The New Zealand
LAW JOURNAL

6 July 1976 No 12

NEW ZEALAND AND THE GLORIOUS REVOLUTION

The decision of Sir Richard Wild CJ in *Fitzgerald v Muldoon* (Wellington 11 June 1976) is an occasion for dancing in the streets *(a)*. rejoicing may be confined to lawyers, lay people finding it hard to see why what happened in England in 1688 should be of any relevance to contemporary New Zealand. Nonetheless, rejoice we should for the superannuation case affirms in ringing terms the classical orthodoxy of our constitutional arrangements. The decision stands as a signal example of the contribution that tradition in the culture of the law can make to ordered liberty. And *Fitzgerald's* case removes some of the effects of the Attorney-General's unfortunate exercise of his power in April 1976 to stay private prosecutions arising out of the same conduct of the Prime Minister dealt with in the case ([1976] NZLJ 169).

Three days after the Prime Minister was sworn in he issued the press statement complained of in the proceedings. The statement of 15 December 1975 purported to give effect to the National Party's election policy to abolish the New Zealand Superannuation Scheme and refund all contributions to employees. The offending paragraph of the statement was:

> "The compulsory requirement for employee deductions to the New Zealand Scheme will cease for pay periods ending after this date. Mr Muldoon said that he recognized that because of arrangements made for payment of wages and salaries in advance through computer systems or by other means, deductions would in some cases continue for limited periods. All deductions and contributions, including any which may be made from now until 31 March 1976, will be returned to employees through the income tax refund system or could be transferred to another scheme. Similarly, the compulsory requirement for employer contributions will cease as from today in respect of salaries or wages paid from now on."

In a further statement issued on 23 December 1975 the Prime Minister said:

> "... the Government had already made it clear that the superannuation scheme finished on December 15 and the compulsory requirement for employee deductions and employer contributions ceased for pay periods ended after that date. Empowering legislation, with retrospective effect, would be introduced early in the 1976 Parliamentary session."

At the time the proceedings were issued and the case was decided Parliament had not been called together so no legislation implementing the Government's policy had been passed. There was evidence that Parliament had been summoned for 22 June 1976, 10 days after the date of the decision.

The New Zealand Superannuation Act 1974 established an earnings-related superannuation fund. The scheme is a compulsory one. The Act requires that contributions be made at a prescribed rate by employees on their earnings with matching contributions by their employers. The employer is required to deduct the amount of the employee's contributions from the gross earnings of the employee. The plaintiff, a clerk in the Department of Education, was not a member of the Government Superannuation Fund established under the Superannuation Act 1956; neither was he a contributor to any approved alternative

(a) The phrase has an honoured place in the literature of the constitutional law of the United States, Kalven, "The New York Times Case: A Note on the Central Meaning of the First Amendment." [1964] Sup Ct Rev 191.

scheme referred to in the New Zealand Superannuation Act 1974. Accordingly, when the plaintiff became an employee of the Crown in June 1975 he began to make contributions to the New Zealand Superannuation Scheme. The evidence showed that from and including the pay period ending 11 February 1976 no employer's contributions were paid in respect of the plaintiff's employment. The learned Chief Justice found: "To that extent he has a direct interest and he has suffered a loss which, though small, is of monetary value. In all the circumstances of this case I think he is entitled to sue."

The plaintiff sued the Prime Minister, the New Zealand Superannuation Board, the Attorney-General and the Controller and Auditor-General. Against the Prime Minister the plaintiff sought a declaration that the announcement that the compulsory requirement of the New Zealand Superannuation Act 1974 requiring deductions from employees and employer contributions should cease as from December 15, 1975, constituted an exercise of a pretended power of suspending of laws or of the execution thereof and was accordingly illegal by virtue of s 1 of the Bill of Rights 1688. He asked for a mandatory injunction requiring the withdrawal of the announcement and instruction and an injunction restraining the Prime Minister from continuing to instruct the Superannuation Board to refrain from taking any action to enforce payment of contribution deductions and employers' contributions pursuant to the Act. The plaintiff sought similar declarations against the Attorney-General concerning the failure of the Crown as employer to make deductions and contributions in respect of the plaintiff's own earnings. Against the Controller and Auditor-General he sought declarations relating to "the alleged failures of the Superannuation Board, and a declaration that the Controller and Auditor-General is entitled to call on its members to show cause why they should not be surcharged." The plaintiff also sought injunctions against the Prime Minister and mandamus against the members of the Superannuation Board.

Sir Richard Wild CJ's disposition of this potentially embarrassing case resolved neatly the tension between principle and expediency. On the one hand he stared in the face a frontal attack upon the sovereignty of Parliament and the rule of law. Without compromise he branded the occasion for what it was. On the other side he faced the practical problem of potential administrative chaos in setting the Superannuation Act going again when everyone knew that not only was it the Government's intention to abolish the scheme but that they had the numbers in Parliament to do it. He avoided that problem by the common sense solution of adjourning the proceedings for six months.

The Chief Justice vindicated principle by declaring that the Prime Minister's announcement of 15 December 1975 was illegal as being in breach of s 1 of the Bill of Rights 1688. He issued a declaration to that effect. He held that by making the statements he did the Prime Minister was purporting to suspend the law without the consent of Parliament. The Chief Justice held that the Prime Minister having received his commission by Royal authority and having entered upon his duties made the statements in the course of his official duties and "by regall authority" in terms of s 1 of the Bill of Rights. Having issued the declaration all other matters were adjourned for six months because "it would be an altogether unwarranted step to require the machinery of the Act now to be set in motion again, when the high probabilities are that all would have to be undone again within a few months."

The symmetry by which the learned Chief Justice was able to vindicate principle while avoiding direct interference with executive government is reminiscent of Chief Justice Marshall's famous "masterwork of indirection" in *Marbury v Madison* 1 Cranch 137; 2 L Ed 60 (1803). Officials who had been appointed to office as Justices of the Peace by President John Adams just before he left office sued for delivery of their Commissions which the new administration withheld. The Chief Justice held that the plaintiffs were entitled to their Commissions but the Supreme Court was without power to force the Secretary of State, Madison, to deliver them because the Act which allowed the Court to proceed in such cases was unconstitutional. Thus it was the doctrine of judicial review was established in the United States – the power of the Supreme Court to strike down statutes repugnant to the United States Constitution.

Of course, New Zealand's Chief Justice claimed no such power in *Fitzgerald's* case, although we might be disposed to agree with Alexander Hamilton that the judiciary is the "least dangerous" branch of government. (A Hamilton, in the 78th *Federalist* "The Judges as Guardians of the Constitution") Our own Constitution is a much more humble affair than the American one both in what it does do and what it does not.

The Judges in New Zealand rarely have occasion to pass upon the basic elements of our Constitution. For this reason our constitutional law tends to be rather sterile. It has a tendency to be dominated by theory and history. The cornerstones of our system are Magna Carta, The Petition of Right, The Bill of Rights and the

"spirit" of our Constitution. Not for us the passionate controversies involved in protecting liberty by constitutional litigation in the American fashion. We tend even to be suspicious of the federal boundary rides conducted by the High Court of Australia in its constitutional jurisdiction. We have put our trust in Parliament. On that we have staked our all. And it is at that very point that the Chief Justice has given us aid and comfort.

The judgment of the learned Chief Justice is conspicuous for the strength and simplicity of its reasoning. The judgment contains no remarkable analytical qualities. They were not called for. The point was too big. Only two authorities are relied upon, the Bill of Rights and Professor A V Dicey. How appropriate!

The approach adopted by the learned Chief Justice would have gladdened the heart of Lord Camden LCJ who decided in robust but simple terms some cases in the 1760s which added immeasurably to the palladium of our liberties. (*Wilkes v Lord Halifax* 19 How St Tr 982 (1763); *Wilkes v Wood* 19 How St Tr 1154 (1763); *Entick v Carrington* 19 How St Tr 1030 (1765)).

Sir Richard Wild CJ relied upon s 1 of the Bill of Rights 1688:

> "That the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall." *6 Halsbury's Statutes* 490 (3rd ed).

The Chief Justice followed that citation with a sustained but disciplined statement of rhetorical power which, it can be safely predicted, will enrich the minds of generations of constitutional law students:

> "It is a graphic illustration of the depth of our legal heritage and the strength of our constitutional law that a statute passed by the English Parliament nearly three centuries ago to extirpate the abuses of the Stuart Kings should be available on the other side of the earth to a citizen of this country which was then virtually unknown in Europe and on which no Englishman was to set foot for almost another hundred years. And yet it is not disputed that the Bill of Rights is part of our law. The fact that no modern instance of its application was cited in argument may be due to the fact that it is rarely that a litigant takes up such a cause as the present, or it may be because governments usually follow established constitutional procedure. But it is not a reason for declining to apply the Bill of Rights where it is invoked and a litigant makes out his case."

The Chief Justice went on to rely upon Dicey's dictum that under the English constitution Parliament "has the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament". (AV Dicey, *Law of the Constitution* 39 (10th ed).

The avenues by which Sir Richard Wild CJ might have escaped making a decision so unpalatable to the government were many. He flirted with none of them. He did not delay until Parliament changed the law. The issuance of a declaration is discretionary, but it was issued. He rejected arguments, based on a construction of the press release, that there was no assertion that the Act was being lawfully suspended. He made it clear, too, that while the Prime Minister gave no instructions to officials "it is perfectly clear that they acted because of his public announcement of 15 December. Had it not been made they would have continued as before".

The symbolic importance of tainting with illegality a press statement of the Queen's chief minister should not be underestimated. In so saying the Chief Justice was instructing the nation. His subject was the rule of law. His message was that no one was above the law, that it applies to the mighty as to the humble. The point was also procedural. No one doubts the legitimacy of a legitimately elected Government changing the law. But the means by which change must be achieved continues to be of utmost importance to our democracy. Many of our protections in the law are procedural, a characteristic of Anglo-American jurisprudence. The proper forms must be observed.

Political scientists have suggested in recent years that the sovereignty of Parliament is a legal myth. They say that party discipline, the rise of cabinet government coupled with increasing powers given to the executive makes Dicey's view a charade. There may be something in the point. But we know now that we will not be permitted to drift away from the traditional constitutional wisdom. If new parameters to our Constitution are to be developed the question will need to be decided in deliberate and orderly fashion.

In the broadest sense *Fitzgerald's* case is significant for another constitutional reason. It demonstrates perhaps more than any case ever decided in New Zealand the division of governmental powers between the three great components of the Constitution: Parliament, the executive and the judiciary. Each has its role to play. The preservation of balance in the system requires that the activities of each in relation to the others remains within proper boundaries.

It is understandable that a busy politician recently elected would be eager to implement his policy. The course taken by the Prime Minister

was illegal but there is no need to castigate him for it. The Constitution has been vindicated, the rule of law is secure and no one has come to any harm. Surely it is a salutary thing that the great features of our Constitution – the supremacy of Parliament and the limits upon executive power – should be brought to public notice. That it can occur without leaving blood on the carpet is in the best traditions of 1688.

