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INTER ALIA

A constitutional conundrum

The rumpus that followed revelation of the "secret" Court hearing at Christchurch for a Judge's son highlighted our unhappy juxtaposition of judiciary and parliamentarian. With commendable caution, both the Minister of Justice, Mr D Thomson, and the Attorney-General, Mr P Wilkinson, eschewed any involvement that was not entirely necessary. Both reiterated that it was not for them as politicians to interfere with the judiciary – to which a quiet "amen".

However, the Ministers' anxiety to avoid meddling, effectively if unintentionally brought about a premature conclusion that the matter was "closed" – premature as there were a number of unanswered questions left to nag the public mind. Conspicuously there was the suggestion that the Magistrate involved had "admitted error" – yet his statement admitting error was restricted to a failure to make it plain that the defendant had been dealt with in the same manner as anyone else. Then there was the revelation that the defendant's sentence was out of line as far as Christchurch sentencing policy was concerned – although there can be acute difficulties in imposing penal sentences on those intimately connected with judicial officers. Finally there lingers the suspicion that a concerted effort may have been made in some quarters to cover the unfortunate affair up by meeting press queries with suggestions that the unusual time might have been to suit the convenience of counsel, or because there was a particularly heavy list, or that the defendants' names had been called alphabetically.

What was needed, and at the time of writing what is still needed, is a one-man inquiry into all aspects of what took place; an inquiry that could, unhappily, lead to resignations.

At the same time, the Attorney-General has called for suggestions from the public as to how the judicial system might be improved to prevent any repetition of the Christchurch incident.

Not surprisingly, the Attorney-General some days later recorded that not one suggestion had been forthcoming.

It would be wrong to consider such silence an endorsement of the present system, however, as the affair demonstrated the unfortunate way in which under our present system the executive and the judiciary can collide. Because the situation is so fraught with danger, the executive is understandably reticent, with the result that it can be impeded in performing its function.

What is needed is some form of judicial complaints board which could deal with complaints about judicial officers without, at least in the first instance, involving politicians.

From time to time unfortunate situations arise, and though some of these have been smoothed out through the diplomatic and confidential intervention of the Attorney-General, there are others which have not been. Also there are undoubtedly complaints which would, could and perhaps should have been made but which, for lack of a forum, have been allowed to lie, perhaps to fester.

It is the proud boast of the common law that there is no wrong without a remedy, yet the simple fact of the matter is that the person aggrieved by what he considers to be judicial misconduct has no one other than a politician to whom to turn.

In other, more progressive countries than our own, countries with a similar legal heritage, there exist such complaints bodies, and perhaps Mr Wilkinson might consider the formation of one here.

The body must, of course, preserve judicial independence and so must predominantly comprise judicial officers, leavened with others to represent the Law Society and the public at large.

Such a body could investigate complaints – be they from practitioners about persistent delays in reserved judgments or the public about judicial

conduct – and make whatever recommendations it thought desirable either to the Attorney-General or to the judicial officer concerned.

Not only would such a body fill a vacuum, but it would effectively eliminate political involvement, at least unless and until executive action is called for.

"Pig" and "Oink"

Before leaving the subject of politicians and the judiciary, a word to the editor of the *Sunday News* which treated its readers on 29 February to the following gem: "The Courts have taken off on a campaign to show that the right to free speech doesn't cover the right to call police 'pigs' or 'oinkers'. It's all tied in with Prime Minister Rob Muldoon's election pledge to beef up law and order, support the police and instil more respect for the law. The aim is to knock the word 'pigs' as it is applied to policemen before it falls into the same common usage as 'poms'."

First, the Courts have taken off on no such "campaign": they are continuing to do what they have always done, and that is to enforce the law, including laws concerning offensive language.

Second, the Courts do not, and hopefully never will, become involved in the enforcement of political pledges unless those pledges are translated into law.

Third, the Courts are not concerned with preserving the purity of the English language.

Fourth, your own article, by being so in error, unwittingly serves to undermine the respect for the law you note as being necessary. Perhaps in the future such pieces could be perused by your lawyers so that these gaffes are avoided?

Who is buying our politicians?

Revelations that the CIA has funded political campaigns in other Western countries inevitably leads to examination of our own electoral provisions. Although recently overhauled, no attempt was made to compel identification of donors of cash to party coffers.

It is one thing to argue that some right of privacy exists; it is quite another to argue that the public is not entitled to know precisely who is buying if not our politicians' favours, at least ready access to their ears.

The two points of view are not irreconcilable. Donations of, say, $20 and under could be made in confidence, and those of more could be required to be disclosed.

The proposition is unlikely to find any favour with either major party, as each appears anxious to preserve as confidential the sources of its finance. Yet perhaps the very reason that it does run into opposition merely demonstrates how needed such a reform may be.

There can be little doubt that the present situation is unsatisfactory.

Suppression of name

This topic has been touched on in earlier "Inter Alia", however there is a passage in an unreported judgment of Mr Justice Quilliam which deserves publication.

His Honour was dealing with an appeal against sentence by a youth convicted of cultivating cannabis and the possession of both cannabis and cannabis seeds; he was the son of a former cabinet minister and his father was at the time a Member of Parliament. His Honour addressed himself to an application for suppression of name in the following terms:

"It is submitted to me that the appellant is a member of a well-known and respected family who are likely to suffer from publication of the appellant's name to an unreasonable degree. Let me say immediately that I have the strongest personal sympathy for parents who find themselves placed in the kind of situation in which these parents find themselves. The appellant's father has held high office and he is still in a position of considerable prominence. He himself has done nothing to bring upon himself the adverse effects which must result from publication of his son's offences. This, however, is one of the disadvantages which inevitably flow from the achievement of any position of prominence. I know of no principle that persons in such a position have any right of immunity from publication concerning the wrong-doing of members of their family. It was argued further that as a legislator the appellant's father may have to take part in a consideration of legislation concerning drug abuse and that he should be able to do so without it being generally known that he has been personally touched by such a matter. I respect the submission which was made, but for myself I firmly take the opposite view. I think that it is much more important that when he expresses a view on such a subject it should not be concealed from the public, to whom he is responsible, that he has a personal consideration affecting the subject which could conceivably colour his opinion one way or the other" *Police v Gandar* (Supreme Court, Palmerston North. 17 April 1975. No M21/75.)

Jeremy Pope

NEW EDITOR FOR LAW JOURNAL

Consequent upon the appointment of Mr Jeremy Pope to the Commonwealth Secretariat in London, Mr Tony Black has been appointed editor of the New Zealand Law Journal. In so doing the publishers are continuing with their policy of appointing to the position lawyers with a general practising background.

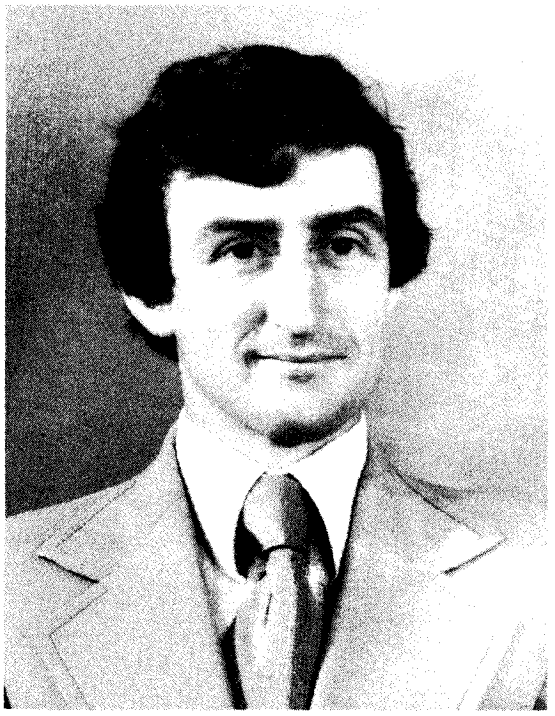
Mr Black, 32, is an LL M graduate of Victoria University. At the time of his appointment he was a partner in the Wellington firm of Messrs Macalister Mazengarb Parkin & Rose. He has also practised in Invercargill as a principal with Messrs Macalister Bros.

He describes himself as "a hack of all trades", though confesses to a special interest in town planning, tax law and environmental law generally. He participates in the activities of the Environmental Defence Society.

Mr Black says he sees the function of the Journal as keeping the profession abreast not only of legal developments but of legal thinking generally. "The Journal would be failing in its task should it not provoke discussion and promote change as well as reflect it," he said.

"It should also find room to entertain," he added, quoting from Jack Point in *Yeomen of the Guard*:

"I can teach you with a quip if I've a mind,
"I can trick you into learning with a laugh.
"O winnow all my folly, folly, folly and you'll find
"A grain or two of truth among the chaff."



Tony Black

Mr Black will also be editing other Butterworths publications, including Butterworths Current Law, Magistrates' Courts Decisions, and Tax Reports (New Zealand).

JEREMY POPE MÓVES ON

After editing the New Zealand Law Journal since 1970, it comes as something of a wrench to set it aside. However any editor can outstay his welcome, and some may feel I have already outstayed mine. A periodical, too, needs a change of editor if it is to remain relevant, dynamic and interesting. A rut can develop with the same seat too long in the editorial chair.

My only hopes when taking on the editorship, initially part-time while practising at Upper Hutt, was to make the JOURNAL more readable and more useful. If I have accomplished this, and when we have compared the numbers of "Letters to the Editor" in recent years and the favourable reception accorded the CURRENT LAW supplement it seems that I may have, then I must be content.

I would, in parting with the JOURNAL to take up the post of Assistant Director of the Legal Division of the Commonwealth Secretariat in London, like to place on record my thanks to the publishers, particularly Mr Bob Christie, the late Mr Bill Falconer, Mr Peter Smailes and latterly Sir Alexander Turner, as well as my former partner,

Mr Lance Beck of Upper Hutt; to all of them I am indebted for their patience, tolerance, support, and forbearance. The period of my editorship coincided with an enormous upsurge of public interest in the law and with lawyers themselves becoming much more visible than they had in the past. Such a transition inevitably brought trials and tribulations as new ground was broken. I would, too, record my debt to the New Zealand Law Society, notably Mr GJ Seeman SM, Mr WM Rodgers and latterly Mr Lester Castle, for their interest and encouragement, and my thanks to all those who have contributed to the JOURNAL over the past 6 years – and Mr Allan Brassington's name has to be mentioned *(a)*.

I leave for London confident in the belief that my successor, Mr Tony Black, will make his own, original contribution to the JOURNAL, and I very much look forward to reading it under his enthusiastic editorship.

I can only wish him the degree of support given to me by so many of the judiciary and the profession; to each of them my heartfelt thanks.

(a) Mr Brassington, composer of so many obituaries for distinguished Cantuarians (never Cantabrians), laments his outliving his contemporaries and despairs of finding his own Boswell. We have suggested he include a draft obituary along with his will.

