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PROTESTS AND THE COURTS

> "... of all the places where law and order must be maintained, it is here at these Courts. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society." *Morris v Crown Office* [1971] All ER 1079, 1081 Lord Denning MR.

Recently we published an article describing the security arrangements surrounding the Klaus Croissant trial in Germany ([1978] NZLJ 130). It was published as an illustration of what can happen when those with a grievance persist in carrying their protest into the Courtroom. It is an extreme example. It is not the first. Nor will it be the last.

Necessary though the precautions described may have been, whether for the protection of the Court or of the defendant, nonetheless they are anathema to those brought up under a system where the Courts are open and Justice is dispensed in public. This institution was not a generous gift but a hard-won concession from the Crown and now a fiercely defended right. So determinedly has that right been defended that legislation requiring suppression of defendants' names before conviction was so criticised as a departure from our concept of public proceedings that it was repealed only 10 months after it had been passed. The German trial illustrates how easily that right may be eroded by the activities of an unthinking or perverse few.

The Bastion Point protesters and their supporters can hardly be equated with German terrorists. However, the disruptive tactics employed at the first Magistrate's Court hearing provoked a similar feeling of antipathy towards those, who, by their actions, seemed hellbent on forcing a closed hearing or at least some form of selective admission to Court. It is not in the public interest for our Courts to be forced to that. Nor for that matter did it help the protestors who lost a lot of the support that had been generated by the dignity that until then had exemplified their cause.

New Zealand is a country of healthy protest. Protesters not infrequently cross the dividing line between permissible and inappropriate behaviour but usually with full knowledge of the consequences. One wonders whether they would so readily do so if they knew that all subsequent Court proceedings would be behind closed doors or if they thought that decisions would be influenced by the actions of a noisy mob outside. We have then seen the spectacle of those who are used to living in a country which has open and public Court hearings before an independant judicial officer and who undoubtedly gain much of their confidence to protest as they do from that, threatening the very tradition that gives them that confidence. Wilmot CJ put it well as long ago as 1765 when he said: "The real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone." The whole incident made troubled reading.

The Prime Minister gave an assurance that this type of incident would not be allowed to recur. His expression of concern and interest in the functioning of the Courts is welcomed. Yet, welcome though his expression of support is, it must be said that this is not primarily a matter for the Executive, and in today's political climate there was reason to fear that his statement that the incident would not be allowed to recur would best ensure that it would. It is to the credit of the Bastion Point supporters that at the second series of trials it did not.

Conduct in the Courtroom and within its environs is a matter for the Court, and Judges and Magistrates have ample power to deal with disruptions. They have, after all, the powerful, some say overpowerful, weapon of commital for contempt. Obviously the backing of the Executive is needed to enforce Court orders and it would be nice to

say that the police, for example, should not limit entry to Courts except by judicial direction. That approach would be over-simplistic as the police, of course, have their duties with regard to keeping the peace. Should a case arise where exclusion of the public from a Court hearing was considered we would expect the situation to be recognised as a delicate one to be handled between police and judiciary, as in the past, with the tact and diplomacy that any borderline situation demands. We would not expect public access to Court hearings to be limited without the consent of the presiding Judge or Magistrate. Nor would we expect that consent to be lightly given.

The reason for making this point explicitly is also founded overseas – this time in Australia. From Australian newspaper accounts it would seem that the conduct of the Sydney police concerning a Gay Rights March was not beyond reproach. Matters were not improved by the police, without the knowledge of the presiding Magistrate, refusing access to the Court of all but defendants and witnesses. We can do without that.

Without going overboard about free and open Courts being the bastion of the individual against tyranny and so forth it is comforting to live in a society that has them. Threats to their openness or independence are not welcome and nor is any activity that places or threatens any restraint on free access to the public hearings we have learnt to expect. In essence, at a Court is not the place to protest.

Tony Black

CRIMINAL LAW

CANADIAN TRANSFER OF OFFENDERS BILL

Criminal Law Bill

A Bill providing for the transfer of convicted offenders both to and from Canada has been introduced into the House of Commons.

Essentially it consists of the legislation that is necessary in order to implement treaties allowing persons under sentence to be returned to the country of which they are citizens. Such treaties have already been entered into with the United States and with Mexico, and it is hoped that similar treaties can be concluded with other countries. The treaties with the United States and Mexico are not yet effective and are awaiting ratification. This ratification cannot take place until the legislation has been enacted, enabling effect to be given to the terms of the treaties.

To understand the nature of the Bill, it is necessary to bear in mind the general tenor of a number of treaties which Canada has signed, as well as some of their provisions. First, the Bill is not in any way concerned with the extradition or expulsion of foreign nationals. On the contrary, a person could not be sent back to his country of origin unless he requested his own transfer. Under the Bill, no one could be transferred against his will.

The purpose of the treaties is to make it possible for prisoners who so desire to return to their country of origin to serve their time, or obtain parole, in a cultural surrounding which is familiar to them and which may favour their social readaptation. Those who have been found guilty of a criminal offence should have the opportunity, whenever possible, to serve their sentence or to be paroled in a country where they have relatives and friends and where they can seek assistance. As was said on the Second Reading, humanitarianism and good sense favour this option.

The treaties do not, however, provide for the automatic transfer of any offender merely because he has expressed his wish to be returned to his own country. The application is first to be considered by the country in which he has been convicted, and unless that country approves of his transfer the matter is at an end. If that country does agree that the transfer is appropriate, then the country that would receive the offender is approached, and its views are sought. It is only with the concurrence of all three parties, the offender, the state in which he was convicted, and the country of his destination, that any transfer will take place. Additionally, so far as Canada is concerned the Government has stated that it

The Commonwealth Law Bulletin is a substantial (200 page) quarterly magazine published by the Commonwealth Secretariat. It includes a readable review of major judicial decision and legislation within the Commonwealth together with comment on more important developments and law reform proposals. The value of the publication is illustrated by this article which will be appearing in a forthcoming issue. Should New Zealand be considering similar arrangements? (Copies of the Commonwealth Law Bulletin may be obtained from Commonwealth Secretariat Publications, Marlborough House, London SW1 5HX and cost £1 each).

will not return a prisoner convicted abroad to a provincial institution, nor will it send a person from a Canadian provincial institution to another country, unless it first has the consent of the provincial authorities.

The Bill is not confined to sentences of imprisonment. The treaties and the Bill also relate to individuals benefiting from parole in the country where they have been convicted and who wish to go back to their home country. It is interesting to note that the treaty on the international exchange of paroles is included in the Bill. During the Fifth United Nations Conference on Crime Prevention and the Treatment of Young Offenders held in Geneva in 1975, Canada raised the possibility of an international exchange of paroles. Other countries have welcomed this initiative and proposed that this arrangement be extended to persons under detention.

As far as Canadians convicted abroad and being returned to Canada are concerned, the Bill has been drafted on the basis that so far as is possible the offender who is sent back to Canada will be treated in the same fashion as if his conviction and sentence had been those of a Canadian court.

Certain specific provisions have been necessary in addition to this general concept. For example, the Bill provides that there shall be no appeal against, or other review of, the conviction and sentence imposed by the foreign state. Such a provision is in conformity with Canada's undertaking to this effect as set out in the treaties.

In reality, this provision in the treaties and in the Bill is based upon the practicalities of the situation as well as upon the desire of sovereign states that their judicial proceedings shall not be challenged in another country. Certainly it will not be practical for a Canadian transferred, for example, from Mexico, to have Canadian courts adjudicate upon a contention by him that evidence was admitted that would not have been admissible in Canada. The complications inherent in this, or any similar proceeding, are at once apparent.

One of the legislation's provisions deals with the place of imprisonment for a repatriated Canadian offender. In that case, the regular rule prevails: when the initial sentence is for two years or more, and there is no parole involved, the offender will be detained in a penitentiary. When the sentence is for less than two years, he will be detained in a provincial prison subject to the province's consent before the transfer.

Upon the arrival of the offender in the establishment, the authorities will have to decide on the length of time to be served. There are three considerations involved, each one being provided for in the legislation: how much time will the offender be credited with toward the completion of his sentence? will he also be eligible to earn remission? when will he be eligible for parole?

The first of these has been dealt with by providing that, upon reception at the institution, the inmate is to be credited toward completion of his sentence with all time that stood to his credit in the foreign state at the time of his transfer. The documents supplied by the foreign state will set this out. This is believed to be the only equitable way of proceeding, since the sentence imposed by the foreign court is presumably determined in part by the credits which accrue to the offender.

For example, in the United States' legislation to implement these treaties, the offender returned to that country is to be given credit for all time in custody, including time in custody before conviction. This is understood to reflect the practice obtaining in most of the individual states of the Union. Accordingly, when a person has been sentenced in the United States, it is reasonable to assume that the length of sentence has been set by the judge on the grounds that such credit will be extended. It would not be proper to delete any portion of that credit if the person is transferred to Canada to serve the remainder of his sentence.

The right to earned remission has been provided for by making the offender eligible to earn remission at the same rate as a Canadian offender newly committed upon a sentence of imprisonment. In order to preserve a proper sanction against institutional misconduct, and to avoid any question as to the legality of forfeiting certain time credited by the foreign state, the Bill makes remission and its equivalent credited on transfer subject to forfeiture as if the credits had been granted under Canadian law.

Eligibility for parole has posed some problems. It has not been possible to prescribe exactly the date of eligibility for parole, but a general rule has been formulated which will take care of the vast majority of cases. This is to require the National Parole Board to determine, as nearly as it can, when the person would have been eligible for parole had the sentence been imposed in Canada. That will then be his eligibility date.

This does not, however, enable a date to be fixed for those Canadians who – in very rare instances – have been convicted abroad of murder and who wish to return to Canada. Had such an offence been committed in Canada, the minimum period to be served before parole could even be considered would vary. For murderers governed by the latest legislation, eligibility for parole consideration would occur, if the murder were second degree murder, at from te 'o 25 years, depending on the view the judge took on the case.

If the murder were catagorised as first degree, the period of initial ineligibility for parole would be 25 years. In either case, whether first or second degree murder, any inmate with more than 15 years of parole ineligibility would be able, after 15 years, to apply to a court to shorten such period.

Obviously, it is impossible to draw a perfect parallel. For example, a Canadian court could not examine thoroughly the case of an inmate whose offence is described in the files of a foreign court; it would also be impossible to know what decision a foreign court would have come to had it studied the question of eligibility for parole. By way of compromise, the Bill refuses to grant parole to murderers until they have served ten years of their sentence. However, it provides for an exception when the documentation submitted by the foreign court establishes that had the crime been committed in Canada, it would have rated as a first degree murder. In such case, the duration of the ineligibility period for parole is extended to fifteen years. The inmate will be eligible for day parole, and temporary leave without escort, only when he is only three years away from eligibility to full parole, as is the case with Canadian convicted murderers.

The categorisation of murders committed abroad between first or second degree murders is a source of difficulty. The legislation charges the Solicitor General with this function. An examination of the various possibilities has not yet allowed a better solution as it does not seem that a Canadian court could properly solve the issue. Further, under that provision the Minister may, through an administrative procedure, require that an inmate spend five more years in prison before he be considered for parole. At the time of the transfer an inmate may receive early examination, but the Government hopes that the legislation is scrutinized in its Committee stages.