Geoffrey Palmer,
Professor of Law,
Victoria University of Wellington.

SUPERANNUATION: RETROSPECTIVE TERMINATION

On 15 April 1976 the President of the Auckland District Law Society, Mr J R Towle, wrote to the Attorney-General, the Hon P I Wilkinson concerning his stay of proceedings for alleged breaches of the New Zealand Superannuation Act 1974. The content of that letter and the Attorney-General's reply are of more than passing interest and form part of the background record leading up to the decision of the Chief Justice, Sir Richard Wild, in *Fitzgerald v Muldoon* (Wellington, 11 June 1976) – a welcome decision of major constitutional import.

Mr Towle wrote:

"My Council at its meeting on Monday April 12 discussed your decision to stay a number of private prosecutions brought against an employer for alleged breaches of the New Zealand Superannuation Act 1974.

"In the opinion of my Council there can be no doubt that your decision was within your powers. Having regard to some of the matters referred to in your statement and the fact that civil proceedings are available to persons wishing to establish their legal position under the Act, my Council does not make any criticism of your actions as a law officer.

"However, grave concern was expressed by Council members at the situation which resulted in this unprecedented action on your part.

"You will appreciate that it is an affront to the rule of Law to urge disobedience of a particular Law and indicate that no urgency would be taken to repeal that Law.

"It is fully accepted that the Government's policy was to bring to an end the superannuation fund created by the Act and to repeal the Act. It is also accepted that the repealing legislation could be complex and take some time to draft. It would however be relatively simple to pass a Bill as an interim measure to create a moratorium on all further deductions and contributions.

"The Prime Minister's announcement in December seems to have led to the present situation. It is possible that if the Government had simply announced that contributions made after December would be refunded to employers and employees respectively when the legislation was passed there might have been far less objection and resultant difficulty.

"The Society has noted your statement that, 'Any modern Government must have powers to carry on its work during the Parliamentary recess – however long or short in duration – and this need has become greater as the nature' extent and complexity of the responsibilities of Government have grown" '. The statement itself is unobjectionable except in the context of the present situation. The Government does have all the powers it needs to continue its work during a Parliamentary recess, the work being that of the executive branch carrying out the administration of the Government's policy within the laws of the land.

"What we objected to is the executive's claiming the right to suspend amend or repeal the law of the land on the strength of a general election result. Sight should not be lost of the fact that Governments change by the election of members of Parliament and it is the ability to command a majority in Parliament that entitles a Government to take office.

"While we know that a Government makes many major decisions and implements them by means of Bills which its majority ensures will become law, it is frequently and fortunately the case that legislation in the form originally introduced by the Government undergoes substantial changes, both because of public opinion and as a result of Parliamentary select committees hearing submissions from members of the public and interested bodies. It can therefore by no means be taken as certain that all legislation will eventually

find itself enacted in the form envisaged by the Government when it first announced its decision.

"A substantial delay between the announcement of a decision to enact legislation and the enactment of that legislation does not concern us, when the legislation is not to come into effect until it is passed or until some later date.

"However it becomes most objectionable and indeed of grave concern to the Council and members of the profession when there is a long delay after the Government's announced decision before the passing of legislation which is made to have a retroactive effect.

"You will be aware of the objection taken by the New Zealand Law Society and many others at the retrospective nature of two tax Bills introduced by the previous Government. You will recall that you and other members of the then Opposition were strongly opposed to the delay which eventuated during which tax-payers could have entered into transactions without knowing whether or not they were liable for tax on those transactions.

"The Society by no means takes a rigid attitude in matters of retrospective legislation as obviously in respect of some measures effective from the date of a public announcement. It would be unwise to rush legislation through without allowing adequate debate, but much of this legislation lies in the area where the individual citizen does not have any alternative course of conduct anyway.

"In the present situation the Prime Minister's announcement and the acceptance of it by many employers and employees as if it were enacted law, made those employers and employees liable for criminal prosecutions for failing to adhere to the terms of the Act which is the only enacted law. On that basis alone if a case can be made for the exercise of your powers to stay prosecution, a case has also been made for the summoning of Parliament.

"It is the hope of my Council that you as titular head of the profession will emphasise to the Government the affront to the rule of law which it has committed in relation to the New Zealand Superannuation Act and that the affront remains and continues to aggravate until Parliament meets or until the citizens of this country are again exhorted to observe the laws of the land."

The Attorney-General replied on 11 May:

"I write to acknowledge your letter of April 15 addressed to me as Attorney-General which arrived when I was overseas. As Attorney-General, I am both a law officer and a member of Cabinet and I reply in this joint capacity.

"I appreciate the view expressed by your Council that it makes no criticism of my action as a law officer.

"I note that there is no suggestion in your letter that – in the light of recent developments – the discretion of the Attorney-General in using his power to stay proceedings pursuant to s 77A of the Summary Proceedings Act should be in any way fettered.

"There is also no indication that you and your colleagues feel that the existing joint legal/political role of the Attorney-General requires reassessment. Should you subsequently decide to make submissions with respect to these areas, however, you would be assured that they would receive my close attention. Yesterday, Cabinet decided that Parliament will open on 23 June, and as a member of Cabinet I must support this decision. As you are no doubt aware, Cabinet proceedings are strictly secret; I can therefore give no indication of the nature or extent of any discussions which have taken place with respect to the calling of Parliament. Nor, of course, can I refer to arguments adduced by me or any other member of Cabinet in the course of any such discussions.

"At this stage, I do not feel that there is much more I can helpfully say regarding the timing of the calling of Parliament. I can tell you, however, that it is Government's intention to introduce the validating legislation with a minimum of delay when Parliament resumes. The Superannuation payments issue will soon be fully debated in the House, and I do not propose to anticipate in detail the likely areas of debate.

"I must, however, make special reference to what I regard as the crux of your communication, namely the comment in the third paragraph of your second page, to the effect that what your Council objects to is the Government claiming the right to suspend, amend, or repeal the law of the land on the strength of a general election result. I do not accept that the Government had claimed that right.

"What the Government did, through the Prime Minister, was to state in plain terms what it intended to do in relation to the superannuation legislation and to say that the proposed repeal would have retrospective effect to the date of the Prime Minister's statement. As a result of that indication by the Government of its intentions, the Superannuation Corporation, which is an independent body charged with the collection of the monies payable under the Act, decided that it would not take action to recover the monies payable in terms of the Act until Parliament had made its position clear by passing legislation.

"It was in the light of those circumstances that the Prime Minister said that in terms of the proposed retrospective legislation the obligation to

make payments under the Act would cease as from December 15.

"The suggestion that the Government was suspending, amending, or rejecting the law on the strength of a general election result is therefore strongly rejected. Suspension of a law by Government is one thing. A decision by the particular agency concerned with that law not to take enforcement steps under it, is quite another. We do not have to look far for a precedent of a Government choosing not to enforce laws before they have been repealed. The abrupt termination of the enforcement of the National Military Service Act 1961 after the election of the previous administration is such an example. It had been a part of the Labour Opposition's policy that, if elected, it would abolish the compulsory military training scheme, and as soon as it was elected it absolved all those who were then required to serve from serving despite the fact that they had been given call-up notices. The legislation was not repealed until 10 months later."

CASE AND COMMENT

Section 120 of the Domestic Proceedings Act 1968 and Ultra Vires Consent Orders

Penman v Penman (the judgment of Beattie J was delivered on 29 April last) reveals a trap for the unwary. Section 77 (1) of the Domestic Proceedings Act 1968 states that, where the hearing of an application for a maintenance order or for the discharge, variation, extension, or suspension of a maintenance order is adjourned for any period exceeding one week, or where any such application is referred to a conciliator under s 15 of that Act, any Magistrate may, if he thinks fit, having regard to all the circumstances of the case, make an order under s 77 (1). Section 120 of the 1968 Act states that the Court may, if it thinks fit, make any order under the Act by consent of all the parties thereto. In the case before him, Beattie J found that neither of the two specified situations in s 77 (1) existed and so had to decide whether the Magistrate had had jurisdiction to make under s 120 an interim maintenance order which was ultra vires s 77 (1). His Honour held that "s 120 only gives the power to make consent orders for matters which properly fall within the jurisdiction of the Act and not to grant jurisdiction where none exists. An example of the use of s 120 could be for a separation order where the party consenting admits one of the grounds in the appropriate section. Here, however, the grounds do not exist." This ratio decidendi appears, with respect, to be consonant with the respective statutory provisions and with the two authorities that were cited to, and followed by, His Honour, viz, *Prince v Prince* [1974] Recent Law 99 and *Beck v Beck* [1975] 2 NZLR 123.

It is interesting to note that there are cases on permanent maintenance after divorce which tend to show that an ultra vires consent order can be given the Court's blessing: see *Mills v Mills* [1940] P 124 (CA) and *Hinde v Hinde* [1953] 1 All ER 171 (CA), which suggest that ultra vires agreements should not be embodied in an order and that, even if they are, they are not orders for periodical payments stricto sensu, and cannot be enforced as such, and, on the other hand, *Hole v Hole* [1941] NZLR 418 (CA) in which it was held that the Supreme Court had power to make an order on divorce, by consent, for maintenance for the life of the wife, although it was ultra vires the contemporary divorce legislation. Further reference may be made to *F v F* [1941] NZLR 279 and *McLean v McLean* [1952] NZLR 673 (CA).

PRH Webb

Auckland University Law Faculty

AMNESTY INTERNATIONAL

has list of 85 lawyers detained in 23 countries for:

- opposition to government policies
- defence of persons charged with political offences
- protesting against torture of clients

other lawyers, magistrates, law students have "disappeared without trace.

Lawyers could and surely should help those who suffer for common beliefs. For further information please write to Amnesty International (NZ), Box 3597, Wellington.

INTERNATIONAL LAW

INHUMANE AND INDISCRIMINATE

We are indebted to SCIENTIFIC AMERICAN INC *for permitting us to reprint this article on incendiary weapons.*

The effort to restrict or prohibit the use of incendiary weapons by international agreement – an aspect of arms control and disarmament largely neglected since the 1930s – is currently being taken up with a renewed sense of urgency, spurred in part by recent advances in the technology of fighting with fire. Over the past few years the General Assembly of the United Nations has approved by overwhelming majorities a series of resolutions condemning the use of napalm and other incendiary weapons in specific military situations. Last May a group of 18 countries placed a draft of a comprehensive ban on incendiary weapons before the International Committee of the Red Cross, which has been assigned the task of "modernising" the Geneva Conventions of 1949. In pursuance of its mandate the Red Cross has convened several conferences of experts "to examine in more detail the question of particular conventional weapons which may cause unnecessary suffering or have indiscriminate effects." Incendiary weapons are expected to be high on the agenda of the next such conference, scheduled to begin soon at Lugano in Switzerland.

