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INTER ALIA

Perusing party policy

If a political party could be forced to implement all, and only all, its promises, both of our major political parties would long since have been placed in receivership. It is nonetheless not altogether futile to look at the promises made by a successful party and to subject them to the kind of scrutiny we might usually reserve for a draft lease.

In its manifesto, the National Party made a number of promises of particular interest to lawyers, perhaps foremost of which is a pledge to support a pilot neighbourhood law office. However on analysis this turns out to be support for "the idea" of such "a" law office, and so may in practice mean nothing more than a pat on the back – and nothing like the funding so essential to implementation of the Law Society's plan.

Promised, too, is a review of the procedure for making judicial appointments – but not a wide-ranging review. One simply "to ensure that suitably qualified women are given the same consideration as men." As there is no evidence whatsoever to suggest that suitably qualified women have been passed over in the past, this suggestion may be somewhat less than revolutionary.

More interesting is the promise to legislate for the granting of divorce where the Court is satisfied "after a two-year compulsory waiting period," that the marriage has "irreconcilably broken down". The legislation "will require consultation [with whom?] and a genuine attempt at reconciliation, but will not require proof of fault". On the face of it, this will abolish adultery as a ground for divorce, and do away with all grounds for immediate divorce – unless the "compulsory waiting period" can run while parties are cohabiting. No light is shed on whether the two-year period is to run from the filing of the petition (which can hardly be expected to gain much enthusiasm) or from some other date, such as that of a separation agreement or order. Nor is the phrase "irreconcilably broken down" given any expansion – and we know that in Britain this much heralded reform was simply to provide a euphemism as all the old grounds remained as proof of such a state of affairs.

Still on the topic of family law, there is to be a rebuttable presumption that, when a marriage is legally terminated (and this appears to mean only on divorce), "matrimonial property acquired during the marriage is shared equally between the spouses". Apart from the limiting factor of this applying only to "matrimonial property" (whatever that is), this appears to be a blow for womanhood – until we see that "the Courts will be permitted to override this presumption where considered necessary in the interests of fairness and equity". Back to where you were?

On the commercial front, there is to be a "review" of the law relating to commercial activities for the better protection of investors, shareholders, creditors and others adversely affected "in the event of a financial collapse". This will make us better able to *anticipate* such disasters, and able to deal with them more *speedily* and *effectively*. Unfortunately not a word is said about being better able to *avoid* them.

Apart from studying "the practicability" of making ready-reference summaries of the contents of Acts of Parliament (could they mean such animals as indexes?), the new Government has also pledged to take "all steps found necessary" to ensure a smooth and expeditious flow of documents through the Land Transfer Office.

Of course, the profession was only com-

plaining, and the difficulty only existed, during times when conveyancing was booming. Could it be that the immediate removal of the Housing Corporation from the lending market and the imposition of a credit squeeze were, in fact, merely instances of this desirable plank being implemented?

Lest the above comments be taken seriously, perhaps the writer should simply conclude by confessing that no dark intrigue or merchandising malpractice is suggested. Merely that lawyers may have their uses after all, and that they could be usefully, even gainfully, employed in future and by all parties were they to vet such promises and to enquire what the promises were really meant to mean before the promises are neatly packed, printed and turned loose on an unsuspecting public.

Jeremy Pope

CASE AND COMMENT

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

The Glenmark case: Irrigation and the prescriptive dam

In s 21 (2) of The Water and Soil Conservation Act 1967 the Legislature made provision for the saving of certain existing water rights notified to the Regional Water Board before 1 April 1970. Glenmark Homestead Ltd, ("the owner") owning a farm property at Waipara through which the Glenmark creek flows, was among the users of existing rights to take advantage of the provision. The owner notified the North Canterbury Catchment Board, as the Regional Water Board, that at the material times it maintained a dam on the creek, and abstracted 200,000 gallons of water per day for irrigation, both uses being claimed to be "lawful" for the purpose of s 21 (2) and therefore saved by that provision as existing rights. The notice stated that the dam had existed since 1890 and was "entitled to remain by prescription", and that the use of the water for irrigation was lawful because it had not reduced the flow of water in the creek "by an amount cognisant to the senses", more water being returned to the stream by natural springs than was abstracted and the lower riparian owners suffering no diminution of the flow.

The Board, giving no reasons, rejected the company's notice so far as it claimed that the use for irrigation was a lawful existing use and possibly by implication so far as it claimed that the damming "lawfully existed at the 9th day of September 1966". In *Glenmark Homestead Ltd v North Canterbury Catchment Board* [1975] 2 NZLR 71 Macarthur J held, on an application by the owner for review, of the Board's decision that the Board had power to determine the lawfulness of the uses claimed under s 21 (2) but that the decision should be accompanied by the Board's reasons and was subject to judicial review (there being no clear words in the statute to oust the jurisdiction of the Supreme Court). On the last point Macarthur J quoted (p 88) the well-known dictum of Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, 286.

In the result, Macarthur J, though rejecting the owner's submissions as to the Board's powers, was prepared to consider the propriety of directing it to reconsider and determine the matters raised in the notice and give reasons for its decision.

Macarthur J's judgment is of great importance in establishing that, on the proper construction of the Act, a Regional Water Board had a duty not merely to record notices claiming existing uses but first to determine the lawfulness of those uses and whether they were saved by s 21 (2). On the other hand, the numerous such uses, claimed and notified by owners and recorded by Boards throughout the country, remained justiciable in the Supreme Court. Presumably by now an application for review would be inappropriate but Macarthur J shows (p 88) that at least in many circumstances a declaration could be applied for as to the lawfulness of the use claimed and that that declaration would prevail in the event of any conflict with a decision of the Board.

For the conveyancer searching the records of a Regional Water Board the significance of this is that whether the Board appears merely to have recorded a use of natural water notified to it before 1st April 1970 or has (as it should have) deliberately considered and then determined the lawfulness of the use notified, before recording it, in neither case is the record conclusive as to lawfulness. The conveyancer must make inquiries to satisfy himself on that point in the absence of a Supreme Court judgment determining it.

Macarthur J then had in mind that further consideration might have to be given, in the circumstances of the instant case, to the owner's

notice, and to whether the uses claimed in it (the abstracting of water for irrigation and the damming of the creek) were lawful and within s 21 (2). He therefore devoted much of his judgment to considering common law riparian rights and prescriptive rights, upon which the lawfulness of the owner's using the water for irrigation and his damming of the stream respectively depended. As Macarthur J pointed out (pp 81, 87) the second proviso to s 21 (1) saves, without the need for any notification to the Regional Water Board, the substance of the *ordinary* or *primary* riparian rights to use the stream water in unlimited quantities for domestic purposes. Irrigation is not among these but it is among the *extraordinary* or *secondary* purposes connected with the riparian tenement, for which the riparian owner has a limited right to take water if he returns it to the stream substantially undiminished. Assisted by the judgment of Buckley J in *Rugby Joint Water Board v Walters* [1967] Ch 397 (where the older authorities are fully discussed) Macarthur J stated the law of extraordinary or secondary rights, in relation to irrigation, as follows (p 84):

> . . . a riparian owner is permitted by the common law to take water for irrigation provided that the user is reasonable as to extent and nature, that the flow of the stream is not perceptibly diminished and the water is not unduly detained by the process of irrigation, and lastly that the owner restores to the stream the water which he takes and uses for that purpose substantially undiminished in volume and unaltered in character.

Whether the actual method of irrigation used by the owner in the instant case satisfied these stringent tests was a question not before the Court. If it did not satisfy them, there was no common law riparian right to use the water for the purpose. That is, the use was non-riparian and might be enjoined at the suit of a lower riparian owner – unless a prescriptive right to use the water for irrigation by the particular method had come into existence.

Macarthur J's remarks about prescription could have been applicable here though he made them only in regard to the damming of the stream which the owner expressly justified in the notice to the Board on the ground of prescription. With respect, the learned Judge's remarks needed in any event to be qualified somewhat.

In discussing the law of prescription in New Zealand it is no longer quite enough to say with Macarthur J, on the authority of *New Zealand Loan and Mercantile Agency Co Ltd v Corporation of Wellington* (1890) 9 NZLR 10, that the Prescription Act 1832 (UK) is in force in New Zealand but has no application to Land Transfer land unless the easement claimed was "acquired" under the Prescription Act before the land was brought under the Land Transfer Act, in which case it may subsist though not noted against the certificate of title (p 85: ss 62 (b) and 64 of the Land Transfer Act 1952). That statement is (with a possible exception in respect of Land Transfer land with no living registered proprietor) correct as far as it goes. But the New Zealand authorities such as the *New Zealand Loan and Mercantile Agency* case and the textbook passages (Garrow's *Law of Real Property* (5th ed), 396, 405, and Adams *Land Transfer Act* (1st ed) 90, 91, 139; 2d ed 99-100, 158-159) to which Macarthur J refers show a view of the meaning of "acquired" which needs to be revised in the light of the decision of the House of Lords in *Colls v Home and Colonial Stores Ltd* [1904] AC 179. There it was held that no easement is acquired under the Prescription Act until the bringing of an action in which the right claimed and enjoyed for upward of the prescriptive period applicable is brought in question. To be specific in relation to the *Glenmark* case, an easement to maintain the dam constructed in 1890 would have come into existence under the Prescription Act, not upon expiry of the twenty year period in 1910 but after that on the commencement of an action in which its use was called in question (and upheld). If there has been no such action, no easement under the Prescription Act has arisen. An easement under the fiction of the lost modern grant remains a possibility but one so far untested in New Zealand (see Garrow, op cit, 404-405).

The points here made are supported by the writer's fuller discussion of the general topic elsewhere (F M Brookfield, "Prescription and Adverse Possession" in *New Zealand Torrens System Centennial Essays* (1971, ed Hinde) 162, 172-174). Here it need only be said in summary that, if *Colls'* case is followed in New Zealand (and the New Zealand law has so far been laid down without reference to it), easements under the Prescription Act 1832 will be found to exist over Land Transfer land, saved by s 62 (b) of the Land Transfer Act 1952, only in the rare cases where an action in which the easement was established was brought before the land came under the latter Act. On the other hand the facts and period of use may support a claim for a prescriptive easement under a fictional lost modern grant.

To the latter possibility Macarthur J's comments about the establishing of prescriptive easements (p 85) are generally applicable. In the instant case and cases like it, the history of the title of each of the riparian owners would, as he says, have to be investigated. One may add that in

some circumstances it might be relevant whether or not the title of a riparian owner to his portion of the stream bed is under the Land Transfer Act, in view of the practice of District Land Registrars (not however invariably followed) of excluding from a riparian owner's Land Transfer title the stream bed or his portion (ad medium filum) of it. (See *Attorney-General and Hutt River Board v Leighton* [1955] NZLR 750 discussed by the writer in "Prescription and Adverse Possession", *Torrens Essays* (supra), 197-203). In such cases a riparian owner's title to the stream bed is under the common law though the riparian land is under the Land Transfer Act; but that circumstance would of course leave unaffected the protection given to the title of riparian land by the Land Transfer Act.

FMB

INNOCENT MISREPRESENTATION AND THE SALE OF GOODS

Some 70 years after the passage of the Sale of Goods Act, it still remains uncertain whether an innocent misrepresentation permits a rescission of the contract. DR RICHARD LAWSON *examines the present position.*

The dispute stems from the wording of s 61 (2) of the Act where it is said that "the rules of the common law . . . shall continue to apply to contracts for the sale of goods." In *Watt v Westhoven,* [1933] VLR 458 the Full Court believed that "the distinguished lawyers who formed the Select Committee on the English Act could not have employed the words 'the rules of the common law' in other than their true and technical sense" (per Marin ACJ at 462). Since innocent misrepresentation was unarguably a remedy existing in equity, it followed that innocent misrepresentation was not a remedy available in sales of goods.

