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MINOR OFFENCES

Under s 86 of the Summary Proceedings Act 1957 where a defendant is convicted, and by that conviction adjudged to pay a fine or do some act, then the Registrar of the Magistrate's Court is directed to give the defendant a notice of the conviction or order. Under the minor offences procedure a defendant who does not intervene is, as was observed by Mahon J in *Auckland City Council v King* (unreported, Supreme Court, Auckland, 26 November 1976 (M 566/76)), to all practical purposes reliant on the notice to ascertain his fate. "He cannot ascertain his fate by reference to the date of hearing because there is no date of hearing . . . . No doubt it is theoretically possible for such a defendant to make diligent and frequent inquiry but as there is no date upon which sentence is to be passed it follows that even repetitive inquiries are likely to be fruitless, and the defendant in practice merely awaits notification from the Court as to the outcome of his case".

The matters to be included in the notice are set out in the Act but "the phraseology . . . does not comprehend notice of a disqualification order". The Magistrates' Courts have adopted various systems of informal notification of disqualifications but these systems are by no means infallible as Mr King discovered.

Mr King was served with a notice of prosecution on a charge of failing to keep left. He did not give notice of intention to deny the charge or appear and the matter was dealt with in accordance with the minor offences procedures. A conviction was entered and he was fined and disqualified for two months. However, the notice he received indicated only that he had been fined. Subsequently in the course of a routine check he was asked to produce his driver's licence and it was then that the disqualification was discovered. He was charged with driving while disqualified and raised as a defence that he was unaware of the disqualification.

In a fully reasoned judgment Mahon J held that "if there is some evidence that the defendant honestly believed on reasonable grounds that he was not disqualified, then he is entitled to be acquitted unless the Court or jury is satisfied beyond reasonable doubt that this was not so". The appeal succeeded and there will be few who would disagree that justice was done.

His Honour also indicated "that s 86 could readily be amended by incorporating a requirement that disqualification under the Transport Act must also be notified". That step should not be taken however without giving very full consideration to his Honour's concluding observations:

"The minor offence procedure introduced by the Summary Proceedings Amendment Act 1973 was directed to a large extent at the expedient disposal of minor traffic offences, but as Barker J observed in *Auckland City Council v Brinsden* (unreported, 7 September 1976 (M 883/76), Auckland Registry), the imposition of disqualification under this procedure gives rise to many problems. The average citizen, despite the warning on the Notice of Prosecution, hardly ever considers disqualification a real risk when his transgression has not involved an accident and appears to be a minor infringement. He is unaware of s 30 (4) which authorises disqualification for any offence relating to road safety, and is equally unaware of the wide range of circumstances in which that subsection may in practice be invoked. There is probably not one citizen in ten who realises that he may be disqualified, as a first offender, for travelling in a deserted city street at between 30 and 40 miles per hour. Such disqualifications are in fact imposed, for I have dealt with them on appeal, not always to the disadvantage of the appellant. Then if an appeal is brought from a disqualification order imposed under the minor offences procedure, the Supreme Court is confronted with an abbreviated summary of facts from which it is often impossible to discern whether s 30 (4) in fact was relevant. Barker J considered that *offences which on the facts suggested probable disqualification should be prosecuted by way of summons*, and I must say that in my opinion there is plainly some support for that view". Tony Black

CASE AND COMMENT

Dead but he won't lie down? Presumption of death and dissolution

Lichtwark v Lichtwark (the judgment of Mahon J was given on 21 September last) is an interesting case where, under s 19 of the Matrimonial Proceedings Act 1963, a petitioning wife sought a declaration that her husband was dead and a consequential decree of dissolution of their marriage. Section 19 (3) reads: "In any such proceedings, the fact that for a period of seven years or upwards the other party to the marriage has been continuously absent from the petitioner, and that nothing has happened within that time to give the petitioner reason to believe that the other party was then living, shall be evidence that he is dead in the absence of proof to the contrary." As Mahon J remarked, were it not for this subsection, the common law principles relating to presumption of death would have to be applied. Moreover, the terms of the subsection considerably lighten the burden of a petitioner proceeding under s 19 and the procedure permits the making of a decree if dissolution when in fact the other spouse may not be dead.

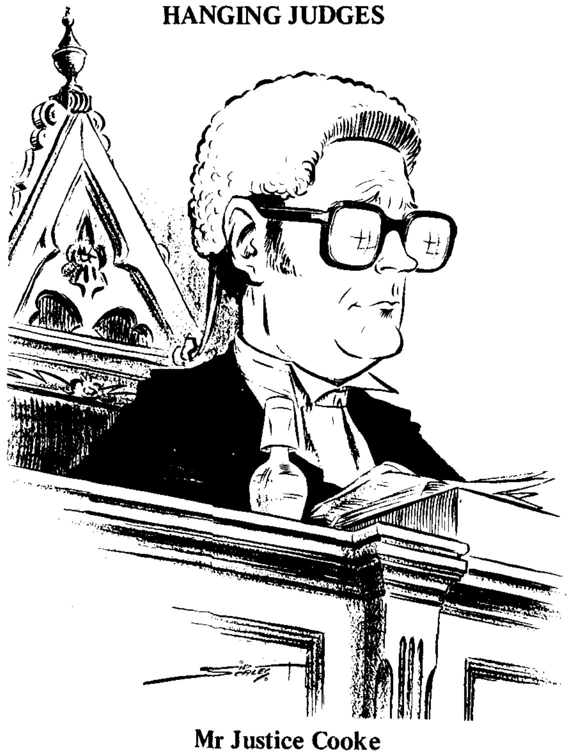
The petitioning wife was married to the respondent in 1942 and there were seven surviving children of the marriage. On or about 19 June 1968, when the parties were running a dairy business in Auckland, the husband disappeared. There had been some measure of disharmony between the spouses and the wife had taken legal advice about it and separation proceedings had been suggested to her. The husband became aware of this and shortly before his disappearance made a guarded reference to one of his children as to his impending departure. Since 19 June 1968 the wife never saw her husband. Widespread inquiries were made and it was ascertained that the husband had disappeared in the company of a woman of whom the petitioner had not known. On a day which coincided with the husband's disappearance, this woman put her child into the temporary care of a neighbour while she went off, ostensibly to keep a dental appointment. She never returned and her husband never saw her again. His Honour thought that it seemed clear that the two had travelled together to Australia. The Australian police later told the petitioning wife that her husband had entered Australia under his own name on 1 July 1968 and was thought to be proceeding to Western Australia to seek employment. The police did not refer to the question whether the husband was accompanied by a woman, but no specific inquiry had been made as to this. At any rate, his Honour was satisfied that the husband was accompanied by the woman mentioned above. It appears that searches had been conducted by the wife throughout this country and Australia for some news of her husband. Appropriate inquiries had been made from every possible source in New Zealand and inquiries were also made in Australia from hospitals, social welfare agencies, employment agencies, immigration authorities, State police in various Australian States and the Commonwealth police, and no trace was found of the husband. During the course of the hearing a final inquiry was made about the woman with whom the husband had disappeared, and evidently a blank was drawn. The husband, moreover, had never been in touch with any one of his family, including his wife, their seven children, and his brothers and sisters. Indeed, nobody could be found who had heard of or from him since 1968. In these circumstances, Mahon J felt that the provisions of s 19 had been satisfied and he accordingly granted the decree sought by the wife. It is perhaps noteworthy that counsel appeared on behalf of the Crown as amicus curiae and said that, as a consequence of his own inquiries and of police inquiries, he could offer no evidence in opposition to the petition.

It is respectfully submitted that this decision is correct, having regard to *Harris v Harris* [1970] NZLR 804; [1970] NZLJ 270 and *Sumner v Sumner* [1970] NZLJ 372, a not unuseful case which does not appear to have been cited to Mahon J.