Until now the debate over what are held to be the inherently inhumane and indiscriminate effects of incendiary weapons has been handicapped by the lack of precise information on the severity of wounds caused by incendiary weapons compared with those caused by other weapons, and on the actual numbers of civilian casualties likely to result from the employment of incendiary weapons. In an attempt to provide the necessary information the Stockholm International Peace Research Institute (SIPRI), an independent organisation funded by the Swedish parliament, has compiled a detailed report titled *Incendiary Weapons.* The report was written by Malvern Lumsden, a member of the SIPRI research staff, and has been published in the US in co-operation with the MIT Press.

The SIPRI book describes the historical development of incendiary weapons, together with attempts to restrain the use of these weapons by international agreement. The closest these diplomatic efforts have ever come to success, it seems, was at the disarmament conference of the League of Nations in 1933. In spite of the ultimate failure of that attempt, the SIPRI book relates, incendiary weapons were widely regarded before 1939 "as illegal and inhumane, in the same category as weapons, such as mustard gas, which cause chemical burns. The question of illegality was, however, totally ignored during World War II, when a definite policy of incendiary bombing emerged." The mass incendiary attacks carried out in that period against cities in Germany and Japan killed about a million people, mostly civilians; nonetheless, according to postwar studies, the attacks did not have the decisive effect on the outcome of the war that was claimed at the time.

Since World War II, the SIPRI report continues, napalm bombs have been used increasingly by some 25 countries for air attacks in close support of ground troops, and for air strikes in rear areas independent of ground operations. Particularly large quantities of napalm were expended by the US and its allies in Korea and Indochina. Although official figures on the use of incendiary weapons in Indochina have never been made public, the SIPRI researchers estimate (on the basis of previously unpublished data) that nearly 400,000 tons of aerial napalm bombs were dropped during the war in Indochina by the US and its allies. In addition napalm was dropped in large quantities in oil drums from helicopters and fired from flamethrowers mounted on armoured vehicles and river-patrol boats. Counting these weapons, together with white phosphorus, magnesium and thermite weapons (which were employed for a variety of purposes, including several attempts to cause massive forest fires), the SIPRI team concludes that the total quantity of incendiary munitions used in the Indochina war was greater than that used in any other theater of any other war. Moreover, the report assets, in at least some periods of the Vietnam war the majority of the napalm bombs dropped were intended not for close tactical air support but rather to destroy rear-area targets, including villages.

A large part of the SIPRI book is devoted to a

detailed, illustrated examination of the medical problems that arise from both the thermal and the toxic effects of particular incendiary weapons on the human body. The general conclusion is that "the extreme suffering and indiscriminate effects of incendiary weapons are impossible to justify by considerations of 'military necessity.' "

Warning that "serious attempts . . . to limit the military use of technology by legal and humanitarian constraints" have in the past often "been hindered by a lack of insight into emerging technologies," the SIPRI report points to a "new generation" of incendiary weapons reportedly under development. The emerging weapons include, for example, a device said to contain a new incendiary material capable of creating a "chemical fireball" that radiates enough thermal energy to inflict third-degree burns on exposed people in a few seconds. The only other weapons that produce radiant energy on this scale are nuclear bombs. The new incendiary material (which apparently consists of highly volatile, self-igniting organometallic liquid such as triethylaluminum, slightly thickened with a long-chain polymer such as polyisobutylene) can be incorporated in a wide variety of grenades, shells and cluster bombs. The pertinent lesson to be drawn from the historical record, the SIPRI study notes, is that "to be effective, political or legal restrictions must be one step ahead of the technology they are trying to hold in check rather than one step behind."

LEGAL LITERATURE

Legal Concept and Principles of Land Value by JAB O'Keefe. Butterworths, Wellington. 1975. xvii + 263. $20. Reviewed by ED Morgan.

Land valuation, like town planning and water use, contains a basic dichotomy. It owes its origin to a discipline distinct from law, but a substantial part of its practice is now governed by legal principle. Valuation, the oldest of these hybrid sciences, is the one in which the lawyer's quest for certainty through logic, precedent or happily both, seems least successful.

In this area there are less of the great judgments, such as Wagon Mound or High Trees, in which the whole field is lit up by a lightning flash of insight. Most of the law has been decided in a climate of hostility, where anger and finance coincide, and where authority collides with the inbuilt human instinct to own land.

At times the Courts seem to tread as warily at Nat Bumppo through a disneyland of imaginary creations: the hypothetical subdivider, the prudent lessee, optimum productivity, willing sellers and willing buyers (of confiscated land), invisible improvements, hypothetical net returns and the ever present fair market concept.

To this subject, too often obscured by cloudy thinking, *Legal Concept and Principles of Land Value* by JAB O'Keefe brings an analysis which is as refreshing as it is penetrating. The author's central theme is the existence of a legal concept of land value, shaped by economic worth and the power of land to serve community needs. Part of the basis of this concept he finds in the investment nature of land assets, allied to the proper use of capitalisation methods and such valuation techniques as discounted cash flows. In two illuminating early chapters, he dissects the traditional economic concept, pointing out that a theory of land value must embody a variable concept; for money, the measure of value, is itself a variable, and the nature of the valuation is dependent on whether it has to be legislatively based. The price of money affects the value of land, and the question whether it is taxed or not taxed.

All other values are relative to the fair market concept, but the fair market concept is a moving target, which requires a certain amount of deflection shooting. Valuations can be made only at a point fixed in time, while the market is influenced by the economic climate and is ever-changing.

Although the book has a strong philosophical core, it is at the same time a satisfying record of case law and text book principle. The text is the best source I have seen of general valuation law, from both New Zealand and overseas sources. Its range is wide enough to cover such exotic fields as Maori tenures, hotels, mines and oil lands, and to scan strata title valuation, corner influence in urban land, and security and enterprise values.

I believe this book will assume a dominating position in its field.

CRIMINAL LAW

EXTRADITION FROM NEW ZEALAND

Auckland barrister, P A WILLIAMS, *suggests some methods of improving current procedures.*

The emphasis of this paper is not upon the academic niceties pertaining to extradition law but upon the pragmatic realities of the Courtroom situation.

Extradition law is mainly administered in New Zealand by busy Magistrates assisted by lawyers and prosecuting police officers. The relevant law therefore should be straightforward and articulate embodying the necessary principles to ensure that extradition will take place where appropriate and at the same time safeguarding the rights of the resident defendant. Some scope for the application of mercy should also be preserved.

Extradition in New Zealand where it relates to Commonwealth countries is controlled by the Fugitive Offenders Act 1881 (UK). The statute is in force in New Zealand but has been repealed insofar as it affects the United Kingdom by s 21 of the Fugitive Offenders Act 1967 (UK). The latter statute provides for the return of offenders from the United Kingdom, but the surrender of offenders by New Zealand to any part of the British Dominions, including the United Kingdom, still rests on the Act of 1881.

Let us critically examine this Act.

Firstly, from a New Zealander's point of view it suffers from being an Imperial Act. Most small law libraries do not contain Imperial Acts and because this one was passed in 1881 many of the terms are outdated, eg "the Governor of that possession", "Inter Colonial" and others.

Under Part I of this Act a fugitive offender from any British possession found in New Zealand may be arrested there if the offence with which he is charged is punishable in the place where it was committed by twelve months imprisonment with hard labour, or more.

This often involves the prosecution in calling a witness expert in the law of that particular British possession. It is also noteworthy that hard labour has long been abolished in New Zealand as a form of punishment, as in many other parts of the Commonwealth.

The term "hard labour" should therefore not be used and a list of extraditable offences should be clearly defined. In 1965 the Conference of Commonwealth Law Ministers held in London formulated a positive doctrine regarding extradition. This doctrine acknowledged the sovereign and independent status of the nations and countries of the Commonwealth and expounded an assimilation of the law relating to fugitive offenders. To quote from their report, it was agreed that Commonwealth extradition arrangements ". . . should be based upon reciprocity and substantially uniform legislation incorporating certain measures commonly found in extradition treaties; for example a list of returnable offences, the establishment of a prima facie case before return and restrictions on the return of political offenders." These provisions were to be manifested in new fugitive offenders legislation in each Commonwealth country.

The 1881 statute contains machinery for the exercise of a discretion by the Governor (in practice the Minister of Justice) whether or not the person apprehended should be extradited. This administrative review of the merits of extradition collateral to the judicial review is a safeguard well worth preserving, but its existence should not be used as a justification for any hiatus in the powers of the Courts.

Under Part I of the Act the defendant is accorded a hearing before a Magistrate who should only commit to prison to await his return if the evidence produced raises a strong or probable presumption that the fugitive committed the offence. In practice these words are interpreted to mean a prima facie case, that is, the usual standard of proof required to commit a defendant at a preliminary hearing of an indictable offence. Thus it would be preferable if the words "prima facie" were used in the statute.

It is of interest, however, to note that in *Kwasi Armah* [1966] 2 All ER 1006, the Queens Bench Division held that the words "strong or probable presumption" in s 5 of the Fugitive Offenders Act 1881 (44 and 45 Vict c 69) as requiring no more than that a prima facie case must be established, and it was not possible for the appellate Court to interfere where (as in that case) there was evidence on which the Magistrate could rule that a prima facie case had been made out on the evidence before him.

The House of Lords, however, reversed the

decision. In *Armah v Government of Ghana* [1966] 3 All ER 177, the House of Lords held (Lord Morris of Borth-y-Gest and Lord Pearson dissenting) under s 5 of the Fugitive Offenders Act 1881, the duty of the Magistrate was to weigh the whole evidence before him and to decide whether he himself thought that it raised a strong and probable presumption that the alleged offender had committed the offence, giving the words "strong and probable presumption" their ordinary and natural meaning; and it was not sufficient that the Magistrate should have formed the view that a reasonable jury might convict at a subsequent trial, though he himself was not satisfied on the evidence before him that a strong and probable presumption of guilt was shown.

Section 29 of the Act defines the evidence the Magistrate must consider. In a recent New Zealand case, *Re Best and Ashman*, two persons committed to prison for removal to the United Kingdom were discharged by a Supreme Court Judge because the evidence considered by the committing Magistrate did not comply with this section and a further section, s 39. Presuming that committal was meritorious factually, a technical non-compliance with the Act enabled, temporarily at least, those two persons to avoid extradition. A review of the statute therefore could well lead to a clearer definition of the evidence to be considered by the Magistrate.

In *Re Best and Ashman*, (unreported; Supreme Court, Auckland, June 1975. Mahon J) an application for a writ of habeas corpus ad subjiciendum was made. His Honour said at page 17 of his judgment:

> "It has been said on more than one occasion in extradition cases, whether under a foreign treaty or under this particular Act, that the manner of taking of overseas depositions ought not to be scrutinished with too much nicety and I certainly agree with that view of the matter. But in each of the cases that I have consulted, depositions have in fact been taken in an accepted and conventional manner, making allowance for differences of practice in the respective countries or British possessions. In this case however, the purported depositions were taken in a manner not permitted by the law of England and consequently I am quite clear that they are not admissible in extradition proceedings in New Zealand."

The prisoners were discharged. It may well be that in *Best and Ashman* the fault was not in the law draughtsmanship but in the negligence of the authorities in England responsible for the issue of the actual extradition proceedings in that particular case.

