic that all those in New Zealand are bound by Acts of the New Zealand Parliament. There can, it has been repeated ad nauseam, be no question of individuals selecting for themselves which of the country's laws they will choose to obey, and which they will choose to disregard.

This is trite law and should hardly bear repeating. That it does highlights the fundamental nature of the error.

The New Zealand Superannuation Act 1974 is one such Act. Nothing distinguishes it from any other Act, save that (along with some others) it has been promised radical amendment in the National Government's 1975 election manifesto.

The Act imposes certain duties on employers, and s 93 in particular creates a number of offences, the penalties for which are up to 12 months' imprisonment, a $2000 fine, or both.

Notwithstanding these unequivocal statutory duties, the Government has instructed employers that they need not comply with the law, and that when Parliament is finally assembled, retrospective legislation will be introduced to exonerate them from blame. This, of course, is to actively encourage members of the community to break the law as it stands, and raises the intriguing possibility of members of the cabinet actually being parties to the commission of those offences by counselling their commission (cf s 66, Crimes Act 1961).

It is fundamental that the Executive has no right or claim to any power whereby it can pick and choose which of the Acts of Parliament the citizenry are to comply with, and which they can with impunity disregard.

It is Parliament and Parliament alone who can repeal legislation. If the Executive does not want Parliament to convene before the end of May, then it has to live with the consequences. If it wants legislation amended immediately there is only one way in which it can give efficacy to its wishes, and that is to convene Parliament immediately.

If it does not wish to do that, then it must suffer the inconvenience of a particular statute remaining both on the statute book and in force as part of the law of the land.

Until such time as Parliament itself chooses to create such a power, the Executive has no power to suspend legislation.

It is often lost sight of that it is Parliament – not the Government – which alone determines what the law shall be. True, the Government may invite Parliament to pass a measure, but very often its final form is very different from its original. Witness also the measures which are allowed to lapse.

There are, of course, practical reasons why the Act, it if is to be radically amended, should be amended without delay. However, if those practical reasons do not outweigh the Government's desire to wait until the end of May to call the House together, then those reasons can hardly be sufficiently compelling to call for the erosion of the Rule of Law. For that is precisely what is involved. And when leaders of government openly flout the laws of their choosing, they can hardly be surprised should others do likewise.

More than this, Parliament is seen in the role of a mere cipher – doing no more than validate decisions already taken and enforced by the Executive. This is to add further to an already sorry picture.

The writer has welcomed the election of so many lawyers as Members of Parliament. All but one will sit on the Government benches. Their silence suggests that collectively they have fallen at the first fence.

Protecting ourselves, and protecting each other

In a spirited defence of the Rule of Law, Sir John Donaldson recently told 200 solicitors at an Oxford Weekend Course that the concept is in jeopardy. Here, of course, both major political parties profess to support the Rule of Law – but do either really understand it? Here is part of what Donaldson J had to say:

"People are losing faith in the Rule of Law. Their confidence must be restored. At the same time we must all consider whether the system does not require modernising and making more responsive to current needs.

"And this is where we, as lawyers, have a special part to play. Perhaps we are the most politically aware of all professions, apart from that of politics itself. And when I use the words 'politically' and 'politics', I use them in their true sense of referring to the art and science of government – not in the popular sense of *Party* political. In the party sense we are as diverse as any comparable group in the population. Some of us, like myself, have necessarily renounced all party loyalties. In my case they were never very strong anyway. Yet I would guess that we are almost as one in our belief that Parliamentary democracy cannot exist without the Rule of Law. This is not a case of jobs for the boys. The Rule of Law, as such, has no more to do with lawyers than with every other citizen. No, our common belief is *not* based on professional self-interest. It is based upon an understanding, upon an awareness, of how fragile is the organisation of a free society and how essential is the Rule of Law to the maintenance of that freedom.

"But not only have we an appreciation of what is at stake. We have the opportunity and the ability to communicate that appreciation. We can explain and we can persuade. It is a fundamental truth that we have to tell. Let us tell it to all who will listen. Let us even tell it to those who pretend not to, for events will remind them day by day of what we have said. And the message is simple.

"We are a nation of 50 million people. No two of us are completely alike. As a nation we have enormous interests in common. In the last analysis, we sink or swim together. But none of us belong only to the national group. We also belong to numbers of smaller common interest groups within the nation. Some are regional, some are social, some economic – the categories are almost endless. And inevitably there are points at which the interests of those groups conflict. Indeed, quite apart from groups, conflicts of interest between individuals are inevitable, unless you are a solitary castaway upon a desert island.

"Without some rules life would be intolerable. The weak would go to the wall. But not even the strong would really benefit, for we are none of us wholly strong and self-sufficient. And as life becomes progressively more complex, so we all become more interdependent At many points each of us needs help and protection. This is what the Rule of Law is all about – protecting us from others, which we all applaud, and protecting others from us, which is the price we have to pay.

"But apart from the needs of individuals, there is another consideration. In former times the need was to preserve the military strength of the nation. Without the King's Rule – the Rule of Law as it then was – internecine strife would have sapped that strength and the country would have been overrun. Today it is the economic strength of the nation which is in peril. That strength depends upon our all working and living peaceably together, both as individuals and as groups. The King's Rule has been replaced by a new concept. It is still the Rule of Law. But it is no longer *them* ruling us. It is *us* ruling ourselves. Above all it is us protecting ourselves and protecting each other. This is what the Rule of Law is for. This is what it is and what it does. Every action – or inaction – which damages the Rule of Law, damages each one of us. And by 'us' I do not, of course, mean the lawyers. I mean every citizen of this country.

"I sometimes wonder whether the average citizen realises how the British system of Parliamentary democracy is intended to work. Ideally we should all get together and hammer out agreed rules of conduct, agreed rights and privileges, agreed obligations and duties. Everyone would accept that that is impossible. But do they understand the alternative system which we have adopted? I fancy that if you did an opinion poll and asked who made the laws, most people would answer 'the Government'. This is a sad commentary upon the constitutional education of this country. Perhaps it is also a reflection upon the declining power of Parliament, or at least the extent to which it is seen to have power,.

"No, people must realise that whilst the Government proposes, it is or should be Parliament which decides. This is no academic point. It is rare for the political party forming the Government of the day to enjoy an absolute majority of popular support. Even when it does, it is disapproved of by large numbers of citizens. No political party can therefore win acceptance as representing the will of the nation. But Parliament can. It is vital to the proper functioning of a Parliamentary democracy that Parliament should be, and be seen to be, independent of the Government of the day – the Executive. Alas the need for party discipline tends to blur this

division, though there can be no doubt that it should be preserved, so far as possible."

As Sir John has clearly stated, it is Parliament who rules, Parliament who expresses the will of the people. An Executive that arrogates to itself dictatorial powers over Parliament denigrates that instituion and ultimately imperils the future of democracy as we know, understand and practise it.

What adds to the sadness of our situation is the incapacity or unwillingness of the daily press to understand and lock with the threat. Instead, criticism is portrayed as Opposition sour grapes at the demise of one of its major reforms.

The problem is very much more basic than that and deserves to be clearly shown for what it is.

Jeremy Pope.

OMITTED EASEMENTS

By D W McMORLAND, *Senior Lecturer in Law at the University of Auckland*

Section 62 (b) of the Land Transfer Act 1952 provides that:

> ". . . the registered proprietor of land . . . under . . . this Act shall . . . hold the same subject to such encumbrances . . . as may be notified on the . . . register . . . but absolutely free from all other encumbrances . . .
>
> "(b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land".

This provision and its Australian counterparts have now arisen several times in litigation and this seems an appropriate moment to attempt an analysis of its scope. Paragraph (b) raises two main questions: what class of easements comes within its scope, and what is its relationship to s 182 of the Land Transfer Act?

The decisions make it clear that the subsection does not protect all easements. The distinction originally accepted was between those easements created before the servient land came under the Land Transfer Act and those created after that date, only the former being protected. It will be argued that this distinction has now been replaced by that between legal and equitable easements, regardless of the date of creation, again with only the former being protected.

There has never been any doubt that easements registered under the Deeds Registration Act or otherwise existing at common law over the servient tenement prior to its being brought under the Land Transfer Act come within the section *(a)*. Because the diversity of means by which easements could be created at common law made it impossible to insure that they were all recorded on the title when the servient tenement was brought under the Act, the purpose of the section was thought to be to protect those not recorded. This was so even though the dominant owners had the right to lodge a caveat on the application to bring the servient tenement under the act *(b)*.

The easements within this group include those created by deed, whether registered under the Deeds Registration Act or not *(c)*, and also those created by prescription before the date on which the servient tenement came under the Act *(d)*. Although the cases do not provide examples, it would presumably also include an easement created in any other manner recognised by the common law or statute as giving a legal easement.

The greatest degree of debate has concerned easements created after the servient tenement was brought under the Act, but before legal easements proper can be considered it is first necessary to distinguish between these and certain statutory rights analogous to easements. These latter rights have been mentioned in connection with s 62 (b) *(e)*, but it has now been made clear that if they are

(a) Lean v Maurice (1874) 8 SALR 119; *Anderson v Maori Hill Borough Council* (1885) NZLR 3 SC 364; *James v Stevenson* [1893] AC 162; *Bevan v Tatum* [1927] NZLR 909.

(b) In re Schmid (1881) 15 SALR 48; *In re Schultze* (1894) 13 NZLR 605; *In re Houison* (1897) 18 NSWLR 300; *Carpet Import Co Ltd v Beath & Co Ltd* [1927] NZLR 37 at 58.

(c) See the cases cited in fn *(b)* supra.

(d) NZ Loan and Mercantile Agency Co Ltd v Corporation of Wellington (1890) 9 NZLR 10; *Smith v Christie* (1904) 24 NZLR 561; *Carpet Import Co Ltd v Beath & Co Ltd* [1927] NZLR 37. For doubts that s 62 (b) preserves all easements in respect of which the appropriate period has elapsed see F M Brookfield "Prescription and Adverse Possession", *The New Zealand Torrens System Centennial Essays* at pp 172-174.

(e) Gray v Urquhart (1910) 30 NZLR 303; *Hawke's Bay River Board v Thompson* [1916] NZLR 1198.

to prevail against a purchaser, they do so without the aid of s 62 (b) and that to link them with the subsection is mistaken *(f)*.

To create a legal easement over land after it has been brought under the Land Transfer Act, it must have been registered in one of the forms provided by the Act *(g)*. But after this has been done it remains possible that it might be omitted by error in the Land Registry Office from a new title issued for the land, or that some other fault might occur so that the easement does not appear on the face of the title. The old view was that such an easement would not come within the scope of the section because it was limited to those easements created before the servient tenement was brought under the Act. This was based on *Jobson v Nankervis (h)*, but that case concerned an easement which had not been registered, so that the statements relied upon were only obiter.

Later cases have shown that the division based on the time of creation of the easement is not correct. First the subsection was applied in Victoria *(i)* and Tasmania *(j)* to prescriptive easements acquired over Land Transfer land, a method permitted in those jurisdictions though not in New Zealand *(k)*. Then, in *James v Registrar-General (l)* it was applied to a right of way which had been properly registered and put on the title of the servient tenement, but omitted by error when a new title was issued. It was held that the easement was binding under the equivalent of s 62 (b) on a purchaser who had bought after the issue of the new title and in reliance upon it. This decision has been twice followed in New South Wales in cases involving similar facts *(m)*. None of these cases take the scope of the section beyond the preservation of an easement created in a manner recognised as giving rise to a legal easement at the time of its creation. The Australian view to date is therefore that a legal easement will be protected by s 62 (b) regardless of the time of its creation.

Whether this view will be accepted in New Zealand is not yet clear. In *Sutton v O'Kane (n)* Richmond J, with whose judgment concerning s 62 (b) Turner P concurred, expressly left this point for future decision. Wild CJ was willing to accept that the subsection could apply, as regards easements arising since the servient land was brought under the Act, to those "created by registration or . . . capable of being notified on the register" *(o)*. It is submitted that there is no reason why the Australian view should not apply in New Zealand. It seems quite reasonable that an easement which has been properly created by registration should be within the protection of the subsection when it has been omitted from the title in error as in *James'* case.