The interest of this case does not, however, end here. Counsel for the Crown asked the wife what Mahon J called "a pertinent question". He asked her why she had not sought a divorce on the ground of four years' living apart. The reply was that she desired a decree of presumption of death because she and her husband were, at the time of the disappearance, the joint registered proprietors of the matrimonial home. The wife evidently believed that a decree of presumption of death under s 19 would suffice to vest the property in her by way of survivorship. "Such a belief," remarked Mahon J, "reasonable though it may be, is erroneous. The common law presumption of death after a period of seven years requires something more than the proof necessary for a decree under s 19. In order to raise the common law presumption there must be an absence of acceptable affirmative evidence that the person supposedly deceased was alive at some time during the continuous period of seven years or more. Once that is shown then if the applicant can prove that there are persons who would be likely to have heard of him over that period and those persons have not heard of him, and that all due inquiries have been made appropriate to the circumstances, the common law presumption will be created: *Chard v Chard* [1956] P 259, *Tristram & Coote's Probate Practice* (24th ed), 349. But that presumption will be rebutted if there is another assignable and probable cause for the disappearance and the absence of news thereafter. In the present case the evidence as to the circumstances of the disappearance of the respondent leads to the inference that he is in fact alive. He was 48 years of age when he disappeared and the lady [with whom he disappeared] was evidently somewhat younger. There can be little doubt on the balance of probabilities that they are both living somewhere in the Commonwealth of Australia, having started a new life together under a different name. As will be apparent, the evidential presumption under subs (3) is distinctly artificial. I am not here purporting to make any decision as to what the result might be if application were made for leave to swear death. I am only pointing out that on the evidence which I have heard, I doubt if such leave could be granted. As I say, the probabilities emerging from the evidence are that the respondent is alive. I also draw attention to the fact that a decree under s 19 is of no assistance in applying for an order for leave to swear death although the evidence given in support of that decree would necessarily form part of the proof: *Tristram & Coote* (supra) 548."

Professor PRH Webb
Auckland University

HANGING JUDGES



Mr Justice Cooke

CORRESPONDENCE

Sir,

Stamp duty and matrimonial property

The attention of the profession was drawn this year to the liability for stamp duty attracted by documents (whether Court Order or Agreement) recording the arrangements of separating spouses where the ownership of matrimonial property was involved.

In view of the current trend of political and judicial thinking on the division of matrimonial property, can there be any justification for the imposition of ad valorem conveyance duty on the value of the real property which is the subject of rearrangement in such circumstances. Such documentation is brought about by situations quite distinct from other conveyancing transactions. To impose ad valorem duty at a time when the individuals frequently cannot afford to pay the duty and when the circumstances are often already creating personal strain is, I suggest, unjustified.

If the spirit of the proposed matrimonial legislation is to recognise on separation each spouse's rights in law irrespective of registered ownership then documentation giving effect to those rights should be exempt from stamp duty.

Ramon Pethig,
Wellington.

CRIMINAL LAW

CRIMINAL RESPONSIBILITY FOR THE ACTS OF INNOCENT AGENTS

By Dr G F ORCHARD *Senior Lecturer in Law, University of Canterbury*

Introduction

In a note in this Journal last year ([1975] NZLJ 699, 701-702) it was suggested that it was questionable whether, as a general rule, a person could be held guilty of a criminal offence in New Zealand by reason of his having procured an innocent agent to effect the actus reus of the offence. In particular, this was thought to be doubtful where, to the accused's knowledge, the agent was innocent of any offence because of ignorance or mistake on his part. In essence this doubt was inspired by the wording of s 66 of the Crimes Act 1961 which provides that a person is guilty of an offence if he "actually commits the offence" (s 66 (1) (a)), or if he is a secondary party to an "offence" committed by someone else (s 66 (1) (b), (c) and (d); *R v Bowern* (1915) 34 NZLR 696). In the Crimes Act the term "offence" means "any act or omission for which any one can be punished . . . whether on conviction on indictment or on summary conviction" (s 2). An innocent agent who actually effects the actus reus of an offence does not commit such an "offence", and so the application of the secondary party provisions is precluded, and it was suggested that at least in the case of some crimes a person who knowingly procures an innocent agent to so act does not "actually commit the offence" within the ordinary meaning of those apparently simple words.

R v Paterson

This problem has now been considered by the Court of Appeal in *R v Paterson* [1976] 2 NZLR 394. The accused had persuaded one Brown to uplift a TV set from a flat which was in fact occupied by a Mr Fisher. The accused provided Brown with a key to the flat and in entering the flat and removing the TV set Brown acted in the belief that it was the accused's flat. The accused was convicted of burglary of the flat after Roper J had instructed the jury that the accused was guilty of burglary if he "had the intention to commit the crime in Mr Fisher's flat, namely, theft of his television set, and that by the use of Brown as an innocent agent who was unaware of the true circumstances, a breaking and entering was in fact arranged as though it had been done by a robot". On appeal it was argued that this was a misdirection in that the wording of the Crimes Act 1961 is inconsistent with the general application of the common law principle which provides for criminal responsibility for the acts of an innocent agent, and in particular that principle could not be applied to the crime of burglary. The Court of Appeal rejected these submissions and affirmed the conviction.

The principal part of the reasoning in the brief judgment of the Court can be conveniently divided into three steps.

First, the Court accepted that the accused could not be held liable as a secondary party unless it was proved that the offence had been committed by another, and thus concluded that:

> "In the present case the question which we have to decide is whether or not the words 'Actually commits the offence' are in their ordinary meaning apt to describe a person who, with the necessary criminal intent, uses another but innocent person as an instrument to perform the physical act necessary to commit the particular crime."

The Court then answered this question in the affirmative:

> "In our view the words in question are perfectly appropriate to cover such a case" ([1976] 2 NZLR 394, 396, per Richmond P).

Secondly, the Court found support for this conclusion from the fact that at common law a person who acted through an innocent agent could be convicted as a principal in the first degree because the agent was "merely the instrument" used by the accused, and thus the agent's act was regarded as the accused's act. A passage to this effect was quoted from *Brisac* (1803) 4 East 164; 102 ER 792. In that case this reasoning was employed primarily to rebut an argument that the Admiralty was the only proper venue because the accused had been on the high seas when the agent acted in Middlesex, but the attribution of the agent's act to the accused was doubtless the theoretical basis for the general common law principle of liability.

Thirdly, the Court said that this reasoning "must be applied to the language of s 66 (1) (a)", but then said this was subject to one reservation:

"It may be that there are some crimes which by virtue of their statutory definition cannot be committed by the use of an innocent agent". But this reservation did not apply in Paterson: "So far as the crime of burglary is concerned, however, we have no doubt that it can be so committed . . ." ([1976] 2 NZLR 394, 396-397).

Commentary

It can hardly be doubted that the conclusion that Paterson was guilty of burglary is a sensible one from the point of view of public policy, and it seems clear that it would be the inevitable conclusion at common law. On the other hand, it is respectfully doubted whether this conclusion is consistent with the natural import of the words used in the Crimes Act.

In arriving at its decision the Court took the view that the words "Actually commits the offence" in s 66 (1) (a) are apt to cover the case where the accused "acts" through an innocent agent, but it is submitted that a proper determination of this question requires an examination of the definition of the particular offence in question: it is only in the light of this definition that one can determine whether it can be said that in ordinary parlance the accused "actually committed" the offence. The question posed in *Paterson* cannot be answered solely by reference to the wording of s 66 (1) (a) because the words "commits the offence" necessarily refer one to the definition of the offence in question, which will reveal what has to be done in order to "commit" the offence. The Court of Appeal accepts this in so far as it recognised that there may be offences which are so defined that the innocent agent principle cannot be applied, but the Court offered no examples of such offences and it is noteworthy that there was no examination of the definition of burglary, which was held not to be such an offence.