This was expressly to adopt the Court of Appeal's view in *Riddiford v Warren* (1901) 22 NZLR 572. There Williams J had argued that the reference to common law was to be understood in contradistinction to the rules of equity (at 583); while Denniston J went even further, arguing that innocent misrepresentation had never permitted the rescission of a contract for the sale of goods and, a fortiori, did not do so now *(a)*.

As against this, English Courts have periodically recognised, without demur, the right of a plaintiff to rescind for innocent misrepresentation *(b)*, and McGregor J has observed of *Riddiford v Warren* that it has been subject to "criticism in various text-books" *(c)*. Yet only in *Goldsmith v Rodger* [1962] 2 Lloyd's Rep 249, where it was the *seller* who was granted rescission, has the remedy been sanctioned in the United Kingdom. In substantial qualification of this last cautious note, it ought to be said that the Misrepresentation Act 1967 (UK), which removes certain bars to rescission from innocent misrepresentation, plainly is based on the assumption that it does embrace contracts for the sale of goods *(d)*.

Recent cases have done little to clarify the matter. In *Academy of Health and Fitness Pty Ltd v Power* [1973] VR 254, the misrepresentation concerned the availability of gymnasium and sauna facilities under a contract for the use of a health studio. Crockett J found that the misrepresentation had become a term of the contract. Since the term in this case was found to be a warranty, the learned Judge was able to distinguish the leading case of *Leaf v International Galleries* [1950] 1 All ER 693. Here, Denning L J had refused to allow rescission for an innocent misrepresentation as it had become a condition of the contract, the right to rescind for breach of which had passed by lapse of time. He added that an "innocent misrepresentation is made less potent than a breach of condition" and hence the loss of the right to reject for the latter inevitably carried the same consequence for the former (at 695).

This reasoning is not satisfactory. An innocent misrepresentation can hardly be said to be less potent than a breach of condition when it has actually contributed to inducing the very making of the contract.

But if, by less potent, Denning L J meant the consequences deriving from the misrepresentation, that of course is to beg the question.

Since he had only to deal with a misrepresentation which had become a warranty, Crockett J could avoid the restrictions imposed by the English case and so proceed to allow rescission of

(a) At p 580. See too Lowe J in *Watt v Westhoven* [1933] VLR 458, 465.

(b) *Leaf v International Galleries* [1950] 1 All ER 693; *Long v Lloyd* [1958] 1 WLR 753.

(c) *Root v Badley* [1960] NZLR 756, 761. See Atiyah, Sale of Goods (5th ed) pp 301–2.

(d) See too Misrepresentation Act (1971–2) SA

the contract. But even if the reasoning of the learned Judge seems persuasive, it produces an anomalous situation. It effectively means that the rule limiting a breach of warranty to a claim in damages has in most circumstances evaporated. In all cases where the warranty is express, and not just implied by law, it is reasonable to suppose that the giving of such warranty at least partially induced the contract. Thus, if Crockett J be right, the real remedies for breach of warranty are damages or rescission at the victim's discretion. It is odd, too, that a minor breach could produce a rescission, but not necessarily a major breach. It should also be said that s 1 (a) of the Misrepresentation Act 1967 (UK) when removing the bars to rescission, refers only to misrepresentations which have become terms of the contract, no distinction being taken between conditions and warranties. This indicates the belief that both had provided a bar to rescission.

For these considerations, it is thought that the apparent rejection of the Victorian case in *Holms v Burgess* [1975] 2 NZLR 311 is the better approach. In preliminaries to a contract for the sale of a horse, the seller misrepresented the health of the animal. Casey J doubted the decision in *Academy of Health & Fitness Pty Ltd v Power* and assented instead to the view that when once an innocent misrepresentation becomes a term of the agreement, the right to rescind is gone (at 317).

Although Casey J stated a general principle that only where it constitutes a failure of consideration does an innocent misrepresentation vitiate a contract, this must clearly be construed in the circumstances of the case. Viewed thus, *Holmes v Burgess* brings us no nearer a solution to the problem. Whether an innocent misrepresentation does allow rescission remains a matter of conjecture. It is believed, though, that the law in *Riddiford v Warren* is correctly stated.

THE LAWYER'S PUBLIC IMAGE

Public relations concerned a number of delegates to the 1975 Triennial Law Conference. Mr GERALD SANCTUARY *Secretary Professional and Public Relations, The Law Society, England, gave his views in an address to The Law Society of New South Wales some time ago.*

Anyone who takes up responsibility for protecting, and indeed enhancing, the public image of lawyers has set out across an uncharted sea full of rocks, hidden reefs, sunken ships, treacherous currents and even hostile submarines. Also, the crew are far from being united as to their ultimate destination, there often being as many opinions on a subject as there are solicitors considering it.

There are many, of course, who see no reason to set sail at all. "What need has a profession of an 'image'?", they ask, "We are not selling packets of corn flakes, nor do we figure in the pop charts. We are doing a very necessary job, we are needed by the community; let us simply get on with our work to the best of our ability, and people can take us as they find us".

I will deal with this view as I go along, but I would like to return to my marine analogy for a moment. I mentioned rocks, reefs, currents and submarines. The rocks and reefs are difficult to avoid; they represent the delays in the processes of law, the difficulties experienced with national and local government officials, and the problems unnecessarily inflicted on us by the legislators. I imagine that you suffer from these difficulties in Australia just as we do in England. If we are not very careful our clients will blame us for the existence of these hazards, and we deserve to be blamed if we fail to explain them, and fail also to give a regular account to clients of the way in which we are negotiating our way round them.

The sunken ships are those members of the profession who have capsized through their own inefficiency or dishonesty. Hundreds of satisfied clients make no news; one crooked solicitor among thousands makes the local, and even the national, headlines.

As to treacherous cross-currents, I can speak of these with some authority; they are those elements in the mass media of radio, television and the press who set out to prove that solicitors are pompous, dilatory and expensive. I am glad to say that we have developed ways of navigating through these tidal waters.

The submarines are those who compete with us for our more remunerative work. Tax and estate duty consultants lurk in shoals in the deep waters of the City of London, though the current financial crisis has forced one of these firms to reduce its staff from 120 to 40. Throughout the country the banks are now trying to get hold of the profitable end of the executor and trusteeship market. There are even a few pirates trying to set themselves up as cheap conveyancers, but they are

not earning themselves a very good name, and the recent dramatic fall-off in the property market has not helped them. Within the past few weeks a company has set up business with the expressed intention of selling American-style title insurance and doing cut-price conveyancing work.

In considering the public image of an individual, a company or a group, one must first perceive the reality behind the image. It may be helpful to see ourselves as others see us, but it is just as important to see ourselves as we really are. I am a solicitor. I think of solicitors as men of affairs, experienced in solving the practical and legal problems of men, women and corporations most especially in relation to the property they own.

What other work do we do? In my work for The Law Society I have recently brought up-to-date the series of leaflets entitled "See a Solicitor." These are based on our perception of the current activities of the profession. They deal not only with such matters as house purchase and the making of wills, but also with executorships and trusteeships with advocacy, taxation, starting a business, and of course matrimonial affairs. In England and Wales there are now about 110,000 divorces a year. This compares with rather less that 400,000 marriages, but I think these figures produce something of a false impression, because some of the recent divorces are based on separation for a period of five years or more. Many people who could not previously obtain a divorce are now doing so on this ground.

The "See a Solicitor" leaflets also deal with motoring problems, and explain the services offered by solicitors to landlords and tenants. I mention these leaflets because they indicate our view of what solicitors actually do. They are a reflection of the way we see ourselves.

But how are we seen by others, by our clients, and by those members of the general public who have never had occasion to consult a solicitor? A little over a year ago we conducted a survey in order to discover the answers to these questions. You will be glad to hear that, of those questioned who had already consulted a solicitor, their opinion of our profession was more favourable than those who had not. Some 86 percent expressed themselves as "very satisfied" or "fairly satisfied" with the service they received. Generally, in fact, we stand fairly high in the public's esteem. Most popular are the nurses and doctors, and we come in the next group, with bank managers and clergy. In fact, we are sandwiched in between the bankers and the ministers of religion, less popular than the former but marginally more liked than the latter. Right at the bottom of the popularity stakes are Members of Parliament, and estate agents.

Yet the survey we commissioned was not primarily designed to show how much we are liked; much more important is the type of work that the public think we do. It will not surprise you to learn that they already know that solicitors do conveyancing work, and that we are skilled in the preparation of wills. Also, they will tend to turn to us when accused of crime, and when their marriages get into such difficulty that the resulting conflict must be settled in a Court of law. But let me go back for a moment to the claim I made, that solicitors are men of affairs, able to solve the practical and legal problems of their clients. The unpalatable fact is that, in England and Wales at least, the public do not perceive us as particularly skilled in matters of finance.

I found this discovery somewhat galling. When I was in private practice I fancy that I had a fair grasp of the taxation and estate duty problems of my clients, and knew a good deal about the best ways of solving them. I like to think that I was reasonably acquainted with such matters as insurance, the raising of money on long-term and short-term loan, the vagaries of the stock market, the significance of shareholdings in private companies, and so on. I was experienced in administering large trusts, and this involved the general management of their affairs, and collating the advice given by accountants, stockbrokers, bank managers, insurance advisers, and others. No doubt you possess a similar competence. Unfortunately, our skill in matters financial is little known to the general public – in England, at any rate. They will certainly turn to an accountant to solve their taxation problems, when in fact a solicitor, with his more intimate knowledge of the family and its affairs may be able to offer better all-round advice. They are as likely to go to a bank in relation to trusteeships as they are to a solicitor, and when they have a substantial insurance claim they will approach the insurance company itself rather than seek independent legal advice. For help with investment problems they will probably go direct to a stockbroker; if they have an employment difficulty – currently referred to as an "industrial relations" problem – they will go to their union representative rather than to a lawyer.

There is therefore much to be done if we are to be perceived by the public as we think we should be. It is comforting to know that we are reasonably well trusted, and indeed accepted as one of the essential professional services. Yet it is worrying, to say the least, that the extent of our real competence is not appreciated.

Why is it worrying? Because we have to make a living in our egaliarian society. Gone are the days when a solicitor in Britain would live comfortably

on fees charged to three of four well-to-do families. Today we are more obviously in the market-place, competing in many areas with others who have an equally good head for business.

This is why the public image of the solicitor matters today, where in the past it was less significant. Our income is directly related to our perceived role in society, and we are in competition with others when it comes to much of the best business. We have no monopoly in the formation of companies for clients, nor are we the only people permitted to advise others on the best way to order their affairs so as to pay the least amount of tax. Although solicitors are normally permitted to represent clients at tribunal hearings, many others are also given this right. We claim a skill in advocacy, but there are others, such as union officials and social workers, who are also operating successfully in this field.

Our public image is particularly important in the case of those people who have practical, financial or legal problems and who have not previously consulted a solicitor. If they see our profession as distant, pedantic and over-expensive, they will turn to someone else for help. We still suffer somewhat from the Dickensian image. I see television programmes quite frequently which portray solicitors as rather witless and doddery characters. Admittedly, we have had a programme "The Main Chance", in which an aggressive and somewhat over-sexed solicitor played the central character. Yet there is little doubt that many people regard their first visit to a solicitor with as much enthusiasm as a similar call on the dentist.