There might, however, be room for disagreement over the boundary of this class of easement. The learned Chief Justice spoke of easements "capable of being notified on the register" and, though he gave no examples of such an easement, it may be assumed that the type of situation envisaged is related to the example given by Richmond J. His Honour suggested a situation in which the parties have done everything required on their part to create a legal easement up to the stage of presenting a memorandum of transfer in proper form for registration, but the Registrar has omitted to enter any memorial on the title of the servient tenement. Against, Richmond J expressly reserved his opinion on these facts, but they do raise the question of where the boundary line is to be drawn.

The clearest boundary would be between legal and equitable easements. For the creation of a legal easement over land under the Land Transfer Act registration is required which under s 34 (2) of the Act, is not complete until there is a memorial entered on the register. This would exclude the situation suggested by Richmond J from the protection of s 62 (b). The validity of this reasoning must turn in the last resort on the meaning to be given to the word "created" in s 62 (b) itself. It is suggested that it must mean created in a particular form, either legal or equitable, and if, as will be submitted below, equitable easements are outside the scope of the subsection, it must be restricted to legal easements. Therefore, if no memorial has ever been entered on the title pursuant to s 34 (2), the easement would not have been "created" for the purpose of s 62 (b). On the wording of s 62 (b) it is not, of course, relevant to discuss whether an easement has been "omitted" from the title until it is first decided whether it has been "created". Neither does it appear to be relevant to consider in the present context of easements arising after the servient land has come

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(f) Miller v Minister of Mines [1961] NZLR 820 at 841-2, per Cleary J.

(g) Land Transfer Act 1952, ss 90 and 90A.

(h) (1943) 44 SR (NSW) 277. Applied in *McCrae v Wheeler* [1969] NZLR 333.

(i) Nelson v Hughes [1947] VLR 227.

(j) Wilkinson v Spooner [1957] Tas SR 121.

(k) Land Transfer Act 1952, s 64.

(l) (1967) 69 SR (NSW) 361.

(m) Berger Bros Trading Co Pty Ltd v Bursill Enterprises Pty Ltd [1970] 1 NSWR 137; *Maurice Toltz Pty Ltd v Macy's Emporium Pty Ltd* [1970] 1 NSWR 474.

(n) [1973] 2 NZLR 304. For a full discussion of this case see D J Whalan, "Light and Some Shade Cast on the Fraud and Omitted Easements Exceptions in the Torrens System Statutes" [1973] NZLJ 418.

(o) Ibid, at 315.

under the Land Transfer Act, whether they are "existing upon" the land. The Court of Appeal in *Sutton v O'Kane* was unanimous in restricting these words to easements acquired before the servient land came under the Act *(p)*.

It is therefore respectfully submitted that to bring easements "capable of being notified on the register" as illustrated by the situation suggested by Richmond J within the scope of s 62 (b) would be to give a somewhat odd meaning to "created" as used in that section.

The next point to consider is whether equitable easements are within the scope of the subsection. There is no authority relating directly to easements of this type created before the servient land came under the Act, but one writer has doubted whether the section would apply to them *(q)*. This doubt is considerably strengthened by the judgment of the Court of Appeal in *Sutton v O'Kane* which unanimously held that it does not apply to equitable easements created after the land has come under the Act. The same reasons of principle which exclude those created after the land comes under the Act apply to those created before that date. To give them the full protection of the subsection is to protect them against even a bona fide purchaser for value of the legal estate without fraud, a status equivalent to a legal interest and far greater than they had previously enjoyed. It is thus submitted that equitable easements, whatever the time of their creation, should not have the protection of s 62 (b).

The difficulty with the relation between s 62 (b) and s 182 is largely removed if all equitable easements are excluded from the scope of s 62 (b). Section 182 protects bona fide purchasers of the legal estate without fraud against unregistered interests and its normal role is in regard to equitable interests. If these were to be included within s 62 (b), it could well be necessary to regard s 182 as paramount, at least for the purpose of those particular easements *(r)*. But if only legal easements are within the scope of the subsection the issues are simpler. Broadly, if s 62 (b) is paramount, the legal easement retains its character as such against all third parties; but if s 182 is paramount, the legal easement will not prevail against a bona fide purchaser of the legal estate without fraud and will have the same status as an equitable easement as regards purchasers of the servient land.

Some help may be had from the statute in deciding which interpretation is correct. Following the interpretation of the New South Wales legislation by Jacobs JA in *James v Registrar-General (s)*, it may be seen that s 63 (d) makes a bona fide purchaser for value a specific exception in the case of s 62 (c), whereas s 62 (a) is meaningless unless it is a paramount exception. There is no specific indication given regarding s 62 (b), but from the necessity to make a specific exception for s 62 (c) it may be argued that s 62 (b), like 62 (a), is an absolute exception. This was the conclusion reached in *James'* case and applied by White J at first instance in *Sutton v O'Kane (t)*.

Very little help comes from the other decided cases. *Crisp v Snowsill* concerned an equitable easement, so that although it was found that s 182 was paramount, the reasoning cannot be applied to the case of a legal easement *(u)*. The nearest decision is *Carpet Import Co Ltd v Beath & Co Ltd (v)*, which concerned an easement acquired by prescription before the servient land came under the Land Transfer Act. It was found that s 182 does not apply to any interest not capable of being registered under the provisions of the Land Transfer Act and the statutory licence case of *Gray v Urquhart (w)* was cited as authority. The Full Court saw this as avoiding the issue of which section is paramount and expressly left that question open. The Court of Appeal in *Sutton v O'Kane (x)*, having found that the equitable easement was not within the scope of s 62 (b), was also able to leave the issue for future decision. The only comments were made by Richmond J, but they do not point to any answer, however tentative *(y)*.

However, on the basis of the argument outlined above, it is respectfully submitted that White J was correct and that s 62 (b) should not in any circumstances be read subject to s 182. It is not unreasonable to suppose that it was the intention of the former section to preserve the legal easements coming within its scope in full effect as against third parties.

This leaves the final question of what should be done when an easement is found to come within s 62 (b). It it submitted that if the easement was created before the servient land came under the Land Transfer Act but was not brought down on the title, the Court should direct

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(p) at 315, per Wild CJ; and at 350, per Richmond J, with Turner P concurring.

(q) F M Brookfield, "Case Note on *McCrae v Wheeler*" [1969] NZLJ 605 at 606.

(r) This was done in *Crisp v Snowsill* [1917] NZLR 252.

(s) (1967) 69 SR(NSW) 361 at 380.

(t) Unreported; delivered in the Supreme Court at Dunedin on 22 March 1972. Noted [1972] NZLJ 438 (DWMcM).

(u) [1917] NZLR 252.

(v) [1927] NZLR 37 at 59-60.

(w) (1910) 30 NZLR 303.

(x) [1973] 2 NZLR 304.

(y) Ibid, at 351.

the District Land Registrar to enter it on the title. Although there is no machinery for this in the Acts *(z)*, such orders have been made in earlier cases *(a)*, and it would be entirely in accord with the spirit of the Act to ensure that all legal interests do appear on the titles *(b)*. The same reasoning applies when an easement registered after the servient tenement has been brought under the Land Transfer Act is in question.

In conclusion the submissions made above are summarised as follows:

(1) That s 62 (b) applies only to legal easements and never to equitable easements. The time of creation of the easement is in either case irrelevant.
(2) That s 62 (b) is not subject to s 182 as regards any of the easements within its scope.
(3) That when litigation has shown any easement to be within s 62 (b), the Court should order that it be properly entered on the title of the servient tenement.

(z) Carpet Import Co Ltd v Beath & Co Ltd [1927] NZLR 37 at 59.

(a) Smith v Christie (1904) 24 NZLR 561; *Stevens v National Mutual Life Assoc* (1913) 32 NZLR 1140.

(b) F M Brookfield, "Prescription and Adverse Possession", *The New Zealand Torrens System Centennial Essays* at p 174; D J Whalan, "The Torrens System in New Zealand – Present Problems and Future Possibilities", *The New Zealand Torrens System Centennial Essays* at p 273, n 49.

SUICIDE AND THE CLAIMS OF DEPENDANTS

PROFESSOR BRIAN COOTE *considers the position in the light of the Court of Appeal's decision in Pallister v Waikato Hospital Board* [1975] 2 NZLR 725

Suicide in New Zealand is not so common that the class of dependants who might have claims to compensation is a large one. But the existence or otherwise of such claims is important enough to the unfortunate people concerned. Consequently no apology is made for taking the opportunity given by the recent decision of the Court of Appeal in *Pallister v Waikato Hospital Board* [1975] 2 NZLR 725 to consider the position of such dependants since the passing of the Accident Compensation Act 1972. As will appear, there are grounds for believing that, no doubt unwittingly, the legislature may have deprived some dependants of rights they would have had before the Act, without substituting any rights to compensation under the new legislation. It also appears that, in some circumstances, rights of action will continue in the future to arise under the former law, notwithstanding the provisions of the Accident Compensation Act.

In *Pallister v Waikato Hospital Board* the deceased, an elderly man suffering from depression, had been admitted to hospital after having twice, that same day, attempted suicide by jumping from upstairs windows. Within twenty-four hours of his admission he had made a third, this time successful, attempt on his life. The widow of the deceased claimed from the hospital damages under the Deaths by Accidents Compensation Act 1952, on the ground that the hospital had been negligent in its care of the deceased. At first instance ([1974] 1 NZLR 561), Mahon J held that the Hospital had not been negligent and that finding was upheld by a majority (Wild CJ and Richmond J, Woodhouse J dissenting) of the Court of Appeal. That finding, of course, disposed of the plaintiff's claim. But the interest and importance of the case lies in a discussion of other issues by Mahon J at first instance and subsequently by Woodhouse J at length, and Richmond J briefly, in the Court of Appeal.

In his judgment, Mahon J, after finding for the defendant on the issue of negligence, went on to say that even had there been negligence the plaintiff would still have failed because, though the deceased's mind had been disturbed at the time of his suicide to the extent that the continuance of his life had become intolerable to him, he had not been shown to be insane to the standard required by s 23 of the Crimes Act 1961. Mahon J's judgment therefore directly raised the question of the degree of insanity which must have been suffered by a person who destroys himself, if his dependants are to recover damages under the Deaths by Accidents Compensation Act. But indirectly it raised questions of causation which have relevance to the Accident Compensation Act and questions of public policy which have much wider ramifications. If Mahon J were right, for example, it would under New Zealand law be impossible for someone under irresistible impulses

to suicide, but otherwise sane, to enter into an enforceable arrangement with a hospital to protect him from those impulses. In the Court of Appeal, Woodhouse J, in his dissenting judgment, with some support obiter from the other Judges, expressed a different view and one which, it is submitted, for reasons which will be shown, is to be preferred.

The Relevance of Insanity

When claims are brought under the Deaths by Accidents Compensation Act on behalf of the dependants of someone who has committed suicide, the degree of insanity of the deceased is relevant at three points. In the first place, under s 4 of the Act, death has to have been caused by the wrongful act, neglect, or default of the defendant. To the extent that self-inflicted death may constitute a novus actus interveniens, a problem of causation arises. Secondly, s 4 also requires, as a condition of recovery by the dependants, that the deceased himself should have had, at the time of his death, an actionable claim in respect of the wrongful act, neglect or default of the defendant. If, on this notional claim, the deceased would have had to rely on injuries he had in fact inflicted upon himself, there may be circumstances where his claim could have failed on that account. Finally, considerations of public policy may operate to defeat the dependants' claims either indirectly, by defeating any claims the deceased might himself otherwise have had, or directly, by disqualifying the dependants from taking any benefit from the wrongful act of the deceased.

That these three problems do not necessarily raise precisely the same issues has not always been recognised in the cases. Moreover, there is a further distinction, which introduces yet another variable. In some of the cases, the immediate result of the wrongful act of the defendant has been personal injury to the deceased which, in turn, has brought about a state of mind which has led to his act of suicide. In these cases, the effect of the wrongful act has been to cause the suicidal state and, in that sense, to cause the suicide itself. In the other cases, the deceased has been placed in the care or custody of an individual or institution whose wrongful act has been to allow the deceased the opportunity to destroy himself, and only in that sense to cause his death. Once again, the possible differences inherent in these two types of situation have not always been recognised in the cases. In what follows, some attempt is made to separate out these various considerations.