Any young person returned to Canada and sent to a provincial institution may be transferred to a suitable facility for juvenile delinquents, if he is within the juvenile age range at which young persons are considered to be juveniles in that province. He could not, however, be held in that juvenile institution beyond the date the foreign sentence would expire, unless, of course, further legal measures were taken, for example under the provincial Act for the protection of children.

Persons returning to Canada on parole or probation will be equated, so far as is possible, with Canadians paroled or placed on probation in Canada. If paroled, they will be subject to supervision and to sanctions for breach of parole conditions. Those on probation will, when necessary, be dealt with for a breach of the terms of the probation order, except that they will not be liable to be sentenced for the original offence for which they were put on probation.

There is also provision for foreign nationals to be transferred from Canadian institutions to their own country. The Bill does not contain many clauses dealing with them, since all that is necessary is to provide authority for their release from incarceration and transfer, or their transfer while on parole or probation. After transfer has been effected, they are to be dealt with in accordance with the law of the state to which they go.

The United States and Mexico, in addition to the treaty with Canada, have signed a treaty between themselves, and already exchange prisoners. The most recent statistics show that 90 Canadians are serving prison terms in the United States, and nine Canadians in Mexico. There are 102 Americans in provincial prisons in Canada, and 172 in federal penitentiaries.

It was said on behalf of the Solicitor General that "the more the passing of the Bill is delayed, the longer prisoners abroad will have to wait for repatriation. A number of them, together with their parents and friends here in Canada, no doubt are awaiting the outcome with the utmost interest. This is just the more understandable because, as has been recognised for a long time, penal sanctions are particularly brutal when suffered in a foreign land, and the effect is heavier than expected by the court".

The Parliamentary Opposition has stated its acceptance of the principle that a prson who has been convicted might be better rehabilitated close to friends and relatives and in their natural homeland, and has noted that the other side of the situation is that Canada will be accepting foreign sentences.

"Most Members of Parliament have had the experience from time to time of being contacted by constituents whose relatives, often sons or daughters, have been incarcerated in foreign jurisdictions or, at least, arrested before trial", an Opposition Member recalled. "We have all shared the agony of those particular families while their children might have been awaiting sentence or trials in situations which were not humane according to our views and traditions. I understand that this legislation cannot come to grips with that particular situation. I am not suggesting that it should or could: I merely point out that this legislation will not be the answer to all situations with which we as Members of Parliament are from time to time faced when we get frantic phone calls – and justifiably so – from parents or other relatives who have found that members of their families have been seized and imprisoned before their trials in foreign jurisdictions".

STATUTORY INTERPRETATION

THE PROBLEM OF TIME IN STATUTORY INTERPRETATION

By J F BURROWS, *Professor of Law, University of Canterbury*

(a) Introduction

There are many Acts of Parliament still in force which were passed many years ago. Their interpretation can pose problems such as the following.

(1) Some of the subject-matter with which the Act was dealing may have gone out of existence.

(2) New things may have come into existence which the legislaters could not have foreseen when they passed the Act.

As a simple example, imagine that an Act makes provision for the presence of "newspaper" reporters in Court, and the years since the date of the original enactment have seen the advent of the broadcasting media, the question might well arise whether reporters for those new media are covered by the words of the Act *(a)*.

(3) Circumstances may have changed so radically that the Act is operating in an environment quite different from that which existed at the time it was passed. Thus, when the Sale of Goods Act 1908 was passed mass-produced, cellophane-wrapped, consumer goods did not exist on anything like the scale they do today; the Act, unrepealed and substantially unamended, is still doing service in today's very different consumer society. The Copyright Act 1962 is in force in an age of rapid developments in techniques of photocopying. Sometimes these changes of circumstance will mean that the particular mischief which the Act was originally passed to remedy is no longer existent; the Official Secrets Acts of 1911 and 1951 were enacted in times of temporary strife and seem in some respects inappropriate to the temper of our own age *(b)*.

(4) Words may change their meanings over a period of time. This may be the result of factors of the sort discussed in (2) and (3); or of changes in social and moral attitude; or of simple linguistic shifts. Thus the word "indecent", although no doubt it bears much the same dictionary definition as it did in the Victorian era, today applies to a narrower range of behaviour; the word "shop" presents a different mental picture to the grocery-shopper of today than to his or her counterpart 50 years ago.

These problems can best be dealt with by treating (1) separately, for it presents features of its own, and (2) (3) and (4) together.

(b) Disappearance of subject-matter

This is the most extreme imaginable change of circumstance. In theory statute law knows no doctrine of frustration or desuetude *(c)*, and the mere fact that the very subject-matter of a statutory provision no longer exists does not mean that the provision itself ceases to exist as law. Yet the effect must be that the provision, having nothing on which to operate, becomes to all intents and purposes a dead letter. Thus, s 68 of the Judicature Act 1908 making provision for the appeals to the Court of Appeal from "inferior Courts having extended jurisdiction", still appears on the statute book; but there are no longer such things as inferior Courts having extended jurisdiction, this special form of Court having been abolished years ago. The effect of this abolition, it has been held, is to render s 68 "inoperative" *(d)*. This does not mean it has been impliedly repealed, nor even that it is no longer law; although empty of subject-matter it remains part of the law, and the Court of Appeal has admitted of the possibility that it might become operative again if at some future time there came into existence an intermediate Court to which its provisions could apply *(e)*.

The disappearance of subject-matter sometimes does not have such drastic effect. Often, although the precise subject-matter no longer exists, there is something closely analogous to which the statute's provisions can be held to apply. Thus, since the abolition in New Zealand of the distinction between felony and misdemeanour, the expression

(a) Eg, Crimes Act 1961, s 375, now amended by the Crimes Amendment Act 1976.

(b) The Act, originally passed with the purpose of stopping espionage, has been used to punish relatively unimportant disclosures by government employees: see Dawson, *The Law of the Press* (1947), 81. For a case where it seems likely that a statutory provision was interpreted so as to remedy a mischief quite different from that envisaged by Parliament, see *Moore v News of the World Ltd* [1972] 1 QB 441.

(c) See, however, Diamond [1975] Current Legal Problems 107.

(d) *Kidd v Markholm Construction Co Ltd* [1970] NZLR 867.

(e) *Kidd's* case (supra n (d) at 872, CA per North P.

"felonious intent" which first entered the Police Offences Act in 1884 and still appears there, is interpreted to mean "intent to commit an indictable offence" *(f)*. However, although in this instance it has been possible to find a fairly close equivalent for the departed object of reference it is sometimes not so easy, with the result that the term in the statute becomes one of considerable vagueness. For instance the term "working class", which appears in several English statutes, used to have precise reference to an easily identifiable group of individuals who earned less money, and were regarded as being of a lower class, than other members of the community.

> "All that has now disappeared. The social revolution in the last fifty years has made the words 'working classes' quite inappropriate today. There is no such separate class as the working classes" *(g)*.

However the term has to be interpreted, and now may be taken to include a large number of persons, although the class is probably now incapable of precise definition *(h)*. In such a case the purpose of the Act, if it is reasonably clear, will doubtless help to give shape to the concept *(i)*.

(c) Other changes

Under this heading we may group together the sorts of problem outlined in *(a)* (2) (3) and (4), for the problems, and the answers to them, raise similar issues.

The books suggest that there are two quite irreconcilable rules for interpreting such statutory provisions.

On the one hand there is the "rule", several times enunciated by Lord Esher and thus commonly attributed to him, which we may designate the *historical* approach. It is that an Act must be construed as if one were interpreting it on the day after it was passed *(j)*. If rigidly applied this "rule" could lead to a static interpretation which would render the statute incapable of dealing adequately, or indeed at all, with changing conditions. In fact, the rule has not been rigidly applied, and in some of the cases where it has been mentioned there have been other factors leading to the decision – such for example as that the new development could not be accommodated within the scheme of the Act without undue strain *(k)*. On the other hand there is also support for an *ambulatory* approach *(l)*: this is the "rule" that an Act must be considered as always speaking. This rule has been enshrined in New Zealand in s 5 (d) of the Acts Interpretation Act 1924, which reads as follows:

> "The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof according to its spirit, true intent, and meaning".

Like so many other provisions of the Acts Interpretation Act 1924 this one has not often been cited, and its scope is substantially untested *(m)*. It may mean no more than that a draftsman can safely use the present rather than the future tense ("shall") *(n)*, but its concluding words suggest it is capable of much more than that, and of meaning that a statutory provision must be looked at through "present-day spectacles".

Like several other rules of statutory interpretation which hunt in pairs, these two are not exactly easy to reconcile. The first assumes that it is the precise intention of the original enacting parliament which one is seeking out; the second that it is the meaning which presents itself to the modern reader, the words having a life of their

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(f) *Berry v Ritchie* [1932] NZLR 1315; *R v Wilson* [1962] NZLR 979; *Police v Bazley* [1976] 2 NZLR 152.

(g) *H E Green & Sons v Minister of Health* [1948] 1 KB 34, 38 per Denning J.

(h) Ibid at 39. See also *Ledwith v Roberts* [1937] 1 KB 232, 275–277, where Scott LJ traces the demise of the special class of idle and disorderly persons which the vagrancy legislation was passed to control.

(i) Cf the judgments of Lush and Hayes JJ with that of Hannen J in *R v Wood* (1869) LR 4 QB 559; the Judges appear to differ on the purpose of a provision exempting "fancy bread" from certain statutory requirements; what was known as "fancy bread" at the time the relevant provision was passed had ceased to be so called when the case was heard. Compare with this case *Aerated Bread Co v Gregg* (1873) LR 8 QB 355.

(j) Eg, *Sharp v Wakefield* (1889) 22 QBD 239, 242; *The Longford* (1889) 14 PD 34, 36; *Gaslight & Coke Co v Hardy* (1886) 17 QB 619, 621 (all per Lord Esher MR).

(k) Eg, *The Longford* (supra) especially per Bowen LJ at 38. In the *Hardy* case (supra) the "rule" was used only to support the refusal to use later legislation to interpret the act in question.

(l) See the use of this word in *National Dock Labour Board v British Steel Corporation* [1973] 1 WLR 89, 102; [1973] 1 All ER 305, 316 per Lord Hodson.

(m) See *Public Trustee v McKay* [1969] NZLR 214, 217; *Victoria University of Wellington Students' Association v Government Printer* [1973] 2 NZLR 21, 24; *Newton King Ltd v Whitcombe* [1924] NZLR 517, 526; *Co-operative Transport Association Ltd v Tauranga Co-operative Dairy Association Ltd* [1948] NZLR 724, 729; *McKenzie v Jones* (1910) 29 NZLR 233, 237 and 239. In none of these cases is the section discussed at length; nor are most of them what one could imagine to be typical illustrations of its application.

(n) See Leitch and Donaldson (1955) 11 NILQ 45, 121.

own independent of the will of the original framers. One may say immediately that the latter approach sounds infinitely more sensible.

(1) *Examples of the historical approach*

Four examples may be given of a rather backward looking approach to interpretation.

Firstly, there is *Commonwealth v Welosky (o)* which, although an American decision, is a useful and much-cited example. A statute provided that a "person qualified to vote for representatives to the general court shall be liable to serve as a juror"; the question was whether women became liable to jury service when, at a date subsequent to the passing of this statute, they became entitled to vote. The Court held that they did not, for the term "person" had to be read as at the date of the statute, and at that time it meant "men". The case seems unsatisfactory as failing to distinguish between the connotation, or broad meaning, of a statutory phrase and the specific denotations, or instances, which were in the minds of the framers at the time of its enactment. The denotations of a word can change without affecting its connotation.