Jeremy Pope

CASE AND COMMENT

Australian cases contributed by the Faculty of Law, University of Otago

A contract with a non-existent company

Miller Associates (Australia) Pty Ltd v Bennington Pty Ltd (SC of NSW) (1975) 7 ALR 144 provides an interesting comparison with three most recent New Zealand cases. In the typical fact pattern common to all these cases A. puts his name down to a contract, signing in the name of a company, while, in fact, the company has not yet been incorporated. Eventually the contract is repudiated and the other party seeks to enforce it on A. personally. The legal problem thus is that of the personal liability of a company promoter on a pre-incorporation contract (see Shapira, "Directors Without a Company and Other Professing Agents" (1975) 3 Otago LR 309 and (1975) 49 ALJ 635).

In *Miller v Bennington* a home property was knocked down in an auction to the second defendant, one Russel. Russel then told the plaintiff's (vendor) solicitor that he wanted to buy the property in the name of a company, and that he was a director of it. On the solicitor's advice, the contract was executed by Russel "For and on behalf of [the ccompany] and with its authority – J C Russel, director . . ." The company, in fact, was incorporated only three days later. A cheque signed by Russel personally was paid as a deposit. The cheque was not honoured and was later replaced by another cheque, signed by the first defendant and apparently endorsed by Russel. Again the cheque had been returned unpaid. Both defendants submitted that no consideration had been given for the cheque, as it was given in respect of a contract which was a nullity by reason of the non-existence of the company.

There are three viewpoints as to the validity and effect of a contract made on behalf of a non-existing company. The first seeks the solution exclusively in the terms of the contract, proceeding from the starting point that a person who signs on behalf of a non-existent company does not undertake personal liability unless such liability is actually agreed upon (*Black v Smallwood* (1965) 39 ALJR 465). The second view acknowledges a legal presumption by which both parties have intended to bring about a valid contract, which imputes a personal liability of the individual signatory. Such liability can be excluded by the contract. (*Kelner v Baxter* (1866) LR 2 CP 174; *Rita Joan Dairies v Thomson* [1974] 1 NZLR 284; *Marblestone Industries Ltd v Fairchild* [1975] 1 NZLR 529). In effect, the difference between the two views lies in the reversal of the normal order of proof. It forces the so-called agent to rely on the contract in order to disclaim personal liability.

The third view is associated with the English decision in *Newborne v Sensolid (GB) Ltd* [1957] 1 QB 45, which have established the proposition that where a person signs in the name of a company without any addition of the word "agent" or similar terms (ie A. and underneath X. Ltd, as opposed to A. as agent for X. Ltd) his signature is treated as part of the signature of the company itself. Consequently, where the company is non-existent, that contract is a nullity and no personal liability would arise.

The decision has drawn a great deal of criticism, for turning on subtle differences of terminology of no real significance. Moreover, it is inconsistent with other principles which establish the personal liability of corporate agents. (See Bowstead, *Agency* (13th ed 1968), 393 note 12.) Indeed, the *Newborne* proposition seems an oddity both in principle and in logic. While the abstract corporate entity affords a solid defence against personal liability to competent corporate agents, there appears to be little ground to extend it to a person who seeks to hide behind a non-existent company which is the mere creature of his imagination. Logically, it is difficult to perceive how a physical execution of a document can be attributed directly to a non-entity.

The decision in *Newborne* has, however, commended itself to the High Court of Australia which has applied it wholeheartedly in *Black v Smallwood*, supra. In *Miller v Bennington* Sheppard J having reviewed the authorities and pointed to certain doubts as to the validity of the distinction drawn in *Newborne*, has eventually followed *Black v Smallwood*. The plaintiff lost his case on the ground that both parties had apparently intended the contract to be made with a company which at the time did not exist.

The same approach has recently been applied in New Zealand in *Hawke's Bay Milk Corporation Ltd v Watson* [1974] 1 NZLR 236 where a supplier of goods failed in his attempt to recover the price from two persons who contracted in the name of a company which in fact did not exist. In contrast, in two other cases that came closely on the heels of *Watson, Rita Joan Dairies v Thomson*, supra, and *Marblestone Industries Ltd v Fairchild*, supra, the Court has acted upon a presumption that a person who signs for a non-existent company is personally liable unless contrary intention is proved.

It would appear that the approach taken in the two latter cases is by far preferable to that in *Watson and Miller v Bennington*. In practice the personal liability of a company's promoter is hardly ever contemplated let alone expressed in the agreement. In such circumstances, a rule of law which would afford an initial protection to an unsuspecting third party would better serve both justice requirements and business convenience.

The result in *Miller v Bennington* proves once again that the problem is far from settled. The *Newborne* proposition, in spite of its thin ground, has a drastic effect and leaves the plaintiff with little chance of recovery. *Miller v Bennington* went even further than *Watson* by holding that the defendant's position is not affected by his awareness of the non-existence of the company which he purports to represent – (1975) 7 ALR at 156. In contrast, where a presumption of liability is employed such knowledge would be critical to the defendant as it would make the presumption irrebuttable – *Marblestone Industries v Fairchild*, supra.

The recent cases serve as a reminder of the need for a legislative reform which would give the third party a "bridging" protection, unless and until the obligations are adopted by the company. Such reform was recently implemented in the United Kingdom (s 9 of the European Communities Act 1972) and in Canada (s 14 of the Business Corporation Act 1975). A similar measure has been recommended by the Macarthur Committee for Reform of the Company Acts in New Zealand – Final Report, March 1973, paras 105-107. But until such legislation is passed, it is hoped that future Courts will prefer the approach of *Rita Joan Dairies Ltd* and *Marblestone Industries* to that of *Watson* and *Miller v Bennington*.

GS

A NEW TREND IN STATUTORY INTERPRETATION?

by Dr J F BURROWS *of the Faculty of Law, University of Canterbury*

The Courts are the authoritative interpreters of statutes in the British system and constitutionally it cannot be otherwise. Legislation is given legal effect on subjects by virtue of judicial decision, and it is the function of the Courts to say what the application of the words used to particular cases or individuals is to be. (See *Black-Clawson International Ltd v Papierwerke A-G* [1975] 1 All ER 810 at 828 per Lord Wilberforce). His Lordship was giving his reasons for holding, along with the rest of the House, that parliamentary history is inadmissible as an aid to the interpretation of a statute. However, our legal system has perhaps tended to exaggerate the importance of judicial decisions in the area of statutory interpretation. In the past they have been accorded the same reverence, and treated in the same way, as cases at common law. Yet that is to ignore a vital distinction. At common law cases are the be-all and end-all: they *are* the law. In statute law it is the words of the legislation which are the law: the cases are no more than explanations and applications of this written law. However it certainly has been true that cases on statutory interpretation have assumed a compelling importance. Huge clusters of cases can build up around a statutory provision, and it has been well said that we lawyers never feel quite confident unless we can produce a decided case which supports the interpretation for which we are contending. We are "casebound".

This attitude has had some unfortunate results. First, judicial dicta on the meaning of a statute have occasionally assumed more importance than the words of the statute itself. Judicial paraphrases of sections have sometimes virtually supplanted the sections themselves. There are cases on the Land Transfer Act, for example, where the principles of indefeasibility of title have been expounded by reference to cases like *Fels v Knowles* and *Boyd v Mayor of Wellington* rather than by reference to the important sections of the act itself. (An example is *Pearson v Aotea Maori Land Board* [1945] NZLR 542.) Secondly, the law has been placed progressively beyond the reach of the non-lawyer. Lawyers are not the only people who use statutes in their business: so do members of government departments and administrators of many kinds. Such persons must feel the law to be unnecessarily inaccessible if, instead of simply reading the words of the relevant statute, they are required to be familiar with a large number of judicial dicta and decisions before they can feel they know the whole story. Thirdly, unyielding reliance on decided cases, and the doctrine of stare decisis, can mean that the meanings of words in an act are frozen, and not easily capable of development, from the moment of the first authoritative decision. Yet changes in society do lead to changes in the meanings of words in popular speech. Are we to say that ordinary words in a statute must be taken to mean what they meant in 1910, when they were authoritatively intrepreted by the Court of Appeal, rather than what they would convey to the ordinary reader in 1976? So to hold not only makes statutes the less effective in regulating the needs of a fast-moving modern society, but also seems to offend against the canon of interpretation contained in s 5 (d) of the Acts Interpretation Act 1924: "The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof according to its spirit, true intent, and meaning." This section, a companion to the much better known s 5 (j), has been cited very seldom in the course of its long life.

Of course, Court decisions will always be important in the sphere of statutory interpretation, for in no other way can doubts on the meaning of sections be authoritatively settled; the demands of certainty in the law will also require that the doctrine of stare decisis continue to play a part. But it is possible to achieve these ends without treating the cases in quite the same way as common law cases. There are several interesting recent decisions in the United Kingdom which seem fairly clearly to show that a subtle change is taking place in the attitude to cases on statutory interpretation.

1 A number of recent cases have emphasised that the only thing in a case interpreting a statute which binds later Courts is the actual decision applying the words of the statute to the facts of the case, and not the Judge's dicta on the construction of the act. One of the most

important of these pronouncements is in the Privy Council case *Ogden Industries Pty Ltd v Lucas* [1969] 1 All ER 121 where Lord Upjohn, delivering the judgment of the Board, said, at 126, "It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and Courts must beware of falling into the error of treating the law to be that laid down by the Judge in construing the Act rather than found in the words of the Act itself. No doubt a decision on particular words binds inferior Courts on the construction of those words on similar facts but beyond that the observations of Judges on the construction of statutes may be of the greatest help and guidance but are entitled to no more than respect and cannot absolve the Court from its duty of exercising an independent judgment."

2 In some ways the most significant of the recent cases is *Cozens v Brutus* [1972] 2 All ER 1297, in which the House of Lords held that the meaning of an ordinary word of the English language is not a question of law. If a statute uses simple words which any ordinary person could understand, and if there is no suggestion that the words are used in any special sense, there is simply no judicial definition required, and indeed a Judge should not paraphrase the words for a jury. It is entirely up to the tribunal of fact, as a matter of fact and not law, to say whether these ordinary words in their ordinary sense cover the facts of the instant case; that tribunal's decision will not be upset on appeal unless it is clearly unreasonable. It would be quite unrealistic to say that the approach advocated by *Cozens v Brutus* is free from problems. What, for instance, is an "ordinary word of the English language" for this purpose? (So far, "insulting", "moor" (of a yacht) and "dishonest" have been held to be.) Surely, also, the inconsistency of decision which the approach could lead to, and the difficulty of correcting idiosyncratic decisions on appeal, are undesirable? And surely there will be some "ordinary words" which are so fraught with policy that the Courts will opt to retain control over their definitions as a matter of law? (Cf, for instance, the care with which the New Zealand Court of Appeal defined "disorderly behaviour" in *Melser v Police* [1967] NZLR 437.) However although the scope of the application of this new doctrine is undefined, and probably indefinable with exactitude, *Cozens v Brutus* will, at least in those cases where it does apply, make a contribution to the lessening of reliance on decided cases. This is so for several reasons: (a) it focuses attention on nothing more than the ordinary meaning of the words of the statutory provisions; (b) because it views with disfavour judicial attempts to define ordinary words there will be less dicta and less judicial paraphrase building up around the statute; (c) because decisions on the application of ordinary words to fact situations are decisions of fact, they will not bind future Courts. *Cozens v Brutus* takes an important step towards recognising the primacy of the statutory words themselves. More than this, it could conduce to the kind of "ambulatory" approach to interpretation which is envisaged by s 5 (d) of the Acts Interpretation Act; for if it is for the tribunal of fact to apply the ordinary meaning of the statutory words to the facts of the case, they are likely to take the ordinary meaning of the words *today*, not the meaning which they bore at the time the statute was passed, or at the time some earlier case was decided.