Part II of the Fugitive Offenders Act 1881 is designed to facilitate extradition of fugitive offenders from one part of a group of nearby "British *possessions*" (to use the archaic language of the Act) to another with a minimum of formalities.

In short, the Magistrate need only be satisfied that the prisoner is the person referred to in the warrant and that the warrant was lawfully issued.

Under Part II of this Act, however, the alleged fugitive may defend by adducing evidence that the case is trivial or that the application is not made in good faith in the interests of justice *or otherwise*, having regard to the distance, to the facilities of communication, and to the other circumstances of the case, it would be unjust or oppressive or too severe a punishment to return the prisoner. This section, s 19, is a very sound section especially as the words "or otherwise" have been granted a broad definition.

Section 19 of the Fugitive Offenders Act 1881 was very carefully examined by Wilson J in *R v H (A Prisoner)* [1971] NZLR 982. His Honour held the words "or otherwise" in s 19 of the Act enlarged the grounds upon which the Court could make an order discharging the prisoner. At page 986 his Honour said:

> "Like the learned Magistrate, I am satisfied that the case is not a trivial case – the prisoner is charged with an offence punishable with imprisonment with hard labour for seven years – and the application for his return is made in good faith in the interests of justice. Because he did not appreciate the existence of the third ground he did not consider it, but I do now.
>
> "The third ground is that it would be "otherwise" (that is, otherwise than because of triviality or bad faith) unjust or oppressive, or too severe a punishment to return the prisoner, 'having regard to the distance to the facilities of communication, and to all the circumstances of the case'."

The result was therefore that because the prisoner suffered from hysteria, together with other circumstances of the case, he was discharged absolutely.

Pursuant to s 10 of this Act a superior Court has the power to discharge a fugitive where the case is frivolous or return unjust.

This section was considered in *Re Gorman* [1963] NZLR 17, where, in refusing to discharge the prisoner, the Court observed that this discretion ought to be exercised only in exceptional cases.

Section 18 of this part of the Act provides for the paying of expenses back to the British possession where he was apprehended of a prisoner

not prosecuted or acquitted. This is indeed a salutary provision and should be amplified to contain mandatory compensation and payment of legal expenses.

So much for the Fugitive Offenders Act 1881.

Pursuant to a New Zealand statute entitled the Extradition Act 1965, extradition is regulated between New Zealand and such foreign countries that have concluded extradition treaties with New Zealand that have been applied under that Act by the Governor-General by Order in Council. Lists of these countries can easily be obtained by reference to the New Zealand Statutory Regulations.

Subject to the terms of the Act the treaty provisions are preserved.

Statutory restrictions on surrender are contained in s 5 of the Act:

"(1) An offender shall not be surrendered to a foreign country,–

"(a) If the offence in respect of which his surrender is requested is one of a political character; or

"(b) If he proves to the satisfaction of the Court or of the Minister, or, where he is brought before the Supreme Court, or a Judge on habeas corpus, to the satisfaction of the Supreme Court or Judge, that the request for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

"(2) An offender shall not be surrendered to a foreign country unless provision is made by the law of that country, or by the extradition treaty, that the offender will not, until he has left or has had an opportunity of leaving the foreign country, be detained or tried in that country for any offence committed before his surrender other than an extradition offence disclosed by the facts on which the surrender is grounded.

"(3) An offender who has been acquitted, an account of his insanity, of any offence within the jurisdiction of New Zealand, and who, consequent on such acquittal, is detained in any hospital under Part VA of the Criminal Justice Act 1954, shall not be surrendered until in accordance with law he ceases to be so detained.

"(4) An offender who has been convicted of any offence within the jurisdiction of New Zealand, and who, consequent on his conviction, is detained in a penal institution or detained under Part IV of the Mental Health Act 1969, shall not be surrendered until in accordance with law he ceases to be so detained.

"(5) Where, in any case to which subsection (3) or subsection (4) of this section does not apply, an offender has been accused of an offence within the jurisdiction of New Zealand, not being the offence for which his surrender is requested, he shall not be surrendered until the proceedings against him have been disposed of.

"(6) An offender shall not be surrendered until after the expiration of fifteen days from the date of his being committed to custody to await his surrender or, in any case where a writ of habeas corpus is issued, until after the Supreme Court has decided, on the return to the writ, that he is not to be discharged from custody, whichever event last happens.

"(7) In every extradition treaty made between New Zealand and a foreign country after the commencement of this Act provision shall be made either to the effect that no New Zealand citizen shall be surrendered or to the effect that the Minister may in his discretion refuse to surrender an offender who is a New Zealand citizen."

In addition certain defences are afforded by s 9:

"(1) At the hearing the Court shall receive any evidence tendered by or on behalf of the offender to show –

"(a) That he did not do or omit the act alleged to have been done or omitted by him; or

"(b) That he is not the person against whom the foreign warrant was issued; or

"(c) That the alleged act or omission is not an extradition offence in relation to the country which seeks his surrender; or

"(d) That the offence is of a political character, or that the proceedings are being taken with a view to try or punish him for an offence of a political character; or

"(e) That his surrender would not be in accordance with the provisions of the treaty between New Zealand and the country which seeks his surrender; or

"(f) That he has been previously convicted or acquitted in New Zealand in respect of the alleged act or omission.

"(2) For the purposes of paragraph (d) of subsection (1) of this section, the Court may receive such evidence as in its opinion may assist it in determining the truth, whether or not such evidence is otherwise legally admissible in a Court of law.

"(3) Nothing in this section shall limit the

power of the Court to receive any other evidence that may be tendered to show that the offender should not be surrendered."

It is of interest that in contrast to the Imperial Act, the Act dealing with extradition between New Zealand and foreign countries emphasises that extradition will not be granted where the offence has political connotations.

The common law of most countries has long recognised that asylum should be granted where the alleged offence is a political offence, in the sense that certain circumstances which surrounded the commission of the offence gave it a specifically political character.

Apparently in 1854 when France requested the extradition of two Frenchmen who had attempted to cause an explosion on a railway line with the purpose of assassinating Emperor Napoleon III, the Belgian Court of Appeal held the offence, being a political one, fell within this exception and refused extradition.

The cases, however, indicate the difficulties the Courts have encountered in defining a political offence.

In a comprehensive article entitled "The Schtraks Case Defining Political Offences and Extradition", published in 28 MLR 27, CF Amerasinghe said (at p 29) referring to dicta of the various Lords in the Schtraks case:

> "All the opinions focus the nature of the problem. On the one hand is the idea that asylum should be granted to political refugees. On the other hand the interests of the State requesting extradition and of the international community in seeing that offenders are effectively punished must be preserved. Although it may be difficult to provide a definition of an exclusive nature so as to preclude the possibility of expansion and flexibility, it is necessary that the term "political offence" should not cover so wide a field as to defeat the very purposes of the extradition law. It may be easier to agree upon a minimum to be included in a definition than upon a maximum, but it is necessary that some indication of the maximum limits of definition be given, if only in a negative way. It is submitted that a limited definition of this kind can be attempted on the basis of the existing practice of English Courts."

Personally, the author of this paper considers that the modern prevalence of outrageous crimes of violence perpetrated in the name of political idealism may make public opinion demand an even more restricted definition of this defence to surrender.

This Act also preserves the discretion of the Minister of Justice to refuse to surrender an offender, but only, it would appear, where the offender is a New Zealand citizen.

Section 8 provides for a hearing as if the proceedings were the preliminary hearing of an information for an indictable offence.

Under both Acts discussed above the fugitive has a right of appeal to the Supreme Court, but only by way of habeas corpus.

Generally speaking, the Magistrates' findings of fact are not reviewable under the habeas corpus procedure and the only arguable points that can be raised are those going to jurisdiction, although a reading of the cases indicates that where a gross injustice has been imposed Judges have somewhat strained this narrow interpretation of their powers in favour of the fugitive – although not invariably. It is notewrothy in this regard that s 10 of the Imperial Act referred to above grants powers to the superior Court to discharge the fugitive when the case is frivolous or return would be unjust or oppressive.

It is submitted that this right of appeal by way of habeas corpus is outmoded and should be replaced by a statutory right of appeal granting the appellate Judge the power to refuse extradition and discharge the prisoner if he considers on a perusal of the depositions and other evidence that the case is not factually strong enough to warrant extradition. The power would be additional to the Appellate Court's powers to discharge the prisoner on other grounds discussed above.

After all, the substantive ground supporting extradition is that the prisoner is probably guilty of a serious criminal offence and should be punished in the country where he committed it.

If, however, the evidence fails to establish a case where a reasonable jury adequately directed by a trial Judge could properly convict, then surely the defendant should not be put to the humiliation, expense and mental anguish of being extradited. The Appellate Court therefore should have plenary powers to review the case on the merits.

Generally speaking, the committing Magistrate does not see the witnesses relied upon by the prosecution and so he is in no better position to judge their credibility than the appellate Judge.

It thus becomes quite plain that the extradition law in New Zealand is outdated, clumsy, inconsistent and highly technical.

The aim of the law should be to facilitate extradition, applying the law uniformly and evenly. It is absurd and unfair that A should have a defence because the country seeking him is a British Dominion, and B should not have available to him that same defence as the country so requesting him is not a Commonwealth country.

It may be argued that the virtues of British justice and the democratic processes found in British countries establish grounds for distinguishing principles of extradition from those applicable to foreign countries. But the residual discretion of the Minister of Justice should surely prevent a New Zealand citizen, or for that matter any resident of New Zealand, from being deported to a country where there is a likelihood that he will be dealt with by unusual or improper or cruel processes.

The methods of improving current procedures so far as New Zealand is concerned are as follows:

The repealing of all current legislation and the enacting of one extradition Act by the New Zealand parliament. Such an Act to apply to both Commonwealth and foreign countries without distinction per se on that basis.

Except, of course, where the prisoner has actually been convicted of the offence in the country requesting his surrender, the new Act should require a hearing where the merits of the case factually are carefully weighed, granting plenary powers for the prosecution to present evidence by clearly defined "evidence" and for the defence not only to adduce evidence legally admissible but the same further licence to lead evidence of a hearsay nature and other evidence not strictly in accordance with the laws of evidence where the interests of justice so require.

The statutory and common law defences already pronounced should be preserved but without any distinction depending upon the country requesting surrender unless in the specific case certain relevance is established as mentioned above.

An effective reform of the law pertaining to the compulsory sending of a person from one country to another for legal reasons should not overlook other legislation of a non-extradition nature but effectively very similar, for example, in New Zealand the Aliens Act 1948, the Immigration Act 1964 and the Shipping and Seamen Act 1965.

Where asylum is sought from extradition on political grounds and the alleged offence is of a violent nature, a strict statutory definition of political grounds that would avail should be applicable.