In fact, there seem to be some offences in the Crimes Act 1961 which are so defined that it could be readily concluded that a person "actually commits" them when he acts through an innocent agent, some which are so defined that this question might be disputable (although since *Paterson* it seems likely that liability should be imposed in such cases), and some which are so defined that such a conclusion appears to be extremely difficult or impossible if anything like the "ordinary meaning" of words is to be adhered to.

For example, liability for the acts of an innocent agent could be readily imposed in respect of offences which are so defined that the actus reus includes the bringing about of a result "directly *or indirectly*". This class of offence includes assaults (s 2), and homicides (s 158). Again, there are a number of offences which are defined to include the action of a person who "*causes*" something to happen, and a person who procures an innocent agent to bring about any such event can be literally said to have "caused" it: eg s 121 (1) (c) ("causing" something to be conveyed into a prison), ss 188, 191 ("causing" grievous bodily harm), s 195 ("causing" the ill-treatment of a child), s 200 ("causing" poison to be taken), s 201 ("causing" disease), s 266 ("causing" forged documents to be uttered). The offence of theft can be included in this group of offences in that s 220 (5) expressly provides that the offence is committed "when the offender moves the thing, *or causes it to move or be moved*, with intent to steal it." Receiving is another crime which is probably so defined that the imposition of liability for the acts of an innocent agent requires no distortion of the words used by the statute: s 260 provides that "the act of receiving" is complete if the offender has "possession" of the thing "either exclusively or jointly" with another; "possession" (and more particularly, "joint possession") is a term of art and it would involve no new doctrine to hold that possession of the agent is possession of the procurer, who can thus be said to "actually commit" the offence. If this is thought to involve a departure from the "ordinary meaning" of words it is probably a departure inherent in the concept of possession which has been developed in the law.

There are also numerous crimes where the plain meaning of the words used in the definitions is not obviously confined to personal conduct by the alleged offender, and here again liability can be imposed for the acts of an innocent agent without any clear departure from the "ordinary meaning" of the words. The following are some examples of such offences: s 113 ("fabrication" of evidence "by any means"), ss 146, 147 ("keeping" or "managing" brothels and the like), s 186 (the unlawful "supply" of things), ss 220, 228 ("conversion" of things), s 233 ("bringing" stolen property into NZ), ss 238, 239 ("threatening" and "demanding").

In contrast to the offences in this lengthy and incomplete catalogue there are other crimes which are so defined that it is extremely difficult to see that a person can "actually commit" them unless a substantial departure from the "ordinary meaning" of the words used is accepted. Perhaps the clearest examples are those crimes which by definition can only be committed by a person with a particular status: eg perjury, which requires "an assertion . . . made by a witness . . . being known to the witness to be false" (s 108), or bigamy: "the act of a person who, being married, goes through a form of marriage" (s 205). But there are also offences in respect of which it is extremely difficult to apply the innocent agency principle simply because the words used to define them seem plainly to require particular conduct on the part of the offender before he can be said to have "actually committed" them. For example, s 107, which creates the general offence of contravention of a statute where no penalty is provided: it consists of "wilfully doing" or "omitting" a forbidden or required act. Similarly, rape and a number of other offences require the act of sexual intercourse, including "penetration" (ss 127, 128, 130, 132, 134, 138), and some offences are defined in terms of one who "does an indecent act" (eg ss 125, 126, 133 (1) (b), 134 (2) (b), 139 (1) (a), 140 (1) (b), 141 (1) (b)). How can it be said that a person "actually commits" any of these offences unless he personally performs these acts? A combination of the wording of s 66 (1) (a) and the wording of the definitions of these crimes makes it extremely difficult to apply the innocent agency principle, but the actual decision in *Paterson* causes difficulty for the same linguistic reason.

Burglary is defined in s 241 and this requires (inter alia) that the offender "breaks and enters any building or ship". The word "breaks" *might* be thought to be sufficiently impersonal to be capable of fairly describing the activity of one who "acts" through an innocent agent, but it seems to be an abuse of language to suggest that a person can be said to "actually enter" a place when he is not even there. This linguistic difficulty is aggravated by s 240 (2) (b) which provides that for the purpose of the burglary sections "an entrance" is made "as soon as any part of the body of the person making the entrance, or any part of any instrument used by him, is within the building or ship". In this context it seems plain that "instrument" cannot include a person, or part of a person's body, but if so this provision reinforces the impression that to be said "to enter" a place a person must actually be there. Nevertheless, the decision in *Paterson* means that a person may "actually commit" burglary (ie he may "actually break and enter") although he is absent from the building or ship. Notwithstanding the reasoning of the Court of Appeal this does not seem to be consistent with the "ordinary meaning" of the words which s 66 (1) (a) requires us to consider.

The Court recognised that the innocent agency principle might be excluded by the definition of a particular offence but it is difficult to escape the conclusion that the definition of burglary is such that a more detailed explanation of how the principle can be applied to it was called for. The impression that insufficient attention was paid to the definition of the offence is reinforced by a sentence following the Court's conclusion that the words in s 66 (1) (a) are "perfectly appropriate" to cover a case of innocent agency: "Indeed, we believe that the ordinary man in the street would have no hesitation in saying that a dishonest employee who made use of an innocent carrier to bring about the physical taking of goods from his employer's premises would be a person who 'actually committed' the crime of theft". [1976] 2 NZLR 394, 396, per Richmond P. The charge in *Paterson* being one of burglary, this statement seems rather irrelevant, but in any case the question for the "man in the street" should not be as general as whether the accused "actually committed the crime of theft": the question is whether he can be said to have "actually taken or converted the property" etc, ie whether his conduct "actually" complies with the definition of theft (and it has already been suggested that in the case of theft an affirmative answer presents little difficulty).

Before leaving the reasoning of the Court of Appeal it must be noted that the Court rejected a further argument that the terms of the Crimes Act impliedly exclude liability for the acts of innocent agents, except when this is expressly provided for, in that the sections creating defences of infancy and insanity include subsections to the effect that the availability of any such defence is not to affect the liability of any other alleged party (ss 21 (2), 22 (2), 23 (4)). In declining to give these subsections (which were introduced in 1961) this effect the Court said: "We think that they were introduced, possibly as a matter of caution, to overcome the general rule . . . that there can be no secondary party if the principal offender was not criminally responsible for his act" ([1976] 2 NZLR 394, 397 per Richmond P). This suggests that when there is a defence of infancy or insanity for the apparent principal, counsellors and procurers and the like are to be regarded as secondary parties. If the Court's view of s 66 (1) (a) is accepted it does seem that these provisions have little or no substantive effect: if the effect of the defences in ss 21, 22, and 23 is simply to protect a guilty party from conviction (cf Adams, *Criminal Law and Practice in New Zealand* (2nd ed), paras 388-391) there would seem to be no principle standing in the way of the conviction of secondary parties, and if (as seems more likely) the existence of such a defence renders the person in question innocent, then (according to *Paterson*) s 66 (1) (a) could apply to give the same result as the common law, which held those who procured "offences" by children and the insane to be principals in the first degree. Furthermore if the effect of these defences is to render the person in question innocent of any crime, it seems (from *Paterson*) that these express provisions as to other "parties" have a rather surprising theoretical effect in that those who would otherwise be liable under s 66 (1) (a) are to be regarded as liable as secondary parties, notwithstanding the absence of a principal criminally responsible for his acts.

