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"INSINUANTE SE BUROCRATIA"

In his editorial, "Revolution or Rehash?" ([1977] NZLJ 385) relating to the Town and Country Planning Bill, Tony Black uncovered a pernicious provision. Clause 154 provides that Part I of the Judicature Amendment Act 1972 is not to apply in respect of any decision of a planning authority where there is a right of appeal to the planning tribunal. The Editor asks: "... should the Supreme Court, traditionally looked on as the guardian of the rights of the individual, be excluded in this manner?"

The answer is an unequivocal no.

In essence, the clause disregards the clear distinction between the appeal function, which deals with the merits of the matter in law and fact, and the review function, which goes to the question of legality.

It is inimical to the rule of law. Professor Wade framed that principle in these terms:

> "Government under the rule of law demands proper legal limits on the exercise of power. This does not mean merely that acts of authority must be justified by law, for if the law is wide enough it can justify a dictatorship ... The rule of law requires something further. Powers must first be approved by Parliament, and must then be granted by Parliament within definable limits. These limits must be consistent with certain principles – for instance, with the principles of natural justice – so that *a standard is imposed on the administration which commends itself to the public conscience. The instinct for justice must be allowed to infuse the work of executive government,* just as it must infuse the work of Parliament and the work of the courts" (emphasis added) (H.W.R. Wade, *Administrative Law* (Oxford) 1971, p 48).

For the purposes of administrative law this broad ideal is readily seen as the basic principle affording protection to the rights of the citizen. But that language is too limited. It is not only the means by which governmental power is controlled but also *the process by which principles of justice and fair procedure are impressed into the exercise of administrative and subordinate legislative powers.*

It provides both a standard for the administration and a sanction against any departure from that standard.

In our jurisdiction it is the historic function of the ordinary Courts to pass judgment on the validity of acts of government in accordance with this principle. Executive power is subject to legal controls exerted by Courts that are independent of the executive. So it must be. For the Courts to restrain the inevitable excesses of governmental power they must be both independent of government and accessible to the governed. These concepts of independence and accessibility are of the utmost constitutional importance.

It is this overriding supervision that discourages and ultimately prevents a public authority from exercising the statutory powers vested in it otherwise than in accordance with the law. They must act within their jurisdiction. In general terms they must comply with the principles of natural justice giving interested persons a fair opportunity to be

heard and deciding the matter without bias. In exercising a statutory power or discretion they must act in good faith have regard to all relevant considerations, not seek to promote purposes alien to the statute, and not act arbitrarily or capriciously.

It is proposed that these requirements should not apply to the public bodies specified in cl 154, these bodies may then make decisions in disregard of the letter as well as the spirit of the law, be biased and prejudge the issues, deny a fair hearing, act in bad faith and proceed with manifest unreasonableness or unfairness. They could disregard all notions of common justice.

Numerous ordinary people appear before councils in good faith believing that they are receiving a fair hearing before an objective and sympathetic body – and in most cases so they are. Many do not appeal against an unfavourable decision. They rely on the integrity of their council. This is as it should be.

To exempt the decisions of planning authorities from the scope of judicial review must eventually undermine this trust. Placing local bodies above the law can have no other consequence.

One practical example may be taken. At the present time backstairs pressure on members of councils or their planning committees is of little profit. We may expect a change if cl 154 is passed.

Reported decisions do not confirm that councils acting in their planning capacity have been challenged irresponsibly. On the contrary, since the Judicature Amendment Act was enacted in 1972 there have been some 15 reported applications for review of planning matters of which 10 have been successful.

Those who seek the enactment of the clause proceed on the assumption that it is sufficient to provide a further hearing before the planning tribunal. They undoubtedly see the problem in terms of arriving at a decision on the planning merits and nothing more. There is more to it than that. The decisions that are not to be impugned are decisions affecting the rights of citizens: the principles that will be ignored are the principles of natural justice; the illegality to be overlooked is an illegality affecting the whole proceeding; the standard of administrative behaviour that will no longer be expected is a standard of fairness commending itself to the "public conscience"; and the jurisdiction of the Courts that is to be excluded is the traditional function of the Supreme Court to supervise the exercise of governmental power.

Even if a true hearing on the merits were possible before the appeal body when there is a basic defect in the proceedings, the fact remains that all governmental power should be exercised within legal limits and that *those limits serve to impose on the administration a standard of justice and fair procedure that the community accepts as its due.*

It is inherently unsatisfactory for a decision void in law to remain effective. Yet, whenever a planning authority acts contrary to or in defiance of the law a decision that is void ab initio will be the basis of the subsequent appeal. It will matter not that the foundation is rotten.

When Parliament prescribes a two-staged proceeding then persons affected by a proposal are entitled to the benefit of both stages – not just the one. If the initial hearing is bad and cannot be impugned by them they are being denied the first stage of the procedure laid down by Parliament.

Nor is the assumption that a right of appeal is a sufficient safeguard warranted in practice. A citizen with a genuine grievance in respect of the conduct of a planning authority in arriving at a decision will tend to find his complaint subverted to the factual merits notwithstanding that he may claim (with justification) that those merits are distorted by legal defects in the earlier decision. Even if he presses the point it is likely to remain a secondary issue. He may, indeed, run a real risk of prejudicing the presentation of his own case on the merits.

Again as a practical matter, it cannot be overlooked that the public body will enjoy the status of being the planning authority at the hearing of an appeal. For the purposes of the Act it is the body entrusted with planning responsibility – with responsibility to carry out preliminary investigations and studies, formulate planning policy and objectives and prepare and promulgate an operative scheme – its scheme. It necessarily assumes a dominant or influential role.

In any event, the appeal tribunal is not the appropriate forum to resolve questions of legality. It is intended to be a planning body having planning expertise and experience. Three of the members of each of the proposed planning tribunals are to be laymen, one or more of whom are likely to be past members of local bodies.

There are any number of more specific drawbacks in cl 154. No thought has apparently been given, for example, to the fact that the full procedures available in the Supreme Court (such as discovery) are frequently necessary to enable an aggrieved person to pursue his remedy effectively. Perhaps worse, an interested party who discovers an illegality after the time for lodging an appeal has expired is still denied the benefit of the Act.

As the clause is worded, however, an aggrieved person could still seek any one or more of

the prerogative writs. It is probable that the zealous authors of the clause did not intend this and that the appropriate amendment will duly be put forward. The point needs to be stressed that the rights Parliament will then be negating are not just the procedural rights that it conferred by statute in 1972, but common law rights which have been securely established as part of our jurisprudence since the seventeenth century.

It may be seriously questioned whether, if the Judicature Amendment Act 1972 had not been passed, Parliament would now find itself pressed to interfere with these rights. Only last year an unsuccessful attempt was made to amend the Act to exclude all government officials and employees from the purview of the Act in respect of the exercise of statutory powers in the course of carrying out investigations or inquiries into alleged breaches of the law. Clause 154 demonstrates that the enactment of the Judicature Amendment Act 1972 may have facilitated the ease with which the scope of judicial review may be restricted by those who have the ear of government. It would be tragic – as well as ironic – if an Act that was welcomed by administrative lawyers because it simplified the procedure by which citizens could gain access to the Courts to protect their substantive rights should become the means by which those rights are progressively restricted.

E W Thomas

FAMILY LAW

DOMESTIC PURPOSES BENEFITS – EARLY REFERRAL TO THE MARRIAGE COUNSELLOR

By IW JENKIN, *Director, National Marriage Guidance Council of New Zealand.*

The report of the Domestic Purposes Benefit Review Committee to the Minister of Social Welfare, published at the end of May, suggested (p 16, Sect 2.10) that on application by a wife for the Domestic Purposes or Related Benefit there should be an immediate and compulsory reference to conciliation in the same way as separation applications are now referred to conciliation services under the Domestic Proceedings Act. The National Marriage Guidance Council saw possible advantages for the clients, for lawyers and for marriage counsellors in a proposal that benefit applications should be referred directly to counsellors. In the past a husband or wife applying to the Social Welfare Department for a Domestic Purposes Benefit was placed on an Emergency Unemployment Benefit (EUB) until such time as he or she obtained a Maintenance Order to approved Maintenance Agreement. She was required to bring and pursue maintenance proceedings as a condition of continuing to receive the EUB.

Our experience seemed to indicate that most solicitors advised such clients to apply for separation, custody, property and often non-molestation orders in addition to a maintenance order. These steps were taken in order to protect the client's rights in the event of a complete and permanent breakdown of the marriage, and it was assumed that a later referral to a court conciliator kept open the possibility of preserving the marriage if this was appropriate in any particular case. In point of fact it now takes on a national average, up to six months before the Court process results in the parties receiving an invitation to see a conciliator and by this time what had perhaps been only "unhappy differences" have often become a "state of serious disharmony" with the differences between the parties formalised and indeed often exacerbated.

It would obviously be an advantage to clients if they were given the opportunity to explore their problems with the help of a counsellor and decide what was best to be done before becoming involved in the adversary system. This view is consistent with the New Zealand Law Society's "First Submission to the Royal Commission on the Courts" 1 March 1977, which suggests (Sect 7.22) "... that the investigative conciliation and supporting services associated with the concept of a Family Court should *first be brought to bear* on the problem within the administration of the Family Court. It is only if and when these services fail that recourse should be had to the Courtroom to resolve the differences but this is regarded as an important right to preserve."

It would be an obvious advantage for counsellors to work more closely to the marriage crisis and they would not need to be involved in discussion about the advisability of legal proceedings which had already drawn on the skills of two separate solicitors. The NMGC was aware too that it had been frustrating for solicitors once they had become professionally involved with the details of a client's case to have the mat-

ter clouded by a considerable lapse of time while papers were being served, conciliation carried out or a date for hearing sought. It would be much more satisfactory for solicitors to receive their clients after conciliation procedures were concluded so that they could move directly to obtain a Court hearing.

The pilot scheme now being tried out in Auckland, Hamilton, Christchurch, Dunedin and Invercargill involves close co-operation between the Department of Social Welfare and the National Marriage Guidance Council. When a husband or wife applies for a benefit he or she will now be given an Emergency Maintenance Allowance (EMA) under s 61 of the Act. The basic amount will be less than the amount previously payable as an EUB. It is calculated as $49.84 a week for a solo parent with one child, increased by $3 a week for a second child and further increased by $1.25 a week for each additional child. The grant of an EMA at reduced rates will be paid for a period of 26 full weeks or until such earlier time as the qualifications for a Domestic Purpose Benefit are fulfilled. These payments are in line with decisions made by cabinet. Normally the continuation of the EMA would be conditional on the commencement of maintenance proceedings.