Causation

Since the *Pallister* case concerned the liability of a custodian, it is perhaps appropriate to begin with cases of that kind.

If claims against those who had custody of persons with suicidal tendencies were to be brought in contract, the causation question would be a relatively simple one. It would be whether, in breach of the contract, the custodian had allowed his patient the opportunity to destroy himself. But, the common law of damages being what it is, claims on behalf of dependants have in the past had to be brought, not in contract, but under the Deaths by Accidents Compensation Act 1952. Section 4 of that Act requires that the death be "caused by" the wrongful act, neglect or default of the defendant. The question, therefore, is whether the act of the defendant in allowing the deceased an opportunity to commit suicide could be said to have "caused" his death.

The liability of a custodian was raised once before in the New Zealand Court of Appeal, in *McFarland v Stewart* (1901) 19 NZLR 22. The deceased had been admitted to a private hospital suffering from delirium tremens, and subject to suicidal tendencies. While the proprietor, a medical practitioner, was absent and the institution was in the charge of his nineteen-year old son, the deceased obtained a rifle and ammunition which had been left in easily accessible places in the institution and shot and killed himself. Though, when the matter came before the Court of Appeal, one of the judges, Edwards J, dissented in the final result, all of them proceeded on the basis that for a custodian carelessly to allow someone with suicidal tendencies the means and opportunity to destroy himself would be to "cause" his death, provided that the act of suicide itself were not the proximate cause, in the sense of being a novus actus interveniens. For the majority, that meant that the dependants could succeed only if the deceased had been insane at the time he killed himself, within the limits of the *M'Naghten* rules *(a)*. The dissenting judge, Edwards J, thought it sufficient that the deceased should have had an irresistible impulse to suicide. There can be no doubt, then, that in New Zealand, a custodian can be said to have "caused" the death by suicide of his patient, provided the deceased's mind was, at the time, afflicted to the requisite degree. But *McFarlane v Stewart* was treated by Mahon J at first instance in *Pallister v Waikato Hospital Board* as authority binding on him that the degree of

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(a) Ie, that the deceased was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act, or so as not to know that what he was wrong: *M'Naghten's* case (1843) 10 Cl 6 Fin 200 (HL). The equivalent New Zealand statement of the rule is contained in the Crimes Act 1961, s 23.

insanity required is that which constitutes a defence under the criminal law. It is, no doubt, an unexceptionable proposition that if a deceased, when he killed himself, knew neither the nature and quality of his act, nor that it was wrong, he cannot be said to have broken the chain of causation. But the crucial question is whether the New Zealand Court of Appeal has by implication held, as part of its ratio decidendi, that self destruction by an uncontrollable impulse will break the chain of causation, if the deceased knew at the time that what he was doing was wrong.

That this was not, in fact, part of the ratio in *McFarlane v Stewart* was the view expressed, it is submitted correctly, by Woodhouse J in his dissenting judgment in the Court of Appeall in *Pallister's* case. In his view, the true ratio of the earlier decision was that there had been no negligence because the suicide of the deceased had not been foreseeable. But in any event, it could be added, the discussion in *McFarlane v Stewart* of the question of insanity arose not in the context of causation, but in relation to the requirement under s 4 of the Deaths by Accidents Compensation Act that the deceased must himself have had a right of action had he lived. Since attempted suicide was at that time a crime in New Zealand, it was thought that the deceased's notional claim would have failed on the ground of public policy which is, of course, a quite different matter.

Had the court held that only insanity in the *M'Naghten* sense would prevent suicide constituting a novus actus interveniens it would, it is submitted, have been quite wrong. In the context of causation, it is not the fact that an intervening act is criminal which makes it a novus actus. "Voluntariness" is the test *(b)* and it is to be noted that Edwards J, the only Judge in *McFarlane v Stewart* who had (because he had found for the plaintiff on the other issues) to consider the question of causation, held it to be sufficient that the deceased should be subject to uncontrollable impulses to suicide. In the *Pallister* case, Woodhouse J was prepared to go further in respect of those having the custody of persons with suicidal tendencies. In his view, supported by Richmond J, the concept of a novus actus interveniens does not embrace foreseeable acts in respect of which a duty of care has specifically arisen. A "new cause" must be independent of the pre-existing negligence and not the result of it.

(b) *Cf Hart and Honore, Causation in the Law,* 1958, pp 145–146. It is appreciated that what the law regards as "voluntary" may itself vary from one circumstance to another. There is a lengthy discussion of this question in the judgments of Smith and Hudson JJ in *Haber v Walker* [1963] VR 348.

That it would be a solecism to require the criminal law standard of insanity in the context of causation becomes clearer when consideration is given to those cases where suicide has followed personal injury inflicted by the wrongful act of the defendant. Another New Zealand Court of Appeal case, *Murdoch v British Israel Federation* [1942] NZLR 600 was of that type. The deceased, a tramway worker, had been crushed between a motorcar and a tram and had suffered amputation of one leg and serious injury to the other. He became depressed and eventually killed himself. Here the causation question was whether injuries resulting from the wrongful act of the defendant in turn caused the deceased to take his life. As it happens, on this sort of question there is an established line of authority under the workers' compensation legislation, both here and in England. In *Dixon v Sutton Heath and Lea Green Colliery* (1930) 23 BWCC 135, the English Court of Appeal held that the chain of causation between injury and death is not broken by a suicide which is the result of mental derangement short of insanity in the *M'Naghten* sense, provided that the injured man's power of volition had been "dethroned" in consequence of his work-injury. This case has been applied in New Zealand (eg in *Creagle v Lake Brunner Sawmilling Co* [1953] NZLR 158) and the line of authority it represents was accepted as correct by Myers CJ and Ostler J in *Murdoch v British Israel Federation* [1942] NZLR 600, 621, 635.

In addition, it has been held in England, in two relatively recent cases (*Pigney v Pointers Transport Services Ltd* [1957] 1 WLR 1121 and *Cavanagh v London Transport Executive,* 23 October 1956, The Times) under the local equivalent to the Deaths by Accidents Compensation Act, that the suicide of the deceased was caused by personal injuries previously received, notwithstanding that, when he subsequently took his life, he was sane under the criminal law. A similar conclusion was reached in *Haber v Walker* [1963] VR 348 by the Full Court of Victoria (sitting as a Court of Appeal). Indeed, in the Victorian case, Smith J (at 359) adopted, as the relevant test, whether the deceased had exercised a free choice. If his choice to kill himself had been made "under substantial pressure created by the wrongful act" his conduct could not ordinarily be regarded as voluntary. He referred to Hart and Honore, *Causation in the Law,* pages 38, 122, 134.

A reservation which does emerge from the workers' compensation cases is that the deceased's depressed condition should be caused directly by his injuries and not be the result merely of his own brooding over the accident or worrying over his

inability to work *(c)*. This reservation apart, however, it appears well established, overseas at least, that a suicide brought about by an uncontrollable or irresistible impulse will not break a chain of causation, even if the deceased at the time knew that what he was doing was wrong. Once again, the problem is whether the New Zealand Court of Appeal has compelled any other result in this country. It is submitted it has not.

To begin with, it is to be noted that in the *Murdoch* case it was held that, at the time he committed suicide, the deceased was insane within s 43 of the Crimes Act 1908. Strictly speaking, therefore, a decision on the question whether insanity short of the *M'Naghten* type would suffice did not have to be made. For his part, Myers CJ inferentially raised the causation point by referring to the workers' compensation cases. These he disposed of, not on the ground that they were wrong on the question of causation, but on the ground that, under the Deaths by Accidents Compensation Act, though not under the Workers Compensation Acts, the deceased himself had to have a potential cause of action. (This, it will be recalled, was a point on which the judgments in *McFarland v Stewart* (1901) 19 NZLR 22 appeared to have turned.) This distinction, too, was the basis of the judgment of Ostler J (at 633–635). Smith J began his judgment by distinguishing the workers' compensation cases in the same way. He concluded, upon his analysis of the judgments in *McFarland v Stewart,* that the Court of Appeal had there decided, as a matter of causation, that insanity under the criminal law was required. However, he then stated (at 648) that he found it difficult in principle to see why an irresistible impulse should be insufficient. With respect, it is submitted that the learned Judge's appreciation of the principle was the correct one and that he had misconceived the result of the earlier New Zealand case. In any event, however, he concluded this part of his judgment by saying that the matter did not arise for decision in the instant case.

The only member of the Court who clearly adopted the view that criminal law insanity was necessary as a matter of causation was Johnston J. The remaining member of the court, Fair J, stated (at 677) that he thought it desirable to leave the matter open "until it becomes necessary to decide it."

Having regard to the collateral authority of the workers' compensation cases, to overseas decisions under legislation comparable to the Deaths by Accidents Compensation Act, to the above analysis of the two New Zealand Court of Appeal decisions, and to the reservations articulated by Edwards, Smith and Fair JJ and now by Woodhouse and Richmond JJ, it is submitted that there is nothing to prevent the acceptance in this country of a test under which involuntary self-destruction would not be regarded as a novus actus interveniens, even though the deceased may not have been insane in the criminal law sense. And in the case of custodians it may be possible to go even further and state that even voluntary suicide may be "caused" by the neglect of the custodian.

(c) Dixon v Sutton Health and Lea Green Colliery (1930) 23 BWCC 135, 138, per Scrutton LJ; *Withers v London Brighton & South Coast Railway Co* [1916] 2 KB, 772. See the discussion of this limitation by Smith J in *Haber v Walker* [1963] VR 339, 359–360.

The Hypothetical Claim of the Deceased

As has already been stated, besides requiring that death should be caused by a wrongful act, neglect or default, s 4 of the Deaths by Accidents Compensation Act provides that the act, neglect or default should be "such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof." Only then does the Act allow liability in an action on behalf of the dependants of the deceased. The dependants' action in turn is for damages "proportional to the injury resulting from such death to the parties for whom and for whose benefit such action is brought." The problem raised here, assuming that death by suicide was caused by the wrongful act, neglect or default of the defendant, is whether the deceased himself would have been disqualified from suit, had he lived, because of his act of self destruction.

It is important to note that, by the express wording of the Act, the action which the deceased must have had (had he lived) is in respect of the "act, neglect or default" of the defendant. It is not in respect of his own death. Prima facie, therefore, provided death was "caused" by the wrongful act of the defendant, and the deceased would have been able to receive damages in respect of that wrongful act, the conditions of the Act should have been satisfied. The potential significance of this lies in a difference between the "custodial" and the "personal injury" cases. In the former, if the deceased had had a contract with the custodial authorities, he could have had a right of action for breach of contract independently of any injuries he might have inflicted on himself. But in the absence of such a contract, the deceased would have to rely, in his notional claim for damages, on his self-inflicted injuries. That was the case in *McFarland v Stewart* (1901) 19 NZLR 22 and it is hardly surprising that the Court of Appeal should have held that the deceased would have been disqualified had he claimed, since his injuries were

regarded as being the result of his own criminal act.

By contrast, in the personal injury cases, the deceased ex hypothesi would have a claim in respect of the injuries which had immediately resulted from the defendant's wrongful act, whether or not he could have recovered damages for the further injuries subsequently self-inflicted. That being so, and provided the suicide was *caused* by the initial wrongful act of the defendant, the conditions of the Act would be met and the dependants ought not to be disqualified simply on the ground that disabilities would have attached to any claim by the deceased based on his own self-inflicted injuries (*Pigney v Pointer's Transport Services Ltd* [1957] 1 WLR 1121, 1125).

Murdoch v British Israel Federation [1942] NZLR 600 involved suicide following injury inflicted on the deceased by another party, but the distinction between the two types of case does not appear to have been noticed. The judges appear to have assumed that the decision in *McFarland v Stewart* was conclusive against the claimants even though that was a custodial case where there had been no injury, other than the self-inflicted one, on which the deceased could have relied. They also seem to have taken it for granted, without analysis, that the cause of death postulated in the Act was the immediately fatal injuries, rather than the "wrongful act, neglect or default" which the Act in fact prescribes *(d)*.