Here are some more figures gathered from the survey:

> In response to the statement about solicitors "The fees they charge are too high", 65 percent of those questioned agreed and only 19 percent disagreed.
>
> Faced with the statement "You never know how much they are going to cost beforehand", 63 percent agreed and 19 percent disagreed.
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> Finally, when it was suggested that solicitors are "slow to get things done", 56 percent agreed and 19 percent disagreed.

These figures are far from reassuring, and underline the need for an effective public information campaign on the part of the profession.

This is the age of communication. Events occuring in a distant part of the globe within the last few hours are immediately brought to the television screen in the corner of our livingrooms. An air disaster in Yugoslavia, a Chinese leader's heart attack, a dropped catch in the final and crucial Test Match are all instantly reported to us, with suitable comment. If a new law is proposed, lawyers are asked what they think about it. If a critical comment about the legal profession is made by a garrulous Member of Parliament, the mass media are on the telephone to us within the hour.

On the other hand, we can make news outselves. In the three years I have been at The Law Society I do not recollect one occasion when a press release from our office has gone unnoticed by the mass media. Indeed, if we were to fail to say what we think, then the public would be left to form their own impressions about solicitors, basing their views to some extent, no doubt, on what our critics or detractors say. We need to look after our public image by having something to say for ourselves.

Not that I am in any way opposed to criticism. If we are unable to cope with it, we cannot be much good at our own profession. And of course we have critics within as well as without. There are solicitors who would like to see The Law Society adopt different policies; there are some who want to see our work in administering the Legal Aid Scheme handed over to some other authority; others say that the Society should not be involved in matters of discipline and professional conduct. I believe they are quite wrong, but critics render a public service by stating their views, and we render a greater one by explaining their errors.

It is not always easy. A critic is usually responsible to no-one but himself, but a professional association must take time for thought before it makes public statements or responds to criticism. We cannot afford to seek to capture the headlines with sensational statements, for we have a reputation to uphold, and people rightly expect us to behave in a responsible way. Thus it is that our own criticisms are couched in moderate language and carefully argued, not put together in sensational terms in one of the more popular taverns of Fleet Street.

I would not have it any other way. People have come to rely on what we say, and would be much disappointed if they thought that we were getting into the habit of crying "wolf". At the same time, the eyes of the world are upon us, and if we make no effort to explain ourselves then some folk are bound to form a false impression of us. Yet I believe salesmanship to be a mistake. As I mentioned earlier we do not sell packets of cornflakes. Nor do we sell wills, contracts, settlements or statements of claim. We offer a personal service, and we deserve to be well paid if this service is of a high quality.

So our "image" is to be built on public knowledge of our work and the nature of our

skills, not on the more obvious end-products of our activity. For example, the client who is legally divorced with the assistance of his solicitor has not necessarily been well served. One of the leading members of our profession, Lord Goodman, said not long ago that the solicitor who is nothing more than a lawyer is not much of a lawyer. So the client who has obtained the divorce she sought may have been ill-served by her legal adviser if reasonable prospects of conciliation were ignored by him. Equally, if the terms on which the divorce is obtained are harsh on her, or if her solicitor has failed to advise her effectively in relation to matters of custody and access, the division of property, the adequacy of maintenance or the provision of pension rights, then she will have as much right to complain as the young Scottish lady who found the famous snail in the ginger-beer bottle. The solicitor with a matrimonial practice is not selling divorces; he is providing a service as guide, counsellor and friend. Therefore it is a regular and sustained campaign of public information about our services that is needed, and I trust that this is what we are providing.

There is one blind alley in pursuing public relations for solicitors. One can all too easily be tempted into frantic activity by the inaccurate and provocative statements of others. Many is the time when I have been telephoned by a solicitor and asked – sometimes told – to point out that this or that statement on the radio or in the press was wrong, unfair, even slanderous. Once or twice I have fallen to the temptation thus offered, and have only succeeded in making a fool of myself. There are of course occasions when a false statement is made by someone of consequence, and this has to be corrected; but one finds far more often that the attempt to deny an unfair remark or report does more damage that did the original slur. After all, if a leading politician says that solicitors are expensive parasites, the only way in which I can respond to this is to issue a statement that repeats the original slander, followed by a denial. Why should I do that? Why should the slander get a second hearing? No, it is far better to ignore such remarks and to continue with a carefully planned programme that explains what solicitors are, and the value of the work that they do.

We all want to be liked, or at least approved of. Most of us would prefer the public to recognise the need for lawyers, and to accept that we meet that need. The department at The Law Society for which I am responsible is entitled the Professional and Public Relations Department, and one of our tasks is the maintenance of good relations between the Society and its members. Strangely enough, I believe that one of our most effective exercises in professional relations during the past two years was the publication of the results of the survey that I have already quoted, which showed that solicitors were far more popular than they had themselves thought. So although I have heard one or two of my professional brethren deny the fact, I maintain that we are human enough to want to be liked.

If public relations for solicitors are correctly described as "the improvement of relations between the profession and the public", then it is necessary to think in strategic as well as tactical terms. I have of course been discussing strategy up to this point rather than tactics. We must first aim to be better understood by the general public before we can hope to be appreciated – and instructed to act on their behalf. Which brings me to a yawning gap in public understanding, their virtual ignorance of what law is all about. What are the most popular phrases in day-to-day use which refer to the law?

"I'll have the law on you",
"It's against the law",
"Ignorance of the law is no excuse", and
"The law is an ass".

The first two remarks, both very common, disclose one of the greatest public misunderstandings about the law: namely, that it is concerned mainly with crime.

The geographical and political separation of our two countries is not so great that our law and yours have nothing in common. I imagine that from time to time you may even have occasion to refer to the great work *Halsbury's Laws of England*. At present it consists of some 56 volumes, and only one of those volumes has to do with crime. Yet it is with crime that the law is associated in the public mind. Why? Because no conscious effort has been made to tell the people about the law, the fabric upon which the tapestry of our social and political life is woven.

I suggest that you ask youselves how much you learned about the law at your own school. Not very much, I would think. In years of private education all I ever gathered was some information about the respective roles of the Queen, the House of Lords and the House of Commons in passing legislation. I learned nothing there of contracts, of the law relating to the family, of the meaning of a hire purchase agreement, a lease, a mortgage, or indeed the law about travelling on the roads. Surely a serious attempt should be made in our schools to explain such basic essentials as these?

I will return to this idea, but I would now like to turn from strategy to tactics. I hope you will be interested to learn of some of the activities we have undertaken at The Law Society over the past three years.

For some time we have indulged in a form of institutional advertising by producing the "See a Solicitor" leaflets to which I have already referred. The great majority of these leaflets are sold to the profession at cost price, and we also produce a metal stand designed to hold the leaflets. Solicitors buy the stand and put it in their waitingrooms.

We also send these leaflets to the major newspapers in England and Wales, to the BBC and Independent Television companies, and to the national women's magazines. Many of these give advice to their readers, and they often send the leaflets out with their letters. The leaflets are also displayed in some libraries and Citizens Advice Bureaux.

There are over 28,000 practising solicitors in England and Wales, and a total of 120 local Law Societies. Some local Societies have as few as 40 members. Others are very large, and several are considerably older than The Law Society itself. It is through these local Law Societies that much of the profession's publicity effort is organised. The great majority of Societies have a Press Officer, a term I prefer to "Public Relations Officer", who is responsible for contacts with the local press, also radio and television, in his area. From our Chancery Lane office we are able to help him a good deal. We have a large and growing set of articles about the law, written by journalists and designed for local newspapers. These mention the role of the solicitor, and explain legal matters in simple language. And in case they are not simple enough we also produce a series of visual features, cartoons, each of which tells a short story, usually illustrating a particular decided case. Both articles and cartoons are available to the local press without cost, and gladly accepted by them.

We offer other facilities to the press: a day does not pass without a telephone call to our Press Officer, making enquiry about the legal problems of a reader, a need for law reform, a recent case of some other problem. The enquiries pour in from the national 'heavies', *The Times*, the *Daily Telegraph* and the *Guardian*, but also from the more popular press. They come from the BBC, its national radio and television stations, and also from commercial companies.

Yet effective public relations amounts to more than a reaction to stimulus. So we are holding press conferences when we feel we have something important to say; we issue press releases when our Council, or our Standing Committee on Law Reform or some other Committee has recommendations to make to the Government of the day; and we hold press lunches. Some of these lunches are organised so that specialist press correspondents can meet a solicitor with particular knowledge of their subject. For example, the solicitor-editor of *Beaumont on Air Law* recently talked about his experience in dealing with the results of flying accidents.

When it comes to the provision of solicitors to appear on radio and television programmes, we came to the conclusion that we should not only select them for the purpose, but also give them specialist training. Using closed-circuit television facilities in a commercial studio, and the services of a professional interviewer, we put some 20 solicitors through their paces. A dozen of them were thought to be good enough to merit training, and this they have received. All are now appearing on television and radio programmes in their own areas of the country; we have representatives in Newcastle, Plymouth, Norwich, Manchester, Southampton, Carlisle, Cardiff, Swindon, Leeds, Birmingham and of course London. When a matter of importance to the legal profession arises, we send a detailed note – or brief – to our trained colleagues, and they are able to express the professions viewpoint to audiences throughout the country.

Naturally we are also in close touch with the BBC's national networks of radio and television. I am fortunate enough to be one of those who take part in their programmes, but I work closely with a team of experienced colleauges, for it is not desirable that only one voice or face should be identified with the profession. In a single year we are involved in literally hundreds of nationwide broadcasts. I cannot quantify the effectiveness of all this work, but I can tell you that the demand steadily increases, and that the members of our own Law Society are pleased with the increased amount of attention that the profession is receiving. My own feeling is that the more involved we are with the mass media of television, radio and the press, the better the public will understand what solicitors do.

This is the real point. We are not interested in the aggressive "selling" of solicitors' services; there is no point in trying to persuade the public to accept services that they do not want. We *are* interested in achieving a much greater degree of public understanding of the work of our profession.

So in addition to the activities I have already described, we are setting out on a national educational programme. This programme is based on a simple belief: that the better the law is understood by the people of our country, the more the role of the practising lawyer will be appreciated. This has become the strategy of our public relations policy; now to the tactics.

We began by opening negotiations with publishers for the publication of a series of books which would explain the law in straightforward

terms and would be designed for lay people. We employed the services of a literary agent, and the result was a new series of paperback books under the general title "It's Your Law", published jointly by The Law Society and Oyez Publishing Ltd. I took on the task of general editor of the series, and wrote the first book entitled: "Before you See a Solicitor". This explains what a solicitor does, how he is trained and how he charges for his services. It even describes how people can solve some of their legal problems for themselves.

Two other books in the series have now been published:

"The Police and the Law", and

"The Company Director and the Law".

Both of them have started selling well, and there are several other titles in the pipeline, for example:

"Your Business and the Law"

"The Homeowner and the Law",

"The Motorist and the Law",

"Children and the Law",

"Accidents and the Law",

and so on.

Equally important, we believe, is our schools educational programme. This began two years ago when we decided to produce a set of four filmstrips explaining the European Economic Community. The filmstrips were designed for use in schools and colleges. The full kit consists of the four filmstrips, each accompanied by a gramophone record (or a cassette tape) and some teaching notes. In each filmstrip a different aspect of the Community is described, and the role of the solicitor is explained in relation to contracts, the regulation of monopolies, the export of materials and so on.