However, in the five areas where the pilot scheme operates the Social Welfare Department is now prepared to pay this emergency maintenance allowance and to set aside the requirement to begin maintenance proceedings while the couples seek to make their own decisions on family matters with the help of a counsellor. In this way many clients will be referred to a counsellor within a relatively short time of the marriage breakdown and emotional factors will very often be the first focus of counselling. The physical separation will, however, entail very practical problems and it is hoped that once pain and hostility have been accepted and understood, the parties will often be able to lay more appropriate foundations for the settlement of these practical problems. It is the counsellor's task to explore both parties' attitude to the marriage itself, to questions of maintenance custody, access and the sharing of the property. The counsellor will then assist them to decide whether they are ready to come to some agreements, whether they believe further counselling would be helpful for personal or practical reasons, or whether it would be necessary for one of them to take court action for maintenance. If the clients desire to enter into formal agreements constituting a legal separation, we believe that negotiations between their solicitors will usually have been advanced by previous joint counselling. If the parties agree to resume the marriage, then a great deal of distress, time and money may well have been saved. If the parties are unsure whether the marriage is at an end or not, the counsellor will raise with them the possibility of signing a maintenance agreement which will meet the criteria set out by the Social Welfare Department, make the payment of a DPB at full rates immediately possible, and give the marriage and decisions about its future some "breathing space".

In canvassing this possibility, Marriage Guidance counsellors will not be acting as agents of the Social Welfare Department but in the interests of all of their clients including the children, and such matters will not normally be brought to a conclusion while the parties are still emotionally distressed and unsure of themselves. If a husband or wife already had a lawyer acting, the counsellor would suggest that the client should again seek legal advice before concluding a maintenance agreement but from our point of view it would be a pity if a maintenance agreement which was proposed in order to "buy time" for the marriage then became the basis of Court proceedings.

At the conclusion of counselling the marriage counsellor issues a formal report to the Social Welfare Department. This covers the six following possibilities:

(i) My clients wish to discuss with the Social Welfare Department their proposals for a maintenance agreement which may be registered.
(ii) I enclose a signed Maintenance Agreement.
(iii) My clients wish to consult solicitors with a view to drawing up an agreement to separate with the dispositions this entails.
(iv) My clients have agreed to resume their marriage.
(v) There appears to be no prospects of agreement and the matter is open for further action by the Social Welfare Department.
(vi) Last appointment not kept.

A copy of this report will be issued to both the husband and the wife at the conclusion of the final interview and this will be available to their solicitors to support an application for dispensing with conciliation in any subsequent action under the Domestic Proceedings Act 1968.

In effect this scheme gives both marriage counsellors and legal practitioners an opportunity to evaluate the effects of providing marriage counselling "before adversary proceedings are commenced". Some legal practitioners may feel that certain of their clients' rights may be put in jeopardy by early agreements which may result from counselling. Many marriage counsellors would feel this a small risk to take if we can avoid the distress, the delays, the confusion and the destructive effects on the lives of children, wives and husbands which have accumulated under the present system.

HUMAN RIGHTS

HUMAN RIGHTS AND DEVELOPMENT

By NEVILLE LINTON *Professor, Institute of International Relations University of the West Indies, G A Augustine, Trinidad. An outline of a paper delivered to the Seminar on Human Rights in the Caribbean held at Barbados in September 1977, organised by the International Commission of Jurists.*

We are in an era which has been marked by a lot of activity in respect of defining international norms and values. There is much invocation and reiteration of these norms as we move about an avowed goal of the 20th century – the building of a global community of shared values and institutions.

Progress towards fostering international value – sharing, however, leaves much to be desired, and this is particularly true in the area of human rights. Much of the difficulty in achieving significant implementation of human rights stems from the fact that we are in the midst of one of the most, if not the most, revolutionary periods of human history. It is a period of vast and varied political, social and economic changes, of instability and disorder rather than of stability and order, and thus hardly a period suited for achieving agreement on law or principles. It is a period of challenge to long-established norms, philosophies, practices and even to basic conceptions of the nature and purpose of man and woman. It is a period of three (or is it four?) worlds divided over the organisation of the international political system and marked by a wide diversity of regimes and legal systems. It is only against a background of a real appreciation of the variety in power, ideology, culture and therefore, of objectives, that we can discuss this question of human rights.

Much of the current belief in human rights stems from a Western liberal tradition which assumed not only that men were equal but which, in the first half of the century, was optimistic about the creation – before the end of the century – of a material equality amongst men, both within and between states. That dream also assumed the transformation of the backward Afro Asian world in the image of the West – that was the liberal blueprint for heaven on earth; at core it was a culture-bound image and thus smacked of imperialism, but its motivations were undoubtedly both genuine and generous.

What has happened of course is that the scenario has changed and the plot has thickened – indeed there are several plots. We are running away from a Western dominated, Euro-centred world and therefore there are different agenda and different priorities. In such a context and at such a time, is it possible to have common agreement on the meaning of human freedom?

A good deal of the misunderstanding and recrimination in the world comes from operating from false premises. The realities of the globe are not consistent with the terminology of international law and organisations; we do not in fact share or practise the values of the United Nations Charter. The ideals of unity and of peace through internationally agreed constitutional norms are tied to the concept of the legitimate, inviolable sovereign state, and implies a vision of a stable international order which is culturally whole. The Human Rights tradition comes out of such a vision – a vision of a Western world which had long accepted the state system and thus was concerned with limiting the power of the State so as to encourage political, economic and social pluralism, and so as to give the individual maximum freedom of action. Thus the growth of ideas of individual and group rights very much paralleled the growth of free enterprise, capitalism, and liberal democracy.

But in the post World War II world we have had an avalanche of new states – states which are unstable, whose sovereignty and territorial integrity are often under challenge, states which lack a sense of unity and, for the most part, are still to establish internal order and an acceptance of their legitimacy – both internally and externally. In such states the priorities are necessarily different to those of old-established, ideologically-settled states. Since the emphasis is on order – rather than law – the goal is to strengthen state, ie governmental, power rather than individual or group power. Indeed the government may often be struggling to achieve compliance to its authority by contending groups, and thus the emphasis is on collective rights (of the whole) rather than group or individual rights. Quite apart from this there is reason to believe that the traditional cultures of Asia and Africa were communally oriented and did not pit the contrast between the individual vs the society in the way in which a competitive

and capitalistic Western society envisaged it, and therefore the Afro-Asian states are slow to internalise the colonially learnt lessons.

In addition the new states have appeared on the scene in the second half of the twentieth century when it is an accepted purpose of the state to advance, in the widest sense, the welfare of its citizens. This is a responsibility which implies broad powers of control for the state, to such an extent that even in Western capitalist states there is increasing centralisation and governmental participation in the economic sector. Now in many of the old Western states, it might be possible to accomplish such governmental control without necessarily treading too hard on individual rights. This can be done in part because of surpluses from the past, usually purloined through imperialism, and technological advances which permit a high level of living for all of the citizens. But in new states, with struggling economies, mass welfare cannot be delivered without a system of control and centralisation which would hardly permit the play of individual rights in the classic tradition.

Against this background, then, I am arguing that, for most Third World States, social and economic rights have a priority, *at the domestic level,* over the traditional civil and political rights, a rightful priority both because of the objective conditions within these states and because the traditional rights are not necessarily culturally relevant. This is not to suggest that civil and political rights are unimportant; they are necessary but are subject to limits within a context of developing an effective welfare state which benefits all of the people. Indeed it would be difficult to achieve effective mass welfare without a fair level of civil and political rights, as the processes of the one tend to imply the other. For instance women and ethnic minorities are often disadvantaged groups economically and socially – as they achieve equality in these areas therefore they would be enabled to fight more vigorously for their civil and political rights.

The process of development is a harsh and demanding one. I know of no state which has developed, in the sense of achieving a satisfactory standard of living for the majority of its citizens, without extreme exploitation either at home abroad, or both. Or to put it another way, without a surplus which has been squeezed out at the expense of some group. The United States developed at the expense of the displaced and annihilated Red Indians, the black Slaves and the working classes; the European giants at the cost of their miserable colonial peoples, and the working classes; the USSR at the cost of the benighted peasants and the lost souls of the labour camps.

Today, with the advantages of technology and science, the process should be easier but, even at best, it remains painful. It remains a process which cannot, for instance, afford the luxuries of full freedom of choice or of movement. As for the first, a state with limited educational facilities may find it necessary to say to a young person "You will be an engineer and not a doctor" – in the manner of Japan, which in its early days allocated careers to its bright young people. And as for the second, I am firmly of the opinion that a "developing" state has the right to prevent a citizen who has been educated at state expense from emigrating unless he has given adequate service at home. Beyond this, whether or not a citizen has been educated at state expense it can be argued that, in a "developing state, he should be subject to the duty of service in hardship areas if his skill is called for. This suggests that a "developing" state should be somewhat like a mobilised state – as indeed it is, if properly conceived – it is like wartime, and a discipline akin to wartime discipline is needed for the war on want, on hunger, on ill-health, on ignorance and on insecurity, for the war on the depressing cycle of poverty which kills and maims as effectively as bullets.

The main problem however is that of avoiding abuse of power by politicians, bureaucrats and other elites during the development process. This is no easy task – it certainly is not guaranteed by constitutions – the record in this respect is clear. It is in this connection that certain core civil and political rights should be considered inalienable – specifically the right to peaceful assembly, the right to a Government based on the expressed will of the people, the right to take part in the government, the right to a fair trial, the right not to be subjected to arbitrary arrest, detention or exile, the right to education, the right to freedom of information. It is also in this connection that the international arena comes into play, for often outside pressure, if properly and honestly applied, can be effective in levering open a situation where domestic groups are powerless. The Human Rights record in the Third World is hardly a happy one. But of course, not many states in the Third World can properly be described as "developing" states. That term has been used, far too loosely, to describe any non-industrial state. But the many, stagnating, non-democratic politics which abound in the Third World are not "developing" States in any sense of the term. It is not development to change from colonial dictatorship to tribal dictatorship or party dictatorship. It is not development to exchange white exploitation for black or brown exploitation. It is not development to run economies where, even if the gross GNP grows, the per capita income does not.

Societies with these characteristics are not "developing" societies and I hold no brief for the abuse of human rights which flourish therein. States which are really concerned with true development and are willing to undertake its discipline, are also states I would argue which would have a tolerable system of human rights, as development requires citizens to cooperate willingly for the good of the whole.

But the question of development is one which leads one to focus inevitably on the international system. In the decades since the end of the war we have seen a gradual growth of appreciation and understanding of the implications of development. It is now generally acknowledged that in order to change, significantly, the status and condition of a part of the system – the weaker part – there would have to be global changes. But while this is grasped – and that is what acceptance of resolutions on a New International Economic Order implies – the willingness to effect such changes is hardly there. The greatest challenge to the achievement of an international respect for human rights therefore lies in the workings of the international system.

The recently concluded North-South talks in Paris are a case in point – these can hardly be described as a success. The hope for a better deal for the Third World has not materialised and, all over the globe, regimes in developing countries are struggling to make ends meet. The ever-tightening conditions which have played havoc with many an economy, particularly since the energy-price revolution of 1973, have had their effects in domestic politics – many a government has been rejected at the polls by a desperate people who are blaming governmental inefficiency for their plight. There is, of course, the other phenomenon – of increasing repression by governments which cannot deliver welfare for all and which capture for the ruling elites what little there is of a national patrimony. In a decent international economic system there ought to be less international tolerance of such governments and little domestic excuse for treating those who are clamouring for more bread as if they were revolutionaries.