Assuming, however, that under New Zealand law the claimants must in all cases show that the deceased could have recovered damages for the injuries he inflicted upon himself, it becomes important to note the ground on which, in the two New Zealand Court of Appeal cases, it was held that the deceased would have been disqualified. It was that, at the time both those cases were decided, attempted suicide was a crime. It could only not be a crime if the deceased were insane under the local equivalent of the *M'Naghten* rules. Now that attempted suicide is a crime no longer, that reason for the hypothetical disqualification has gone, as has that particular reason for adopting the criminal law test of insanity.

This is not to say that there may not be other grounds of public policy for disqualifying claims based on suicide or for adopting the *M'Naghten* test of insanity. It does mean, though, that those grounds would have to be sought elsewhere than in the binding authority of the *McFarland* and *Murdoch* decisions.

Public policy

After a careful review of the cases, Mahon J at first instance in *Pallister v Waikato Hospital Board* [1974] 1 NZLR 561, 569–575, concluded that the fact that neither suicide, nor attempted suicide, was any longer a crime made them no less contrary to public policy. With respect, it is submitted that in general this conclusion is, and must be, the right one. That being accepted, the question for resolution is whether public policy as such requires the disqualification of the claims of the dependants of those who have killed themselves, unless the deceased was at the time insane under the *M'Naghten* rules. In the view of Mahon J, the relevant public policy was that which prevents the accretion of a benefit to the estate or representative of a man who has committed suicide whilst responsible in law for his actions. Its rationale he saw as "an amalgam of social interest, national security and moral or religious aversion" going back to "the interest of society in men as human lives." Suicide being thus wrongful, the wide principle against allowing a person or his estate to profit from his own wrong would come into play. But the application of that public policy depends upon the principle upon which it is based. That principle, it is submitted, is that the law does not allow profit from a wrong to act as an inducement to commit the wrong. Its corollary is that an unintended wrong is not caught by the rules *(e)*.

By way of example, the rule has been applied to prevent those guilty of murder (eg *In The Estate of Crippen Dec'd* [1911] P 108) or manslaughter (eg *In The Estate of Hall* [1914] P 1) taking under the will of their victims. Similarly, at least where suicide or attempted suicide is a crime, the rule has been held to prevent recovery, by the personal representative of someone who has killed himself, of moneys payable under an insurance policy which the deceased had on his own life (*Beresford v Royal Exchange Insurance Co Ltd* [1938] AC 586). At the other extreme, the rule does not apply where the deceased was insane in the strictest sense when he caused the death of the victim or of himself, as the case may be (*In re Houghton* [1915] 2 Ch 173). In between these extremes lie wrongful acts which, though committed by a sane person, are unintended. These have been discussed several times in the English Courts in connection with accident insurance, and claims to indemnity for the results of such acts have been allowed (eg *Tinline v White Cross*

(d) Cf *Haber v Walker* [1963] VR 348, 355, per Smith J, 365, per Hudson J.

(e) The principle is discussed in detail by SC Loval and JC Smith, "Some Structural Properties of Legal Decisions" [1973] CLJ 81, 84 et seq. There is a more general discussion in Shand, "Unblinkering the Unruly Horse" [1972A] CLJ 144.

Insurance Co Ltd [1921] 3 KB 327; *James v British General Insurance Co Ltd* [1927] 2 KB 311; *Hardy v Motor Insurer's Bureau* [1964] 2 QB 745). In a recent case, *Gray v Barr* [1970] 2 QB 626, 640, Geoffrey Lane J, in a passage subsequently adopted by Lord Denning MR in the course of his judgment on appeal, summed up the law in these terms:

> "The logical test, in my judgment, is whether the person seeking the indemnity was guilty of deliberate, intentional and unlawful violence, or threats of violence. If he was, and death resulted therefrom, then, however unintended the final death of the victim may have been, the court should not entertain the claim for indemnity."

On the other hand, in *In re Giles, decd* [1972] Ch 544, Pennycuick VC has held that a woman who has pleaded guilty to the manslaughter of her husband on grounds of diminished responsibility can not take under her husband's estate. The learned Judge declined to distinguish between degrees of diminished responsibility. That, he thought, was something that could be done only by a tribunal higher than his own. It is significant, though, that the learned Judge confined himself to what he considered to be rules already well established in relation to murder and manslaughter and, further, felt it unnecessary to analyse the grounds upon which the rule had been established. He did not address himself to the case of wrongful acts which were not criminal and his attitude seems consistent with the following statement by Lord Atkin in *Beresford v Royal Exchange Insurance Co* [1938] AC 586, 598–599:

> "I think the principle is that a man is not to be allowed to have recourse to a court of justice to claim a benefit from his crime, whether under a contract or under a gift. No doubt, the rule pays regard to the fact that to hold otherwise would in some cases offer an inducement to crime, or remove a restraint to crime and that its effect is to act as a deterrent to crime, but, apart from these considerations, the absolute rule is that the courts will not recognise a benefit accruing to a criminal from his crime."

On this showing, it is submitted, there is sufficient authority for a difference of approach between criminal acts and acts which, while wrongful, are not criminal. It is perhaps significant that, in the *Beresford* case itself, Lord Wright in the Court of Appeal ([1937] 2 KB 197, 219) seemed to allow the possibility of a different result if suicide were to cease to be a crime. More recently there has been a suggestion from Salmond LJ in *Barr v Gray* [1972] 2 QB 554, 582 that even if the crime of suicide had not been abolished by statute it might be that, today, *Beresford's* case would have been decided differently.

In the Court of Appeal in *Pallister v Waikato Hospital Board* all three Judges were agreed that the fact that attempted suicide was no longer a crime in New Zealand meant that the position was open for review. All three were also agreed that in the "custody" cases, the paramount concern of public policy should be to impose a duty on the custodian to take care to preserve the life of the patient.

If, as has been suggested above, the application of public policy varies depending on whether the allegedly disqualifying act is or is not criminal, it would be open to the New Zealand Courts to go further and hold that dependants in cases where suicide follows personal injury should also escape disqualification. Moreover, the argument that the dependants ought not to profit from the deceased's wrong depends upon the further premise that it is the deceased wrongdoer who (through his estate) would otherwise receive the benefit. Though, as has already been pointed out, *Murdoch v British Israel Federation* seems to have been decided on the contrary assumption, Woodhouse J was prepared to state in the *Pallister* case that the claims of dependants under the Deaths by Accidents Compensation Act are original, not derivative. They stem from the wrongful act of the defendant, not the self destruction of the deceased. If this (it is submitted, correct) view were to find favour, the public policy problem would be overcome.

The Accident Compensation Act 1972

For the dependants of someone who has committed suicide since the Accident Compensation scheme came into force, the first problem is whether the new Act displaces any rights they might otherwise have had under the Deaths by Accidents Compensation Act 1952. The answer would seem to depend on the circumstances preceding the death.

Section 5 of the Accident Compensation Act states that where any person suffers personal injury by accident in New Zealand, or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought independently of the Act. "Personal injury by accident" is now defined by s 2 of the Accident Compensation Amendment Act (No 3) 1975 to include the physical and mental consequences of any such injury or of the accident. Accordingly, in cases where the deceased has been injured and subsequently has committed suicide, the dependants will be confined to the new Act if the original injury was by accident and the subsequent death

was the "result" or "consequence" of that injury. On present New Zealand authority, it might conceivably be argued that suicide "results" from injury only if the deceased was insane in the *M'Naghten* rules sense. But such an argument would be of no assistance to the dependants of one who had suffered from an uncontrollable impulse to suicide but was otherwise sane. The break in causation which would take them outside the Accident Compensation Act would by the same token deny them recovery under the Deaths by Accidents Compensation Act.

In the custodial cases, however, it would seem that in some circumstances the dependants would retain rights under the Deaths by Accidents Compensation Act. They could have no such rights if the suicide were the "result" or "consequence" of an earlier personal injury by accident. But in all other cases they should retain their former rights against the custodian so long as "accident" is not hereafter defined in terms wide enough to include suicide. The reason is, of course, that death would not be the result of "personal injury by accident". If this analysis is correct, it is of continuing importance that the law relating to claims under the Deaths by Accidents Compensation ACt should be correctly stated and understood.

A second problem for dependants is the scope of the rights given them under the new legislation. These rights are defined both positively and negatively in the Act.

The positive requirement is that the deceased should have died as "the result of" personal injury by accident in respect of which he had cover under the Act. Again, the question of causation becomes of crucial importance. If the views expressed in *McFarlane v Stewart* and *Murdoch v British Israel Federation* are taken as the guide, suicide would constitute a novus actus interveniens, unless the deceased were insane in the *M'Naghten* sense. For this reason too, therefore, it would seem important that it be recognised that these cases represent too restricted a view of the previous law.

The negative provisions are contained in s 137 of the Accident Compensation Act, as amended by the 1975 amendment Act. Subsection (1) states that no compensation is payable in respect of the death of any person where the death was due to suicide not being suicide which was the result of "personal injury by accident in respect of which the [deceased] had cover under [the] Act." The subsection also provides that no compensation shall be payable where death results from personal injury which a person wilfully inflicts on himself or, with intent to injure himself causes to be inflicted upon himself. In each case, the Commission has a discretion to pay the whole or any part of any compensation which would otherwise have been payable, to dependants "in special need of assistance."

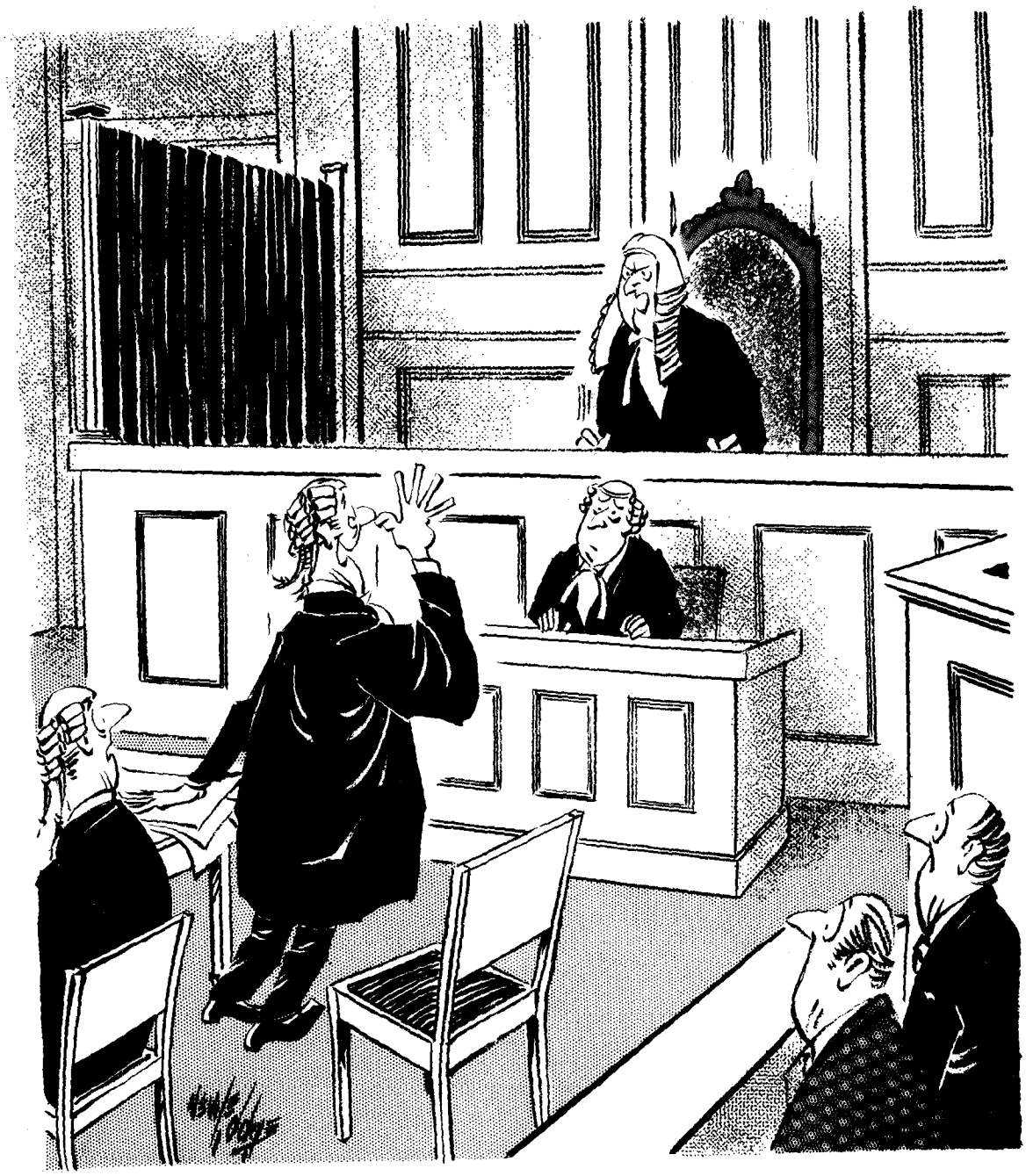
In the case of death from self-inflicted injury, therefore, the disqualification would seem to depend on whether the deceased did or did not intend his own death. If he did intend his death, the disqualification will depend on whether his state of mind was the "result" of a previous personal injury by accident. If he did not intend his own death, it will depend on whether his self-injury was "wilful". To put the matter the other way round, there will be no disqualification for unintended death unless the deceased's self-inflicted injury was "wilful". It should be sufficient that the injured person was suffering from a state of mind which affected his will. But that would, of course, be of no help to the dependants if they have to show that the deceased was insane in the *M'Naghten* sense in order to qualify in the first place. In the case of suicide, s 137 says nothing directly about "will" and sets a test simply of causation. Yet again, the extent of both qualification and disqualification is going to depend on whether recourse is had to *McFarlane v Stewart* and *Murdoch v British Israel Federation.*