Second is the New Zealand case of *McCulloch v Anderson (p)*. The question was whether a land agent who had prepared a tenancy agreement was "acting as a conveyancer", contrary to the terms of the Law Practitioners Act 1955 (NZ). Hutchison J followed the provision back to its source, an ordinance of 1842. He believed that "the key to the question is what (the words) would have meant in 1842" *(q)*. He found, in turn, that the word "conveyancer" as used in the 1842 ordinance must have meant what was recognised as a conveyancer in an equivalent English statute of 1804, namely a drafter of deeds. Thus, since the tenancy agreement in this case was not a deed, the defendant was found to have committed no offence under the 1955 legislation. Yet such an historical approach has obvious dangers, and could in some cases frustrate the very object of the act in question. In *McCulloch's* case itself the judgment ignores the important fact that in 1804 the deed was virtually the universal mode of recording a legal transaction; by 1962 it had waned considerably in importance, having been superseded by various less formal modes of accomplishing the same task.

Thirdly, there exists (or used to exist?) a doctrine known as contemporaneo expositio *(r)*. It is best formulated in this passage from the judgment of Martin B in *Morgan v Crawshay (s)*:

> "In construing old statutes it has been usual to pay great regard to the construction put on them by the judges who lived at or soon after the time when they were made because they were best able to judge of the intention of the makers at the time".

Thus stated the doctrine is effectively a rule of evidence, but it clearly reflects the view that one should take the meaning of a statute as at the time it was passed.

Fourthly, the mischief rule of interpretation is sometimes used to focus attention on the particular factual mischief in Parliament's mind at the time the statute was enacted and thus to anchor the statute in the past; indeed the rule as it was enunciated by Lord Coke in *Heydon's* case conduces to this. In *Chandler v Director of Public Prosecutions (t)*, the question was whether the accused had, in terms of the Official Secrets Act 1911, acted "for a purpose prejudicial to the interests of the state" by disrupting an air force base. To their unpromising contention that the Crown ought not to be the sole arbiter of the interests of the state, Lord Reid replied *(u)*:

> "The Act of 1911 was passed at a time of grave misgiving about the German menace, and it would be surprising and hardly credible that the Parliament of that date intended that a person who deliberately interfered with vital dispositions of the armed forces should be entitled to submit to a jury that government policy was wrong, and that what he did was really in the best interests of the community".

While one does not quibble at the conclusion reached in this case, this method of reaching it (ie considering only the specific fact situation which existed at the time of the enactment) could at times hinder the effective modern operation of a statute. In fact the mischief rule is capable of much greater flexibility than this; the purpose of an Act can normally be sufficiently abstracted from the specific facts which inspired its passing to accommodate changes in circumstance. The remedy which Parliament has provided usually extends beyond that specific mischief *(v)*.

(o) 276 Mass 398, 177 NE 656 (1931) discussed in Reed Dickerson, *The Interpretation and Application of Statutes*, 127–128.

(p) [1962] NZLR 130.

(q) Ibid at 132. See also *Crook v Edmondson* [1966] 2 QB 81.

(r) See the discussion of the doctrine in Maxwell, *Interpretation of Statutes* (12th ed 1969), 264–270.

(s) (1871) LR 5 HL 304, 315.

(t) [1964] AC 763.

(u) Ibid at 791.

(v) See Dias, *Jurisprudence* (4th ed) at 232. Also *Maunsell v Olins* [1975] AC 373, 394 per Lord Simon, and *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436, 462 per Viscount Simonds.

(2) *The ambulatory approach*

However, many cases adopt an approach which keeps the statute much more in touch with modern circumstances. Indeed there are sufficient of them to suggest that the ambulatory approach is the proper one.

Firstly, there are many cases adapting statutory provisions to things which have come into existence since their enactment. Provided a statute contains words which are capable, albeit on a somewhat strained interpretation, of referring to the new thing, and provided it comes within the purpose of the statute, the statute will normally be deemed to cover it. This is to recognise the difference between the connotation of the words, which remains constant, and the denotations, which may alter with time. Thus the word "carriage" has been held to include a bicycle in a statute passed to promote road safety, even though the bicycle had not been invented at the time the act was passed *(w)*; likewise, in a very famous case, an Act regulating the telegraph was held also to regulate the recent invention the telephone *(x)*.

However it must be clear that the new thing is within the purpose of the Act. If it is not it will be held not to be covered, even though on purely semantic grounds it might have been possible to include it. For example, in *Newton King Ltd v Whitcombe (y)*, an Act required anyone who dealt in secondhand *articles* to obtain a licence and comply with certain other requirements. It was held that dealers in motor vehicles, which only became an object of commerce after the passing of the Act, were not included; for although motor vehicles are "articles" the object of the Act was to prevent the disposal of stolen goods, and motorcars "are not articles that thieves pass through secondhand shops, nor in respect of which the secondhand dealer is liable to act as a 'fence'" *(z)*. Analogy is important in arriving at a determination in such cases: the more closely analogous the new thing is to items which have been held to fall within the provisions of the statute the more likely it is that it will itself be held to be covered by it *(aa)*.

These "new development" cases thus seldom raise a problem. Nevertheless, there may at times be cases where two equally able and informed minds would differ on the conclusion to be reached *(ab)*.

Secondly, there is Privy Council authority which is, arguably at least, contrary to the "tracing" approach taken in *McCulloch v Anderson*. In *Administrator-General of Bengal v Prem Lal Mullick*, Lord Watson said, in a passage which has received endorsement several times in Australia and New Zealand *(ac)*:

> "The respondent maintained this singular proposition, that, in dealing with a consolidating statute, each enactment must be traced to its original source, and when that is discovered, must be construed according to the state of circumstances which existed when it first became law. The proposition has neither reason nor authority to recommend it. The very object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating act is passed".

The *Mullick* approach makes particularly good sense if the consolidation has brought together into the same Act sections from diverse origins; their new context must surely colour their meaning *(ad)*. However this authority goes only so far – it is applicable only to consolidating Acts, and seems to regard the time of passing of the most recent consolidation as the relevant time for interpretation. Recent House of Lords authority on consolidating Acts may go a little further: it holds that if the words of a consolidating Act are clear (and that presumably means that they strike a modern-day reader as clear) the Court should not refer back to the history of the particular section *(ae)*.

(w) *Corkery v Carpenter* [1951] 1 KB 102; *Taylor v Goodwin* (1879) 4 QBD 228.

(x) *Attorney-General v Edison Telephone Co* (1880) 6 QBD 244. See also *ICIANZ v Commissioner of Tax* (1972) 46 ALJR 35, 43 per Walsh J.

(y) [1924] NZLR 517.

(z) Ibid at 525 per Reid J.

(aa) Ibid. The lack of close analogy was decisive in a Privy Council case in which the question was whether large trailers and tractors were "carriages" for the purpose of an act imposing a small wharfage charge: *Kingston Wharves Ltd v Reynolds Jamaica Mines Ltd* [1959] AC 187.

(ab) Cf the judgments of Barwick CJ and Windeyer J in *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327, disagreeing on the question of whether "gas" in an old statute included liquid petroleum gas.

(ac) (1895) LR 22 Ind App 107, 116 per Lord Watson, cited with approval in *Maybury v Plowman* (1913) 16 CLR 468, 479, *Minister of Customs v McParland* (1909) 29 NZLR 279, 288–289, and *Warren v Hammond* [1928] NZLR 808, 813. See also *Avenue Properties (St John's Wood) Ltd v Aisinzon* [1976] 2 All ER 177.

(ad) See *Food Controller v Cork* [1923] AC 647, 668 per Lord Wrenbury and *Tursi v Tursi* [1958] P 54, 69 per Sachs J.

(ae) *Farrell v Alexander* [1977] AC 59 and *Commissioner of Police v Curran* [1976] 1 WLR 87, fol-

Thirdly, modern authority has severely limited the scope of contemporaneo expositio, and thus provides strong support for an ambulatory interpretation. In *Campbell College Belfast (Governors) v Commissioner of Valuation for Northern Ireland (af)* the House of Lords rejected a definition of "charitable purposes" propounded in an old case on the statute in question, in favour of a more modern definition. Lord Upjohn said *(ag)*:

> "As to contemporaneo expositio, this doctrine is I believe truly confined to the construction of ambiguous language used in *very old* statutes where indeed the language itself may have had a rather different meaning in those days".

He refused to apply the doctrine in the case before him, although the statute was over a century old, because its language was plain and unambiguous. This dictum could have far-reaching implications. If it is right, it would seem to mean that if the words of an Act appear plain and clear to the modern reader, they will be applied in that plain sense regardless of what they were thought to mean some years ago. The "ordinary meaning" of the words becomes their ordinary meaning from time to time.

Fourthly, the ambulatory approach may be supported by the case of *Cozens v Brutus (ah)* which holds that if the words of a statutory provision are "ordinary" words their meaning is a question of fact not law, to be decided by the tribunal of fact, a jury if there is one. This must surely mean that the tribunal will give the words their modern meaning. It has already been said by the English Court of Appeal, applying this doctrine, that the tribunal is entitled to find that the word "warehouse" means something different now from what it did last century *(ai)*. This approach could, at least in theory, have important implications for the doctrine of precedent. It is generally believed, with good reason, that decisions on the meanings of words in statutes bind later courts provided they were made at the appropriate level in the judicial hierarchy. This could freeze the meaning of a word at the date of the first authoritative Court decision. Yet if the *Cozens v Brutus* doctrine, and even the doctrines discussed in the preceding two paragraphs, are pushed to their logical limits, they could mean that a Court could refuse to follow an earlier authoritative decision if it could be shown that the meaning and usage of that word had changed in the meantime. There is a recent English Court of Appeal decision (citing *Cozens v Brutus)* which goes this far. In *Dyson Holdings Ltd v Fox (aj)* the question was whether the de facto wife of a tenant was a member of the tenant's "family" for the purpose of the Rent Acts. It was held that she was, despite the fact that an earlier Court of Appeal decision (decided in 1949) had held the contrary. Both James and Bridge LJJ took the view that morals had changed so radically since 1949 that the word "family" had obtained a new connotation in popular usage; the earlier case need thus not be followed.

> "[I]f language can change its meaning to accord with changing social attitudes, then a decision on the meaning of a word in a statute before such a change should not continue to bind thereafter, at all events in a case when the courts have consistently affirmed that the word is to be understood in its ordinary accepted meaning" *(ak)*.

(d) Conclusions

It is apparent that the Courts have not been entirely consistent in their approach to the interpretation of old statutes *(al)*. However it does appear that the tendency today is towards an ambulatory approach; indeed the law would rapidly become unworkable if it were not. No doubt some types of statute are more amenable to it than others. For instance, some statutes use words which import standards and values which obviously alter with time: "mobile phrases", Lord Wilberforce has called them *(am)*. With a few rare exceptions, judicial decisions on these statutes have always mirrored the social opinion of the age. Statutes concerning "indecency", "obscenity" and "profanity" are examples *(an)*. So are statutes incorporating questions of degree

lowed in *Rossiter v Commissioner of Inland Revenue* [1977] 1 NZLR 195, 207.

(af) [1964] 1 WLR 912.