There is a direct link of these matters to international politics. For, as the system now operates, prominent governments in the industrialised world make allies of and support regimes in the Third World which are openly dictatorial and backward. Since they are not prepared to make fundamental changes in the international economic system such alliances necessarily follow. The fact of the matter is that a world which would live with the tragedies such as the Sahel will find it easy to live with the obscenities like Soweto.

The focus in this last quarter of the twentieth century then has to be on the struggle for global development – to establish the right of development for all and to create the conditions for the right of all to flourish. Heretofore it might not have been possible to engage in this particular enterprise, but contemporary science, technology, administrative skills and resources are such that a world free from want is possible. Thus the real Cold War is now joined, not the imperial competitive war of the East/West giants, but the fundamental confrontation between the haves and the have-nots, the North/South alignment if you, will, over the reshaping of the globe; not an ideological struggle but a fight to establish Human Rights by acknowledging in a concrete fashion the equality of mankind. It is the characteristic of this new confrontation that the leadership in the struggle has been taken on the initiative of the have-nots themselves. This is in itself an important assertion of equality. It is a change from the past where the emphasis was on "noblesse oblige" – the rich helping the poor – and where the approach smacked of charity. A different perspective of the international relations of states and peoples is being called for. In this healthier developing climate it will not be as easy for the North to assuage its conscience by focusing on threats affecting the individual in the South – a favourite activity of Northern liberals.

The extent to which our perception is distorted at the international system level is astonishing. A recent headline in the *International Herald Tribune,* for instance, reads "Bumper Grain Harvest Around World Raises Fear of a Food Crisis" – normally one expects that there is a crisis when food supply is short but this crisis was being apparently anticipated by the experts because of a glut. The problem being that the expected drop in prices would be found politically intolerable in the grain-exporting countries and this might lead to a drop in production so as to keep up prices. In essence the story demonstrates that we cannot manage the world food problem as long as the question is approached from the perspective of capitalist economic beliefs of the inherent link between supply and demand on the one hand and price on the other. Food is a matter which can only be properly organised in the world if it is treated as a global problem and as a human right.

Another systemic issue which is becoming of increasing importance is that of migration. The current patterns of settlement in the world reflect particularly the effects of imperialism – both over land and over sea. It has led particularly to the widespread dispersal of peoples of European

descent and these peoples hold dominant positions in exactly those parts of the world to which migrants currently most desire to move. These are also the parts of the world with, more or less, the best absorptive capacity – particularly in terms of area and resources; I am referring to North and South America. It is exactly in these areas however that there are the greatest barriers to the migration of non-white peoples either on grounds of race or of skills or of both. I would argue that the imperatives of development, of human rights and of redressing the balance of history require that some preference be given to migrants from the Third World. A proper approach to development would see the necessity of distributing the burden of supporting the poor and unskilled not only by the sop of "foreign aid" to weaker economies, but by the actual movement of peoples. It is not development for the "have" countries to improve their situation by culling, primarily, the skilled from the "have not" countries. It is also not development for overcrowded Third World countries not to take seriously their responsibilities in respect of population control.

There is also the question of the attitudes towards primary resources, particularly mineral resources. The tradition has developed that resources in the ground are the property of those who live there and, by implication, it is for those residents to decide what should be done, or not done, with the resource. These concepts come from the grasp of reality which we have from the past – a very limited grasp in terms of our knowledge of the environment, of other cultures, of science or technology. Today's reality is quite different – the need for the international management of important resources is becoming clearer every day and, for the human rights of all of us, we need to move towards establishing regimes for such regulation. Such an approach has the advantage that it makes possible a fairer distribution than the current one which leaves us all at the mercy of the technologically advanced. There has been an astonishing growth of international organisations in this era – it is in many ways the century of international organisations, for that surely is a characteristic phenomenon of the twentieth century transformation of the international system.

The use of international institutions, governmental and non-governmental, at regional and global levels, to establish a brave new world should be a primary technique of those interested in establishing human rights. It is a necessary technique for attacking vested interests; for justifying interference in what is called "internal affairs"; for initiating processes which will transform societies and the lives of people; for indulging in what would otherwise be called "intervention". The concepts of sovereignty, territorial integrity, exclusive property rights, aggression, self-determination, legitimacy can all easily be barriers to the conditions which permit the development of peoples and of the human spirit.

It is a commonplace that racism is a major factor hindering development of Third World peoples and thus of the whole world – since we are only exploiting a small percentage of the potential brain power of the globe. It is clear that the liberal westerner has given far more priority to the issue of liberty than to those of equality or fraternity. The fight for equality has had great difficulty in moving forward fast enough in a world where the information streams are essentially controlled by both the private and public capitalist systems. Few human rights are more important than the right to full and varied information. It is a basic and seminal right.

It is instructive how our vision of development has evolved and changed as more information becomes available – hence the valid concerns today about issues such as the environment and appropriate technology. The oppression of ideas and cultural imperialism which have flourished hitherto will dwindle rapidly if we can provide true freedom of information. An informed Third World will then be able to fulfill the possibilities latent in the magic of science and to meet the expectations of prosperity for all. World development in the best sense of that term rests upon achieving Third World development.

A proper approach to development is only possible when we get beyond the restricting limitations of the established rights of sovereign states to focusing on the rights of peoples – for whom states exist, rather than the other way around. A proper approach to development would see what is called foreign aid as an international tax, associated with which there are rights and obligations as with any tax system. A proper approach to development would stress the development of a multicultural world in which all cultures are given respect and opportunity so that the very concept of development is affected in the process and the goals of the international system are defined by reference to a broad constituency. In such an environment there would not be a prospect of men toiling, without surcease, on climbing a ladder of achievement built by so-called advanced societies. The task of Sisyphus is the lot of Third World man at present – no role is more dehumanising than that frustrating climb. The central thrust of all of our endeavours in the human rights field must surely be to create an environment in which it is possible for all humans to be human.

TRUSTS AND TRUSTEES

GIFTS TO UNINCORPORATED ASSOCIATIONS

By H K INSALL.

Introduction

"It would astonish a layman to be told that there was a difficulty in his giving a legacy to an unincorporated non-charitable society which he had, or could have, supported without trouble during his lifetime". So said Brightman J in *Re Recher's Will Trusts* [1972] Ch 526, and few would doubt the truth of that statement. In fact, it probably astonishes many lawyers to see such a large amount of legal argument, theorising and invention being used up on a problem that hardly warrants it, both from the points of view of size and complexity. Although the problem was extensively discussed by the Privy Council in *Leahy v Attorney-General (N.S.W.)* [1959] AC 457, recent English cases have taken a different approach and the law remains unsettled. This paper will examine the recent English decisions after a more general discussion of the earlier law.

Briefly, the reason why a problem arises when a gift is made to an unincorporated association is because, according to the law, the donee has no legal personality, or to use the more eloquent language of the Privy Council,

> "It arises out of the artificial and anomalous conception of an unincorporated association which, though it is not a separate entity in law, is yet for many purposes regarded as a continuing entity and, however inaccurately, as something other than an aggregate of its members. In law a gift to such a society simpliciter . . . is nothing else than a gift to its members at the date of the gift as joint tenants or tenants in common" (p.477).

Thus, an unincorporated association per se cannot be the beneficiary of a gift, so the question to be answered is: Who, if anyone, *is* the beneficiary of the gift? Clearly, this involves a question of construction. The gift will be construed in a certain form depending on the circumstances of the case, and this construction renders the gift either good, or bad. This will occur when the construction contravenes either one of two rules which originated to encourage the circulation of property. The first is the "beneficiary principle" which states that a trust to be valid must be for the benefit of individuals. The second rule is the rule against perpetuities and this specifies a time limit within which an interest must vest. The objection to certain gifts to unincorporated associations (such as gifts construed so as to benefit both present and future members) is not that the gift vests outside the limit but that the gift itself is of perpetual duration and thus "tends to a perpetuity".

In the following pages, the various constructions which have traditionally been placed on gifts to unincorporated associations will be examined.

Individual member construction

The prima facie construction of a gift to an unincorporated association is as a gift to the individual members of the association at the date of the testator's death. If this interpretation of the gift is applied, the gift is valid, being an immediate and absolute one. A leading example of this construction was the case of *Cocks v Manners* (1871) LR 12 Eq 574 where a disposition by will to "the Dominican Convent at Carisbrook" was considered. It was held to be a valid gift to the individual members, being subject to no trust which would prevent the members from spending it as they pleased.

In the more recent case of *Leahy v Attorney-General N.S.W.*, the Privy Council examined this area of the law in detail. The facts in that case were that a testator provided that his farming property was to be held on trust for "such orders of nuns of the Roman Catholic Church or the Christian brothers as my executors shall select". The Privy Council went to great lengths in trying to clarify the law. The starting point of their restrictive judgment is found in their statement that,

> "In law a gift to a society simpliciter (i.e., where to use the words of Lord Parker in *Bowman v Secular Society*, neither the circumstances of the gift nor the directions given nor the objects expressed impose on the donee the character of a trustee) is nothing else than a gift to its members at the date of the gift as joint tenants or tenants in common (p 477).

Their Lordships were to emphasise that it is because the gift can be construed as one to the

individual members, that it is valid. But they continued that though a gift is prima facie one to the individual members, there may be considerations that arise out of the terms of the will, the nature of the society, its organisation and rules and the subject matter of the gift *(a)* which indicate it is not a gift to the individual members and therefore fails as a purpose trust or because it tends to a perpetuity. Their Lordships then applied this process to the facts in the case before them and concluded that there were ample indications that the prima facie construction of a gift to individual members had been displaced. However, the reasoning employed by their Lordships has been soundly criticised *(b)* and it is likely that their conclusion depended on judicial intuition.

Even if it is assumed that the Privy Council made a "common-sense" evaluation of whom or what the testator intended to benefit by his gift, this must be seen as a rather pointless exercise when it is considered that the testator's *real* intention was to benefit the "artificial and anomalous conception on an unincorporated society, which though it is not a separate entity in law, is yet for many purposes regarded as a continuing entity and *however inaccurately (c)* as something other than an aggregate of its members". If the prima facie conclusion in favour of a gift to individuals is to have any meaning, it should be necessary to show that some other construction was actually intended, before dropping the "individual member" construction. Unless this point is accepted, the *Leahy* approach will be so stringent that it will invalidate all gifts to unincorporated associations save those which clearly indicate that the gift could only be construed as one to individual members.

Despite this restrictive view in *Leahy* it is clear that a gift to an unincorporated association which can be construed as a gift to the individual members as joint tenants or tenants in common will be valid, there being no question of perpetuity and each member having an absolute severable share of the gift. However, this construction is in nearly all cases a distortion of the testator's intention; very rarely does he intend to give each member of an association a share of a gift in the same way that he would give shares in his estate to his family. Thus the second construction of gift, has a big advantage over the first in that it represents much more closely the intention of the testator.