3 As already stated, certainty in the law renders it desirable that actual decisions on the meaning of statutory words as applied to particular fact situations should normally be binding. (The reconciliation of *Cozens v Brutus* with this requirement is the most difficult aspect of that case.) The House of Lords has recently reaffirmed this, but at the same time has taken steps to ensure that the amount of authority and judicial opinion building up around a statute should be as little as is consistent with the maintenance of this principle and, in particular, that an end should be put as quickly as possible to the vacillation of opinion on the point. Two cases illustrate this.

(a) In *Jones v Secretary of State for Social Services* [1972] 1 All ER 145 it was held that once the House of Lords has given a ruling on the interpretation of a statutory provision that should be final; the House, despite its new-found power to depart from its own decisions, should be particularly reluctant to exercise that power when the question is one of statutory interpretation (see especially per Lord Reid at 149). Thus judicial discussion of the statutory provision in question is kept to a minimum. (b) In *Carter v Bradbeer* [1975] 3 All ER 158 Lord Diplock, who disagreed with the majority of the House on a question of statutory interpretation, nevertheless declined to deliver a dissenting judgment. He said (at 161):

> "Whether any useful purpose will be served by encumbering the law reports with a reasoned dissenting judgment in this House on a question of statutory construction will, in my view, depend on the reasons for the dissent. On the meaning of the particular statutory provision with which the case is concerned the opinion of a minority of the members of the appellate committee can have no persuasive influence in any subsequent cases which turn on that provision. Certainty in the law within

this narrow field will have been achieved by recording the opinion of the majority."

His Lordship emphasised that a question of statutory construction is one in which the strict doctrine of precedent can only be of narrow application. No doubt a substantial consideration underlying both the *Jones* and *Carter* cases was that vacillation of opinion on the meaning of a statutory provision leads only to uncertainty: another was, in Lord Diplock's words, that it is pointless to "encumber the law reports" unnecessarily.

4 The final case may be regarded also as a significant departure. It is concerned with the effect of judicial precedents interpreting words which have since altered in meaning. In *Dyson Holdings Ltd v Fox* [1975] 3 All ER 1030 the question was whether the de facto wife of a tenant of premises was a member of the tenant's "family" for the purpose of the Rent Acts. It was held that she was, despite the fact that an earlier Court of Appeal case, decided in 1949, had decided the contrary. It was emphasised that "family" was an ordinary word which must bear its ordinary meaning, and that such had been the change of social mores that the term "family" now encompassed in popular speech a much wider range of relationships than in 1949. The earlier case need thus not be followed. Bridge LJ said (at 1036):

> "If language can change its meaning to accord with changing social attitudes, then a decision on the meaning of a word in a statute before such a change should not continue to bind thereafter, at all events in a case where the Courts have consistently affirmed that the word is to be understood in its ordinary accepted meaning."

Such a fluid approach had previously been adopted to the interpretation of constitutional statutes and also to the interpretation of statutes incorporating community standards (such as "indecency"); but never before had it been formulated in such general terms as this.

Judicial decisions will always play an indispensable part in the understanding of statute law. They are essential to clear up doubts about the meaning and application of statutes – and as long as draftsmen are less than divine there will always be such doubts. Moreover once a doubt has been dispelled it is obviously desirable that the case dispelling it should not be readily upset. But the cases discussed in this article do contribute towards reducing the bulk of case law, and the *unnecessary* reliance upon it, which have been features of our statutory interpretation for so long. They are a step towards the recognition that it is the words of the statute read in their present-day sense which matter above all else, and that the function of case law must be secondary to this. One cannot but wonder whether it is Britain's entry into the common market, and the consequent forced familiarity with continental treaties and modes of interpretation, which have contributed to the development. (See the discussion by Lord Denning on the differences between English and continental modes of drafting and interpretation in *H P Bulmer Ltd v J Bollinger SA* [1974] 2 All ER 1226 at 1236-1238).

OBITUARY

J R E Bennett

The death occurred recently of Mr J R E Bennett a well known member of the legal profession in Wellington. The senior partner in the legal firm of Young Bennett & Co at the time of his death, Mr Bennett had been in practice in Wellington all his life and had long enjoyed a high reputation as a family solicitor and conveyancer.

Mr Bennett was educated at Wellington College and on leaving school in 1915 joined the legal firm of Young & Tripe as a law clerk. Later he went overseas and served in the army for 18 months in France where he was wounded towards the end of World War I. On his return to New Zealand he rejoined his former employers and qualified in law in 1923. He became a partner in the firm of his employers by then known as Young White and Courtney in 1928 and continued in that firm and its successors in active practice until his death.

Mr Bennett was a director for several years of a number of companies including the Dominion Life Insurance Office, the Commercial Union Assurance Co Ltd, the Metropolitan Permanent Building Society and Electrolux Ltd. He also served his profession as a member of its District Council, becoming Wellington President in 1947. He later served as a memeber of several New Zealand Law Society's Committees. In earlier life he had been an active low handicap golfer and throughout his life he was a keen gardener.

Mr Bennett was a devoted family man and he is survived by his widow and his sister Miss Myrtle Bennett.

CONTRACTS TO NEGOTIATE?

R G HAMMOND *a Hamilton practitioner challenges the reasoning behind* Courtney Ltd v Tolaini Bros Ltd *[1975] 1 All ER 716.*

In 1969 Professor Knapp suggested that the common law "had not been so much resistant as oblivious" to the notion that there may be at law such a concept as an enforceable contract to bargain or negotiate *(a)*. He then posed the question as to whether there might be any reason to think that the Courts might prove receptive to such a concept and took some comfort from various American authorities and certain of the provisions of the United States Uniform Commercial Code as at least indicating that the door might not be entirely closed to this sort of proposition. But it seems that the common law is now no longer oblivious, but openly resistant for in *Courtney Ltd v Tolaini Bros Ltd* [1975] 1 All ER 716 a strong Court of Appeal (Lord Denning, MR; Lord Diplock and Lawton J) rejected out of hand any such notion.

It will be recalled that in *Hillas and Co Ltd v Arcos Ltd* [1932] All ER Rep 494 Lord Wright had stated:

> "There is then no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing; yet even then, in strict theory, there is a contract (if there is good consideration) to negotiate, though in the event of repudiation by one party the damages may be nominal, unless a Jury think that the opportunity to negotiate was of some appreciable value to the injured party." *(b)*

As to that proposition, Lord Denning, MR said:

> "That tentative opinion by Lord Wright does not seem to me to be well founded. If the law does not recognize a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognize a contract to negotiate. The reason is because it is too uncertain to have any binding force. No Court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through; or if successful, what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law," (at p 720).

(a) "Enforcing the Contract to Bargain", (1969) 44 NYULR 673, 686.

(b) at p 505; Pollock thought Lord Wright was correct – see note in (1932) LQR 10.

The conventional view of contract law assumes that there is a clear theoretical distinction between what the law calls a "contract" and the relation between those who have merely entered into negotiations looking to the formation of a contract. The common law admits on this view of the matter of no half-way house. On the other hand all practitioners will be familiar with factual situations encountered where a level of agreement has been reached (and often manifested) which in the eyes of the parties themselves is sufficient to bind them to at least ongoing negotiations. The parties do not necessarily expect ultimately to agree on an entire contract – but they do expect to be entitled to at least go to the table with each other in good faith. If one party resiles in this situation and the aggrieved party takes legal advice, on the conventional view of the law he will usually be cautioned that the possible objections which will be taken to any claim by him are all or any of the following: no mutuality of obligation; lack of consideration; presence of illusory promises; absence of intention to be bound; lack of certainty and definiteness; "agreement to agree". Properly advised, the client will also be told that, conceptual considerations aside, realism requires recognition that a Court's decision on whether a contract has been created will in some immeasurable, but nonetheless important respect, depend upon the moral or ethical quality of the conduct of the parties with respect to the particular transaction in dispute. As Lord Ratcliffe has observed, "fairness of mind, cannot involve such innocence as the credo that Judges do not make law or that the personal element does not creep into the making of decisions."

And yet one remains not entirely convinced by this conventional wisdom. There is a schizophrenic quality to the answers given which emanates from the feeling that these answers in no way accord with the realities of the intention of the parties.

It is not here proposed to canvass all the arguments for and against the proposition that the

law does, or should, recognise the notion of a contract to negotiate, but rather to consider the two arguments which were articulated by the Court of Appeal, viz:

(a) That such an arrangement is too uncertain; and

(b) The supposed difficulties with remedies *(c)*.

As to the first argument, the common law legal world is too thoroughly imbued with the principle that "an agreement (or contract) to agree (or contract) is too uncertain to be enforceable" for an attack ever to be mounted directly on that citadel but the point can fairly be made that (as a matter of construction) the agreement may not be to agree at all – the true content of what passed between the parties may simply be that they agree not to deal in any way with any other party pending further negotiations between them. The question surely is not, "have these parties reached something which is an entire contract with all necessary terms actually ascertained or ascertainable by reference to objective controlling standards provided by the parties?" but "what in fact did these parties agree to do?". The answer in at least some cases may be that the parties regarded themselves as committed to negotiate and thereafter to be bound only to the extent actual agreement is eventually reached. There is nothing intrinsically uncertain about a commitment to negotiate – indeed it is suggested that most businessmen would instantly recognise in it a potentially valuable right. It may even be possible that on a proper construction of the agreement the parties went one step further than an agreement to negotiate and that there was a contract to make a definite offer.

The opponents of this sort of argument would no doubt ask, what is there to prevent any party to such an agreement either not negotiating at all, or else making a totally ridiculous offer? That question can be dealt with by reference only to some objective standard such as "good faith". Professor Samek has argued that a contract to negotiate "would not be valid since a contract to negotiate implies that the parties retain an option to terminate negotiations" *(d)* but a good faith argument would suggest that the parties have an option only to terminate negotiations in good faith. Certainly it has been suggested that in areas of American commercial law this sort of solution has been adopted. If negotiations conducted in good faith fail to produce agreement, the parties are discharged from further obligation. If either refuses altogether to negotiate, or does so dishonestly, he is guilty of breach. The onus of showing bad faith must, of course, be on the plaintiff, as part of his duty to make out his allegation of breach *(e)*. There are English decisions in relation to "options" which come close to such an approach. For instance in *Smith v Morgan* [1971] 2 All ER 1500 *(f)*. Brightman J was faced with the situation in which a vendor had covenanted with a purchaser that, should he wish to sell adjoining land, the "first option" of purchasing it should be given to the purchaser. It was held that this was a contract by the vendor to offer the land at a price at which she was in fact willing to sell. The vendor had to act bona fide in settling the price, so that if, for example, she was intending to sell by auction, the offer would be at the intended reserve. *Smith v Morgan* shows that, in the case of a contract to make an offer at least, it does not matter that the terms of the offer are not spelled out – they are to be ascertained by what the offeror in the event, acting bona fide, is prepared to offer to others. No doubt there is a distinction between a contract to make an offer and a contract to negotiate but there seems in principle no reason why the requirement of good faith could not operate in both cases.

