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INTER ALIA

De facto relationships and the domestic purposes benefit

The Social Security Amendment Bill introduces a new test of conjugal status for benefit purposes. Instead of "living together on a domestic basis as husband and wife" it proposes "having entered into a relationship in the nature of marriage". Both descriptions are very general and leave the Social Security Commission with a considerable discretion as to whether a particular relationship falls within the section. The point that many find offensive is that the exercise of the discretion calls for some degree of inquiry into the personal life of the recipient of the benefit.

In administering the DPB the Department of Social Welfare is very conscious that a couple living in a de facto relationship and receiving both an income from employment and a DPB would be advantaged when compared with a single income family. Others are conscious of the increasing burden of welfare services on a small workforce. Overgenerosity to one group can be unfair to others – albeit in an indirect way. So this discretion and the accompanying inquiry is likely to remain for so long as we have a benefit intended particularly for single people.

However, there are indications both in the amending Bill and elsewhere of a more positive approach to the plight of solo parents. In the first place the Bill gives the Commission a discretion in deciding when a couple shall be regarded as having entered into a relationship in the nature of marriage. Thus a beneficiary could presumably be told that his or her relationship with another is reaching the stage where the benefit should be reviewed and be given time, say, six months, to make a decision as to the future.

The Bill also recognises that a working solo parent faces additional costs in respect of child care. Child care is not a luxury item but is essential if he or she is to be able to work, particularly in today's economic climate. It gives the Commission authority to disregard as income that part of a widow's or DPB recipient's personal earnings up to $20 a week used to meet the cost of placing a dependent child in a day-care facility. This clause does not go anywhere near far enough. Placement in a day-care centre is all very well in the case of pre-school children. However, with school age children the question of after school care arises. Here it is more usual to think in terms of engaging someone who can perhaps do some of the housework and prepare the evening meal, as well as supervising the children. This type of assistance, again, is not a luxury but entirely reasonable, particularly in the case of a person who is both holding down a fulltime job and bringing up a family. Money spent enabling a person to work without undue stress will return itself manyfold in benefit savings.

Recently, in answer to a Parliamentary question the Minister of Social Welfare, Mr Walker, indicated that a research contract aimed at ascertaining factors affecting solo parents attitudes to returning to the workforce was currently under negotiation. This type of research project is long overdue. The Accident Compensation Commission is an example of a body that carries out positive rehabilitation programmes. The Social Welfare Department could well emulate that example by encouraging job training and providing financial assistance for those wishing to return to work. Again, in the long run money so applied will be well invested.

Employment will not be every solo parent's ambition. However, a continuation of the trends outlined above will make it very much easier for

those who prefer the harder way of independence to achieve that goal.

Confidentiality of police documents

The Police Amendment Bill inserts new provisions relating to confidentiality of police documents. Two matters are not satisfactory, namely the definition of "confidential police documents" and the limitations placed on the use of police documents in Court.

In essence confidential police documents are documents "containing information relating to crime, criminal offenders, or suspected offenders published by any member of the police *and intended by him* for circulation only to members of the police". It will of course be impossible to tell on the face of a document whether the author intended it for circulation only to members of the police. Considering that a person who has a confidential police document in his possession is liable to imprisonment for a term not exceeding three months or a fine not exceeding $500 this subjective element is most inappropriate. However, rather than importing any sinister intent we would prefer to believe that this point had simply not been thought of in the drafting of the Bill and now that its unsatisfactory nature has been pointed out, would expect the provision to be amended by requiring, for example, confidential police documents to be clearly marked as such.

The provision also prohibits the production of confidential police documents, or evidence of its contents, being given in any Court proceedings without the written permission of the Commissioner of Police and prohibits civil or criminal proceedings being taken in respect of anything contained in confidential police documents. We fail to see why police documents should be in any different position from other Crown documents in respect of which privilege may be claimed. It is for the Court "to hold the balance between the interest of the public in ensuring the proper administration of justice and the public interest in withholding documents whose disclosure would be contrary to the national interest". The question of confidentiality of Crown documents is generally handled at a ministerial level. We note that the Bill vests the Commissioner of Police with the authority to decide what documents may be produced.

Finally, the Minister of Justice Mr Thomson does not accept that the decision of the Court of Appeal in *Apperley v Tipene* (March 1978) prompted this particular proposal. The Court allowed Apperley to inspect a statement made to the police by Tipene that was alleged to contain defamatory matter. If this amendment is passed, that statement, inspection of which was opposed, will not be able to be used in evidence without the consent of the Commissioner of Police.

Social security and ministerial directions

Late last year the Family Benefits (Home Ownership) Act 1964 and the Social Security Act 1964 were amended to require the Social Welfare Commission "to comply with any general or special directions given to it in writing by the Minister". In an earlier editorial ([1978] NZLJ 18) we indicated that publication of Directions in the *Gazette* was not satisfactory and also anticipated that problems would arise where a directive conflicted with an express provision in the Act itself. We now have a batch of directives (*New Zealand Gazette* 31 August 1978 page 2419). To ensure that they are more readily accessible to the legal profession they are published in this issue of the *Law Journal* in the minuscule type usually reserved for exemption clauses. As to the second point – let us be thankful for legal aid.

The first Direction concerns family benefit and is obviously intended to counter the MacFarlane decision referred to in the earlier editorial. It sets out an income, assets and needs test and directs the Commission to "apply the following income and assets and needs test and, if the affairs of that applicant, or the spouse of that applicant as the case may be, fail to come within its prescription, you shall take it that that applicant, or the spouse of that applicant as the case may be, can reasonably be expected to arrange finance from another source".

Quite where this leaves the person, who after extensive inquiry says "that despite your saying I can find reasonable finance in fact I cannot" remains to be seen. Certainly the Direction so limits the Commission's discretion as to make the section standing on its own misleading. If this policy is to be continued the Act should be amended to reflect it.

Now for the Domestic Purposes Benefit Direction. In 1977 the Social Security Act was amended to require a maintenance order or agreement as a condition for receiving a Domestic Purposes Benefit. In cases of hardship an emergency benefit would be granted under s 61. The Direction recites that it is the policy of Her Majesty's Government to require applicants for a Domestic Purposes Benefit to consider conciliation of their matrimonial differences. To encourage this the rate of emergency benefit is reduced to $16 less than the standard rate for a Domestic Purposes Benefit. The relationship between a reduced benefit and conciliation is rather obscure. That apart, the purpose of emergency benefits is to provide for cases of hardship. Need is the criterion – not conciliation. Again, through his Directive, the Minister is using the welfare legislation to promote policies that are not apparent on the face of the Act.

Finally there is a group of directives designed to ensure that no income-tested beneficiaries are

worse off because of increased taxation incurred in the change to National Superannuation or as a result of revised tax scales. It will be appropriate for the Commission to grant on application an additional benefit under s 61G to those with a reduced income. That additional benefit is also approved as a matter of policy.

Section 61G empowers the Commission to pay an additional benefit "if the Commission is satisfied that, after taking into account his financial circumstances and commitments, such special entitlement or rate of additional benefit is justified." It is very questionable whether that policy of Her Majesty's Government would, in normal circumstances, have been regarded by the Commission as justifying payment of an additional benefit, particularly as the inquiry into financial circumstances is limited to whether or not the changes have brought about a reduction in income. If the justification is that the amount normally paid to income-tested beneficiaries is the minimum amount reasonably required for living and should be maintained then the inference may fairly be drawn that the Minister is deliberately requiring those seeking a Domestic Purposes Benefit, which is also an income-tested benefit to endure a period of hardship in the initial and most difficult period of separation during which he directs they are to receive $16 less than the DPB. That is a scandalous situation. Judges have commented on the importance of the Domestic Purposes Benefit in helping parties over this period, and to sort out property, maintenance and custody matters in more amicable circumstances than would otherwise prevail. Their observations indicate where the emphasis should lie.

These Directions require the Social Welfare Commission to exercise its discretion in a manner unauthorised by the Social Security Act. They go beyond what the Act permits, conflict with its basic policies, and leave the Commission caught between statutory duty and ministerial directions that are almost certainly ultra vires. It is one thing to administer by regulation or direction within the frame work of a statutory policy. It is quite another to have the policies created by the directions.

Tony Black

CASE AND COMMENT

Administrative law – Bias

The long judgment of Mahon J in *Anderton and Others v Auckland City Council and James Wallace Pty Ltd* (judgment 30 June 1978) contains comment on the usefulness of the new application for review and the effect of a rehearing before an appellate tribunal on an invalid first instance decision, but it may become best known for its discussion of bias. In this case it was decided that actual predetermination needed to be established. The applicants, having established this, were granted relief and the decision of the Council granting planning permission was quashed.

There has been much discussion in recent cases of bias and the appropriate test to be applied. Before discussing the contribution made by Mahon J, it may be useful to discuss what is commonly understood by bias. It manifests itself in various ways. Those who have a pecuniary interest in the result of a dispute are described as biased and are disqualified from adjudicating; *Dimes v Grand Junction Canal* (1852) HL Cas 759. Strongly held views which have been translated into action also disqualify. This happened to the prohibitionists elected to a liquor licensing committee who refused to renew any licence; *Isitt v Quill* (1895) 11 NZLR 224. But there are more subtle situations. Friendship, family or personal association between one of the parties and the decider may disqualify; *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577. But this is less likely to happen if the decider is a popularly elected local tribunal; *Muir v Franklin Licensing Committee* [1954] NZLR 152. The statement of a policy and its application to individual cases without regard to their circumstances also disqualifies; *R v Torquay Licensing JJ, ex parte Brockman* [1951] 2 QB 784. But a general statement by a member of a tribunal in relation to an issue which later comes before it for decision does not automatically disqualify; *Ex parte Angliss Group* [1969] ALR 504. Nor does reliance on experience gained from earlier cases involving the decider which result in a certain inevitability about the result of the case before the tribunal; *Turner v Allison* [1971] NZLR 833 (itself a planning case). There is also the case of the dedicated and enthusiastic minister or official, anxious to secure policy objectives, who may be thought to have failed to approach decision making with an open mind. Does this list of situations, which is not intended to be exhaustive, fit comfortably into the two categories advanced by Lord Denning MR in the *Lannon* case, supra, of pecuniary interest and bias? A pecuniary interest automatically disqualifies.

But for bias to disqualify Lord Denning MR applied the reasonable suspicion test.

Mahon J canvassed the recent Australian, Canadian, English and New Zealand decisions and the classification of "interest" and "favour" advanced in HH Marshall, *Natural Justice* (1959), 34 et seq and concluded that the reasonable suspicion test was favoured. He observed:

> "As may appear from what I have just written, the tendency in New Zealand, as in Australia, seems now to favour the 'reasonable suspicion' test and it might even be said that in each Commonwealth jurisdiction there is now a tendency to relax the test of bias. It may be that in the great majority of cases the result will be the same whichever test is used. Cf Wade, *Administrative Law* (4th ed) at p 410, where the learned author pointed out that, if 'likelihood' is given the meaning of 'possibility' then it equates to 'suspicion' with the result that in conjunction with an objective approach, the 'real likelihood' test would not give any different results than the 'reasonable suspicion' test. But, as the learned author went on to say, the word 'likelihood' can also mean 'probability' and in this sense it must differ essentially from 'suspicion' . . . .
>
> "I have referred to judicial dicta in England and in Canada which suggest that real likelihood and reasonable suspicion of bias are, in practice, at all events, tests of invalidation which blend with each other so as to blur any conceptual distinction . . . .
>
> "The question always is, whether a right-minded and fair observer, be he litigant or not, could reasonably suspect from the manner of adjudication that the cause was prejudged. If to that question a reviewing Court is compelled to give an affirmative answer in a case where in fact no bias was present, then that is the price to be paid for the continuance of general confidence in the public administration of justice."

He then identified four categories of disqualification:

(1) Actual bias may be proved. *Isitt v Quill*, supra, was cited as an example.

(2) Pecuniary interest will disqualify, as in *Layton's Wines, Ltd v Wellington South Licensing Trust (No 2)* [1977] 1 NZLR 570.