Conclusions

The Court of Appeal found that the words "actually commits the offence" are apt to describe a person who acts through an innocent agent. It is respectfully suggested that this is highly disputable. Furthermore, it is a conclusion of which others have not seemed confident. Thus, Stephen, in his *Digest of the Criminal Law* (which was cited by the Court) certainly supported the common law rule that a person acting through an innocent agent should be a principal in the first degree, but in his Digest (which was in effect a draft Code) he thought it necessary to expressly provide for this. In Article 35 he provided a general definition of principals in the first degree ("Whoever actually commits, or takes part in the actual commission of a crime . . ."), but then in Article 36 he provided that "whoever commits a crime by an innocent agent is a principal in the first degree". Stephen's Digest seems to contradict rather than support the decision in *Paterson* in that it is a fair inference from Article 36 that such a person does *not* "actually commit the offence" within Article 35. The code drafted by the Criminal Law Commissioners of 1879 also supports this view: s 71 of that Code defined parties as those who "actually commit" an offence, or aid, abet, counsel or procure "an offence", and in addition it expressly included anyone who aids, abets, counsels or procures another "to do or omit *any act* the doing or omission of which forms *part of* the offence". "Actually committing" an offence was thus treated as distinct from employing an innocent agent to effect the actus reus of an offence. Section 7 of the Queensland Criminal Code (which in other respects is much the same as s 66 of the Crimes Act 1961) contains a similar provision.

In New Zealand the wording of the provisions as to parties in the earlier Criminal Codes of 1893 and 1908 was in material respects the same as s 66 of the Crimes Act 1961: for some reason (which may have been attempted simplification) the provisions explicitly covering the use of innocent agents which were present in the Draft Code of 1879 were apparently deleted from the English Bill of 1880 which formed the basis of the Code enacted in New Zealand. It is submitted that this was unfortunate for two reasons.

First, it has resulted in uncertainty in that even after *Paterson* it is possible that there may be some crimes which are so defined that the innocent agency principle is excluded, but doubt must remain as to when this might be the case.

Secondly, and more importantly, it is submitted that in order to preserve the general application of the principle the Court of Appeal has been forced to distort the meaning of the words used in the Act. The accused in *Paterson* "entered" the victim's flat in only a figurative sense of that word, not in its "ordinary" sense; similarly it is only the language of metaphor which allows innocent agents of offenders to be described as "mere instruments in their hands". It is accepted that the penal provisions in the Crimes Act should not always be construed narrowly: no doubt s 5 (j) of the Acts Interpretation Act 1924 applies to them, but even when that provision may be of assistance it does not justify giving words a meaning which they cannot fairly bear (see Burrows (1969) 3 NZULR 253, 268). The word "actually" means "in fact" and it seems wrong to say that a person can fairly be said to have "actually" done an act when he has done it in a figurative sense only, the act being in fact done by another, albeit on his behalf. It is also accepted that in interpreting the Crimes Act the Court may properly use accepted principles of the Common law as an aid to the interpretation of the Act (*Paterson* [1976] 2 NZLR 394, 396). Although this should only be done if something in the terms of the Act raises doubts as to its meaning (*Bank of England v Vagliano Bros* [1891] AC 107), the departure from the apparent requirements of public policy involved in the argument of the appellant in *Paterson* probably justified the Court seeking assistance from the common law. Nevertheless, common law principles must give way if they are found to be "plainly inconsistent" with the terms of the Act (*Paterson* [1976] 2 NZLR 394, 396) and it is respectfully suggested that this is the situation which arose in *Paterson*. Such a result might be contrary to the reasonable requirements of "policy" and contrary to what are assumed to be general principles of criminal liability, but this is part of the price of Codification. Presumably those responsible for the legislation would have clearly provided for the liability of those who act through innocent agents if they had had doubts as to whether the terms of the Code provided for this. But this was doubtless also. true of the original failure to provide for the liability of unsuccessfull inciters (*R v Bowern* (1915) 34 NZLR 696), and might well be true of the failure to provide for the possibility of a corporation being guilty of culpable homicide as a principal (*R v Murray Wright Ltd* [1970] NZLR 476). It is questionable whether the wording of the statute which confronted the Court in either of these cases was more "plainly inconsistent" with the common law principle in question than that with which the Court had to deal in *Paterson*.

In 1883 the New Zealand Commissioners on the proposed Criminal Code concluded their report by saying that:

> "It is scarcely to be expected that a measure such as this will be free from errors or omissions; and it is to be anticipated that experience will discover the necessity for amendments, modification, and additions."

It is submitted that notwithstanding *Paterson* s 66 of the Crimes Act 1961 should be amended so that liability for the acts of innocent agents is provided for with the clarity which is desirable in a Criminal Code.

FAMILY LAW

FOREIGN DIVORCES ONCE MORE

By P R H Webb *MA, LLB (Cambridge), LLD (Auckland), Professor of Law in the University of Auckland.*

The Courts of this country seem to be building up something of a jurisprudence in the context of refusal to recognise overseas divorce decrees. In *Re Darling (a)*, Casey J held that, by virtue of s 82 (2) of the Matrimonial Proceedings Act 1963 *(b)*, the criteria for recognising overseas decrees set out in s 81 (1) were not exclusive (p 383). He was prepared to hold, following *Indyka v Indyka (c)* and *Mayfield v Mayfield (d)* that New Zealand Courts should recognise an overseas divorce obtained by a petitioning wife in the Courts of her country of residence whenever a real and substantial connection was shown between her and the country exercising jurisdiction (p 383-4). His Honour, however, refused to recognise the divorce that the wife had obtained in Liberia – on the ground that both she and her husband were merely sojourners there and consequently were not really and substantially connected with that country *(e)*. In the light of this, it becomes interesting to examine the recent decision of Mahon J in *Godfrey v Godfrey* [1976] 1 NZLR 711. The husband applied under s 17 of the Matrimonial Proceedings Act 1963 for a declaration as to the validity in this country of a decree of divorce granted in Arizona, USA. The facts were these: the parties were married in New Zealand in 1965 and had three children. The husband had been born in New Zealand and had always lived here. The wife was born in the UK, but came to this country on her parents' emigration during her childhood. Since that time her permanent home had been here. After their marriage, the parties lived here until 1971. They then went, with their children, to the USA so that the husband, a doctor, could engage in post-graduate medical studies there. For 15 months the family lived in Ohio and then, on 30 June 1972, they moved to New Hampshire for a year's stay there. They then moved on to Arizona, where the husband took up yet further medical studies at the University of Arizona. As their marriage had deteriorated, the spouses decided to get a divorce in Arizona, where they had taken up residence in June 1974. Either party was entitled to apply for a divorce after 90 days' residence in Arizona. After living there for some nine months, (and in the USA as a whole for nearly three years) the husband signed a petition alleging that the marriage had irretrievably broken down and seeking a divorce and ancillary orders. The wife subscribed the petition as a consenting party to the divorce and to the associated ancillary relief *(f)*. A decree of divorce was granted in due course and the parties made their separate ways back to New Zealand and continued to live separate and apart. The husband now submitted that the Arizona decree was valid; the wife contended for its invalidity.

Counsel for the husband, in the light of *Re*

(a) [1975] 1 NZLR 382, noted by the present writer in [1974] NZLJ 536.

(b) "Nothing in this section shall affect the validity of any decree or order or legislative enactment for divorce or dissolution or nullity of marriage, or of any dissolution of marriage otherwise than by judicial process, that would be recognised in the Courts of New Zealand apart from this section."

(c) [1969] AC 33; [1967] 2 All ER 689, at pp 105, 727 respectively. This decision of the House of Lords is noted by the present writer in [1967] NZLJ 534.

(d) [1970] P 119; [1969] 2 ALL ER 219, noted by the present writer in [1969] NZLJ 615.

(e) [1975] 1 NZLR 382, 384, applying what Lord Pearson said in the *Indyka* case [1969] 1 AC 33; [1967] 2 All ER 689, at pp 112, 731 respectively.

Neither spouse in the *Darling* case was domiciled in Liberia.

(f) Cf *Tijanic v Tijanic* [1968] P 181; [1967] 3 All ER 976.