The traditional formulas such as "uncertainty", "agreement to agree" and the like are not particularly enlightening and unfortunately are susceptible to being used as a blanket cover to either avoid a detailed examination of the actual transaction and the proper construction thereof or to conceal a value judgment that a plaintiff or defendant ought not to succeed on rather wider merits.

The second argument advanced by the Court of Appeal was in relation to damages. Several points arise here. First, it hardly seems well structured legal reasoning to decide whether relief will be available or not by the difficulty which a Court may have in assessing damages. There are, of course, any number of reported references, particularly in the personal injuries field, that it is the duty of the Court, if there has been a breach of a legal duty, to fix the damages, whatever the difficulty that may be involved. The common law has long been accustomed both in contract and in tort to estimating chances and taking these into account *(g)*. Second, it was generally suggested

(c) See also Ellinghaus, "Agreements which defer 'Essential' Terms", (1971) 45 ALJ 4 and 72; Fridman, "Construing, Without Constructing, a contract", (1960) 76 LQR 521; Winterton, "Is an 'Agreement to Agree' Unenforceable?" (1969-70) 9 West. Aust. L Rev 83.

(d) "The Requirement of Certainty of Terms in the Formation of Contract" (1970) 48 Can Bar Rev 203, 224.

(e) See the articles by Knapp and Ellinghaus. (Supra).

(f) See also *Brown v Gould* [1971] 3 WLR 334; [1972] Ch 53.

(g) See for instance (in tort) *Mallett v McMonagle* [1969] 2 All ER 178 particularly per Lord Diplock at 191; (in contract) *Chaplin v Hicks* [1971] 2 KB 786.

until *Courtney* that damages for a breach of this sort of duty would probably be purely nominal. Certainly it is hard to conceive how the damages could ever approximate to breach of whatever contract might ultimately have eventuated. But that is hardly what a plaintiff would (and perhaps should?) contend for in a case of this nature. Surely the complaint in a case of this nature would be that the plaintiff had been given an undertaking that negotiations were to be commenced, that the plaintiff had made preparation for those particular negotiations, that he had incurred expense by so doing (and in many commercial negotiations this expense could be quite formidable), that the defendant had refused to come to the table and that the plaintiff had thereby thrown away those moneys which he had justifiably outlayed in one form or another in reliance on the agreement that there would be negotiations. In a number of situations these damages would be of a largely liquidated (and at least readily ascertainable) nature *(h)*. The mistake which the Court of Appeal appears to have made, with respect, was to direct its attention to the difficulties of estimating the possible loss under a contract which might never have eventuated. But the plaintiff's claim would be, more usually, for the loss occasioned under the "initial" arrangement (the negotiations) – any loss in respect of what might be termed the "ultimate" contract could presumably only become relevant if there was a stronger arrangement than a contract merely to negotiate.

Another aspect of *Courtney* which deserves comment is that the English Court of Appeal, unfortunately insofar as a matter of principle was concerned, did not take the opportunity to canvass relevant Commonwealth decisions. For instance in *In Re Apps & Sons* [1949] VLR 7 Barry J recognised an agreement as amounting to a "contract to enter into negotiations for the purpose of agreeing on the terms upon which the purchase price .. should be paid." (at p 12). And in *Rudd v Commissioner of Stamp Duties* (1937) 37 SR (NSW) 366 a majority of the Full Court of the New South Wales Supreme Court held the agreement then before it to be an "agreement to negotiate". Since *Courtney* in New Zealand O'Regan J in *Adaras Developments Ltd v Marcona Corporation* [1975] 1 NZLR 324 has held that the term "option" in the context of a particular clause in a commercial agreement conferred on the plaintiff, on the happening of the events stipulated, a right of pre-emption and imposed on the defendant a negative obligation requiring the defendant to refrain from offering other persons the opportunity "of taking up in whole or part the rights for any New Zealand participation" without first making an offer in respect of the same to the plaintiff. These decisions at least recognize that the strict negotiations/contract dichotomy of the common law may be challenged.

One other feature of *Courtney* can be noted. There need, of course, be no wringing of hands over the fate of the plaintiff in that case. The result is quite clearly right – it is the reasoning which is challenged. But if the Court of Appeal had applied the sort of approach which has been suggested herein the Court could quite readily have held simply that (as appears to have been the case on the facts) the performance of any contract to negotiate which might have been suggested that been carried out. The defendant had appointed a quantity surveyor with a view to negotiating and the transaction only come to an end when there were differences over the price. There is no suggestion anywhere in the facts as noted in the judgments that the defendant in terminating the negotiations acted in bad faith. Had the Court of Appeal taken this line then the blunt pronouncement that there can be no such thing as a contract to negotiate would have been uncalled for at least until such time as the opportunity for a fuller consideration of all the various authorities presented itself. It must always be useful for a Court in a case of this nature, to remind itself as Lord Tomlin did the House in *Hillas v Arcos* that, "the problem for a Court of construction must always be so to balance matters, that without violation of essential principles the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains."

(h) Different considerations would no doubt arise in relation to say a contract to make an offer where the damages could conceivably approximate the loss of the ultimate contract.

Judicial brevity – "My Lords, there are several reasons which induce me to be as brief as I can. First, the case in its important general aspects is concerned with doctrines, and to some extent with procedures, with which I am not familiar. Secondly, those general aspects have been examined in great detail and in an authoritative manner by your Lordships who have preceded me. Thirdly, since it is unlikely that any contribution of mine would be regarded as of value in clarifying the law of England, I may at least wind up the consideration of a disastrous case with economy, the lack of which, especially in this class of litigation, is, as others of your Lordships have observed, a notoriously discreditable feature of our jurisprudence." *Cassell & Co Ltd v Broome* [1972] 1 All ER 801, 875, per LORD KILBRANDON.

"AN INCOMING TIDE"

Dr PAUL P HELLER *of Auckland University examines the impact of EEC Law on the national laws of member states.*

". . . The [EEC] Treaty is like an incoming tide. . . . These are the words of Lord Denning MR *(a)* and the treaty he referred to is the Treaty of Rome of 1957 which established the European Economic Community. Here in New Zealand, when we think of the EEC, we are aware of its impact on our exports of primary produce to Britain. But becoming a member of the EEC meant for Great Britain that in "matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal to any statute . . . Any rights or obligations created by the Treaty are to be given legal effect in England without more ado. Any remedies or procedures provided by the Treaty are to be made available here without being open to question. In future, in transactions which cross the frontiers, we must no longer speak or think of English law as something on its own. We must speak and think of Community law, of community rights and obligations, and we must give effect to them. This means a great effort for the lawyers. We have to learn a new system. The treaty, with the regulations and directives, covers many volumes. The case law is contained in hundreds of reported cases both in the European Court of Justice and in the national Courts of the nine. Many must be studied before the right result can be reached. We must get down to it. . . ."

The following short survey of some of the changes brought about by Britian's joining the EEC includes references to case law and to some articles published in legal periodicals, but should not be considered to be a comprehensive or critical study. For the New Zealand lawyer any substantial changes in the law of the United Kingdom are of interest, and in particular changes which inject legal provisions adopted in the civil law tradition of the six original EEC member states into the common law tradition of Great Britain. Apart from this general interest, some information on these changes in Britain could be of practical value for the New Zealand lawyer when considering arrangements with persons and companies in EEC member states (now including Britain). Finally, as New Zealand has always seriously examined, and frequently followed, British legal thought and legislation, our own legislation may in future be influenced by ideas which originated in civil law countries.

The European Communities Act 1972 (UK) has given the force of law *(b)* in the United Kingdom to the directly applicable provisions of the Treaty of Rome (and of other Community treaties), and it provided for subordinate legislation for the purpose of implementing any Community obligation of the United Kingdom or of exercising any rights enjoyed by the United Kingdom under these treaties. The obligations under the Treaty of Rome relate inter alia to the free movement of goods, persons, services and capital between member states of the EEC, to competition among undertakings and to the approximation of such legal provisions as directly affect the establishment or functioning of the common market. In addition, to the specific obligations set out in the Treaty, the Council and the Commission of the EEC have power to make regulations, to issue directives and to take decisions. Regulations have general application, are binding and directly applicable in all member states. Directives are binding upon each member state to which they are addressed, leaving to the national authorities the choice of form and method of implementation. Decisions are binding in its entirety upon those to when they are addressed, and if they impose a pecuniary obligation, are enforceable in member states by the competent national authority.

The Treaty has also established the European Court of Justice as an international, constitutional and administrative tribunal. Member states are required to take the necessary measures to comply with the Court's judgments. Similarly, the EEC Council and the Commission whose act has been declared void or whose failure to act has been declared to be contrary to the Treaty, are required to take the necessary measures to comply with the judgment. Decisions of the Court against private

(a) in *H P Bulmer Ltd v J Bollinger SA* [1974] 3 WLR 202, 209. See comments by Mitchel in [1974] 11 CML Rev 351.

(b) see Wyatt, "Directly applicable Provision of EEC Law" (1975) 125 NLJ 358, 575 and 669.

persons are enforceable through the authorities of the member state in which the enforcement is to be carried out.

Of special interest and importance is the provision of the Treaty about the jurisdiction of the Court, as a constitutional tribunal, to give preliminary rulings concerning the interpretation of the Treaty and concerning the validity and interpretation of acts of institutions of the Community (its Council and Commission). Where such a question is raised before any Court or Tribunal of a member state, such Court or Tribunal *may*, if it considers that a decision on the question is necessary to enable it to give judgment, require the European Court to give a ruling thereon; but where such a question is raised in a case before a Court or Tribunal of a member state against whose decision there is no judicial remedy under national law, that Court or Tribunal *must* bring the matter before the European Court *(c)*.

Under what circumstances an English Court should or should not refer a question to the European Court, was discussed in great detail in the case referred to in note *(a)* supra. In the words of Lord Denning MR *(d)* "... if a question of interpretation or validity is raised, the European Court is supreme. It is the ultimate authority. Even the House of Lords has to bow down to it.... But short of the House of Lords, no other English Court is bound to refer a question to the European Court at Luxembourg.... In England the trial Judge has complete discretion." His Lordship set out in this judgment detailed guidelines as to whether a decision of the European Court is "necessary", and also explained the principles of interpretation to be applied to the Treaty of Rome. His Lordship considered *(e)* that the English Court must follow the same principles as the European Court and he compared the literal interpretation given by English Judges to statutes with the "European pattern" (the civil law system of interpretation) which deduces "from the wording and the spirit of the Treaty the meaning of the community rules". English Courts "must devine the spirit of the Treaty and gain inspiration from it. If they find a gap, they must fill it as best they can. They must do what the framers of the instrument would have done if they had thought of it". A similar rule about "filling a gap" is included in art 1 (2) of the Swiss Civil Code of 1907.