Construction to individual members subject to contractual rights and liabilities

A second construction of a gift to an unincorporated association is one to the individual members, but subject to the contractual rights and liabilities which accrue to them as members of the association. The example of *Re Clarke* [1901] 2 Ch 110 shows that a construction of a gift on these terms will be valid provided there is nothing in the rules of the association or terms of the gift preventing the members from dividing the gift up and distributing it as they please. The same construction was enunciated by Cross J in *Neville Estates v Madden* [1962] Ch 832 as one part of his three way construction of a gift to an unincorporated association. He said such a gift might be construed as

> "a gift to the existing members not as joint tenants but subject to their respective contractual rights and liabilities towards one another as members of the association. In such a case a member cannot sever his share. It will accrue to other members on his death or resignation even though such members include persons who became members after the gift took effect. If this is the effect of the gift it will not be open to objection on the score of perpetuity or uncertainty unless there is something in its terms or circumstances or in the rules of the association which preclude the members at any given time from dividing the subject matter of the gift between them on the footing that they are solely entitled to it in equity (p 849).

How does this construction accord with the approach of the Privy Council in *Leahy's* case? Their Lordships did not specifically adopt or reject such a construction, but they did express the marked dichotomy between a gift construed for the benefit of individual members and gifts for purposes. They regarded *Re Clarke* with suspicion as being an extreme example of construing a gift to an association as one to its members. (at p.479) Certainly the formulation by Cross J. would not be compatible with the *Leahy* approach. Their Lordships stated that in the case of

> "a gift to individuals, each of them is entitled to his distributive share unless he has *previously* bound himself by the rules of the society that it shall be devoted to some other purpose" (p.478).

But in the formulation by Cross J. the contractual

(a) The view that the four factors enunciated were not exhaustive of the considerations can be gained by implication from the text, pp 478 and 485 and was expressly held in *Bacon v Pianta* [1966] 114 CLR, 634.

(b) See Keeler J F "Devises and bequests to unincorporated Bodies". (1963-66) 2 Adelaide LR 336.

(c) Emphasis added.

rights and obligations are imported into the terms of the gift and therefore *the gift* specifies that the members have no severable share. In such a case it seems inevitable that the Privy Council would calmly state: "It is not easy to believe that the testator intended an immediate beneficial legacy to such a body of beneficiaries" (p.485).

As explained earlier, this second construction has the advantage that it circumvents the problems of perpetuity and of the need for a beneficiary without disregarding the testator's usual intention to benefit the artificial conception of an unincorporated association. However, the use of contract to get around an anomaly has created some anomalies of its own. For instance, an infant's "contract" in joining an association would be voidable and further problems arise, when members leave an association, because of the requirements that dispositions of interests in land be in writing. Various solutions to these problems have been suggested, but the desirability of a rule based almost entirely on fiction is to be questioned. This is especially so in the light of recent developments towards the upholding of the next major construction of a gift of an association, as one on trust for the purposes of the association.

Construction on trust for purposes

There is a famous dictum enunciated by Sir William Grant M.R. in *Morice v Bishop of Durham* (1805) 9 Ves. Jun 399,404 to the effect that a non-charitable trust must have a definite object and there must be somebody in whose favour the court can decree performance when exercising its control over the trust. Similarly in *Bowman v Secular Society* [1917] AC 406 Lord Parker said:

> "A trust to be valid must be for the benefit of individuals . . . or must be in that class of gifts for the Benefit of the Public which the courts in this country recognize as charitable in the legal as opposed to popular sense of that term" (p.441).

If a gift to an unincorporated association is not one to the individual members, an alternative construction is that it is on trust for the purposes of the association. Can such a gift be valid in the light of the rule enunciated by Grant M R and Lord Parker?

Again the Privy Council in *Leahy* took a restrictive view and answered this question in the negative. They considered two passages on the subject, firstly the words of Lord Tomlin in *Re Ogden* [1933] Ch 678

> "I do not think that it is in dispute that a gift to a corporation or a voluntary association of persons for the general purposes of such corporation or association is an absolute gift and *prima facie* is a good gift and as no question of perpetuity can be involved in such a case it becomes unnecessary to consider whether the gift is charitable or not. The validity of the gift does not depend upon its being charitable but upon its being an absolute gift" (p.681-2).

The second quote was from Lord Parker in *Bowman v Secular Society:*

> "A gift to an association for their attainment [i.e., the attainment of the association purposes] may if the association be unincorporated be upheld as an absolute gift to its members." (p.442).

The Privy Council specifically interpreted these passages to mean that such a gift can be upheld only when it is construed as a gift to the individual members and the words "for the general purposes" were ignored. Their Lordships in *Leahy* stated their view clearly by saying:

> "A gift can be made to persons (including a corporation) but it cannot be made to a purpose or object: so also a trust may be created for the benefit of persons as cestuis que trust but not for a purpose or object unless the purpose or object be charitable" (p.478).

It is clear that the Privy Council took the words, "a trust must be for the benefit of individuals" to mean that "for a trust to be valid, the *beneficiaries* must be individuals." Their interpretation is clearly shown in their examination of relevant cases. One of these cases was *Re Drummond* (1914) 2 Ch 90 where a testator gave his residuary estate by will to his trustees upon trust for sale and conversion, directing his trustees to hold the proceeds on trust for "the Old Bradfordian's Club". By a codicil the testator declared that he desired that the said moneys should be used by the club for such purposes as the committee for the time being might determine. In his judgment Eve J stated that he could not hold that the gift was one to members individually but that there was a trust (presumably a trust for non-charitable purposes) and that there was abundant authority for holding that it was not such a trust as would render the legacy void as tending to a perpetuity.

The Privy Council suggested that this case is difficult to reconcile with the beneficiary principle. They then examined the House of Lord's case of *Re Macauley's Estate* [1943] Ch 422, 435 (n). In this case there was a gift to "the Folkstone Lodge of the Theosophical Society . . . absolutely for the maintenance and improvement of the Theosophical Lodge at Folkstone". The gift was

held invalid as the words "maintenance and improvement" indicated that the testatrix intended to secure the permanence of the Lodge thus creating an endowment which tended to a perpetuity. However, the Privy Council specifically disapproved of a section of Lord Buckmaster's speech where he said:

> "[There is no] perpetuity if the society is at liberty in accordance with the terms of the gift to spend both capital and income as they think fit" (p.436).

Their Lordships then commented that they,

> "respectfully doubt whether the passage in Lord Buckmaster's speech in which he suggests an alternative ground of validity . . . presents a true alternative. It is only because the society, ie the individuals constituting it, are the beneficiaries that they can dispose of it" (p 483).

Thus, the Privy Council was clear in its insistence that a trust for the purposes of the association is invalid; it can only be held valid if the words specifying the trust for purposes are disregarded and the gift treated as one to individuals.

But this view is not compatible with *Re Drumond* or *Re Macauley* and it is probable that those cases recognized the validity of trusts for the purposes of an association in some instances. What is certain, is that if this assertion is not true, those two cases are anomalous. This is evident from the case of *Re Cain* [1950] VLR 382 where Dean J. said:

> "In some of the cases in which a gift to an unincorporated society was held to create or tend to a perpetuity it appears to me that it might have been held void because it created a trust for purposes not charitable and not a trust for individuals; but this ground appears to have escaped notice" (p.391).

He cited *Re Macauley* as an example, but what appears to have escaped *his* notice is that the House of Lords probably did regard a trust for purposes as valid in some cases, provided no perpetuity was created. Thus it is necessary to ascertain which view is correct. The reason behind the restrictive view is fairly straight-forward, but the opposite view requires an investigation of the relevant principles before it can be sufficiently understood.

An examination of policy behind the beneficiary principle

There is a basic policy factor common to the beneficiary principle and the rule against perpetuities – the encouragement of the circulation of property. The rule against perpetuities is designed to prevent restriction on the use of property by specifying a time limit within which an interest must vest (a life in being plus 21 years).

The beneficiary principle is designed to prevent the legal and equitable title to property being separated for too long as such a separation would restrict the circulation of property. The beneficiaries of a trust have the power collectively to terminate the trust and have the legal title vested in themselves. The self interest the beneficiaries have in the trust property is sufficient to prevent property being tied up for undesirably long periods, but it is essential to this process that ascertainable human beneficiaries do exist who can apply to the court for the termination of the trust. "Every [non charitable] trust must have a definite object. There must be somebody in whose favour the court can decree performance" (Morice op cit).

Those supporting the validity of trusts for the purposes of non-charitable associations argue that to uphold such trusts would not be to override the policy of the beneficiary principle. There *is* somebody in whose favour the court can decree performance. There is authority for the proposition that any member of an association can ask the court to enforce the devotion of association property in accordance with the constitution of the association. *(d)* This fact creates an important distinction between a trust for the purposes of an association and a "pure" purpose trust. In the case of a "pure" purpose trust there is no-one in whose favour the court can decree performance and thus it will be invalid; but, as explained above, if a trust for the purposes of an association does not give rise to this objection, in what way can it be said to be invalid? The case is clearly stated by Ford where he says:

> "Though a trust for an association may be regarded as a trust for that association's objects, it is a trust for those objects as controlled by the members. Authorities dealing with the control by members of association property allow that the members may dissolve the association at any time and, if it is a non-charitable association, may withdraw the property from the purpose. Thus a trust for an association differs in a material respect from a pure purpose trust. The presence in the former of control exercisable by the members means that the policy limiting the duration of pure purpose trusts is not infringed by a trust for an association's purposes even though the association may last indefinitely . . . The true position would

(d) *Fells v Read* (1852) 3 Ves Jun 70, *Rigby v Connol* (1880) 14 Ch D 482 *Van Kerkwoorde v Moroney* (1917) 23 CLR 426, 433.

appear to be that a trust for an association is one for a purpose rather than individuals but the purpose is sufficiently identified with the particular individuals to remove the trust from the scope of the rule limiting the duration of pure purpose trusts" *(e)*.

Thus we arrive at a position which is most satisfactory in principle. It avoids the awkward fictional constructions which are placed on gifts to unincorporated associations in order to make them work, and at the same time it is not open to objection on the grounds of the beneficiary principle. A gift on these terms will also satisfy the rule against perpetuities if there is nothing in the terms of the gift or the rules of the association to prevent the members disposing of the trust property as they think fit.

In view of these apparent advantages it seems logical that where there is a gift to an unincorporated association there should be a prima facie presumption that there is a trust for the purposes of the association which is valid if it does not tend to a perpetuity. This presumption could be displaced if there are clear indications that the gift could only be, either one to the individual members in severable shares (in which case it is a valid absolute gift) or one where the pure purposes of the association were to be benefited for ever, the association being merely the vehicle for defining the purpose (in which case it is an invalid purpose trust.)

Unfortunately this is mere theory, and its worth or practicability will be in doubt until it finds expression in case law. The final section of this paper examines some important recent cases which may have gone some way towards adopting the logic in this theory.

Recent authority

Recent English cases on the question of gifts to unincorporated associations have not followed the *Leahy* approach, but appear to have followed *Re Macauley* and *Re Drummond* in a limited acceptance of a trust for association purposes.