Darling placed no reliance on s 82 (2). This was, in the Court's view, quite correct (p 714). Counsel therefore prayed in aid, as being the only possible alternative, s 82 (1) (b) (i) of the Matrimonial Proceedings Act 1963. This provides that "The validity of any decree or order or legislative enactment for divorce . . . made (whether before or after the commencement of this Act) by a Court or legislature or public authority of any country outside New Zealand shall, by virtue of this section, be recognised in all New Zealand Courts, if . . . (b) That Court or legislature or public authority has exercised jurisdiction – (i) In any case, on the basis of the residence of one or both of the parties to the marriage in that country if at the commencement of the proceedings any such party had in fact been resident in that country for a continuous period of not less than two years . . .". Counsel submitted, not unattractively, that the term "country" meant the USA as a whole. Thus, in his view, the Arizona Court was a Court of the USA for the purposes of the opening words of s 82 (1), and the jurisdiction of that Court was exercised on the basis of residence in the USA because residence in Arizona for a defined period was also residence in the USA. Hence it followed in favour of recognition that the parties had clearly been resident in the USA for more than two years before the proceedings were instituted in Arizona. Counsel for the wife, on the other hand, viewed this submission as not tenable. In this view, the Arizona Court had exercised jurisdiction on the basis of residence *in Arizona*, and that, since residence *in Arizona* had been for less than two years, the decree could not be recognised under s 82 (1) (b) (i).

Mahon J considered that he must accept the latter argument, observing: "But the Superior Court of Arizona based its jurisdiction upon residence in that state alone. Being a state court it could not do otherwise. Its jurisdiction is derived from the statute law of Arizona. There is no federal divorce jurisdiction in the United States of America *(g)*. The word 'country' in a 82 (1) must of necessity mean not only a sovereign state with a unified system of law but also any province or state forming part of a federation in which such province or state exercises its own independent system of divorce law. Thus the word 'country' where it appears in the prefatory words of s 82 (1) means in relation to the United States any one of the states in that republic, and the meaning of the word as it thereafter appears in the subsection is the same *(h)*. In order, therefore, to bring the case within the subs (1) (b) (i) of s 82 the husband had to show that he or both parties had been resident in Arizona for not less than two years. But they had only been there for nine months" (p 714). His Honour accordingly held that he could not declare in favour of the validity of the Arizona decree under either s 82 (1) (b) (i) or s 82 (2) *(i)*.

It is profitable to compare the case before Mahon J with that which came before Bagnall J in England in *Law v Gustin (formerly Law) (j)*. The spouses were married in 1966, both being British subjects. They lived together in England. There were no children of the marriage. In December 1967 the wife left the matrimonial home. She went to the USA and, early in 1969, was granted a decree of nullity by the District Court of Wyandotte County, Kansas, on the ground that the parties' marriage was entered into through fraudulent conduct on the part of the husband, he having no intention of consummating the marriage. She had, however, previously written to her husband to the effect that she did not mean to return either to him or to England. She was living in the State of Kansas with a native of the State of Kansas, Mr Gustin, whom she had met in England and who had been a mutual friend of the parties. (Sufficient notice was given to the husband of the Kansas proceedings, so that the Kansas decree could not be criticised on the basis of natural justice (p116)). It must be appreciated that the wife's period of residence in Kansas before the decree was pronounced was comparatively short, "amounting to perhaps rather less than 12 months *(k)*". Bagnall J granted the husband a declaration that the Kansas nullity decree was valid in England; observing: "But it is plain that Kansas was at all material times the home state of Mr Gustin; it is also clear that no other reason was

(g) Cf the position in Australia and Canada where there are federal divorce laws.

(h) Cf Domicile Act 1976, ss 2 and 13.

(i) Ibid. Given, even, that one accepts the more extreme cases purporting to follow the *Indyka* case (supra), viz *Mather v Mahoney* [1968] 3 All ER 223: noted by the present writer in (1969) 18 ICLQ 453; [1969] NZLJ 501; *Blair v Blair* [1968] 3 All ER 639; noted by the present writer, [1969] NZLJ 614 and *Mayfield v Mayfield* (supra), it is clear that the refusal to recognise under s 82 (2) was correct. The parties were, it is submitted, just as much "mere sojourners" in Arizona as were Mr and Mrs Darling in Liberia. The Arizona divorce was a "bogus" or not "genuine" one within the language of Ormrod J in *Messina v Smith* [1971] P 322; [1971] 2 All ER 1046. Even if one accepts the most extreme case, *Munt v Munt* [1970] 2 All ER 516, noted by the present writer in (1970) 19 ICLQ 699; [1970] NZLJ 403, Mahon J is still,it is submitted, right.

(j) [1976] 1 All ER 113. This seems to be the first reported English case to consider the extension of the *Indyka* doctrine to overseas nullity decrees.

(k) Ibid. Cf the longer time spent in the USA by the Godfrey family, which nevertheless still left them as not resident in Arizona for 2 years.

given for the wife to leave [England] and her husband and go to the State of Kansas than that she wished to follow Mr Gustin and in due course, if she was free to do so, to marry him . . . [S]uch letters as she wrote all emanating from Kansas showed no intention either of returning to [England] or of going anywhere else, either in or outside the United States of America. In due course, the decree having been pronounced the wife and Mr Gustin did in fact marry and have remained settled in the state of Kansas.

"I am, I have no doubt, entitled to consider what has happened subsequently to the pronouncing of the decree in that state in order to guide me to the right answer to the question of fact that I have posed" *(l)*.

There can be no doubt that his Lordship was right to hold that, in the circumstances attaching to Mrs Law, she was really and substantially connected with the State of Kansas and that, consequently, he could properly recognise the decree of nullity she had obtained there. It is submitted that the New Zealand Courts should recognise the Kansas decree under s 82 (2) of the Matrimonial Proceedings Act 1963 even though recognition would not have been possible under s 82 (1) (b) (i) because of lack of two years' residence by Mrs Law in Kansas *(m)*.

(l) [1975] 3 WLR at pp 846-847, applying *Indyka v Indyka*, per Lord Wilberforce at p 105, *Blair v Blair* and *Mayfield v Mayfield* both also supra, and *Alexander v Alexander* (1969) 113 Sol Jo 344. One would have thought that the best case to follow would have been *Welsby v Welsby* [1970] 2 All ER 467, noted by the present writer in (1970) 19 ICLQ 697, where the wife had also "moved on" to the land of her lover. It is clear, though, that Mrs Law was not a "mere sojourner" in Kansas.

(m) As Mrs Law was, in the New Zealand sense, obviously domiciled in Kansas, recognition could also be claimed under s 82 (1) (a), viz that she was domiciled in Kansas at the time of the nullity decree.

THE CONTEMPORARY LAWYER

The Professor F W Guest Memorial Lecture delivered by the President of the New Zealand Law Society, Mr LESTER CASTLE, *on Thursday 4 November 1976 at the University of Otago.*

Anthony Sampson in his book *Anatomy of Britain* referred to the following terms: "The law more than any other profession is imprisoned in its own myths and shibboleths and while the barristers preserve their traditions and the solicitors tie up their thick paper in pink tape their protected world has become increasingly irrelevant to the great world outside. On the other hand one cannot forget that in spite of their maddening habits lawyers have maintained the incorruptible British system of justice."

There will be some who say today in New Zealand that Sampson's commentary still applies to the members of the legal profession in this country.

There are two aspects of the statement that call for comment: First, that lawyers have maintained the incorruptible British system of justice, and, it is fair to add, lawyers have been responsible in maintaining the rule of law.