The European Communities Act provides that for the purpose of all legal proceedings any question as to the meaning or effect of the Treaty is to be treated as a question of law which, if not referred to the European Court, is to be determined as such in accordance with the principles laid down by the European Court, and in accordance with any relevant decision of this Court. Judicial notice must be taken of the Treaty and of any decisions of, or expressions of opinion by, the European Court on any such question.

Even before Great Britain joined the EEC, the effect of the Treaty of Rome on the sovereignty of the Crown in Parliament was the subject of a decision of the Court of Appeal *(f)*. The plaintiff claimed the government, by signing the Treaty, would for ever surrender in part the sovereignty of the Crown in Parliament, and in doing so, would be acting in breach of law; he referred in particular to the fact that many EEC regulations would become automatically binding on the people of the United Kingdom and that all the Courts of this country would have to follow the decisions of the European Court.

Lord Denning MR agreed that the sovereignty of the United Kingdom will henceforth be limited and will be shared with others; he also agreed that once the Treaty has been signed, the United Kingdom has taken an irreversible step. His Lordship thought that the treaty-making power rests not in the Courts, but in the Crown, and this exercise of the Crown's prerogative cannot be challenged in the Courts. As to the question whether one Parliament can bind its successors, Lord Denning conceded *(g)* that "[w]e have all been brought up to believe that, in legal theory, one Parliament cannot bind another and that no Act is irreversible. But legal theory does not always march alongside political reality... We must wait to see what happens before we pronounce on sovereignty in the Common Market... We will not pronounce upon it today."

The Belgian Court de Cassation decided *(h)* that the Treaty which created the Community law has instituted a new legal system in whose favour the member states have restricted the exercise of their sovereign powers in the areas determined by the Treaty; this Court held that in the event of a conflict between a norm of domestic law and a norm of international law (such as the EEC law) which produces direct effects in the internal legal system, the rule established by the Treaty must prevail. The German Federal Constitutional Court

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(c) see "Bentil, Nature and Scope of the Preliminary Ruling" (1973) 123 NLJ 922, and Willims, "Preliminary Ruling on European Community Law" (1974) 118 Sol Jo 44 and 59.

(d) at 210 and 211.

(e) at 215 and 216.

(f) Blackburn v Attorney-General [1971] 1 WLR 1037 (CA).

(g) ibid, 1040–1041.

(h) Minister for Economic Affairs v SA Fromagerie Franco-Suisee "Le Ski" (1972) CML Reports 330, 373.

considered *(i)*, however, that EEC law is neither part of the national legal system nor international law, but an independent system of law flowing from an autonomous legal source. Where a conflict arises between Community legislation and fundamental rights entrenched in the German Constitution, the latter must prevail, so long as the competent Community organs have not removed the conflict of norms. This highest German Court considered that the European Court has no jurisdiction to give binding statements as to the compatibility of Community law with the fundamental rights guaranteed in the German Constitution.

In a comment on the German case, the *Economist (j)* referred to a decision of the European Court *(k)* which acknowledged that fundamental rights form an integral part of the general principles of law, the observance of which it ensures; in safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the member states, and it cannot therefore uphold measures which are incompatible with the fundamental rights recognised and protected by the constitutions of those states. The *Economist* added: "That opens up a whole new can of legal worms. Does it mean that the European Court of Justice has to interpret the fundamental rights in Britain's unwritten constitution? Can a Frenchman appeal against a decision by the commission or the council, on the grounds that it conflicts with fundamental rights in the German constitution which are recognised and protected by the European Court of Justice? Or does it mean that citizens of the Nine are separate and unequal before the European Court of Justice? But these are questions for future test cases which will intrigue lawyers and line their pockets."

After these comments about EEC law in general and about the limitation of the sovereignty of EEC member states, reference will be made to certain provisions of the Treaty of Rome which are directly applicable in the United Kingdom and have brought about changes in the laws of this country:

Nationals of all member states of the EEC have the right to move freely within the territories of all these states, to accept offers of employment and to reside in a member state during and after termination of the employment, subject, however, to limitations justified on grounds of public policy, public security or public health. In the case of a Dutch national *(l)* who was refused leave to enter the United Kingdom to take up employment with the Church of Scientology, the High Court asked the European Court of Justice for an interpretation of the provisions of the Treaty and of a relevant Directive adopted in accordance with the Treaty. The European Court ruled *(m)* that the provision of the Treaty and of the Directive issued are directly applicable in member states so as to confer on individuals rights enforceable by them in the Courts of a member state; no further legislative measures are required in member states which have, when implementing the relevant provisions, no discretionary power. The European Court also decided that a member state is entitled, in imposing restrictions on grounds of public policy, to take into account the fact that an individual is associated with some body or organisation the activities of which the member state considers socially harmful, although no restriction was placed upon nationals of the state who wished to take similar employment.

It should be mentioned that the term "nationals", "Nationals of member states" or "nationals of member states and overseas countries and territories" wherever used in the Treaty of Rome are to be understood to refer only to persons who are citizens of the United Kingdom and Colonies, or to British subjects not possessing that citizenship or the citizenship of any other Commonwealth country or territory who, in either case, have the right of abode in the United Kingdom, and are, therefor, exempt from United Kingdom immigration control *(n)*.

Nationals of member states are also entitled under the Treaty to the freedom of establishment in the territory of another member state, including the right to establish agencies, branches and subsidiaries, and to take up and pursue activities as self-employed persons, under the same conditions as laid down for the nationals of the country where such establishment is effected. The term "nationals" includes companies and firms formed in accordance with the law of a member state and having their registered office, central administration or principal place of business within the EEC. This provision does, however, not apply to

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(i) Internationale Handelsgesellschaft mbH v Einfuhr–und Vorrats–stelle fuer Getreide und Futtermittel (1974) CML Reports 540 at 549 to 552.

(j) Of 12 April 1975.

(k) J Nold KG v EC Commission (1974) 14 CML Reports 338; see comment on this case in [1974] 11 CML Rev 334.

(l) van Duyn v Home Office [1974] 1 WLR 1107.

(m) [1975] 2 WLR 760; see Simmonds, "van Duyn v Home Office: The Direct Effectiveness of Directives" (1975) 24 ICLQ 419

(n) Declaration by the Government of the United Kingdom on the definition of the term "nationals", annexed to the Final Act signed at Brussels on 22 January 1972 (on the occasion of the signature of the Treaty of Accession to the EEC), Cmnd 4862-I, 118.

activities which in the other state are connected, even occasionally, with the exercise of official authority.

The European Court of Justice declared *(o)* that this provision of the Treaty is directly applicable in member states, not depending on any Community Directive. In this case a Dutch national, residing in Belgium who had qualified docteur en droit belge and had been refused admission to the profession of avocat in Belgium because he was neither a Belgian national, nor was there in existence an agreement between Belgium and the Netherlands about reciprocal admission to the Bar of nationals of these countries. The European Court was asked for a ruling on what is to be understood by the words "activities connected with the exercise of official authority". The Court decided that the exclusion is limited to those activities which, taken on their own, constitute a direct and specific connection with the exercise of official authority; it only covers a whole profession where such activities are not separable from the professional activities as a whole. But the typical activity of avocat in Belgium, such as consultation, legal assistance, representation and defence of parties in Court (even where the avocat has monopoly rights) are not connected with the exercise of official authority *(p)*.

In addition to granting to nationals of other member countries of the EEC the freedom to take up employment and the freedom of permanent establishment under the same conditions as are in force for the nationals of the particular country where these freedoms are sought, nationals of member states are also entitled to provide temporarily services for remuneration to a client in another member state. The respective provisions of the Treaty of Rome are not directly applicable in member states but refer to Directives to be issued by the Community about liberalisation of specific services. Such directives have already been issued about certain services in commerce and industry, agriculture, insurance and cultural professions. No directive has yet been issued about the temporary activities in another member state of lawyers. A draft directive of 1969 proposed that foreign lawyers should have the right of assisting their client by way of consultation, oral conduct of defence, access to Court files, visit of persons in detention and presence at the preliminary inquiry, always provided that the foreign lawyer works in conjunction with a local lawyer, and that he conducts himself in accordance with the professional rules both of the country where he is established and of the country where he provides the service. This draft Directive was rejected by the European Parliament in 1970, but a working party of the EEC Council is still considering amendments to the original draft in co-operation with representatives of member states *(q)*.

It must be mentioned that three South Pacific states (Fiji, Tonga and Western Samoa) have special arrangements with the European Community and its member states regarding the freedom of establishment and the provision of services. These three Pacific countries, together with forty-three other developing states in Africa and in the Caribbean Sea established under a Convention signed at Lome in February 1975 a special form of association with the EEC in the fields of trade, aid and industrial co-operation. A provision of this Convention says that as regards the arrangements that may be applied in matters of establishment and provision of services, the 46 states on the one hand and the EEC member states on the other hand will treat nationals and companies of member states and nationals and companies of the 46 states respectively on a non-discriminatory basis *(r)*.

In view of the enactment in New Zealand of the Commerce Act 1975, the rules of the Treaty of Rome on competition are of considerable interest. In general, all agreements between undertakings, decisions of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the EEC, are prohibited and "automatically void". This provision may, however, be declared inapplicable if the agreement, decision or practice contributes to improving the production or distribution of goods, or to promoting technical or economic progress, while allowing consumers a fair share of the

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(o) in the case of *Reyners v Belgian State* (1974) 2 CML Reports 305

(p) see *In re Scholer* [1955] NZLR 1190 where it was decided, before the Law Practitioners Act 1955 came into force, that an unnaturalised alien is not "a fit and proper person to be admitted" as a barrister. See also the decision of the Supreme Court of South Australia in *Re Ho* (1974/1975) 5 ALR 304; in this case it was held that a British Protected Person, being neither a British subject nor an alien, may be admitted to the Bar; the learned Judge expressed the view that even if Ho were an alien he could still take an oath of allegiance because even an alien owes allegiance to the Queen while present in her dominions and while he was the holder of a British passport. See also Blackshaw, "Freedom of establishment and the right of legal practice", (1974) 124 NLJ 1055.

(q) see Hoppe and Snow, "International legal practice – Restrictions on the Migrant Attorney" (1974) 15 Harvard International Law Review 298, and Schneider, "Towards a European Lawyer" (1971) 8 CML Rev 44.

(r) For a copy of the Lome Convention see (1975) 14 International Legal Materials 595.

resulting benefit. Any abuse by one or more undertakings of a "dominant position" within the common market or in a substantial part of it, is also prohibited as incompatible with the common market in so far as it may affect trade between member states.

These provisions were modelled on the United States anti-trust legislation, but exceptions have been allowed for arrangements which result in strengthening European enterprises against competititon (mainly from American, Japanese and multinational companies), without being harmful to the consumer. Under EEC law, mergers are against public interest only if they result in an abuse of a dominant position.