(3) Presumptive bias is normally established by proof of partiality or favour towards one side. There may be other circumstances from which likelihood of predetermination can be inferred. *English v Bay of Islands Licensing Committee* [1921] NZLR 127 was cited. In that case the Committee disqualified itself when it resolved on an irrelevant or unlawful ground that the licence would not be renewed unless the premises were rebuilt.

(4) If an observer, unacquainted with the facts, concluded that there was a reasonable suspicion of bias, the decider would be disqualified. An example is *Police v Pereira* [1977] 1 NZLR 547, where the remarks of the Magistrate could be taken to indicate that the case had been prejudged.

The difference between the third and fourth categories was expressed in these words:

> "In applying the 'reasonable likelihood' test a reviewing Court will assess for itself whether an impartial observer appraised of all the relevant facts would consider whether the real likelihood existed, and where the 'reasonable suspicion' test is relied upon the Court will judge the impression, to be considered objectively, on the mind of the litigant or observer unacquainted with any outside facts or circumstances created by the outward form or conduct of the proceedings under review."

What Mahon J appears to have done is to return to the position taken by Salmond J in *English v Bay of Islands Licensing Committee*, supra. Though his views will undoubtedly be influential in New Zealand, doubt must be expressed that the earlier test of real likelihood of bias will displace the more recently adopted reasonable suspicion test in cases other than actual bias and pecuniary interest.

There remains the question – what next? The second respondent must have been heavily committed financially to the development and will probably seek reconsideration by the Council of its application for consent. Mahon J does not see the situation as falling wtithin the ex necessitate principle or calling for the solution adopted after *Low v Earthquake and War Damage Commission* [1959] NZLR 1198 and [1960] NZLR 189. The local body election of 1977 has made it possible for sufficient uncommitted members of Council to take a decision on the application.

JFN

Police v Minhinnick – War medal – Colour of right – Eureka! We have found a new frontier of the criminal law. Sheer intensity of feeling about an object-d-art can become colour of *right*. And this despite a deliberate intention to permanently deprive the owner and admission that it is against the law. The possibilities are mind-boggling despite the judgments self imposed limitations. Museums, libraries, supermarkets and chain stores beware. A new era of innocence is with us! Yours more in sorrow than jest. Maximus Lenienci Per Incuriam *(Apologies for the bad Latin)*

TAXATION

TAX PLANNING FOR ESTATES CONTAINING LIVESTOCK

Part I: An Outline of the Standard Value System

By JOHN PREBBLE, *an Auckland practitioner.*
This is the first of three articles on the particular estate and tax planning considerations applicable to farmers' estates that arise from the adoption of the standard value system.

A farmer's livestock will usually be one of his most valuable assets. Consequently, a major focus of any estate plan drawn up for a farming client must inevitably be upon the medium term and ultimate disposal of his livestock.

Most of the assets of a farmer – land, house, plant, and so on – can be disposed of according to much of the same principles as the property of a person following another calling. Livestock, however, must be dealt with on a different basis. The reason for this lies in the special approach to livestock that is adopted in farm accounting and, more importantly, in the income tax consequences that follow therefrom. Nowadays, as in fact might be expected, the principles of livestock accounting for tax purposes enshrined in the Income Tax Act 1976 tend to overshadow the original, strictly accounting, reasons for their adoption.

The problem stems from the rule of both accounting and income tax law that fluctuations in a taxpayer's stock-in-trade are reflected in his taxable profits. The provisions governing stock-in-trade are found in s 85 of the Income Tax Act. Section 85 (6) provides that where the value of a taxpayer's trading stock at the end of an income year exceeds the value of the stock at the beginning of the year, the amount of the excess must be included in his assessable income for that year. Section 85 (4) allows for several different methods of valuing trading stock, but it does not affect the general principle of s 85 (6).

To the layman in accounting matters the rule in s 85 (6) may initially appear harsh. Most of us are used to being taxed on income that we can spend. But the merchant is also taxed on profits that are still locked away in stock-in-trade. These profits will be no use to him as spending money until the stock is sold. Nevertheless, the rule in s 85 (6) is necessary, and indeed essential to the fair operation of the income tax law, for the reason that sums spent in purchases of stock-in-trade are deductible for tax purposes, just as are any other expenses of running a business. If taxpayers were assessable on income from realisations of stock only, a merchant could simply reduce or eliminate his taxable profit in any particular year by purchasing extra trading stock. A manufacturer could achieve the same result by purchase, processing, and stockpiling of materials and finished products. Admittedly, they would only be putting off assessment day, but tax deferred is very often tax saved, at least in some measure.

What has this to do with a farmer? The essential fact is that, for a farmer, livestock are stock-in-trade, no matter that they might appear to the untutored observer to be more in the nature of a capital asset. Should there be any doubt, s 85 (1) specifically provides that "trading stock" includes livestock.

The tax treatment of trading stock that is fair and correct for the merchant or manufacturer can be most unreasonable for a farmer. The difficulty is that farmers face a fluctuating market. It would be unfair to tax a farmer on the basis of stock values in March only to find that by August his paper profit had become a paper loss. Moreover, a farmer often keeps his livestock for far longer than a merchant keeps his trading stock, sometimes the full life-span of the animals concerned. This practice only exacerbates the problem, with unrealised profits appearing and disappearing with the changing fortunes of the farming sector. Worse, losses from disease or adverse weather could wipe out profits on livestock in hand after tax had been paid thereon. The answer to these problems is the standard value scheme, a special method of accounting for livestock that is sanctioned by the Income Tax Act for the benefit of farmers.

Fundamentals of the standard value scheme

The standard value system, set out in sections 86, 88, 89, 93, 94, and 95 of the Income Tax Act 1976 offers farmers a means of avoiding the tax difficulties that would otherwise face them as a result of the various factors mentioned above. The scheme is basically simple. The farmer elects to adopt a standard value for his stock and, until the stock is actually disposed of, that value obtains for tax purposes.

In fact, the farmer will not usually adopt just

one value for all the different ages, sexes, and types of the stock he owns. Rather, he will choose values appropriate to the several different classes of stock in his herd or flock. However, there is no difference in principle between the operation of farm accounts where there is only one standard value, and accounts where there are several. Consequently, for ease of exposition, the ensuing discussion and examples will assume that the herds and flocks considered share a single standard value.

A rather simplified example of the standard value system in operation is as follows. The market value of a farmer's herd doubles in an income year. Nevertheless, in that year he has no stock purchases, births, sales, or deaths; he has the same beasts at the end as at the beginning of the year. Under the standard value system, even though the herd has doubled in market value, the farmer has not made any assessable profit, since the book values of the beasts remain the same.

When the stock is disposed of, the proceeds of sale are, of course, included in the calculation of the assessable income of the farmer. This result obtains in respect of the regular sale of the progeny of a farmer's livestock, of stock bought in for fattening, or of stock replaced in ordinary farming operations. But generally speaking the amount of tax will not be affected by the level of the standard values adopted by the farmer in question. For example, selling off old stock with a low standard value might result in a large assessable income, but this will be correspondingly reduced by the deductions taken by the farmer in writing the replacements down to the low standard value that applies to his herd or flock. It will thus be noted that the standard value scheme simpliciter does not entirely avoid the accrual of assessable profits. For example, if sales and purchases balance out, and the natural increase in a herd exceeds deaths, then the standard value of the increase will represent income.

This result could tend to discourage farmers from increasing their herds; they must pay income tax for owning more animals (albeit on standard rather than true values) without having sold the animals to provide the cash to pay the tax. Consequently, since 1966 farmers have had available to them a special option in respect of increases to their herds. This is the nil value scheme.

Under this scheme, a farmer can elect to ascribe a nil value to any increases in his herd beyond the basic number of livestock he owned before making that election. Provisions in s 86 (1) of the Act prevent the farmer from manipulating the basic number in order to ascribe nil values to stock that are not part of a true increase in numbers. When the stock is eventually sold, the sale proceeds are, of course, assessable income in the same way as under the standard value scheme.

Potential tax liability

The net effect of the standard and nil value schemes is to allow farmers to defer paying tax on unrealised profits. But the other side of the coin is that the longer a farmer's standard values remain static, the greater is his potential tax liability. Thus, if a farmer has the necessary cash resources to pay the resulting tax, it is often good practice to increase standard values in years when his income, and thus his marginal tax rate, are low. The same considerations apply to farming companies. Section 86 (2) of the Act requires the concurrence of the Commissioner to a change in standard values, but in practice the Commissioner does not require taxpayers to ask permission where the change is an increase up to a maximum of the current market value of the stock in question. Nevertheless, there will always be a limit to the amount by which it is advisable to increase standard values in this fashion. Where a farmer is regularly paying tax at the maximum marginal rate, an increase may never be advisable. Consequently, a build-up of potential tax liability is virtually inevitable.

A well-advised farmer would often expect to be able to spread this potential tax liability over a number of years or, as will be explained in a subsequent article, to pass it on to the next generation. However, various events may cause or force a disposal of all or a substantial part of the taxpayer's livestock within a short space of time: in particular, within one financial year. In these circumstances, the farmer's income would be unusually high, and his tax liability would crystallise almost all at once. Accordingly, the Act provides for spreading this unusually high income forwards or backwards into different tax years, the exact provisions varying according to the different factors that cause the disposal of the livestock. The circumstances covered include: retirement (s 93 (4)); destruction of diseased animals, where the consequent payment of compensation is assessable (s 92); sale of stock, or inability immediately to replace stock, as a result of fire, flood, adverse weather, or the loss of farmland through the expiry of a lease or a taking by the Crown or a local authority (s 94); sale of stock by a sharemilker, in order to raise money to buy his own farm (s 95); and, simply, sale of "a substantial part of the livestock of a farming business" (s 93).

Finally, it should be mentioned that the standard value of livestock may be adjusted with the concurrence of the Commissioner to smooth the income of a farmer at the beginning of his

farming operations, as well as on disposal of stock. If a farmer were to purchase all his livestock and write it all down to modest standard values in the first year of business, his resulting deductions would be unlikely to be as much benefit to him as a similar write-down in some later year, when his marginal tax rate had increased. The write-down might even cause a loss for tax purposes in the first year, causing the farmer also to lose the benefit of his rebates and special exemptions. Indeed, even if his income remains static, the farmer will be better off if he can spread the write-down evenly over several years. This practice is in fact permitted by the Commissioner, and farmers commencing business are usually well advised to reduce the standard value of their livestock steadily over three years, the length of time allowed. The three year period need not commence immediately the stock is purchased, but may itself be delayed for up to three years, though once the write-down has started the three years must be consecutive. This somewhat elaborate arrangement results from rulings by the Commissioner pursuant to the requirement of s 86 (2) of the Act that a change in standard values must be "with the concurrence of the Commissioner".

MARRIAGE — A STOCK EXCHANGE?

Penny Fenwick is an Assistant Lecturer in Sociology at the University of Canterbury and teaches courses in social inequalities; social theory; the women's movement and marriage and the family. She is active in the feminist movement, especially concerned with women's health and fertility control. She is particularly involved in establishing the Womens' Self Centre for preventive mental health in Christchurch and in the abortion movement there. She is also Projects Officer for the Christchurch branch of the Society for Research on Women. This paper was presented at the 1978 New Zealand Law Conference.

On a recent television programme *(a)* the legal profession was soundly berated by some members of the public for its involvement in marriage breakdown and it was asserted, for instance, that the "legal profession makes a circus out of the family". In particular it was argued that it was humiliating for the family to have its personal problems aired in public and it was seriously questioned whether the adversary system of the Courts is a suitable venue for such deliberations. It was evident to many speakers that magistrates and solicitors alike were ill-equipped to deal with the problems of marriage breakdown – problems for which they are increasingly called upon for advice. Legislation currently before Parliament introduced by Mr J K McLay M P seeks to remove the adversary situation from "post-marital" arrangements and put the Courts at the end of the line following counselling rather than at the beginning as at present.

Yet while one MP is involved in introducing such a forward thinking measure that many would see as long overdue, other MP's bemoan the "breakdown of the family unit", talk in punitive terms of the need to strengthen the family unit and act in a similarly punitive manner.