Re Recher's Will Trust [1972] Ch 526 was heard by Brightman J. In considering the validity of a gift "upon trust as to both capital and income for . . . Antivivisection Society" he recognized no prima facie construction of a gift to members but individually dismissed three suggested constructions of the gift as one to individual members, as one to present and future members, and finally as one on trust for the purposes of the association. Then he considered how otherwise, if at all, it was capable of taking effect. It was argued that there could be no halfway house between the constructions of a gift to the individual members as joint tenants or tenants in common and a trust for members which is void for perpetuity because no individual member acting by himself can ever obtain his share of the legacy. Brightman J. rejected this argument as contrary to common sense. In doing so he held that the true construction of the gift was

> "a gift to the members beneficially not as joint tenants or tenants in common so as to entitle each member to an immediate distributive share, but as an accretion to the funds which are the subject matter of the contract which the members have made inter se" (p.539).

This construction is similar to the second type defined by Cross J. in *Neville Estates v Madden.* But Brightman J. seems to be using it as a device for upholding a purpose trust. He says:

> "A trust for non-charitable purposes as distinct from a trust for individuals is clearly void because there is no beneficiary. It does not however follow that persons cannot band themselves together as an association or society, pay subscriptions and validly devote their funds in pursuit of some lawful non-charitable purpose. An obvious example is a members' social club. But it is not essential the members should only intend to secure direct personal advantages to themselves . . . The association may be one which offers no personal benefit at all to the members, the funds of the association being applied exclusivly to the pursuit of some outside purpose" (p.538).

So Brightman J. clearly contemplates as valid a gift which is to the members but which is automatically added to the fund devoted to the attainment of purposes. He was emphatic in his denial of the argument that these purposes must benefit the individual members for the gift to be valid. It was submitted to him that there must be a distinction between "inward-looking" associations (associations which existed solely to promote the interests of its members) and "outward-looking" associations (which exist to promote some outside purpose). A gift to an inward-looking association, it was said, could be construed as a gift to individual members because the testator must have intended the gift for their benefit. But a testator could not have intended to benefit individuals with a gift to an outward-looking association, which was therefore invalid. Though this argument did not appear to lack logic, Brightman J. rejected it mainly by emphasising the imprecision, undesirability and impracticability of the terms "inward" and "outward-looking."

(e) *Ford* Unincorporated Non-Profit Associations, p 31.

This case, though giving effect to a gift for purposes, was still orthodox in the sense that the gift was still construed as a gift to the members beneficially. The most recent authority on the subject went further towards acceptance of a trust for the purposes of an association, per se, and the judge reasoned in a rather different way to Brightman J. The case *Re Lipinski* [1976] 3 WLR 522 and the judge was Oliver J. His different approach seems to have two causes. One is that he applied the streamlined view of the beneficiary principle as stated by Goff J. in *Re Denley's Deed Trust;* [1969] 1 Ch 375 the other seems to be that the courts place great emphasis on the testator's intention to the extent that their reasoning is influenced by their desire to give effect to it.

Re Lipinski concerned a direction by the testator that his residuary estate be held "as to one half thereof for the Hull Judeans (Maccabi) Association . . . to be used solely in the work of constructing the new buildings for the association and /or improvements to the said building."

After rejecting a submission that the association was charitable, Oliver J. turned to consider the effect of the gift for the purposes of the association. He began by stating the three-way explanation set out by Cross J in *Neville Estates v Madden* [1976] 3 WLR 522. He regarded this merely as a working guide which might require "a certain amount of qualification in the light of subsequent authority" (p.531). Applying the "working guide" to the facts, Oliver J. decided that the specification of sole purpose of the gift made it impossible to come within the first construction as a gift to individual members. In considering whether the gift could come within the second category, the learned Judge said:

> "there appears to be a difficulty in arguing that the gift is one to the members of the association subject to their contractual rights *inter se* when there is a specific direction or limitation sought to be imposed upon those contractual rights as to the manner in which the subject matter of the gift is to be dealt with" (p.532).

However, he did not accept the next orthodox step of reasoning that because this was a "purpose" trust that it was invalid. This was the central theme of his judgment and his line of reasoning began with a criticism of the *Leahy* approach. He suggested that the dichotomy expounded in *Leahy's* case between a (valid) gift to persons and an (invalid) gift to purposes or objects was an over-simplification. He continued, explaining the distinctions which *Leahy* had ignored:

> "There would seem to me to be as a matter of common sense a clear distinction between the case where a purpose is described which is clearly intended for the benefit of ascertained or ascertainable beneficiaries, particularly where those beneficiaries have the power to make the capital their own and the case where no beneficiary at all is intended (for instance a memorial to a favourite pet) or where the beneficiaries are unascertainable. If a gift may be made to an unincorporated body as a simple accretion to the funds which are the subject matter of the contract which the members have made inter se . . . I do not really see why such a gift which specifies a purpose which is within the powers of the association and of which the members of the association are the beneficiaries, should fail. Why are not the beneficiaries able to enforce the trust or indeed in the exercise of their contractual rights to terminate the trust for their own benefit? Where the donee association is itself the beneficiary of the prescribed purpose, there seems to me to be the strongest argument in common sense for saying that the gift should be construed as an absolute one within the second category – and more so where if the purpose is carried out the members can by appropriate action vest the resulting property in themselves, for here the trustees and beneficiaries are the same persons" (p.532).

That passage appears to be a statement of his reasoning supported by logic and common sense. As to the question whether the reasoning was supported by the authorities, Oliver J. answered that they appeared to be "at least consistent" with it. The case on which he placed most emphasis was the purpose trust case of *Re Denley*. Goff J. held in that case that the rule against enforceability of non-charitable purpose or object trusts was confined to those which were abstract or impersonal in nature where there was no beneficiary or cestuis que trust. A trust which though expressed as a purpose was directly or indirectly for the benefit of an individual or individuals was valid provided that those individuals were ascertainable at any one time and the trust was not otherwise void for uncertainty. Oliver J adopted the reasoning in *Re Denley* and applied it to the facts of the case before him.

There are two aspects of the judge's reasoning which call for comment. First, he argued that if a gift to an unincorporated association as a simple accretion to the funds (as in *Re Recher*) was valid, he did not see why a gift to the purposes of the association (with certain limits) should fail. However, in comparing a purpose trust to a *"Re Recher"* trust he omitted the important fact that Brightman J. still construed

the gift in *Re Recher* as one to the individual members'. *(f)* However fine the distinction may in effect be, the fact that the gift *was* construed to individuals is of great importance in theory and it must be recognized that Oliver J. did not take note of this in his reasoning.

The second aspect worthy of note is a different facet of the same sentence. Oliver J. accepts the restatement by Goff J. of the beneficiary principle, but in expressing it in the form of a rule governing gifts to unincorporated associations, he imposes limitations which seem to lack the logic and common sense of the rest of his judgment. Thus the Denley rule that "a trust which though expressed as a purpose was directly or indirectly for the benefit of an individual or individuals was valid provided that those individuals were ascertainable at any one time and the trust was not otherwise void for uncertainty" becomes the *Lipinski* rule, "I do not really see why a gift to an unincorporated association which specifies a purpose *which is within the powers* of the association and of *which the members of the association are the beneficiaries,* should fail." The limitations first that the purpose be within the powers of the association and second that the members themselves be the beneficiaries were probably devised to prevent *every* gift to an unincorporated association being validated under *Re Denley.* That case confines invalidity to those purpose trusts abstract or impersonal in nature and as it is unlikely for associations to be set up for such purposes, most gifts to the purposes of unincorporated associations would be valid. The limitations imposed by Oliver J. are, however, artificial and arbitrary and are likely to be worn down if and when a case having borderline facts arises.

It is also noteworthy that the limitation requiring the members themselves to be the beneficiaries expresses substantially the same distinction which was phrased in the terms of "outward and inward looking" associations and which was firmly rejected in *Re Recher.* This makes it realistic to ask whether the reasoning of Oliver J. would have been different had he been considering a case which was on its facts the same as *Re Recher.*

Despite these few problems, *Re Lipinski* is a very important case in that it states clearly and unambiguously for the first time that there can be a valid trust for the purposes of an association. It is probable that in the next few years, we will see a development and extension of *Re Lipinski* to the stage where its effect accords in principle with that of *Re Denley.*

Future direction

The question where the law will go from here is not easy to answer considering the unsettled nature of the authorities. *Re Recher, Re Denley* and *Re Lipinski* are moving in the "right" direction; certainly *Leahy's* approach is restrictive at every point and unsatisfactory in theory and practice. Any situation where a layman is astonished by the legal consequences of his actions is indicative of a need to bring the law into accord with practical reality. As there are important interests to be upheld, the law must once again tackle the familiar task of finding the balance between them which best satisfies the needs of the society at the time.

(f) His actual words were: "the legacy is a gift to the members beneficially not as joint tenants or as tenants in common so as to entitle each member to an immediate distributive share, but as an accretion to the funds which are the subject matter of the contract which the members have made inter se".

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HISTORY

THE NEW ZEALAND COLONELS' "REVOLT", 1938

L H BARBER *(History Department: University of Waikato), describes the events that led to the sacking in 1938 of New Zealand's senior territorial army officers (two of whom were lawyers) without their being subjected to a court martial.*

Army regulations and service traditions have normally acted as strong deterrents to New Zealand army officers tempted publicly to rebuke their political masters when dissatisfied with the state of the nation's defences. Frustrated senior officers have usually managed to contain their anger and refrain from political comment. Professional silence has been broken only on a few occasions when budgetary cuts have provoked an angry response from field officers thwarted by lack of men, equipment and funds. One of these exceptions took place on 19 May 1938 when four senior colonels of New Zealand's miniscule army, of 510 regular force soldiers and 7,112 territorials, publicly rebuked their political masters.

The New Zealand colonels' "revolt" of 1938 was led by officers with long and distinguished service records. Its participants were also citizens with powerful connections in the opposition National Party. Colonel CR Spragg, VD, was a farmer and exporter, who had commanded the first battalion of the New Zealand Rifle Brigade in 1917 and 1918, and had subsequently commanded the New Zealand Mounted Rifles. Colonel NL Macky, MC, the leader of the "revolt", was a barrister and solicitor in a legal firm that included several officers – the firm of Russell, McVeagh, Macky, Barrowclough and Elliott. Macky had served as a captain in the New Zealand Rifle Brigade from 1915 to 1919, and in post war years had been promoted to command the Auckland regiment, and then the First New Zealand Infantry Brigade. Colonel AS Wilder, DSO, MC, VD, was a wealthy sheep farmer with influential friends on the opposition benches in parliament. Colonel FR Gambrill, VD, a former commander of the Second New Zealand Infantry Brigade, was a Gisborne barrister and solicitor, and a personal friend of Sir Andrew Russell, who commanded the evacuation of the Anzac forces from Gallipoli, and who led a powerful lobby group known as the New Zealand Defence League. Beside their connections with the National Party the colonels were in a position to use the press to their advantage. A relative of one of the colonels was employed on the editorial staff of the *New Zealand Herald*, while a territorial officer under the command of another was similarly employed by the *Taranaki Herald*.