Dicey describes the rule of law this way: "No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of the law established in the ordinary legal manner before the ordinary Courts of this land." Put another way: we are a nation of 3 million people, no two of whom are completely alike. Collectively, we have many interests in common. Indeed, in the last analysis we sink or swim together. Equally we belong to numerous small common-interest groups within the nation, eg, regional, social, economic, political and others, the interests of which inevitably conflict. Conflicts of interest between individuals are inevitable. It follows that without some rules life would be intolerable. The weak would go to the wall but not even the strong would really benefit, for none of us is wholly self-sufficient. As life becomes more complex, so we all become more inter-dependent and at many points each of us needs help and protection. That is what the rule of law is all about – protecting us from others, which we all applaud, and protecting others from us, which is the price we have to pay.

In the end, the responsibility for upholding the law belongs to the ordinary citizen, each and everyone of us. This does not mean that we must all agree with each individual law – far from it. But, it does mean that the overwhelming majority of us must believe in one basic truth – namely, *if we want to preserve our freedom, we must surrender part of it*. There is no other way! For every person to whom any given law is a restriction there are others, and often very many others, to whom it is a protection. The price which we pay by accepting the restriction is tiny compared with the benefit we get from the protection of the law as a whole. Thus, by the rule of law we mean the system by which free men and women each surrender part of their freedom in order that others also may be free. So, in spite of what Sampson calls "maddening habits", the contemporary lawyer is duty bound not only as legatee and trustee but also as citizen to play his part in the maintenance of our incorruptible system of justice and of the rule of law.

The second part of Mr Sampson's quotation that I would comment on is in respect of "myths and shibboleths" and the irrelevancy of our protected world vis-a-vis the "great outside world". We all know the story of the accused who asked the Magistrate if he would dispense with sureties; the Magistrate questioned whether he had a friend who would act as surety for him.

"The Almighty is my friend", he replied.

"Yes, yes", said the Magistrate, but could you give me the name of a friend living nearer."

"He is everywhere", was the answer.

"That is so", replied the Magistrate, "but I'm afraid we will have to find someone of more settled habits."

It could be said that, some years ago, the profession had perhaps become too settled in its habits, but I believe the steps that have been taken and those currently under consideration display a social awareness or social conscience symptomatic of a closer inter-relation with the outside world: as I hope to demonstrate later.

What then of the "myths and shibboleths"? Just as the law to the layman should be comprehensible (and I interpolate here that clarity of the law should be sought rather than precision, which is not the same thing), so should the members of the legal profession continue to strive, not only for clarity in the law, but also for simplicity of language. We must shed the cloak of mystique with which we surround ourselves. The age-old stereotype language which still permeates the judicial system and, to perhaps the same extent, the solicitor's practice is not only anachronistic but also irrelevant in the great outside world. It is important that legal language be updated in itself so that it is comprehensive; and that the forms and procedures of our Courts be modernised. I note that some steps have already been taken to bring this about in the redrafting of the Code of Civil Procedure by the Supreme Court Rules Committee. The profession should also understand that high sounding phrases, and glib use of technical legal jargon can no longer be countenanced.

The myths and shibboleths, the chains with which we have imprisoned ourselves, must be broken. Mystique has no place in the repertoire of the contemporary lawyer. In short, the client is entitled to advice in layman's language.

There are three characteristics associated with every profession:

(1) Specialised knowledge held in common by members of that profession.
(2) Responsible use of that knowledge in the service of the community.
(3) Freedom within the law for each member of the profession to act independently of any other person.

There is much that could be said about the knowledge and skills required of the lawyer today, and how he, like other professional people, must strive to keep abreast of the times. I content myself, however, by saying that the education and the training of any person is a partnership between that person and the community. Both contribute and both should benefit. If lawyers are among the better educated and more highly trained members of the community, it follows that they should use their abilities to make a major contribution to the life and growth of the community.

In *this* day and in *this* country I believe that the contributions made to the life and growth of the community by the legal profession give the lie to Mr Sampson's claim that the lawyer's world has become irrelevant. We all know that 70 percent, that is, about 2000 of the practising lawyers in this country, have been in practice for 10 years or less. Most of these people are directly involved in the hurly-burly of private practice and know full well the demands that are made by an insatiable public upon their time and expertise at all hours of the day and night. These contemporary lawyers have been responsible in large measure for the outward-looking and more liberal policies that the Law Society has espoused in recent times.

The challenges to our sense of values and traditions today are endless and it is essential that the contemporary lawyer is listening critically. The art of being a good listener is, of course, part of the training for citizenship. I believe that the art of listening critically adopted in the councils of the district law societies and in the Council of the New Zealand Law Society has had a great deal to do with the profession's break with its traditional conservative and introverted attitudes.

On the one hand, there are those who will say that the only hope of preserving what is best lies in the practice of an "immense charity, a wide tolerance, and a sincere respect for opinions that are not ours". On the other hand, Edmund Burke says: "Because half-a-dozen grasshoppers under a fern make the field ring with their importunate chink . . . do not imagine they are the only inhabitants of the field." The ability to listen critically demands a marked talent to differentiate and distinguish between the "importunate chink" and those opinions that demand our sincere respect. This is not to say that we should assume a purely passive listening role! There are many issues on which we must be positive! And one issue on which I believe we must be positive is legal education and the qualifications required for the practice of law.

Thirty years ago and before then, the dominant influence on a law student was undoubtedly the principal under whom he trained. Today, it is clearly his university lecturers. I do not denigrate the quality of education that today's law student acquires. But, we ought to be aware of its limitations – and consider if something vital is missing. We all know that becoming a lawyer involves much more than learning the law and its sources. What a client expects often differs in substance and form from the expectations of a Judge, a Magistrate, and a fellow practitioner. The lawyer in training must face many dilemmas before he gains the self-assurance that his clients and colleagues demand. In the process, he must acquire that sense of proper behaviour that characterises the profession. Formerly, the student became a lawyer as he watched and helped lawyers in practice grapple with real problems of real clients. Today, he may be admitted to the profession without any such experience. His formal education is isolated from the great outside world. Though his knowledge of legal principles may be greater and his intellect better trained than his predecessors, he may enter the profession knowing little of what lawyers do – or should not do. The "professor" of law has supplanted the "artisan".

Many young lawyers admit to having been ill-prepared for the realities of practice. Senior practitioners criticise the same shortcoming. Furthermore, Mr Justice Haslam said on his retirement from the Bench that, whatever their academic achievement, many of those admitted were fitted neither by nature nor by attainment to appear before the higher Courts. He went on: "Even the most adaptable and promising can benefit from systematic tuition from their elders . . . If tuition in the practical aspects of the profession's activities is to be usefully given, only a seasoned and experienced practitioner can impart the message and, even from him, its adequate formulation will require both time and effort beforehand."

Within the profession, there is growing disquiet that too much responsibility is being placed on our university staffs in preparing law students for practice. The answer may lie partly in a modified degree structure or in new methods of tuition, especially during the professional studies that only graduates seeking to practise law need pursue. Even now the Education Committee of the New Zealand Law Society is studying the procedures adopted elsewhere which point to kinds of learning activity that might assist law students as they make the transition from university to law firm. At the College of Law in Sydney and at the School for Practical Training in Melbourne, six months' tuition on a full-time basis in simulated office conditions is a prerequisite to entry to the profession.

Whatever is done to better fit students for admission to the practising profession, *greater involvement by practising lawyers appears essential*. Further, on the experienced members of the profession there still rests much responsibility for ensuring that lawyers not yet entitled to practise on their own accounts are adequately trained for the responsibilities that will be theirs – for example, in the solicitor-client relationship, the code of professional responsibility, accountancy and accountability, and the technique of interviewing clients. This "in-house" training is essential to the recently or partly qualified practitioner. I repeat that, though the newly qualified are "better educated" through the universities than their predecessors, the onus still rests on the members of the profession, contemporary lawyers, to inculcate in those with whom they are associated the traditions of integrity and standards of practice to which I will make reference later.