In conclusion I quote without comment the words of our late Minister of Justice, Mr Hanan:

> "I would not envisage that this discretion would be exercised in the ordinary case where we do not want a citizen to escape justice if he has committed a serious crime overseas, but such a provision offers a residual safeguard if, for example, a country with which we have a treaty should become a dictatorship." (344 New Zealand Parliamentary Debates, 2881 (21 September 1965))

Who could refuse! – A letter received recently by an Auckland practitioner.

"Dear Sirs,

"The Unit Titles Act 1972 is something of a mystery to us. We have, in view of this transaction, read it. We have even resolved to travel to Auckland to see how the Act works in practice. But time has not permitted us to up anchor for a day and the scale fee, what with the cost of petrol and the thirst of our motor car, leaves no margin for the luxury of a visit to your City. Also, as our summer has just arrived, we are reluctant to leave it.

"Diffidently, we attach our transfer. Be as kind to it as you can. Rectify its faults. Remedy its omissions. As a last resort – But only as a last resort – tear it up and retype it.

"And please send a settlement statement. And an estimate of land value. No fancy declarations. Just: 'The land is worth $x and there are T units on it'. Our stamp office understand that. And so do we. Yours etc."

The attorney's obsequies – Samuel Foote (1920-1777), actor and dramatist, and contemporary of David Garrick was visitng a farmer who had buried a relation, an attorney, and who was complaining of the great expense of funerals in the county.

"Why," said Foote as though greatly suprised, "do you *bury* you attorneys here?"

"Yes indeed," said the farmer, "What else should we do with them?"

Replied Foote, "We never do that in London."

"However do you manage?" asked the farmer.

"When an attorney dies," Foote explained, "we lay him out in a room overnight by himself, open the window wide, lock the door, and in the morning he is gone!"

"Good gracious," exclaimed the farmer, "and what becomes of him?"

"Well, we can't say exactly," Foote replied, "All we know is that in the room the next morning there is a strong smell of brimstone!"

INDUSTRIAL PROPERTY

DEVELOPMENTS IN THE EQUITABLE DOCTRINE OF BREACH OF CONFIDENCE

By R G HAMMOND, *A Hamilton practitioner.*

Introduction

In 1972 the Younger Committee on Privacy (UK) expressed the view that it was not satisfactory to leave the development of the law relating to breach of confidence to the Courts. It accordingly recommended that this branch of the law should be referred to the Law Commissioners with a view to its restatement in legislative form.

In direct contrast, in December of 1973 the Torts and General Law Reform Committee of New Zealand at the request of the then Minister of Justice, Dr A M Finlay, presented to the (then) New Zealand Law Revision Commission a Report on the Protection of Trade Secrets. It concluded that:

> "Our survey of the law on this matter and of such other materials as were available to us has led to the conclusion that there is no need for major change in the existing law. In our view, the existing actions available at common law and equity provide a satisfactory remedy in those cases outside the patent system where protection is desirable. The Courts have shown a willingness to develop the equitable principles relating to breach of confidence in order to cover new types of situations. At the same time the rules developed by the Courts have proved sufficiently flexible to take account of other interests, mainly the interests of employees and society in the mobility of labour and utilisation of special skills, and the public interest in receiving disclosure."

At the time the Committee presented its report there was in Australasia only one reported decision in respect of the equitable obligation of confidence, *Conveyor Co of Australia Pty Ltd v Cameron Bros Engineering Co Ltd* [1973] 2 NZLR 38 *(a)*. There have since been decisions by McMullin J in *New Zealand Manufacturers Ltd v Taylor* [1975] 2 NZLR 33 and Bowen CJ in *Interfirm Comparison (Australia) Pty Ltd v The Law Society of New South Wales* (1975) 5 ALR 527 *(b)*. Given the difficulties created by various English authorities (which led the Younger Committee to the conclusions expressed by it) it is now appropriate to examine these recent Antipodean decisions to ascertain to what extent (if at all) those difficulties have been overcome and whether the optimism of the New Zealand Committee as to the ability of the Courts rather than Parliament to deal with this area of the law is to be preferred.

Historical

To put the matter in perspective it is necessary to recall something of the history of the equitable remedy. The impression seems to have been gained that this is of relatively recent origin and that the recent vogue this area of the law has enjoyed is an illustration of the fact that equity is not past the age of child bearing *(c)*. On the contrary, this area of the law is grounded in respectable antiquity. The doctrine began life as a purely equitable obligation in the Court of Chancery in the eighteenth century. It was another manifestation of the power of that Court to check unconscionable abuses for which no common law remedy was provided. The doctrine first manifested itself in relation to the ancillary protection of unpublished literary property *(d)* but it is entirely misleading to base the jurisdiction, as has been done in even relatively modern times *(e)* upon the protection of a common law right of property in the author of an unpublished manuscript. The original protection was in turn extended in the course of a relatively short period of time to other intellectual rights and processes such as patent medicines, new inventions and trade secrets *(f)*. It would be true to say that Courts of Equity in the

(a) Since affirmed Court of Appeal, 25 July 1975 (not yet reported).

(b) There is in New South Wales an unreported decision of Meyers J in *American Flange & Manufacturing Co Inc v Rheem Australia Pty Ltd* (10/2/70) accepting the existence of an equitable obligation.

(c) See the report of the NZ Committee, page 7; Copinger & Skone James, Copyright (11th Ed) 34.

(d) *Webb v Rose* (1732) cit 4 Burr 2330; 98 ER 216. *Millar v Taylor* (1769) 4 Burr 2303; 98 ER 201. *Duke of Queensbury v Shebbeare* (1758) 2 Eden 329; 28 ER 924. *Abernethy v Hutchinson* (1824) 3 LR (OS) Ch 209. *Prince Albert v Strange* (1848) 2 de G & Sm 652; 64 ER 293. *Morison v Moat* (1851) 9 Hare 241; 68 ER 492.

(e) Eg by Lord Halsbury LC in *Caird v Sime* (1887) 12 App Cas 326 at 337.

early cases sometimes professed to grant an injunction in furtherance of a common law right, because those Courts were anxious to conceal every extension of their jurisdiction from the common law Judges. The early cases, however, are really governed by the principle that information obtained by reason of a confidence reposed or in the course of a confidential employment cannot be made use of either then or at any subsequent time to the detriment of the person from whom or at whose expense it was obtained. The concept is one against unauthorised user and has obvious affinities with "trust". The principle as thus evolved had sufficient potential to extend to all marketable knowledge obtained by virtue of a position of confidence.

As the nineteenth century unfolded the equitable obligation which had clearly been enunciated by the earlier Chancellors came to be overshadowed by cases which were decided on the basis of a term (sometimes express, but more often implied) as to contractual confidence. These were in the main cases in which the parties had been in contractual relations or master and servant situations wherein the Court found no difficulty in implying into those relationships an obligation as to confidence, which in the master and servant cases was usually annexed to the general duty of good faith. There were a considerable number of master and servant cases relating to inventions and the like during a period from about 1850 and extending right through until the Second World War and in virtually all of these cases, because of the existence of a contractual link the Court was easily able to find an express or implied contractual term as to confidence *(g)*. Against this background the equitable obligation was largely lost sight of. The turning point came with *Saltman Engineering Co Ltd v Campbell Engineering Ltd* (1948) 65 RPC 203. That case merely reaffirmed what had always been implicit in the cases right from the earliest decisions, namely that the existence of the principle is in no way dependent upon contract. This reaffirmation of the existence of the equitable obligation found almost instant acceptance in a more complex and industrialised society requiring flexible concepts for the solution of problems and disputes relating to the protection of what might be termed marketable industrial knowledge in a broad sense. Since the *Saltman* case the existence of the equitable obligation has been upheld in a number of judgments *(h)* and since 1948 the concern of the Courts has been rather to define the scope of the principle and to formulate subsidiary principles upon which relief will be granted.

Some commentators have seen in this area of the law a supposed example of a dynamic growth of equity jurisdiction but this notion is largely misplaced. To borrow a phrase from Bagnall J (speaking in the somewhat removed area of matrimonial property) . . . : "the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past child bearing; simply that its progeny must be legitimate – by precedent out of principle" *(i)*. Unfortunately a thorough study of the historical development of the law is all too often in these crowded times replaced by naked assertion as to what the law (supposedly) is.

It is not here proposed to review all the modern cases – probably the most useful general statement of principle is still the judgment of Megarry J in *Coco v A N Clarke (Engineers) Ltd* [1969] RPC 41. There it was held that to establish a cause of action based on an equitable obligation of confidence three elements are required, namely: (a) that the information was of a confidential nature; (b) that it was communicated in circumstances importing an obligation of confidence; (c) that there was an unauthorised use of the information. Insofar as the Antipodean cases confirm the existence of such an obligation they are to be welcomed. The equitable duty has proved to be in other jurisdictions a flexible remedy. Nevertheless, the incidents attaching to the duty and the remedies for the breach thereof are still not free from doubt and the decisions under review are of some interest on this score.

The antipodean cases

In the *Conveyor* case Moller J held that the defendants committed a breach of confidence by continuing to make and sell products very similar in design to the plaintiffs' after the expiry of a contract pursuant to which they were put in possession of the necessary design information. The Court considered that it was enough to provide a plaintiff with a cause of action if the

---

(f) See eg *Canham v James* (1813) Ves & B 218; 35 ER 302. *Newberry v James* (1817) 2 Mer 446; 35 ER 1011. *Williams v Williams* (1817) 3 Mer 157; 36 ER 61. *Green v Folgam* (1823) S & S 398; 57 ER 159. *Yovatt v Wynyard* (1828) 1 J & W 394; 37 ER 425.

(g) See eg *Re Marshall & Naylor Patent* (1900) 17 RPC 553. *Edisonia Ltd v Forse* (1908) 25 RPC 546. *Amber Size & Chemical Co Ltd v Menzel* [1913] 2 Ch 239. *British Reinforced Engineering Co Ltd v Lind* (1917) 34 RPC 101. *Robb v Green* [1895] 2 QB 1 *Tuck & Sons v Preister* (1887) 19 QBD 629.

(h) Seager v Copydex Ltd [1967] 2 All ER 415. *Fraser v Evans* [1969] 1 All ER 8. The best law review article is Gareth Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970) LQR 463.

(i) Cowcher v Cowcher [1972] 1 WLR 425, 430.

offending article is "evolved" from the plaintiff's designs so long as that particular defendant has made use of confidential information. In the *Needle Manufacturers* case the plaintiff had invented a method for making flexible arms but he had not patented it. The first defendant was employed by the plaintiff. This defendant was told by the plaintiff that the plaintiff had built certain machines for himself for the purpose of making flexible arms and that information in that respect was strictly confidential. This defendant left the plaintiff's employment and subsequently worked for the second defendant. Whilst in that defendant's employ he built a machine to make flexible arms which was in substance a copy of the plaintiff's machine. McMullin J was prepared to grant an injunction on account of what, in his view, amounted to a breach of both an implied term as to confidentiality and a breach of an equitable obligation of confidence. In the *Law Society* case the Law Society of New South Wales was interested in procuring an interfirm comparison for its own purposes in connection with costing exercises. There were discussions between the Law Society and Interfirm Comparison with a view to obtaining the services of Interfirm to prepare this survey. Certain material was made available by Interfirm to the Law Society but the Law Society and Interfirm never came into contractual relations. In the event the Law Society proceeded to have the survey undertaken under an arrangement with the University of New England. The President of the Law Society had been given a questionnaire by Interfirm and he passed it on to the University. The University was held to have made use of it, albeit in an indirect manner, and ultimately this was held to be a breach of confidence even though not done deliberately, but by error or oversight.