The "revolt", a bloodless protest, became public knowledge on 19 May 1938 when the four colonels published a manifesto in New Zealand's major newspapers. In their protest the colonels attacked claims made by the Minister of Defence, F Jones, and by the Chief of the General Staff, Major General JE Duigan, that New Zealand's land forces were in a state of efficient readiness for combat. The colonels made five points. They charged that the organisation and maximum establishment of the territorial force had been recently reduced to a size insufficient for the defence of the dominion. The public's attention was drawn to the fact that the number of territorials trained was far short of the meagre establishment allowed. The colonels deplored the low level of training and poor physique of the territorial force and insisted that reductions in strength together with public indifference had brought morale to a low ebb. The Labour Government was blamed for lack of application to defence problems, but the colonels added that a succession of governments must bear the blame for the territorial army's neglect. Their manifesto concluded with a warning that the signatories expected that its publication would result in disciplinary action being taken against them, and ended with this explanation:

> "We would like the people of New Zealand to realise the gravity of the situation is such that we feel all personal consideration must be put aside if we are to carry out our duty to our country as citizen soldiers" *(a)*.

This article asks four questions of the New Zealand colonels' revolt. What provoked their condemnation of the government's defence policy? Had they exhausted all other avenues of approach

Acknowledgment – This article was prepared as a contribution towards a study of the New Zealand army in peace time initiated by the General Staff. I acknowledge the generous assistance given by officers, retired and serving, in the preparation of this paper.

(a) *Waikato Times*, 19 May 1938.

before they embarked on their premeditated and dangerous public contest with the Minister of Defence? How fair was their criticism of the dominion's defences? And how was their revolt quelled?

The publication of the colonels' manifesto was a deliberate act by officers who knew full well that they were breaching military discipline. What sequence of events provoked their condemnation of the government's defence policy? In part the colonels were reacting to a rationalization of the New Zealand army. On 1 September 1937 Major General Duigan commenced a substantial reorganisation of the territorial force. In his annual report to the Minister of Defence, Duigan announced that the changes effected were intended to better secure the protection of the main ports and to build "a field force of strength to enable requisite expansion, if the necessity should arise" *(b)*. At first glance the new defence policy appeared an impressive attempt to revive an army sadly neglected during the great depression of the 1930s. A defence council was instituted, with the chiefs of staff committee and army board as integral parts. Proposals were made to strengthen port defences and attention was given to a plan to mechanise the infantry. The new programme recommended the introduction of films as an instructional technique, authorised the provision of motorised transport for territorial camps and weekend training, and granted public servants who enlisted in the territorials leave for 12 working days, on full pay. Duigan promised a new walking-out uniform for all territorials, frock-coats for senior officers, and promotion for regular force officers who had suffered salary cuts and deferred promotion during the depression.

The defects of the new system soon became apparent to territorial officers. Although the territorial force made up the bulk of the New Zealand army no provision had been made to appoint any territorial officer to the newly formed army board. The new scheme offered no increase in pay to territorials. Instead it demanded increased training commitment. Furthermore, numbers of junior officers were made redundant by the reorganisation of units and were retired without attention to the advice of their territorial commanders. Colonels previously commanding under-manned brigades were posted to a new colonels' list – with few active or advisory duties. Duigan's offer of frock-coats and a more imposing headdress increased the fury of the territorial colonels left without men to command.

The senior territorial officers were left with the task of explaining and commending the government's new defence policy to battalion commanders and junior officers. In so doing they found themselves bombarded with criticisms of the scheme and with threats of resignation from long-serving officers. On 17 December 1937 WS McCrorie commanding officer of the First Battalion of the Taranaki Regiment, wrote to one of the colonels, RF Gambrill, threatening to resign his commission. McCrorie complained:

> "Everything possible to retard and knock back the territorials in provincial districts has been done. [We have been] cut down and thrown into a nondescript battalion. . . . Farmers will not release, or probably cannot afford to release, farmhands. Further no appeal has been made or lead given by the government for recruiting" *(c)*.

By 1938 morale within the New Zealand territorial force was at an all time low. Major General Duigan was unpopular with senior territorial officers, who contrasted him unfavourably with his predecessor, Major General Sir William Sinclair-Burgess, who had been cruelly notified of his retirement from office by a phone call from a civilian secretary in March 1937 *(d)*. On 4 June 1937 Duigan had boasted to one of the colonels that he felt "certain in his own mind that the recommendations which I have placed in the hands of the government will produce efficiency much higher than we have at the present time" *(e)*. The territorial officers were far from convinced and immediately touched on the basic weakness in Duigan's plan – lack of manpower. In presenting the scheme to his minister Duigan himself had been forced to admit that

> "It would be over optimistic to expect more than nine thousand men of the right type to fill the ranks of our organisation in peace under a system of voluntary enlistment" *(f)*.

By the beginning of 1938 the Anschluss had become a reality and independent Austria was no more. The German army had grown to over 75 divisions, with nearly one million men able to be called to the colours. Japan was now at war with China, and Italy's imperial ambitions in Abyssinia had drawn only a toothless growl from the League of Nations. Europe had become a cauldron of simmering discontent and many New Zealand veterans of the First World War looked with alarm at the deficient state of the dominion's land forces. At its annual conference the Farmers Union called for a return to conscription, as did the Returned

(b) *Appendices to the Journals of the House of Representatives* (hereinafter AJHR), H-19 (Report of the Chief of the General Staff), 1938.

(c) W S McCrorie to Gambrill, 17 December 1937.

(d) Personal interview with Colonel R F Gambrill, 27 November 1974.

(e) Duigan to Gambrill, 4 June 1937.

(f) AJHR, H-19 (Report of the Chief of the General Staff), 1938.

Servicemen's Association. In 1936 the National Defence League had been reconstituted by Lieutenant-General Sir Andrew Russell, and its leaders, including HE Barrowclough (later a hero of the Second World War), kept steady pressure on the government for an increase in defence expenditure *(g)*.

By early 1938 it was obvious to most senior territorial officers that the Labour government was unlikely to improve the state of the territorial force. By 1936 and 1937 the strength of the volunteers had fallen by five thousand. Only three thousand troops had attended annual camps in 1938 – in all only forty-one percent of the army *(h)*. The prime minister, MJ Savage, had answered critics of his government's defence policy with a trite and simplistic assurance, "we are in a better position today than ever. Military officers tell us that, and they should know" *(i)*. However, while a few regular force staff officers provided Savage with the reassurance that he sought, the dominion's citizen soldiers saw more ominous signs on the European and Asian horizons. By early 1938, New Zealand's senior territorial officers were convinced that war was coming and that their nation was ill prepared to meet it.

Had the colonels exhausted all other avenues of approach before they embarked on their premeditated and dangerous contest with the Minister of Defence? The colonels' claim that they acted as citizen soldiers in the interests of their country can only be credible if they had in fact exhausted all other permitted channels of protest before issuing their manifesto.

The colonels realised early in their conflict with their superiors that they were involved in a difficult conflict of loyalties. Gambrill identified the problem in December 1937, when he wrote to Macky:

> "The question resolves itself into a clear-cut issue – 'which way does our duty lie? Does our duty as officers to our GOC transcend our duty as citizens to our country? If not, what is our duty?' " *(j)*.

The consistency and persistency of the colonels' attempts, in the months following the army reorganisation, to convince their superiors that the territorial force was in a critical state of disrepair is made patent in an exchange of correspondence between Gambrill and the Chief of the General Staff, and between Gambrill and the Minister of Defence.

When it became apparent at mid-1937 that Major General Duigan was unimpressed by the representations made to him by the colonels and by battalion commanders, Gambrill sought permission to represent the views of his subordinates directly to the Minister of Defence. Permission was granted, and in August 1937 Gambrill wrote to Jones making many of the points later included in the colonels' manifesto. Gambrill affirmed that the new scheme offered no practical improvement in the condition of the territorial force and warned that it would most likely aggravate the problem of recruiting. He protested that a voluntary system did not allow the establishment of a large body of trained men and cited deficiencies in the numbers and training of the 1937 volunteers as evidence of the weakness of the system *(k)*.

Jones was advised to seek "a public and spirited appeal . . . by the Prime Minister . . . to the patriotism of the people" *(l)*. The colonel suggested that increased pay and the granting of travelling allowances to those attending territorial camps and courses might well encourage recruiting. He requested the government to encourage employers to grant leave without stoppage of pay, or loss of annual holidays, to those attending these camps. Gambrill knew that the voluntary system was inefficient, but he made suggestions that were a loyal attempt to make it work.

In his reply of 11 October 1937 Jones ignored Gambrill's positive advice and fastened on the colonel's criticism of the voluntary system:

> "The principal recommendation in your report is the reintroduction of compulsory military training. This is contrary to the policy of the government, but, quite apart from that, there appears to be no justification for compulsory training at a time when compulsory training is not in force in any other part of the Empire" *(m)*.

Gambrill made a lengthy reply to the minister on 22 October. He protested that he had no party politics and that far from being a militarist he was a member of the League of Nations Union. The colonel made plain to the minister that his advice was based on grim experience:

> "The sight – witnessed by me on Gallipoli in 1915 – of half-trained troops (from the English Midlands) of undoubted bravery, being slaughtered in an endeavour to do that which trained troops would have found unnecessary" *(n)*.

Colonel Gambrill was aware that some of the minister's staff officers had advised him that the European situation was unlikely to lead to war. He

(g) R M Burdon, *The New Dominion*, London, 1965, p 271.

(h) AJHR, H-19 (Report of the Chief of the General Staff), 1938.

(i) *Poverty Bay Herald*, 4 June 1938.

(j) Gambrill to Macky, 17 December 1937.

(k) Gambrill to Jones, 26 August 1937.

(l) Ibid.

(m) Jones To Gambrill, 11 October 1937.

(n) Gambrill to Jones, 22 October 1937.

suffered no such delusions. He paid tribute to the Labour government's humanitarian legislation, but asked:

> "Of what use is it to build the Ideal Democratic State if the whole structure is to disappear overnight on the threat of any Fascist Dictator?" *(o)*.

On 8 November the minister wrote a brief reply wherein he paid tribute to Gambrill's motives, informed him that he had said nothing new, and requested his loyalty. Exasperated by the minister's failure to comprehend the critical issues at stake, Gambrill forwarded a copy of Jones's reply to selected battalion commanders. This resulted in a reprimand from Duigan, who insisted that "You will realise that if this sort of thing is allowed to go on discipline would go by the board, and loyalty to me and to the service will disappear" *(p)*.

Gambrill retorted that his letters to the minister had been written on behalf of the battalion commanders, as well as on his own behalf, and he was duty bound to inform them of the minister's response to his representations. He bridled at Duigan's suggestion of disloyalty and countered:

> "If the honest expression of sincere and considered opinion by an Officer of Senior Rank on a vital issue is disloyalty then I must plead guilty, but to my mind the withholding of such an opinion rather than the expression of it constitutes the offence.... As a sycophant I would be no real use. A critic is a bigger nuisance perhaps but can perform a real service" *(q)*.