These rules of the Treaty and of subsequent EEC Regulations are directly applicable to enterprises; the enforcement of these rules is a function of the EEC Commission which may, on its own initiative or on application by a member state, investigate cases of suspected infringement and propose appropriate measures to bring any infringement to an end, including the imposition of fines. The Commission's decisions are subject to appeal to the European Court of Justice. But these rules also "create rights in private citizens which they can enforce in the national Courts and which the national Courts are bound to uphold" *(s)*.

The European Communities Act 1972 provides for the continued application of the United Kingdom trade practices legislation, notwithstanding that an agreement may be void by reason of any applicable provisions of EEC law, but the Restrictive Practices Court and the Registrar of Restrictive Trading Agreements have been given discretion not to proceed with action under the United Kingdom legislation in view of Community proceedings.

(s) Lord Denning MR in *Application des Gaz SA v Falks Veritas Ltd* [1974] 3 WLR 235, 224.

(t) Re the merger between British Steel Corporation and Lye Trading Company Ltd [1975] 1 CML Reports D 38; this decision is based not on the rules of the European Economic Community Treaty, but upon the similar rules of the European Coal and Steel Community Treaty and of a regulation issued thereunder.

(u) see note *(s)* at 242 and 244

(v) Schorsch Meier GmbH v Hennin [1974] 3 WLR 823, discussed in (1975) 91 Law Quarterly Review 161; see also the decision of the Court of Appeal in *Miliangos v George Frank (Textiles) Ltd* [1975] 2 WLR 555: where the money of account and the money of payment of a contract is in a foreign currency, whether it be on EEC or a non-EEC currency, the English Courts now have the power to give judgment in that foreign currency.

(w) see Dalton, "Proposals for the Unification of Corporation Law within the European Economic Community: Effect on the British Company" (1974) 7 Journal of International Law and Politics 58, and Dilwar Hussain. "Doctrine of Ultra Vires" (1974) 124 NLJ 993.

The rules of EEC law about mergers and dominant position apply also to some mergers of two enterprises within the same member country. A decision of the EEC Commission *(t)* approved the acquisition by the British Steel Corporation (UK) Ltd of the whole or a majority share capital of Lye Trading Co Ltd, a steel stockholder operating almost entirely within the United Kingdom.

In a case before the Court of Appeal *(u)* Lord Denning MR considered that the provisions of the Treaty of Rome about competition and concentration "are framed in a style very different from an English statute. They state general principles. They lay down broad policies. But they do not go into detail. The words and phrases are not defined. There is no interpretation clause. . . . The European Court of Justice interprets them according to the 'wording and spirit of the Treaty'. . . . These provisions create new torts or wrongs. Their names are 'undue restriction of competition within the common market'; and 'abuse of dominant position within the common market'. Any infringement of those activities can be dealt with by our English Courts".

Another provision of the Treaty of Rome which was considered by the Court of Appeal *(v)* obliges member states to authorise payments connected with the movement of goods, services or capital to be made in the currency of the member state in which the creditor resides. In this case goods had been supplied by a German company under contract in German currency to an English buyer. The German company claimed the debt in *Deutsche Mark* in the English Court. Lord Denning MR held that it would be contrary to the spirit and intent of the Treaty of Rome to preserve and apply the English rule by making a creditor in a member state accept judgment against a defaulting English debtor in depreciated sterling; the rule that an English Court could give judgment only in sterling no longer applied.

The Treaty of Rome refers to the need for co-ordinating the company laws of member states in order to provide equivalent protection of members and of other persons having dealings with companies. This was done by way of Directives issued by the Community. In order to bring the company law of Great Britain into conformity with these Directives, the European Communities Act provides:

(i) that in favour of a person dealing with a company in good faith, any transaction decided on by the directors shall be deemed to be within the capacity of the company or of the directors to enter into; this rule modifies the ultra vires doctrine *(w)*;

(ii) that those who act in the name or on

behalf of a company at the time when it has not been formed shall, subject to any agreement to the contrary, be personally liable on the contract;

(iii) that the registrar of companies publish in the *London Gazette* notice of the receipt or issue of certain documents;

(iv) that a company shall not be entitled to rely against other persons on the happening of certain events (eg an alteration of its memorandum or articles of association, a change among its directors) if the event had not been officially notified at the material time, and is not shown by the company to have been known at that time to the person concerned, or if the material time fell on or before the fifteenth day after the official notification and it is shown that the person concerned was unavoidably prevented from knowing of the event at that time;

(v) that a company must forward to the registrar of companies a printed copy of any statutory provision which amends its memorandum or articles of association

(vi) that a company must mention certain particulars (such as its place of registration, the address of its registered office, the fact that it is a limited company if the word "limited" is not part of its name, and if it refers to its share capital, the amount of its paid up capital) in all business letters and order forms.

In addition to these provisions of the Community law and of the European Communities Act, which change some basic principles of English company law, the original six EEC member states signed in 1968 a Convention on the mutual recognition of companies and legal persons; the United Kingdom has undertaken to become a party to this Convention which dispenses with any formal decision or declaration in member states about the recognition of the incorporation of the company in anoter member state. Further conventions and directives have been drafted dealing with international mergers of joint stock companies, on bankruptcy, on the formation and the capital of a company, on annual accounts and audit, and on the internal structure of companies.

In concluding these notes about some of the legal implications for Britain of becoming a member of the EEC, reference must be made to the large number of international conventions drawn up by the Council of Europe, and organisation with a wider membership of European states than the EEC. Even if the implementation of the rules of the Treaty of Rome in the economic sphere has not made the progress hoped for by the original planners, and even if a monetary, economic and – hoped for – political union is still in the distant future, much has already been achieved in the legal field and there is considerable scope for study by the comparative lawyer and anybody interested in developments in the law of the United Kingdom.

Of special interest is the draft European Company Statute, which allows companies operating in at least two of the EEC member states the right to be registered as a European Company in a European Register of Commerce, instead of registration under the member states' national company laws. The Statute provides, following the rules of company law adopted in some continental member states, for worker participation in decision making, and for a two-tier company structure (a management board and a supervisory board).

As in the field of company law, the EEC has also taken steps to unify the national laws of member states relating to patents and trade marks. A Convention on the Grant of European Patents was signed in 1973 which provides inter alia for the establishment of a European Patent Organisation and of a European Patent Office. A single patent application will lead to the grant in all member states of an identical patent with the same scope of protection and the same length of validity. In addition, a Convention on a European Patent for the Common Market has been drafted which will provide for a single Community Patent effective throughout the territory of the EEC *(x)*.

Finally a Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments was signed and ratified by the original six member states in 1968. The United Kingdom undertook in the Act of Accession to accede to this Convention.

(x) see Manson, "The EEC Patent Union and Polilitical Integration" (1973) 12 Columbia Journal of Transnational Law 342.

The Habeas Corpus Act – "Bishop Burnet related a curious circumstance respecting that important statute the Habeas Corpus Act. 'It was carried,' he said, 'by an odd artifice to the House of Lords. Lord Grey and Lord Norris were named to be the tellers. Lord Norris being a man subject to vapours was not at all times attentive to what he was doing. So, a very fat Lord coming in, Lord Grey, at first for a jest counted him for two, but seeing Lord Norris had not noticed it, he went on with the misreckoning. So it was reported to the House and declared that they who were for the Bill were a majority though it indeed went on the other side; and by this means the Bill passed'." from *The Law* Leslie Missen.

A POLITICAL TRIAL?—IV

NLA BARLOW *concludes his four-part account of the trial of the "San Quentin Six" by pondering broader and even more disquieting aspects. Earlier parts appeared at [1976] NZLJ 86, 114 and 139.*

The San Quentin trial gives one much to ponder about regarding the state of American justice and penal administration. In a country on the brink of celebrating its two hundredth anniversary of freedom and which has during that period constructed one of the most refined and sophisticated systems of civil rights history has ever seen, it seems a disquieting contradiction that trials of this kind are still going on. While not seeking to predict the jury's verdict in any way now that the matter has finally got to Court, there are some disturbing features concerning the initiation of these proceedings that cannot be safely ignored. In many respects the trial has the trappings of a political inquisition. For one thing it is extremely doubtful that the proceedings had they been commenced, say, in New Zealand or the United Kingdom or any other common law country for that matter, would have ever got off the ground. The grand jury whose constitutional function it is to prevent the issue of vexatious or oppressive indictments, marked as they have been in this case by juror resignations and a bare majority vote to indict the six were presented with extremely weak evidence which unless buttressed with new evidence during the trial proper will certainly not survive the appellate process even if a trial conviction is obtained. There were no witnesses to the killings. It is not even known whether they occurred before or after George Jackson's death. A perusal of the grand jury transcript shows that the defendant's names are rarely even mentioned. The single mention of defendant Fleeta Drumgo's name is that of a San Quentin guard who says that he kicked another guard during the Adjustment centre confrontation. How could this possibly be sufficient evidence to convict a man of five counts of murder? With defendant William Tate, the sole evidence is a guard's testimony that he saw him tie up another guard and thought he heard his voice. Similarly with the other defendants. And what if the escape attempt is proved to be a set-up to murder George Jackson as Marin's public defender Frank Cox alleges it to be? It is not difficult to see in the San Quentin trial the same unmistakable pattern of other political trials where the Nixon Administration policy of drawing indictments to silence or discredit establishment critics such as Abbie Hoffman, Tom Heydon, Daniel Ellsburg, Bobby Searle, the Vietnam Veterans Against the War, Father Branigan and Sister Elizabeth, Angela Davis and a host of lesser-knowns has been practised. Often they have been rammed through cowering grand juries by manipulative and high-handed prosecutors. Almost without exception the defendants have ultimately been acquitted but at a great cost to themselves financially and their cause morally.

Without an independent judiciary, the responsibility for determining whether there is sufficient evidence to indict a defendant should be left with the people, but grand jury selection and operation procedures should be strengthened. They should always be presided over by a Judge, not the District Attorney as is often the case. In this, the most complex of heterogeneous societies, one can appreciate how essential to the ends of justice are the myriad of technical constitutional rules that sometimes seem to bog down American judicial machinery. In this case, where there is a serious possibility that the FBI and CIA, both of whom have not hesitated to abuse legal processes in the past and who are no strangers to killing for political ends both inside and outside of the United States, are implicated in the escape conspiracy, such rules are the only protection a defendant has against a miscarriage of justice.

Even if the defendants are convicted, their deaths or permanent incarceration is not going to end the bloodstained history of violence that has been a fact of San Quentin life over the past decade. This problem is not peculiar to San Quentin. It pervades the whole of the California penal system. It has its origins first and foremost, as Jessica Mitford so eloquently exposes in *Kind and Usual Punishment*, in the institution of the indeterminate sentence itself. In California, Judges have very limited powers of sentencing. They may set only an indeterminate term such as 1 to 10 years, or 1 to 20 years, or 5 years to life (which can and often does mean natural life, not the average of 9 to 12 years it means in New Zealand).