The "Spring board" principle

The first comment that should be made is that these decisions, although not categorised as such by the Judges concerned, are clear applications of the "spring board" principle which was first enunciated by Roxburgh J in *Terrapin Ltd v Builders' Supply Co Ltd* [1967] RPC 373 (reported late). He put the principle thus:

> "As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a spring board for activities detrimental to the person who made the confidential communication, and spring board it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public" (ibid, 391).

The "spring board" principle, has two difficulties, neither of which has been completely resolved by the decisions under review. First, the principle is apparently contrary to the decision of the House of Lords in *Mustad v Dosen* [1963] RPC 41. In that particular case it was held that after disclosure has been made to the world at large it is impossible to get an injunction restraining a defendant from disclosing what amounts to common knowledge. This on the basis that the secret, as a secret, has ceased to exist. *Mustad* is an odd case. The appeal reached the House of Lords in June 1928. Notwithstanding that the appeal dealt with a point of law without precedent, for some extraordinary reason the case was allowed to go unreported both in the Court of Appeal and the House of Lords. The decision of the House of Lords was not reported until some 36 years later when its importance was realised after the decision had been brought to the attention of Roskill J in *Cranly Precision Engineering Ltd v Bryant* [1966] RPC 81. The position for Roskill J in that case was further complicated by reason of the fact that in 1960 Roxburgh J had come to a somewhat different decision in Terrapin without having had the (then) unreported decision in the *Mustad* case cited to him or brought to his attention. In *Cranly* Roskill J said of *Mustad*:

> "The effect of that decision is clearly that if the master had published his secret to the whole world (as had the appellants in that case) the servant is no longer bound by his promise to the master not to publish that same secret, but it is important to observe that publication in that case was publication by the master" (ibid, 95).

The facts of *Mustad* were that the appellants, Mustad, were the owners of certain confidential information relating to a machine for manufacturing fish hooks. Their rights derived by purchase from the liquidator of the original owner, a Norwegian firm called Thoring & Co. Dosen had been in the employment of that company and had entered into a written agreement with Thoring & Co under which he expressly agreed that he would not disclose information of which he might get insight in consequence of his work. When Thorings went into liquidation in November 1923 Dosen was advised by a firm of "competent Norwegian lawyers" that the liquidation of that company released him from the expressed covenant of secrecy. Dosen thereupon took employment with the respondents, Allcock, in the mistaken, but honest, belief that he was at liberty to give that firm the full benefit of information which he had got while formerly working for Thorings. He gave

this information to Allcocks whereupon Mustad instituted proceedings for an injunction against both Dosen and Allcocks. The Writ was issued in August 1925. In October 1925 an interlocutory injunction was refused by the Court of first instance but was granted by the Court of Appeal in November 1925. At the date of issue of the Writ an application for a patent of the allegedly confidential material had been made in Germany, the actual date of the application being January 1925. After the date of the commencement of the action, Mustads, under the advice of leading counsel, and, as they thought, to protect their position, made a convention application in the United Kingdom for a patent. Publication was in January 1926 and in May 1926 they received a sealed patent. In March 1927 Rowlatt J granted a final injunction which was then set aside by the Court of Appeal. The appeal to the House of Lords then followed. It was after the application for the British patent that Dosen had contended that the secret had thus been published to the whole world and that he was free from any obligation of secrecy under which he might otherwise have been. What is significant about the *Mustad* case is plainly that it was the plaintiffs themselves who made the knowledge public. But if the successful patent application has been made by someone other than the plaintiff in principle there seems to be no reason why knowledge of the subject of the grant of a patent should not be capable of being confidential information. If the decision is viewed in this light the conflict which otherwise exists in strict logic disappears.

The *Mustad* decision is not recorded as having been cited in the two New Zealand decisions but the case did not escape the notice of Bowen CJ in the *Interfirm* case. He held that,

> "Any disclosure suggested falls far short of the disclosure to the world, which was held to destroy confidentiality in Mustad."

In effect, if not by design, the Antipodean cases may well have joined a growing list of decisions which have, thankfully, circumvented the somewhat restrictive decision of the House of Lords and it may now be arguable that *Mustad* is strictly confined to cases where the plaintiff himself published the information. Possibly, even more restrictively, it may be limited to cases of publication via a patent specification. Or, on another view of the matter, it may be that, more pragmatically, (and, therefore, more likely) the Courts will in future treat the question of whether information is or is not confidential as a simple question of fact and that the question of any publication of information is only one element in that broad factual enquiry *(j)*.

The second problem with the "spring board" principle is the somewhat plaintive entreaty of Megarry J in *Coco* as to how the duty of confidentiality is supposed to be performed when the information is partly public and partly private. John Citizen is under a duty not to use confidential information as a spring board to getting him a head start. But how is he supposed to perform that duty? He is free to use his own original idea, which converted failure into success; but he cannot take advantage in the original recipient's further ideas of which he knows, until such time as he or someone commissioned by him would, unaided by any confidence, have discovered them. As Megarry J would have it, the net effect in this sort of situation is that the defendant is left with a unique disability in that he alone, of all men, must for an uncertain time abjure a particular field of endeavour, however great his interests. Megarry J finally noted that he felt that he had "not got to the bottom of the matter", principally it seems, because he felt considerable hesitation in expressing "a doctrine of equity in terms that included a duty which law abiding citizens cannot reasonably be expected to perform". In the *Conveyor* case Moller J did not note *Coco* as having been cited to him. He held that when the information at issue is partly public and partly private, the recipient of it must take a special care to use only the material which is in the public domain. The sort of difficulties which so troubled Megarry J were not raised. But it is submitted that there is no conflict of principle between the two decisions. In *Conveyor* the learned Judge formed the view on the facts that there had been an outright copy by the defendant rather than the situation to which Megarry J had been addressing his mind, that of the improvement of a pre-existing idea. It is in this latter area that a definitive decision is still awaited. The difficulty in formulating any principle to cover this situation is on the one hand to adequately safeguard the confidential information while on the other ensuring that the public interest in the advancement of knowledge generally by the improvement of pre-existing ideas is not curtailed.

The "damages" problem

A notable aspect of *Needle Manufacturers* and *Interfirm* is the assumption on which the cases appear to have proceeded, that damages can be awarded for a breach of the purely equitable duty of confidence. In the *Conveyor* case, as far as any pecuniary relief was concerned, the parties had

(j) But the decision has not entirely spent its force in relation to patents. See *Franchi v Franchi* [1967] RPC 149.

apparently agreed that once liability was fixed the question of quantum would either be agreed or referred to some special referee, and in the event that case was disposed of on contractual grounds. In the *Needle Manufacturers* case the question of damages was left open because the learned Judge felt that the parties might be able to agree on some satisfactory accounting between themselves. The question of damages or accounting for profits was therefore reserved but it does not appear to have been suggested that damages may not be available for breach of the equitable duty. In the *Interfirm* case Bowen C J awarded damages both for a breach of copyright and for a breach of the equitable obligation of confidence.

The first indication that an action for damages might lie against a person who broke a confidence, other than an award of damages in lieu of an injunction under Lord Cairn's Act, is to be found in *Nicrotherm Electrical Co Ltd v Percy* [1956] RPC 252. In those proceedings at first instance Harman J considered that the defendants were liable, inter alia, for breach of confidence and he concluded that the plaintiffs were entitled to an enquiry into the damages, if any, caused by the breach of confidence; they were also given leave to apply for injunctions. The matter then went to the Court of Appeal *(k)* and in that Court Lord Evershed MR left open the question of whether common law damages could be granted for a non-contractual breach of confidence. The general tenor of this judgment seems to be to doubt whether he should allow a claim for damages other than in lieu of an injunction. Gareth Jones has attacked the *Nicrotherm* decision as being "mildly revolutionary" in that by implying a damages claim can succeed independently of any equitable relief, it pre-supposes a fusion of law and equity. On the other hand in *Seager v Copydex Ltd* [1967] RPC 349 the Court of Appeal allowed a plaintiff who only owed the defendant an equitable duty of confidence, "damages" on the analogy of the law of conversion. The reasoning of Lord Denning MR in that decision was that the discloser should not get a start over others, and particularly the plaintiffs, without paying for it. On the analogy of conversion, on this view, once the damages are paid the information becomes the property of the defendant *(l)*. There is thus some weight of authority supporting the award of damages for breach of confidence but it is submitted that it cannot confidently be asserted that those damages are of a straight common law nature. One theory which has been advanced as explaining the award of damages in *Seager* is that there is an emergent tort of breach of confidence *(m)*. So far this explanation is strictly theoretical and has not received judicial sanction. The real difficulty with *Seager* is that the Court of Appeal did not explain whether it purported to grant damages in the exclusive jurisdiction or under Lord Cairns' Act (which would assume that the Court authorises damages in lieu of an injunction sought to protect equitable rights) or on the basis that under the judicature system remedies peculiar to one of the old jurisdictions are available generally (which would be a fusion fallacy). The result is unsatisfactory and will undoubtedly give rise to problems in the future. There is nothing in the judgment in *Seager* by way of analysis of Lord Cairns' Act. But what seems to have been overlooked is that for that Act to be construed as applicable in the exclusive jurisdiction the term "wrongful act" must be read as referring not only to legal wrongs (ie torts) but also to breaches of purely equitable obligations. That term did not have the wider meaning when used in s 83 of the Common Law Procedure Act 1854 – this was passed four years before Lord Cairns' Act as another procedural reform and dealt with the award of injunctions by the common law Courts. The term "wrongful act" surely was intended to have the same meaning in both statutes. If this line of reasoning is correct it follows that *Seager* so far as it purports to uphold an award of damges as a remedy for breach of an equitable obligation of confidence was misconceived. Even if, contrary to this argument, damages may be awarded, they are (or should be) not damages at large, but damages in lieu of an injunction under Lord Cairns' Act. There is also a further argument which does not as yet seem to have been raised in any reported case that a defendant may be called on in equity to indemnify the plaintiff in accordance with the principle in *Nocton v Lord Ashburton* [1914] AC 932.

The doubts which have been raised regarding an award of damages for breach of the equitable duty of confidence to some extent reflect the conceptual confusion which has so bedevilled this branch of the law. The doctrine, as suggested, began life as a purely equitable obligation with strictly equitable relief. The absorption of the notion of a breach of confidence by common law Judges, and their endeavours to deal with it in contractual or proprietary terms has led to many of the confusing statements that one finds, particularly in the earlier cases, and there is the danger that the Courts, whilst reaffirming the

---

(k) [1957] RPC 207.