At this stage the colonels were acting independently of each other in making their protests. While they were proceeding through the correct channels of communication with their superiors at army headquarters Duigan's charge that their discussion of their grievances with junior officers were prejudicial to good discipline seems fair. In defence of the colonels it must be noted that the junior officers were highly incensed at the government's policies and needed little encouragement from their commanders. On 1 September 1938 the *Poverty Bay Herald* reported that a meeting of territorial officers had been held in Gisborne and that the new reorganisation had been roundly condemned. Army headquarters demanded immediate action against those officers who had contravened para 443 of the Army Regulations, a paragraph forbidding communication with the press. The Chief of the General Staff also charged that officers who publicly criticised the reorganisation were acting in defiance of para 436 of Army Regulations, which required that officers accept responsibility for upholding the credit of the military forces.

It was in early May 1938 that the colonels decided to go beyond the normal channels of communication and address themselves directly to the New Zealand public. For one of the colonels Anzac Day 1938 was the watershed that decided him to make this unorthodox appeal. Colonel Gambrill was one of the large New Zealand Returned Services Association contingent that attended the ceremonies held in Sydney to mark the anniversary of Gallipoli. Ten thousand veterans marched through Sydney and in the discussions that followed general opinion agreed that war was imminent and the Empire grievously unprepared *(r)*. Immediately on his return Gambrill reported to Trentham Camp for a senior officers' course. He soon found that Colonels Macky, Spragg and Wilder were as alarmed as he over the state of the army. It was during the Trentham Camp course that the four colonels decided to make a unified personal approach to the minister, and if the minister failed to satisfy their demands, to submit their case to the nation. Jones met the colonels, listened courteously to their charges and promised to make a speech calling for popular support for the territorial force. The minister delivered a speech at Dargaville where he made a few references to the need for adequate defence, but in no way suggested that New Zealand was endangered, or the army other than in good heart. The colonels immediately judged the minister's speech inadequate and submitted their already prepared manifesto to the newspapers.

The colonels accompanied their manifesto with several justifications for their unorthodox behaviour. Gambrill informed Puttick, the Adjutant-and Quartermaster General, "that dictates of conscience placed me in a position which made the action taken inevitable" *(s)*. When John A Lee, parliamentary under-secretary to the prime minster, attacked the colonels on 8 June, in Palmerston North, Gambrill prepared a retort that, although never submitted for publication, provided a clear appraisal of the colonels' awareness of the implications of their action:

> "We admit freely that we have adopted a militarily unorthodox method of expressing our opinions on what is a most vital public matter. We realised fully before making our statement that we must pay a penalty.... To repeat the concluding sentences of our statement: 'The gravity of the situation is such that we feel all personal considerations must be put aside if we are to carry out our duty to our

(o) Ibid.
(p) Duigan to Gambrill, 17 January 1938.
(q) Gambrill to Duigan, 23 January 1938.
(r) Personal interview with Colonel Gambrill, op cit.
(s) Gambrill to Puttick, 2 June 1938.

country as citizen-solders' " *(t)*.

In mid-1939 Gambrill, Macky and Wilder admitted to Army headquarters that their joint act had been:

> "a premeditated breach of an officer's code of conduct. . . .We were motivated solely by the impelling force of conscience and our immediate motive was the thought that by our action we should serve our country" *(u)*.

The colonels' "revolt" was an embarrassment and a challenge to army headquarters and the minister and Chief of the General Staff responded with anger and speed. On the day of the manifesto's publication Colonel E Puttick, the Adjutant and Quartermaster-General, wrote to each of the colonels demanding confirmation that they were indeed the authors of the offending statement *(v)*. All four admitted their responsibility and were informed, in a second letter from Puttick, that while their communication with the press on military matters could have resulted in the cancelling of their commissions "it is considered that, in the interests of the discipline of the forces, such a serious breach cannot be countenanced, and it is proposed to recommend that you be posted to the Retired List " *(w)*.

On 27 June Puttick wrote again to the four colonels and informed them that the *New Zealand Gazette* of 30 June 1938 would post them to the Retired List – with permission to retain their rank and wear the prescribed uniform *(x)*. The four colonels were "sacked" – without a Court of Enquiry, or a court-martial, by a short *Gazette* notice retiring them from active service.

A fierce public debate followed their dismissal. From Britain General Sir William Ironside (later to be Chief of the Imperial General Staff) privately congratulated the four officers on their courageous stand *(y)*. The *New Zealand Herald* referred to the dismissals as a "drastic decision", involving "action without trial" *(z)*, while in Auckland, Gisborne, Hastings and other towns, territorial officers held meetings in camera to determine what backing they could give to the retired colonels. Resignations were threatened. In the *Poverty Bay Herald* the postings were denounced as "an army 'purge' ", and the colonels were praised as patriots who "with their eyes open, preferred the more courageous course of sacrificing themselves in an attempt to save the country rather than the alternative of saving their own skins and sacrificing the security of the dominion" *(aa)*.

CS Brown, a Wanganui barrister and solicitor, even published a poem entitled "The Four Colonels", in praise of the citizen soldiers:

> "We are four naughty colonels, we've all got the sack;
> The minister spoke, and we answered him back.
> So on to the scrap heap we promptly were thrown,
> And we hereby record that the fault was our own. . . .
> 'But, sir,' we replied, standing straight to attention,
> 'there is one little point that we'd just like to mention. . . .
> Where are the troops for our trenches and forts?
> Who'll fire the rifles? Who'll man the supports?
> For stout hearts are vain when shells scream and roar,
> Unless for their duties they're trained long before'. . . .
> We've told all the people the things they should know –
> That New Zealand, untrained, is defenceless – and so
> Out in the cold, on the scrapheap we're thrown.
> Now don't you see that the fault is our own" *(bb)*.

Opposition National Party parliamentarians quickly adopted the colonels' cause. On 5 July 1938, HS Kyle, member for Riccarton, ridiculed Jones's statement on defence, made at the Easter Labour Party Conference. He referred to the four colonels as officers "fired from the military forces simply because they were game enough to issue a manifesto that did not coincide with the views of the present government" *(cc)*. JA McL Roy, opposition member for Clutha, added his support for the colonels during the Budget debate, arguing:

> "I do not know all the officers in question, although I served under one of them, but I believe they were among the finest soldiers that New Zealand has produced, and it is deplorable that their services should have been dispensed with in such a summary manner" *(dd)*.

Not all politicians thought this way. The prime

(t) Unpublished memoir of the late Colonel R F Gambrill.

(u) Gambrill to Army Headquarters, 5 May 1939.

(v) Puttick to Gambrill, 19 May 1938.

(w) Puttick to Gambrill, 3? May 1938.

(x) Puttick to Gambrill, 27 June 1938, *New Zealand Gazette*, 3? June 1938.

(y) Personal interview with Gambrill, op cit.

(z) *Hawke's Bay Herald Tribune*, 7 July 1938 (The editor reviews reaction in other newspapers).

(aa) *Poverty Bay Herald*, 4 June 1938.

(bb) Charles Stanley Brown forwarded the original draft of the poem, 'The Four Colonels', to Gambrill on 7 July 1938.

(cc) *New Zealand Parliamentary Debates* (hereafter NZPD), 252 (5 July 1938), p 350.

(dd) NZPD, 252 (5 August 1938), p 81.

minister, M J Savage, refused to comment on the issue, but his parliamentary private secretary, John A Lee (a hero of the First World War) strongly attacked the colonels during a political rally in Palmerston North. Lee charged that:

> "To no small extent the statement issued by the four colonels was invalidated because of the fact that most of the signatories were prominent for their anti-Labour political activities. If colonels desired to become politicians, they had the privilege of resigning and delivering political speeches" *(ee)*.

In the weeks following the publication of their manifesto, the colonels carefully watched public reaction in order to determine their next attack. They made no defence against the charge that they had committed an offence against military law. Gambrill freely admitted this to Puttick when he wrote, "I regret that dictates of conscience placed me in a position which made the action inevitable" *(ff)*. Despite their avowal of guilt their arbitrary dismissal had played into their hands. Macky advised his colleagues to sit tight and let public pressure on the government do the rest:

> "The interest up here is intense. They are expecting a court-martial – very proper method – see cutting I sent you. Instead summary dismissal – and illegal. Why do anything? . . . However, my strong conviction is now silent. It creates the public inquisitiveness" *(gg)*.

The colonels now alleged that they had been treated not unjustly, but improperly. The Labour government had passed a Political Disabilities Removal Act to allow civil servants to express their political opinions as private citizens, without fear of censure or dismissals. The colonels noted that this same government had made no provision for allowing citizen officers, who voluntarily gave large slices of time to national military service, any representation on the Army Board, and no liberty to voice opinions on military matters while retaining their links with the army. The newspapers mainly agreed that the government had used military regulations to silence its critics. The fate of the colonels was contrasted unfavourably with that of C G Scrimgeour, the Controller of Commercial Broadcasting, who made a fierce radio attack on the parliamentary opposition only to receive a kindly reprimand from Savage. The prime minister referred to this senior public servant's breach of regulations as "a very human action" *(hh)*, but retired four colonels who criticised his government.

At this stage a legal opinion was sought from a prominent Auckland King's Counsel – C P Leary. In a 12 page summary Leary traced the history of the rights, prerogatives and duties of commissioned officers. He concluded that the colonels had no recourse to the civil courts and they had no right to demand a court-martial. He advised, on English precedent, that publication in the newspapers of criticism that could be regarded as conduct to the prejudice of good discipline should have resulted in trial by court-martial. Leary advised the colonels to seek redress by an appeal to the King, who alone had the power to grant and cancel an officer's commission *(ii)*. In July 1938 Wilder, acting also for Spragg, Gambrill and Macky, claimed the right to personally represent their cases before the Governor-General, as the King's representative in New Zealand. In his letter applying for a Vice-Regal interview, Wilder declared that he had been dealt with contrary to the tradition and customs of the army, and that the action taken against him was contrary to law and was therefore invalid *(jj)*.

Viscount Galway, the Governor-General, received the four colonels on 28 July 1938. The Governor-General had already made clear that as Wilder's commander-in-chief he must listen to any statement the colonels cared to make, but he was unable to take any action nor make any representation on their behalf *(kk)*. The rather pointless interview began with Galway childishly taking the colonels to task for appearing before him out of uniform. He was startled and annoyed by the reply that as retired officers they were now entitled to wear uniform only on certain defined occasions, and an interview with the Governor-General was not listed as one of these *(ll)*. The interview with Galway kept the colonels' case before the public gaze – it did little else.

In the months following Munich the colonels' manifesto received increased public support, and quiet government attention, as the tempo of Hitler's demands and threats increased. The colonels had been jeremiads to many of their fellow countrymen who now found their prophecies only too accurate. The government's realisation that the colonels had been right did not result in their reinstatement. They had warned the dominion of the weakened state of its defences but they had made too many enemies within the general staff and amongst the Cabinet to gain personal vindication that way. Their real vindication came

(ee) *Dominion*, 9 June 1938.

(ff) Gambrill to Puttick, 2 June 1938.

(gg) Macky to Gambrill, 27 June 1938.

(hh) A cartoon in the *New Zealand Herald*, 19 August 1938, satirises this contradiction.