The European filmstrips have been successful, by which I mean that they have received good reviews and are selling well. Already The Law Society has received by way of royalties almost enough money to repay the original investment. This success encouraged us to go further, and we recently completed four new filmstrips under the general title "The Law of the Land". The first, entitled "A Home of Your Own" deals with buying a house. The second, "Customers and Contracts" explains shoppers' rights, particularly necessary following recent consumer legislation. The third and fourth strips are "On the Road" and "Marriage and the Family". They are already selling to the schools, and we hope to extend the series. In fact, we have already received over 4,000 pounds by way of royalties since May; the cost of making 500 copies of each of the four filmstrips was 6,000 pounds and sales continue at a satisfactory rate.

In addition, a simple book for schools about the origins and the development of our law is being published, entitled "The Living Law" and we have plans to produce wall charts, recorded talks and special kits with specimen documents such as a will, a hire purchase contract and a tenancy agreement. Although The Law Society is providing the "seed" finance, our hope in each case is to obtain by way of royalties at least as much money as we have invested.

As I am sure you know, the British public have benefited since 1949 from the Legal Aid Scheme. Since 1973, when the recent Legal Advice and Assistance Act came into effect, this scheme has been enlarged so that solicitors can be paid for giving advice and other help, whether or not a Court action is involved. Unfortunately, the rules relating to financial entitlements prevent many people with modest incomes from receiving the help they need. Nevertheless, the scheme has been widely advertised on television and in the press. Cut-out coupons were inserted in the newspapers, so that people could obtain the help of a solicitor if they did not already know one. With the Central Office of Information and the Lord Chancellor's Department, we were very active in preparing the national advertising campaign that launched the new shceme last year. In all the advertisements, solicitors were shown in a sympathetic and helpful role, and I am sure that this has helped to improve the profession's public image.

This catalogue of our work is not exhaustive, because we are continually developing new projects. Frequently we discuss these with members of the profession at special workshops held in different parts of the country. Public relations workshops have even been held – at the expense of those who attended – in the Mediterranean islands of Malta and Majorca. We have under consideration the launch of a television series and a film about solicitors. We are actively considering ways in which our relations with Members of Parliament can be improved. One adventurous local Law Society embarked on a campaign of press advertisements explaining the reason why people should seek a solicitor's advice. We help with this campaign, and are currently in touch with several other local Societies who are considering similar local press advertising campaigns.

I believe that it is also our task to look to the future. It is not enough to describe the work that solicitors are doing today; we should be taking steps to find out what changes the profession would like to see in its pattern of work, and base our activities accordingly. The world in which we work is not static. We must adapt ourselves to the rapidly changing times. The profession of law is not merely useful; it is essential. If solicitors did not exist, it would be necessary to invent them.

POLICE ARMED OFFENDER SQUADS – PUBLIC PROTECTORS OR INSTRUMENTS OF DEATH?

Mr R A MOODIE, *formerly an Inspector of Police and now a Wellington barrister, suggests that an unfair and undue burden is being placed on certain individual police officers.*

There has been surprisingly little in the nature of a public reaction to the killing of Daniel Taniora Houpapa by a police marksman at Taumarunui on Sunday, 4 January 1976. Most of the people the writer has spoken to have simply shrugged the killing off as another unfortunate, but necessary incident, in our increasingly violent way of life. Many found considerable comfort in the statement of Commissioner Burnside after the shooting that there had been no change in his department's policy to shoot only to wound.

Houpapa's death followed closely on that of Edward James McDonald Ross who was shot down by a police marksman on on 31 October 1975 at Bryndwr after he had stabbed his seven year old daughter with a knife. In that case, too, the public were reassured that the police shot only to wound, and subsequently Ross's killing was endorsed by the Solicitor-General as being justified in law.

Five years earlier the death of Bruce John Glensor resulted in a similar reassurance from the police, and that death, too, was held justified in law. Glensor was shot down in Garden Road, Wellington, after he had defied the police for two days with firearms and had threatened to kill a number of people. His life came to a prompt end when he tried to turn his gun on an unarmed police dog handler. Glensor, too, fell to a police marksman's bullet.

Whilst there has been nothing publicly revealed in any of these killings to suggest that the police action was other than justified, there is a disturbing, and I suggest dangerous, fiction in the idea that each death was a gratuitous rather than a calculated consequence of police action.

Glensor was shot at close range with a .303 calibre rifle. Ross and Houpapa were shot with .223 calibre rifles, also at close range. Glensor was shot in the lower abdomen, Ross and Houpapa in the chest. In each case not only was death almost instantaneous, but also the police had only a split second in which to act. The police officers involved could not afford the luxury of a second shot – if they missed with their first an innocent person would have died. In the case of Edward Ross, little Maria Ross almost did.

And not only did the police bullets have to find their targets, they had to find them with effect. If Glensor, Ross or Houpapa had been only slightly wounded or the police marksman had missed, the result would have been the same – or perhaps worse – than if the police had not shot at all.

Having regard to these considerations what options present themselves to the police marksman? It is surprising the number of people (even lawyers) who believe that it is possible, and indeed reasonable, for a police officer in these circumstances to shoot the offender in the arms or legs, or even shoot the gun out of his hands. Those poor souls have been watching too much television.

Armed offender confrontations generate considerable tension. That tension, together with the critical situation in which the Armed Offender Squad works, make it imperative that the marksman select the largest target that presents itself to him. Although a marksman, he cannot possibly hope for complete accuracy in the circumstance in which he must operate.

It was, therefore, no coincidence that both Ross and Houpapa were shot in the chest. And the bullet that killed Glensor probably hit where it was aimed.

The Armed Offender Squads have carried out hundreds of operations since they were set up in the early 1960s. It is surely a tribute to the courage and professionalism of the personnel of which they are comprised that to date only three persons have died during these operations. They had saved countless lives in each operation at the risk of their own. Society at large owes them a considerable debt and yet we insist on burdening them with the fiction that when they shoot, they must only shoot to wound.

When a police marksman shoots at an armed offender he does so only as a last resort. That is, he shoots at a time when all other avenues or courses of action have been exhausted and at a time when a failure by him to take positive action will probably result in death or serious injury to innocent third persons. He shoots not to wound, not to kill, but simply to achieve the instantaneous and complete elimination of the armed offender's

capacity to kill or seriously injure others. His act is done without malice and in the public interest. But when the police do shoot, death is a probable, if not inevitable, consequence of their so doing. It is an act which, in lawyers' language, is calculated to kill.

The notion that the police only shoot to wound is a dangerous one. It may cause an armed offender to believe that an act of foolishness on his part is more likely to result in injury rather than death. Or, a fortiori, that if he does get killed, it will be by accident rather than design. It must also distract the police, and may cause them to hesitate too long before pulling the trigger – with unfortunate consequences for those their act is designed to protect.

A police marksman must be acutely aware as he is about to fire that there is a tremendous contradiction between his Commissioner's statement that he will only shoot to wound and his own knowledge of what his bullet will do to its target. Indeed, there is some evidence of this type of hesitation in the three shootings.

In the case of Glensor, for example, there were, I am informed, three guns trained on him at the time he was shot. Why then did only one go off? The officer who shot Glensor told me afterwards that he expected a volley of shots when he fired. If he, like his colleagues, had hesitated, an unarmed police officer would surely have died.

In the case of Ross, the police had some difficulty in getting a sighting on their target. But Ross's head presented itself to the marksman. Did he refrain from shooting at it because he would surely have killed the offender? His failure to shoot sooner almost cost Maria Ross her life.

In the case of the Taumarunui shooting, Houpapa is reported as having fired three shots – one into the air, and two at the police. Is it possible that chance played a large part in preventing three deaths in that case?

Indeed, and without intending to detract from what I have said earlier concerning the excellent job the Armed Offender Squads have done, is it possible that luck has played too large a part in each of these incidents in which – eventually – an armed offender has died?

The deaths of Glensor, Ross and Houpapa can in no way be described as "police killings". The use of that phrase in reference to them constitutes a gross distortion of the truth. They died because society, through its agent, the police, found it necessary to take extreme measures against them for its own protection. Responsibility for these deaths rests, therefore, with the principal, not with the agent. Each and every member of our society must share the burden of that responsibility.

There is clear evidence, however, that we are not doing this. By the simple expedient of declaring that police officers will not shoot to kill we have foisted the whole burden of each killing onto the individual police officer who fires a fatal bullet. By so doing we have placed both ourselves and our agents at risk.

The law requires that we should employ only reasonable measures to protect oursleves from harm from others. In the heyday of the sword and cutlass it may have been reasonable to wound only. Today, technology has provided wrongdoers with devices that can kill and maim instantly and in a terrible way. A wounded swordsman is a weakened, and therefore reduced, threat. A wounded rifleman may still possess the same – or even greater – potential for harm. The law recognises these different circumstances by laying down the prescription for protective action in very general terms. But if a police marksman is to act with the confidence that he must have, in that split second in which he must make up his mind whether to shoot or not to shoot, surely he requires a much more precise statement from his principal as to how the latter intends he should act in the circumstances. It is not, of course, possible to anticipate all the combinations of circumstances that may present themselves. It is, however, at the very least, reasonable to expect that the principal anticipates and accepts that its agent may kill in its name. It is surely also reasonable that any such killings should be preceded by a declaration by the principal that that is the case.

In some jurisdictions "police killings" are a daily occurrence that promote little reaction from the communities in which they occur. It is likely that we will experience more violence in our own society in the future. But in spite of the high value the New Zealand Police have placed on human life, there is a danger that a similar kind of public apathy to such deaths will grow in this country. The law will, of course, determine whether in any particular case a shooting by the police is justified. But there is still a wide margin between what is legally justifiable and what is publicly acceptable.

The police have demonstrated that they are acutely aware of this distinction. In the Glensor and Houpapa fatalities the parents of the young men who died themselves expressed publicly their approval of the action taken by the police. But

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(a) There have, however, been three instances in which armed offenders have been shot without being killed (in Whangarei, Cromwell and Christchurch). But the ability of a marksman to achieve that result is dependent upon such factors as light, timing, distance, weather, position from which he must shoot, and most importantly the extent to which the lives of others depend upon his first shot.

would it not be better for the future to establish a closer public liaison between the public and the police in these matters?

It is the writer's thesis that such a liaison between the public and the police is needed in the matter of Armed Offender Squad operations. This could be achieved by a Commission with responsibility for:

(1) Laying down more precise (and honest) guidelines for the police marksmen to work from

(2) Accepting responsibility in the public's name for the deaths that occur in the course of armed offender operations.

(3) Ensuring that adequate public information is available of the standards set by the Commission for the police marksmen. This is necessary to ensure that the public is aware of the responsibility it has in this matter.

(4) Investigating each fatality – not for the purpose of recrimination or even determining criminal liability but to ensure that the standards it has set continue to be adequate to meet changing circumstances.

(5) Establishing post-fatality procedures. At the moment all the information on the shooting supplied to the Solicitor-General (to determine whether the shooting was justified in law) and the Coroner (to determine the cause of death), is compiled by the police. Whilst I have absolutely no doubt that the information supplied in the cases I have referred to was as complete as could possibly be obtained, there is, in principle, some justification for suggesting that a completely independent observer should be involved at the point of its collection and compilation.