The body responsible for determining a prisoner's precise sentence is the Californian Adult Authority. This nine member, full-time, million dollar budget board, is advertised as being "composed of persons who have demonstrated skills, abilities, and leadership in many fields". In fact its Reagan-appointed personnel consists of a retired dentist and eight former law enforcement figures – "eight cops and a dentist", as Miss Mitford puts it. It is akin to leave the power to sentence prisoners with a board of Crown Solicitors, prison superintendants and policemen – unlike the independent judiciary and parole board it presently resides with in New Zealand and other common law countries. The result has been that first-offender inmates in California suffer the longest medium sentence in the United States and possibly the world. Worse than this, the power can be used to detain prisoners indefinitely, particularly militant blacks, on the basis that they are not yet "rehabilitated" which in truth means that they choose not to accept white middle-class and capitalist values. Only one of the San Quentin six, Hugo Pinnell, is serving an official life sentence, but the five others have served or are serving de facto life sentences. Defendant William Tate, now 30, was detained for 10 years, the maximum permissible (the minimum was one year), for a non-grievous assault committed as a 19 year old youth. He would be unlikely to have served more than that in New Zealand had he actually murdered his victim. Defendant Fleeta Drumgo was convicted of second-degree burglary and sentenced from 6 to 15 years. He has served seven years to date. Eight to go. A third defendant, Luis Talamantez, has so far served 12 years in prison for the theft of $130 when he was 18. George Jackson himself served 11 years in prison before his death in 1971. His original crime – a $70 theft. An offence that would attract a moderate fine and perhaps probation in New Zealand. The same that Spiro Agnew and most other white collar criminals get in the United States.

Like George Jackson, the author of *Soledad Brother* which has enjoyed world-wide publication, all six San Quentin defendants have sought to raise their consciousness above the squalor and depression of prison life by study and writing. Some have become Marxist – conversions that have not exactly endeared them to the ultra-conservative Adult Authority. Defendant Luis Talamantez was recently admitted as a member to the New Directory of American Poets. But no human spirit, no matter how elevated, can entirely extinguish the smouldering frustration of indefinite detention. This is poignantly echoed by George Jackson in this passage from a letter to his mother in 1968 just two years before his death:

> "No transfer for me; they turned it down. No relief in my ordeal, twenty-four hours a day in this cell. I've been in here for over eighteen months now; in prison eight years next month. I've forgotten what it was that earned me this. . . .
>
> "It is clear that they are not going to give me a chance. You were right, that is exactly what they fear. Just because I want to be my black self, mentally healthy, and because I look anyone who addresses me in the eye, they feel I may start a riot anytime. I've stopped more trouble here than any other black in the system. . . . As an individual, I don't worry about my future. I know my ideals will prevail, so I dont't worry about that. They can't harm me because the reality is that I have nothing to lose but my chains. . . ." (*Soledad Brother*, pp 138, 139).

More guards and more inmates will surely die until the indeterminate sentence, a great blight on Anglo-American jurisprudence, is banished from the Californian statute books. Conditions inside the prisons themselves need no less urgent attention. Prison litigation in this country has already won judicial acknowledgement that the legal status of a prisoner is something more than that of an animal over which prison officials have absolute power.

But the conditions of solitary confinement to which the San Quentin defendants have been assigned would make Papillon feel at home. The Marin Citizens for Due Process, a middle class group of concerned citizens, who are supporting the San Quentin Six Defence Committee, have visited the prison and described their conditions there as follows:

> "They have lived 23½ hours a day in 7 foot x 7 foot cells without windows for direct sunlight with only a combination toilet-sink and a steel plate bunk. They are fed through a steel slot in the door and prohibited from all outdoor exercise and participation in prison, vocational, and educational programs. When removed from their cells they are always skin searched and locked in neck-chains, manacles and shackles. For four years they have not been allowed to touch another human being except their attorneys during Court proceedings."

Nor are any of the defendants strangers to the Adjustment centre. Many of them have spent the majority of their term there. Committed originally for filing affidavits or suits against prison authorities or publishing literature attacking prison conditions, or for joining the race-proud Muslims. An act which also courted bad conduct reports and parole refusals and, extraordinarily enough,

near-starvation. For when prison officials discovered that their religion forbids the consumption of pork, Muslim inmates were fed with regular lashings of it. Needless to say, pork had rarely been seen in prison before!

Racism, which the United States has strenuously sought to remove from its schools, restaurants, and buses, still survives in prisons and penal employment practices. More blacks in responsible official positions would be least relieve the appearance of racism in prison administration. Sustained efforts to recruit humane and properly qualified personnel must be made. Most of California's prison guards are immigrants from the deep south and many little more than semi-literate thugs. The *San Francisco Chronicle* recently carried a story (Thursday, 4 September 1975), in which New York State only that month threatened dismissal of prison officials belonging to the Klu Klux Klan – which unfortunately is still very much alive throughout America. Up until then, Justice Department policy was to permit Klan membership providing officials did not participate while at work! Hardly reassuring to a black man behind bars.

In the brutalised atmosphere of San Quentin prison, in which ex-inmate James Carr in his autobiography *Bad* gives a black a one-to-three chance of leaving alive, stories of official abuses are so commonplace they are no longer listened to. During the trial a San Quentin guard admitted to the Court that both racism and brutality were accepted practices of the prison administration. He confirmed that many of the inmates from the Adjustment centre were "bruised" by the guards after the alleged escape incident. Actually they were photographed, chained and naked on the grass. The inmates say that they were kept there for eight hours and subjected to all kinds of physical brutality – kicked, beaten, gassed, burned with cigarettes, and wounded with shotguns. In Court, days later, several of the men opened their shirts to expose their wounds for all to see.

In the same year San Quentin guards gassed to death a black mentally unstable inmate who refused to leave his cell because he was afraid of being beaten. This, like many other incidents of its kind, sparked off a round of protests from the other inmates and further contributed to the seething tension that has built up between keeper and kept in this prison.

Prior to his present trial, San Quentin defendant Hugo Pinnell claims to have been assaulted three times in 30 days. Before a Congressional Subcommittee his counsel, Edwin T Caldwell, described the wounds sustained by his client, including fractured teeth and lacerations requiring sutures. Said Attorney Caldwell to the Committee:

> "The situation has gotten so bad that my client is fearful even of leaving his cell while at San Quentin. I will state for the record that I am a registered Republican from a conservative background. This is such a shocking thing for me that I can't believe it exists."

After his teeth were fractured, Pinnell was permitted to go to the prison dentist to have his damaged teeth pulled. When the dentist began to prepare the novocaine, one of the accompanying guards (who was also one of the guards who assulted Pinnell), told the dentists not to give any pain killer but to "chain the animal in the chair and do it like that". And that, says Pinnell, was the way it was done.

San Quentin prison, like all other American prisons, has too a long and bitter history of racial conflicts between inmates. Until recent years both black and brown men (Chicanos) were terrorised by powerful organised and well armed white inmate groups who generally called themselves "Nazis" and adopted a style based on this subculture. With the growth of black pride and education that followed the advances made in the early sixties, black inmates formed themselves into their own groups to resist the power and brutality of the white inmate groups. The most influential of these was the Muslims who imposed a strong sense of discipline, pride, and race loyalty, upon its members. White supremacy was no longer accepted. After a series of bloody clashes involving countless assaults and deaths at the hands of the "Nazis", Jackson and his disciples finally won the respect, if not the acceptance, of the other racial groups. By sitting in the cushioned front chairs instead of the broken down wooden back benches traditionally reserved for blacks in the San Quentin television room, for example, they integrated this prison facility. In the process they acquired a few broken heads and bad conduct reports from officials for stirring up trouble. But they were successful in winning equal rights in regard to this and other prison facilities.

They then turned their efforts towards solving racial conflicts between inmates and ultimately began building up a united prisoner movement aimed at protesting prison conditions and treatment and eliminating the racism still practised by San Quentin guards. An alliance between black, brown, and white inmates shocked and frightened the prison administration who had always found it convenient to encourage racial divisions to defuse situations involving discontent with their own common condition. This indeed touches on the motive the defence say the FBI and CIA, those perennial villains of American criminal history, had for disposing of Jackson. Both of these

organisations had actively infiltrated radical black groups and sought to destroy any unified prisoners' movement and links with outside groups such as the Muslims. They were, after all, subversive anti-capitalists. They were Marxists. Muslim leaders Malcolm X and Huey Newton had already been disposed of. It is common knowledge that their deaths were no accidents.

Meanwhile the San Quentin six continue to stand trial. Whether they are found to be cold-blooded murderers as the State contends, or six oppressed men, singled out for their outspoken political fervour (like hundreds of radical young American defendants before them, as they say) may well depend upon whether there is some universal truth in the belief of old Fastenko, one of Solzenitsyn's cellmates in the Gulag Archipelago, who felt that "to stand up for the truth is nothing. For truth you have to sit in jail!"

We have to wait upon a jury verdict for the anwsers to these questions.

OF SHIRTS AND SUITS AND LIGHT

MR DM PALMER *finds fault with the system of justice in the garden city and offers some advice.*

The sartorial problems faced by those who practise in the Supreme Court were first brought to my attention many years ago when I was employed as a law clerk by a relatively large firm which had four partners who appeared regularly in Court. Naturally I was in awe of all practitioners, especially those whose forensic brilliance enabled them to play *Abide With Me* on the heartstrings of juries. In my innocence, I assumed that their Court clothing would match the pristine beauty of their arguments.

Alas, illusions are made to be shattered – as mine were by the affair of The Office Shirt (hereinafter referred to as TOS). One fateful day one of my employers asked me to step down to the Supreme Court and extract TOS from the firm's locker and take whatever steps seemed appropriate to get it clean. Doing my best not to gag at the musty smell, I groped inside the locker in search of TOS and finally found something on the floor, beneath an old bar jacket. Hauling the object out into the light I discovered it to be a shirt about the size of a small pup tent (so as to cover extremes of anatomical dimensions), that it was a light grey/brown in colour, and that paper clips had been threaded through two holes where the more organised would have inserted collar studs. Apart from signs of years of wearing without benefit of washing, it was also apparent that some desperado had used its tail to clean his shoes. The smell suggested the penultimate stages of putrefaction.

It is pointless to traverse my frustrating and fruitless attempts to clean this loathsome object. Suffice to say that it was finally consigned to the rubbish bin and a replacement purchased.

Years passed and in due course I was admitted and allowed to appear in the Supreme Court on undefended divorce days, with the result that I had to personally face the problem of Court dress. Having been born within the last 40 years I had never worn a shirt which did not have a collar attached to it, and so found the process of bludging paper clips from Court staff and wiring stiff collars on to the replacement TOS not only difficult, but anachronistic. Fortunately, this problem was solved very soon after when our office had shown the son of a Canadian barrister around the local Court scene. By way of thanks, his father sent two Court shirts to each of us in the office. These are made for the Canadian Bar Association and are like a normal one piece shirt except that the attached collar is of the old fashioned wing variety. They can be washed in a washing machine and the collars do not need starching, just normal ironing. I am prepared to make one of mine available if the New Zealand Law Society would like to try to arrange for a "run" to be manufactured in New Zealand. These shirts are a real boon. No more starched collars cutting into one's neck, no more paper clips, no more trying to find someone to starch collars and, glory be, no more TOS.

All the above is really a digression since the problems of TOS are essentially those of sanitation and convenience. My real problem arose as a result of the hallowed necessity to wear a "dark" suit in the Supreme Court. At first there was no difficulty as I only owned one suit, a sort of dark grey/black affair which was suitably dowdy.

The problems arose when I decided to buy a

second suit. I told the tailor that I wanted a dark material suitable for the Supreme Court. He pointed out that dark blue was worn by quite a few of his lawyer clients and seemed acceptable to the Court, but went on to say that blue did not "go" with my colouring. He suggested a dark green, pointing out that this would be appropriate for the Supreme Court and at the same time would add the bit of "dash" now badly needed in view of the ravages of the years. While accepting the latter suggestion I was doubtful about the former, so he gave me a sample of the material we had chosen and I took this down to the Supreme Court where I examined it with all the Court lighting turned on. It seemed dark and dowdy, and therefore acceptable, so I ordered a suit made from this material. The end product certainly looked dashing in the daylight but was just as dark and anonymous as my other suit when I came to wear it in the Supreme Court.

Then came the crunch. Twenty-six years or so after the foundation stone for the new Supreme Court at Christchurch had been laid, the old Supreme Court was finally closed and we had to move into a new temporary Court. Unlike the old Court, this new building was apparently designed around the theory that the people using it ought actually to be able to read their briefs and was therefore brightly lit with neon strip lighting (with "daylight" tubes). Under these my previously "dark" green suit appears positively prismatic, indeed, almost fluorescent. So many comments have now been made about this garment that I can no longer wear it in the Supreme Court at Christchurch, although it still looks "dark" in the Supreme Court at Wellington and in the Court of Appeal.

All of which brings me to the real point of this rambling tale. Everyone agrees that the law should be certain. Very well, if we are to wear "dark" suits in the Supreme Court, surely we are entitled to a definition of the word "dark". My researches indicate that it may be impossible to define that word but it should be possible to scientifically describe the parameters within which a suit may be judged for "darkness".

Why is it that my green suit appears "bright" in the Court at Christchurch and "dark" in the Court at Wellington?

The answer is that colour only has meaning in relation to light. The one cannot exist without the other. In total darkness everything of every colour appears black. To take a less extreme example, a red flower may appear "dark" in a very weak light and "bright" in intense daylight. In other words, the intensity of the light modifies the colour. The more intense the light the brighter the colour.

This, however, is not the end of the problem because light may vary in intensity but also in quality. The quality of light will depend upon its source. All light coming from whatever source will have colour which is called its colour temperature and can be measured by an instrument called a colour temperature meter. This device measures colour in degrees Kelvin. Sunlight tends to be blue and measures about 6,000 degrees kelvin at midday on a sunny day. Ordinary tungsten light bulbs tend to give off a brown colour (getting browner as they age) and measure about 2,000 degrees Kelvin. So, our red flower may appear "bright" in sunlight and "dark" under tungsten light.

When we look at any object we see it because of the light which is reflected from it. It follows that what we see will depend upon a combination of three things:

1 The intensity of the light source.
2 The colour of the light source.
3 The object which we are examining.

It is immediately apparent that the lawyer selecting a suit only has control over 3 above. Numbers 1 and 2 are in the control of those who construct the Court buildings. The reason that my suit is "bright" in one Court and "dark" in another, is that in one building the light source is bright and blue, whereas in the other it is dull and brown.

I have already demonstrated that the colour content of light can be measured. The intensity can also be measured scientifically in lumens. This measurement can be made at the source of the light or at the point where the light hits any object such as a lawyer standing in Court.

My suggestion is this. The Jusitce Department should specify a set of lighting conditions which will prevail at all Courts in the country, ie there should be a guarantee that a lawyer standing at any table within the bar in any Court would be lit by light of an intensity of X lumens with a colour temperature of Y degrees Kelvin. Once these criteria were laid down, common sense could then decide what, under these controlled conditions, would be a "dark" suit and what would not. Until this is done, a suit which is "dark" in one Court may appear "bright" in another.

If the Justice Department is prepared to accept my suggestion, then I am prepared to go further and to set out suitable criteria in lumens and degrees Kelvin. These will, of course, be designed to ensure that my green suit will appear "dark" in all Courts.

In the meantime, does anybody in Wellington want to purchase a secondhand green suit guaranteed to appear "dark" in both the Supreme Court and the Court of Appeal in that city?

DICTATING TASTE AND TRAVEL

Dr R G LAWSON *continues his Occasional Notes from Britain*

The purchase by the Tate Gallery of a load of old bricks has predictably had the philistines girding their loins. Amidst all the arguments deployed by the trustees to support their purchase, I sought in vain for the obvious, indeed the only, reply: that since this was an example of modern art, it was a legitimate purchase for any gallery to make, whether, as such an example, it was good or not.

But what was yet more disturbing was the action of the Minister for the Arts. Since the Tate received handsome sums of taxpayers' money, he would have to dilate seriously on whether old bricks were a legitimate item for such money to be spent on. Well, I maintain it is none of the Government's business to tell us what is or is not good art. This is the real issue to come out of this brouhaha, but predictably nobody seems to be saying so. But you can imagine just what the press would say (indeed goes on saying) when Soviet officialdom savages a display of officially disapproved or unapproved art.

These are not the only disturbing straws in the breeze. Take, first, the case of *Congreve v Home Office*. Some while ago, the cost of a TV licence rose from £12 to £18, the increase due to come in force on 1 April. Not all were fools, however, since they realised that, if their licence was due to expire at any time up to the end of June, it was worth their while renewing it before 1 April, and so saving £6 at the cost (on a pro-rata basis) of some £2, a net gain of £4. Realising the effect of such thrift on BBC revenues, the Home Office instructed the Post Office that licences were only to be renewed on their expiry date, or from their expiry date, and that anyone who had got in before this order would have his new, overlapping, licence revoked.

True enough, the Home Office is empowered to revoke licences; but for a doughty solicitor, Mr Congreve, this power was not to be used oppressively. At first instance, Phillips J disagreed. The citizen, he said, had always an alternative, to get rid of his telly. This, as a sound reason for anything, defies comment.

The Court of Appeal was much more of heroic build. Speaking ringingly of the abuse of executive powers, and the rights of citizens to live without official and officious intermeddling, it declared the actions of the Home Office ultra vires. Just to put the boot in, the Ombudsman slated the Home Office as well. So now an order has gone out restoring to those who had their licences revoked their precious piece of paper costing a mere £12.

But not every Court is a Court of Appeal, and not every Judge is Lord Denning. Consider now the action of Mr Justice Dunn. He has recently ordered a husband and wife, now contesting an unseemly custody issue, not to discuss the case at all with the media. Since a Member of Parliament already had an official concern with a previous aspect to the case, and since the press is wont to report parliamentary proceedings, he, too, is effectively restrained from bringing the case before the House. Small wonder that he is going to bring the matter before the Privileges Committee.

Quite apart from this special point, it really does seem iniquitous for a Judge to take such powers unto himself. Yet what sort of example is he set? *Congreve v Home Office* we've already seen. But what about *"In re the Angolan Mercenaries"?* The story concerns British citizens, born and bred, who wish to fight for the pro-Communist forces in Angola. Authority did not wish them so to do, so they were bailed up at Heathrow while an unedifying search went on for a suitable law to prevent their departure. There was none, so their passports were confiscated, only to be returned when they promised not to go (or return) to Angola.

In strict theory, this action has no significance. No one needs a passport to leave his own country; nor does he need one to enter a country – any proof of identity will do. But you know and I know that without a passport, you are stuck. Your liberty to come and go is effectively dead and buried. The old executive power to control a subject's movements, the writ of ne exeat regno as it was called, long since ineffective, has been summoned from the grave.

So, against all my training and sentiment, I find myself praying for a Bill of Rights guaranteeing the liberties which we believed we had but which are shown to depend on such fragile

foundations and superior good will *(a)*. Lord Denning will not always be with us, nor will Mrs Justice Heilbron who declared the right of a woman to have children a fundamental human right and who (over the vehement protest of the mother) prevented the sterilisation of an 11 year old girl of only slightly less than normal intelligence. It is good, therefore, to hear of a Labour Party discussion paper urging the introduction of just such a Bill, incorporating the European Convention on Human Rights. Quickly, please.

(a) The JOURNAL has made the same point in respect of the New Zealand situation: see [1975] NZLJ 589.

CORRESPONDENCE

Sir,

Barrister or Witch Doctor?

Mr Dugdale has scored again in your first issue for the year and refreshingly so, but I doubt very much that the public interest will be served by stripping the barrister bare of trappings. Unlike the practice of medicine or accountancy, the practice of law is a game to be played by the rules, the infringement of which will often bring sanctions out of all proportion to the import of the merits of the case at hand. Our mentors warn us against taking ourselves too seriously, taking our losses with fortitude and our wins with humility and playing the advocate with a certain measure of objective detachment. So that whether one believes in some divine delegation of authority through the instrument of the judiciary, or the sheer farce of the traditional concept of justice, it is paramount to the effective working of the system, and indeed our own emotional well-being, that the sense of gamesmanship prevail.

I trust it would not be overstating the case to suggest that behind all this is a driving archetype, to use a Jungian term, which one would expect to find recurring throughout the history of legal process as we know it. So it was with some relief that I stumbled on Huizinga's "Homo Ludens" now enjoying a revival in the Paladin series lamenting over homo sapiens and homo faber and providing a colourful interpretation of man's instinct for play as a fundament of human culture. He has a whole chapter devoted to "Play and Law" which makes commendable reading and in which he states " – it seems to me that it (the costume of English Judge and Barrister) has little to do with the vogue for wigs in the 17th and 18th centuries". "Functionally it has close connections with the dancing masks of savages". And if that is not enough to whet your appetite then your disgust will not be assuaged by any amount of argument. Add a little reading on the importance of myth to the surival of reflective conciousness and you may react with a little more caution to the emotive deprecations of the "childish desire to dress up". Profound thinkers have observed good reason for the symbols of authority and adjudication to be dressed in head-dress and robes ranging from the feathered head of an Indian chief to the Urim and Thummam upon the High Priest of Israel or the wig and gown on a mere mortal involved in the intricacies of judging one's fellow man in New Zealand. It has been the purpose of those outside the totalitarian societies to endeavour to keep the human element in the judicial process at the level of the lowest common denominator for obvious reasons. One senses this difference in a symbolic sense and in a way which seems to affect even the adjudicators themselves when one compares practice in the Supreme Court to that in the Magistrates' Courts (E&OE).

Having mentioned an area unstated in Mr Dugdale's comment, designedly or no, one can only sympathise with the practicalities of the "progressive view" if only it would address itself a little more to elucidating how the public interest could be better served. The speechlessness in any police Court is evidence enough of the need to portray far more basic attitudinal changes in those involved in the process of law than the mere elimination of the head-dress. But sufficient unto the day is the comment hereof and this writer had better leave such considerations for another time. Suffice to say that liberal thinkers have set themselves to demythologising with little appreciation of the sociological effects thereof. Perhaps it is time for a little more profound debate on the issue.

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The primary retainer – "He gives to his client the benefit of his learning, his talents, and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law – he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other license which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer." Mr Justice Crampton.