(ii) Legal opinion, 22 July 1938 (Gambrill Papers).

(jj) Memorandum: Wilder to Army Headquarters, July 1938.

(kk) Interview Gambrill, op cit.

(ll) Memoranda: from Gambrill to Wilder, Spragg and Macky, July 1938.

through the quickened interest in defence that their challenge evoked. In his 1939 report as Chief of the General Staff, Duigan announced that the government had authorised an increase in the establishment of the territorial force that allowed an enlistment of 16,000 *(mm)*. The colonels' manifesto, and the public's response to it, had given the government's critics, and the newspaper editors, a weapon with which to prod the Minister of Defence into action. The *New Zealand Herald* typified the response of the dominion's editors when it declared:

> "A government that is failing to discharge its primary responsibility to organise national security should not be allowed to gag those best qualified to judge the position and inform the public. In this case the gag failed. . . . All good citizens will agree that they [the colonels] did well and will resent the fact that their well-doing has been punished as a military 'crime' " *(nn)*.

Although to a large extent events vindicated the colonels only two of their number were finally fully reinstated. Colonel Spragg died on 1 October 1939 following an illness accentuated by the strain of the contest. On 3 October Gambrill, Macky and Wilder were informed that they had been replaced on the Reserve of Officers. While Macky and Wilder received overseas commands during the Second World War, Gambrill was persistently refused active command and served in New Zealand as a Home Guard Group Director.

The New Zealand colonels' "revolt" of May 1938 succeeded. It successfully provoked New Zealand citizens to demand that their government provide the territorial army with more men, additional equipment and better pay. The "rebels" were treated as heroes by most New Zealanders, who were incensed by their treatment and agreed full well with the editor of the *New Zealand Herald*, who charged:

> "That such a sentence can fall on citizen soldiers in a free domocracy is profoundly disturbing. That it should be delivered without charge or hearing or trial outrages the British tradition and love of fair play" *(oo)*.

The editor should not have the last word. Like the "rebel" colonels the *New Zealand Herald* was not free from political partisan views, and while the editor had touched one breach of "fair play" he had ignored another. The colonels, as far as the army was concerned, were as much bound to refrain from criticism of government defence policy as were their regular force officer counterparts. As officers they were well aware that if their consciences were sufficiently worried by politicians' blunders they had the right to resign and themselves contest parliamentary seats. Although they knew this they preferred to embarrass the government, force their own dismissal and use their status as officers martyrs to further their cause. Because, as Lee was quick to point out, their cause happened to be the opposition National Party's cause, they intruded party politics into the officers' messes of New Zealand.

The colonels had introduced a dangerous innovation into New Zealand political life and for this they deserved their dismissal. Officer-politicians, a commonplace in other political traditions, had previously played no part in New Zealand politics. The speed and firmness of the General Staff's reaction emphasised the convention that the officer corps should remain aloof from political life.

(mm) AJHR, H-19 (Report of the Chief of the General Staff) 1939.

(nn) *New Zealand Herald*, 1 July 1938.

(oo) Ibid.

MORE MISLEADING CASES

"Legislation changes might be necessary to guard against losses or damage caused by false claims in the prediction of major earthquakes at a specific time and place," Sir John Marshall said today.

THIS is an unusual action. The plaintiff claims damages from the Director of Meteorological Services. According to the evidence the plaintiff obtained a long range forecast from the defendant who advised the plaintiff that the Horowhenua area would expect to receive heavy rain over each of the ensuing days. Heavy rain did indeed fall in Hawke's Bay, Wairarapa and Canterbury to such an extent that special relief committees were set up and Government grants made to farmers who suffered from the damage so caused. However, the rain which caused such damage passed by on the other side (of the ranges) and left the Horowhenua area comparatively dry. This might be regarded as a matter for rejoicing in the case of Mr McGregor who farmed in that district. However, Mr McGregor states he has suffered loss not from the rain, or indeed, from the absence of rain, but because he had negotiated an insurance known as a pluvius insurance with Lloyd's underwriters at a premium of $1500 against the possibility of a certain quantity of rain falling on named days. The rain fell not, and, as the events in the policy did not come to pass, the Underwriters have retained the premium without being called upon to pay out to Mr McGregor. Counsel for Mr McGregor relies on *MLC v Evatt* and the *Hedley Byrne* judgment. Lord Diplock held that the carrying on of a business or profession which involved the giving of advice of a kind which calls for special skill and competence is the normal way in which the person lets it be known to the recipient of the advice that he claims to possess that degree of skill and competence, and is willing to exercise that degree of diligence which is generally possessed and exercised by persons who carry on the business or profession of giving advice of the kind sought.

In evidence, the Director of Meteorology stated that he and his senior staff all had degrees in science – some of them had Masters or Doctorates. Under cross examination he was asked if it was necessary to do more than see whether the seaweed appeared damp, or the little man with the umbrella had come out, or perhaps to consider the state of his corns. He indignantly denied that these methods were either reliable, or in use in his office. Moreover, separate seaweed, corns and weather houses would have to be established and observed in all areas to which forecasts applied. He pointed out they only foretold rain, and he was expected to say something about the way the wind might blow. He asserted that long training and special skills were required. An examination of the Public Service salary scale showed he was remunerated more favourably than his counsel. It has been held that a duty of care will be more readily inferred when the adviser has a financial interest. The Director of Meteorological Services agreed that the meteorologist who forecasts successfully was likely to earn a great deal more in general than the unsuccessful forecaster. I was referred to *Salmond on Torts* where the learned author said "It has also been held that the defendant should be a person whose profession or trade is to make statements or give information or advice or who has a financial interest in the transaction in question". I hold that the Director professes to have a special knowledge or skill and has made a representation to Mr McGregor with the intention of inducing him to arrange his affairs in accordance with that advice, and that the Director is financially interested in his being able to forecast successfully.

I then have to decide whether the advice was negligent. Evidence was given that no rain fell on any of the days prognosticated. That seems to me prima facie evidence of negligence. Res ipsa loquitur. There was no evidence given by the Director to show that he was other than negligent in forecasting the exact opposite of what happened.

It was argued that there was only this one event which was evidence of negligent forecasting, but the Court cannot ignore its tomatoes, which it planted in reliance on the defendant's forecast of mild weather, and lost immediately through a heavy frost. Nor can the Court ignore its weekend at Taupo, when both golf and fishing became impossible through climatological disasters which were unforseen by the defendant.

Then it was stated that the plaintiff had no insurable interest in the rain. Rain falls alike on the just and the unjust, on the insured and uninsured. Mr McGregor's title has no exception as to air space – cujus est solum, ejus est usque ad coelum et ad inferos. If he owns the air space above his land, does he not then own the rain which falls on

his land? I hold he does.

Then it was said, we are dealing here with the rain which though forecast did not fall on his land. How, it is said, can he have an insurable interest in rain which on the days in question, never came into existence? No compensation without precipitation was the underwriter's contract. Was his policy a contract of indemnity?

Under the Gaming Act and the Marine Insurance Act all contracts by way of wagering or gaming become null and void. Mr McGregor had an insurable interest in his crops, and his arrangement with the insurers to safeguard his profits from the crops, I hold to be good.

Of course, if Mr McGregor had taken out rain insurance with nothing more at stake than his golf or fishing the policy would have been void. I am sure the plaintiff would not do a thing like that. Mr McGregor was induced to pay $1500 to Lloyd's, on the negligent advice of the defendant. I therefore hold he is entitled to recover from the defendant his insurance premium, with costs as from a great height.

However, I cannot let the matter rest there.

The plaintiff states that he is entitled, should he wish, to call himself a Maori.

I am passing the papers to the Crown Solicitor with a view to a prosecution of the defendant under the Tohunga Suppression Act 1908 which provides for a penalty of up to six months' imprisonment in the case of a first offence (and 12 months for subsequent offences) for every person who misleads or attempts to mislead any Maori in the foretelling of future events.

It has been suggested to me that a well known racing tipster may have successfully lobbied for the repeal of this statute some few years ago. I am giving my judgment at a provincial Courthouse whose library does not disclose such a repeal, but no doubt some other statutory prohibition has been enacted to cover the public evils of witchcraft, soothsaying and fortune telling, such as s 236 and 237 of the Justices of the Peace Act 1927. Section 12 of the Police Offences Amendment Act quite rightly makes it an offence to tell fortunes for reward. Adams J in *Copeland v Cummings* [1921] NZLR 326, held that it is immaterial if the defendant has an honest belief in his power to divine the future, and that the defendant does not intend to deceive.

I trust this will be a salutary lesson to the weather forecaster.

Reported by Dick Daniell.

CORRESPONDENCE

Dear Sir,

Children: consent to medical treatment

RJ Hooker, in his recent article "Children: Consent to Medical Treatment" [1977] NZLJ 389, suggests that it is difficult to interpret and reconcile s 25 (5) (b) and (c) of the Guardianship Act 1968.

The writer respectfully submits that there is no inconsistency between these subsections. Section 25 (5) provides that

> "Nothing in this section shall limit or affect any enactment or rule of law whereby in any circumstances–
> "(a) No consent or no express consent is necessary; or
> "(b) The consent of the child in addition to that of any other person is necessary; or
> "(c) Subject to subsection (2) of this section, the consent of any other person is sufficient."

At common law, where the consent of the child in addition to that of any other person is necessary, then by definition the consent of any other person cannot be sufficient, so that no conflict between subs (5) (b) and (c) arises.

However although at common law a child's informed consent will be *sufficient* to constitute legally effective consent, his consent may not always be *necessary*. It seems that a guardian can give a valid consent even where the child is capable of consenting, but refuses to do so (see *B (BR) v B (J)* [1968] p 466, 473-474 (CA); *S v McC, W v W* [1972] AC 24, 45 (HL)). With respect, the statement that "where a child refuses medical treatment and that refusal is informed, the child's consent is necessary", is apt to mislead: it is important to distinguish, as subs (5) (b) and (c) do, "necessary" and "sufficient" consent.

Nonetheless, s 25 (5) is not without some difficulty. Subsection (5) (b) preserves the common law position where "the consent of the child in addition to that of *any other person* is necessary." However it does not expressly preserve the common law position where the consent of the child alone (rather than the consent of the child "in addition to that of any other person") is necessary. Likewise, subs (5) (c) preserves the common law position where "the consent of *any other person* is sufficient", but makes no reference to situations when the child's consent suffices at common law.

It could be argued, as a matter of statutory interpretation, that the principle "expressio unius, exclusio alterius" operates so that s 25 (5) should be construed as abolishing a child's common law capacity to consent to medical treatment. Certainly, the "mischief rule" could be invoked to argue that no such restriction was intended, and this approach would accord with the Legislature's intention to clarify, rather than alter, the law in this area (see (1968) NZPD 3390).

However, it is to be hoped that rather than wait for the matter to be litigated, Parliament will see fit to amend s 25 (5). The Family Law Reform Act (UK) s 8 (3) states that

> "Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted."

The addition of a similar savings provision to s 25 (5) merits consideration.

Yours faithfully,
RJ Paterson
Papakura