I would, however, make it clear that in proposing such a Commission I am in no way suggesting that a public enquiry should be instigated into every shooting by the Armed Offender Squads. A number of people have suggested this to me. I am, with respect, totally opposed to the idea. We have delegated to the police marksmen the most dangerous and surely the most responsible job that it is possible for one man to ask another to do. If the police have demonstrated any fault in doing that job to date, it arises only from a tendency (in my view) to shoot too late. To subject his actions to a public enquiry after the event would only operate to further undermine the marksman's confidence and might result in him not shooting at all – with fatal consequences to the innocent. The need to ensure that the Armed Offender Squad personnel act with complete confidence in what they are doing is something which can be so easily overlooked in the emotion that these fatalities can generate. The need to preserve confidence will, therefore, require appointments to the Commission that are acceptable to the public and the police alike. And the imposition of responsibility on the Commission for past and future fatalities, as opposed to particular cases only, will ensure that its members maintain the balance between what the public interest requires in terms of post-fatality investigations and what the police require in order to do their job.

The Armed Offender Squads are in every respect public protectors and are in no sense instruments of death. Their record over the past decade firmly establishes that. But talk of their shooting to wound as opposed to shooting to kill creates a distorted picture of their operation. It allows the interpretation that their members are poor shots who shoot only to wound – but happen to kill. They in fact do neither. When they do shoot it is in circumstances which require the instant and complete incapacitation of their target. This in turn demands a degree of timing and sureness that places the life of the armed offender at risk. But they shoot to protect life, not to destroy it. And when they do kill, it is in the name of the public and each and every one of its members – not in the name of the police. It is inevitable that a death will occur in the future that does not receive the degree of acceptance that the fatalities I have referred to here have. My plea is that we anticipate that event by establishing procedures now to preserve for the future what has served us so well in the past.

A sense of outrage – Naturally I shared with all other members of the cricket-loving middle classes – "right-thinking people like us" as Lord Denning might say – a sense of outrage at the damage done to the Headingley pitch (but how much worse had it been the sacred turf of Lords). But on reflection I doubt whether there has ever been a demonstration that has achieved so much publicity for the cause while at the same time harming so few people. Moreover none of us, I think, can entirely escape responsibility for the occurrence. Only a month or two ago I was myself at a meeting, addressed by the Home Secretary, where a member of the George Davis defence group was distributing pamphlets on the case, and was able, during the course of the meeting, to slip in a question to Mr Jenkins.

The reaction of the Home Scretary, myself and the rest of the meeting was, frankly, one of complete indifference. And yet identification evidence has all too often been found wanting recently. And if Mr Davis is innocent, 20 years is one hell of a long time. BROUGHAM in the Justice of the Peace.

A POLITICAL TRIAL? — PART I

N L A BARLOW *en route to New College, Oxford, spent some time at the trial of the San Quentin Six" in San Francisco. In the first of four parts, he records the background to the trial.*

Five present and one former inmate of San Quentin, the maximum security Californian State prison, are presently standing trial on five counts of murder and a number of lesser offences at the Marin County Superior Court. The trial began in July 1975 and is expected to last a mammoth six to nine months. Popularly known as the San Quentin six, the charges against the defendants arose out of an alleged escape incident that occurred at the prison, a great forbidding yellow rock fortress situated twenty miles north of San Francisco, almost five years ago in August 1971.

Charged are prisoners David Johnson (29), Hugo Pinnell (30), John Spain (26), Luis Talmantex (32), Fletta Drumgo (30) and ex-prisoner William Tate (30) who is on Court bail with a $100,000 cash bond which was raised by his defence committee.

Like the case of Joan Little, the young negro girl acquitted in July of the murder of a police guard whom she killed with an icepick while resisting an attempted rape, the San Quentin trial has been denounced by the American left as a repressive and politically inspired state prosecution. All of the San Quentin six are black and have close associations with black militant organizations including the panthers and muslims. All too have been outspoken critics of conditions of San Quentin and especially the alleged white racism of the prison officials.

San Quentin has been beset by a number of violent internal incidents that may be said to be part of the "unprecedented, bloodstained unheaval . . . rocking the prisons from coast to coast" to use the words of Jessica Mitford the author of *Kind and Usual Punishment*, a 1974 publication on "the prison business" in the United States. In California where San Quentin is located it is indeed something of a business. The state which once celebrated its liberal tradition for penal reform now maintains the largest and most expensive penitentiary complex in the country with some 22,000 inmates and a correspondingly amorphous prison beaurocracy.

As the San Quentin trial has been linked with a number of these past violent incidents a brief resume of their facts is necessary to understand the background of the case. The first occurred in Soledad prison (situated some hundreds of miles away in the Los Angeles area) in 1970. In an otherwise ordinary altercation between a group of black and white inmates in an enclosed exercise area at this prison a guard noted for his sharp-shooting ability fatally shot three inmates, all black, from the concrete security of a twenty feet gun tower. The men were shot down one after another. Not one of the white inmates involved in the original fight were harmed. In keeping with the eye for an eye psychology of prison existence, a guard was killed some three days later. He was found dead after having been apparently thrown from the third storey tier inside the prison. There were no witnesses to the killing but three black inmates, all activists in protesting racism at Soledad, were indicted in connection with the guard's death. One of those accused was "Soledad Brother" George Jackson. Another was one of the present San Quentin Six defendants Fleeta Drumgo. For some reason, George Jackson was transferred to San Quentin prison for the duration of the trial, and by just two months he failed to survive to hear the jury's verdict. His co-defendants did and were both acquitted. But Jackson was killed in the alleged escape attempt the San Quentin trial itself is concerned with. Also killed were two other inmates and three guards. Once again there were no witnesses. But indictments were drawn up. Twenty seven men were present in the area of the prison from which the alleged escape originated. Six were indicted. All political activists within the prison. Five blacks and one Chicano (Mexican-American). It is pertinent to recount the fate of the gun tower guard who may be said to have triggered off these events. First, he was absolved of criminal responsibility. A grand jury (a judicial body now obsolete in New Zealand whose function, that of scrutinizing the issue of indictments, has been assumed by Justices of the Peace and Magistrates), exonerated the guard. They said it was "justifiable homicide". The families of the three dead men then went to the civil Courts. They sued the guard and seven other prison officials. The famous and controversial San Franciscan attorney Melvin Belli, representing the families, told the all white jury that the decadent black inmates had been

deliberately "set up" for the killing because of a racial conspiracy at Soledad. He said that the guard was an expert marksman who had fired a total of four bullets shooting two of the men through the heart. The third bled to death after being shot in the leg. A fourth survived. At least he did not die. He was shot through the testicles. The gun tower guard who had since retired to Germany, returned to testify that he had fired two warning shots and had not aimed to kill anyone. The jury disbelieved him. They awarded the plaintiffs $270,000 (US) in damages.

Another preliminary incident, equally macabre, occurred at the Marin Court (the venue of the San Quentin six trial) itself. In August 1970, just a year before the events that led to the trial occurred, Jonathan Jackson, the 17 year old brother of George Jackson, attempted to free a number of black prisoners involved in a trial there (two of whom refused to leave the Court with him) by kidnapping the presiding Judge, Judge Haley and the prosecuting District Attorney. The bizarre scheme almost worked. Jonathan Jackson, with two "liberated" inmates and the hostages, descended to the public car park, from the fourth storey Courtoom. But there a party of San Quentin guards, who had previously co-operated in deference to the lives of the hostages, now decided the prevention of the escape of their charges to be an objective of greater import and strafed the fugitive group until all were killed, including the Judge, Jackson, and the two inmates. Only the District Attorney, who was seriously wounded, escaped death. This tragic action was taken by the San Quentin guards in defiance of directives given by Judge Haley himself before being forced to vacate his bench to accompany the Jackson party. Although legally unconnected with the San Quentin trial itself, this episode also serves to demonstrate the inflexibly bitter relationships between the prison's keepers and its kept. Incidentally, this was the case in which Angela Davis was charged with being an accessory before the fact. She supplied Jonathan Jackson with the guns, the state said. She too was black and a militant. Worse than that she was a communist. Like the other defendants netted by the wad of indictments that followed the Courtroom assault, this young philosophy teacher from the University of California was acquitted of these charges however.

Recently the Hearst-owned daily newspaper, the *San Francisco Examiner*, carried under the front page headline query "was the Marin bloodbath a setup?" details of charges made by the Marin Public Defender Frank Cox to the effect that both the Marin Court slayings and the San Quentin prison escape attempt were set up by the CIA and the FBI (with the help of local law enforcement officials) who had prior knowledge of both events and encouraged their commission in order to discredit the militant black movements and if possible dispose of a few of its more outspoken adherents. With daily media exposures about the excesses of these organisations, both of whom have been complicated in a plethora of diabolical plots ranging from tapping undertakers' telephones to presidential assassinations, now making standard reading fare at American breakfast tables, such revelations hardly caused a stir. But the matter is to be pressed further and will eventually be investigated by the Californian Supreme Court, the highest judicial tribunal in the state.

Against this sordid background the state has in the San Quentin trial, which concerns an alleged prison escape in 1971, adopted the most stringent security precautions ever seen in American legal history. Arriving at the Marin Court one is confronted with a Kafkaesque sight. The rooms are curvaceous plasticised compartments that would not seem out of place in a scenario from "Space Trek". Electronic gadgetry is everywhere. Two metal detectors must be negotiated by every visitor to the trial. Sensor detectors are used for smaller items of baggage such as briefcases and handbags. Uniformed guards girded with guns and batons and an array of walkie-talkie machinery abound.

A successful passage through the two metal detectors is not enough, however. One must next show an ID card. A young schoolboy before me, lacking in such trappings of adult society, had the ingenuity to bring his last grade's magazine which bore, unmistakably, a photograph of him and his name. I used my passport. Because of my foreign origin, I was the subject of a referral to a higher authority. No doubt to check the international list of Communists and subversives, just like the immigration men do when one first enters the country. Not being in this category I am permitted to pass on. On to the police photographer that is. He takes my name and address and past address. Then he takes my picture. I'm in good company. Also on the FBI files are dossiers of almost every Senator, Congressman, and Supreme Court Justice, in the country, and they are not even foreigners. Some of them are not even "Commies". Even President Nixon had a file, and whatever they are saying about him these days, no one is accusing him of being a Communist.

After the photograph comes the high point of the exercise. The bodysearch. One is subjected to a 60 second hand frisk to discover anything that might so far have evaded officialdom's reach. These procedures take one right up to the

Courtoom door. But not inside. First a sheriff's deputy must read to you the section of the state law that prohibits the taking of arms and explosives and other contraband into the Courtroom. You are also warned not to converse with the defendants. That in any event is quite impossible for the Court proper and the visitor's gallery is completely sealed off by a $40,000 bullet and soundproof plexiglass screen. The defendants are visible but the proceedings can only be heard by use of relayed tapes. Behind the Judge's bench, video TV cameras scan the Court. After attending a pre-trial hearing, acquitted Pentagon Papers co-defendant Anthony Russo decribed the Court to the *San Francisco Bay Guardian* newspaper as "something BF Skinner (the Harvard behavourial scientist) designed for 1984". Actually the Court itself was designed by Frank Lloyd Wright and when first constructed was hailed as the most modern and luxurious judicial building in the United States.

It is not so much the electronics or the plastic that can be open to objection however, as the Courtroom is otherwise comfortable and really quite aesthetically pleasing. Distasteful as the search and identification procedures were, they may be justified by the interests of Courtroom security. Certainly they were successful in this regard. In a society that seethes with an undercurrent of violence, I felt safer inside this Courthouse than in any other building in the United States.