(l) See also *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97; *Industrial Furnaces Ltd v Reeves* [1970] RPC 605.

(m) North, "Breach of Confidence: is there a new Tort?" (1972) 12 JSPTL 149.

existence of the equitable duty, may overlook the consequences which flow from the very nature of that duty so far as the remedies are concerned. It also follows that until the basis of the right to damages is finally settled, problems as to quantum will arise.

Can contract and confidence co-exist?

McMullin J in *Needle Manufacturers* found for the plaintiff both on an implied term of confidentiality and on the basis of an equitable obligation. It has been argued by Turner *(n)* on the basis of the judgment of Lord Greene MR in *Vokes v Heather* (1945) 62 RPC 47 and 135 that contractual and non-contractual confidence cannot co-exist. The *Vokes* case does not appear to have been cited to McMullin J and the problem, if such it be, was therefore not considered by him. In *Peter Pan Manufacturing Corporation v Corsets Silhouette Ltd* [1963] RPC 45 the attention of Pennycuick J was in arguendo drawn to the decision in *Vokes* and to the possible effect thereof but the point was not dealt with in the judgment. There seems no reason why there should not be, arising out of the same factual circumstances, both a breach of a contractual duty whether express or implied and a breach of an equitable duty of confidence. It is not unknown in the law for one set of facts to give rise to several possible causes of action. The only difficulty which might arise would again be in relation to remedies, particularly if there is any merit in the argument that damages may not be awarded for breach of the equitable duty.

Other matters of principle

Another feature of all three decisions may be noted – the honesty of the defendant will avail him nought if it can be demonstrated that the defendant has even unconsciously used confidential information given to him by a plaintiff in circumstances where he either knew or ought reasonably to have known of the obligation imposed upon him. It is plain that the Courts are prepared to apply an objective rather than a subjective test; this accords with the general approach adopted by the English Court of Appeal in *Seager*. Again, as a matter of general principle we now have the statement of McMullin J that a breach of confidence of a secret process may occur notwithstanding that the employee commits the process to memory. In *Merryweather v Moore* [1892] 2 Ch 518 Kekewich J had stated at p 524:

> "If he can carry them (these materials) in his head, no one can prevent his doing that and making use of them."

It is submitted that in view of later authorities McMullin J was entirely correct in not following this dictum *(o)*.

Conclusion

Mundane exegetical exercises aside, what of the utility of the approach which has been adopted by the Courts? First, there may be, as Professor Burrows has remarked, some vagueness in some of the tests applied *(p)*, but confidence is essentially, like "negligence" or "privacy" a concept which defies intrinsic definition. There are encouraging signs that the Courts are beginning to appreciate that the equitable remedy is non-proprietary in nature and is concerned with fair dealing between man and man. This is nothing more nor less than a return to the eighteenth century cases. Second, there has been a notable pragmatism in approach. The primary enquiry has been a purely factual one, as to whether the information in all the circumstances can be regarded as confidential. The second enquiry has been as to whether the defendant knew, or (constructively) ought to have known this, and the third limb has been to enquire whether the defendant "used" the information. Once those three elements have been established relief in one form or another has been granted. What is perhaps surprising has been the consistency with which this broad approach has been successfully adopted in favour of plaintiffs. There are few reported decisions in which a plaintiff has failed. Third, have the Courts gone too far? Probably not, although there needs to be, as Megarry J demonstrated, an awareness at least of the problems which exist when the information is partly public and partly private. Fourth, in the last analysis in practise these are primarily "commercial" cases. The solutions required for such areas of the law require not only to be reasonably certain, but flexible. The stage is fast being reached where it can be said that both criteria are satisfied. This for the reasons that the Courts seem now to have a greater appreciation of the nub of the equitable doctrine and there is less of a tendency to endeavour to deal with the concept in proprietary terms.

(n) Law of Trade Secrets (1962), 210.

(o) Amber Size & Chemical Co Ltd v Menzel [1913] 2 Ch 239. *Printers & Finishers Ltd v Holloway* [1964] 3 All ER 731. *Baker v Gibbons* [1972] 1 WLR 693. *Westminster Chemical NZ Ltd v McKinley* [1973] 1 NZLR 659.

(p) Burrows, *News Media Law in New Zealand* (1974), 155.

Note

Since this article was written the important judgment of Lord Widgery LCJ in *Attorney-General v Johnathan Cape Ltd* [1975] 3 All ER 484 has come to hand. That decision concerned the right of the Crown to restrain the publication of confidential Cabinet papers (the so-called "Crossman Diaries"). A full examination of that decision is not here intended but the following points may be noted:

(1) In so far as the decision holds that the equitable doctrine is not confined to commercial secrets it is respectfully suggested that it is entirely consistent with the earliest cases (mentioned supra) and which cases were not (apparently) cited to His Lordship. The decision is also consistent with the more recent decision in *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 relating to marital confidences.

(2) The fallacy that the development of this area of the law is of recent origin is again (with respect) repeated. His Lordship said:

> "... the Attorney-General has a powerful reinforcement for his argument in the developing equitable doctrine that a man shall not profit from the wrongful publication of information received by him in confidence. This doctrine, said to have its origin in *Prince Albert v Strange*, has frequently been recognized as a ground for restraining the unfair use of commercial secrets transmitted in confidence" (p 494c).

There is, however, nothing in the judgment to derogate from the thesis of the foregoing article that the doctrine is of rather more ancient origin than merely *Prince Albert v Strange* and that the rather broader view that the Courts are now taking of the doctrine is more consistent with the eighteenth century authorities as formulated by the (then) Equity Chancellors.

(3) The case represents a significant development of the law (from both an adjectival and constitutional point of view) in relation to "public secrets" and the circumstances under which Cabinet proceedings may be divulged and discovered.

FAMILY LAW

IMPRESSIONS OF ONE CHILDREN'S BOARD

By PAM RINGWOOD *Senior Lecturer in Law and Sociology at Auckland University.*

The Children and Young Persons Act of 1974 introduced into New Zealand, an idea which had not been very successful in England. In line with the emphasis throughout the Act on prevention rather than punishment, Children's Boards were established to deal with juvenile crimes in such a way as to prevent their recurrence *(a)*.

The Board has a very limited jurisdiction. It deals only with children under 14 years and then only where both they and their parents or guardians admit the offence. The Board has four members, an appointee from the Police, the Social Welfare Department, Maori and Island Affairs and a member of the Panel of six Residents of the Welfare District appointed by the Minister for Social Welfare. The meetings of the Board are confidential and records are not kept in the usual sense, so that it is not possible to present statistics. The Boards have however been in operation for about a year and from my attendance on one Board, as a member of the residents' panel, some clear impressions have emerged.

The first is that the Board's intervention seems surprisingly successful. The main exeption to this seems to be in the case of theft. The reason for the general success might be in the youth of the offender and the fact that parents on the whole feel at least partly responsible for the child's actions. Many of the parents concerned are only too anxious to have some neutral authority with whom to discuss behaviour which may have been a considerable shock to them. For others, the offence has been the culmination of a period of disturbance with the child. The fact that the Board is not a Court and has no power to try or sentence, encourages the parents and the child to be open in discussion. Many children come with their mothers, what seems to be about a third come with both parents and some, at these tender ages, come without any one at all. The child who has no parental support at all in such an interview, is obviously receiving very little in other areas of his life. The usual reason given for the non-attendance of fathers is that they are working but mothers attend whether or not they are working and even if they are the breadwinner of the family. Obviously the chances of getting to the causes of

(a) Part II Liaison between Police and Social Workers.

the delinquency and of getting family agreement as to preventing further trouble, are very much higher where both parents attend. It is also very important to the child as offering him support in his new behaviour which quite often involves drastic steps such as changing his group of friends. Most of the children seem to be boys and offences like vandalism and theft from supermarkets are committed with the actual support or general encouragement of a group of friends. We are all very susceptible to the opinions of our peers and children no less so, so that changing friends is a necessary if very hurtful process in changing the child's behaviour. One hopeful aspect is always the family who have discussed the offence, established their own punishment and seen that the child has made restitution out of his own resources or lent the money to him and he is repaying it. The family who makes some effort of this kind is the rule rather than the exception and they make the work of the Board much easier in that attention can centre on prevention rather than restitution.

The area we serve is a self-contained geographical region with parks, reserves, beaches, clubs but not very adequate internal transport. It is astounding to see the number of families who think that the main thing for a school child to do after school is to vanish with out trace and not be a nuisance. The trouble is that vanishing out of parental sight often coincides with being a nuisance, particularly in areas with a lot of new homes, heavy mortgages and few facilities for play or activity. Club membership often entails difficulties of transport or finance. Migrant families who make up a large proportion of the families seen, labour under heavy workloads to get a home, little knowledge of local facilities and few friends or relations to share the care of the children. One of the most important duties of the Board often is to help the parents involve their children in interesting and constructive activities. Here the diversity of Board membership and the fact they are all resident in the district, is a big asset. They are aware of the advantages and disadvantages of the local resources and of the particular difficulties in using them. The diversity of membership I have always thought is a big asset also in that at least one member of the Board has often been in a life situation similar to that of the families and can add the convincing sincerity of personal experience and fellow sympathy to their various difficulties.

The Board has a very low key approach. It has not the burdens of a judicial body. Although parents may excuse an offence, they and the child must have admitted it for the case to come before the Board. In my Board, the offence is gone over with the child who reaffirms that he committed it and usually parts of the reports where helpful are also discussed. Being confronted by a panel of four people cannot be a truly informal experience when one has committed a wrong, but every effort is made to make the child and his parents feel that the panel are there to help rather than to criticise. It is in this spirit that the offence is discussed with the child and his view of it sought. Some children are so appalled at being called up before the Board that they require little admonition and considerable encouragement not to reoffend. Some children have not comprehended the significance of their offence and here the words of someone outside the family may well carry more conviction. Some children are never going to understand that what they did was so wrong, because the family principles are anti-social. In really bad cases, the Board can refer the case to Court and not deal with it and in intermediate cases, to involve the Social Welfare Department. A Social Worker is not only involved where there are grave difficulties; referral may be indicated where the family is trying hard but needs some continued or specialist support. Some problems are many sided with truancy, under achievement at school and lack of any proper satisfaction in home life, all featuring. In others the home life may be satisfactory but the child has a particular learning problem at school. Use is made of Psychological Services, and school reports. The child is usually admonished in the sense that what has been discussed is summarised and he is also told that what he did was wrong and it is not to be repeated. Where the Board feels that the parents or child need more support or that they need the reminder of continued supervision, the case will be adjourned for a report or for a further appearance in some months' time in order to check on progress.

Very, very few children are seen more than once. The Board has had its crashing failure, once when caught by a practised and congenital liar of extremely convincing aspect and on a few other occasions when the family situation offered few resources on which to build. In one of these, the family did make some progress for the first time in its well documented care, but could not fully sustain it. In this last, one has the impression that if this approach had been tried earlier of combining authority with family consultation, that results might have been more hopeful.