All that can be said with certainty is that with marriage and its dissolution, as with so many other social issues, a great deal of confusion and misinformation besets not only the public, the legal profession (and other professions involved), but also Members of Parliament. When the latter enact social legislation on the basis of what can be described as misinformation at best and prejudice at worst, as they have been doing with alarming frequency over the last two years *(b)*, the result is a deplorable one.

It was suggested by some members of the panel in the television programme that solicitors themselves should be trained in counselling on marriage breakdown. While a more feasible scheme might be education on the nature and availability of other suitable helping professions, it must be added, at once that such counselling agencies are already overloaded, and preliminary counselling at least seems likely to remain the duty of solicitors for some time. Thus what is vitally important for members of the legal profession at present is some background in and understanding of not only the social as opposed to legal and quasi-psychological factors underlying marriage breakdown, but also those social expectations surrounding the institution of marriage itself. Such an under-

(a) After Ten, Television One, 3 November 1977, *Marriage Breakdown.*

(b) Here I would instance; the legislation based on the Report of the Royal Commission on Contraception, Sterilisation and Abortion; the changes in benefit following the *Report of the Domestic Purposes Benefit Review Committee;* and the removal of "de facto" marriage from coverage by the Human Rights Commission Act 1977 as three notable examples.

standing would do much to aid the solicitor in dealing more effectively with the present situation and in formulating her/his role for the future in the matter of marriage.

It is the purpose of this paper to give at least the basics of such an understanding and to indicate the appropriate avenues for further information. I see it as my brief to provide not only an overview of the assumptions lying behind marriage, but also to give an indication of how matters relating to divorce law, child custody, maintenance etc are derived from these, as well as the changes occurring in both of these areas. In this regard I do not intend to provide specific recommendations for changes in legal procedure, but rather a general framework in which the profession itself might initiate such changes.

I have entitled the paper: Marriage – A Stock Exchange? because that to me encapsulates both society's present assumptions about marriage, the major features of marriage and the changes that are taking place in the marriage institution. We have traditionally spoken of the "marriage market", without realising how much truth lay behind that appellation. Marriage is indeed a market with rates of exchange which fluctuate according to the social climate and like Wall Street it would seem to be prey to wildfire rumours about the imminent collapse of the market. As we have already seen some politicians of late have been excellent fire fanners. To really understand what is happening, like the rational, calculating investor we need to know the reality of the market's workings. On investigation we find the "stock" to have a triple meaning in the marriage market. First, "stock" is taken to mean common – so *common,* in fact, that for most people "marriage is natural, inevitable, and lifelong" while divorce is an unfortunate, if not wicked occurrence. Marriage is so common it needs no investigation. Marriage is good, divorce is bad, and ipso facto we should be encouraging marriage and preventing divorce. It's as simple as that. Second, marriage "stock" is very much concerned with economics, or more particularly *property* – the heart of the market, and the place where the legal profession has tended to be most involved. Just as all marriages are concerned with the acquisition of property, so too is marriage breakdown concerned with the dissolution of that property. Third, marriage stock is of course the *progeny* or offspring of the marriage – the lineage as it used to be called. Here again the legal profession has been closely involved with paternity, custody, maintenance claims etc. I want to use each of these three meanings in turn as the framework of the paper, but before embarking on this there is one over-riding point that needs to be made. The act of marriage sets up an unequal power relationship between the husband and the wife, and this power imbalance underlays much of what will be discussed in this paper. What we have today are patriarchal marriages and patriarchal marriages and patriarchal families and many of the present changes hinge on reactions against this feature of marriage.

Marriage – Stock – Common

The overall point to be made in investigating the commonality of marriage and the false assumptions and actions deriving from this is that marriages are not made in heaven, they are made here on earth and what is considered a "marriage" varies enormously across cultures. That said, the important rider that must immediately be inserted is that there are certain common patterns or components of marriage across these cultures and these relate very closely to our other meanings of "stock" – economic arrangements; wife's dependency; and concern for legitimate offspring. From this some people might argue support for our frequent assumption that at least if marriages are not made in heaven they are "natural". But these common elements are social not natural – they are themes which run through marriage cross-culturally but take different forms in different societies.

Commentators on marriage especially those whose background is counselling have gone some way recently in identifying the social nature of marriage in that they identify changes in the marriage form at different points in the development of Western society. Warwick Hartin *(c)* argues, for instance, that marriage in agricultural society was "maternal" (does he mean matriarchal?;) that the plough led to the development of the patriarchy; and that egalitarian marriage has become increasingly common in industrial society, until today we have "companionship" marriage. He goes on to argue that we are still in the process of changing from "traditional" (whatever that may be) marriage patterns to "companionship" marriage and the present high divorce rates are related to our being in this state of flux. Mervyn Cadwallader *(d)* was saying the same thing when he wrote,

> "The truth as I see it is that contemporary marriage is a wretched institution... The purposes of marriage have changed radically; yet we cling desperately to the outmoded structures of the past.... The basic structure of Western marriage is never questioned, al-

(c) Warwick Hartin, *Divorce Dilemma: A Guide to Divorcing People,* Melbourne, Hill of Content, 1977.

(d) Mervyn Cadwallader in *The Atlantic,* November 1966, pp 62–66.

ternatives are not proposed or discussed... What do we do, what can we do about this wretched and disappointing institution?"

But for both the counsellor Hartin and the sociologist Cadwallader there are just as many unspoken assumptions lying behind their arguments as those of the public, the legal profession and MPs and these merit closer scrutiny. As with many members of the public they have this image of the valhalla of the past where marriages were wonderful, never ended in divorce, and everyone lived in supportive extended families. Is that indeed the case? Has something really gone rotten with the state of marriage and turned it into a "wretched institution"? Let us look at both the historical information we have and at present statistics to test these assumptions.

One of society's biggest assumptions about marriage is that it is a life-long commitment, "till death us do part". How realistic is this today and how true a reflection of our supposedly golden past is it? I think we need to re-evaluate this vision of history in the light of evidence presented by Peter Laslett *(e)*, among others. It is true that in the pre-twentieth Century divorce was unknown for all but the nobility, but Laslett points out, "Consensual unions between partners indissolubly married to other persons may well have been fairly common" *(f)*. Furthermore, Laslett *(g)* argues that, "It is simply untrue as far as we can tell, that there was ever a time or place when the complex (ie, extended) family was the universal background to the ordinary lives of ordinary people". What he calls the "simple family household" and what we call the nuclear family prevailed across much of the Continent and England from as far back as the sixteenth century. Taking this re-evaluation of history a step further, and using Laslett's data for the two English parishes of Clayworth and Cogenhoe, we find not only that "by far and away the most usual household was the household we are now accustomed to – man, wife and children", *(h)* but also that while 68 percent of heads of households in Clayworth in 1976 were married couples (whether legal or consensual) 25 percent were either widows or widowers and the figures for 1688 were 70 percent and 28 percent respectively *(i)*. In the light of this evidence of 20–30 percent of households being under the control of solo parents in the late seventeenth century I think we can put to rest our fears about the social disintegration of our own "fractured families". Clearly marriages did not last for ever in our glorious past. They were very frequently broken by parting or death and solo parent households were commonplace.

To cross three centuries in one leap – what do we know about marriage and divorce in New Zealand today? From some rather dry and at times unsophisticated figures *(j)* we can derive the major trends over the last twenty years. As far as the marriage rate itself is concerned, this climbed steadily from 8.03 per 1,000 mean population in 1956 to reach a peak in 1971 of 9.50 from where it has declined fairly steeply over the last five years to 7.74 in 1976 (provisional). This may reflect an increasing trend for people not to marry as seems to be the case in the United States where the percentage of women aged 20–24 who were unmarried increased from 28 percent – 40 percent between 1970 and 1975 and the number of people in the 25–34 age group who were never married increased by 50 percent in the same period *(h)*. It is possible too that this trend reflects a growing tendency to delay marriage until the late twenties, possibly due to improved contraceptive services for the unmarried, and this supposition is given some weight by the trends in marriage age. The average age at marriage for both men and women has declined only a little in the last 20 years from 25.59 in 1956 to 24.16 in 1975 for women and from 29.07 to 27.05 for men. (This includes all marriages, while those for the never married declined from 23.07 to 21.59 and 26.65 to 24.21 respectively). in fact the 1975 figures show a slight increase in average age at marriage for the never married group, both male and female, but it is too soon to say whether this is a continuing trend.

More support, however, for the statement that people are beginning to marry later is provided by the statistics for the number of minors marrying. Those minors married in any given year increased dramatically for both sexes between 1961 and 1971, from 4,954 to 8,717 for females and from 983 to 2,461 for males. Since 1971, however, that number has declined steadily such that in 1975 it was 7,718 for women and 1,880 for men. The number of minors marrying as a percentage of the total number of each sex marrying follows the same trend.

(e) Peter Laslett, *Family Life and Illicit Love in Earlier Generations*, 1977, Cambridge University Press.

(f) Ibid, p 121.

(g) Peter Laslett and Richard Wall (eds), *Household and Family in Past Time*, 1972, Cambridge University Press, p xi.

(h) Laslett, 1977, op cit, p 60.

(i) Ibid, p 87.

(j) All New Zealand figures used in this paper are derived from: Department of Statistics Statistical Bulletin, Miscellaneous Series, No 1, *New Zealand Males and Females: A Statistical Comparison*, September 1977.

(k) United States Bureau of the Census, January 1976.

In summary we could say that while a high proportion of people still marry, the marriage rate is dropping steadily. Brides and grooms have become only a little younger over the last 20 years and there seems to be a trend developing for them to become older again. Thus our current fears about the juvenility of brides and grooms and hence their propensity for marriage breakdown would have been better founded a decade ago as the number of minors marrying has decreased steadily over the last five years.

Turning now to the divorce and separation statistics we find, as we would expect, that the number of decrees absolute granted in the last 20 years per 1,000 marriages that year has more than doubled from 82.7 in 1956 to 194.1 in 1975 (provisional) and the period 1973–75 has shown the most marked increase, from 137.6 in 1973 to 194.1 in 1975. Immediately it must be noted that there were several changes in divorce proceedings during this latter period which contributed to the increase, clearing the back-log and speeding up divorces, as it were. From this point alone we cannot say whether this will be a sustained trend. There are, however, much more serious criticisms that can be laid at the door of this ill-conceived statistic, such that some people have argued it should not even be computed. Sociologist David Swain has probably been most vocal in his opposition to it, for, as he recently pointed out *(l)*, to claim as the present Minister of Social Welfare has done on a number of occasions that the family is disintegrating and that "one marriage in three ends in divorce these days" on the basis of these statistics is highly inaccurate and a ludicrous base for social policy. Computing divorce rates against the marriage rates for the year of the divorce is a useless procedure. Instead divorces must be computed against marriage rates for the cohort in question and doing so, we find that the current figure is near 1 in 10 marriages ending in divorce. The divorce rate per 1,000 women married in 1946 was 5.6; for women married in 1975, 6.6 and for those married between 1971 and 1975, 5.7. As Swain says, "hardly a dramatic increase" *(m)*.

As far as the distribution of decrees absolute by the duration of the marriage is concerned we find a slight increase over the last 20 years in the percentage of divorces granted for marriages under 4 years of duration. This may be almost completely due to changes in the speed of proceedings referred to above. The vast majority of divorces are still granted to marriages of 5 years or more duration with the modal category remaining 5–9 years duration for the last 20 years. Remembering this is the duration of the marriage on the granting of the decree absolute we can say that the vast majority of marriages will break up within 10 years of the marriage if they are going to break up at all. A high proportion of these people so divorced will then either remarry or form stable de facto relationships if they have not already done so. The incidence of de facto relationships in New Zealand would seem to be relatively high. In a recent sample *(n)* of ex-nuptial births 25 percent were to women in such de facto relationships. Now that separation and divorce proceedings have been speeded up we may find that more of these de facto relationships will become legal marriages. I would hazard however that at least some of these relationships are non-marriages by design rather than "de facto" and, being part of the general trend towards alternative living arrangements, will remain and may increase in number.

In looking at the percentage of decrees absolute granted by the ages of wife and husband at the time of the marriage over the last twenty years we find a substantial increase in the percentages of those being awarded to women under 20 years of age at the time of marriage, from 26.1 percent in 1956 to 41.3 percent in 1975 (provisional). The percentage for all other age groups has declined such that in 1975 84.1 percent (provisional) of decrees were granted to women aged 24 and under at the time of marriage. For men we find an increase over the last 20 years in the percentage granted to those in both the under twenty and the 20–24 age groups at the time of marriage, with 65.1 percent of divorces being granted to men aged 24 or under on marriage.

For separations the important statistic to note is that while the vast proportion of separation orders are applied for by women and the number of orders overall has increased dramatically in the last five years (from 448 in 1970 to 1,922 in 1975), the number applied for by men has increased even more dramatically (from 4 in 1970 to 82 in 1975). Similarly the total number of maintenance orders made has increased dramatically from 597 in 1970 to 2,185 in 1975 and the number of custody orders made in the same period from 290 to 1,814.

Curiously in the last five years there has been only one maintenance order laid against a wife for the support of her husband alone (in 1972). How-

(l) David Swain, *The New Zealand Family: What do we Think we know*, Contemporary Issues and Relevant Research, A Joint Discussion Paper (with Juliet Elworthy) prepared for the 1977 New Zealand Sociological Association Conference, Christchurch, 25–27 November.

(m) Ibid, p 4.

(n) Department of Social Welfare, *Ex-Nuptial Children and their Parents*, Research Monograph No 2, 1976.

ever, in both 1974 and 1975 there were three orders laid against wives for support of husband and children, and none between 1970 and 1974 and this too may indicate a tiny, but developing trend.

In taking an overview of some of the historical background and pertinent figures relating to marriage, divorce and maintenance we have been able to substantiate only a few of the fears currently held about marriage and its "disintegration". It is true that the raw divorce rate and the number of court orders for separation and maintenance have increased dramatically over the last five years. We have also seen however, that the high point of juvenile marriages was some 6–10 years ago and I wonder if we are not now reaping the results of this peaking in separation and divorce? We should keep in mind too that changes in our legal proceedings relating to divorce have not only speeded up the process but led to the final resolution by divorce of some marriages which may in the past have remained unresolved for much longer, if not permanently.

Statistically, the future would seem to hold a downturn in the marriage rate (which must always be weighed against the changes in the age structure of our population anyway), a trend to first marriage at an older age and a potential slackening of the divorce and separation order rates as the backlog of unhappy and unresolved marriages is cleared. I would suggest that such a slackening is some way in the future yet, for both social expectations and people's expectations are still based very much on the traditional model and while one partner in a marriage adopts a conservative line against the other's desire for change then friction is the inevitable result.

New Zealand marriage and their resolution would seem to still follow very much the "traditional" model, and that said, I would like to move on to discussing our second meaning of the marriage "stock" – economics.

Marriage – Stock – Property

Many people would be offended to hear that marriages as far as society is concerned are not really about love or companionship or even erotic experiences, rather they are very cold, calculating and functional aspects of society. The love and eroticism that these people would say they feel is just socially induced bait. If people are really honest, however, they will admit that their reason for marriage was a little love tempered with a lot of circumstance and social (familial, peer etc) pressure. As one woman put it; "This is what women did – grew up and married. I felt that if I let him go no one else would have me".

For every piece of bait there is a trap which goes with it and that trap here is not so much marriage itself but our expectations of marriage and, as we shall see, it is the unreal expectations that we have that make marriage a trap. To give a specific example – as one man said his expectations were;

> "To have my tea cooked for me, play with the kids, do a bit of work in the shed or garden. I thought a man had his jobs to do and a woman had hers and there would be some jobs we would do together".

Consider the strain on that marriage if that man were to find, as is now quite possible, that his wife too has a career, does not intend to give it up on marriage, perhaps does not even want children, and assumes therefore that they will live in a low-maintenance flat where they will share the housework and cooking? Unmet and unrealistic expectations can be just as prevalent on the wife's part, of course, as in some women's automatic assumption that their husband will support them financially.

From the expectations of the man quoted above we can see the implicit economic relationship of marriage and the patriarchal power relationship derived from that – he the "breadwinner" and decision-maker; she the housewife and submissive dependant. There are indeed very close and necessary connections between the marriage unit and the economic forces of any society and each reinforces the other. In our society, for instance, we tend to say that the housewife does not work, by which we mean that she does not get paid wages as her husband does for his labour in the public employment world. That the housewife does labour is indisputable *(o)*. Our denial of the value of the housewife's work obscures her very necessary part in our economy, for it is she who not only bears and rears the workers of tomorrow but also sustains the workers of today in a fit and healthy condition to enable them to so work. Her increasing role in the purchase of consumer goods and her voluntary (unpaid) role in many social services are further facets of her indispensable contribution to our economy *(p)*.

What has this to do with marriage and its break up? Effectively such a sex role stereotyping

(o) "Today it has been calculated in Sweden that 2,340 million hours a year are spent by women in housework compared with 1,290 million hours in industry. The Chase Manhattan Bank estimated a woman's overall working hours as averaging 99.6 per week". Juliet Mitchell, *Women – The Longest Revolution*, New England, Free Press, p 7.

(p) On this topic see, for instance, John K Galbraith's article, "How the Economy Hangs on Her Apron Strings", Ms magazine, May 1974, pp 74–77, 112.

means that the wife is often totally financially dependent on the husband and generally he, by dint of such financial power, controls the family decision-making. Studies have shown *(q)* that when the wife also works a more equitable arrangement is reached vis-a-vis decision-making within the marriage, although there are indications that the wife's working needs to be combined with a change of attitudes by both partners to "women's place" before this is totally effective *(r)*.

For many women in the marriage situation, psychological dependence grows with financial dependence. If the marriage becomes intolerable for her both dependences find her lacking in the autonomy and self-identity (in many cases even sense of self-worth) necessary for her to either take steps to rectify the situation or leave. If, on the other hand, and as is more common, her husband leaves her her dependence again leaves her ill-equipped to cope. Put very crudely the economic exchange encouraged between marriage partners is his money for her cooking, cleaning and sexual favours. Small wonder that some feminists have dubbed this a state of legalised prostitution.

On the break-up of a marriage society has generally argued that men ought to go on supporting their wives especially where there are children from the marriage. It would be fair to say that men have been reluctant to do so, as witnessed by the number of maintenance orders brought against them by women and the number of men who default on payments *(s)*. Not only do men acquire other commitments (de facto wives in particular) but they resent also the loss of the benefits received in the previous exchange – cooking, cleaning and sexual favours, which they now suspect may be going to another man, who therefore ought to be supporting the woman. In this regard society itself of late has adopted the attitude of the cuckolded husband in cutting the Domestic Purposes Benefit from women accused of living in such de facto relationships.

For most women maintenance is a very uncertain income but, especially for those with young children working is also very problematic. Women on average have low educational qualifications, thus earn low wages and have severe child care problems. Added to this marriage breakdown is a traumatic time psychologically and logistically and financial problems only compound this, leaving lasting scars on the relationships and the individuals involved.

Other than maintenance the second economic arrangement generally made on the dissolution of marriage is the dividing of matrimonial property, and women in the past have tended to do rather badly from this. The Matrimonial Property Act of 1976 is forward-thinking in that it recognises the reality of the wife's contribution to the maintenance of the property as equal to the husband's financial contribution, though in many situations now where wives are making both financial contributions through earnings and still doing all household tasks *(t)* this may be less than equitable.

Solicitors are currently most involved with those aspects of marriage which have to do with economics (property and maintenance payments) but at present they tend to approach them with a legalistic, adversary model rather than a social, conciliatory model. If solicitors are said to do the best possible for their clients why is it that many women feel badly done by their solicitors? Could it be because most solicitors are men and bring to that adversary model a male view of the world? Do they tend to operate in terms of the submissive dependent female (with children in tow) stereotype and the male, aggressive man-about-town stereotype? Do they still operate on the sexual favours for money model? What do they really do to counteract the powerless situation in which women find themselves? In dealing with married couples generally, not just at the point of breakdown, how many solicitors still assume that the husband is the only one making both the financial contributions to and the decisions concerning matrimonial property? And what of the children?

Marriage – Stock – Lineage

The days of concern about "continuing the line" are generally over for most of us. With them has gone the Victorian attitude that the children were the property of the father and in reverse women are now awarded custody in most cases of marriage breakdown. It is still true to say, however, that children "are treated as negotiable debris from the marriage, not much different from the hi-fi set or the family car". Not only are chil-

(q) See for instance, Constantina Safilios-Rothschild, "The Study of Family Power Structure: A Review", *Journal of Marriage and the Family*, 32, November 1970, pp 539–552.

(r) Dair L Gillespie, "Who Has the Power? The Marital Struggle", *Journal of Marriage and the Family*, 33, August 1971, pp 445–458.

(s) See, for instance, *Solo Mothers*, Society for Research on Women, 1975, p 53, which shows that of the sample of 300 women 90 who should have been receiving maintenance were not.

(t) *Urban Women*, Society for Research on Women in New Zealand, 1972 shows that 62 percent of women did not consider that they received help from anyone with the housework (p 22).

dren used as the stakes for financial negotiation but very often also as the weapons of psychological manipulation. Whether solicitors realise it or not, and I suspect they are often willing parties to it under the adversary model, couples use divorce, and maintenance orders to "get at" one another. Very many couples later regret this for their relationship disintegrates into one of life-long bitterness.

While many men regret that they see so little of the children for whom they are expected to pay maintenance, their ex-wives are often bitter about the "fun-daddy" relationship that the father can adopt with his children. He can indulge them all Saturday afternoon and then hand them back to their mother to be disciplined, cleaned and cared for all week, often on a meagre budget. Some would argue that the week (or month) about system is psychologically damaging for the child, but I have seen it work well on a number of occasions. One of its biggest advantages is that it preserves an equitable relationship between the child and both parents, preventing the mother from becoming the drudge and ogre and the father the indulger.

There seems to be a trend now for custody to be more frequently awarded to the father than was the case in the past though I have no figures to prove this. One disturbing trend that does seem to be emerging is for custody to be granted to the mother only as long as she adopts the dependent female stereotype. Custody is not so readily awarded to women who show independence and autonomy in their life-style as witnessed by a number of recent cases in which women who were feminist and/or lesbian have lost custody of their children. What are solicitors doing to ensure the issue of custody is removed from the adversary situation of the Courts where such evidence can be used against women?

What are they doing to ensure children themselves are given rights in this situation?

Conclusion

I believe we are still in a period of great reassessment of our attitudes to and expectations of marriage. Above all we should not view this reassessment with fear and suspicion but with optimism for, "typically individuals in our society do not divorce because marriage has become unimportant to them but because it has become so important that they have no tolerance for the less than completely successful marital arrangement they have contracted with the individual in question". We should not bewail the couple who divorce, but aid their parting. We should save our tears for the couple who "stayed together because of the children".

That said, we have a great deal yet to do to smooth the process of marital dissolution. Above all we must get rid of the adversary system, remove the castigation and blame, and the financial and psychological manipulation of parents and children that riddles the present situation. To do this we need to take the mechanism for the dissolution of marriage out of the courts altogether and institute something similar to the Family Court (if we must call it that) used in Canada.

More fundamentally, however, not only those in the legal profession but society in general need to change their attitudes and expectations of marriage profoundly. For a start we need to begin accepting a plurality of norms for living arrangements. While we know that at present the majority of people are still enthusiastic about the marriage institution, they have a willingness to accept some modifications *(u)*. Our first step should be to place "de facto" relationships on an equal footing with legal marriages. At present women in particular are seriously disadvantaged as far as custody and property divisions are concerned if their marriage is not legally recognised. To argue as many do that this would be denying the importance of legal marriage, and to advocate a punitive attitude to de facto relationships lest they become attractive to too many people seems to me entirely negative.

Overall society has adopted too negative and punitive an attitude to both marriage break-up and alternative living arrangements. Surely it is far better to *encourage* people to want to remain in and work at a relationship rather than to *force* them to do so? Surely we should be working towards a situation in which "marriage" however we want to define the term (be it a legal contract or not) is a relationship of mutual love and support between autonomous adults which may or may not (by the choice of the people concerned) produce children whose rights as autonomous individuals are equally respected. In such a situation any person may have one or more "marriages" in a life-time, untraumatised by the wrath of the Courts or the Church.

We need to make many changes in our society before such relationships are commonplace – in particular we need to elevate the position of women from one of dependence to one of autonomy; we need to make every child a truly wanted child by providing safe, readily available contraception and abortion and we need to do much more to respect the rights of those children once they are born. In fact we need to work towards the stage where marriage is no longer a "market" and "stock exchange" but a true companionship be-

(u) See for instance, Keith Melville, *Marriage and Family Today*, Random House, New York, 1977.

tween equals, in which our society's major interest is not control and restriction but freedom and responsibility.

As yet there is little evidence that the legal profession itself endorses such a plurality of norms regarding "marriage". While solicitors would argue that they do the best possible for their clients, too often they accept the strictures of our present laws in refusing, for instance, to recognise communal property arrangements; the wills of gay couples; "contract" marriages etc. If the legal profession wants to remain so vitally involved in these social contracts (as I am sure it does) does it not owe it to its clients to work for more suitable laws rather than force its clients to accept the present strictures? In talking about the place of the legal profession in marriage and marriage break-down we are talking about more than whether the adversary on conciliatory model is more appropriate. Surely we are talking about whether solicitors are prepared to continue acting as agents of social control?

CONSTITUTIONAL LAW

THE COOK ISLANDS ELECTION PETITION CASES

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The determination of Mr Justice Donne in the Cook Islands Election Petition cases of 24 July 1978 deserve careful consideration, not only in the Cook Islands and New Zealand but also in all parliamentary democracies. The learned judge has introduced a revolutionary theory of corrupt electoral practices, relied on the precatory words of the Bill of Rights of 1688 that "election of members of Parliament ought to be free" and, for the first time in known parliamentary history, removed a government by approving a petition. The Chief Justice heard and granted relief in 15 separate petitions, being Misc Nos 18-32/78. Twelve petitions were consolidated and heard together as *Hosking v Browne, Henry and others, Short v Matapo and others,* and *Ngatuaine v Mareiti and others,* concerning the three Rarotongan constituencies, and three petitions were heard as *Pokoati v Tetava* (18-20/78) regarding the single-seat constituency of Mitiaro. The following note introduces the constitutional background of of the Cook Islands and outlines the ratio of the determinations. More precise analysis must await the fullness of time.

Constitutional development of the Cook Islands

The Cook Islands had become a British Protectorate by 1891 – but not a possession, territory or colony. Authorities disagree as to whether the Protectorate was established (1) by the "temporary" proclamation of the British Consul at Rarotonga, Richard Exham, in September of 1888, or (2) by the confirming proclamation of naval Captain Bourke of HMS *Hyacinth* in October 1888 (prima facie, Captain Bourke purported to annex the islands, rather than accept a protectorate), or (3) by the clarifying proclamation of Lord Onslow, Governor of New Zealand, in April 1891. Further confusion arose because Captain Bourke's purported annexation – which had exceeded his instructions – was ratified only in respect of the island of Aitutaki, which was mistakenly thought to have an excellent harbour. See Skegg, *Constitutional Law Relating to the Cook Islands 1888 1901* (unpublished dissertation, held at Davis Law Library, University of Auckland).

The Cook Islands Protectorate, together with the annexed island territory of Aitutaki, constituted the Cook Islands Federation, which remained in existence from 1891 until 1901. A General Council of the Federation met in June 1891 and adopted "A Law to Provide for the Good Government of the Cook Islands." This "Law", which became known as the Constitution Act 1891, established a Parliament for the Cook Islands, to be responsible for the "peace, order, and good government of the Federation", and to undertake "all good works which cannot be done by the people of any island separately".

See Skegg op cit p 35.

In October of 1900, Governor Lord Ranfurly of New Zealand steamed out to the Cooks to accept the cession of, or to annex, all of the Cook Islands, and to terminate the Protectorate. With respect to Aitutaki, his action was probably superfluous, but Ranfurly found that "there was no official record in the islands" of the prior annexation.

Immediately before Ranfurly's departure from New Zealand, the House of Representatives (29 September 1900) and the Legislative Council (28 September 1900) had resolved that it would be in the best interests of New Zealand to annex the Cook Islands:1900 JHR 299; 1900 JLC 131.

The Imperial Government had agreed to this

annexation, possibly to placate the frustrated Premier Richard Seddon, who had failed to gain imperial sway (in right of New Zealand) over Fiji, as well as Hawaii and Samoa. See Sinclair, *A History of New Zealand*, pp 208-220 and Burdon, *King Dick: A Biography of Richard John Seddon*, Chapter 11; and see also the extensive parliamentary debate of 28 September 1900, 114 NZPD 387-426 where MHR Atkinson said of the proposal:

> "Now the Right Honourable the Premier, of course is responsible for this as his own particular 'fad'. He has surveyed the world from China to Peru, he has found it all to be pretty good, but thinks it would be a good deal better if it were under his own immediate sway. His last ambition is to be the uncrowned King of the Cannibal Islands." (144 NZPD 414.)

The Cook Islands subsequently became part of New Zealand on 11 June 1901, by proclamation of Governor Ranfurly: 1901 *New Zealand Gazette* (vol 1) 1307. This proclamation was made under authority of an Imperial Order in Council dated 13 May 1901 (1901 *NZ Gazette* (vol 1) 1307-1308) which in turn had been made under the authority of the Colonial Boundaries Act 1895 (UK). The colonial resolution of September 1900 had been in compliance with the terms of that Imperial act.

A Resident Commissioner was given executive power in the islands by the Cook and other Islands Government Act of 1901 (NZ) and the Cook Islands Government Act of 1908 (NZ) and Island Councils were given limited legislative powers. A more detailed code, of 690 sections, was passed by the New Zealand General Assembly in 1915, which provided for the appointment of a Minister and a Secretary of the Cook Islands (ss 5 and 6 of the Cook Islands Act 1915) and a Resident Commissioner (s 9). Islands Councils were given authority to pass ordinances for the peace order and good government of each island (s 70) but no such ordinance was to have effect until assented to by the Resident Commissioner or the Governor General (s 79). Much of this code is still in effect. See 1976 Statutes of New Zealand, vol 4, pp 3119-3255.

In 1964, New Zealand passed the Cook Islands Constitution Act, which had four important components:

(1) the Cook Islands were declared to be self-governing (s 3);
(2) the Constitution set out in the Schedule to the Act was declared to be the supreme law of the Cook Islands (s 4);
(3) external affairs and defence were reserved for New Zealand (s 5); and
(4) Cook Islanders retained New Zealand citizenship (s 6). (Cook Islanders thereby have an unfettered right to enter New Zealand, and by some estimates, half, or more, of a Cook Islands population of 40,000 (or more) are in New Zealand. Ironically, New Zealanders have no such freedom to enter the Cook Islands: see the Entry, Residence, and Departure Act, passed by the Legislative Assembly in 1971-72.)

The Constitution of 1964

The Constitution, which came into force on 4 August 1965, by SR 1965/128 (NZ), establishes a Westminster model parliamentary system, somewhat modified. Her Majesty the Queen in right of New Zealand is the Head of State, as represented by a High Commissioner or a Deputy High Commissioner, to be appointed by the Governor-General of New Zealand: Articles 2 and 3. In the absence of a High Commissioner and a Deputy, his functions are to be performed by the Chief Justice of the Cook Islands (Article 7). (Article 48 provides that the Chief judicial officer is the "Chief Judge", but by a constitutional amendment of 10 October 1975, all references to that official are amended to read "Chief Justice". At all times relevant to the instant case, the Chief Justice has in fact acted as head of state.) A premier is appointed by the acting head of state as that member of the Legislative Assembly who commands a majority of the members of that Assembly, and 3, 4 or 5 other members of the Assembly are appointed to Cabinet (Article 13).

Legislative authority is given to the aforementioned Assembly, to make laws for the "peace, order and good government" of the Cooks, including laws having extra-territorial operation: Article 39. Article 41 provides for a constitutional amendment by two-thirds of the Assembly, but the terms of the Cook Islands Constitution Act 1964 (NZ) (discussed supra) and the constitutional status of the Queen shall not be affected unless there is a two-thirds vote of both the Assembly and the general electorate: Article 41 (2). Article 37 (4) originally provided for a three-year term for the Assembly, but a constitutional amendment of 25 March 1969, extended the life of a legislature to four years, unless sooner dissolved.

There is no Bill of Rights component as such in the Constitution, although Article 27 (2) protects the secret ballot and universal suffrage, and Article 40 prohibits compulsory acquisition of land without compensation. In addition, the Bill of Rights of 1688 is part of the law of the Cooks: sees s 615 of the Cook Islands Act 1915 (NZ) and Article 77 of the Constitution. An appointed House of Arikis has the appearance of an upper house, but it has no legislative function, and may

consider only such matters as are submitted to it by the Legislative Assembly: Articles 8 and 9. The Legislature of the Cook Islands, therefore, is unicameral.

Article 46 declares that statutes of New Zealand passed after the Constitution comes into force are not to apply to the Cook Islands, unless the specific New Zealand act has been requested and consented to by the Cook Islands. Article 46 is thereby analogous to Section 4 of the Statute of Westminster – Are the Cook Islands to New Zealand as New Zealand is to the United Kingdom? – but Article 46 is more carefully drafted. Not only must the New Zealand Act in question declare the request and consent, but also that request and consent must, in fact, be given. Furthermore, unlike Section 4, Article 46 describes who, or what institution, is to give the request and consent. See Cook Islands Amendment Acts of 1966 (s 5) and 1967 (s 7) (NZ). If New Zealand repeals legislation operative in the Cooks, without that request and consent, the repeal cannot take effect there, although the law in question becomes a shadowy wraith with no body in the statute books. Compare the Fugitive Offenders Act 1881 (UK) and its New Zealand operation in *Re Ashman and Best*, noted at (1976) 2 NZ Recent Law 178 and [1976] NZLJ 458.

Judicial authority is given to the Chief Justice, sitting in the High Court: Articles 47 and 48, as amended. Appeals may lie to the Supreme Court of New Zealand, as the Court of last resort, in constitutional cases, serious criminal cases, civil cases with $400 or more in dispute, or any other case with the leave of the High Court: Article 61 (1). In addition, the Supreme Court of New Zealand may grant special leave, in any case, notwithstanding the above limitations: Article 61 (2). Presumably, any law which purported to cut off this special leave to appeal would be ultra vires the Legislative Assembly: cf *Nadan v The King* [1926] AC 482. With respect to the instant case, section 82 of the Electoral Act, entitled "Determination by the High Court final", states that "Every determination or order by the Judge in respect of or in connection with an election petition shall be final." To the extent that the instant case is a determination of an Electoral Court, and not a judgment of the High Court, the special leave to appeal in Article 61 (2) would not be relevant. Mr Justice Donne would seem to have taken pains to use the word "Determination" instead of the word "Decision" or Judgment" at every opportunity.

The election of December 1974

The electoral problems of 1978, being "fly-in voters" from New Zealand, were foreshadowed in the election of 1974 and in litigation preceding that election. Section 37 of the Electoral Act 1966 restricts the exercise of the franchise to places in the geographical bounds of the constituency in which the vote is to be counted "and at no other place". The only exception to that rule are special voters who may, upon two weeks' prior application, cast a vote in some other Cook Islands constituency: s 52. Only persons physically present in the Cook Islands on polling day may vote. Cook Islanders living in New Zealand, but ordinarily resident in the Cook Islands, and qualified to vote there by Articles 27 and 28 of the Constitution, claimed that the Electoral Act unconstitutionally deprived them of their franchise. The High Court of the Cook Islands stated a case for determination by the Supreme Court of New Zealand, under s 156 of the Cook Islands Act 1915: *Maurangi v High Commissioner of the Cook Islands* [1975] 1 NZLR 557. Wild CJ, joined in a full court by McCarthy P and Richmond J, held that the constitutional right of "universal suffrage" in Article 27 (2) could not be read literally. Specifically, it did not mean that the electors could cast their vote at any place in the universe. The Electoral Act, it was held, did not deprive any New Zealand-dwelling Cook Islander of his right to vote – "it merely creates practical difficulties mainly of expense in the cost of travel." (p 562.) The Court concluded that the 888 persons ordinarily resident in the Cook Islands, but living in New Zealand, even though registered and enrolled for a Cook Islands constituency, has no constitutional right to cast an absentee ballot. Since the Electoral Act was amended in that regard between 1974 and 1978, it might be presumed that the victorious party of 1974, the Cook Islands Party (CIP), did not view the reservoir of votes in New Zealand as being sympathetic to their Government. It may have been decided that expense and administrative difficulty prohibited setting up absentee voting facilities in New Zealand, or the Government may have believed that people outside the islands on polling day did not deserve to vote.

Mitiaro

The Mitiaro petition, relating to the single-seat constituency on that island, was not concerned with the "fly-in" voters scheme perpetrated in Rarotonga. Instead, the petition alleged a more opportunistic, spontaneous corrupt practice.

A hurricane hit Mitiaro on Saturday, 25 February 1978, apparently with more force than was felt elsewhere in the Islands. Visiting the island by plane the next day, Sir Albert not only inspected storm damage and promised relief, but also, in effect, held a campaign rally. On Monday evening, 27 February, any Mitiaroans listening to the radio would have heard Sir Albert promising that David Tetava (the CIP candidate for Mitiaro) would bring food and relief to the island. Moving quickly,

Sir Albert had $1000 worth of food ordered from the Stores Controller of the Treasury on Tuesday 28 February. The requisitions were made out by the Minister of Finance (Mr GA Henry) and the Chief Hurricane Safety Officer, and the food was "to be forwarded to David Tetava – Mitiaro". The shipping costs were paid by the Cook Islands Government. On Wednesday, 1 March, the food was delivered personally by Tetava, ignoring ordinary island channels of distribution. The food parcels were marked with the name "David Tetava", and the CIP took credit for the delivery. Tetava also deceived the island residents by saying that Sir Albert and Lady Henry had donated $300 towards the cost of the food. This was a blatant lie.

The petitioners relied primarily on the corrupt practice of treating as set out in s 70 of the Electoral Act 1966 (CI), which might in substance be regarded as a type of bribery (s 69). The elements of treating were found to be:

(1) giving or providing food to the electors of Mitiaro
(2) for the purpose of procuring the respondent candidate's election or otherwise influencing the voters
(3) with a corrupt intent.

Establishing much of the ground for his subsequent determination of the Rarotonga petitions, the Judge noted that the standard of proof required in election proceedings is the civil standard of the balance of probabilities. In an apparent contradiction, however, the Judge then quoted from *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 at 258 that "the more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law." Donne CJ also accepted the submission of Mr Paul Temm, counsel for the petitioners, that if a corrupt practice was made out, the burden of showing that it was an inconsequential infraction rested with the respondents: *Islington, West Division Case Medhurt v Lough & Gasquest* (1901) 5 O'M & H 120; *Kensington North Parliamentary Election* [1960] 2 All ER 150 at 152. The Judge found, however, that no such proof by respondent was appropriate in this case.

With respect to the elements of the offence of treating, there was no doubt that Tetava had, in fact, provided food to the electors of Mitiaro, and he was bound even where the giving was by agency: *Bay of Islands Electoral Petition* (1915) 34 NZLR 578 at 585. The Judge then examined the respondent's purpose and the requisite corrupt intent simultaneously, as "the word [corrupt] adds little to the meaning of the section." Citing the *Wairau Election Petition* (1912) 31 NZLR 321, 326; *Cooper v Slade* (1858) 6 HL Cas 746; *Rogers On Elections* (20th ed) Vol II, 306 and Adams, *Criminal Law and Practice in New Zealand* (2nd ed) pp 234-235, the Judge found that respondent candidate's purpose was to procure corruptly his own election.

Accepting that the respondent may have had other motives as well (charity, humanitarian relief, and philanthropy), the Court determined that "political popularity and not charity" was the governing motive. *Rogers*, p 313. And see the *Wigan Case* (1881) 4 O'M & H 13, where Mr Justice Bowen discussed the distribution of relief to the poor at election time: "[It] is really not charity, but party feeling following in the step of charity wearing the dress of charity, and mimicking her gait." More recent cases have held that the corrupt purpose need not be dominant in a mixed motive case: *DPP v Luft* [1976] 2 All ER 569 at 574; and see 39 Modern LR 730.

Having clearly found the corrupt practice of treating, the Judge then dealt with the question of relief to the petitioners, once again laying the ground for his subsequent examination of the Mitiaro petition. The Judge began by describing the Electoral Act 1966 as "a 'slip-shod' enactment [which] harbours many ambiguities."

There are several categories of electoral improprieties, or crimes, possibly relevant to petitioners' relief:

(1) the serious offences of bribery (s 69), treating (s 70), undue influence (s 71), and personation (s 72), described as a corrupt practice and punished with a year's imprisonment by s 68;
(2) certain unintentional and procedural irregularities which, by s 78, are to be disregarded; and
(3) more serious irregularities, which are wilful, and which are punishable under s 80, by a fine the severity of which depends on whether the wilful irregularity materially affected the result or not.

These criminal penalties would only be relief to a petitioner if the winning (respondent) candidate was convicted of a corrupt practice: s 7 (1) (h). But in that case a by-election would be held, and the corrupt candidate could stand again, unless he was still in gaol 15 days before the closing of the electoral rolls: s 6; s 8 (b); s 22.

Donne CJ found a more efficacious remedy in s 79 (1) (again anticipating the Rarotonga determination): "the Judge shall determine whether, by reason of some irregularity that in his opinion materially affected the result of the election, the election is void; or whether the candidate whose election is complained of or any and what other candidate was duly elected." After an assiduous exegesis of the relevant passages, the Judge concluded

(1) that the first limb of s 79 (1) was not apposite to the instant proceedings because there were no procedural irregularities in the taking of the poll;
(2) that the second limb of s 79 (1) required neither a finding of a "material affect on the result" nor proof of any particular corrupt practice.

To that extent the Judge could declare any candidate elected (or not elected) "virtually upon any grounds that the Court thinks sufficient because there are no express words in the second part of s 79 (1) limiting the grounds for a determination that the successful candidate was not duly elected". With his next breath, Donne CJ limited the wide discretion which he had just conferred upon himself by saying that "the general words of the second part of s 79 (1) are not to be regarded as empty vessels into which the Court can pour any thing it wishes." The Judge then took as general common law background the precatory remarks of Article 8 of the Bill of Rights of 1688 "that election of members of parliament ought to be free", and the discussion of *Rogers* at pp 301-302 that ". . . at common law . . . an election is therefore avoided by general bribery." Finally, he discerned the fundamental purpose of the Electoral Act to be the securing of freedom of elections.

Remedies under s 79 (1) could therefore be granted

(1) in cases of a particular corrupt practice committed by the candidate or his agents;
(2) upon proof of general bribery or general treating even if not sheeted home to the respondent candidate;
(3) where the election was conducted so badly that it was not substantially in accordance with election law;
(4) where there is other serious misconduct or illegal practice, including violation of otherwise unrelated statutes which affect the election.

Much of the above might be considered obiter dicta since the Judge then relied only on the proven corrupt election practice of treating, and declared the Mitiaro election void on that count alone. The Chief Electoral Officer was directed to set in motion statutory procedures to hold a by-election in Mitiaro.

Rarotonga

Article 27 of the Constitution divides the island of Rarotonga into three electoral constituencies, being Te-au-o-Tonga, Takitumu, and Pauaikura, to return four, three, and two members respectively. Teariki Matenga, of the Takitumu Constituency, was the only Opposition candidate to break the CIP sweep in Rarotonga, edging out the third CIP candidate in Takitumu by 565 votes to 555. The election petitions, then, related to the eight Rarotongan seats won by the CIP, and focused mainly on bribery and the corrupt use of public money.

The facts of the campaign are widely known. Both parties resorted to charter flights to bring in voters from New Zealand on polling day, 30 March 1978. The Opposition Democratic Party chartered two Air Nauru flights, and charged the travellers $245 return, being a pro rata share of the charter costs. The CIP chartered six Ansett Airlines flights, charging $20 a head for food and drink. Of the 758 Ansett passengers, 445 voted in the three Rarotongan constituencies. The Judge found that the CIP airline charters had cost $323,639.90 or 2.8 percent of the total budget of the Cook Islands, and had brought in 9.3 percent of the votes cast in the election. (Imagine the New Zealand Government in 1975 spending 41.3 million dollars to fly in 150,000 Labour supporters from overseas to vote in Auckland electorates.) The Determination then traversed two aspects of this election expenditure: the source of the money, and the purpose for which it was spent.

The source: violations of the Public Moneys Act 1969 (CI)

Donne CJ noted that the original fount of the money was the Philatelic Bureau of the Cook Islands: Henry had officially written to the Director of the Philatelic Bureau on 13 March 1976, requesting $327,000 because "the Cook Islands Government New Projects Company Ltd [CIGNPC] wishes to assist in the financing of a major project for the Cook Islands." The CIGNPC had been incorporated on 6 March 1978, in Rarotonga, with 999 of the 1000 shares owned by the Government. Henry had earlier informed the Director that "the purpose of this Company is to attract outside capital for the development of projects within the Cook Islands." On 14 March the assistant to the Advocate General, Mr CM Turner, received an opinion from an Auckland barrister, Mr DAR Williams, that the Public Moneys Act 1969 (CI) would apply to funds held by CIGNPC. Henry ignored this advice, and after the CIGNPC had received $337,000 from the Bureau, Henry obtained a cheque from CIGNPC made out to himself for $335,000 and deposited that cheque in a private account in his own name with the Auckland Branch of the Bank of New South Wales. On 16 March, another corporation, the Ipukarea Development Company, [IDC], was formed and an account was opened with the Bank of Australia and New Zealand, Auckland Branch. Henry then deposited on 17 March his personal cheque, from BNSW, into the Ipukarea account at ANZ, and on 22 March Ansett Airlines was paid $323,639.90 from the Ipukarea account as pay-

ment in full for the charter flights. The money from the Philatelic Bureau had been laundered and doubly rinsed.

Sir Albert's explanation for this subterfuge was that the $337,000 was actually a personal loan from the joint proprietor of the Philatelic Bureau, Mr Finbar Kenny, to Sir Albert. Sir Albert testified that the government corporations were a sham designed to protect Mr Kenny, an American citizen, from the operation of the American federal Foreign Corrupt Practices Act of 1977 (sometimes called the "Lockheed Act"). Donne CJ rejected this defence, holding that public moneys had in fact been used, and that the attempted camouflage was further evidence of the corrupt motive.

The manipulation and use of the Philatelic Bureau funds, through CIGNPC, were wholesale and wilful violations of the Public Moneys Act 1969, ss 16-34 and amounted to "unlawful conduct of monumental dimensions." As he had foreshadowed in the Mitiaro determination, Donne CJ concluded that ". . . a finding of the misuse of large sums of public money could, *standing on its own*, be enough to warrant action by the Court . . . ." [Emphasis in the original]. Noting that the "public moneys question is inextricably intertwined with the bribery allegations, "the learned Judge found that electoral relief would be possible without a showing of any specific corrupt practice, or irregularity, as defined in the Electoral Act 1966 (CI).

Bribery: section 69 of Electoral Act 1966 (CI)

The Judge found that the aircraft charter scheme was a CIP plan from late December 1977 and early Janurary 1978, when internal CIP memoranda, entitled "Suggestions for E Day" and "Project CE", declared that "fly-in" voters were necessary for victory. Those memoranda had been prepared by a cabinet minister, and the Judge found that the detailed plan was adopted and followed by the CIP by its leader, Sir Albert Henry, and by all the defendant CIP candidates in the Rarotonga elections. The elements of the statutory offence of bribery the Judge found to be the giving of valuable consideration to prospective voters for the corrupt purpose of inducing the voter to vote for the respondent candidates, on the condition that the voter would in fact vote for such candidates.

It was determined that the voters had received a valuable return flight, worth at least $245, for $20, and that each voter had in fact been given the equivalent of at least $225. The Court then determined that the voters were in fact induced to undertake the trip to vote, and actually vote, because of the free flight. It was also found that CIP organisers had carefully culled applicants for the flights to screen out non-CIP supporters, and made the flight conditional upon the appropriate ballot. The Judge also noted that two CIP organisers from Wellingtion, New Zealand (Sam Samuel and Turi Karati) had already been found guilty of the crime of bribery under s 69, that conviction requiring a much higher standard of proof. One voter testified that a CIP organiser had threatened to force the travellers to pay the full cost of the flight if it was learned that they had voted for an opposition candidate. Citing *15 Halsbury's Laws of England* (4th ed) 421, *Cooper v Slade* (1858) 6 HL Cas 746: 10 ER 1488 and *Woodward v Maltby* [1959] VR 794, Donne CJ found bribery to have been proven, and sheeted home to the respondent candidates. In conclusion, he could "imagine no greater perversion of representative democracy than that huge sums of public money be secretly used by candidates to facilitate bribery of hundreds of voters and thereby secure [the re-election of the respondent candidates.]"

Treating and use of public servants

The other charges made by the petitioners, the Judge determined, could be ignored. The provision of food, drink and entertainment was found to be innocent traditional Polynesian hospitality, and not the corrupt election practice of treating. The Cook Islands Broadcasting and Newspaper Corporation was found to be free of general censorship, although the Judge, incidentally, found that news about the election petition hearings in New Zealand had been "shockingly distorted and untruthful".

The remedy

The forms of relief available to the petitioners were not clearly tied to the various types of mischief prohibited by the Electoral Act. As he had done in the *Mitiaro* determination, Donne CJ relied on the second limb of s 79 (1): "The Judge shall determine . . . whether the candidate whose election is complained of, or any and what other candidate, was duly elected." Unlike s 165 of the New Zealand Electoral Act 1956 there was no section in the Cook Islands legislation authorising the Judge to strike off votes obtained by a corrupt practice. The only similar power was found in s 77 of the Cook Islands Act, but that section related to multiple voting and votes cast by unqualified electors. Exercising a certain amount of judicial creativity, the Judge found that "a power to disallow tainted or illegal votes arose as a necessary corollary of the duty of determining [a result under the second limb of s 79 (1)] . . . . [I]t must be accepted that s 79 (1) itself gives, *by necessary implication* the power to examine and disallow votes and I rule accordingly" (emphasis added). The Judge relied on *15 Halsbury's Laws of England* (4th ed) p 501, the *Taunton Case* (1869)

1 O'M & H 181, 186, *Morgan v Simpson* [1975] 1 QB 151, 162 and *Rogers on Elections* (20th ed) Vol II, 222. The Judge contemplated declaring the election results void, declaring the eight seats vacant, and ordering by-elections to be held in Rarotonga. This alternative was rejected by considering that the guilty candidates would thereby profit from their wrongdoing. The opposition party was financially prostrate, the country might not be well governed pending the by-elections, and the unparalleled corruption of the respondent candidates dictated that they not be favoured. The Judge concluded that all the CIP-organised Ansett "fly-in" votes should be disallowed. This produced the following results: In Te-au-o-Tonga, the four successful CIP candidates each lost approximately 280 votes (from totals of 1420, 1363, 1353 and 1323) and each Democratic candidate retained more votes (1248, 1201, 1173 and 1173) than any CIP candidate; in Takitumu, the two respondent CIP candidates each lost 76 votes (from 603 and 599) and the two Democratic candidates (with 564 and 530 votes) joined their colleague Teariki Matenga in representing Takitumu; and in Puaikura, the two CIP candidates lost 55 and 48 votes respectively, (from 541 and 517) to be replaced by the victorious Democrats (with 506 and 487).

The reversal of the results in these eight seats, plus the vacancy declared in Mitiaro, reduced the CIP from a majority of 15 seats out of 22, to a holding of 6 seats out of 21. The Judge then revoked the warrants of office issued to Sir Albert and his Cabinet and swore in the new Premier, Dr Davis and his Cabinet.

Comment

Ancillary aspects of this determination include:

(1) The relevance of the statutory interpretation to the Electoral Act of New Zealand. Although the New Zealand provisions (ss 163-165) are more carefully drafted than their Cook Islands counterparts, there remains the possibility that the determination of the Court under s 169 (NZ) could be grounded in an illegality not found in the Electoral Act 1956 (NZ). The Election Petition Rules, SR 1957/265, would not exclude a pleading which alleges, for example, violations of the Industrial Relations Act 1973 or the Public Finance Act 1977, s 109.

(2) The Government which ruled the Cook Islands from early April to 24 July 1978 was a de facto Government. Are the contracts, appointments, and other acts of that Government effective? Will Sir Albert's sister remain Speaker of the House for another four years as Article 32 of the Constitution requires?

(3) It is unprecedented for a judicial officer to sit in judgment on an elected Government while at once serving as Head of State, privy to the Cabinet minutes of that Government. Presumably, there would have been no legal remedy had Donne CJ failed to swear in Dr Davis and his co-petitioners after cancelling the warrants of the Henry Government. In New Zealand, of course, the Chief Justice could be the acting Head of State, upon the absence or death of a Governor-General, in a similar situation.

OBITUARY

Lionel Denis Cotterill

Mr Lionel Denis Cotterill, a barrister and solicitor and a former chairman of many Christchurch companies including the Canterbury Frozen Meat Company Ltd, has died in Christchurch. He was 83.

Mr Cotterill, who was an old boy of Christ's College maintained a keen interest in the school and also in the Nurse Maude District Nursing Association. He was chairman of the association for 30 years until 1973.

He was born in Christchurch and attended Christ's College from 1904 to 1912. During World War I he served in Britain and France in the Royal Berkshire Regiment and was awarded the Military Cross and Order of the Crown of Belgium. He attained the rank of brevet major.

After the war, Mr Cotterill completed his studies at Oriel College, Oxford, and graduated master of arts. He returned to New Zealand and joined his father in the legal firm, Duncan Cotterill and Company, in 1920, where he continued to work until recent years.

From 1943 to 1966, Mr Cotterill was a member of the Christ's College board of governors, and from 1958 to 1966 was sub-warden of the school. Both his father, Mr Henry Cotterill, and grandfather, Canon George Cotterill, had also been closely connected with Christ's College.

After being on the board of the Canterbury Frozen Meat Company since 1939, Mr Cotterill became chairman in 1961. He held the post until 1970. He was also chairman of Fletcher Humphreys Ltd; Whitcombe and Tombs Ltd; the Canterbury (NZ) Seed Company Ltd; and the Canterbury (NZ) Malting Company Ltd. He was also a director of New Zealand Cement Holdings Ltd, and the Permanent Investments and Loan Association of Canterbury.

Mr Cotterill is survived by his wife and a son.

SOCIAL WELFARE — SPECIAL MINISTERIAL DIRECTIONS

IN the matter of the Family Benefits (Home Ownership) Act 1964:

SPECIAL MINISTERIAL DIRECTION

To: The Social Security Commission.

I, Herbert John Walker, Her Majesty's Minister of Social Welfare direct you pursuant to the powers vested in me by section 4 of the Family Benefits (Home Ownership) Act 1964, as follows:

1. That it is the policy of Her Majesty's Government that those of Her Majesty's Subjects who have low incomes and modest means shall have priority of access to public funds available for housing.

2. That in furtherance of that policy when you are required to take into consideration, pursuant to section 10 of the Family Benefits (Home Ownership) Act 1964, the income and assets of applicants for a Certificate of Eligibility under that Act, or the spouse of such applicant as the case may be, you shall apply the following income and assets and needs test and, if the affairs of that applicant, or the spouse of that applicant as the case may be, fail to come within its prescription, you shall take it that that applicant, or the spouse of that applicant as the case may be, can reasonably be expected to arrange finance from another source within the terms of section 10 (1) (b) (i) of the Family Benefits (Home Ownership) Act 1964.

3. That the income assets and needs test to be applied is as follows:

(a) "Chargeable income" means the total gross income for the period of 12 months immediately prior to the date of application divided by 52, together with the earnings of the applicant and the spouse of the applicant except the personal earnings of the wife in a family where both the husband and wife have earnings.

(b) (i) Except for seasonal workers "earnings" means the weekly average of wages or salary and other periodic emoluments including all supplementary taxable payments and overtime payments paid during the period of 12 months immediately preceding the date of application or the actual weekly wage, salary or other periodic emolument, including all supplementary taxable payments and overtime payments paid at the time of application, whichever is the greater.

(ii) For seasonal workers "earnings" means the total amount of wages, salary or other periodic emoluments including all supplementary taxable payments and overtime payments paid during the 12 month period immediately preceding the date of application, divided by 52.

(c) The following circumstances shall be a "special housing" need:

(i) Where the present housing is inadequate and there is a need for other housing, eg too small for the needs of the family, derelict, etc.;

(ii) Where the present housing is damp or where there is medical evidence that it is causing a health hazard;

(iii) Where the family is required to vacate the property for reasons other than non-payment of rent;

(iv) Where failure to purchase the property currently occupied would result in loss of the accommodation;

(v) Where a State rental house, Government pool house or departmental house will be vacated by the family following the purchase of other accommodation; and

(vi) Where the rental paid by the family exceeds 25 percent of the gross chargeable income of the family including overtime and allowances.

(d) (i) The limit for chargeable income for a family with one child shall be $125 per week, increased by $5 per week for each additional child:

(ii) Where there is a special housing need the limit for chargeable income shall be increased by $10 per week.

(e) (i) The limit for the value of assets including, where relevant, the land on which it is proposed to build the house, owned by a family with one child shall be $10,000 increased by $500 for each additional child.

(ii) Where there is a special housing need the limit for the value of assets owned shall be increased by $3,000.

Given under my hand this 22nd day of August 1978.

H J WALKER, Minister of Social Welfare.

IN the matter of the Social Security Act 1964:

SPECIAL MINISTERIAL DIRECTION

To: The Social Security Commission.

I, Herbert John Walker, Her Majesty's Minister of Social Welfare, direct you, pursuant to the powers vested in me by section 5 of the Social Security Act 1964, as follows:

1. That it is the policy of Her Majesty's Government that any person now being paid National Superannuation, pursuant to section 13 of the Social Security Act 1964, who was, on the 9th day of February 1977, in receipt of an Age Benefit pursuant to what was then section 16 of the Social Security Act 1974 (now repealed) shall not receive substantially less in a period of 12 months than that person would have received had the provisions for Age Benefit not been repealed.

2. That in furtherance of that policy, where it can be

shown that any person now being paid National Superannuation pursuant to section 13 of the Social Security Act 1964, who was, on the 9th day of February 1977, in receipt of Age Benefit under the now repealed section 16 of the Social Security Act 1964 has to pay more terminal income tax for the year ended the 31st day of March 1978 than that person would have had to pay in respect of the same income, other than benefit, allowance, or concession or National Superannuation under the Social Security Act 1964 had that person been able to continue receiving Age Benefit as was provided for by the now repealed section 16 of the Social Security Act 1964, it will be appropriate for you to grant that person an additional benefit under the provisions of section 61G of the Social Security Act 1964.

3. That the amount you will then pay under that grant of additional benefit shall be an amount equal to the difference between the after tax income of such a person in the financial year ended 31 March 1978 and the after tax income that person would have enjoyed had he (or she) continued to receive Age Benefit under the now repealed provisions of section 16 of the Social Security Act. In computing that amount the value of all benefits, concessions and allowances or National Superannuation paid under the provision of the Social Security Act 1964 shall be included as income.

Given under my hand this 22nd day of August 1978.

H J WALKER, Minister of Social Welfare.

IN the matter of the Social Security Act 1964:

SPECIAL MINISTERIAL DIRECTION

To: The Social Security Commission.

I, Herbert John Walker, her Majesty's Minister of Social Welfare, direct you, pursuant to the powers vested in me by section 5 of the Social Security Act 1964, as follows:

1. That it is the policy of Her Majesty's Government that any person being paid an income tested benefit under the provisions of the Social Security Act 1964, or an income tested pension under the provisions of the War Pensions Act 1954, shall not receive a reduction in their income on and after the 1st day of October 1978, as a result of the revision of personal tax scales from that date.

2. That in the furtherance of that policy it will be appropriate for you to grant, on application, an additional benefit under section 61G of the Social Security Act 1964 to any person who is in receipt of such a benefit or pension provided that that person is either:

(a) Unmarried without dependants and receives an income not in excess of $21 a week from sources other than the benefit or pension; or

(b) A solo parent with a dependent child or children not qualified for a young family tax rebate and receives an income not in excess of $25 a week from sources other than the benefit or pension.

3. That the amount you will pay under that grant of additional benefit shall be an amount equal to the increase in the PAYE tax paid by such beneficiary or pensioner from the 1st day of October 1978 as a result of the revision of personal tax scales from that date.

4. That any such grant of additional benefit shall be effective from the 1st day of October 1978 to the 31st day of March 1979.

Given under my hand this 22nd day of August 1978.

H J WALKER, Minister of Social Welfare.

IN the matter of the Social Security Act 1964:

SPECIAL MINISTERIAL DIRECTION

To: The Social Security Commission.

I, Herbert John Walker, Her Majesty's Minister of Social Welfare, direct you, pursuant to the powers vested in me by section 5 of the Social Security Act 1964, as follows:

1. That it is the policy of Her Majesty's Government that any person being paid National Superannuation pursuant to section 13 of the Social Security Act 1964 shall not suffer a reduction in their net income from National Superannuation, on and after the 1st day of October 1978, as a result of the revision of the personal tax scales from that date.

2. That in the furtherance of that policy it will be appropriate for you to grant an additional benefit under section 61G of the Social Security Act 1964 to any married person who is being paid National Superannuation, pursuant to section 13 of the Social Security Act 1964, and whose net income from National Superannuation would otherwise have been reduced, on and after the 1st day of October 1978, as a result of the said revision of the personal tax scales.

3. That the amount which you will pay to any person under that grant of additional benefit shall be 23 cents per week.

4. That any such grant of additional benefit shall be effective from the first fortnightly instalment of National Superannuation in October 1978 and shall be withdrawn when the next general increase in National Superannuation rates comes into effect in February 1979.

Given under my hand this 22nd day of August 1978.

H J WALKER, Minister of Social Welfare.

IN the matter of the Social Security Act 1964:

SPECIAL MINISTERIAL DIRECTION

To: The Social Security Commission.

I, Herbert John Walker, Her Majesty's Minister of Social Welfare, direct you pursuant to the powers vested in me by section 5 of the Social Security Act 1964, as follows:

1. That it is the policy of Her Majesty's Government that those persons who apply for a Domestic Purposes Benefit under the provisions of section 27B of the Social Security Act 1964, and who do not immediately qualify for that benefit because provision for maintenance required pursuant to section 27B (2) (c) of the Social Security Act 1964 has not been obtained, shall be required to consider conciliation of their matrimonial differences, and to encourage this the rate of benefit such applicant is paid should be something less than the rate which they would be entitled to under a Domestic Purposes Benefit granted under section 27B of the Social Security Act 1964.

2. In furtherance of that policy any benefit granted to such an applicant under section 61 of the Social Security Act 1964 (hereinafter called an "Emergency Main-

tenance Allowance") is to be paid at a rate not less than $16 below the relevant standard rate for a Domestic Purposes Benefit, set out in the sixteenth Schedule of the Social Security Act 1964, for the period of 26 weeks from the grant of an Emergency Maintenance Allowance.

Given under my hand this 22nd day of August 1978.
H J WALKER, Minister of Social Welfare.

(*The Gazette*, 31 August 1978, p 2419)

CORRESPONDENCE

Dear Sir,

The employment crisis

In his article entitled "The Employment Crisis" published in the issue of the New Zealand Law Journal for 20 June ([1978] NZLJ 201), Mr DM Stewart terms it a "tragic irony" that "as those in employment periodically win the battle for higher salaries, they limit the employment opportunities for others". The deus ex machina with which he proposes to relieve this deplorable situation is however something of an old chestnut: legal employees should apparently cease to press for higher salaries, thus enabling more of their brethren to be employed, hope that their employers will provide bonus schemes and generally speed a return to the semi-feudal days of yore, when the ratio of salaried employees to profit-sharing partners was, apparently, much higher than it is now. He supports this solution with calculations demonstrating the cost of a solicitor with four years practical experience to his employers as against his likely fees.

It is when one considers more closely Mr Stewart's calculation of these likely fees that his tragedy turns to pathos and his irony is revealed as sophistry. It is well recognised that an hourly rate much higher than $12 is appropriate, in Auckland at least, for a solicitor with four years practical experience. While it must in fairness be conceded that Mr Stewart does state that "much higher hourly rates must or should be charged", it is equally fair to observe that he neglects to give figures calculated on the basis of a realistic rate. The figures suggest that his silence on this point was significant. In Auckland, a rate of $30 per hour is usual, and is even beginning to seem modest, for a solicitor with four years experience. Charging out 6 hours per day of his time at this rate, he will earn for his employers $4,050 per month, or more than twice his "unit cost" (to use Mr Stewart's term) to his employer. On an annual basis, he should bring in fees of about $45,000. His salary will amount to about $10,000. One recognises that 6 hours chargeable time per day is a high average and that, inevitably, matters arise where the fee must for one reason or another be reduced. It is, however, impossible to accept that law firms cannot make a reasonable profit on a solicitor with four years experience if his time is being charged out at $30 per hour assuming efficiency on the part of the solicitor and of the firm. The logical consequence is of course that his salary of about $10,00 cannot be regarded as high. The fact of the matter is that it is modest compared with the salaries paid to doctors and accountants, to take two other categories of professional people, with similar experience. Nor is it, I would suggest unduly high when considered in the light of the responsibilities assumed by a person who handles work for which a fee of $30 per hour is appropriate.

This brings us to the main thrust of Mr Stewart's argument, mainly his coupling of the demands of solicitors for higher salaries with the lack of employment opportunities for law graduates. Unfortunately, the salaries are *not* too high, as has been demonstrated, and the only reasonably likely consequence of lowering them would be an increase in the income of partners in law firms, not a substantial increase in the number of graduates employed. The reason for this is obvious: the numbers of those studying law, and graduating eager to practise as solicitors, has increased dramatically over the past 20 years, at a rate far exceeding the increase in the total population of New Zealand. In 1960, for example, there were four full-time members of staff in the Faculty of Law at Auckland University and about 30 to 40 students in each year. There are at the moment about 36 full-time members of staff and 140 students in each year. In law, as with every other service to the public, there arises a point where the market is saturated. That point has now been reached in New Zealand, as it was reached long ago in most European countries and in the United States. Law graduates are having to search for other fields in which to apply their skills and there are many who hold the view that it can only be to the benefit of the country if more law graduates enter industry and government. The process of adjustment to the change is, however, at the moment particularly painful because most students graduating now entered law school in the expectation, fostered at least tacitly by the profession, that employment in law offices would be available to them on graduation. But the adjustment will be made, as it must be made, and it can only be delayed if legal employers are enabled to employ marginally larger numbers of qualified staff at lower salaries.

Mr Stewart disclosed his interest as an employer midway through his article and it seems appropriate that I disclose mine as an employee (not one of Mr Stewart's) at this point in this letter. Like him, I trust that I am being objective when I say that I cannot blame the employees for what is happening. Professional people who have studied for five years or more to obtain a qualification which involves them in difficult, responsible work, often carried out in situations of considerable pressure, are entitled to expect salaries commensurate with their skills and responsibilities, and comparable with those paid to members of other professions. Mr Stewart would complain that to pay such salaries involves an unacceptably high increase in fees. I suspect that this is not so, and that many firms would find (and are finding) that a simple increase in efficiency at current rates would more than

cover salary increases which in percentage terms are hardly world shattering. In any case, do law firms really believe that it is right to deny their *employees* realistic salaries so as to keep fees down? Is a selfless desire to employ more law graduates the real reason for the resistance to higher salaries? And are partners in law firms themselves prepared to accept lower incomes to the same two ends? The last question seems to me to make the first two rhetorical.

Yours faithfully,
Michael Crew
Auckland

Mr Stewart replies: My first response was to offer Mr Crew a job but then I thought that if he really did earn $45,000 per annum in fees, my partners would soon realise he was better value than me. I still adhere to the view however that with the general rise in overheads and a relative reduction in return, the spotlight is squarely on the cost of employment. This was not however intended to be the main thrust of my article. It was a starting point to try and demonstrate that there is a crisis in finding jobs for people which may be more than just a passing economic phase. Mr Crew himself shows another side to this with his figures on the numbers of current law graduates. Consistent with my broader thesis, these graduates may not find industry and government more able to accommodate their undoubted skills than the profession.

LEGAL PROFESSION

DEFENCE RESTRICTIONS

For some time now the Parliamentary Order Paper has included a government notice of motion by the Prime Minister, Mr Muldoon, concerning the trials in the Soviet Union of Anatoly Shcharansky and Alexander Ginsburg. The motion notes "that there are aspects of these two cases which have caused serious misgivings and anxiety in New Zealand and many other countries, [and] the House wishes the Government of the Soviet Union to know that the conduct of the two trials and their outcome will be followed by all members of the House with the closest attention as indeed will all other trials of human rights activists in the Soviet Union".

The cause of fair trials is worthy of the highest degree of international support and solidarity.

The following article by Quentin Peel was published in the *Financial Times* of 13 May 1978. "Mr Jimmy Kruger, the South African Minister of Police and Justice, hinted today that curbs might be introduced to prevent foreign money being used to finance legal costs in political trials, and to prevent liberal lawyers from appearing frequently in such cases.

"Such practices, he said, were undermining South Africa's legal system. Abuses of the court system and legal procedures had become so serious they could no longer be ignored.

"Speaking in Parliament, Mr Kruger revealed that 66 cases involving terrorism were currently being heard in court. Last year, there had been 31 cases of sabotage, in which six people had died and 41 had been injured.

"He said 91 'trained terrorists' had been arrested and another 594 'untrained terrorists'. There were 168 people being held under the indefinite detention section of the Terrorism Act.

"He said he could not be expected to listen to 'essays on human rights' while bombs were exploding in South African cities.

"Mr Kruger said ways had to be found to prevent practices which undermined the legal system, such as delaying tactics in security cases, demonstrations in and near courts, the intimidation of witnesses, the 'frequent appearance' of certain lawyers in security proceedings, and the 'enormous amounts of money' available to defendants in these cases.

Referring to legal aid, he said this should only be available to people with 'good cases'.

" 'I don't wish to see legal aid as it exists in other countries where it is available to everyone," he said. "We are not a Socialist state. But if you have a good case, then you must be helped' ".

The practical limitations resulting from cutting finance available for defence lawyers, and the suggestion that there may be some restriction on who will be permitted to appear for a defendant are hardly conducive to fair trials. A prominent South African lawyer confirmed the accuracy of the newspaper report and had this to say:

"The Bar here was very upset by Kruger's statement. In particular, there is absolutely no evidence that defence lawyers have used delaying tactics in security cases. On the contrary, there is much evidence that the trials have been unduly protracted by the prosecution in order to wear out the defence and exhaust its funds. At least there is no other evident explanation of the manner in which the police and prosecutors conduct some of the trials which take place. Of course it would be very much easier for the security police and the prosecution if people charged with 'terrorism' were not defended".

It seems fair to say that if Mr Kruger genuinely does not wish to see the legal system in South Africa undermined he should give away his shovel.

Tony Black-