What cannot be forgotten however, is the sight of the defendants themselves. There they are, clearer than ever, in spite of the brownish tint of the plexiglass shield. Literally draped in the accoutrements of guilt; they are dressed in chains. Chained around the waist, manacled at the wrists and shackled at the feet. During recesses they are removed to small holding cells whre they are tied to a pipe that runs down the centre of the floor. The holding rooms below the Auckland Magistrates' and Supreme Courts, themselves dank and foul smelling cells, seem inviting by contrast. Back into Court the defendants are led with chains around their necks and attached to a short chain leash held by an armed guard. From the Court they are taken on their leashes to a special bus containing metal cages, one for each man. Shades of New Orleans Square in pre-civil war America. Everything is there but the slave auctioneer and his block.

With the exception of local Marin newspapers, media opinion has vehemently attacked these excessive security measures which were imposed by the presiding trial Judge, Judge Broderick. Larry Hatfield, an influencial West coast columnist with the *San Francisco Examiner*, described the trial as a "sham" arguing that the defendants "cannot get a fair trial as long as the trial is held in a cage and the defendants are chained like wild animals in a cage". Noting that the Judge has already "imposed a security screen outside the Courtroom that would do credit to an El Al (Israeli) plane flying out of Cairo", Hatfield concludes that "the fact remains that they should be given a chance. No jury, no matter how hard it tries, can ignore the chains and their implicit suggestions of guilt. That denies the defendants their basic right to a fair trial", (*San Francisco Examiner*, Thursday 21 August 1975). Wrote an equally outraged columnist, James Bendat at the *Los Angeles Times* (Thursday, 22 May 1975), "In the San Quentin Six case . . . the defendants have been in chains from the outset. They had not acted in a "disorderly, disruptive and disrespectful manner" before being chained, nor was the action taken as a last resort. Why, then, has Judge Henry Broderick ordered the defendants shackled? . . . Perhaps it is because the defendants in the case, each of whom has spoken out for many years against prison conditions, have been labelled 'militants' by prison authorities. Perhaps we have reached the point where it is no longer shocking to see black and brown people chained in our Courtrooms. If so, that realization ought to give us plenty of discomfort".

American constitutional law accords with these sentiments. Upon the shackling and gagging of black defendant Bobby Searle (during the abortive 1969 Chichago eight conspiracy trial) for repeatedly demanding to defend himself, the Supreme Court in upholding these measures, added the proviso (per Justice Hugo Black) that "no person should be tried while shackled and gagged except as a last resort". If the San Quentin defendants are convicted, doubtless much will be made of this point in the series of appeals that will inevitably follow.

Support your local policeman – I believe you are too considerate to law enforcement officers. I sometimes get the impression that such officers are not using their notes to refresh their memory. There is no memory to refresh. There is a record on the back of a copy of a Traffic Offence Notice and that is read out and is the evidence. Admittedly it was made contemporaneously but are we not getting to the stage where the record is the evidence not what the traffic officer says. I must admit I have had the refreshing experience of one traffic inspector saying he couldn't remember anything about the matter. – Mr D J Sullivan SM to the Wellington Young Lawyers.

WORKS COMMITTEES AND INDUSTRIAL RELATIONS

BRIAN BROOKS, *presently Senior Lecturer at the University of New South Wales looks at s 233 of the Industrial Relations Act 1973*

The traditional system of industrial relations in New Zealand is based on the philosophy that the interests of workers and employers are always in opposition to each other, that the respective groupings are readily identifiable and that their respective interests are different. A body of law has evolved which has attempted to maintain a clear division between the legitimate spheres of interest of the two groups and much judicial and legislative ink has been spilled in defining the proper ambit of an industrial dispute *(a)*, what managerial prerogatives are justiciable and what are not, the proper exercise of trade union powers *(b)* and what constitutes an industrial matter *(c)*. With but one notable exception *(d)* legislation in the area of industrial relations has structured a system in which conflict and confrontation is the focal point, a system in which the relevant tribunals lack jurisdiction in the absence of an industrial dispute. Hence the paradox that a system designed to eliminate conflict and prevent inflation through wage control *(e)* each year generates hundreds of industrial conflicts. The conundrum makes sense when it is appreciated that in the formal system of conciliation and arbitration an industrial dispute is a technical legalistic term in no way synonymous with strikes and stoppages and quite consistent with a state of amicability between the parties *(f)*. Nonetheless it remains true that the philosophy of conciliation and arbitration perceives two sides in industry each representing opposed interests with the apparent potential for disruption so great that the two parties must be compelled in the public interest, to come together and negotiate under the aegis of the Stage. For exactly eighty years this has been the consistent legislative approach.

Read against this background the Industrial Relations Act 1973 in s 233 at first glance opens the path to a quite novel departure from the wellworn highways. Section 233 enacts as follows:

> "(1) Without limiting the provisions of s 232 of this Act, the Governor-General may from time to time make regulations for all or any of the following purposes:
> "(a) Providing for the establishment on a voluntary basis of works committees representative of workers and employers in relation to any industries or undertakings or branches thereof for the purpose of promoting and maintaining harmonious industrial relations, and for the purpose of improving and maintaining the welfare, safety, and health of workers:
> "(b) Prescribing the functions of any such works committees:
> "(c) Providing for the payment of workers by their employers for the time occupied in attending meetings of any such works committees or in attending to any matters arising out of the discussions of any such works committees.
> "(2) Regulations may be made under this section to apply in respect of workers employed in the service of the Crown."

Leaving aside peripheral matters the core of s 233 is found in the reference to "works committees representative of workers and employers" and the clear implication that these bodies, when and if established, will be charged with some form of joint problem-solving in order to promote and maintain harmonious industrial relations by, amongst other things, improving the welfare, safety and health of the workers. These concerns are reinforced by the provisions of s 16 of the Industrial Relations Act 1973 for in that section are enumerated the functions of the Industrial

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(a) In *re Wellington City Corpn* [1944] NZLR 537; *NZ Sheepowners IUE v Tyndall* [1960] NZLR 606; and see Mathieson, *Industrial Law in New Zealand* (1970) Ch 5.

(b) *McDougall v Wellington Typographical IUW* (1913) 16 GLR 390; *Ohinemuri Mines and Batteries Employees' IUWW v Registrar of Industrial Unions* [1917] NZLR 829; *Gould v Wellington Waterside Workers IUW* [1924] NZLR 1025; *Auckland Freezing Works etc IUW v NZ Freezing Works IAW* [1951] NZLR 341; *Wellington Watersiders IUW v Wall* [1962] NZLR 777; *Prior v Wellington Waterside Workers IUW* [1958] NZLR 1. See generally, Szakats, *Trade Unions and the Law* (1968).

(c) see Mathieson supra, ch 5, pp 255–260.

(d) Industrial Relations Act 1949, s 7, which made provision for the establishment of works committees.

(e) see Brooks, *The System of Industrial Relations in New Zealand* [1973] NZLJ 407.

(f) *The Cromwell and Bannockburn Colliery Co Ltd v Otago Conciliation Board* (1906) 25 NZLR 986.

Council such functions to include recommending to the Government ways and means of improving industrial relations, industrial organisation and industrial welfare and recommending amendments to any Act relating to industrial matters with a view to improving industrial relations and industrial welfare. Thus the Government will, hopefully, receive a body of expertise and knowledge from which informed judgments can be made and on which, amongst other matters, the discretion in s 233 (1) (b) will be exercised.

Recommendations to the Government from joint problem-solving committees of employers and employees is not uncommon and is indeed the source of the Industrial Relations Act at least in greater part *(g)*. But the feature of novelty worthy of remark is that section 233 explicitly draws attention to employer-employee co-operation on joint committees at the level of the individual undertaking. The possibilities are as limitless as the problems and the wording of s 233 bristles with fish-hooks. One example will suffice to make the point. Take the expression "welfare", which in the context of s 233 (1) (b) has relevance to the individual worker in his particular industry or undertaking. How is the "welfare" of a worker to be determined? And by whom? The institutionalised adversary system of New Zealand's industrial relations elevates the trade union to corporate entity status *(h)* for the system is dependent on the clear identification of the combatants and the law has never doubted that it is the union and the union alone which has a monopoly of representing workers covered by Awards or Industrial Agreements. Are the "representatives of workers" envisaged as a component of the works committees intended to be none other than the existing union representatives? If so the enactment is surely tautologous for the present worker representatives, namely the trade union officials, exist for the very purpose of "improving and maintaining the welfare, safety, and health of workers". If elected officials are not to be the representatives there is a very real and immediate danger to the trade union of a weakening of the authority of its officials once rank and file members are in a position to represent workers in a particular industrial undertaking. Significantly, s 233 (1) (c) provides for the making of regulations to ensure the payment of "workers" by their employers for the time occupied in attending meetings of any such works committees or in attending to any matters arising out of the discussion of any such works committees. The explicit reference to a worker-employer nexus and the absence of the qualification "representative" in s 233 (1) (c) makes it difficult to avoid the conclusion that the members of the works committees will be drawn from the individual workers and not from the existing trade union officials. Such a policy would be met with vigorous resistance by the trade union movement. It would also be an approach inconsistent with many authoritative pronouncements during the elephantine gestation period of the Industrial Relations Act 1973 all of which emphasised that one of the major purposes of the Act lay in the opportunities which it gave to strengthen the industrial organisations, in particular the trade unions *(i)*.

Even if it is conceded for the moment that the problem of representation might be surmountable there remains a further problem of substance. What is the content of the expression "welfare"? Will the employer see the term with the same viewpoint as the worker? Is the term to be confined to, say, narrow financial matters? Assuming the latter for the purpose of the argument we find that an enormous area of theory and practice opens up. Financial welfare obviously includes wages and other items of remuneration yet the sine qua non of the compulsory conciliation and arbitration system is the settlement of wages by the national machinery and it would be absurd to expect the works committees to be empowered to negotiate wages given the solicitous attention paid this question by various tribunals in recent years and successive Governments. At the same time it must not be overlooked that the works committees are to be established on a voluntary basis

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(g) On 14 March 1972 the New Zealand Federation of Labour and the New Zealand Employers' Federation made available to the Government their joint proposals on revised industrial legislation. These proposals were welcomed by the then National Government whose Minister for Labour applauded the combined efforts in the Government Statement on the introduction of the Industrial Relations Bill into the House of Representatives, 22 October 1972. The most important gap in the joint proposals related to those portions of the proposed legislation which would deal with general wage adjustment procedures, strikes and lockouts and the registration and conduct of industrial unions.

(h) Industrial Relations Act 1973, s 166 which carries forward s 56 of the Industrial Conciliation and Arbitration Act 1954. See generally, Brooks, *The Legal Status of Private Associations in New Zealand* [1969] Recent Law 119

(i) See the Government Statement of October 1972, supra. And note also the background paper to the new Act supplied by the Department of Labour and published as, "The Industrial Relations Act 1973", [1974] NZLJ 32, and in particular the section on p 36 dealing with industrial unions and associations.

and clearly the opportunity is afforded such bodies to explore the financial aspect of welfare in novel ways. Thus it would be quite consistent with the participative philosophy of section 233, and perhaps of the Act as a totality, for various forms of financial participation to be introduced into an undertaking through the machinery of works committees. Financial participation by employees has been widely and frequently discussed in New Zealand with proposals ranging from profit-sharing to employee shareholding to joint management-worker co-operatives *(j)* and the Labour Government in its 1973 Budget, at p 14, indicated its intention "to encourage a greater identity of interest between the employer and the employee" by proposing a scheme "to encourage companies to give employees a stake in their industry and to assist them to acquire that stake". Such schemes are not new, indeed, there has existed statutory power to enable the worker to have this financial stake in the form of labour shares since 1924 *(k)*, a legislative provision found today in the Companies Act 1955, s 67. Moreover, any employee of a public company can "participate" by the purchase of ordinary shares thereby participating in profits and losses. It is legitimate therefore to ask of the previous labour Government why it saw the need to act more vigorously to encourage companies to extend financial participation?