Section 13 (6) of the Act provides that the Social Welfare Department shall furnish such secretarial, recording and other services as may be necessary and by s 15 gives the Board power to request reports and to refer for medical, psychological, psychiatric or social work counselling.

Here is one of the less helpful provisions. It is very similar to the way in which conciliation was introduced, except there, there was at least, a court system set up. Merely giving Boards power to request reports or refer, does not give the overworked agencies, any more manpower to carry out the requests or referrals. In fact in some cases the Board is not anxious to make a needed referral either because the time lag will be too long, as often happens with remedial educational methods or some institutions, or because the agency is so overworked that they could not give the request attention if a spate of referrals were to be made. Where extra cases are likely to result from the Boards' activities, there should be provision for existing facilities to be enlarged. One may have to make a referral because there is no reasonable alternative and yet be aware that the referral is adding too much to an already busy department or person.

Statutory enactment of powers does not have a loaves and fishes effect on resources.

One important feature of the procedure under the Act, is the involvement of the offender in the decision making process. The advantage of this is, as is well researched, that many more people act on what is decided, if they are involved in the discussion. Only about 3 percent act on the message given to them in a lecture or sermon – this number is multiplied more than 10 times where the person can discuss the lecture. These people tend to continue to act on their decision for longer than those who were simply talked at *(b)*. This is a general principle of group effects which is well demonstrated in the Boards operation and which has an advantage in preventive work, over proceedings where the person is not as involved but feels they are being done to him. He is less committed to the findings and his subsequent behaviour is much less affected by them. As Dean Inge has said, if sermons were really effective in changing attitudes, 2,000 years of giving the sermon would have resulted in more substantial changes than have been made in society. He likened giving a sermon to the task of filling narrow necked vases by throwing a bucket of water in their general direction. Involvement in discussion is more like taking the bucket to each vase.

Since I started this article, I was cheered to see Ranginui Walker's description of his year on a Children's Board (The Listener, May 1976) and to see that his experiences were very similar to ours. The Boards could not replace the Court system but there is a lesson to be learnt from the success of this simple humane and preventive procedure – that where the offence is admitted, that where the offenders are not hardened and there is no long list of previous offences, where the families can be involved and local knowledge can be used – that the consultative procedures of the Board can be a successful and inexpensive way of preventing recidivism and resolving the problems giving rise to that offence. The cases are pre-selected because they must fulfil these requirements to come before the Board. It might be worthwhile considering whether older "children" – say between 14 and 18 years might also be considered where the offence is admitted, restitution is made, no other offence is known and in the opinion of the Police or the Social Welfare Department, action, by the Board would be sufficient. I have added an element here which is not obligatory for the younger offenders – that of restitution because in my opinion it is an important element in bringing the offender to grips with the consequences of his action. Five minutes vandalism does not seem much but six months paying for it out of pocket money or part time jobs, does bring it into better perspective.

It has been a privilege to serve on the Board but also it has been a very heartening experience as one sees justice carried out but also humanity made successful.

(b) Darwin Achieving Attitude Change in Groups. Reading in Social Psychology ed. Cartwright & Zander.

NEW MAGISTRATE

Mr James Walker Bain has been appointed as a temporary magistrate in Auckland.

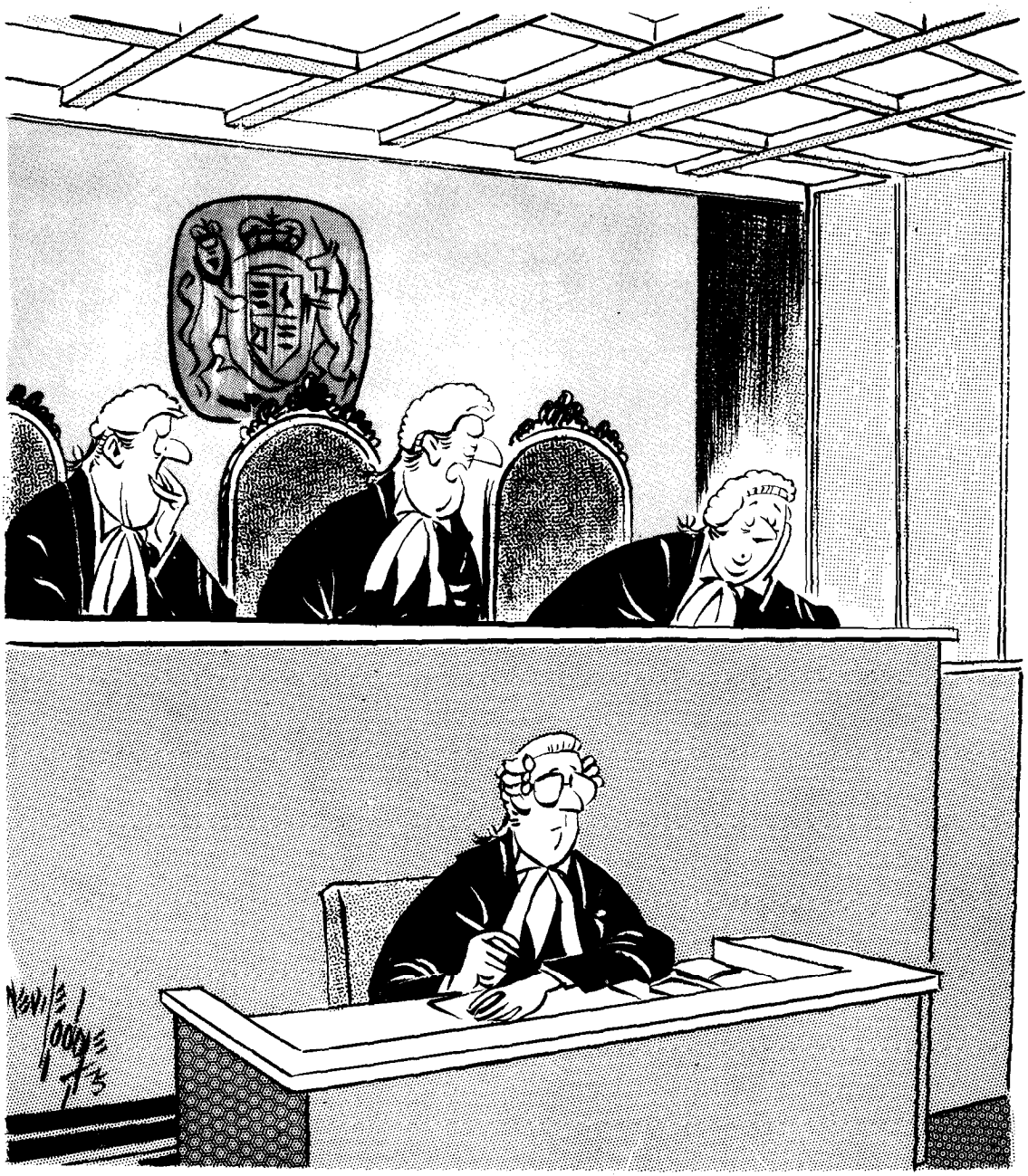
Mr Bain, 67, is a barrister in practice in Auckland. It is expected his appointment will help ease the heavy workload presently facing Auckland courts.

In announcing the appointment the Minister of Justice the Hon DS Thomson said that "although emminently qualified Mr Bain is approaching the normal retiring age for magistrates (68) and thus his appointment was on a temporary basis."

Born in Hawera, Mr Bain was educated at Tokomairiro District High School and Otago Boys High School. He graduated from Otago University LLB and was admitted to the Bar in 1938.

A former senior Crown counsel in Auckland Mr Bain is married with two children.

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



Drafted by Scilicet *Engrossed by Nevile Lodge*

"... and the appeal is therefore disallowed, our brother Mophett dissenting."

A CONSEQUENCE OF CONFIDENCE

The Law Society in England has recently reaffirmed that a solicitor to whom a client confesses that he has committed a crime with which he has not been charged should not tell the police. That part of the statement will hardly raise eyebrows. However, the statement continues to the effect that confidence should be preserved even if it meant that innocent people will be convicted of those crimes and punished. This statement was not made in vacuo but in response to the disclosure by one of Glasgow's leading criminal solicitors Joseph Beltrani that for some years he had been certain that one of his clients, Patrick Meehen, who on 24 October 1969 had been sentenced to life imprisonment for murder, was innocent. He knew of Meehan's innocence because in 1972 another client of his, William "Tank" McGuinness, confessed to him that he and another had committed the murder. This confession coupled with statements made by Ian Waddell (who had also confessed to the murder) strongly indicated that Meehan was the victim of a serious miscarriage of justice. Beltrani however bound as he was by his professional obligation to preserve his client's confidence was unable to reveal his knowledge and was left in the invidious position of knowing that an innocent man was serving a long prison sentence but being unable to do anything about it.

Possibly in time McGuinness would have confessed. As it was on 25 March 1976 he died in hospital after a stabbing and subsequently Beltrani and McGuinness's widow, son and daughter made statements which led directly to Meehan receiving a free pardon in May 1976 after serving six and a half years in prison.

In making its ruling the Law Society emphasised the importance of observing the principle of confidentiality. Without it clients would no longer speak freely to their legal advisers and the entire system of justice and independence of the legal system would be undermined. In England this principle has enured in the face of a hard case that could be exceeded only by one in which the death sentence was imposed. In New Zealand it is yielding to the administrative requirements of the Inland Revenue Department.

The Meehan case is also of interest from another viewpoint. It joins the case of George Davis in pointing to the danger of relying on identification evidence for a conviction.

Meehan's conviction resulted primarily from the identification evidence of the murdered woman's husband who gave evidence that he and his wife had spent most of the night in question with the murderers. As the murderers were masked he could not identify the killer by face but at an identity parade each member was to be asked to repeat a phrase one of the murderers had used to the murdered woman. Meehan was chosen as the first to speak and the deceased's husband collapsed saying "That's enough. I don't want to hear any more. That's the man." No one else was asked to speak and the husband's evidence was enough to convict Meehan.

It is noteworthy that the Devlin Report on Evidence of Identification in Criminal Cases (published 26 April 1976) said in its opening words that "In cases which depend wholly or mainly on eyewitness evidence of identification there is a special risk of wrong conviction".

The Committee went on to conclude that the only way of diminishing the risk was to increase the burden of proof. It did not favour imposing a requirement of corroboration but did "wish to ensure that in ordinary cases prosecutions are not brought on eyewitness evidence only and that, if brought, they will fail. We think that they ought to fail since in our opinion it is only in exceptional cases that identification evidence is by itself sufficiently reliable to exclude a reasonable doubt about guilt."

The approach the Committee recommended was that the trial Judge should be required by statute to direct the jury that it is not safe to convict upon eyewitness evidence unless the circumstances of the identification are exceptional or the eyewitness evidence is supported by substantial evidence of another sort; that he should indicate what additional circumstances, if any, might be regarded as supporting the identification; and if there are no additional circumstances he should direct the jury to return a verdict of not guilty.

The Report made a number of other recommendations and it is interesting to note that a number of them have already been implemented in England.

Tony Black