(ag) Ibid at 941. Italics supplied. Cf the approach of Lord Wilberforce in *Reed International Ltd v Inland Revenue Commissioners* [1976] AC 336, 358–359.

(ah) [1973] AC 854.

(ai) *LTSS Print and Supply Services Ltd v London Borough of Hackney* [1976] QB 663. See also *R v Dunn* [1973] 2 NZLR 481, 483 where the Court of Appeal cite with approval Henry J's direction to the jury on the meaning of the word "indecent": "It is the modern and popular use and acceptance of the term today. We are talking in this case of 'now', the present day application of that word". *Cozens v Brutus* was cited.

(aj) [1976] QB 503.

(ak) Ibid at 513 per Bridge LJ.

(al) Sometimes Judges in the same case differ: compare the judgment of Lush and Hayes JJ with that of Hannen J in *R v Wood* (1869) LR 4 QB 359; and the judgment of Lord Tucker with that of Viscount Simonds in *Galloway v Galloway* [1955] 3 All ER 429 at 440 and 434 respectively. See also fn (ab) supra.

(am) *Director of Public Prosecutions v Jordon* [1976] 3 All ER 775, 780.

(an) *Police v Drummond* [1973] 2 NZLR 263,

(ao). More obviously, statutes conferring judicial discretions to do what is "just" or "fit" have customarily been applied in a way which keeps them in line with the contemporary social and moral state of things. The New Zealand Court of Appeal has recently said, for example, in relation to the Family Protection Act, that the attitudes of many people today have changed from those which prevailed in 1900 when the Act was passed *(ap)*:

> "In some respects society now expects more to be done for widows: in others less. The point is obvious that the Family Protection Act is a living piece of legislation and our application of it must be governed by the climate of the time".

In the case of such discretionary statutes judicial precedent plays a lesser part than is normal in matters of statutory interpretation *(aq)*. There are also indications, especially in the United States and Australia, that constitutional statutes are particularly amenable to this kind of ambulatory interpretation. Windeyer J in particular has several times emphasised that the principles laid down in a constitution are not to be tied to the very things denoted at the time of its inception *(ar)*. A constitution, to use the metaphor of Holmes J, is an organism whose development could not have been foreseen by its begetters *(as)*. It is of particular interest to note that the interpretation of statutes in this category also does not seem to be as rigidly constrained by the doctrine of stare decisis as does the interpretation of other statutes *(at)*. Earlier cases may be useful as formulating guidelines and providing illustrations, but do not tie the Court to a particular interpretation.

But, even if one ignores such clear examples, it seems that the Courts have for the most part succeeded in adapting legislation, without ever departing from its words, to the circumstances of today. Indeed it is little short of a miracle that the Sale of Goods Act 1908, although in some respects it is creaking at the seams, has managed to survive substantially unamended for so long. That it has done so is a tribute to the inventiveness or the Courts, and to attitudes such as that expounded by Lord Diplock *(au)*:

> "Unless the Sale of Goods Act 1893 is to be allowed to fossilise the law and to restrict the freedom of choice of parties to contracts for the sale of goods to make arrangements which take account of advances in technology and changes in the way in which business is carried on today, the provisions set out in the various sections and subsections of the code ought not to be construed so narrowly".

In conclusion, it is often said that the "mischief", or "functional", approach to statutory interpretation is more conducive to an ambulatory interpretation than the literal approach. That is not necessarily so. As already shown, the mischief approach, unless abstracted from the particular facts which inspired the passing of the statute, can have the reverse effect. On the other hand an approach which looks simply to the natural meaning of the words without reference to their antecedents or to the circumstances which attended the passing of the act, can have the effect that the words are accorded the meaning which an ordinary reader would accord them here and now. There is some evidence,

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264 per Turner P: "I should be reluctant, in deciding whether it was obscene to behave in a certain way in Christchurch in New Zealand on Anzac Day 1972 ... to be inhibited or restricted by what Chief Justice Cockburn said about the publication and sale of a shilling pamphlet to the public in Wolverhampton in England in the year 1867". See also *R v Martin Secker Warburg* [1954] 2 All ER 683 esp at 685 per Stable J; *Armstrong v Moon* (1894) 13 NZLR 517; and *R v Dunn* supra fn (ai). Compare, however, *Crook v Edmondson* [1966] 2 QB 81, where the word "immoral" was taken to mean what it would have meant in 1898 (but see the dissenting judgment of Sachs J at 93).

(ao) See for example *Woodward v Docherty* [1974] 1 WLR 966 where it was held that whether the amount of rent attributable to furniture was "a substantial part of the whole rent" might vary with time, and with considerations such as the availability of cheap furniture and the readiness of a tenant in a housing shortage to accept furniture he does not really want in order to get a home. See especially Sarman LJ at 969.

(ap) *Re Wilson* [1973] 2 NZLR 559, 562 per McCarthy P.

(aq) See the discussion in the author's article in (1976) 7 NZULR 1.

(ar) Eg, *Damjanovic v Commonwealth* (1968) 117 CLR 390, 408–409 per Windeyer J; *Chapman v Suttie* (1963) 110 CLR 321, 344–345 per Windeyer J; *Fishwick v Cleland* (1961) 106 CLR 186, 197 per totam curiam; *Attorney-General of Ontario v Attorney-General of Canada* [1947] AC 127, 154 PC per Lord Jowitt; *Victoria v Commonwealth* (1971) 122 CLR 353, 396 per Windeyer J.

(as) *Missouri v Holland* (1920) 252 US at 433.

(at) See the *Damjanovic* case (supra n (ar) at 408–409 per Windeyer J and *SOS (Mowbray) Pty Ltd v Mead* (1972) 46 ALJR 192, 205 per Windeyer J.

(au) *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] AC 441, 501. However compare his judgment in *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Assn* [1966] 1 WLR 287, 324 where he stated his opinion that the meaning to be accorded the term "poultry" in a statute must be the meaning "the ordinary educated Englishman attached to the word 'poultry' in 1926, the year the Act was passed". See the express espousal of an ambulatory approach by Scarman LJ in *Ahmed v Inner London Education Authority* [1977] 3 WLR 396 or 406.

as the cases cited in this article show, that this, despite a great deal of talk about the purposive approach being the "modern" one, is in fact the approach favoured, where possible, by the Courts today.

ADMINISTRATIVE LAW

REPRESENTATION BY COUNSEL BEFORE COMMISSIONS OF INQUIRY WHERE REPUTATION IS AT STAKE

This report has been prepared by the Auckland District Law Society's Public Issues Committee.

The Public Issues Committee reports from time to time in an effort to give both lawyers and non-lawyers a background to current issues with a legal content. The Committee does not and cannot represent the views of all lawyers nor the views of the Council of the Auckland District Law Society. Rather the Committee is a group of Auckland lawyers and although appointed by the Council it is completely autonomous and expresses its own views. Members of the Committee are: A P Randerson; (Convener) G B Chapman; S Elias; G J Judd; L J Newhook; C M Nicholson; E W Thomas; M G Weir.

One of the most thought-provoking aspects of the Commission of Inquiry into the "Moyle affair" concerns the exercise by the Commissioner, Sir Alfred North, of a discretion to disallow the persons named in the Order of Reference (or, indeed, anyone) to be represented by counsel.

It is proposed in this short paper:

(1) to examine the basis of this apparent jurisdiction to refuse representation and to consider its applicability where the Commission of Inquiry is established specifically to investigate an individual's conduct;

(2) to consider the reasons given by Sir Alfred North for its exercise in this case;

(3) for comparative purposes, to comment upon recent developments in the common law with respect to representation by counsel before statutory and domestic tribunals; and

(4) to ask whether a statutory change is desirable to ensure that, in future, representation by counsel is not refused to one whose reputation is in jeopardy before such an Inquiry (or to others specially interested).

(1) The basis of the apparent jurisdiction to refuse representation

It is to be recognised at once that there is an entrenched and authoritative line of reasoning which runs something like this:

(a) A Commission of Inquiry is not a Court of law; it does not decide issues between parties, it merely inquires and reports;

(b) Whereas Courts of law have evolved well-defined rules of procedure and rights of audience appropriate to the judicial function, a Commission of Inquiry is subject to no rules of procedure and its inquiry (at least in general terms) is not a judicial proceeding;

(c) No civil consequences to individuals are involved; no report of a Commission of Inquiry can be the subject of any subsequent action against anyone;

(d) It is therefore within the entire discretion of the Commission whether or not to permit representation (whether by counsel or anyone else) *(a)*.

While the general rule to be derived from the authorities is that Commissions of Inquiry "... may hear counsel or not as they please" *(b)*, it is also recognised that a Commission may *if it thinks fit* permit the attendance of counsel even "... for persons who are not parties in any true sense and may allow such counsel to examine and cross-examine witnesses" *(c)*.

We are therefore told only that Commissions of Inquiry have a wide discretion in the matter.

(a) For the leading New Zealand statements of the above, see *Jellicoe v Haselden* (1902) 22 NZLR 343, per Williams J at 358: *Timberlands Woodpulp Ltd v Attorney-General* [1934] NZLR 270, per Myers CJ (delivering the judgment of the Full Court), at 295; and *In re the Royal Commission to inquire into and report upon State Services in New Zealand* [1962] NZLR 96, CA, per North J at p 109, and per Cleary J at p 114.

(b) *Jellicoe v Haselden*, supra, per Williams J at 358.

(c) *Timberlands Woodpulp Ltd v Attorney-General* [1934] NZLR 270, per Myers CJ at 295.

We are not told what are the chief considerations that may help a Commission to arrive at a just decision in a given case, particularly where an individual's conduct is a subject of the inquiry.

Some assistance, however, is given by the case of *In re the Royal Commission to inquire into and report upon State Services in New Zealand (d)* ("the 1962 case"). There, the point was made by Cleary J that:

> "No doubt in some inquiries a greater degree of participation should be allowed than in others, as, for instance, where the sole object of the inquiry is to investigate the conduct of an individual" (p 117).

In the same case, Cleary J emphasises that there is a distinction between an inquiry such as the one before him in that case (into State Services in New Zealand) and one where there is a complaint against conduct. In the former case, rights of parties interested in the proceedings "... cannot be as extensive as might be the rights of a party cited to an inquiry [of the latter kind]" (P117).

When these considerations are examined in the light of the circumstances of the North Inquiry into the "Moyle affair", the following conclusions may be drawn:

(1) The North Inquiry directly concerned the conduct of an individual;

(2) The sixth term of reference set out in the Commission's Warrant put Mr Moyle's veracity directly in issue before the Commission. That term of reference read:

> "6 The extent to which the public statements made by the Hon Colin James Moyle MP correspond to or differ from the accounts on the Police file and if there are any differences, the explanation or reason for such differences".

(3) Although a Commission of Inquiry is not a Court of law the consequences of an adverse report by a Commission of Inquiry with such terms of reference could (potentially at least) be as serious, as ruinous to reputation, and as lasting as the sentence of any criminal Court or the judgment of any civil Court;

(4) A person whose conduct is the subject of such an inquiry (the consequences of which could affect his career and his livelihood as well as his reputation) may need assistance to bring out the points most in his favour, or to redress the prejudice caused by statements adverse to him; only representation by counsel may give him a fair chance of presenting an adequate case. The same may go for others appearing at the inquiry;

(5) There may be legal issues of considerable bearing (for example, issues going to the jurisdiction of the Inquiry); a layman unaided by counsel may not grasp the points to be taken or know how best they might advance his case. For example, in the circumstances of the North Inquiry, a submission could have been based on Article 9 of the Bill of Rights 1688 which enacts:

> "That the freedome of speech and debates of proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament".