The answer lies in the history of the long standing legislation. In short, very few companies availed themselves of the optional statutory schemes *(l)* and there is little evidence to suggest that whatever the inducements in the future that companies will display greater readiness to extend to employees a financial stake in the company. Whatever the merits or otherwise of this long-standing antipathy against extending financial participation to employees it is worth emphasising that such participation will not in itself lead to improvements in employer-employee relations for it bears no relation to the benefits to be gained from improved job-satisfaction, nor does it enable any practical participation in the management or operations of the business. The received wisdom of the behavioural scientists is incontrovertible on the point that various forms of financial participation are inadequate to create job-satisfaction *(m)*. All such schemes might do is assist in alleviating dissatisfaction by increasing incomes and improving the standard of living. Thus the expression of intention the 1973 Budget to encourage a greater identity of interest between employer and employee, will remain no more than a pious hope unless the envisaged "stake" is to have a wider meaning.

The research of behavioural scientists has demonstrated conclusively that a worker will become involved and interested in his work when he is able to participate in decisions about matters which he understands and which immediately concern his job. Thus the expression "welfare" is susceptible to a further definition, one couched not in narrow financial terms but in wider intangible psychological terms. It would be heartening to believe that the Government which enacted the Industrial Relations Act 1973, s 233, had taken cognisance of the work of industrial psychologists, that the provision for the development of works committees was a conscious response to a felt need for a move towards some halting form of industrial democracy and that the Government was aware when it drafted the legislation of the experience of advanced industrial societies. That these matters are most unlikely to have been in the legislators' minds becomes more certain when it is appreciated that s 233 of the Industrial Relations Act 1973 represents no advance on almost identical legislation enacted three decades earlier, legislation which failed to yield more than a token gesture towards the concept of worker-participation *(n)*.

The demand for worker participation, financial and non-financial, has steadily intensified since 1945 in capitalist and non-capitalist economies. The sharing of the responsibility for the management of an enterprise has been developed in a number of countries including West Germany, Norway, Israel, Sweden and the United Kingdom *(o)*. In some instances worker-participation in decision-making is mandatory as in West Germany where the works councils have extensive powers in all matters affecting staff. Agreement from the works council is required for recruitment procedure, redundancy, training and retraining, overtime, shift-arrangements, the allocation of housing, transfers and dismissals *(p)*. In France it is a requirement of law that all companies employing

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(j) See generally Wilson, M, *Workers' Participation in Management in New Zealand*, unpublished M Jur thesis, University of Auckland, 1974; Hines GH (ed), *Business and New Zealand Society* (1973) especially sections 3 and 4.

(k) Companies Empowering Act 1924.

(l) Department of Labour, *Workers' Participation in New Zealand: An Interim Report*, 1973.

(m) See generally Hines, G, *Organisational Behaviour: Human Relations in New Zealand Industry* (1972).

(n) Supra, notes (d), (l).

(o) Wilson, supra.

(p) Frame, A *Worker Participation in Company Management: With Particular Reference to Co-determination in the Federal Republic of Germany* unpublished LI M research paper, Victoria University of Wellington, 1972; Frame, A *Workers' Participation in Company Management*, (1970) VUWLR 417.

over 100 workers set aside a fixed proportion of their profits which proportion, after the usual deductions, is distributed to the workers *(q)*. In recent years the United Kingdom has received the collective wisdom of lengthy and potent Royal Commissions and other bodies of inquiry and both major parties have introduced suggestions to involve the managed more closely in the process of managing. In the light of these, and other models it is not difficult to accept the criticism that the enactment of section 233 of the Industrial Relations Act is no more than a "half-hearted effort to introduce some mild form of workers participation in management" *(r)*. The pity of the matter is that even this mild experiment is certain to fail. A recent authoritative survey of New Zealand management practices revealed that 69% of the companies surveyed reported that they never hold conferences with employees to inform them of relevant company information such as changes in plans, objectives or profits and that 93% of New Zealand managers believe that matters of company policy are the responsibility of management alone *(s)*. One need look no further for an explanation for the failure of the Industrial Relations Act 1949, and no further for a depressing prognosis of section 233, for clearly management attitudes have not softened since the 1940s *(t)*. In the same breath, however, it should be said that there are other factors which make it equally certain that the legislation of 1973 will be as unsuccessful as that of 1949.

To begin with it will be recalled that the accepted system of compulsory conciliation and arbitration recognises only the trade union as a negotiating unit and the creation of a legally recognised industrial dispute is solely within the competence of the registered trade union. The individual worker is thus completely dependent on his union to advance his welfare. The Industrial Relations Act 1973 perpetuates the traditional system whereby the individual worker has little choice but to accept the authority of the union to act on his behalf. The Act also perpetuates the distinction between a worker for the purposes of industrial law and the reality that many employers are, as individuals, themselves workers and at common law would be recognised as being one party to a contract of employment. For the purposes of New Zealand's conciliation and arbitration system it can be asserted that if a person is not covered by a union unqualified preference clause then he is not a worker. Many low-statused managers are not protected by a union, they are frequently the employee most likely to benefit from a scheme of worker-participation in management, yet may, by the operation of legal definitions, find themselves excluded, or, at best, on the side which least serves their interests. The concept of representatives from two opposing groups is therefore artificial and s 233 of the Act enhances rather than retards the unreality. Furthermore the common law, and the now repealed Industrial Conciliation Act 1954, did not recognise the legal enforceability of the collective agreement largely on the argument that it was not the intention of the parties to create legal relations *(u)* and it will be of interest to observe the status accorded any agreements which may emerge from works committees, assuming the committees have terms of references wide enough to permit negotiation on substantive matters. It is most unlikely that committees set up under s 233 will be more than merely powerless consultative bodies. Support for this speculation is found in the survey of companies mentioned above, the traditional system of settling industrial differences and the fact that to give power to a works committee would erode the historic, hardwon and jealously preserved prerogative of trade unions.

The Industrial Relations Act 1973 is entitled "An Act to make provision for improving industrial relations . . ." and few could confidently deny that industrial relations in New Zealand needs improvement. Closer working relations be-

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(q) Hancock, H *Profit-Sharing Reform for New Zealand: With Reference to Overseas Experience Particularly the French Ordinance of 17 August 1967,* unpublished LI M research paper, Victoria University of Wellington, 1972.

(r) Professor Alexander Szakats, (1974) 16 JIR 183, 186.

(s) Hines G *The New Zealand Manager* (1973) Ch 5, pp 52–53

(t) That the community approach remains conflict-orientated, and that s 233 is both friendless and an orphan, is illustrated by the fact that several harmless clauses providing for disclosure of financial information to unions during the negotiation of Awards and Agreements was removed from the Industrial Relations Bill before it was enacted; Industrial Relations Bill 1972 cl 65 (3).

(u) *Ford Motor Co Ltd v Amalgamated Union of Engineering and Foundry Workers* [1969] 1 WLR 339; [1969] 2 All ER 481. For comment, see Selwyn, *Collective Agreements and the Law,* (1969) 32 MLR 377; Hepple, *Intention to Create Legal Relations* [1970] CLJ 123. Registered voluntary and collective agreements are recognised and enforceable under the Industrial Relations Act 1973, Para V Part VI, Part XI. For the earlier position see Harrison, *Collective Agreements and the Industrial Conciliation and Arbitration Amendment Act 1970,* [1971] NZLJ p 180. Note also, Thomson, *Voluntary Collective Agreements in Australia and NZ,* (1948) 1 Uni W Aust LR p 80.

tween employer and employee are an obvious source of fruitful improvement and the Labour Government expressed its awareness of this simple truth. Unhappily the one section of the Act which directly addresses itself to this issue does so in the most muted and hesitant tones. So dismal has been the legislative experience to encourage harmony in industry by allowing for the financial participation of workers through the purchase of labour shares that the Special Committee to Review the Companies Act has recommended that s 67 of the Companies Act 1955 be repealed. It would be ironic if the recommendation is acted upon whilst s 233 of the Industrial Relations Act remains on the statute books. Even before repeal it is clear that the legislative experiments for worker-participation in New Zealand have been ludicrously unsuccessful. Perhaps, to save s 233 of the Industrial Relations Act from becoming yet another historic curiosity and to achieve consistency of treatment with section 67 of the Companies Act then s 233 itself should be immediately repealed. Alternatively, both sections should be made mandatory so that all companies must issue shares to employees and all companies must communicate on a regular and organised basis with employees. These are the only choices open to a society which has traditionally adopted a highly legalistic and authoritarian approach to industrial relations. Section 233 of the Industrial Relations Act is as aberrant as s 67 of the Companies Act for each is inconsistent with the institutionalised conflict approach to handling industrial problems which is now almost an article of faith in New Zealand. Neither section is likely to be made mandatory for coerced industrial harmony is a contradiction in terms, yet as they stand each section is no more than a rhetorical flourish. Industrial reality and the precepts of the law stand far apart: "Altogether the longer one ponders the problem of industrial disputes the more sceptical one gets as regards the effectiveness of the law. Industrial conflict is often a symptom rather than a disease. I think we lawyers would do well to be modest in our claims to be able to provide cures" *(v)*.

(v) Professor HW Arthurs quoting Otto Kahn -Freund in the foreword to Kahn-Freund, *Labour Law: Old Traditions and New Developments* (1968) xii.

THE EKETAHUNA LAW REPORTS

Attorney-General (ex rel the United Tribes of New Zealand v Attorney-General

Sale of land – Position of parties after completion – Remedies of parties – Rescission – Adequacy of purchase price – Imbalance in negotiating power – Whether sale should be set aside.

CRUMBLE J (orally): This straight forward case comes before this Court by way of a writ whereby the plaintiffs seek the cancellation of a contract of sale and purchase on the grounds of a gross inequality of bargaining power, and the return to them of a parcel of land known as the Dominion of New Zealand.

The plaintiff is a voluntary association originally created at the instance of one James Busby some years prior to the execution of the contract in dispute, and signalled by a salute of guns and the consumption of some particularly nasty foodstuffs, described in contemporary accounts as a mess of flour, sugar and water, by the original members of the voluntary association. Some years after these events the members of this association received a visit from an agent of the British Crown, William Hobson, who had been deputed to enter into a contract with the plaintiff for the transfer from the plaintiffs to the Crown of the parcel of land in dispute. After some discussions a contract was duly executed on 6 February 1840. purporting to dispose of the land in question and known since that time as the "Treaty of Waitangi". Both the plaintiffs and the defendant are agreed on the facts as stated thus far.