For all the reasons advanced, therefore, it is submitted that it remains as important as ever that the *McFarlane* and *Murdoch* cases be recognised as representing too restricted a view of the law. If those cases should be seen as stating accurately the law which obtained before the Accident Compensation Act, a restrictive view of the rights given dependants under that Act would seem to have some justification. But once it is accepted that the previous law was actually a good deal more liberal to the dependants of those who had committed suicide, the climate changes. It becomes obvious that to give a restrictive interpretation to the rights created by the new Act would be to take from the dependants rights they would previously have had, without substituting new rights in their stead. At the least, it would reveal a lacuna in the new schemes which ought to be made good by amending legislation.

Trial by psychiatrists: – "We adjudge *Lowery v The Queen* [1973] 3 All ER 622, to have been decided on its special facts. We do not consider that it is an authority for the proposition that in all cases psychologists and psychiatrists can be called upon to prove the probability of the accused's veracity. If any such rule was applied in our Courts, trial by psychiatrists would be likely to take the place of trial by jury and magistrates. We do not find that prospect attractive and the law does not at present provide for it". *R v Turner* [1975] 1 All ER 70 (CA), per Lawton LJ

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

Drafted by Scilicet *Engrossed by Neville Lodge*



"Have you not heard of contempt of Court, Mr Drubble?"
"Yes, M'Lud, but I haven't gone this far before."

POLICE POWERS OF SEARCH

". . . [T]he difficulties which have arisen in this case lend emphasis to the need for a careful examination of the various problems associated with search warrants." So said Mr Justice Richmond in Auckland Medical Aid Trust v Taylor [1975] 1 NZLR 728, 743 Dr William Hodge *of Auckland University begins such a survey*

Members of the police are like any other citizen in that damages for their trespasses to land, or chattels, or persons are available against them, unless they have the consent of the occupier or they have some other statutory excuse. Like any other citizen, a constable can be charged with the offence of wilful trespass, under s 3 of the Trespass Act 1968, and sentenced to three months in prison or fined up to two hundred dollars if he refuses to leave premises after a warning by the lawful occupier, under s 4 (3), or if he returns within six months. There is, in New Zealand, no common law ground of "state necessity" as a defence to what would otherwise be a trespass by agents of the Crown *(a)*. The police do have, however, an exclusive grant of power, under a series of statutes, to enter private premises with a judicially issued search warrant, a power second in importance only to the police power of arrest. Unlike the power of arrest, the search power is exclusive to the police, not available to the private citizen.

Traditionally, search warrants were available only to search for stolen goods *(b)*. but today a search warrant is available under s 198 of the Summary Proceedings Act 1957 for *any* serious offence, "being an offence punishable by imprisonment", and under six other specific statutory provisions *(c)*. These six somewhat redundant provisions are a mixture of, on one hand, antique powers predating the warrant power now co-ordinate with a criminal code, and, on the other hand, very modern attempts to address some specific bit of modern mischief.

It will be assumed here, in a discussion of these warrants, without making a proof, that a search warrant is meant to be an independent judicial decision, objectively made by the Magistrate or Justice of the Peace on facts presented by a constable on oath. As a check on the discretion of the law enforcement officers of the crown, the search warrant is a manifestation of the independent, non-partisan, non-political, objective role of the judiciary; as an independent decision-maker, the Court must stand back from the heat and the zeal and the fury involved in apprehending criminals, and balance public safety and law and order on one hand, and privacy and civil liberties on the other.

As Wilson J recently said in the Supreme Court in Auckland:

> "The law regarding search warrants is intended to reconcile or settle the conflicting interests of a citizen in the privacy of his home or premises and that of police officers whose duty is to detect criminals and bring them to justice. These laws will be strictly construed and the interests of the citizen or the owner of the premises will be jealously watched by the Court. If that principle is not followed, the way is open for the abuses of the powers of the executive through the police which are the earmarks of totalitarian states. . ." *(d)*.

(a) That defence was laid to rest 200 years in England in *Entick v Carrington* (1765) 10 How St Tr 1029 and companion cases. It apparently has never been used in New Zealand. See the discussion in Holdsworth, *A History of English Law*, Vol 10, pp 658-672.

(b) See discussion of this point in *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299, 308.

(c) These six powers are, in chronological order: Gaming Act 1908, s 3; Fisheries Act 1908, ss 55 and 81; Official Secrets Act 1951, s 13 (1); Sale of Liquor Act 1962 (s 271); Indecent Publications Act 1963, s 25; and Narcotics Act 1965, s 12 (1). There is a seventh power, newly created in the Children and Young Persons Act 1974, s 7, which authorises a constable or a social worker to enter premises and search for and/or remove an ill-treated or neglected child. This power is not examined in this paper because (1) it is not directed at criminal activity (see ss 3 and 4 of that Act) and (2) there has not been time to examine practice under the Act, as it came into force in April of 1975.

(d) Auckland Medical Aid Trust v Taylor, Supreme Court, Auckland, 11 October 1974 (A 1302/74).

It will also be assumed that to be valid in New Zealand any search warrant, under any statute, will meet five requirements: first, the Magistrate or Justice of the Peace must be personally convinced to a certain objective degree of probability that things relating to an offence will be found on certain premises. To the extent that this objective double-checking becomes routine rubber-stamping, this requirement is not being met, and to the extent that Justices of the Peace and Magistrates see themselves as police auxiliaries, protection is lost. Judicial approval must be real scrutiny, not just "Where do I sign?" Secondly, those premises must be specifically set out in the warrant: it would be ludicrous to allow the "place" referred to in the warrant to be "Invercargill" or "Karori" or "Remuera". Thirdly, the thing to be seized must be described with some degree of particularity (this requirement and the next requirement will be dealt with in some detail, infra). Fourth, the offence to which the thing to be seized relates must also be described with some degree of particularity. Finally, the warrant must be dated and be valid only for a specific period after that date, usually a month *(e)*. It would not be appropriate to allow the police to store warrants with an indefinite shelf life.

The first of the six specific powers referred to above is found in the Gaming Act of 1908, s 3, which empowers a Justice of the Peace to issue a search warrant when "there is reason to suspect" that premises are being used as a common gaming house, a provision created originally in s 3 of the Gaming and Lotteries Act 1881. By that original section, and by the scheduled warrant form, the constable was empowered to seize all "tables and instruments of gambling and also all moneys and securities" found on the named premises. This section, and the companion form of warrant, were re-enacted verbatim in the 1908 Act, and they can be found in exactly the same form in the 1931 Reprint, but a significant change was made in a 1953 Amendment Act. Section 2 of that amendment gave the constable power to seize not only the tables, instruments, moneys and securities mentioned above, but also *"anything* found there which is *evidence* of an offence under this Act" (emphasis added). The constable is thus given power to make his own decision as to the evidentiary nature of all other articles, and the probability of their relating to a gambling offence. The 1953 legislation thus created a two-stage process, being first the judicial finding of "reason to suspect" at the time of issuing the warrant, and secondly an independent power given to the constable at the time of execution. The change was apparently made in 1953 to reverse the 1902 decision in *Barnett and Grant v Campbell* (1902) 21 NZLR 484, which held that the seizure of papers, although evidence of an offence, was not authorized by the warrant or the Act. More will be said of this case infra.

A second specific power, to treat these in chronological order, is found in ss 55 and 81 of the Fisheries Act of 1908, which empower a Justice to issue a warrant "upon information on oath that there is probable cause to suspect that an offence against this Part of the Act has been committed" (s 55 refers to Sea Fisheries and s 81 is a companion provision in the Freshwater Fisheries Part). Although these sections do not seem to have been litigated in New Zealand Courts, the implication is that the informant is the decision-maker as to probable cause, and the Justice only receives the sworn information and issues the warrant. Section 55 gives the constable power to seize apparatus used for "unlawful fishing", s 81 gives officers the power to enter "to detect such offences", and apparently there is a co-ordinate power in both sections allowing seizure of fish unlawfully taken: neither the magisterial decision, however, nor the warrant seems to provide the executing officer with any guidance. It might also be of interest to note that fish are defined as "every description of fish and of shellfish . . . and every description of seaweed . . . but not salmon or trout or oysters' *(f)*.

A third specific power, to continue with a chronological order, is found in the Official Secrets Act 1951, s 13 (1), which empowers a Justice of the Peace to issue a warrant if he has reasonable ground to suspect that a violation of the Act has occurred. Apparently this warrant is also of a general nature, since there is no provision for specifying what sort of violation has transpired, no provision instructing the constable what to seize, and the constable is directed to seize "anything which is evidence of an offence under

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(e) See the decision of the US Supreme Court in *Berger v NY* 388US 41 (1967) where a state statute was struck down as unconstitutional because (amongst other reasons) it authorised a 60 day warrant.

(f) Fisheries Act 1908, s 2 (1), as amended by s 2 (1) (a) of the Fisheries Amendment Act of 1971.

(g) A search warrant under this section was employed in Auckland in 1974 to search the house of Dr Oliver Sutherland, a DSIR employee. Counsel for Dr Sutherland, Mr David Lange, told the author that the search warrant used in that case specified a "cabinet memorandum" as evidence of a "breach of the Official Secrets Act 1951".

this Act" *(g)*. There have been no cases concerning the search provisions of this Act in New Zealand, and no cases reported in the United Kingdom under the companion provision in their Act of identical name *(h)*.

A fourth power of search with warrant, concerning a particular problem, was provided in the Sale of Liquor Act 1962, s 271, whereby a Justice of the Peace may issue a search warrant if he has "reasonable ground to believe that a breach of the Act has occurred." The 1962 provision is a proximate, though not verbatim, re-enactment of s 228 of the 1908 Licensing Act which is, in turn, a verbatim re-enactment of s 186 of the Licensing Act 1881. There are two leading cases on this section, regarding the judicial duty of the issuing Justice himself to find "reasonable ground to believe" rather than be "satisfied that the sworn informant is satisfied" *(i)*, but there seems to be no reported decision on the breadth of the constabular power in execution of the warrant. There is no requirement to specify in the warrant what manner of violation has transpired, nor is the executing officer instructed as to what liquor he should seize, but, on the other hand, the constable has no power to seize papers and documents as evidence of an offence. To that extent, the Sale of Liquor Act 1962 resembles the pre-Amendment Gaming Act 1908, as interpreted in *Barnett and Grant v Campbell* (1902) 21 NZLR 484.

A fifth power of search with warrant was granted to the police in the Indecent Publications Act 1963, s 25, a successor to the original Indecent Publications Act 1910, s 10. By the original provision, a Magistrate issued a warrant "if satisfied" that documents were kept in violation of the Act, under a scheduled form which required a specified recital of the indecent documents and which directed the executing constable "diligently to search for the said documents".