Conceivably a submission could have been made upon the statute 42 Edw III, c 3, which enacts that no man shall be put to answer for a crime unless in the manner prescribed by law, together with the statute 10 Car 1, c 10 (which abolished the Court of Star Chamber and declared all courts but the ordinary courts of justice illegal *(e)*. Whether these particular submissions would have succeeded is beside the point. The point is that the opportunity was not there for these (or for other submissions) to be made because legal representation was not permitted. Given the nature of the inquiry and the possible consequences, it is arguable that this was a serious defect;

(6) Referring to inquiries where the conduct of an individual is under investigation, Cleary J has said (again in the 1962 case):

> "In such an inquiry, or in one where questions of law are involved, Commissioners would no doubt welcome the appearance of counsel, and one might imagine inquiries of such a character that it could not fairly be said that a party or person interested has been 'heard' in any proper sense of the word unless he has had the assistance of counsel" *(f)*.

Of all inquiries, the North Inquiry into the "Moyle affair" must surely have been an inquiry "... of such a character". Yet the assistance of counsel was not allowed.

(2) Sir Alfred's reasons for refusing representation

Before the inquiry commenced, Sir Alfred received a request from Mr JS Henry, Mr Moyle's counsel, that Mr Henry be permitted to represent Mr Moyle. This request was declined. In his report, Sir Alfred records the reasons which he gave to Mr Henry at the time:

> "To begin with I was inclined to think that Mr Moyle had a case to justify his wish to be represented by counsel, but I am satisfied having read the Police files that it would encumber this Commission in a way that would

(d) [1962] NZLR 96, CA.

(e) In relation to this matter, see *Cock v Attorney-General*, (1909) 28 NZLR 405.

(f) [1962] NZLR 96, CA, per Cleary J at p 117.

not be the least bit desirable. I will bear in mind what Mr Henry says that he fears that his client could be put on trial and I shall do what I can to ensure that that does not happen. As I see it, my task is simply to decide what happened in 1975 and the use that was made of the incident in Parliament in November 1976.

". . . . I have also to consider how far the Ministers were involved in this happening and the extent of their knowledge. But largely it is a matter of record, Mr Henry, and I feel in the circumstances that I must decline your request to be present at the enquiry".

This statement would appear to contain three reasons:

(1) the "encumbering" reason;
(2) the investigatory nature of the Commission's task; and
(3) the claim that relevant material was largely a matter of record.

The third reason is puzzling. The sixth term of reference required the Commission to ascertain the extent to which public statements made by Mr Moyle corresponded to or differed from the accounts on the Police file ". . . and if there are any differences, the explanation or reason for such differences". While it is true that the actual statements made by Mr Moyle were a matter of record, the question of interpreting and seeking to reconcile the statements made was a task of a difficult kind. The Commission may have benefited from hearing counsel probe the evidence and seek to reconcile possibly conflicting statements.

The frailty of the second reason in a case which concerns an inquiry into individual conduct has already been discussed.

It remains to consider Sir Alfred's first reason that to allow representation would be to encumber the Commission in a way that would not be in the least bit desirable. It is not clear exactly what is meant by the use of the word "encumber". It is true that the Commission was working within strict time limits (the Commission's Warrant was dated 25 November 1976; Sir Alfred was required to present his report by 20 December 1976). It may also have been considered that the objects of the inquiry would have been more conveniently achieved in the absence of counsel.

Such a view, if correct, must be resisted. Surely it is more inconvenient that a man's reputation should be seriously damaged than that a Commission of Inquiry should be "encumbered". As Lord Atkin said in a famous speech in the House of Lords: "Convenience and justice are often not on speaking terms" *(g)*. It is a question of balancing factors such as the nature of the inquiry against the possible consequences of an adverse report to the individual whose conduct is being investigated. It is certainly clearly arguable that when grave consequences to an individual's reputation are possible, a Commission of Inquiry should not hesitate to allow legal representation however much that might encumber the inquiry.

It should not be assumed, however, that legal representation will necessarily prove to be to the advantage of the person seeking to be represented. He might well find that a legally assisted Inquiry goes into the matter more deeply and more thoroughly than one not so assisted. This may be to the individual's advantage or disadvantage but at least the individual should have the choice whether or not to be represented. He makes that choice knowingly.

It is true that very occasionally an Inquiry may have an aspect that affects national security. This was the case with Lord Denning's inquiry into the Profumo affair. In that inquiry Lord Denning not only refused to permit counsel but also took his own notes. It is submitted that only in these truly exceptional cases, if at all, should other interests prevail over the interest of the person whose conduct is the subject of investigation to legal representation. No comparable security feature affected the North Inquiry.

(3) Recent developments in the common law with respect to representation by counsel before statutory and domestic tribunals

At common law the relevant principle is that of *agency*. Stirling J stated the principle in 1886 in these terms:

"I take it that, subject to certain well-known exceptions, every person who is sui juris has a right to appoint an agent for any purpose whatever, and that he can do so when he is exercising a statutory right no less than when he is exercising any other right" *(h)*.

Stirling J's formulation was adopted by the English Court of Appeal in *R v Assessment Committee of St Mary Abbotts, Kensington*, [1891] 1 QB 378, CA. In turn, Isaacs J in a case before the Australian High Court in 1916, said:

". . . that case [the *St Mary Abbotts* case] establishes the prima facie common law right of any person who has a statutory right to appear before a non-judicial tribunal to

(g) *R v General Medical Council, Ex p Spackman* [1943] AC 627, 638.

(h) *Jackson and Co v Napper, In re Schmidt's Trade Mark* (1886) 35 Ch D 162, at 172.

> conduct his business before the tribunal by an agent as well as personally" *(i)*.

In relation to domestic and statutory tribunals, it follows that so long as the person concerned is himself entitled to an oral hearing, the agency principle permits him to appear through a representative.

Also in relation to domestic and statutory tribunals, the English Court of Appeal has considered the principle in three recent decisions.

In the first, *Pett v Greyhound Racing Association*, [1969] 1 QB 125, CA, Lord Denning MR cited the leading cases on the agency principle, and then said:

> "I should have thought . . that when a man's reputation or livelihood is at stake, he not only has the right to speak by his own mouth. He also has the right to speak by counsel or solicitor".

(In the same case, Lord Denning MR was also of the opinion that when a tribunal is dealing with matters which affect a man's reputation or livelihood, ". . . or any matters of serious import . . .", natural justice requires that he can be defended, if he wishes, by counsel or solicitor. This last is a view that has yet to find favour with the Courts generally, but it is an interesting indication of one strand of judicial opinion).

In the second case, *Enderby Town Football Club Inc v Football Association Ltd* [1971] Ch 591, CA, it was held that the contractual rules of the Association could exclude representation other than that provided by a fellow member of the Association. (In *Pett's* case, the rules were silent on the matter, and on the facts of the case the charge was far more serious; the Court was therefore more ready to intervene to ensure legal representation).

In the most recent Court of Appeal decision, *Maynard v Osmond* [1977] QB 240, CA, the matter concerned a disciplinary hearing under the (UK) Police Discipline Regulations 1965 which limited representation to a member of a police force selected by the accused or on his behalf. The Court of Appeal held that the procedure provided by the Regulations was both appropriate and reasonable.

In the judgment of Lord Denning MR, the following statement is significant:

> "On principle, if a man is charged with a serious offence which may have grave consequences for him, he should be entitled to have a qualified lawyer to defend him . . . . But also, by analogy, it should be the same in most cases when he is charged with a disciplinary offence before a disciplinary tribunal, at any rate when the offence is one which may result in his dismissal from the force or other body to which he belongs; or the loss of his livelihood; or, worse still, may ruin his reputation for ever" (p 252).

What relevance do these cases have to the North Inquiry and to the special position of Commissions of Inquiry? It is conceded at once that although a Commission of Inquiry shares certain characteristics with a statutory or domestic tribunal, a major difference is that the Commission's function is inquisitorial while the usual function of the statutory or domestic tribunal is to adjust rights as between parties. That is a significant difference without doubt, but it should not be exaggerated.

One trend in judicial opinion that is discernible in the cases cited is that the Courts are more ready to insist upon legal representation where the person concerned faces a hearing that could result in his losing his livelihood or that could ruin his reputation. It has already been pointed out that the report of a Commission of Inquiry into the conduct of an individual can have these consequences just as readily as the decision of a statutory or domestic tribunal. Surely, therefore, a Commission of Inquiry should apply the same considerations, and be obliged to observe the same standards, as the common law now increasingly imposes in the case of statutory and domestic tribunals.

(4) Is a statutory change desirable to ensure that in future legal representation is not refused to one whose reputation is in jeopardy before such an inquiry (as well as to others specially interested)?

Is this issue one of sufficient importance to warrant amendment of s 4A of the Commissions of Inquiry Act 1908? The foregoing suggests that it is. Few people would wish to face a Commission of Inquiry into some aspect of their conduct without the aid of counsel and there can be few who do not have some feeling of sympathy for this aspect at least of Mr Moyle's ordeal.

One aspect would be to await the evolution of the common law. The judgment of Cleary J unmistakably points the way. Unfortunately, it is a subject infrequently litigated. The analogy of statutory and domestic tribunals is only that, an analogy. It may be years before the common law in its uncertain development provides the protection that those whose conduct is investigated by Commissions of Inquiry need here and now.

The urgent need is therefore for statutory amendment and, it may be suggested, the complete replacement of the existing s 4A. This section provides as follows:

(i) *The King v The Board of Appeal under section 50 of the Commonwealth Public Service Act 1902–1915, Ex p Kay* (1916) 22 CLR 183, at 186.

> "**4A Persons interested entitled to be heard at inquiry** – Any person interested in the inquiry shall, if he satisfies the Commission that he has an interest in the inquiry apart from any interest in common with the public, be entitled to appear and be heard at the inquiry as if he had been cited as a party to the inquiry".

One problem with the section, as identified by Sir Alfred himself when sitting as a member of the Court of Appeal *(j)*, is that it ". . . purports to give to another class of persons a right which has never been defined in the case of parties". Thus it follows that if, as in the 1962 case itself, there are no "parties" as such (the subject of the inquiry being State Services in New Zealand), the evident right which the section confers on the next class of persons (persons interested) turns out to be nugatory.

The first need is to abandon the concept of "party" status. In the context of a Commission of Inquiry, the concept is misleading. It is simpler and more realistic to think in terms of those who are specially interested in the subject-matter of an inquiry. What rights should they have? Should all persons interested have the right to be represented? A current proposal of the Law Reform Commission of Canada would appear to accord such a right to those who persuade an advisory commission that they have a "real interest" in the subject matter of the Commission's inquiry. In their proposed draft legislation on Commissions of Inquiry, they include a clause that reads: "Any person, group or organisation appearing before a Commission may be represented by counsel" Another question is whether there should be full rights to examine and cross-examine witnesses? There is a limited statutory precedent for allowing such rights in section 6FA of the Royal Commissions Act 1902-1973 of the Commonwealth of Australia. There such rights may exist ". . . so far as the Commission thinks proper".

Considering these different elements, and the particular issue which the North Report has raised, perhaps a statutory provision to replace the existing s 4A might be suggested along these lines:

> "(1) Where a Commission is specifically charged with investigating any aspect of a person's conduct
>
> "(a) There shall be a presumption that that person and any other person interested may appear personally or by counsel or solicitor and may call witnesses and may examine or cross-examine any witness on any matter relevant to the inquiry; and
>
> "(b) This presumption shall not be displaced unless there appear to the Commission to be strong and compelling reasons for displacing it, which reasons must be stated in writing by the Commission.
>
> "(2) In any other case, any person interested may appear personally and the Commission shall have a discretion to authorise legal or other representation to any such person who requests to be so represented, and such person or his representative may, so far as the Commission thinks proper, call witnesses and examine or cross-examine any witness on any matter relevant to the inquiry.
>
> "(3) For the purposes of subsections (1) and (2), a 'person interested' shall be:
>
> (i) any person named in the Commission's Order of Reference;
>
> (ii) any person who satisfies the Commission that he has an interest in the inquiry apart from any interest in common with the public".

(It would follow that sections 11 and 12 relating to costs, would have to be amended consequentially).

It is considered that the time has now come to amend part at least of the Commissions of Inquiry Act to ensure that legal representation is available for any person who finds his conduct to be the subject of investigation by a Commission of Inquiry. The necessary reform should not be delayed.

(j) [1972] NZLR 96, CA, at 109.

"No-one who comes to the Courts asking for justice, should come in vain. This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our Court if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of goods and the speed of service": per Lord Denning MR in *Atlantic Star* [1973] QB 364, 381

Philological exhibitionism – "In Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] QB 26 a decision of this Court upon which the Judge relied, I was careful to restrict my own observations to synallagmatic contracts. The insertion of this qualifying adjective was widely thought to be a typical example of gratuitous philological exhibitionism": per Diplock L J in United Dominion Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968] 1 WLR 74, 82.

Back row, 1 to r: Mr Justice Casey, Mr Justice Somers, Mr Justice Ongley, Mr Justice Barker, Mr Justice Jeffries, Mr Justice Vautier, Mr Justice Sinclair, Mr Justice Bain. Third row, 1 to r: Mr Justice White, Mr Justice Beattie, Mr Justice Quilliam, Mr Justice McMullin, Mr Justice Mahon, Mr Justice O'Regan, Mr Justice Chilwell. Second row, 1 to r: Mr Justice Cooke, Mr Justice Richardson, Mr Justice Perry, Mr Justice Moller. Front row, 1 to r: Mr Justice Speight, Mr Justice Richmond, (President of the Court of Appeal), Mr Justice Davison, (Chief Justice), Mr Justice Woodhouse, Mr Justice Roper.

THE JUDICIARY

In this issue we publish a photograph of the Judiciary. It was taken earlier this year at the Triennial Conference of the New Zealand Law Society in Auckland. The opportunity is also taken to record a number of judicial appointments made over the past year.

Sir Ronald Davison, GBE, CMG, Chief Justice

Foremost among these was the appointment of the Chief Justice Sir Ronald Davison.

At the time of his appointment Sir Ronald was the second most senior Queen's Counsel in New Zealand, and he was well-known in the Courts, and also as an arbitrator, and for his work in the commercial and environmental fields.

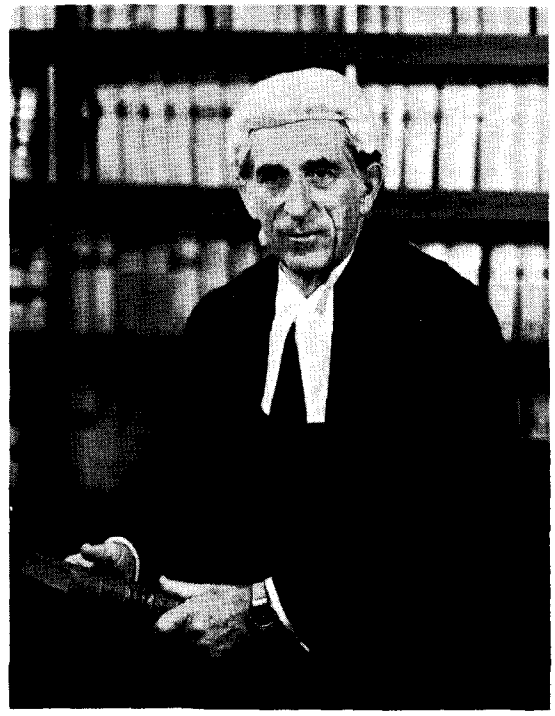
Born in Kaponga, Sir Ronald was educated at Te Kuiti District High School and Auckland University. From 1940 to 1946 he served with the Armed Forces, first with the New Zealand Army as a lieutenant and subsequently with the RNZAF in Europe where he held the rank of flying officer.

After the War, he practised as a barrister and solicitor as a partner in an Auckland firm. In 1953 he began practice as a barrister only and he was appointed a Queen's Counsel in 1963.

Sir Ronald served on the Council of the Auckland District Law Society for 6 years and was appointed President of that Society in 1965. He also served on the Council of the New Zealand Law Society and as Chairman of the Legal Aid Board. He was for some years a member of the Torts and General Law Reform Committee.

Sir Ronald has had a wide range of interests and activities outside the field of the law. He was a member of the Auckland Electric Power Board from 1958 to 1971, is a past Chairman of the Environmental Council, and was a member of the Countryside in '80 Committee. He was a director of the New Zealand Insurance Company Limited and Chairman of Directors of Montana Wines Limited. In the industrial field Sir Ronald has conducted inquiries directed to the resolution of several disputes and has been the one-man Aircrew Industrial Tribunal since 1971. He was awarded the CMG in 1975 for public services.

Sir Ronald was sworn in as the tenth Chief Justice of New Zealand in Auckland on 17 February 1978 at a ceremony attended not only by his brother Judges and members of the legal profession but also by many of prominence in the civil and religious life of Auckland and indeed New Zealand. He was welcomed to the Bench by the



Sir Ronald Davison, GBE, CMG, Chief Justice

Senior Puisne Judge Sir Clifford Perry and the congratulations of the Government were extended to him by the Attorney General Hon P I Wilkinson and those of the profession by the President of the New Zealand Law Society, Mr L H Southwick QC.

Finally the President of the Auckland District Law Society, Mr B D Lynch spoke on behalf of over 1300 members of the profession in this District who have a right of audience in this Court." He placed Sir Ronald's appointment in a most interesting prospective as follows:

"This is an historic occasion for the Auckland Bar. His Honour is only the second member of the Auckland Society to be appointed to the office of Chief Justice of New Zealand; this is the first time a representative of our District has been invited to address the Court at a swearing in the Chief Justice; and it is also the first occasion on which this Courtroom in its history of over 100 years has witnessed the swearing in of the Chief Justice.

"While expressing to the Bench the genuine

warmth with which the appointment of his Honour has been greeted by my Society I believe that it is not out of place to express publicly the Auckland District Law Society's recognition of the work and dedication of the former Chief Justice, Sir Richard Wild. My Council has already placed on record its sympathy in connection with the illness which has brought about the resignation of the former Chief Justice; and I respectfully request that the thanks and appreciation of all lawyers in this District be conveyed to Sir Richard and Lady Wild.

"And now, with your Honours' leave, I will address myself to the new Chief Justice, his Honour Sir Ronald Davison.

"Your service to the law, sir, extends back almost 40 years. Your reputation as a leading barrister has been established throughout New Zealand, although you have always practised in this city and as a member of our Society. Your service to our Society included six years on the Council, culminating in your election as President in 1965.

"It is a matter of pride to the members of the Society that you are its first former President to be appointed to the office of Chief Justice and that you join five former Presidents now serving as puisne Judges. You are in fact the third former President of this Society to be sworn in as one of Her Majesty's Justices in this Court within the space of only eight months.

"It is most appropriate that your swearing in should take place in this Courtroom in which you have frequently appeared as a leading figure in many important trials and legal arguments over the past 30 years. I trust that I may be permitted to strike a personal note by recalling the trial of Chesley Lauchlan Brooks, charged with the murder of Mr Hodgson at Te Teko a number of years ago. Many here present will recall that you were one of the defence counsel, and that your client was acquitted of the murder charge but convicted of manslaughter. A sequel to the case shows that your Honour will not be unfamiliar with the problems of the practising barrister. Reference has already been made to your contribution in helping to shape the civil legal aid scheme and in serving as Chairman of the Legal Aid Board since its inception. In the related field of offenders' legal aid, you will know of the submissions made in another forum by the New Zealand Law Society. It remains a fact of legal practice that in cases such as the Brooks trial lawyers frequently act with little financial reward, and I may strike a familiar chord – I hope a sympathetic one – when I mention that your entire fee for that case was an old radio, which I believe subsequently ended its days in the cowshed of your brother's farm. Your leader, Mr L P Leary QC, who is present in Court today, would no doubt be able to tell us what subsequently happened to his fee, which consisted of one old motorcycle.

Payment in kind to the third defence counsel, Mr P G Hillyer QC, also present in the Court today, consisted of one old rifle.

"You bring with you to the high office to which you have been appointed the great breadth of experience gained from many years practice as a Barrister in virtually all fields of Court and tribunal work, the judicial qualities demanded of all Her Majesty's Justices, and the administrative and diplomatic skills which are demanded particularly in the office of Chief Justice.

"May it please your Honours, my Council records its appreciation to the Bench for the opportunity of being represented by its President at this historic swearing in. His Honour and Lady Davison are assured of the goodwill and support of the members of the profession in this District. I formally request that the congratulations and best wishes of our Society be joined with the other tributes being made today on this the occasion of the swearing in of the Chief Justice of New Zealand."

Sir Ronald replied: "It would indeed be a man with a heart of stone with lead in his veins who would not be deeply moved to sit on the Bench in the Court, as I do now, in the presence of such a large and distinguished gathering, and have administered to him the oaths of office of Chief Justice of New Zealand.

"This Court for me brings back many memories.

"It was here in the Chambers at the rear that I was admitted as a barrister and solicitor of the Supreme Court nearly 30 years ago.

"It was here that as a fledgling barrister I conducted my first Supreme Court trial in a case prosecuted by that redoubtable Crown Prosecutor – Sir Vincent Meredith.

"It was here that I was called to the Inner Bar as one of Her Majesty's Counsel.

"And it is here today that you all do me the great honour of gathering to witness this ceremony of my swearing-in as Chief Justice.

"I assume this office with but one regret. It is, that the occasion for my appointment has arisen due to the untimely retirement of Sir Richard Wild because of ill health. I am sure that we would all wish to convey to Sir Richard and Lady Wild our respectful affection and best wishes in Sir Richard's present illness.

"May I now express to you, Sir Clifford Perry, my thanks for the warmth of your welcome to me on behalf of the Judges of New Zealand and for the friendliness you have shown me and the wise guidance you have given me over past weeks.

"To all Judges of the Court of Appeal and to

all judges of the Supreme Court who have received me with so much friendship and good will I also express my grateful thanks: Especially do I express my thanks to those who in some instances have travelled long distances to be present today.

"I enter upon this office with a feeling of humility. I have, however, been wonderfully encouraged by the very many messages of goodwill which I have received from throughout New Zealand and by the presence of such a large gathering in this Court. As I look around this Courtroom I see a great number of distinguished persons to whom I must extend my thanks for their attendance.