From this point I have found myself in considerable confusion. I have studied at length the copies of the contract available, some being in English and some in a Polynesian language, and I have found, to my surprise, that no one copy of the contract is in accord with any other in its terms and conditions. Further, some versions differ wildly one from the other. A further difficulty has entered into my considerations. The

events in question having taken place some 135 years ago, neither party in this case, despite diligent search, has been able to discover any witnesses to the contract willing, or indeed able, to give evidence. Nevertheless, I am indebted to counsel for the plaintiff for drawing to my attention a published eyewitness account of the execution of the contract in dispute. This is the account of a W Colenso, a printer, which, although published some 50 years after the event, seems to be a lucid account. It certainly seems from this account to have been a most irregular affair altogether, involving as it did the translation of the document, which contained a large number of terms which for linguistic reasons could not be translated, from one language into another. Indeed Mr Colenso at the time drew to the attention of the Crown agent that the other contracting parties had no very clear idea of what was involved in the transaction. It appears also that the vendors were most reluctant and had to be encouraged by the purchaser to sign the contract by the distribution of various manufactured goods, which in any event seem a most inconsiderable amount to pay for the land in dispute, particularly in view of its later value. It also appears that a number of the vendors subsequently repudiated the contract in no uncertain terms.

It is on these grounds that the plaintiffs claim an inequality of bargaining power.

In arriving at my decision I have had the advantage of reviewing some recent English cases. I refer in the first instance to *Lloyds Bank Ltd v Bundy* [1974] 3 WLR 501 wherein it is stated in part by Lord Denning MR "English law gives relief to one who, without independent advice, enters into a contract upon terms that are very unfair or transfers property for a consideration which is grossly inadequate, or when his bargaining power is grievously impaired because of his ignorance". There is further in *Instone v A Schroeder Music Publishing Company* [1974] 1 WLR 1308 the opinion of Lord Diplock who opines: "Standard forms of contracts are of two kinds the first setting out terms upon which mercantile transactions of common occurrence take place the fairness and reasonableness of which is presumed by their wide use by parties whose bargaining power is fairly matched. The same presumption does not apply to the other kind of contract which has not been the subject of negotiation between the parties to it the terms having been dictated by the stronger. In the field of restraint of trade this calls for vigilance on the part of the Court to see that an unconscionable bargain was not struck". Such dictum cannot be confined to the protection of those who grow up and are educated within the English culture. A fortiori it must apply to the indigenous peoples of the South Pacific, the so-called "noble savage". And even more so when, as in a restraint of trade situation, that "noble savage" is almost entirely dependant on his land for his economic survival.

It was argued by counsel for the defendant that in signing the contract the plaintiffs did in fact have the advantage of independent advice from two English gentlemen, a Henry Williams, a cleric widely trusted by the vendors, and the said James Busby, less widely respected. I have looked into this contention and I find that as a result of the successful conclusion of the transaction both of these gentlemen were confirmed in their own possession of more than twenty thousand acres of the land in dispute. In the light of this, I cannot help but feel that the "independent" status claimed for the advisors is not entirely an accurate description to be applied to them. Nor, as I have earlier remarked, do I find the consideration to be adequate it having been shown in evidence that considerable tracts of land are, these days, rarely disposed of for one blanket and two twists of tobacco. It is further noted that the terms of the contract were not drawn up by negotiation between the parties but by the Crown agent in this case, assisted and advised by the aforementioned Williams and Busby.

Finally I have given due notice to the dictum coined by my learned brother Mumble C J: *Callidus Polynesianus canem* and I find that it by no means applies in this instance. Rather the contrary appears to be the case. I therefore find for the plaintiff who has sought the return of the parcel of land known as the Dominion of New Zealand. There will be an order accordingly, and a further order that the present occupiers do give vacant possession forthwith.

As in the result the defendant is wholly denuded of his assets, it is appropriate that the plaintiff should pay the costs of the defendant, even though it is successful. These costs I fix in the sum of one blanket and three twists of tobacco.

Order accordingly

[Reported by Agricola]

Drops of justice – Shades of the "Merchant of Venice" in the Christchurch Magistrate's Court yesterday. While Magistrates pondered, rain from the leaky roof plopped and plinked into an array of mop buckets, reminding the Bench no doubt that the quality of mercy is not strained, but "droppeth as the gentle rain from heaven upon the place beneath". (from the Christchurch *Press*).

THE TWENTIES: NEW ZEALAND'S XENOPHOBIC YEARS

L H BARBER *of the Department of History at the University of Waikato reviews a low point in civil rights and, for perhaps the first time, outlines the Wolter case.*

The writers of popular histories have attached many neat descriptive labels to the 1920s. The decade has been dubbed "the Jazz age", "the Roaring Twenties", the "Prohibition era", and "the time of the gangster". These descriptions, albeit brief and exciting, scarcely apply to New Zealand for the years immediately following the close of the First World War. While it is true that there was some jazz (Mrs McGerkinshaw altered the tempo of her piano playing at the woolshed dance), the only "roaring" came from Fred Dagg's father, when his dog ambled on to the dance floor. Prohibition was never unloaded at the New Zealand wharves, and the term "gangster" was used by farmers to describe nothing more sinister than the Inland Revenue Department.

The twenties in New Zealand does not fit the United States' model. New Zealand life was rustic, slow-moving, and as socially conservative as Bill Massey was himself. If the popular descriptions are not applicable, what labels could be more usefully invented to describe the New Zealand situation? The "mud and grass decade" would give proper emphasis to the agricultural and pastoral consolidation and dominance of the period. As for most of the decade, a Reform Government was in office, so perhaps the title "the Reformed decade" would be useful?

Both labels have their merit, but both fail to capture an important element in New Zealand's social life in the Twenties – the existence of a fierce patriotism, and a fervent rejection of minority opinions and aliens. The 1920s in New Zealand were a decade of loyalism and bigotry; and of lingering bitterness towards all things German, and a newfound hatred for all that might be labelled Bolshevik. Parliamentary speeches, newspaper editorials and letters, and several civil rights affairs, provide evidence for the existence for this xenophobic ethos. There is evidence aplenty (though much of it still needs sifting) that the twenties were New Zealand's xenophobic years. The case now outlined is typical of a number of civil rights affairs that were prominent in this decade.

F F Wolter was a German who emigrated to New Zealand in 1906 and became a naturalised subject in 1911. In 1913 he graduated BA and took an MA the following year, winning the Jacob Josephs scholarship in the process. On the eve of the First World War Wolter was negotiating for an academic position in modern languages with an Australian university. Shortly after the declaration of war he was interned on Somes Island, as an enemy alien, and in 1915 his naturalisation was revoked. Wolter was a victim of a fierce anti-German hysteria that infected New Zealand during the war, and in the years immediately following the Armistice.

Whilst incarcerated on Somes Island Wolter was accused of sedition, by a New Zealand periodical. In December 1919 Wolter penned a letter of protest to the *Free Lance* rebutting this charge:

> "This attack on my honour was the more deeply felt as I was not in a position to defend myself being at the time in the internment camp, where I had been suddenly sent in spite of my protestations of loyalty, without being given a chance to call anybody on my behalf and without being allowed to give evidence myself in repudiation of the accusations brought against me by persons who were absolute strangers to me, with whom I was not confront . . . [I have] always been opposed to Kaiserism and to German militarism. My inability to dissimulate my dislike . . . having me one year and seven months' sojourn in a German military prison."

New Zealanders were not impressed. Still holding himself to be a British subject Wolter refused to register in 1921 under the Aliens Act (as a German subject resident in New Zealand) and was duly prosecuted. Since his release from detention he had vainly sought academic employment or employment in a government department. Despite numerous promises and assurances no employment was given. In January 1923 Wolter's persistent petitioning of Parliament secured an Order in Council annulling the revocation of his letters of naturalisation, but he still remained unemployed. While the acting-Prime Minister, Downie Stewart, obtained a 50 pounds grant for Wolter, as compensation for the injustice done, Wolter sought employment not charity. On 5 February 1924 Wolter wrote to a Wellington

clergyman, outlining his predicament –

> "I have now fought for fully eight years for justice and am now thoroughly tired of the struggle. Already two years ago the degree of Litt D has been awarded me, but it has not yet been conferred owing to my not being able to pay the fee of 15 guineas. . . . Of the 50 pounds granted me last year, after paying the fee, and reserving 5 pounds for ten weeks' rent, there remain only 2 pounds for my living. I shall live on this as long as anything remains, and shall then starve. My only ambition is to keep alive until the capping ceremony at Easter, and I expect to break down during the ceremony in the Town Hall."

Neither Downie Stewart, nor the Wellington clergy, were able to persuade the government to make a position for Wolter. Wolter's contention that the public service blocked every attempt made by politicians who espoused his cause may possibly have been true. However, one of Wolter's few friends did persuade the government to provide Wolter with a grant of 200 pounds and a free passage to the United States. Justice was not done, but at least the son New Zealand did not want was able to emigrate to the New World with enough money to begin a new life – at the age of fifty.

What does the Wolter affair have to tell us about the New Zealand social ethos of the 1920s? Wolter's unjust treatment can in part be explained by the long lingering of anti-German feeling in the years following 1918. The 1920s were violent years when political and social polarisation deepened old hatreds. The New Zealand government was loth to offend public opinion, and the civil service, by creating a job for a former subject of Imperial Germany. To those in power, as well as those in the country-side, Wolter was a "filty Hun". The tensions, prejudices, and propaganda of the First World War endured long after 1918. Populism, imperialist sentiment, and patriotic jingoism, reinforced by conservative lobbies (the Farmers Union and the RSA amongst others) paid little attention to the principle at stake.

Despite his persecution in Prussia, his undoubted loyalty, and his scholarship, there was no place for Wolter in the New Zealand of the 1920s. His is not the only *cause celebre* of the decade. The prosecution of two teachers, Page and Burton, for refusing to take an unqualified oath of loyalty to the Crown, the persecution of two Divinity students, Richards and Miller, who refused to undertake compulsory military training (claiming that one could be a conscientious objector without being a Quaker), together with the Wolter case, point clearly to the fact that in the twenties New Zealand's judicial and governmental officers (and probably most citizens) held a very narrow concept of what views and behaviour were proper in the Dominion. German accents, pacifist views, and even a belief that the Kingdom of Heaven should take precedence over the laws of men, were branded as dangerous alien beliefs. The twenties were indeed for New Zealand a xenophobic decade.

The telling judicial question – "During the trial of a man charged with the theft of money as a servant, the prosectuion sprang a surprise by obtaining a Judge's order allowing the Crown to inspect a bank account which the accused had formerly operated. It showed that a sum exactly equivalent to the amount stolen had been lodged in his account on the very day of the theft and subsequently withdrawn. During preparation for the defence, it was found that the other evidence for the Crown could be satisfactorily answered, but it became necessary to obtain the reply of the accused to this damning piece of new evidence. The explanation given by the the accused was that he had won the money from "a double" bet with a bookmaker. He would not give the bookmaker's name and enquired if he was obliged to reveal it in Court. As wagering with a bookmaker was illegal, I was able to say that he could not be required to give any evidence which might incriminate himself. It was necessary for the accused to testify on other points but, being without a satisfactory answer to my enquiry, I could not elicit any evidence from him on that particular point. He had to be left to get out of the difficulty which was certain to arise in cross-examination, the best way he could. Shortly after the resumption of the trial, the following catechism occurred;

Crown Prosecutor: Where did you obtain the £200 you paid into your account at the bank?

Witness; I collected a double from a bookmaker the previous day.

Crown Prosecutor: What was the bookmaker's name?

Witness: I decline to say.

The Judge: Were you advised that you need not answer a question if it tends to incriminate you?

Witness: Yes

The Judge: That was sound legal advice. Now I am going to give you equally sound advice. You cannot incriminate yourself if you tell us the names of the horses in the double. What were their names?

Witness: I forget, sir.

That last statement was received with derisive laughter and sealed his fate". From *Advocacy in Our Time* by OC Mazengarb QC.