By that language, found in the 1957 Reprint and as it remained until 1963, there seemed to be a power in the constable to seize only what the Magistrate had been apprised of, and not things which the constable, at the time of execution, decided was evidence of an offence. The provisions of 1963 contain no scheduled warrant, but refer instead to subs (2) to (7) of s 198 of the Summary Proceedings Act 1957, and constabular and magisterial powers and duties thereunder will be discussed infra. A New Zealand Court has decided, however, that the phrase "magazines and books" is sufficiently particular for this warrant, and that the phrase "reasonable ground to believe" requires a greater factual probability than "suspicion" *(j)*.

The sixth and most recent special search power is found in the Narcotics Act 1965, s 12 (1) which is an expansion of powers in the Summary Proceedings Act 1957, so as to allow a search of *persons* found on the premises. Other than that provision, of course, the Narcotics Act 1965 does not need to provide for a search warrant power at all, since possession of narcotics is a crime punishable by imprisonment, and thus provided for in the 1957 Act. Section 12 (1) only expands the list of any "building, aircraft, ship, carriage, vehicle, box, receptacle, premises or place" as appropriate places to search, to include human bodies. It is worth noting that the statutory predecessor of the Narcotics Act, the Dangerous Drugs Act 1927, clearly set out a two-stage process. Section 11 of that Act provided first, at the time of application the Justice must be satisfied that there is reasonable ground to suspect an offence, and secondly, at the time of execution the constable may acquire reasonable grounds to suspect that any drugs or *documents* relate to an offence. The constable may then seize such drugs or documents, even though the Justice had absolutely no knowledge of their existence whatsoever.

The actual terms of the search warrant now obtainable under the Narcotics Act 1965 will be dealt with in discussion of the Summary Proceedings Act 1957, but before discussing that Act, it would be helpful to note any general trends in the six statutes considered so far.

It is submitted first that there is a clear movement in modern draftsmanship toward the test "reasonable ground to believe" in place of the older, less rigorous "reason to suspect". The Gaming Act 1908 and its statutory predecessor both refer to "reason to suspect"; the Fisheries Act of the same year refers to "probable cause to suspect"; the Dangerous Drugs Act 1927 refers to "probable cause to suspect"; and the Official Secrets Act 1951 refers to "reasonable ground to suspect". The more recent statutory language in the Narcotics Act 1965, the Indecent Publications Act 1963, and the Summary Proceedings Act 1957 all refer to "reasonable ground for believing", and the Sale of Liquor Act 1962 requires a "reasonable ground to believe" (although, as an exception, the Sale of Liquor Act standard dates back to the

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(h) Official Screts Act 1911, s 9 (UK). The only variation in the New Zealand Act is that the New Zealand draftsman has substituted "place specified" for the English "place named" and "by force if necessary" for the English "if necessary, by force".

(i) Bowden v Box [1916] GLR 443; *Mitchell v New Plymouth Club, Inc* [1959] NZLR 1070.

(j) Seven Seas Publishing Pty v Sullivan [1968] NZLR 663

Licensing Act 1881) *(k)*. There is certainly no difference between the infinitive form of "to believe" and the verbal noun or gerund "for believing" and, furthermore, it is chasing a verbal will-o-the-wisp to attempt to articulate either "to believe" or "to suspect" as an objective quantum of data, but it can be said with authority that "belief" is a more rigorous standard than "suspicion": *Seven Seas Publishing Pty v Sullivan* [1968] NZLR 663, 666. McGregor J in that case placed reliance on the *Shorter Oxford Dictionary* to define "to suspect" as "to imagine" and "to believe" as "to have evidence or faith", and held that a warrant issued on "suspicion" was defective in law, when the statutory requirement was "belief" *(l)*.

It is further submitted that companion to a more rigorous criterion for magisterial approval there is a general trend, once the warrant is issued, toward increasing constabular powers of search. A survey of current and past empowering acts in New Zealand shows that the draftsman has expressed the powers given to the constable in one of three distinct formulae: (1) power to search for and seize those things – *and only those things* – which were described to the Magistrate; (2) power to search for and seize those things described to the Magistrate *plus* those of a genus or species similar to the things described; or (3) power to search for and seize items as in (1) and (2), *plus* any *evidence* of the offence to which the items in (1) and (2) relate.

The first formula can be found in the Justices of the Peace Act 1882, s 208, the Justices of the Peace Act 1908, s 263, the Justices of the Peace Act 1927, s 276, the Criminal Code Act 1893, s 341 the Crimes Act 1908, s 365, and the Indecent Publications Act 1910, s 10. For a copious precis of similar United Kingdom legislation, see *10 Halsbury's Statutes* (3rd ed), p 357, notes h-k. (The author makes no claim of thorough research regarding the 50-odd statutes set out there, but they do generally set the tone for early New Zealand statutes. The Frauds by Workmen Act 1748, s 4, for example, gives any "constable or headborough . . . in the day time power to search for and seize", inter alia, "any thrums of yarn" and certain materials of "wooll and furr". Some English statutes are not so specific, such as the Larceny Act of 1916, s 42 (2) (c), which, in authorising a search, provides that "It shall not be necessary . . . to specify any particular property . . . [but the chief police officer] may give [authority to search] if he has reason to believe generally that such premises are being made a receptacle for stolen goods".) Ordinary practice in 1916 must have been specificity, if the statutory draftsman felt the need to spell out the opposite in the Larceny Act *(m)*.

The second formula can be found in the Licensing Act and Gaming Act, both of 1908, ss 228 and 3 respectively, where the constable can seize any type of liquor (and containers) (s 228) or tables and instruments of gambling (s 3). There is no requirement to specify to the Magistrate what sort of liquor sale in violation of the act, or what sort of gambling has transpired, but the constable has no power under either statute to seize other evidence relating to licensing or gambling offences.

Examples of the third, and most recent formula can be found in the Dangerous Drugs Act 1927, s 11, and the Official Secrets Act 1951, s 13 (1). The first example creates constabular power to seize not only drugs but also any document which even indirectly relates to drug dealing *(n)*, and the second example gives the constable the power to seize "any sketch, plan, model, article, note or document" relating to an offence, and anything else which might be "evidence" of an offence. When considering the extremely wide-sweeping definition of "offence" in that Act, there is little extremely wide-sweeping definition

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(k) As a further exception, the recently passed Children and Young Persons Act 1974, s 7, creates a magisterial power to issue a warrant when there is "reasonable ground for suspecting" that a child or young person is being ill-treated or neglected. Perhaps the lesser standard is justified by the objects of the Act which are "to promote the well-being of children and the welfare of the family" (s 3), but if that is so, perhaps the power to search should have been given to a constable *and* a social worker, not a constable *or* a social worker.

(l) It must be assumed that McGregor J chose the Oxford alternative which refers to evidence, since faith as belief is a rather slippery concept. "I suspect that I have broken my leg" is certainly more factual, and capable of verification than "I believe in God". The first may be based on pain and a loud snapping noise; the second will be based on a leap of faith. The law certainly does not expect Magistrates to make leaps of faith.

(m) The reader should note, however, that at common law the justice of the peace has power to issue a search warrant for stolen goods, and *need not mention "specific goods".. Jones v German* [1897] 1 QB 374, 376.

(n) The "documents" referred to here apparently are not as broad as the word "evidence", since they must be at least indirectly related to a drug transaction. The constable then could seize documents not described to the Magistrate but he could not seize as evidence documents like "The Diary of an Opium Eater".

of "offence" in that Act, there is little doubt that constables could seize virtually any paper or work product at the home of a suspect. The trend toward giving constables power to seize "mere evidence" may or may not be continued in the Indecent Publications Act 1963, s 25, and the Narcotics Act 1965, s 12 (1), as both of these sections refer to the Summary Proceedings Act 1957, and that Act may or may not give the constable power to seize evidence unanticipated but discovered *(o)*.

We will now turn to the Summary Proceedings Act 1957, s 198, to determine whether that Act follows the two general trends just outlined, and to examine its provisions generally.

The most important source of the police power to search premises is found conveniently reposing in s 198 of the all-purpose Summary Proceedings Act 1957, following the detailed codification and enumeration of procedures in and powers of the Magistrate's Court. Section 198 is a provision plucked from the Crimes Act 1908, s 365, the Justices of the Peace Act 1927, s 276, and the Crimes Amendment Act 1955, s 2, and provides for the issue of a search warrant to the police to aid in their investigation of any offence punishable by imprisonment, under the Crimes Act or any other New Zealand statute.

The features of that section which in no way have been challenged are as follows: the application for the warrant must be made by a constable on oath, and ordinarily in writing, although in proper cases the application may be made orally, whereupon the Magistrate must make note, in writing, of the grounds. The standard police practice, as described to the author, is to make application in writing *always* ; if there is no time to make a written application, then there is probably no time to get a warrant at all, and the police will enter under some other power, such as s 317 of the Crimes Act 1961 or s 12 (2) of the Narcotics Act 1965.

The applicant constable has the burden of persuading the Magistrate that there is "reasonable ground for believing" that a search should be made; that is, the Magistrate himself must be given enough facts on oath to have reasonable grounds for his believing that a thing relating to a serious offence will be found on the premises.

The warrant may be directed to a particular constable, but unlike the Australian Commonwealth Statute *(p)*, may in any case by executed by any constable. Since the executing constable explicitly need not be the applicant constable, and since the executing constable might not have the extensive background information of the applicant constable, it would seem necessary for the warrant to provide as much information as possible.

The executing constable must have the search warrant with him, and he must show it to the householder or occupier upon request. The warrant is thus a source of information for both the constable and the occupier, who need not render blind obedience to any agent of the crown.

The warrant will be valid for one month after issue, and may be executed at any time of the day or night, with force if necessary, to gain entry, and with any force necessary to open boxes or receptacles found on the premises. No action for damages to locked doors and locked receptacles could be brought against officers executing a valid warrant.

If a householder attempted to interfere with a constabular exercise of the warrant power, an arrest and conviction for obstruction could surely follow, assuming the constable possessed a valid warrant. Even if the warrant were later quashed, under the Judicature Amendment Act 1972 and s 204 of the Summary Proceedings Act, the defendant householder might still be convicted of obstruction, since the test under s 77 of the Police Offences Act 1927 is whether the obstructed constable was doing his duty. Surely the constable has a duty to carry out the lawful orders of his superior, under the aegis and imprimatur of a Magistrate, to search certain named premises, unless the document is plainly deficient on its face. In the case of a quashed warrant, it would have been the Magistrate who was exceeding his powers, not the constable, and the constabular oath, s 37 of the Police Act 1958, would probably apply. But whether a quashed search warrant is invalid ab initio and thus invalid on the day of execution, or is only void from the date of decision does not need to be decided in these pages.

The householder would have a better defence if the constable were exercising powers not granted in the warrant, and the householder's obstruction were limited to that excessive exercise. For example, extrapolating from a leading New Zealand case, Barnett and Grant could not have been convicted of obstruction had they interfered with Campbell's seizure of their gambling documents.

The most difficult problem, and one left unresolved by a close reading of s 198, is the

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(o) A further problem under the Indecent Publications Act is that only materials relating to s 22 "offences involving knowledge" can be seized, since s 21 "strict liability" offences are not punishable by imprisonment. This problem may be academic only.

(p) Crimes Act 1914-1988 (Cth), s 10

existence or not of a constabular power to seize materials not mentioned in the warrant. In other words, is the warrant a two-stage process, being first a threshold requirement of magisterial objective approval and enumeration of things to be seized, and secondly, after the crossing of both the metaphorical legal threshold and the literal threshold of named premises, an independent police power to exercise an independent, judicial-type discretion to seize things not described in the warrant and not listed in the warrant? Or is the constable sent out by a magisterial directive to go and get only those concrete and specific items as seen in the mind's eye and typed on the warrant form by the magistrate?