"To the retired President of the Court of Appeal, Sir Alfred North.

"To the retired Judges of the Supreme Court, Mr Justice Wilson and Mr Justice Coates.

"To His Worship the Mayor and other distinguished civic leaders of this community.

"To His Worship Mr McLean, SM, representing the Magistrates of this city.

"To the Bishops of Auckland, Bishop Gowing and Bishop Mackey, and other leading churchmen.

"To Mr Gordon Orr, the Secretary for Justice.

"To Assistant Commissioner Overton, representing the police.

"To Mr R A Waite, the President of the Auckland Justices Association.

"To two former Presidents of the New Zealand Law Society, Sir Denis Blundell and Mr S W W Tong.

"To all the other leading citizens of Auckland gathered here.

"To all members of the Bar – many of whom have travelled long distances from other centres to be present on this occasion.

"I note with particular pleasure seated at the Inner Bar the Attorney-General, the Solicitor-General, Mr Southwick, QC the President of the New Zealand Law Society, Mr Lynch the President of the Auckland Law Society, Mr McKay the President of the Wellington Law Society and in addition to Queen's Counsel practising in Auckland, Queen's Counsel from Rotorua, Hamilton, Wellington and Christchurch also. To each of you I express my grateful thanks and appreciation for the honour you do me and to my office by your presence here today.

"To you Mr Attorney, and to Mr Southwick and to Mr Lynch, and to Mr McKay each of whom has addressed me this afternoon and spoken such all too kind words of me, and given such encouragement to me at this time I also extend my gratitude.

"And may I be forgiven on this occasion for introducing briefly a personal note. It is a source of great pride and satisfaction to me that my parents, both of whom are now octogenarians, have been spared in good health to be present in Court to witness this ceremony this afternoon. To them, to my wife and to all my family, who have supported and encouraged me throughout the years, I express my heartfelt thanks.

"I realise that I assume office at a time when the rule of law and the institutions of our society are under challenge as never before and when agitation for change is rife within our community.

"It is right that we should from time to time re-examine the ancient order of things and bring our institutions and practices into accord with modern day conditions of society. In this respect our system of Courts and Court procedures are at present under scrutiny by a Royal Commission headed by Mr Justice Beattie and once the findings of that Commission are published there will begin the task of remoulding our present Court systems to meet the needs of the age and, hopefully, of ages yet to come.

"In this task there must be the full co-operation of all branches of our legal system – the Bench – the Bar and the administration. I call upon you all to play your respective parts and to render your fullest co-operation in implementing such planned changes as may be decided upon.

"Whilst it is right that the fabric of the administration should from time to time be subject to change to meet the changing needs of society there is, however, one cardinal principle in the rule of law in this country which must not be allowed to change in spite of challenges which I observe are being made to it on many fronts.

"In this country every citizen of whatever race, colour or creed is equal under the Law. Every citizen has the same rights – there must be no first nor second class citizens – there must be no privileges for one class nor detriments for another.

"But, correspondingly, every citizen has the same obligations. The obligations to observe the standards of conduct and behaviour which the community has set for itself through our laws, to observe the law as it exists and if change is sought, to bring about change by constitutional means. Any other course can but lead to anarchy.

"The lawful rights of the individual must be protected. The power of the State must not be allowed to become oppressive of those rights.

In concluding may I make reference to the judicial oath I have just taken. The oath read:

> "I will well and truly serve Her Majesty Queen Elizabeth the Second, Her heirs and successors, according to law, in the office of Chief Justice of New Zealand; and I will do right to all manner of people after the laws and usages of New Zealand, without fear or favour, affection or ill will. So help me God.

"The opening words 'I will well and truly serve' convey to the Judge his duty to the Crown

as a servant in the administration of Justice.

"The words 'according to law' tell him that he is there to administer the law as it exists in spite of any personal views he might have as to what it ought to be.

"Then the oath affirms 'I will do right'. Here the Judge affirms his duty to do justice.

" 'To all manner of people'. This expression covers all people, rich or poor, Christian or pagan, capitalist or communist, of whatever race, colour or creed.

"The words 'After the laws and usages of New Zealand' tell him that he must do justice according to the law, not injustice according to the law.

"Then in the phrase 'Without fear or favour, affection or ill will' which contains perhaps the most frequently quoted words of the oath enshrining the independence and impartiality of the Judge, he affirms his duty to act without fear of the powerful or favour of the wealthy, without affection to one side or ill will to another.

"And finally, in the words 'So help me God', the Judge affirms his belief in God and seeks his help in carrying out his judicial office.

"In accordance with the terms of that oath, and pledged to uphold its precepts, I now enter upon my term of office as Chief Justice of New Zealand.

"Thank you, one and all, for your attendance here today."

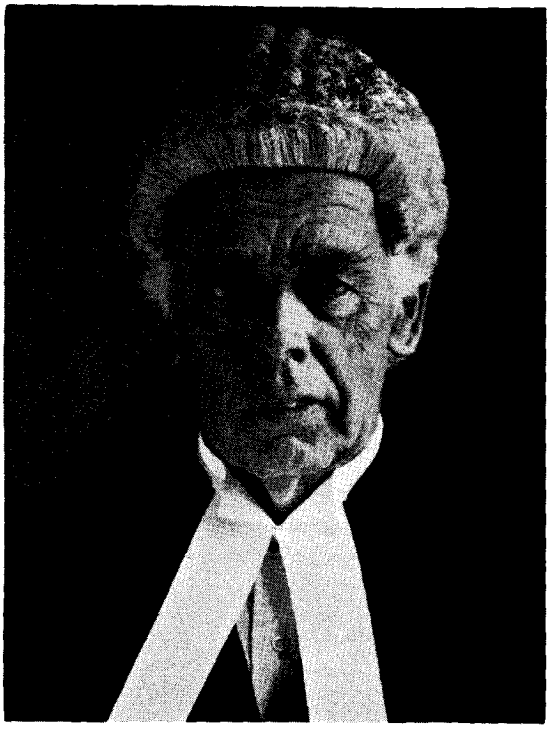
Mr Justice Mills

The appointment of Mr Justice Mills to the Bench was an occasion of some note for practitioners in Invercargill. His was the first direct appointment to the Bench from the Invercargill Bar.

His Honour was sworn in in Invercargill by His former Chief Justice Sir Richard Wild who had with him on the Bench Mr Justice Jeffries. That it was an occasion is attested by the words of Sir Richard.

"Sittings of the Supreme Court have been held in this city since as long ago as 1861, and the legal profession here has a proud history. Two other present members of the Supreme Court practised here before going North and later being appointed to the Bench. But never before in all that 114 years has this city witnessed a scene such as we have here this morning, when one of your own native sons has been elevated to the Supreme Court, and takes the solemn oaths of office.

"Mr Justice Mills is a Southlander born and bred. He has practised here for more than 30 years, has been President of your Society, has served the community as Crown Prosecutor for more than 26 years since his appointment on 3 February 1951, and has been an outstanding citizen in many spheres which I will leave others to



Mr Justice Mills

"It will be a matter of pride to all the members of the profession in Invercargill that his service with you and for you should be so recognised. It will be a matter of rejoicing, Mr Mayor, for the citizens of the whole city and province that this appointment has been made, not least because it brings the number of South Island Judges up to five. You show your feelings handsomely by your presence in Court this morning. He is your friend and my friend."

His Honour's reputation extended beyond Invercargill and one can be sure that when the Vice President of the New Zealand Law Society, Mr N S Marquet of Dunedin said – "When in practice he was dedicated to the law, he earned the respect of his colleagues, his clients and his adversaries. He is recognised as being friendly and outgoing, always courteous and mindful of the dignity of his fellows and yet firm and decisive as occasion demands. Within the legal profession the highest office to which a practitioner may aspire is acknowledged to be appointment to the Bench and the appointment of his Honour is more than apt in this respect" – he was not relying on hearsay. He continued,

"Your Honour has been a leader among men. The stock of our judiciary is comprised of such men and this, if I may say with respect, is especially exemplified by the two Judges who attend on your taking of the oath of office this morning. I

would mention only two aspects of your outstanding career. You have served your profession well as Crown Prosecutor, as a member of the local Council and then as President of the Southland Law Society and also as a member of the Council of the New Zealand Law Society. Secondly you served your country with distinction during the Second World War for five years in the Royal New Zealand Navy, rising to the rank of Lieutenant Commander. We express our thanks that you have agreed to accept this appointment for it is testimony of one of your qualities, your sense of duty to serve.

Those who have known his Honour will find a responsive chord struck by the remarks of the President of this Invercargill District Law Society, Mr W S Broughton.

"During your career at the Bar, defence witnesses who have been cross-examined by you, and jurymen who have listened to your final addresses, may have on occasion been in awe of your rhetoric and stern countenance. However, those who appeared with you would know that this impression was misleading and their memories will be more of your unfailing courtesy and helpfulness whether to senior members of the Bar or those more recently admitted.

"Your feeling for those less fortunate in the community is amply illustrated by your close involement with a large number of community activities, particularly with the New Zealand Crippled Children Society for a long period, culminating with your appointment as National President of the Society. Your involvement with Rotary and as Chairman of the Southland Medical Foundation and other organisations is indicative of a very close involvement with the community in which you have lived and worked during your professional career.

"We in Southland have been grateful to you for the work you have done for the profession, firstly, as a member of the Council of the District Law Society and secondly, as its President in the mid 1950s. Your contribution to the affairs of the Society and the profession will be remembered, and it is with regret that we learn that your elevation to the Bench will take you from amongst us to Auckland.

"Your move to Auckland saddens us, – your good company and good conversation will be missed, not only by your professional colleagues, but also by your wide circle of friends."

Mr Justice Sinclair

The appointment of Mr Justice Sinclair to the Bench was announced at the same time as that of Mr Justice Mills and he was sworn in at Auckland on 18 November 1977. The former Chief Justice Sir Richard Wild, the Solicitor General Mr R C Savage QC, and the President of the New Zealand Law Society, Mr L H Southwick QC, all took the occasion to emphasise the great pressure of work under which the Courts, particularly those in Auckland, were labouring. Mr Southwick in particular referred to the amount of time Judges were required to sit in Court and this corresponding reduction in time available for reflection. All hoped these additional appointments would provide some relief.

Mr Justice Sinclair's career was well described by the President of the Auckland District Law Society Mr B D Lynch:

"I am told it is almost 36 years to the day since you started work in the office of Wilson, Henry & McCarthy. Apart from an absence of two years in the Army you were employed by that firm for some nine years both before and after graduation, until 1950 when you became a principal of the firm and have so remained until your present appointment.

"During your years in practice in Auckland you have had a wide experience in virtually all

aspects of Court work. In the criminal field I may refer to your part in the successful defence in 1954 of the murder charge against James Wilson indicted for poisoning his wife, in which you briefed Mr L P Leary QC as senior counsel. Your Honour will no doubt have read the chapter on this case in Mr Leary's book *Not Entirely Legal.*

"In the area of personal injuries claims your experience includes your success in gaining an award of damages which at the time was a record in a deaths claim in the unreported case of *May v Absolum.*

"You have had a very extensive practice in matrimonial property and domestic litigation. One reported judgment well known to lawyers throughout New Zealand is the case of *E v E* in which you argued the case for the respondent before the Court of Appeal presided over by his Honour the Chief Justice. The judgments in this case take up some forty pages of the 1971 New Zealand Law Reports and contain a comprehensive review of all recent decisions in New Zealand and England affecting matrimonial property.

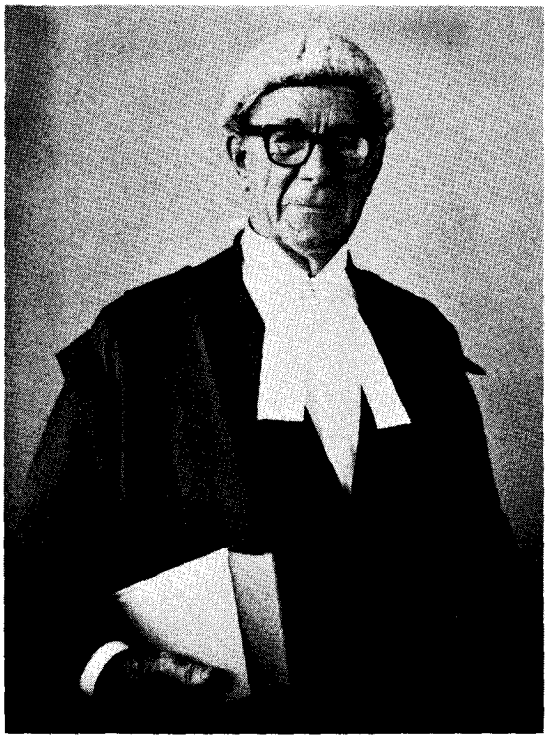
"In addition you have had wide experience in the fields of industrial and commercial law. It is clear that you have all the qualifications and experience to meet the high standards which are required of members of our Supreme Court Bench.

"Apart from your legal and professional background there is, however, one further attribute to which I must refer and for which, with respect, I predict that you will be particularly remembered during your term of office on the Bench. Your reputation amongst colleagues in this city, sir, is that of a leading lawyer who has never lost his concern for his client, whether his cause be large or small. Many other instructing solicitors have shared my experience of your willingness to accept a potentially unremunerative brief or instructions involving a difficult client, and of your commitment to a case based on your professional view that no client is too big and no client too small for your personal attention.

"I wish to acknowledge the contribution which you have made to the profession during your years in private practice. You have always taken an active interest in Society affairs and after several years on the Council of our Society you were elected President in 1969. You were for several years Chairman of the Society's Common Law Committee, and you were also a member of the New Zealand Law Society Council for four years. You have served on New Zealand Law Society Committees investigating the Accident Compensation Bill and reporting on the Matrimonial Property Bill.

"For eight years you have been a member of the Legal Aid Appeal Authority and for the last three years you have been Chairman of that authority.

"May it please Your Honours, I deem it a privilege to have been asked to speak at this ceremony and I formally request that the members of the Auckland District Law Society be associated with the formal tributes being paid today to Mr Justice Sinclair."



Mr Justice Bain

Mr Justice Bain was sworn in as a Judge of the Supreme Court in June 1977. His career in the law could hardly be described as conventional, at least by New Zealand standards, embracing as it did private practice, Crown practice and Administrative and Magisterial appointments in centres ranging from the Southland provincial town of Gore to the metropolitan City of Auckland.

He began his career as a cadet in the Justice Department at Gore in 1924. He graduated LL.B. from the University of Otago in 1938 and was admitted a barrister and solicitor of the Supreme Court at Christchurch in 1939.

In 1945 he became a legal advisory officer in the Head Office of the Justice Department and was appointed Assistant Crown Solicitor in the Crown Law Office in 1948. He spent some five years as Secretary of the Law Revision Committee and saw the passage of the Crown Proceedings Act

1950 Magistrates' Courts Act 1948 and Magistrates' Court Rules, Limitation Act 1950 and Contributory Negligence Act 1957. In 1961 he opened a branch of the Crown Law Office in Auckland, serving there as Crown Counsel in charge until his retirement from the public service in 1964. He then practised in Auckland as a barrister until 1976 when he was appointed a Stipendiary Magistrate.

During practice as a barrister, his Honour undertook appointment as Judge Advocate for the Northern Military District and also as chairman of the Secondary Schools Disciplinary Board from constitution in 1970 for two terms of three years each. He was also chairman of the Motor Spirits Licensing Authority for 12 years from 1965.

As an author he contributed the chapter on the judicial system and elsewhere in the first edition of *The British Commonwealth, its Laws and Constitutions: Vol IV. New Zealand.*

Mr Justice Bain served for many years in the territorial army. He sailed with the Second Echelon and served five years in the Middle East attaining the rank of captain.

CASE AND COMMENT

Application for review

The new remedy of an application for review has been invoked with, it appears, increasing frequency in order to determine whether decisions have been taken according to law. This is as it should be. In the field of immigration and admission to New Zealand there have been three such cases, *Pagliara v Attorney-General* [1974] 1 NZLR 86, *Tobias v May* [1976] 1 NZLR 509 and this year, *Movick v Attorney-General,* decided by the Court of Appeal on 17 March 1978. The last case concerned a Fijian student who wished to remain in New Zealand to take up a temporary position with the New Zealand University Students Association. The Minister refused to grant his application to remain in New Zealand; Movick thus became a person remaining in New Zealand in breach of the Immigration Act 1964, s 14. The Court of Appeal declined to make the interim order sought under s 8 of the Judicature Amendment Act 1972, as inserted by s 12 of the 1977 Amendment. The way in which the proceedings were brought prevented the substantive issues being decided.

This note will discuss some of those issues. The appellant had sought an extension of his student permit before it expired. When this was declined, he appealed to the Education Advisory Committee created by the Minister with functions described in Parliamentary Paper E21, 1975. A departmental officer told him that he should be seeking a work permit, not a study permit. Movick withdrew his appeal on the basis of what the Court described as misleading advice. Only later, when the Minister had declined his application for a work permit, did Movick attempt to revive his appeal. What is the legal effect of the advice given by the Department? Such authority as exists, apart from some contrary remarks by Lord Denning MR, suggests that misleading advice is not a defence though it may be an extenuating circumstance. Lord Denning has invoked in the public law area something akin to the *High Trees* principle in contract, but in public law the question of the extent of the Officer's authority to commit his department is almost certain to arise. It is easy then to understand, if not sympathise with, Lord Simond's blunt rejection of the Denning doctrine in *Howell v Falmouth Boat Construction Ltd* [1951] AC 837; [1951] 2 All ER 278. The subsequent revival of the doctrine in *Wells v Minister of Housing and Local Government* [1967] 1 WLR 1000; [1967] 2 All ER 1041 and *Lever (Finance) Ltd v Westminister City Corporation* [1971] 1 QB 222; [1970] 3 All ER 496 was in much more guarded terms. Because the misrepresentation made or misunderstanding created by the official of the Labour Department appears to have concerned principally a matter of fact rather than law, there would be a stronger reason for holding the Department responsible than in the *Falmouth Boat* case.

The second point concerns the effect of Parliamentary Paper E21 1975, on the Minister's discretion. Did it fetter it? Was it an improper delegation of the Minister's powers? The answers to those questions might determine the validity of amnesty promises made by a Minister of Immigration. The effect of an amnesty statement arose in *Salemi v Minister for Immigration and Ethnic Affairs (No 2)* (1977) 14 ALR 1, where the High Court of Australia divided 5–1 on the effect of the policy set out in the statement offering an amnesty. The majority did not accept that the amnesty announced by the Minister had changed the status of a person who had become a prohibited immigrant. Only Murphy J thought otherwise. But the powers of the Minister and his officials are in Australia different from those in New Zealand. In Australia the Minister cannot

grant an entry permit; that power is given to "an officer", a phrase which does not include the Minister. The Minister could however grant exemptions, but his amnesty was not intended to be an exemption.

As to the status of the amnesty, its legal effect was seen to be by Barwick CJ to be minimal. At p 9 he declared:

> It is regrettable that because the Minister does wish to extend the amnesty to the applicant, and indeed has assigned an untenable reason for not doing so, he has given ground for a sense of grievance and disappointment: but that is no basis, in my opinion, for saying that the applicant had in the language of the law a 'legitimate expectation' of the grant of an entry permit of indefinite duration. The Minister's statement was no more than a statement of policy. Statements of policy as a rule do not create legal obligations, though they may understandably excite human expectations as distinct from lawful expectations. Perhaps *Australian Woollen Mills Ltd v Commonwealth* (1944) 69 CLR 476, well illustrates the proposition. Governments are free to change policies; they are also free not to implement them. To have decided not to pursue the Minister's announced policy with respect to amnesty would not give the applicant, or for that matter any prohibited immigrant, in my opinion, any right. Doubtless, the statements were calculated to excite an expectation of their performance. But, again in the language of the law, they were not capable, in my opinion, of creating an expectation founded in or at least attendant upon legal right".

The amnesty statement was not seen as limiting the Minister's discretion. A similar view was taken by Gibbs J who referred to the principle of estoppel in these terms at p 21:

> "Once it is concluded that the Act, so construed and understood, does not impose a duty to act in accordance with the principles of natural justice, it is not relevant that statements made by the Minister may have led the plaintiff to expect that he would not be deported; the fact that the plaintiff had acted on the faith of the Minister's statements would then only be relevant if there arose an estoppel or some contractual obligation binding the Minister, and this is not suggested".

On this approach, only if it had been held that there was need to comply with the principles of natural justice would the amnesty statement have any relevance. Those who were in effect the minority on this point in *Salemi* took a different view; the promise of amnesty was seen by them as raising a "legitimate expectation" in persons such as Salemi who were therefore entitled to expect compliance with the principles of natural justice. As a result, the appellant was entitled to know why he was excluded from the amnesty and to have an opportunity to make submissions and rebut material adverse to him before the Minister acted. The 3–3 split on this issue renders it difficult to offer any conclusion other than this – a promise of an amnesty has little effect except perhaps to oblige the decision maker to take greater care in applying government policy in an individual case.

The remaining issue left unresolved by *Movick* is the status of a Commonwealth citizen or alien present in New Zealand in terms of an entry permit. Can the permit be cancelled and deportation ordered without a hearing? In the Court of Appeal, Woodhouse J had some reservations about summary cancellation and deportation. Those doubts were shared by some members of the High Court in *Salemi,* supra. Stephen J discussed the relevant authorities on pp 30–32. Among the cases listed is *Pagliara,* supra. Most, but not *Pagliara,* support the conclusion that summary action is unlawful. A distinction is clearly warranted between an alien legally entitled to be within the country on the one hand and an alien applying for admission or one whose permit has expired on the other. Whether it is based on the legitimate expectations of the temporary resident or on the basis of a fundamental and pervasive obligation to be fair, the power of deportation is such that some kind of hearing before its exercise would be seen by most lawyers as necessary.

Fine Tuning – Did you know that according to the Social Security (Travelling Fees) Order 1978 (13 March 1978) the travelling fees payable to medical practitioners are computed at the rate of 16 cents per kilometre, while those payable to lawyers under the Offenders Legal Aid Regulations 1972, Amendment No 2 (17 April 1978) are computed at 15 cents *per mile* (or approximately 10 cents per kilometre)? It makes one wonder whether the rest of the fees scale is not two thirds down as well!

He saw a lawyer killing a viper
On a dunghill hard by his stable;
And the Devil smiled, for it put him in mind
Of Cain and his brother, Abel.

Samuel Taylor Coleridge