At the same time, as the profession seeks to develop in students the intellectual powers and the skills and the moral qualities that will be required of lawyers during the twentieth and twenty-first centuries, it must also provide for the re-education and retraining of its members to meet the demands of society. An encouraging start has already been made in this field.

Meantime, are there any signs and portents of the recognition by lawyers of the relevance of the outside world?

Are we fulfilling our obligation to make a major contribution to the life and growth of the community?

Are we making responsible use of our knowledge in the service of the community and thus to the profession?

In contemporary society, most people of good will voluntarily assist the less fortunate, without expectation of reward. Lawyers are no exception. But, in the legal profession's view, competent legal advice and other legal services are more than just a need; they are a right of every citizen. Something more than the charity of a profession is therefore required. Thus, for more than 40 years, the legal profession has supported the introduction and growth of legal aid schemes. With one exception, these schemes provide legal representation in Court, at little or no cost to the client, and for part payment by the State for services rendered (subject always to the approval in civil legal aid by the District Legal Aid Committee manned by lawyers voluntarily and unpaid).

The exception is the Legal Advice Bureaux, or Legal Referral Centres. There are more than 30 such centres which anyone can attend at advertised times to discuss legal problems free of charge. The referral centres are staffed by lawyers who attend voluntarily and who are unpaid. This service, valuable though it has proved, has one serious limitation. The centres can provide only simple advice on simple problems. They do not have the staff or the facilities to investigate claims or act on behalf of claimants. People with problems that require action are referred to a law firm able to help. Apparently, some, no doubt through frustration or bewilderment, never arrive at the law firms to which they are referred.

Lately, provision has been made for similar services *in* Institutions where inmates are unable to visit solicitors, for example, in Christchurch, at Paparua, in Auckland, and in Wellington, at the prisons, Mt Crawford, the Arohata Institution and at Wi Tako.

Two years ago, my predecessor, the late Guy Smith, said that the legal profession's most pressing responsibility was to see that legal assistance was available to all whose legal rights were threatened or required to be asserted. That is still true. More recently, the Lord Chancellor, the Rt Hon the Lord Elwyn-Jones, said when in New Zealand last year that neither good laws nor good Courts were of any value if people did not have effective access to legal advice and legal remedies. They must have access to advice, assistance and advocacy that would enable them to insist upon those rights. It was those who were least well off, the Lord Chancellor said, who most depended on the protection the law gave them. Legal services, he said, were an instrument of community development. In areas of deprivation, they could restore people's confidence in the law and the Courts and the legal system to redress their grievances, to protect their lawful rights and to provide a framework for an ordered community.

The New Zealand Law Society has given careful and detailed consideration to meeting this need, and, on its own initiative, has appropriated $10,000 of its members' funds to establish a pilot Neighbourhood Law Office in Auckland in partnership with the Government. The objective of the scheme is to ascertain the extent of the need for legal services that is not being met at present. The office will provide services at little or no cost. Its staff, recruited by the Law Society, will be concerned primarily with helping individuals with their individual problems. It is expected that the minimum staff for the pilot scheme will comprise two solicitors, a community worker and a typist-receptionist. Three major charitable trusts have given $5000.

The Society will initiate this pilot scheme as soon as the Government undertakes to provide the balance of the funds needed – approximately $25,000 in the first year.

Unquestionably, there will be a role in Neighbourhood Law Offices for lawyer volunteers to assist and contribute, as many of them do now elsewhere, both during and outside normal business hours. However, in managing and operating this scheme, we see no place for the starry-eyed idealist who lacks the skills and experience to make an effective contribution. In the interests of the community, Neighbourhood Law Offices must be organised and supervised by qualified, competent people. Those who consult a Neighbourhood Law Office should expect no less.

Discussions with groups and individuals at meetings held for the purpose of determining the need or otherwise of Neighbourhood Law Offices elsewhere than in Auckland emphasise the validity of the view of the New Zealand Law Society that the prime purpose is assistance to individuals with individual problems.

The Society has been "ready, willing and able" to introduce this pilot scheme for over 12 months but it is axiomatic that neither the Government nor the Law Society is prepared to commit itself to funding such an office without having some say in its control. At the same time I should stress that the Law Society will participate in a joint scheme with the Government to provide such an office but will not agree in any way to the independence of the profession being jeopardised. There has of course been no difficulty in the Society operating an effective and satisfactory partnership with Government in other fields of Legal Aid.

May I again underline the desire on the part of members of the Society that individual help be given citizens by concerned people, lawyers and community workers who are prepared to meet them on their own ground, talk with them and not "at them" and try to help them with their separate and individual problems. This is the overriding consideration. In my view, it is essential that there should be no class or political considerations allowed to intrude in the efforts of the Society or the Government to provide this kind of personal service.

Several years ago the same kind of concern to serve those in need of legal services led members of the profession to initiate in many centres a volunatry duty solicitor scheme. For some years, solicitors on a roster waited at Magistrates' Courts to make preliminary appearances, unpaid, on behalf of people who were unrepresented. Two years ago, the Government recognised this service as part of the Legal Aid scheme. In agreeing to the modest fee suggested by the Government, the Society recognised again the right of all people to professional representation if so desired. More than 500 lawyers now participate in the scheme.

I have mentioned the proposed Neighbourhood Law Office and the now well-established Legal Advice Bureaux and Duty Solicitor Scheme because I see them as examples of a profession serving the community manifestly unselfishly. However, in some other New Zealand Law Society activities to bring the law closer to the layman, critics of the legal profession may perceive self interest. The profession is developing a resource of simple statements, readily comprehensible by the layman, about aspects of the law and its practice. Some of these will find their way into pamphlets. There is, however, a fundamental problem in that in my view insufficient attention is given to elementary principles of law in our schools. As earlier indicated, law pervades society. If we are to prepare our children adequately for citizenship, we must teach them something about the law, for, as they mature, they will meet it at every turn – when they learn to drive, buy goods in the market place, get married, acquire a home, have children, and so on. More fundamentally, an understanding by young people of why we have laws, how they are made, where the law can be found, and what a citizen's rights and obligations are under the law, may well be a prerequisite for respect of the law and the institutions that fashion it.

Such an understanding, I suggest, also encourages the use of democratic processes to effect social change, and the settling of disputes by negotiation, arbitration, and due process. The Law Society and the Department of Education are discussing ways and means of bridging this educational gap.

One must acknowledge two activities of immense importance in the development of the law. They are, first, lawyers' contribution to the five Law Reform Committees that prepare working papers at the request of the Minister of Justice on changes *he sees* as necessary in the law. This is a heavy burden, shouldered voluntarily by leaders of the profession – who, as you might expect, are already under heavy pressure in their own offices because of their expert and specialised knowledge. Secondly, we should remember lawyers' work in scrutinising on behalf of the New Zealand Law Society every Bill introduced into Parliament, and preparing submissions on many Bills for presentation to committees of the House. Our Legislative Council has long been dead and buried. It follows that legislation here is not subjected to the same critical review and scrutiny as obtains in bicameral countries such as Britain and Australia. Though some organisations that make representations on Bills do so, naturally enough, to further the interests of their members, in contrast the New Zealand Law Society is not motivated by self-interest but is concerned to protect the traditional rights of citizens under our democracy. This is a bold claim and one that I am proud to be able to make. I am bound to add that the stands the Society takes and the submissions it makes are not always heeded; but I do emphasise that the submissions are prepared not by a team of full-time paid research officers, but by lawyers in private practice who give freely of their time and expertise.