The language of s 198 does not seem as clear as the proverbial pellucid mountain stream on this point – it is rather as murky as the recent Ruapehuan lahar. The pertinent provision, subs (5), directs that the search warrant shall authorise the constable to seize "any thing referred to in subsection one of this section", but subs (1) is in four parts and the reference in subs (5) to subs(1) does not spell out whether subs (5) refers to the whole or the parts. The first part of the subsection, a description of magisterial duty, is accompanied by a tripartite list of categories of things to be seized, which are, roughly speaking, the fruit, evidence, or instrumentality of an offence. Does the seizure power in subs (5) refer to any fruit, any evidence, or any instrumentality found by the constable? Or only that fruit, that evidence, or that instrumentality as perceived and recorded by the Magistrate? Do the words "any thing" in subs (5) mean any thing which the constable decides is fruit, evidence or instrument, or only things in the three categories which the Magistrate believes are on the named premises, and which relate to the particular offence.

The logical possibilities for interpreting the statutory language include the three formulae historically used in New Zealand: (1) a power to seize only those things noted by the Magistrate; (2) a power to seize those things analogous to and in a class noted by the Magistrate, and (3) power to seize any other things related to the offence set out in the warrant. A fourth possibility is an interpretation never employed in a warrant form in New Zealand, being a power to seize not only evidence of the offence in the warrant, but also evidence of any other offence, either committed by the occupier or by any other person. These four possibilities are determined by narrow or broad interpretations of the statute, but a fifth possibility is to acknowledge a residue of common law power or state necessity to supplement a narrow statutory interpretation. It is submitted that this possibility should be dismissed out of hand, as having no historical or judicial support in New Zealand whatsoever; the choice will lie between the narrow and strict formula initially proposed, and the broader, perhaps more practical, third and fourth formulae.

The first formula is supported by the unanimous decision of four Judges of the New Zealand Court of Appeal in *Barnett and Grant v Campbell* (1902) 21 NZLR 484, which gave judgment and apparently costs to plaintiff occupiers who alleged and proved wrongful seizure and conversion of their books and papers by Chief Detective Officer Campbell. The Court found that the Gaming Act warrant employed by the detective, which referred to "instruments of gaming", did not permit the seizure of books and papers, even though those documents were evidence of the commission of the offence of gambling. The detective is given a legal authority to seize those goods, and those types of goods listed in the warrant only, and has no supplemental power to seize evidence. It should be noted that under the Gaming and Lotteries Act 1881, s 3, even the Magistrate was precluded from ordering the seizure of documents, although he could have done so under s 341 of the Criminal Code Act of 1893; nevertheless, the ratio of *Barnett and Grant* can be described in this way; "Armed with a search warrant for particular things, the executing officer has a legal power to seize those things only, and not items of evidentiary interest."

This decision remains the leading decision on search warrant authority in New Zealand, to the occasional inconvenience of criminal investigation. Members of the Police Department have told this author that the decision is a narrow one, and pertains to the Gaming Act only, and since that Act has been specifically amended to allow seizure of such documentary evidence *(q)*, the decision has absolutely no relevance today. Those remarks would seem, with respect, to be obviously wrong, since the Court of Appeal in 1972 expressly applied the *Barnett and Grant* principles to a search warrant issued under the Summary Proceedings Act. In *McFarlane v Sharp* [1972] NZLR 838 the Court reviewed a police seizure of documents, evidence of the offence of book-making, made while executing a search warrant relating to a bank robbery. With no dissenting judgment the Court held that *Barnett and Grant* was direct precedent, a near-identical fact situation, and in finding the gambling evidence to have been illegally seized expressly refused to reconsider or overturn *Barnett and Grant* (albeit

(q) (1902) 21 NZLR 484

they did suggest to the Legislature that "the matter might well be examined").

In addition to these two leading decisions, there is the recently delivered lucid judgment of Richmond J in the appellate consideration of the Auckland Medical Aid Trust [AMAT] search warrant. In joining his brothers McCarthy P and McMullin J in a unanimous determination that the search warrant used at the Medical Aid Clinic was excessively vague, Richmond J relied exclusively on statutory interpretation, rather than preceding cases. He came to the conclusion that s 198, in view of its history and purpose, "authorises the seizure only of such things as regards which the *Magistrate* is satisfied that reasonable grounds for belief exists". He demonstrates that

> "subs (5) refers back to the entirety of subs (1) and therefore, in the context of the present case, authorised the seizure of such things only as regards which the Magistrate, in the words of subs (1) '*is* satisfied that there *is* reasonable ground for believing that there *is* in any . . . place. . . any thing which there *is* reasonable ground to believe will be evidence as to the commission of any such offence'. . . . [T]he word 'is' occurs four times and clearly relates to the time at which the Magistrate is considering the application for a warrant." [emphasis in original].

Of some support to the Richmond argument (which definitely does not represent the ratio of that case) and the *Barnett and Grant* and *Mcfarlane* decisions is the English Court of Criminal Appeal decision in *R v Waterfield* [1964] 1QB 164 where the defendants' convictions for assaulting two constables were quashed. In that case Waterfield and another had been arrested for assault after driving their vehicle away from the inside of a carpark, not being a public road, in spite of police attempts to detain the vehicle as evidence of a dangerous driving offence. The car was not moving along a public highway, the police had made no arrest prior to the attempted seizure, they had no search warrant, and in the circumstances no power to seize and detain evidence. It was found that reasonable force may be used to resist a police attempt to seize the property of any person, unless the police have specific authority to take that specific property.

It is submitted that these judgments, taken together with the exceptional police power to seize property incident to arrest, represent the Eighteenth Century General Warrant Cases principle that private property ought not be taken by agents of the Crown unless a judicial officer has first approved that taking.

The formulae which allow police, on their own discretion, to seize evidence of offences has been advanced by series of recent English decisions, which might fairly be described as sweeping aside, or at least undermining the spirit of those 18th century cases.

The first of these English decisions is *Elias v Pasmore* [1934] 2 QB 164 where the police entered premises of the National Unemployed Workers Movement to carry out an arrest warrant for one Harrington, issued in consequence of an allegedly seditious speech made in Trafalgar Square. While on the premises lawfully, to arrest H, the police seized documents and materials not directly related to the charge against H, which were in fact evidence of a charge against Elias. Although the case does revolve around an arrest warrant, as the authority to enter, and to some extent the power to search pursuant to arrest, in so far as it concerns the taking of items unrelated to the arrestee, it is good authority for a broad police power to seize evidence any time they are lawfully on premises. The case is chiefly noted for the remark of Horridge J at page 173, that

> ". . . the interests of the State must excuse the seizure of documents, which seizure would otherwise be unlawful, if it appears in fact that such documents were evidence of a crime committed by anyone, and that so far as the documents in this case fall into this category, the seizure of them is excused".

The learned Judge concluded his argument on this point by resolving that even if the original seizure of the materials was "improper at the time", it was excused because "they were capable of being and were used as evidence" at the trial of Elias. This decision is probably the broadest extension of police powers enunciated by a modern British Court and, with all due respect, seems to have something of the bootstrap about it.

The second case in this series is *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299, which focused on a search warrant for stolen goods, to wit "ladies' coats, skirts and suits, knitwear, jumpers and shirts the property of Ian Peters Ltd." In executing the warrant at the Chic Fashion shop in Llanelly, the police found no garments made by Ian Peters Ltd, but they did find ladies' garments of other manufacturers with labels removed selling at a discount. The police seized some 65 of these items, reasonably but mistakely believing them to be stolen, but returned them two days later, upon the receipt of a satisfactory explanation from the managing director. The company brought an action against the chief constable for damages.

The facts were agreed between the parties and the only question for the Court of Appeal was this: "Were the police entitled to seize goods not mentioned in the warrant but which they believed, on reasonable grounds, to have been stolen?" Lord

Denning MR began by recounting the history of search warrants, and noted Lord Coke's aphorism that "every man's house is his castle", but he continued by taking judicial notice of "the ever-increasing wickedness there is about". "In these trying times", he said at p 313, "honest citizens must help the police", and constabular efforts must not be hindered. The law must not "favour thieves and discourage honest men". Accepting the agreed facts, and noting the parlous times, the Court then gave judgment for the defendant constable on the legal question as stated above, with these two limits: First, the evidence seized must relate to the person in possession who is already under suspicion; and secondly, the validity of the police action must be judged at the time, and cannot be cured, if illegal, by a later decision to bring charges. To the extent of these two caveats, *Chic Fashions* is a retrenchment of *Elias,* and is a sort of half-way house between the strict and narrow interpretation of *Barnett and Grant* and the wide-sweeping decision in *Elias* . As a half-way house, it also could represent the second formula in use in New Zealand, justifying the seizure of anything in the genus "stolen goods", any time a warrant specified a particular stolen good.

The third case in this English series is the Court of Appeal decision in *Ghani v Jones* [1970] 1 QB 693, a determined attempt by Lord Denning MR to lay down the law with firm and broad legislative brush strokes on a canvas much wider than the case before him. That case arose during the course of a murder investigation, when police took, apparently with begrudged consent, the passports of the supposed victim's mother-in-law, father-in-law, and (a few days later) sister-in-law. The ubiguitous constable Jones *(r)* took the passports on 13 June and 19 June respectively, and refused to give them back through the months of June and July, in spite of solicitor's letters, and defended a writ issued on August 13 with an affidavit saying, in effect, "We need the passports for their potential evidential value." The lower Court ordered the return of the passports, and the police appealed. Lord Denning dismissed the appeal, holding that the original taking was justified, and not tortious, but the police had now held the documents long enough. Noting that the police were on the premises legally, and by invitation, he gave four prerequisites for the police seizure of evidence not justified by a warrant or by an arrest: (1) the police [not a Magistrate] must have reasonable grounds to believe that a serious crime has been committed; (2) the police [not a Magistrate] must have reasonable grounds to believe that the article is either fruit, instrument, or evidence of the serious crime; (3) the police [not a Magistrate] must have reasonable grounds to believe that the person in the possession of the article is implicated in the serious crime, *or* his refusal to surrender the article must be unreasonable *(s);* (4) the police must not keep the article for an unreasonable time, but must return it promptly; and a final limit is (5) the police decision must be judged at the time, and not by whether or not charges are laid.

Several comments should be made about this decision. Since the Court of Appeal ordered the passports to be returned, it can be argued that all of Lord Denning's remarks are obiter dicta. Furthermore, Lord Denning dealt rather high-handedly with the admittedly conflicting decision in *Waterfield* by implying it was incorrectly decided and would have been reversed in the House of Lords, but the police ". . . did not wish to put the ratepayers to the expense of an appeal, simply to clear up the law" *(t).* It can be argued, therefore, that *Ghani v Jones* does not even represent the law of England, not to mention New Zealand.

In support of Lord Denning, it should be pointed out that England has not had the benefit of New Zealand's codifications and search warrants are authorised there only piece-meal by provisions appended to various offences. There is, in fact, no statutory authority to search for evidence of the crime of murder. There is power to search for narcotics, and explosives, and the eggs of protected birds, but not murder victims. The probability is that if the English legal system could take itself in hand, and establish a Criminal Code with a co-ordinate search power, there would be no need to backhandedly justify police trespasses.

At any rate the decision now seems to represent the principle that a constable on premises lawfully, that is, by means of warrant or with occupier's consent, may seize evidence of a serious crime if the occupier would be unreasonable if he refused police access, or if he is implicated in the crime.

(r) Constable Jones regularly turns up for leading cases, from London in 1934 (see *Duncan v Jones* [1936] 1 KB 218) to Wales in 1966 (see *Chic Fashions v Jones* [1968] 2 QB 299) to Oxford in 1967 (see *Ghani v Jones* [1970] 1 QB 693).

(s) Lord Denning MR may have in mind here the case of the innocent wood-cutter, whose axe is stolen by a homicidal maniac. Does the wood-cutter have a right to the return of his axe, which he needs to earn his living, or may the police keep it as evidence of several bloody murders?

(t) [1970] 1 QB 693, 707

To apply the principles of *Ghani v Jones* to the *Elias* case, it would seem that Elias' papers could still be seized since his offence was the incitement of Harrington, the original suspected person, but the remark by Horridge J that the materials could be evidence of a crime by anyone now seems highly suspect, as well as his relation back, bootstrap doctrine. It also seems clear that Lord Denning MR would have upheld the seizure of papers in *Barnett and Grant* and *McFarlane*

Whether Lord Denning's remarkks are obiter dicta or not remains to be seen, but at least one English decision has subsequently applied them to a search warrant case. In *Garfinkel and Others v Metropolitan Police Commissioner (u)* constables searched the plaintiff's premises under the authority of a warrant granted under the Explosive Substances Act 1875-1883, and found no such explosives. The police did seize certain papers and documents. The plaintiff sought an order for the documents, alleging that they were trespassorily seized. The defendant Police Commissioner argued successfully that the police were on the premises lawfully, and that the documents were evidence of a criminal act by the occupier, namely a conspiracy to pervert the course of justice or to commit contempt of Court. The seizure would have been illegal under *Barnett and Grant v Campbell* or under a strict *Chic Fashions* principle, but *Ghani v Jones* was applied, and the seizure was upheld.

MacFarlane v Sharp is, of course, clear precedent for the rejection of *Ghani v Jones* in New Zealand, pending a legislative examination, but the recent remarks by McCarthy P in the *AMAT* case may have served to re-open the question. The President of the Court did agree with McMullin and Richmond JJ that the search warrant used at the clinic was excessively vague and therefore invalid, but quaere, what would McCarthy P have said about a general search which was made pursuant to a narrow and valid warrant? Suppose, for example, the constable had obtained a warrant for the four cases named by the informant, and the warrant referred to those four alleged offences, and those four files – could the constable seize first the four named files and *then* seize the other 496? Apparently McCarthy P would prefer the half-way house of *Chic Fashions,* whereby a constable may seize materials not mentioned in the warrant which are evidence of the offence which is in the warrant. It is not completely clear, however, whether by the words "the offence" McCarthy P means any offence identical to the one in the warrant, or only the offence in the warrant. At one point, he refers favourably to language in the warrant form which allows seizure of materials "which would be evidence as to the commission of *an* offence . . . " (emphasis added) but he concludes that paragraph by "leaning toward an interpretation" which would allow the constable to seize "evidence of the commission of *the* offence" (emphasis added). McMullin J supports that conclusion by adding that "Common sense dictates that . . . a police officer should be permitted to seize . . . an article obviously connected with the offence to which the warrant under execution was related." These remarks are not necessary to the decision in *AMAT,* but are only offered as additional reason to require that the offence in question be set out in particular terms in the warrant. The indication is, then, that given a sufficiently particular warrant, the Court of Appeal, with Richmond J dissenting, would permit a constable to seize any article relating to the offence in the warrant, although the Magistrate had not known of its existence. They would certainly not allow the seizure of an article relating to a totally different crime, but they *might* allow the seizure of an article relating to a crime similar to the one specified in the warrant.

Reading *McFarlane* and *AMAT* together, the police could summarise their cumulative effect and logical extensions in this way: the Court has expressly rejected the broad police power of *Elias* and *Ghani* . They also seem to be rejecting the Richmond J formula of allowing no constabular exercise of discretion, and apparently the Court would opt for one of the halfway houses, either the "common sense" McMullin J rule of allowing a constable to seize any evidence of the offence in the warrant, or the *Chic Fashions* approach of allowing seizure of evidence relating to similar offences, whether they be other illegal terminations of pregnancies, or other theft-type offences.

The New Zealand police (unlike their brothers in England) are now perched on the horns of dilemma – on one hand they are told that they must be meticulously particular in the phraseology of the warrant; on the other hand, they are told they may be restricted to seizing only those items in the warrant relating to those offences in the warrant. So they must tread the very narrow path between getting a warrant that is so general it gets tossed out for vagueness, and getting a warrant that is so specific that they are unable to seize articles they find because they are not mentioned in the warrant. Imagine the case of bank robbery, investigating which the police get a warrant specifying "Robbery of the Frankton Branch of the Bank of New Zealand". In executing that warrant, the police find evidence of a shoplifting

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(u) Reported only at [1972] Crim LR 44, and *The Times,* September 4, 1971

offence. Can they seize that evidence? Or should they have obtained a warrant which referred to "unlawful theft of goods or money", which could refer to the fruits of shoplifting? In the first case, there is the risk that the seizure will be declared unlawful. In the second, there is the possibility that the warrant will be declared too vague and therefore invalid.

It is submitted that the law of search warrants in New Zealand ought to be on firmer ground; if the police are to be expected to toe a particular line, the Legislature owes it to them to say where that line is. In the hope of marking that line, the following remarks are offered for the sake of clarity and to assist legislative scrutiny.

In choosing between broad police discretion as opposed to magisterial control, it should be noted that by history and statutory precedent in New Zealand, Richmond J would seem to have won the palm on behalf of the first formula, and a narrow police power. As Richmond J points out in *AMAT*, the precedents for s 198 of the Summary Proceedings Act are found in the Crimes Act 1908, s 365 and the Justices of the Peace Act 1927, s 276 (those acts are reprinted conveniently in the second volume of the 1931 Reprint). The warrant form in the Crimes Act 1908 (Form 1, Third Schedule)Sdirects the constable "to enter . . . into the said premises and to search for the said things, and to bring the same before me or some other Justice." The companion form (No 47) in the Justices of the Peace Act 1927 requires the constable "to enter . . . into the said dwellinghouse . . . and there diligently to search for the said goods, . . . and bring the said goods so found . . . before me."

The picture created by these statutes is that of a constabular automaton, acting as a uniformed delivery boy for the Court, merely aiding the Court in its investigation of crime. This relationship between constable and Court may well have changed, and police powers increased, and the liberties of the subject proportionally decreased, but, if so, that change ought to be made, and in clear terms, by the Legislature. The Summary Proceedings Act is certainly not a clear rejection of the past practice.

It should also be noted that Judges and critics alike are agreed that legislative review is needed. The Court of Appeal has asked for such a review in both *McFarlane* and *AMAT*, and Lord Denning's judgment in *Ghani v Jones* may well be the act of a desparate and frustrated Court who could wait for Parliament no longer. Professor ECS Wade said, rather cautiously, 40 years ago, that "It would seem that a case for legislation exists" *(v)*. More recently, Dr Leigh wrote in the Modern Law Review that expansion of police powers "are matters which cannot be left to the slow and cumbersome process of judicial decision. They must be dealt with by legislation" *(w)*. And still more recently a critic in the Criminal Law Review asked ". . . [I]f the old liberal principles of freedom of private property are now thought to be archaic, incongruous, and an unwarranted fetter on the activities of the police, [and] if the old rules are to be adopted . . . is it not more appropriate for Parliament to make the necessary changes?" *(x)*.

A further point to consider is that if the constable is directed only to follow magisterial directive and is, in effect, the delivery boy mentioned above, that does not actually mean that his hands will be tied. If, for example, a constable is on premises legally, acting under a search warrant relating to a bank robbery, and he stumbles over a kilo of heroin, he does not need to close his eyes, turn away, and go back to the Magistrate for further orders. He has a duty, and a power to seize any goods which are illegal per se. No one could attempt to deter the constable by saying "Please return that heroin. You have no power to seize it. It belongs to me". Police power to seize contraband is unquestioned, and unquestionable. No one will sue for the return of his heroin (or his machine gun, or his counterfeiting plates).

The constable may find materials which are not, in fact, contraband, but which the constable has reasonable ground to believe are evidence of another crime than the one he is investigating (as in *McFarlane* and *Garfinkel)*. The lesson here, as taught by *Barnett and Grant* and *McFarlane,* is to make an arrest for that newly discovered crime. As long as the seizure is made after, or concurrent with the arrest, it will be deemed a search and seizure incident to the arrest. The constable will be completely protected in respect of the seizure, if the arrest was properly carried out, even though it later is shown to be mistaken.

In addition to the power to seize contraband, and the power to search incident to arrest, which will cover most cases, the constable alternatively could seek the consent of the occupier to carry away the goods for investigation. This latter possibility would cover the case where bank robbers used a farm house for a hide-out, holding

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(v) ECS Wade, "Police Search" (1934) 50 LQR 354, 363

(w) LH Leigh, "Recent Developments in the Law of Search and Seizure" (1970) 33 MLR 268, 280

(x) JW Bridge, "Search and Seizure: an Antipodean View of *Ghani v Jones*" [1974] Crim LR 218, 221.

the farmer hostage, and handled a saucer to give milk to the farmer's cat. To obtain the saucer for a fingerprint test the constable would not be able to seize it as contraband, nor could he seize it pursuant to arresting the innocent farmer, but he could take it with the farmer's consent.

It is submitted that these three possibilities (contraband, arrest or consent) will cover virtually all cases, but in the odd case, to address McMullin's fear that the article would disappear prior to the return of the constable with a new warrant, there is a fourth albeit unwieldly, possibility. No constable ever executes a warrant alone, for several good reasons. If suspicious goods are found, and none of the three solutions above permit their seizure, one or more constables can stay in the house, while another returns to the car, radios Headquarters, determines the location of the nearest Justice of the Peace, and drives there, while Headquarters are ascertaining by telephone that the Justice is at home. Alternatively, a constable could go directly from headquarters to Magistrate's Chambers, get the warrant, and proceed to the premises. This exercise does take a bit of time, and the expenditure of petrol, but it will surely be a most rare occurrence, and may be better than expanding constabular power for the sake of convenience.

Another area which the legislators and the Governor-General should address, is the confusion surrounding the form of warrant found in the 1958 Regulations (1958/38, form No 50). As Richmond J has pointed out, the power granted by the Regulation may be in excess of the power granted in the statute; there is the further confusion that the form actually in use by the police does not precisely follow the form set out in the Regulation.

The warrant form prescribed in the Regulation clearly demarcates a Magisterial duty beginning with the words "I am satisfied . . .", and a constabular duty beginning with the words "this is to authorise you [the constable] . . . ." A plain reading of the constabular section shows that the constabular duty is thought to be independent of the magisterial duty, and that the constable is expected to seize "any thing" which he (not the magistrate) has reasonable ground to believe will be evidence of the commission of the offence. This form was issued by Order in Council by Governor-General Cobham, under the authority of s 212 of the Summary Proceedings Act, but there was obviously no power on the Council to issue a form which exceeded the statutory grant of power in s 198. The draftsman of the regulations has made his own, perhaps unjustified, interpretation of s 198. That problem could be rectified by Order in Council, prescribing a new form, tracking the statutory language more closely.

It should also be noted, and this irregularity could be cured by a uniformed officer, such as the Commissioner, that the form now in use by the police departs from the form prescribed in the regulations. Form 50, as set out in the Regulations, includes three editorial parenthetical remarks designed to assist the Magistrate to fill in blanks. These parenthetical remarks are

(1) "Here describe . . . [the] premises"
(2) "Here insert description of the things to be searched for", and
(3) "State offence, being an offence punishable by imprisonment."

In the form now in use by the police, the second of these remarks is omitted, and only the first and third are printed as marginal notes. The absence of the second could well explain a tendency toward vagueness in filling out warrants and ought to be cured without delay by an order to the government printer.

For all of the foregoing reasons, the author agrees with Mr Justice Richmond that search warrant powers should be carefully examined, and it is submitted that that examination should be taken up by the legislature.

Contempt in the face of the Court? – In those days the finding by the Grand Jury of "true bill" or "no bill" on an indictment was made known with some little ceremony. The person indicted was placed in the dock, then the Grand Jury's finding was announced by the Sheriff by solemn proclamation. An old "lag" with many convictions against him in Australia had arrived in New Zealand to practise his calling – burglary. He was committed to stand his trial at the sitting in Timaru before Mr Justice Johnson. There was a strong prima facie case against him, but the Grand Jury was stupid about it, and threw out the bill of indictment. The accused was placed in the dock, and the Sheriff duly proclaimed 'No Bill". This procedure was a novelty to the accused, whose experience hitherto had been limited to Australian Courts. He was a little hard of hearing, apparently, and not catching the words of the Sheriff's proclamation, he blurted out "Guilty, your Honour". A titter went round the Court.

"How dare you?" said the Judge in his sternest tones – "how dare you say you are guilty when the gentlemen of the Grand Jury have found no bill against you? How dare you?" The astonished burgler, embarrassed and apologetic, was promptly removed from the dock, but the usher's stentorian "Silence in the Court" could not suppress the laughter – from *Cheerful Yesterdays* by O T J Alpers.