The contribution by practising lawyers to law reform is a vital one. The lawyer in private practice understands the effects of our laws perhaps better than any other person in the community. However, much more time must be devoted to studying the effects of our laws, comparing them with those of other countries, and initiating proposals for change. The burden of law reform should not be carried solely by the already busy private, government and university lawyers who comprise the Law Reform Committees. That the committees must continue to function is imperative, for there will always be a need for able experienced members of the profession engaged full time in the practice and teaching of law to be directly involved in the machinery of law reform. However, many of our statutes are old, much amended, in need of re-vamping and consolidation, eg, the Public Works Act, the Moneylenders Act, the Wages Protection and Contractors' Liens Act, and even the Town and Country Planning Act of comparatively modern origin, to name only a few. Reform of our laws is proceeding too slowly. Many of the reforms needed have little party-political appeal but profoundly affect the lives of New Zealanders.

In the United Kingdom before 1964, the system of law reform was much the same as it is in this country. Much time and energy was expended by volunteers in preparing working papers on topics suggested by the Government of that country. You will note that, as obtains here, the Law Reform Committees there had *no innovative powers*; they did not initiate, but were expected to cover the topics and aspects of the law notified by the Minister. The reports and working papers submitted by the committees akin to our own received from Parliament there much the same treatment as they receive here; with one or two exceptions the reports were "pigeon-holed". In 1964, however, a statutory body of full time Law Commissioners, working independently of the Government but reporting to the Lord Chancellor, was established. Since then, the Law Commissioners have produced a series of reports in the preparation of which they have made continuous use of the experience and wisdom of the legal profession, the academic world, and John Citizen, and indeed, all interested community groups.

The work of the commissioners is not carried out under a "cloak of secrecy". They operate openly and at each stage – the initial planning, the provisional proposals, the final report – they invite and encourage submissions, contributions and criticism. In the Lord Chancellor's view, law reform is not just for specialists; it must be carried along by the wishes and instincts of the whole people. I hope that, as New Zealand is one of the few Western countries without a permanent law reform and legal research body – a permanent commission as in England – early steps will be taken to remedy what is a substantial defect in law reform in this country. The English system has the added advantage of parliamentary law draftsmen seconded on a full-time basis or as the exigencies demand. The commissioners are thus able to discuss the proposed legislation with the draftsmen "around the table" and thereby get the "feel" of the intended legislation, its purport and intent. intended legislation, its purport and intent. Further, clarity may be achieved rather than precision. Such a body should go a long way in stemming the tide of hasty legislation in New Zealand.

What really counts when it comes to assessing a profession's contribution to the community is the quality of service given by practitioners of that profession to their clients. Clients and the public do have a right to expect a fiduciary relationship – that is, one of complete trust – between solicitor and client, and strict confidentiality; objective expert advice on matters of law, in words that the layman can understand; scrupulous attention to detail in carrying out clients' instructions; efficient management of clients' affairs; fees that represent not more than fair payment for the work and responsibility involved; and the integrity that marks the lawyer as a professional servant of society. There is no room in the profession for "mixed businesses". I deplore the contemporary lawyer acting as an entrepreneur, a merchant banker, a speculator, a developer, or as an operator of a finance house – because once a lawyer becomes closely associated with a client in business enterprises, either personally, or with the use of that client's or other clients' funds, he can no longer retain the impartiality and integrity that marks the professional man.

No contemporary lawyer can afford to have his integrity questioned or his fiduciary relationship with his client jeopardised through self-interest, no matter how attractive the "piece of the action" may appear and no matter how cogently his client may urge him to participate. In this context, may I draw your attention to a recent overseas case against a solicitor, the gravamen of which was as follows:

(i) That in a substantial and sustained way and in breach of his duty as a solicitor he mixed his clients' affairs with his own:

(ii) That in so doing he grossly preferred his own interests to those of his clients, to their financial detriment;

(iii) That in so doing he failed to make proper and in some cases any disclosure to his clients of his interest or the risks involved in the proposed investment;

(iv) That in so doing he failed to give to his clients proper advice concerning such investments or that they should seek independent legal advice;

(v) That in some cases he invested clients' money in unauthorised investments.

By way of commentary on the above, the judgment continues: A solicitor who promotes dealings with various clients clearly misuses his position, and puts it beyond his capacity to observe his primary duty to his clients. The price of being a member of an honourable profession whose duty to his clients ought not to be prejudiced in any degree is that a solicitor is denied the freedom to take the benefit of any opportunity to deal with persons whom he has accepted as clients. I add that if the price is not paid, experience suggests that disciplinary proceedings may ensue. (As an aside: The innovative decision by the Law Society made in June last, without pressure from any outside group or person, to request the appointment by the Government of a Lay Member to the Disciplinary Committee is symptomatic of the breaking with tradition to which I earlier referred.)

I need hardly stress that lawyers do not sell wills, contracts, settlements or statements of claim. They offer a personal service based on their knowledge and skills. The detail of that service differs in every solicitor-client relationship. But underlying every service that a lawyer provides is his traditional concern to protect and defend the rights of his client and to preserve his freedom under the rule of law.

So, I turn to the third characteristic that I earlier suggested is associated with every profession – that is, freedom within the law for each member of a profession to exercise his judgment independently. You will recognise that a member of a profession, to be true to himself, owes his first duty to the ethical principles that underpin his calling. Thus, a lawyer's duty is to advise and represent his client as well as he can, but only within the bounds of what is proper professional conduct.

I am drawing your attention to the need for lawyers to be independent not because I support private enterprise as a means of achieving many social goals. There are some social ends which are clearly better served by the State. Recently, however, it was suggested that lawyers should be servants of the State and be answerable to and be paid by the State. This is not tenable. It is 761 years since Magna Carta was signed, the barons asserted the people's rights to freedom under law, and the King, the Crown, the State was for the first time bound by the rules of law. Magna Carta was intended to secure the individual from the arbitrary exercise of the powers of government, which were unrestrained by the established principles of private rights and distributive justice. Today Magna Carta has been succeeded by a multitude of Statutes of Parliament (not least the Bill of Rights 1689 as we have recently witnessed) and Court decisions. But the principle remains. The rights of the citizen and the State are established by law.

The law defines and restricts the power of the State to compel a citizen to surrender his land for public works. The law gives State power to a police officer. But the law also limits that power; the citizen has the right to know that the law enforcement officer has the requisite authority to act. In short, it is by reference to the law that we distinguish between the proper use and improper misuse of State power. And every week of the year, throughout New Zealand, lawyers stand up in Court to make that distinction – to assert the individual rights and freedoms of citizens like you and me.

I suggest to you, to quote a colleague, that "only an independent self-regulating profession, proud of its function, can protect the people from abuse by the State of its powers . . . It is no use . . . starting from the premise that all persons are equally entitled to justice if . . . proposals then erode the independence of the only group of people in society capable of ensuring that they get it." We are a long way in time and distance from the meadow between Windsor and Staines where Magna Carta was signed – but not so distant that we can forget that the law, and independent lawyers, stand between us and the misuse of State power.

May I recapitulate what I have sought to convey today?

(1) The life and standing of the legal profession rests ultimately on the quality of service it provides to its clients.

(2) A fundamental concern of all lawyers is protecting and defending, under the rule of law, the freedoms of individual members of the community.

(3) An independent legal profession is the citizen's best protection against unlawful abuse of State power.

(4) The 3400 lawyers in New Zealand, individually and collectively through the Law Societies, are making a contribution to the community that, I believe, is in total much greater than is generally recognised.

Our history of respect for the independence of the legal profession and the integrity of the relationship between a lawyer and his client must continue inviolate – so too, our respect for the independence and integrity of our Courts and those who are charged with the heavy responsibility of presiding over them.

Demonstrably, the profession is moving with the times, but it is perhaps fitting to conclude with the words of Lord Brougham, which pose a great challenge not only to the "contemporary lawyer" but also to contemporary society:

> "It was the boast of Augustus (Caesar) that he found Rome of brick and left it of marble; a praise not unworthy of a great prince . . . but, how much nobler will be the Sovereign's boast when he shall have it to say, that he found the law dear, and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence."