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INTER ALIA

Pre-empting the planning decision

The Government might well hold up litigation over the Clutha Development as an example of the type of delay it is seeking to avoid through use of National Development Act procedures. On 10 June 1977 a water right was applied for after, it may be added, several years during which various alternative proposals were considered. Four months later the Otago Regional Water Board made its recommendations (against granting the right) to the National Water and Soil Conservation Authority, which, in December 1977 decided to grant the rights sought. An appeal from that decision to the Planning Tribunal has not yet been heard. There have however been three Supreme Court hearings, one seeking an interim injunction to restrain the continuation of work, one seeking to strike out that application, and a review of the decision of the Authority. Nearly two years have passed and the formal planning processes are nowhere near complete.

Conversely, the Clutha Development and its possible offshoot projects might also be regarded as an example of how the planning process may be pre-empted and consultation reduced, as Ambrose Bierce puts it, to seeking approval of a decision already made. All the National Development Act procedures will add is a sprinkle of holy water to the development steamroller. It will bless but not direct.

Despite the unheard appeal, the Crown, having established that it is not bound by provisions in the Town and Country Planning Act 1977 that would restrain any other developer, is continuing with preparatory work. Some of this work the Crown could do anyway without planning or any other approvals. Some is also needed for other hydro development which, if not approved, is less likely to be opposed than the present Scheme F. But much relates specifically to the scheme under appeal. The work both completed and in progress includes highway diversion, bridge construction; a new rail terminal at Clyde and removal of the tracks from there on; construction of a concrete-lined diversion channel 660 metres long, 34 metres wide and 16 metres deep; substantial excavation; the provision of a concrete batching plant and workshops; the development of a new town; and the acquisition of land. Expenditure exceeds $45 million. Mr Justice Somers expressed the opinion that "expenditure made or to be made by the Crown could not reasonably be a factor in the Planning Tribunals decision upon an appeal. . .". The appellants say that such is the magnitude of the work, and such is the momentum it is giving to hydro development that the decision of the Planning Tribunal has been effectively pre-empted.

But that is not all opponents say. This development had its genesis in a predicted electricity shortfall. Opponents, despite difficulties in obtaining information, cogently argued there would be no shortfall but rather a surplus and have now been shown to be right. A substantial reason for the scheme under review has gone. But instead of the development being revised a buyer is being sought for this surplus power. Opponents say that if the Government commits itself to a sale of electricity in these circumstances it would, by deliberately substituting a new justification for the scheme, make a mockery of rights of appeal. It also, when taken in conjunction with other energy decisions and especially that concerning the ammonia-urea plant, pre-empts the

main function of the Commission for the Future, and, if aluminium smelting as involved, overrides the recently published energy strategy.

It was apparent from comments in the decision of Mr Justice Somers that parties had trouble securing information. The New Zealand Institute of Engineers regretted that lack of detailed information prevented it from commenting adequately on the relative merits of Scheme F and other schemes. The Otago branch of the Royal Society prepared a cost benefit analysis but again suffered from inadequate data. The Water Board itself was critical of the lack of an economic analysis.

This type of comment is all too familiar. It has been heard in other hydro developments, in respect of the ammonia-urea plant, in respect of nuclear power and, more recently, in respect of a proposed new aluminium smelter. The Government is simply not prepared to make available the information needed for sensible debate on the economics and consequent desirability of development proposals.

In the latest instance Professor Moeseke of the University of Otago prepared a report showing aluminium smelting would cost more in imports than it would earn in foreign exchange. In response the Minister of Trade and Industry, Mr Adams-Schneider, simply said the study he had did not support that conclusion. He invited Professor Moeseke to make his calculations available to Trade and Industry for analysis and comment. His report, though, cannot be made available for reciprocal analysis and comment because it was provided by one of the parties seeking to establish the smelter.

That party is seeking a decision in its favour on the use of one of New Zealand's resources —a decision in which, if we are to believe what is being said, the New Zealand public should participate. How can it without information?

In commerce there is a different approach — as witness proceedings before the Commerce Commission and Licensing Authorities. It has even been recognised judicially that where activities are controlled through licensing disclosure of information to competitors is the price of a licence.

The same approach is needed in planning. If those who seek a benefit cannot *openly* justify their claim they should get nothing. That is the way of open government. The secretive practices surrounding major development projects suggest it will not be the way under the National Development Act just as it is not the way now, despite the Town and Country Planning and Water and Soil Conservation legislation. If there is one lesson that should have been learned by now it is that secret practices lead not only to suspect decisions but also to a militant discontent that no legislation will assuage.

New Procedures for Regulations

The Minister of Justice, the Hon J K McLay, recently announced new procedures for the making of statutory regulations.

> "In future, all submissions to Cabinet which recommend the adoption of regulations will include additional information as to the consultations which have taken place, who those consultations were with and whether there was any level of disagreement.
>
> "In addition the Cabinet will in future require a brief statement setting out, firstly
>
> A The present situation
> B The statutory authority under which the proposed regulation is to be made
> C The purpose for which the regulation is intended
> D The justification for adding to the law;
>
> and secondly, a clear indication of whether the impetus for the proposed addition or change originated from within the Department administering the empowering Act, or whether it came from some other organisation or from an individual — in other words: who asked for it?
>
> "Further, as a matter of general practice, at least 14 days will be allowed between the date of the making of the regulations and the date on which they come into force," said Mr McLay.

The expressed object of the new procedures is to ensure both wide consultation between the Government and interested parties as well as greater scrutiny of regulations before they are passed.

That might be the object of the exercise but there is no guarantee the new procedures will secure the level of consultation many would desire — for only Cabinet procedures are affected. The degree of consultation and the extent of any scrutiny will depend on Cabinet decision.

Now Mr McLay also said:

> "There is a tendency in some quarters to regard the making of regulations or orders in council as virtually an automatic

process rather than an extension, within defined limits, of an existing law."

Had anyone else made that statement "some quarters" would be taken as a reference to the Cabinet that has presided over not just the extension but the making of laws by regulation. Remember the carless days scheme and all the other economic stabilisation regulations. Within what "defined limits" were they made?

What difference then will the new procedures make? They will at least enable the left hand of cabinet to know what the right is doing and may even bring about greater scrutiny of regulations by Cabinet and interested parties whom Cabinet selects. But it is hard to believe they will place an effective curb on this excessively used instrument of executive control.

Perhaps the most disquieting feature of the procedures is that they are described as new. Regulations that have passed through the system without the information and explanations outlined in the new procedures have indeed been made by "automatic process".

On the credit side the 14 days delay will give the public some chance to see a regulation before it comes into force. But will economic regulations prove an exception to the general rule?

Wider dissemination of the information to be made available to Cabinet would also be an advantage but there is no mention of this.

The new procedures may enable the Government to "ensure that unnecessary legislation is not passed". But what is needed even more urgently is a means of ensuring that regulations remain as subordinate legislation and are not used, as happens all too frequently, in place of principal legislation. So how about following up with repeal of the Economic Stabilisation Act 1948?

Tony Black

CRIMINAL LAW

THE PREROGATIVE OF PARDON

By WILLIAM C HODGE, *Senior lecturer in Law, University of Auckland.*

"All justice flows from the prerogative."[1] The crown is the source and fountain of justice, and as an aspect of the executive prerogative, the pardon well and truly predates the King's Bench, the independence of which was declared by Coke C J in 1607[2] and secured by the Glorious Revolution and the Act of Settlement 1700. The pardon has always been an integral component of British and English justice, and in evolutionary terms, the independent judiciary is a more recent branch on the prerogative trunk.[3] This is not to derogate from the high function of the Queen's Bench or the Supreme Court, but rather to establish that the executive pardon is not an artificial graft upon the root-stock of justice.

This note will examine the meaning and the sources of the pardon in New Zealand and will also compare its evolution — from identical sources — in the United States. The thesis here is that there are two streams of interpretation, mutually contradictory but both based in historical practice, which explicate any royal pardon. On one hand, it remains the Prerogative of Mercy — as in "This person has suffered enough. Let him be free and let him start anew." On the other hand, the pardon can also be — and was in the United Kingdom until criminal appeals were regularised in the Criminal Appeal Act of 1907 — the Prerogative of Correcting Judicial mistakes.

The prerogative in New Zealand

Until 1879, Letters Patent commissioning

[1] *In re K and Another (Infants)* [1965] AC 201, 237 (Lord Devlin); And see generally, O Hood Phillips, *Constitutional and Administrative Law*, 6th ed ch 20, and Wade and Phillips, *Constitutional Law*, 8th ed ch 23.

[2] *Prohibitions del Roy* (1607) 12 Co Rep 63.

"The King in his own person cannot adjudge any case, either criminal, or treason, felony, etc, or betwixt party and party, concerning his inheritance, chattels or goods, etc, but this ought to be determined and adjudged in some court of justice according to the law and custom of England . . . . God had endowed His Majesty with excellent science and great endowments of nature, but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods or fortunes of his subjects, are not to be decided by natural reason, but by artificial reason and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it."

[3] Dicey called Coke's decision a "fallacy", based on "pedantic", "artificial", and "unhistorical" reasoning, but "essential to the very existence of the Constitution." Dicey, *Law of the Constitution*, 10th ed 18.

and empowering the Governor of the Colony of New Zealand were revoked and reissued afresh upon each new guvernatorial appointment.[4] The first permanent Letters Patent, which accompanied the appointment of Sir Hercules Robinson, contained the following discretionary power of pardon:

> "When any crime has been committed within the Colony, or for which the offender may be tried therein, the Governor may as he shall see occasion, in Our name and on Our behalf, grant a pardon to any accomplice in such crime who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further, may grant to any offender convicted in any Court, or before any Judge, or other Magistrate, within the Colony, a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender of any respite of the execution of such sentence for such period as the Governor thinks fit; and further may remit any fines, penalties, or forfeitures due or accrued to Us: Provided always that the Governor shall in no case, except where the offence has been of a political nature unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender shall absent himself or be removed from the Colony."[5]

These were the last "colonial" Letters Patent. In 1892, during the confrontation between the Ballance Government and Governors Onslow and Glasgow, Royal Instructions were issued, under the Letters Patent of 1879, directing the Governor to take the advice of the Executive Council. In particular, in Paragraph VII the exercise of the power of pardon was restricted:

> "The Governor shall not pardon or reprieve any offender without first receiving in capital cases the advice of the Executive Council, and in other cases the advice of one, at least, of his Ministers; and in any case in which such pardon or reprieve might directly affect the interests of our Empire, or of any country or place beyond the jurisdiction of the Government of the Colony, the Governor shall, before deciding as to pardon or reprieve, take those matters specially into his own personal consideration in conjunction with such advice as aforesaid. . ."[6]

New Letters Patent and Royal Instructions were issued in 1907, marking the official transformation of New Zealand from colony to dominion,[7] and a further reissue of both the Letters Patent and the Royal Instructions was found convenient in 1917 to redesignate the Royal appointee as Governor-General.[8] These matters of terminology aside, the Royal Instructions relating to pardon are identical in 1892, 1907 and 1917, as are the Letters Patent of 1879, 1907 and 1917. It may be helpful to consider the Letters Patent a grant of authority, and the Royal Instructions to be words of limitation.

New Zealand Legislation

Two sections of the Crimes Act 1961 supplement, without limiting the exercise of, the pardon. Section 406, which is entitled "Prerogative of Mercy", declares that nothing in the Crimes Act "shall affect the prerogative of mercy". The positive content of the section creates an extraordinary guvernatorial reference power, whereby the Governor-General can refer to the Court of Appeal the conviction or sentence of a convicted person (s 406 (a)), or a single point relating to consideration of the mercy of the Crown (s 406 (b)), for determination or an opinion, respectively. The Privy Council has ruled in a recent case that the Judicial Committee of the Privy Council has no jurisdiction to hear an appeal from an opinion rendered under 406 (b): *R v Thomas* [1978] 2 NZLR 1 (PC). Section 406 is thus a statutory addition to the prerogative powers, and in no

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[4] See the Letters Patent of 6 November 1874, published in the *New Zealand Gazette* on 8 January 1875 at p 49 (Issue number 3), revoking the commission of Sir James Fergusson and appointing the Marquis of Normandy. A discretionary power of pardon is granted to the Governor in Paragraph VI. For a recent examination of the Letters Patent and guvernatorial powers, see Brookfield, "No Nodding Automaton: A Study of the Governor-General's Powers and Functions", [1978] NZLJ 491, and sources cited therein.

[5] Paragraph IX. See 1879 *New Zealand Gazette* p 486 (No 40). The preamble declared that ". . . We are desirous of making permanent provision for the office of Governor and Commander-in-Chief in and over Our said Colony of New Zealand and its Dependencies, without making new Letters Patent on each demise of the said Office."

[6] (1892) *New Zealand Gazette* p 1026 (No 57).

[7] (1908) *New Zealand Gazette* p 1639 (No 75).

[8] (1919) *I New Zealand Gazette* p 1213 (No 51). (The documents were dated 11 May 1917, but published on 24 April 1919).

sense explanatory or of limitation. It can only be activated after a conviction and upon an application for the exercise of mercy. The power originated in the Criminal Appeal Act 1907, s 19 (UK) and found its way into New Zealand legislation in the New Zealand Act of the same name, passed in 1945 (s 17) and codified in expanded form in 1961. The 1945 Act repealed the less convenient power of the Governor-General to order a new trial: Crimes Act 1908, s 447 (NZ). For recent consideration of this section see *R v Thomas* [1978] 2 NZLR 1 (PC); *R v Morgan* [1963] NZLR 593; and *In re O'Connor and Aitken* [1953] NZLR 584.

Section 407 purports to interpret "the effect of free pardon", by deeming the person pardoned "never to have committed that offence." Three aspects of this section are worth noting. First, the draftsman was careful to use the neutral noun "person" for the pardonee, and not the more prejorative "offender" used in the Letters Patent and the Royal Instructions. Taken literally, the prerogative instruments exclude innocent persons, wrongly convicted, from the operation of the prerogative of mercy. The General Assembly, on the other hand, may have contemplated the wrongful conviction of an innocent person.

The Prerogative Instruments may also exclude the operation of pardon where, in fact, no crime at all had been committed, as in the case of suicide treated as culpable homicide.

Secondly, the legislative history of s 407 indicates that the draftsman intended to nullify any residual statutory attainders. See the Crimes Act 1908, s 452 and the Public Offenders' Disqualification Amendment Act (1882). The object may also have been to foreclose, prospectively, such cases as *R v Graham*, 1865 Colonial Law Journal 16, where a pardoned felon was treated as a repeat offender when he was sentenced for a subsequent offence. As Arney C J said in that case (at p 18): "But the obviating of the consequences of a conviction is something very different from getting rid of the conviction itself."[9]

Finally, s 407's operative predicate, a "damned deeming clause", is a "statutory fiction."[10] In the more picturesque (or *Alice in Wonderland*) language of Cave J.

> "Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is deemed to be, and that notwithstanding it is not that particular thing nevertheless . . . it is . . . that thing."[11]

United Kingdom practice — Limits on the prerogative

An unrestrained use of the pardon would strike close to the bone of parliamentary sovereignty, and limitations on the prerogative pardon are best understood in the context of a struggle between Crown and parliament. The prerogative cannot negate the common law or statutory rights of one private individual to recover damages from another individual. Legal remedies in tort and contract cannot be forgiven or suspended by the Crown to deny a litigant his recovery.[12] Similarly, the crime of public nuisance cannot be pardoned while private citizens continue to suffer cognisable injury.[13] Most importantly, the practice of dispensation and suspension of statute, as abused by James II, was made illegal in the Bill of Rights of 1688.[14] A final parliamentary victory was sealed in the Act of Settlement of 1700, s 3, which prohibited a royal pardon from being pleaded in the House of Commons as a bar to impeachment.[15]

A pardon, presumably, can be granted only after an offence has been committed, but it can issue before indictment or conviction.[16] In practice, however, pre-conviction pardons seem obsolete.[17]

By convention in the United Kingdom and by Royal Instructions in New Zealand the prerogative is exercised on ministerial advice: in the UK upon the advice of a Secretary of State

[9] That case turned on the interpretation of 7 & 8 Geo IV, c 28 wrongly printed in the reports as 7 & 8 Geo VI, c 28 (p 19).

[10] "[T]his term, which is popular with legal draftsmen, is commonly used to create a statutory fiction . . ." Haslam J in *Ross v P J Heeringa Ltd* [1970] NZLR 170 at 173.

[11] *R v Norfolk County Council* (1891) 60 LJQB 379 DC at 380. See also *Words and Phrases Legally Defined*, Butterworths.

[12] *Biggin's* Case (1599) 5 Co Rep 50a; 77 ER 130.

[13] *8 Halsbury's Laws of England* 4th ed, para 949, n 10.

[14] See *Thomas v Sorrell* (1674) Vaughan 330; 124 ER 1098; *Godden v Hales* (1686) 11 St Tr 1165; 2 Show KB 475, 89 ER 1050 *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

[15] A similar exception in the US Constitution, Cert II, Section 3, clause 1, presumably secures legislative control of the impeachment machinery.

[16] *R v Boyes* (1861) 1 B & S 311; 121 ER 730.

[17] *Halsbury* refers to 346 pardons granted in 1972, all of which were post-conviction: see *8 Halsbury's Laws of England* 4th ed, para 949, n 1. See also Wade and Phillips, *Constitutional Law* 8th ed (1970), p 321. But see President Ford's pre-indictment pardon of President Nixon for any and all federal offences committed during his presidency (20 January 1969 to 9 August 1974).

(for the Home Department or for Scotland) and in NZ upon the advice of the Minister of Justice. In spite of this ministerial responsibility, however, such matters, while under advisement, cannot be the subject of Parliamentary questions or discussion.[18] Furthermore, this discretionary function is such that judicial inquiry cannot be made into the ministerial decision making or with respect to material used in that decision making.[19] It is "the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function."[20]

Effect of Pardon

The effect of a free pardon is to remove all statutory attainders and common law infamy. It renders an infamous person a competent witness,[21] it "entirely absolves [the pardonee] from the crime and restores him completely to his former competency and credit,"[22] and amounts to a "purging of the offence".[23] The pardonee may, further, bring an action in defamation in respect of the pardoned offence.[24] The pardonee may re-enter the liquor dispensing business;[25] he may resume the practice of law;[26] and, in general, a pardon restores the citizen's full civil rights, including suffrage, jury service, and capacity to take the oath of witness.[27]

On the other hand, an early case holds that moral turpitude is not necessarily washed away.[28] A more recent case from Australia holds that the principal offender in a bribery case (the bribee?) can still be prosecuted although the bribor received a pardon. The Court found that the bribery was still an historical event, within the purview of the Court: "Accordingly, a pardon is in no sense equivalent to an acquittal. It contains no notion that the man to whom the pardon is extended never did in fact commit the crime but merely from the date of the pardon gives him a new credit and capacity."[29]

American Presidential pardons

The presidential power of pardon, as vested in the US chief executive by Article I, Section 2, Clause 1 of the US Constitution, it is submitted, is relevant to the New Zealand situation because the presidential pardon is defined entirely by the British experience prior to 1787. The US reception of British prerogative practice was frozen in 1787, and the 20th century US is more rooted — or chained — in the pre-Victorian British past than the 20th century United Kingdom. American Judges regularly conduct exhaustive exegeses of the Tudor and Stuart texts and judicial authorities. In the words of Chief Justice John Marshall:

> "[As the power of pardon] had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.[30]

The American authorities dwell more on the prerogative of mercy rather than upon the correction of judicial error, possibly because they [American appellate Judges] discounted the probability of repeated judicial error. The tone was set by Alexander Hamilton, in *The Federalist* No 74:

"Humanity and good policy conspire to

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[18] *8 Halsbury's Laws of England* 4th ed para 951, n 4.

[19] *de Freitas v Benny* [1976] AC 239; [1975] 3 WLR 388. The Privy Council in that case denied a convicted felon the right to review material considered by the advising Minister (in Trinidad and Tobago), saying "Mercy is not the subject of legal rights. It begins where legal rights end." 247, 394.

And see *Hanratty v Lord Butler of Saffron Walden* (1971) 115 Sol Jo 386 CA.

See also the remarks of Lord Edmund-Davies in *R v Thomas*, reported in [1978] 2 NZLR 1, at pp 5 and 8.

[20] *de Freitas v Benny*, ibid, at 247, 394.

[21] *R v Crosby* (1695) 1 Ld Rayn, 39; 91 ER 923.

[22] *R v Reilly* (1787) 1 Leach 454; 168 ER 329.

[23] *Hay v Justices of Tower Division of London* (1890) 24 QBD 561, 564. Pollock B's judgment in that case contains a useful review of textual authorities, including Hale, Hawkins and Chitty.

[24] *Cuddington v Wilkins* (1615) Hob 81; 80 ER 231. *Searle v Williams* (1618) Hob 288; 80 ER 433: and see the discussion in *Leyman v Latimer* (1878) 3 Ex D 352.

[25] *Hay*, note 23 above.

[26] See the thorough exegesis of the English sources in *Ex parte Garland* (1866) 4 Wall 333; 18 L Ed 366, the case of a Southern attorney pardoned by President A Johnson in 1865.

[27] *Corpus Juris Secundum*, Vol 67A, Section 18 (1978).

[28] *Harris v White* (1625) Palm 412; 81 ER 1147. The report concludes with the words of Dodderidge J; "Que pardon ne toll guilt, Dieu solement poit pardon le guilt," which presumably refers forgiveness to a Higher Authority.

[29] *R v Cosgrove* [1948-51] (1978) Tas SR 99. In that case the Premier of Tasmania was prosecuted for receiving bribes, from four named businessmen, all of whom were pardoned. Presumably their testimony was necessary for a conviction.

[30] *US v Wilson* (1833) 7 Pet 150, 160; 8 L Ed 640, 643.

> dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. the criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favour of unfortunate guilt, justice would weasr a countenance too sanguinary and cruel."[31]

A recent restatement of American law concludes that:

> "Under some authorities it has been stated that the effect of a full pardon is to make the offender a new man, and that a full pardon blots out the existence of guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offence. This view, however, has not been universally accepted, recognised or approved, and a pardon does not so operate for all purposes. Accordingly since the very essence of a pardon is forgiveness or remission of penalty, assessed on the basis of the conviction of the offender a pardon implies guilt; it does not obliterate the fact of the commission of the crime, and the conviction thereof; nor does it wash out the moral stain."[32]

Space does not permit more than a brief mention of select US cases. The leading Supreme Court decisions are probably: *ex parte Garland* (1865)[33] where Civil War guilt and presidential pardon are considered; *US v Wilson* (1833)[30] (noted above) the first such case considered by the Supreme Court (no US authority was cited in Marshall C J's judgment); and *ex parte Wells* (1855)[34] which contains the fullest review of English authority and a well-reasoned dissent on the extent of the pardon power.

More recently, lower federal Courts have considered such significant public issues as the amnesty for alleged draft evaders,[35] President Nixon's celebrated conditional pardon of James R Hoffa (former Teamsters' Union President)[36] and President Ford's even more celebrated pre-conviction pardon of Richard M Nixon (former US President).[37]

The American position, both regarding the pardon generally, and Ford's pardon of Nixon in particular, can perhaps best be expressed by the conclusion of Fox C J (US District Court) in *Murphy v Ford*: "[A]s has been tersely said; [a pardon] involves forgiveness and not forgetfulness."[38]

Conclusion

It may well be that New Zealand's deeming clause (Crimes Act 1961, s 407) does wash away all taint of guilt. That section may statutorily declare that the pardonee is in no further need of forgiveness, contrition, penance, repentance, moral rehabilitation or spiritual absolution. At the same time, however, a deeming clause remains a pretence and does not purport to amend fact. Furthermore, a strict interpretation of the prerogative instruments dictates that the pardon be considered the prerogative of mercy, not the prerogative of correcting judicial error.

Presumably a New Zealand pardonee can expect at least a partial electronic purge of his computer file at Wanganui. It is by no means clear, however, that a pardonee can expect his name to be erased from all entries on the magnetic tape. The schedule to the Wanganui Com-

[31] *The Federalist* is a collection of eighty-five essays supporting ratification of the US Constitution, written by Alexander Hamilton, John Joy, and James Madison, published anonymously in 1787-1799.

[32] *Corpus Juris Secundum*, Vol 67A, Section 18, p 23.

[33] See note 26 above.

[34] (1855) 18 How 307; 15 L Ed 421. McLean J's dissent in that case distinguished the American President from the British Sovereign.

[35] *US v Lockwood* (1974) 382 F Supp 1111.

[36] *Hoffa v Saxbe* (1974) 378 F Supp 1221. The issue in Hoffa's case was the constitutionality of the condition that the pardonee "not engage in direct or indirect management of any labor organisation" for eight years. The British precedents for conditional pardon are considered extensively in the judgment and in "The Conditional Presidential Pardon" (1975) 28 Stanford L Rev 149. Pratt J considered the prerogative of pardon to be "the predecessor of the modern criminal justice devices of probation and parole" (p 1228.)

[37] See the challenge to the legality of Ford's all-inclusive pre-indictment pardon in *Murphy v Ford* (1975) 390 F Supp 1372. The pardon, which was upheld, covered all federal offences during the six years of Nixon's presidency:

"Now, therefore, I Gerald R Ford, President of the United States, pursuant to the pardon power conferred upon me by Article II, s 2, of the Constitution, have granted and by these presents do grant a full, free, and absolute pardon unto Richard Nixon for all offences against the US which he Richard Nixon has committed or may have committed or taken part in during the period from January 20, 1969, through August 9, 1974." (1974) 10 Presidential Documents, No 37, 1103; Proclamation 4311.

For further consideration of President Ford's pardon of his predecessor, see Zimmett, "The Law of Pardon" 1974-75 Annual Survey of American Law 179. See also the news media of 9-12 September 1974, and *Time* magazine, 23 September 1974. A *Time* essay by Mayo Mohs refers to the lack of "contrition" and "repentance" on the part of the pardonee.

[38] *Murphy v Ford* (1975) 390 Fed Sup 1372, 1375.

puter Centre Act 1976 requires that the name of the accused be deleted from Justice Department records upon "acquittal, withdrawal, or dismissal of a charge". Other data includes particulars of proceedings and "particulars of persons against whom an information has been laid", as well as details concerning "inmates of penal institutions including their date of release", and "classification of fingerprints and particulars of the identity of persons who have been charged with an offence" (to be "removed from the system . . . when the person is acquitted"). In addition, the offence for which the pardonee was convicted may or may not be treated as a "selected unsolved crime". The police could presumably elect to treat such a case as cleared and closed. In any case, it seems unlikely that the deeming clause will work a total electronic clearance of all the relevant magnetic tape.

Finally, it must be said that the form of recent New Zealand pardons is equivocal.[39] To decree, for example, that "there is real doubt . . . [that a case] was proved beyond reasonable doubt" is equivocation squared, two quasi-negatives, not making a positive. Given, the dual source and purpose of the pardon power: add the mystery of the deeming clause, multiply by the double use of the word doubt, and the result is confusion compounded.

[39] The "recent pardon" referred to signed by the Governor-General and countersigned by the Minister of Justice on 17 December 1979 is set out below:

"Whereas on the sixteenth day of April 1973 Arthur Allan Thomas was convicted in the Supreme Court at Auckland of the murder of David Harvey Crewe and of Jeanette Lenore Crewe and was sentenced to imprisonment for life:

AND WHEREAS it has been made to appear from a report to the Prime Minister by Robert Alexander Adams-Smith QC that there is real doubt whether it can properly be contended that the case against the said Arthur Allan Thomas was proved beyond reasonable doubt:

NOW THEREFORE I, Keith Jacka Holyoake, Governor-General of New Zealand, acting upon the advice of the Minister of Justice, hereby in the name and on behalf of Her Majesty grant a free pardon to the said Arthur Allan Thomas in respect of the said crime:

AND I command and require the Superintendent of Tongariro Prison Farm and all others whom it may concern to give effect to the said pardon."

WATER AND SOIL

SMALL COMMUNITY WATER SUPPLIES

By T S RICHARDSON *a Whakatane practitioner.*

Around New Zealand there are many small community water supplies, often privately owned and operated by a consortium of property owners. In many cases regional water boards will be quite unaware of their existence and the supply system might only be drawn to the attention of the regional water board when a dispute arises within the group of co-operative users of the water. The factual circumstances of the water supply system and the use of the water will often be thus:

(1) There is an established private water supply reticulation system from which a number of property owners draw water.

(2) The source of the water supply is a natural spring, a stream or other source of natural water from which the water is pumped by a rising main to a community storage system, or on occasions water might be drawn direct from the main.

(3) The water is fed to each of the properties, some of which may be occupied only by the owner and his family or household, others of which may be from time to time occupied by persons other than the owner's family, in some cases by paying guests or tenants for shorter rather than longer periods. The latter case would particularly apply to groups of holiday homes around lakes or in coastal regions.

(4) The water supply would be available to any property owner for fire-fighting purposes.

(5) The pump, and thus the ability to take the natural water, is owned and operated by a consortium of the property owners.

(6) No one property owner "takes" the water, but rather the consortium or co-operative takes the water and stores it for later use by one or more of the property owners connected to the reticulation system.

Pursuant to s 21 of the Water and Soil Conservation Act 1967, all pre-existing common law rights in respect of natural water were abrogated to the Crown, subject, inter alia, to the following proviso:

> "Provided also that it shall be lawful for any person to take or use any natural water that is *reasonably required* for *his domestic needs* and the needs of animals for which he has any responsibility and for or in connection with fire-fighting purposes."

The writer has italicised words which require further consideration:

(a) "*Reasonably required*" — the test for what is reasonably required is one which may be couched in the established "reasonable man" jargon — that which the average person, having a proper regard for the needs and requirements of others in the particular circumstances, would normally and properly require. This is an objective exercise which, in the event of any dispute, requires the determination by the appropriate authority or tribunal rather than the subjective assessment of the person or persons affected.

(b) "*His*" — in accordance with s 4 of the Acts Interpretation Act 1924, words importing the singular number include the plural number and words importing the masculine gender include females. Accordingly the word "his" may be read as "his, her or their".

(c) "*Domestic needs*" — one dictionary definition of "domestic" is "of the home, household or family affairs" (Concise Oxford Dictionary). There appears to be no statutory definition of the term as such, but the Domestic Proceedings Act 1968 refers to "common household", "family" and to concepts of marriage and blood relationships. As a matter of practice, regional water boards and other authorities having jurisdiction under the Water and Soil Conservation Act would not wish to invade the privacy of individuals or groups of persons to establish the composition of any particular household, but if a dispute arises the appropriate authority may be called upon to intervene and in such circumstances may require to make the inquiries necessary to ascertain the relationship of occupiers to owners, and the basis of the occupier's right to occupy the premises if they are drawing or using water from the co-operative water supply system. It is submitted that the plain meaning of "domestic needs" refers to the ordinary requirements of the owner who is the co-taker of the water and his immediate family and household, including servants, overnight or short-stay non-paying guests.

In many cases, members of a co-operatie water supply system do not always take the water for use by their own family and household on the basis above outlined. Particularly in the holiday resort situation the properties may be rented out for short or longer terms, and even guest-houses or motels may be connected to the system.

It is impossible, unless the supply is cut off to all but one household, for one person in the co-operative to draw the water for his own use. The responsibility for satisfying the legal requirements of s 21 of the Water and Soil Conservation Act 1967 is thus a joint one, and the owners of the co-operative should jointly hold the water right unless some or all of them refrain from using the system or unless all members using the water at any time, other than for family and household needs, withdraw from the co-operative and take no water from the system.

Where the co-operative or community group of water users fall out over the inequitable sharing of the water supply, and if a complaint is made to the appropriate authority, all members of the co-operative may be open to prosecution where it is established that the water is being taken for other than strictly domestic needs. It would be a wise policy, therefore, for persons advising or assisting in the establishment of a new community water supply system, or who are involved with existing systems, to arrange for the community group to apply for a water right in connection with what may be said to be "residential needs" rather than purely "domestic needs".

While regional water boards have in recent years been more particularly concerned with the discharges of waste and with rural and commercial irrigation systems, there is no doubt that, as the demands on natural water resources increase, the authorities will be taking a closer interest in the small water-supply systems.

CASE AND COMMENT

Tort — Remoteness of damage

The unfortunate ship's officer who allowed crude oil to escape into Sydney Harbour may by now have forgotten his indiscretions; the litigation which arose out of his actions is not so easily forgotten (*The Wagon Mound (No 1)* [1961] AC 388 and *The Wagon Mound (No 2)* [1967] 1 AC 617). These cases laid down that liability for damage in tort is based on foreseeability, or in the words of Lord Upjohn:

> "The tortfeasor is liable for any damage which he can reasonably foresee may happen as a result of the breach however unlikely it may be, unless it can be brushed aside as far-fetched". (*C Czarnikow Ltd v Koufos* [1969] 1 AC 350 at 422. See also Lord Reid in the same case at 385).

Since 1961, in spite of a series of decisions, there has been considerable argument both academic and otherwise as to how the test is applied. The judgment of Bisson J in *McIsaac v Mayor etc of Tauranga* (Supreme Court, Rotorua, 16 October 1979 (A114/76)) is the most recent, and further clarifies the matter for New Zealand. (The need for a correct and clear interpretation of the test is more necessary in a jury trial than in one presided over by a Judge alone. The difficulty of explaining the test and what it means so that a jury can apply it to the facts is one of awesome complexity).

The plaintiffs were the owners and occupiers of a piece of land in the city of Tauranga. The defendant council had some years before erected a reservoir on a ridge immediately above the plaintiffs' property. At the time of the erection of the reservoir the defendant obtained permission from the plaintiffs to run a discharge pipe from the reservoir through the property of the plaintiffs to a lower piece of land owned by the defendant to enable overflow water from the reservoir to be discharged.

The plaintiffs obtained the necessary town planning consent from the defendants to use their property firstly for a motel complex and then after a source of hot water was discovered on the land they obtained consent to develop it as a swimming pool complex. The plaintiffs also decided to make a series of fish breeding ponds for the purpose of commercially breeding, growing and selling cold water ornamental fish.

Such a commercial activity was neither a predominant nor a conditional use of the plaintiffs' land which was zoned residential and the plaintiffs, who did not have existing use rights for such a commercial activity did not make at any time an application for such planning consent as would be required. Therefore the defendant local authority had no knowledge whatever that fish breeding on a commercial basis had been commenced and was being carried on on the plaintiffs' property.

After the fish breeding had been going on for about a year an employee of the defendant made a mistake in the handling of the reservoir pumping station equipment; water flowed down the discharge pipe through the plaintiffs' property with such pressure that it forced open a manhole cover in the discharge pipe directly above the plaintiffs' fish pools. The water poured over the plaintiffs' land, washing everything away in its course. By the time the water was turned off half an hour later most of the fish ponds had been demolished, their banks were washed away, they were scoured clean and emptied of all the fish. The plaintiffs endeavoured to save the fish but by the next morning all were dead. The plaintiffs had been confident of selling about 32,000 fish that year, and they also lost their breeding stock of about 100 fish. After the flood they made no attempt to re-establish themselves as commercial fish breeders.

Negligence was established and Bisson J found that on a balance of probabilities that the adverse conditions created by the flood had caused the death of the fish and that therefore the flood was the cause of the loss.

Counsel for the defendant had submitted that while it was foreseeable that the discharge of water might cause physical damage to property it was not foreseeable that it would cause destruction of goldfish and economic loss to a business enterprise of which the defendant had no knowledge and which the defendant was entitled to assume did not in fact exist (since it was illegal under the Town and Country Planning Act 1953).

Counsel for the plaintiff countered this submission by arguing that on the question of foreseeability the relevant test is not whether the defendant knew or could reasonably have known of the commercial goldfish breeding es-

tablishment but whether the type or kind of damage suffered was reasonably foreseeable.

In view of these conflicting submissions as to the proper interpretation to be put on the two *Wagon Mound* cases (supra) Bisson J had to consider the tests, which he did after also considering, in particular, *Wells v Sainsbury & Hannigan Ltd* [1962] NZLR 552; *Hughes v The Lord Advocate* [1963] AC 837 and the Court of Appeal decision in *Stephenson v Waite Tileman Ltd* [1973] 1 NZLR 152 which (although it was a claim for damages for personal injuries), gave particular consideration to the guidelines which a Court should follow in applying the test of foreseeability as laid down in *The Wagon Mound* cases. In *Stephenson v Waite Tileman Ltd* Richmond J had concluded that the foreseeability test should be used to decide whether there is a *risk* of the *kind* of damage which occurred, *not* to decide the extent of that damage once it has occurred. After coming to this conclusion, Richmond J laid down three general principles, which, (although the ratio of the decision required that these be restricted to personal injury claims certainly can have wider effect), he thought could be used to resolve many of the difficulties which can arise in cases with rather complex fact situations (such as *Stepehson v Waite Tileman Ltd*). The third of these propositions is apposite in a case such as the present:

> "(3) If the plaintiff establishes that the initial injury was within a reasonably foreseeable kind, type or character of injury, then the necessary link between the ultimate consequences of the initial injury and the negligence of the defendant can be forged simply as one of cause and effect — in other words by establishing an adequate relationship of cause and effect between the initial injury and the ultimate consequence". (*Stephenson v Waite Tileman* (supra) at p 168).

Applying that principle to the facts before him Bisson J concluded that the defendant was liable for the loss of the goldfish and that the loss was causably attributable to the defendant's negligence. In his words:

> "Floods by their very nature cause loss of life and damage to property. What forms of life may be killed or kinds of property destroyed depends on what happens to be in the course of the flood. The defendant must accept the state of the plaintiff's property as it happens to be at the time of the flood. The real risk which a reasonable man should have foreseen from a flood over land of the kind occupied by the plaintiffs was erosion, pollution and destruction of animal and vegetable life and various sorts of structures lying in the path of the water. The actual damage in suit, namely the loss of goldfish, is embraced by the kinds of injury to which I have just referred and which are reasonably to be foreseen when a flood occurs. Furthermore, the defendant is liable notwithstanding that the details of how the flood caused the death of the goldfish may amount to an 'unforeseeable concatenation of circumstances' ".

In answer to this the defendant pleaded illegality as a defence on the ground that since the land use of commercial fish breeding was precluded without appropriate planning consent, an offence under s 36 of the Town and Country Planning Act 1953 (then in force) was being committed. Neither counsel was aware of a Court decision in which the effect of a lack of planning consent on a business suffering tortious wrong had been considered. The Judge concluded that the question of the illegal nature of the fish breeding venture was irrelevant because in effect it was not a causa causans but rather a causa sine qua non. This judgment once again illustrates the difficulties of applying *The Wagon Mound* test to complex fact situations, whether they involve personal injuries or other manifestations of injury. The decision of the Court of Appeal clarified the difficulties as far as personal injury claims were concerned; the present decision shows that the decision in *Stephenson v Waite Tileman* can be applied outside the personal injury field. One cannot but wonder whether such judgments are evidence of a retreat towards the test of "directness" (as opposed to "foreseeability") laid down in *In Re Polemis* [1921] 3 KB 560.

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New Zealand Citizenship and Western Samoa

The case of *Levave v Department of Immigration* (Supreme Court, Wellington; 23 November 1978; Jeffries J; Court of Appeal, 31 August 1979; Cooke, Richardson and Somers JJ; now reported in [1979] 2 NZLR 74) has answered in the negative arguments that the inhabitants of Western Samoa under New Zealand administration become British subjects.

The appellant, Faaosavale Levave, had been convicted under s 14 (5) of the Immigration Act 1964 of overstaying her entry permit. On appeal she claimed that she was a New Zealand citizen and therefore exempt from the permit provisions of the Act. She based her claim on the undisputed fact of her father's birth in Western Samoa on 1 October 1926, she herself having been born there on 13 October 1951. It was argued for her that at the former date Western Samoa was within the dominions of the Crown so that her father was a British subject. Hence, as a British subject born in Western Samoa, he became a New Zealand citizen under s 16 (3) of the British Nationality and New Zealand Citizenship Act 1948, and she herself a citizen by descent under s 7 (1). The alleged offence took place when the 1948 Act was in force but, of course, her citizenship by descent, if established under that Act, would continue under s 13 of the Citizenship Act 1977.

The effect of the appellant's argument, if it had been successful, would be that all persons born under the New Zealand administration of Western Samoa before the 1948 Act came into force on 1 January 1949 would be British subjects, at least if born after the passing of the British Nationality and Status of Aliens (in New Zealand) Act 1923; and would therefore be New Zealand citi- zens under the former of those Acts. And, of course, males who acquired New Zealand citizenship in this way would transmit it to their children. Hence a great number of citizens of Western Samoa (independent of New Zealand under the Western Samoa Act 1961 and now a Commonwealth country under the Commonwealth Countries Act 1977) would also be New Zealand citizens either originally or, like the appellant, by descent.

The British Nationality and Status of Aliens (in New Zealand) Act 1923 ("the 1923 Act") had an important place in the appellant's argument for, it was contended, the effect of s 14 (1) of that Act (which became in substance s 7 of the British Nationality and Status of Aliens (in New Zealand) Act 1928) was to declare Western Samoa part of the dominions of the Crown by providing:

> "14 (1) Subject to the provisions of this section, this Act shall apply to the Cook Islands and to Western Samoa in the same manner in all respects as if those territories were for all pur- poses part of New Zealand; and the term "New Zealand" as used in this Act shall, both in New Zealand and in the said territories respectively, be construed accordingly as including the Cook Islands and Western Samoa."

so that the appellant's father, born in 1926 when that Act was in force, was born "within His Majesty's dominions and allegiance". It would follow that he was under s 1 (1) (a) of the British Nationality and Status of Aliens Act 1914 (Imp), as at common law, a British subject.

So, the question previously posed in another overstayer's case, *Annandale v Collector of Customs* [1955] NZLR 168, which the Court was there able to leave unanswered, fell to be decided first by Jeffries J and then by the Court of Appeal: Was Western Samoa, when under New Zealand administration (at least after the Act of 1923) part of the dominions of the Crown?

Briefly the reasoning runs as follows. The purpose of the 1923 Act was, as the long title shows, to consolidate and amend the law relating to British nationality and the status of aliens in New Zealand and to provide for their naturalisation. Part of the nationality code laid down by the British Nationality and Status of Aliens Act 1914 (Imp) was adopted. Special provision was made (ss 4-12) for naturalisation of aliens and naturalisation in the United Kingdom or in any other dominion or colony was declared ineffective in New Zealand to confer the status of British subject (s 3 (3)). By the British Nationality and Status of Aliens (in New Zealand) Amendment Act 1924, the condition of naturalisation in s 5 (1) (b) of the 1923 Act that the applicant must have an adequate knowledge of English was made inapplicable to "any Samoan, as defined in the Samoa Act, 1921". This provision was carried forward to the 1928 Act as s 8 (1). Section 8 of the 1928 Act fulfilled the purpose declared in the long title of making "special provisions with respect to the naturalisation of persons resident in Western Samoa" by providing (s 8 (2)) that a naturalisation certificate, granted under the section to "any Samoan" (as so defined) who had not, as the Imperial Code generally required, an adequate knowledge of English, would confer the status of British subject in New Zealand only. The difficulty about all this was that

already indicated as furnishing the appellant with her main argument. Successively s 14 of the 1923 Act and s 7 of that of 1928 in effect made a codification of the law of nationality operate in the Cook Islands and Western Samoa "as if those territories were for all purposes part of New Zealand." Thus the appellant argued that for nationality purposes Western Samoa was part of New Zealand so that her father being born in the former was born within dominions and allegiance of the Crown and hence a British subject.

The argument failed before Jeffries J in the Supreme Court and also in the Court of Appeal. A short answer to it, in the judgment of the latter delivered by Somers J, was that "by incorporating into New Zealand law the provisions of s 1 (1) 9a) of the Imperial Act the New Zealand Parliament did not change the meaning of those provisions. We did not understand it to be disputed for the appellant in argument that in the eyes of United Kingdom law in general, and within the meaning of the 1914 Act in particular, Western Samoa is not and never has been *within the Crown's dominions and* allegiance" ([1979] 2 NZLR at 77). Further, the Court of Appeal thought that "all accepted principles of, and aids to, construction, pointed to the conclusion that s 14 of the 1923 Act was concerned with the naturalisation of aliens residing in the Cook Islands and Western Samoa and was not intended to accord the status of natural-born British subject to those born in either place after the statute came into force". These further reasons were largely similar to or supplemented those given by Jeffries J, except for one of some importance. This was that Western Samoa was a mandated territory (see further below) and, in view of certain resolutions of the Council of the League of Nations of April 1923 defining the status of "native inhabitants" of mandated territories, New Zealand Parliament was in effect under "moral, if not legal, international obligations" (at 79) not to alter the status of Western Samoans by making them British subjects. And there was, of course, a presumption that Parliament did not intend to legislate inconsistently with those obligations (*Corocraft Ltd v Pan-American Airways Inc* [1969] 1 QB 616, 653, being cited in this connection).

Other reasons supporting the dismissal of the appeal mostly related to the history and background of the legislation or its relationship to the Imperial Code of nationality found particularly in the United Kingdom Act of 1914. One reason, relied on by Jeffries J rather than in the Court of Appeal, in itself seemed virtually conclusive. The special provisions relating to the naturalisation of "any Samoan, as defined in the Samoa Act, 1921" (see s 2 of the 1924 Amendment Act and s 8 (2) of the 1928 Act) would, on the appellant's argument, appear to have been ineffective; since, as shown further below, there would be no alien Samoans to whom they could refer.

Then again, the coupling of the Cook Islands with Western Samoa in s 14 (1) of the 1923 Act pointed clearly away from the appellant's contention, since the former were undoubtedly already part of the possessions of the Crown and those born there, being British subjects, had (in Somer J's words at 77) "no need of that legislative assistance which s 14 (1) is claimed to give".

The Cook Islands (see now the definitions in s 2 of the Acts Interpretation Act 1924) were not part of New Zealand for the purpose of legislation unless specifically or otherwise clearly included in it. Hence the need in s 14 (1) to extend the Act specifically to the Cook Islands. There was a similar need to extend the Act to Western Samoa, for which New Zealand in terms of its mandate was authorised to legislate but which, subject to what is said below, was clearly not in law part of New Zealand. Neither for the Cook Islands nor for Western Samoa did s 14 (1) make any changes of status. One was, and in the orthodox view the other was not, already part of the dominions of the Crown.

Is another view possible, that the mandate notwithstanding Western Samoa had become part of the dominions of the Crown before and apart from the passing of the 1923 Act? The matter was not argued in *Levave's* case, though a subsidiary argument, addressed somewhat faintly to Jeffries J but apparently not in the Court of Appeal, might have been developed to extend to it. That argument, "grounded in the historical relationship of the two countries", referred to New Zealand's wide powers over Western Samoa in support of Mrs Levave's contention as to the construction of s 14 (1). So employed the subsidiary argument could not succeed. However, it draws attention to the great powers claimed and exercised by New Zealand over the territory, powers so great that the Western Samoa Act 1961 would in substance have been little different had it been the surrender of sovereignty over a colony. Though to do so is to go beyond the case urged for Mrs Levave, it is opportune to consider briefly the extent and legal basis of those powers and any possibility that, quite apart from the 1923 and 1928 Acts, Western Samoans may under the

New Zealand administration have acquired the status of British subjects.

The seizure and occupation of the territory by New Zealand troops during the first World War was followed by Germany's renunciation of her rights over it by the Treaty of Versailles in favour of the principal Allied and Associated Powers, who agreed to confer a mandate on "His Britannic Majesty, to be exercised on his behalf by the Government of the Dominion of New Zealand, to administer German Samoa". The Mandate, in terms confirmed on 17 December 1920, by Article 2 gave "full power of administration and legislation over the Territory, subject to the present mandate, as an integral portion of the Dominion of New Zealand" (see the text in the First Schedule to the Samoa Act 1921). The King had by Order in Council of 11 March 1920 (SR & O 1920 No 569) under the Foreign Jurisdiction Act 1890 purported to give the New Zealand Parliament power to legislate for the "peace order and good government" of the territory. Then the enactment of the Samoa Act 1921 (NZ) followed. Section 4 declared the "executive government" to be "vested in His Majesty the King *in the same manner as if the Territory was part of His Majesty's dominions*". (The section was amended by the omission of the emphasised words by s 14 (4) of the Samoa Amendment Act 1947, which Act was passed to give effect to Western Samoa's change in status from that of a mandated territory under the League to a trust territory under the Charter of the United Nations). Section 100 of the Samoa Act imposed liability for treason upon residents in Western Samoa, so that clearly allegiance was claimed from them. Decisions of high authority have emphasised that the degree of control exercised by a protecting power "may render it difficult to draw the line between a protectorate [to which Western Samoa, as a mandated territory was akin] and a possession". *Sobhuza II v Miller* [1926] AC 518, 523 (cf *In re Southern Rhodesia* [1919] SAC 211 and *Ex parte Mwenya* [1960] 1 QB 241). Indeed, if there was a statutory annexation by New Zealand of Western Samoa, it took place by virtue of the Samoa Act 1921 (rather than by the 1923 Act) supported by the effective acts of government which preceded and followed it. However, here one meets again the objections which the Courts upheld in the present case, and other objections as well. By annexation, *all* residents in Western Samoa, whether born there before or after the annexation, would become or be British subjects so that the naturalisation provisions in the Act of 1923, the 1924 Amending Act and the 1928 Act could not have the general application to Samoans which at least the last two show was clearly contemplated. Further, the preamble of the Samoa Act itself recognised the existence of the mandate. Finally, the creation of a class of New Zealand protected persons to which most Western Samoans were allocated by Order in Council (s 2 (1) of the British Nationality and New Zealand Citizenship Act 1948 and SR 1950/158) confirms that the Crown never intended that its executive acts of government in respect of the territory were to be taken as acts of annexation. Indeed, the status of Western Samoans first as British and then as New Zealand protected persons, rather than British subjects, may adequately explain the allegiance claimed by s 100 of the Samoa Act. And, despite the tendency of a modern Court, as in *Ex parte Mwenya* (supra: where the writ of habeas corpus was held to be available in a protectorate as if it were part of the possessions of the Crown) to look to the reality of power exercised by the colonial or protecting power rather than to any formal distinction as to the status of the territory, there is authority against removing the distinction between subjects and protected persons in immigration matters. See *R v Immigration Officer ex parte Thakrar* [1974] QB 684.

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The Metes of Meates: Crown Contracts and Ministerial Authority

Reflexions on *Meates v Attorney-General* [1979] 1 NZLR 415, noted (JFN) [1979] NZLJ 202, lead to the suggestion that one aspect of the case may require to be further considered. It will be recalled that Mr Meates and his co-plaintiffs, shareholders in Matai Industries Ltd, failed in their Supreme Court claim against the Crown for (among other causes of action) breach of contract in not supplying financial and other assistance to their company, which had been formed and operated during the years 1972-75. One of the defences of the Crown upheld by Davison CJ was that the then Prime Minister, the Rt Hon Norman Kirk, had no authority to make on its behalf the contract to assist the plaintiffs in their venture that they alleged he had made. The present note is intended to carry comment on this constitutional point a little further.

His Honour found no evidence that the

Prime Minister had actual authority to bind the Crown in the matter or, referring to *Watteau v Fenwick* [1893] 1 QB 346, 348-49, that the promises allegedly made were within his "usual" authority. As to ostensible authority as explained in *Attorney-General for Ceylon v A D Silva* [1953] AC 461, 479, it was held that the Prime Minister did not have that either, there being no representation of the Crown that he had authority. In the learned Chief Justices' words ([1979] 1 NZLR at 462):

> "If Mr Kirk made a contractual promise then at most I should infer that Mr Kirk implied he had authority to give the promise. It would not be a representation by the Crown. Such a representation by the Crown could be made by statute: see the Trade and Industry act 1956, s 7(a) for a possible statutory provision giving authority to the Minister of Trade and Industry; or by Cabinet decision.
>
> Mr Kirk in this case had no such statutory authority or Cabinet approval or authority . . . .
>
> If it is necessary for me to reach a conclusion on this matter then my view is that Mr Kirk did not have authority to bind the Crown in the matters of contract alleged by the plaintiffs."

Then, in accepting Crown Counsel's submission that there was no intention on the part of the Crown's agents (including the Prime Minister) to create legal relations with the plaintiffs, Davison CJ was influenced so far as Mr Kirk's promises were concerned by, among other things, the "lack of his express statutory authority to make such a contract; such power being that of the Minister of Trade and Industry" (at 463).

The distinction just made is generally important to the judgment and is a cause of some difficulty in that no account appears to be taken of the first part of s 25(e) of the Acts Interpretation Act 1924:

> (e) Words directing or empowering a responsible Minister of the Crown to do any act or thing, or otherwise applying to him by his title of office, include any member of the Executive Council of New Zealand acting for, or, if the office is vacant, in the place of such Minister, and also his successors in such office . . . .

This provision is the New Zealand equivalent (so far as there is one) of s 12(3) of the Interpretation Act 1889 (UK) which, in turn, is a statutory expression of the common law rule that in England each of the principal Secretaries of State is "capable in point of law of performing the duties of all the departments": *Harrison v Bush* (1855) 5 E & B 344, 352; 119 ER 509, 513. It is clear from both s 25(e) itself and its background that there is no *delegation* from a Minister empowered by a statute to a fellow Executive Councillor who acts for him; and Quilliam J's discussion of the paragraph in *Tobias v May* [1976] 1 NZLR 509 (though not the misleading third heading to the report of that case) is consistent with this. It appears, too, that no special authorisation from the Executive Council is legally necessary. For s 25(e) to have effect an Executive Councillor needs merely to take it on himself to act for a statutorily empowered colleague.

If this is correct then, in the present case, the Prime Minister did have authority to act for the Minister of Trade and Industry and to exercise that Minister's powers under the Trade and Industry Act 1956, since there was nothing (at least at the time; see now s 2A, added in 1977) in that Act that might negative the application of s 25(e) of the Acts Interpretation Act. And *if* Mr Kirk had made the alleged promises precisely enough and (as the Chief Justice thought possible; sed quaere) the powers under the former Act were sufficient, there might well have been a contract binding on the Crown.

In stating that "Cabinet approval or authority" would have been enough to empower the Prime Minister to make the alleged contract, Davison CJ may have had in mind that the Crown's prerogative powers were available, despite any possible application of the restrictive rule in Attorney-General v De Keysers Royal Hotel Ltd [1920] AC 508; and that these could be conferred on Mr Kirk by the Cabinet. But this surely would be to give that conventional body a legal and constitutional status which, politically powerful as it is, it does not have. If prerogative powers were available, the Governor-General in Council not the Cabinet could delegate them to the Prime Minister.

Or there might be adequate implied general delegation to him as one of the Queen's Ministers, since the entire common law rule mentioned above in regard to Secretaries of State may possibly apply to Ministers in New Zealand (cf New South Wales v Bardolph (1934) 52 CLR 455, 518-519).

A final comment concerns the need for parliamentary appropriation of public funds to discharge the contractual liability of the Crown in the matter had there been any. This question

was of course not relevant to establishing whether the liability existed (New South Wales v Bardolph, supra) and, as Davison CJ mentioned in referring to it, it was not argued before him. The point does however appear to be answered by P W Hogg's observation in Liability of the Crown (1971) 125, that, in New Zealand, s 24 of the Crown Proceedings Act 1950 provides in effect a permanent appropriation of funds for the satisfaction of judgments against the Crown.

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OFFICE MANAGEMENT

BUTTERWORTHS LAUNCH LEXIS IN UK

Lexis, a computer based legal research service has been launched in London by Butterworths. The service was launched in the United States seven years ago by Mead Data Central of New York. It is a full-text retrieval system which enables the practising lawyer, using a desk-top terminal linked by satellite to a computer in Dayton, Ohio, to locate in seconds information which might otherwise take days of research. The system is interactive, ie the user can engage in intelligent dialogue with the computer. Its use can be taught in 3½ hours.

The initial database consists of 100 million words and contains the full texts of all English cases reported in the main series of law reports since 1945. In addition English subscribers will have immediate access to 3000 million words of American law.

The database will be kept up-to-date and extended progressively to include a complete statement of all statute law. Special libraries on subjects such as tax, industrial law and intellectual property law will also be added, as well as laws from other jurisdictions such as the EEC, Scotland and certain Commonwealth countries. Source materials in the database will include such items as Inland Revenue press releases, extra-statutory concessions, departmental circulars etc, but the main emphasis will be on cases, statutes and statutory instruments.

The statutory materials are being specially prepared for LEXIS by Butterworths' legal editorial staff, and will consist of the current texts, regularly up-dated. For the first time, lawyers will be able to secure from one source a completely up-to-date version of relevant legislation together with the most current information on when and to what extent it has been brought into force.

Legislation will be made available in LEXIS in stages; each stage will see the addition of the complete statutory texts for a particular subject area. The first subject to be covered will be tax law, followed by industrial law, commercial law, landlord and tenant, local government law (housing, planning, highways, rates etc) until the complete texts of the statute law have been covered.

The LEXIS terminal, which is provided as part of the service, is small enough to fit unostentatiously on a lawyer's desk and has been designed for legal research with specially labelled keys. It combines simplicity of use with the maximum efficiency.

Particular care is being taken to ensure that users are able to use LEXIS to its best advantage. Special training courses will be provided at the Butterworth offices in Bell Yard. Each individual user will attend a course of personal tuition lasting 3½ hours and will then be issued with a special identification number which will permit him to have access to LEXIS through his office terminal.

Charges for the service will be partly fixed and partly based on usage. The amount of the annual subscription will depend on the number and nature of the terminals taken by the subscriber. The cheapest rate, for a subscriber who takes a "desk top" terminal without a printer, will be £1,020 a year. Usage charges will depend in part on the time during which the subscriber is connected to the central computer and partly on the nature of the particular search, but is likely to average something under £1 a minute. In addition, a new subscriber will be required to make a once and for all training charge, which thereafter will entitle any member of the firm, or chambers, to be trained without further expense.

FAMILY LAW

COUNSEL FOR THE CHILD AND PSYCHOLOGICAL EXPERT WITNESS IN CUSTODY AND ACCESS CASES

By G P DAVIDSON, *Senior Lecturer, Department of Psychological Medicine, Wellington Clinical School of Medicine, University of Otago.*

Why appoint counsel for the child in custody and access cases? This article purports to examine a number of principles found useful in recent years in the context of collaboration between solicitor and psychologist in such matters.

1 Access is the right of the child. This does not mean that the emotional investment of the parent in the child has no value or demands no respect, but it is taken that the child needs effective parenting more than the parent needs effective "childing". Thus, the wishes of the child should be thoroughly explored collaboratively and in the context of his or her own development and history. Few lawyers are trained in the necessary skills of interviewing and assessment that enable such exploration. Where possible, the use of an expert in the behavioural sciences, such as a psychologist, is a useful adjunct to a lawyer's own work.

2 Custody and access matters are not matters of criminal law. The axiom needs repeating to both professional and lay people. The fear and consequent style of operation more appropriate to a criminal prosecution should not pervade the Family Court, nor should anything but a conciliatory and reasonable approach underlie interviews. A psychologist engaged by counsel for the child is in a particularly useful role here. In an adversorial position, a "bias of experts can be caused by selection process and by tendency to identify with litigant or attorney they assist"[1]. In a custody and access case, the psychologist may be avowedly on the side of the children, using his special skills in psychometric assessment, developmental psychology, and family process, and his abilities as interviewer, counsellor and therapist, towards the goal of advising the course of action best for the children. Knowing of his role in proceedings, both parents are likely to be extremely cooperative, especially in cases of joint guardianship and contested access. A psychological report may be that much more useful to a lawyer where the psychologist has been involved over some time in therapy with the family. It has been found effective for the psychologist to gain opinions from others involved also, such as schoolteachers, friends, and members of other agencies. Again, such confidants of the child are often more likely to talk candidly with a health care professional working for the child, than with a lawyer representing either the father or mother. Above all, the proper use of a psychologist in such a matter is likely to reassure the child that his interests are being taken seriously and that he is not the undefended meat in the sandwich.

3 Understanding the family is a highly specialised task. Our experience is that best results occur when the psychologist makes one or two home vists to all the parties concerned, and speaks to the family members in various configurations, eg, individually, mother and daughter together, parents together, family interview. The complex dynamics of a family require spcialised training for an evaluation to be made of the nature and quality of relationships within and likely consquences of various formats of separation. Though separation and divorce may being welcome relief of problems in some situations, there is always a loss, even if it is of familiar patterns of battle. More frequently a kind of grief response is observed, even in anticipation of the permanence of the loss of the marital bond in the parents. The assessment of this response needs someone trained and experienced in the wide range of human behaviour, arguably from a clinical point of view, and for this to have value to a court, the assessment needs careful interpretation by a skilled lawyer.

4 Legal distress may preclude psychological distress. The involvement of a psychologist for evaluation purposes has been found to lead

[1] "Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce" Yale Law Journal (1978), May, 1180.

very helpfully into therapy for some families where distress exists. In such cases, the legal process is not an end in itself, but is seen as one part of a service by society to a family in difficulty. A psychologist engaged early in proceedings may be able to effectively bridge the gap between the professions so that the family is offered effectively help to solve its residual problems, in a therapeutic programme which may extend many months after a Court hearing.

5 Clear opinions supported by relevant information and research findings are more use than an unexplained diagnosis. The inclusion of this principle ought to be unnecessary, but it is worth emphasising that jargon and pompous professionalism of the worse kind are to be avoided in favour of clarity and dedication to the interests of the child as a member of the family.

6 It may be surprisingly cost-efficient to use a psychologist as fact-finder negotiator, and conciliator, obtaining an informal family agreement before the lawyer becomes too closely enmeshed in the events, and thereby perhaps doing away with the need for a Court hearing.

Conclusion The above principles in no way call for a blurring of the roles of lawyer and psychologist. This article does not purport to review outcome studies or to make exhaustive case references, but to distil some of the experience of two professionals who have collaborated over some years in a number of custody and access cases. There has been real value in the distance between the disciplines and the roles, just as there are different motivations, trainings, and experiences in the collaborators. The point is that collaboration is enriching to each, each to the other, and the child may often need both.

LEGAL LITERATURE

Cheshire and North, **Private International Law**, Tenth Edition 1979 by P M North, D C L (Oxon), Law Commissioner for England and Wales; Fellow of Keble College, Oxford. London, Butterworths; 1979 lxxxiv + 755 pp (including index). Price $39.70 (limp); $59.70 (cased). Reviewed by P R H Webb.

Dr North notes in his Preface that Dr Cheshire died just a day or two before this edition was consigned to the publishers so that the work is the first edition of one of his texts to appear without at least his "personal blessing". Dr North goes on to state that Dr Cheshire's contribution to this branch of the law has been described as follows: "Cheshire combined an ability to take foreign materials into account with a willingness to criticise the highest literary and even judicial authority and a true originality of thought." Dr North says that it is against this standard that this and future editions of this work must be judged. If, by this statement, Dr North is expressing fears that his efforts conceivably might be weighed in the balance and be found wanting, let him once and for all rid himself of these fears, for he has very clearly enhanced Dr Cheshire's work, not least by the copious and apt references to New Zealand and other non-English case law and, on occasion, statute law. The work should deservedly continue to be a set book for students in English universities and a sound starting off point for the English practitioner who has to research a conflict of laws matter. The writer will certainly prescribe it confidently as a set book for his New Zealand students and warmly commends it to any local practitioner faced with a private international law problem — but with the caveat that is so much more frequently necessary in these times: that New Zealand law is beginning to diverge more and more markedly from English law in certain respects, statute law in particular. Further, if the new Code of Civil Procedure eventually allows service out of the jurisdiction without leave in those cases where, roughly speaking, leave is now required under Rule 48, Dr North's treatment of RSC Order 11, rule (1) will be rendered useless in New Zealand and we shall be constrained to look to the British Columbian cases for guidance.

A few thoughts are offered: Could it be explained somewhere how the English Court assumed jurisdiction in *The Mary Moxham* (1876) 1 PD 107? As students may be coming across "Mareva" injunctions for the first time when they read this book, could the treatment on p 94 be lengthened? As England must, like

New Zealand, be faced with problems of illegal immigrants, a few words on the domicile of such persons might be welcomed in Chapter 7. It has been held in *Re McKenzie* (1951) 51 SR (NSW) 293 that a foundling is domiciled in the country where he is found and this authority is offered to back up the statement to this effect on p 179. As footnote material, Dr North may wish to know that the New Zealand decision in *Hayman v Commissioner of Stamp Duties* [1935] NZLR 835 is concerned with the "seat" of a partnership.

Turning to contracts, there may be the occasional student who says that, having read how to determine the proper law where there is an inferred choice of the proper law (pp 203-206) and then how to determine the proper law where there is no choice thereof (pp 206-212), he does not know into which category to place a particular set of facts. One accordingly wonders if such a student might be given a clearer line of demarcation to assist him. The reviewer would invite Dr North, when time permits, to examine the New Zealand Illegal Contracts Act 1970, the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979, and, for that matter, the Minors Contracts Act 1969, and hazard a guess as to their application in space.

Chapter 10, on Torts, is, of course, very stimulating to one brought up in England, but the New Zealand Accident Compensation Act 1972 (the existence of which could well be footnoted in the eleventh edition with advantage) in practice takes most of the fun out of the chapter. Upon the vexed question whether or not the rule in *Phillips v Eyre* provides a rule for choice of law, reference might usefully be made to the obiter remarks of Mahon J in *Richards v McLean* [1973] 1 NZLR 521, at pp 524-526.

The Family Law Chapters (11-14) will be of considerable guidance in New Zealand — provided that the manifold statutory differences are constantly remembered. On p 311, Dr North puts the question whether, in the case of an actually polygamous marriage, the widow's share on the death of the husband intestate could properly be divided equally between the surviving wives. He considers that it could, but says in the accompanying footnote that there would be difficulty with the distribution of the personal chattels. After looking at *Re Phelps* [1979] 3 All ER 373, one wonders what would happen in England if, say, two wives sought appropriation of the matrimonial home. Would the answer be determinable by lot, perhaps? Further, it should be noted that Dr North could only refer to the short report of *Perrini v Perrini* in the Solicitors' Journal (C1978) 123 Sol Jo 48). That case is now fully reported in [1979] 2 WLR 472; [1979] 2 All ER 323 from which it will be seen that Sir George Baker P did not follow the *Padolecchia* case [1968] P 314; [1967] 3 All ER 863. It will thus be necessary to read with due care the treatment of the latter case on capacity to marry at p 340 of Dr North's text.

It is clear that, as the years go by, England's membership of the E E C will give rise to what Dr North calls in his Preface "a legislative storm to come" in England in a great many more areas. The inevitable result of this will be to bring ever nearer the parting of the ways in English and New Zealand conflict of laws — and thus render future editions of the work informative yet less useful in this country — and this comes to the reviewer as a very mournful matter. Sunt lacrimae rerum.

Dr North's treatment of the abandonment of the old rule that damages could only be awarded in sterling (pp 713 et seq) and the movement towards a doctrine of forum non conveniens (pp 119 et seq) — both new topics — call for special praise, as does his castigation (pp 153-155) of the judicial discretion to refuse to recognise a foreign status. And when, in just criticism of *Henry v Geoprosco International Ltd* [1976] QB 726; [1975] 2 All ER 702, Dr North writes at p 640: "This cannot be sensible", he has the reviewer's whole-hearted support for this succinct and purple patch.

The book, in the limp cover which the reviewer possesses, looks very pleasant in its jet black binding and red lettering. (Occasionally, one can see where the text has been amended, for the print appears lighter, and a mishap has occurred with footnote 5 on p 201, and footnote 5a on p 288 should read 6a). As always, the book continues to give great pleasure. The order of treatment of the various topics and the traditional format have, very properly, been retained, and if one who was educated at the same school as the author and later had the privilege of being his colleague may respectfully say so: "Well done, thou good and faithful author".

Correction — Dam the Clutha [1980] NZLJ 104

The top eleven lines of the left hand column on p 105 are misplaced. They should follow the quotation in that column which ends ". . . Statute itself provides", and lead on to the right hand column.

STATUTES

THE DILEMMA OF STATUTORY COMMENCEMENT

By N J JAMIESON *BA (NZ) LLB (VUW), Senior Lecturer in Law, University of Otago.*

As a matter of logic it may be asked whether those New Zealand statutes having dates of commencement determined by delegated legislation are truly in force. The number of such statutes is large, and as a class contains much important legislation. Examples are to be found throughout the Statute Book in all branches of law. The Accident Compensation Act 1972, the Nuie Constitution Act 1974, the Private Investigators and Security Guards Act 1974, the Wanganui Computer Centre Act 1976, the Waterfront Industry Amendment Act 1977 and the Forest and Rural Fires Act 1977 are only a few of the many examples of Acts commenced by Orders in Council.

As a matter of logic *(a)* none of these Acts is in force. The Wanganui Computer Centre Act 1976 provides a clear illustration of the argument that this class of legislation is devoid of force and effect. Section 2(2) of the Wanganui Computer Centre Act 1976 relates to the commencement of that Act in providing that the Act ". . . shall come into force on a date to be appointed by the Governor-General by Order in Council." The Wanganui Computer Centre Act Commencement Order 1977 *(b)* was made on 7 February 1977. Clause 2 of the Order provides that the Wanganui Computer Centre Act 1976 shall come into force on 17 February 1977.

The authority by which the Wanganui Computer Centre Act Commencement Order 1977 was made is expressly declared by the Order itself. The Order purports to be made pursuant to the Wanganui Computer Centre Act 1976. How can this be so when that Act was not in force? And how obviously illogical the attempt to bring the Act into force appears when one considers that neither the authority to cite and identify the Act nor the authority to enact subordinate legislation under the Act are in force.

Even as a matter of common (and thus intuitionistic) logic this argument deserves a more explicit, abstract and general expression by being divorced from the details of the concrete instance used to explain it. In restating the argument more generally, however, we shall not be content to rest there but shall detail and expand the argument into various forms in case the apparently intuitive acceptance of its most general expression unwittingly depends on ellipsis. The point of being as explicit as possible (which means running somewhat counter to the claims of generality and abstraction) is to ensure there are no hidden premises.

The first form of the argument is that no power can be its own authority. The authority for the exercise of power must be independent of the power. Self-authorising power is thus void for circularity. This general form of the argument is most possibly invalid because it is not clear that any distinction is being drawn between power and force. The outcome of force is not always determined or determinable by legitimacy. There are countless examples of this at international law.

The second form of the argument distinguishes between power and force. In this sense no exercise of power (as distinct from force) can be its own authority. In this sense every exercise of power must be legitimate, and its legitimacy must be determined by some criterion or criteria independent of the power. Thus power and authority are correlatives and signify in law and politics a dyadic relationship between two separate persons or institutions. In this sense self-authorising power is a contradiction in terms. There is no independent criterion by which to gauge its legitimacy. It is brute force masquarading as legitimate power. This is a convincing form of the argument by which the process of commencement orders is of doubtful validity.

(a) Unless otherwise stated, the term "logic" is used throughout this article to denote common logic in its familiar and orthodox sense. No doubt there are more esoteric systems of logic which hold circular argument to be a valid form of inference just as there are non-Euclidean systems of geometry in which parallel lines meet at infinity. The statute-user can hardly be expected to be conversant with non-traditional logics, however, any more than with affine geometry. This is especially so when most legislative draftsmen are conversant with common logic only to the extent of taking it for granted.

(b) SR 1977/8.

The second form of the argument may be expanded into countless variations in so far as distinctions can be drawn between various sorts of power. In this way for example the argument may be restated in the form that all political power is derived from some independent authority in so far as that is necessary to distinguish the legitimate use of force in society from the resolution of conflict by brute force as we think in the jungle. Similar variations on the concept of power may be obtained in the contexts of law, custom, ethics, aesthetics, and so on.

In this way we are led to the final and most particular expression of the commonsense argument against the logical validity of these commencement orders. It says a great deal in favour of the law that the most explicit and convincing statement of the commonsense argument is also that which is of most legal relevance. On the strength of this argument subordinate legislation without superior authority is a self-contradiction. There can be no power exercised by the Executive in making legislation (other than prerogative powers of the Crown) except pursuant to the authority of the legislature as expressed by an enactment in force. Thus any subordinate legislation purporting to be made pursuant to an enactment of the legislature not yet in force for the purpose of bringing that authorising enactment into force is illogical both for circularity and as a self-contradiction.

As a matter of common logic, therefore, most forms of the argument by which commencement orders are logically invalid, if not for self-contradiction at least for circularity, are persuasive and convincing. If the orders are invalid as a matter of logic, how can it be otherwise as a matter of law? This is the legal dilemma.

By way of legal argument can it be submitted that s 12 of the Acts Interpretation Act 1924 resolves this problem? Does s 12 allow an Act not yet in force and without any determined date of commencement to be pulled (if not indeed to pull itself) off the ground and into operation whenever the Executive so determines by tugging on the empowering provisions (the shoestrings, so to speak) of the Act? By this devious and often surreptitious means *(c)* the Act purports to come into force by authority of its own empowering provisions. Yet these provisions are themselves not yet in force. The answer obviously depends on the construction of and interpretation accorded to s 12 of the Acts Interpretation Act 1924 in so far as that section relates to this situation. Do the provisions of s 12 break or transcend the circularity or self-contradiction as seen by commonsense logic. If so, here we may have an instance of that legal thinking by which Coke CJ distinguished natural from artificial reason *(d)*. It is then mistaken to deal with this matter as one of orthodox reasoning. On this basis we have an instance where law resorts to an esoteric form of logic. It follows that the statute-user is obliged to understand this just as if he were called on to comprehend non-Euclidean geometry. This conclusion gives rise to more uneasiness, however, than any conviction as to its truth.

Section 12 of the Acts Interpretation Act 1924 provides as follows:

12. Exercise of statutory powers between passing and commencement of an Act - Where an Act that is not to come into operation immediately on the passing thereof confers power to make any appointment, to make or issue any instrument (that is to say, any Proclamation, Order in Council, order, warrant, scheme, rules, regulations, or bylaws) to give notices, to prescribe forms, or do anything for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof, subject to this restriction: that any instrument made under

(c) Devious and surreptitious in the sense only of being indirect and out of the way. No lesser epithets come into anyone's mind who has tried to ascertain at any time in the six years between the passing (as a matter of urgency) of the Hovercraft Act 1971 and its purported coming into force by a commencement order gazetted on 19 May 1977 (SR 1977/125) whether this Act was or was not in force. Throughtout that time both lawyers and laymen alike have been faced, not only with protracted and tedious research but also with the problem of negative evidence.

(d) *Prohibitions del Roy* (1607) 12 Co Rep 63. The doctrine of parliamentary sovereignty whereby an omnipotent legislature may as a matter of law do anything, does not overawe the "natural reason" distinguished by Coke, CJ. Were this not so it would otherwise follow as a matter of natural reason that logical invlidity could be turned into logical validity by law. Logic is not so enthralled, however, and a logical invalidity may be validated only in an artificial and legal sense and again only to the degree that the law is prepared to be absurd. For such attemps the layman finds the law an ass. Nevertheless, the circularity or self-contradiction of the commencement orders requires for their complete understanding an appreciation of the legal context as viewed by the related branches of constitutional and administrative law.

the power shall not, unless the contrary intention appears in the Act or the contrary is necessary for bringing the Act into operation, itself come into operation until the Act comes into operation. In the context of the numerous class of statutes being discussed, each of which (but not all of each) is being administered as if in force, it is easy to argue what one would wish to think, and so appears obvious to be the case - namely, that as a matter of practical convenience the commencement orders for these Acts must be upheld, if not as a matter of logical, then as a matter of legal validity. To decide legal issues on grounds of convenience, however, is a matter of subjective opinion and no form of reasoning at all.

The extent to which inconvenience is taken into account in the administration of justice, or allowed to militate against commonsense logic or established principles of law, is no compliment to any legal system. It may be that the apparent obviousness of s 12 as a solution is grounded on its literal construction without need for any purposive interpretation or even reference to s 5(j). And it may also be that a decision on the grounds of convenience can be supported by a lack of precision in ss 8-12 of the Acts Interpretation Act 1924, in their rather haphazard use of the terms and expressions "commencement", "coming into operation" and "to take effect", and also in the use of the expression " come into force" in commencement orders. It can also be argued from s 11 of the Acts Interpretation Act 1924 that in providing ". . . every such date shall be taken to be a part of the Act, and to be the date of commencement where no other commencement is therein provided," the words "where no other commencement is provided" apply as much to other means of determining commencement as they do to another determined date of commencement. Finally, s 3 of the Acts Interpretation Act 1924 and s 3 of the Statutes Amendment Act 1936 may be cited to complete the argument for good measure. These enactments respectively provide as follows:

"**3. Declaration that Act applies unnecessary** - It shall not be necessary to insert in any Act a declaration that this Act applies thereto in order to make it so apply. "**3. Act to apply to regulations, etc., made under authority of Imperial Acts** - The Acts Interpretation Act 1924 shall apply to all rules, regulations, bylaws, and other acts of authority made or done by the Governor-General or by any other person in New Zealand under any Imperial Act or under any rule or order of His Majesty in Council in the same way as it applies to rules, regulations, bylaws, and other acts of authority made or done under an Act of the General Assembly of New Zealand." It follows from s 3 of the Acts Interpretation Act 1924 and s 3 of the Statutes Amendment Act 1936 that the Acts Interpretation Act 1924 may apply to commencement orders as being ". . . acts of authority made or done by the Governor-General . . ." and that the Acts Interpretation Act 1924 need not be cited or declared to apply to them.

Against the validity of the commencement orders and the commencement of their parent (?) *(e)* Acts, however, ought to be weighed the following arguments relating, some to matters of literal construction, and others to purposive interpretation.

Arguments relating to literal construction

(1) Section 12 distinguishes between Acts that are to come into operation immediately on passing, and other Acts. The crucial question is what kind of other Act is it to which the section applies. Since the section does not explicitly refer, nor need refer to an Act which empowers the determination of a later date of commencement by instrument, there are no grounds to conclude that the kind of Act in question is any other than one which specifies a later but determined date of commencement.

(2) The words ". . . do anything for the purposes of the Act . . ." as they appear in s 12, must be read ejusdem generis with the previous words ". . . to give notices, to prescribe forms . . ." This is clear from the omissiion of the word "to" as it might otherwise have been used to preface the expression "do anything". Instead the Act reads ". . . to give notices, to prescribe forms, or do anything for the purposes of the Act . . ." Neither determining the date on which an Act is to come into force, nor bringing the Act into force on that date are ejusdem generis with giving notices and prescribing forms.

(3) The nearest that s 12 comes to empowering commencement orders is in reliance on the words ". . . unless the contrary intention appears in the Act or the contrary is necessary for bringing the Act into operation . . ." These words cannot be construed as an extension of the main provision of s 12, however, for they occur as an express restriction to the main provision. The main provision does not empower commencement orders. It follows that the restriction to that main provision cannot empower commencement orders. *Leveridge v Ken-*

(e) In what sense can the parent Act empower its subordinate legislation except in the rhetorical sense of the child being father of the man?

nedy [1960] NZLR 1 relates to provisos and fortunately cannot extend its confusion of the logic of provisos to expressed restrictions.

(4) No "contrary intention" as mentioned in the restriction to section 12 of the Acts Interpretation Act 1924 "appears in" any of the Acts purportedly brought into force by orders. Because, as will be apparent from later arguments relating to purposive interpretation, a contrary intention could easily have been made to appear in those Acts, no reliance on this provision of s 12 can be used to substitute and authorise the orders.

(5) Even if the words ". . . the contrary is necessary for bringing the Act into operation . . ." are held (despite the restriction in which they appear) to apply to and empower commencement orders, they do not empower commencement orders expressed to come into operation before the Act, as most do, but only those which come into operation coincidentally with the date of commencement of the Act. On the strength of this argument the commencement orders themselves should at least be expressed to come into force on the date which they themselves provide for the commencement of the Act. None do so, however, although there is no apparent reason why not. It seems clear that all could have been made to do this.

Arguments relating to purposive interpretation

(1) The main purpose of s 12 is, in relation to any Act not coming into force immediately on its passing, to empower the making and promulgation (as distinct from the immediate enforcement) of subordinate legislation. Thus subordinate legislation may give notices, prescribe forms, and do any other like thing in relation to the Act, so that when the Act does come into force according to its own determined date of commencement it will be operable in the context of that subordinate legislation. It will be clear that the present system of commencement orders does not come within this main purpose.

(2) In so far as s 12 has other purposes these may enable the subordinate legislation to come into operation before the Act comes into operation. The power to do so, however, is restricted to situations where the requisite intention appears in the Act or the prior operation of the subordinate legislation is necessary for bringing the Act into operation. As may be seen from the seventh and last argument relating to purposive interpretation, the requisite expression of intention to empower the prior enforceability of the subordinate legislation is the very thing that is missing from each of the Acts. There is a distinction, too, between that which is necessary or expedient for (the purpose of) bringing an Act into operation and actually bringing it into operation. The distinction is very great in the context of the logical circularity which affects commencement orders. In the same way it is not the prior operation of the subordinate legislation being brought into force before the commencement of the Acts (as invariably happens) that is necessary for bringing the Acts into operation; but only the making and promulgation of that legislation. Almost all commencement orders purport to come into force before the date of commencement of their respective Acts, however. Since this is both needless, and unintended by the Acts, the orders are not authorised by s 12.

(3) Even though the intent of s 12 is to avoid, break, or sanction the circularity of a self-authorising power, the section does not go far enough, nor is it explicit enough in the expression of that intent to deal with the full implications which commencement orders have for established principles of constitutional and administrative law.

(4) The enormity of the problem of commencement orders for New Zealand's legal system may not be allowed to intrude into and prejudice an interpretation of s 12's intent. After all the problem dealt with by the Legislature Amendment Act 1977 was every bit as enormous for New Zealand's legal system as the problem of commencement orders. It is clear from s 3 of the Legislature Amendment Act 1977 that the New Zealand Parliament has accepted the need to validate, or has acknowledged the desirably of validating, all those enactments which in contravention of Parliamentary practice and standing orders had been carried from one session of Parliament to another or from successive sessions of Parliament *(f)*. It is to the merit of any legal institution, and in particular to Parliament which "can do no wrong", that it deals directly with all

(f) "An Act resulting from the passing, whether before or after the commencement of this Act, of a Bill carried forward, whether before or after the commencement of this Act, from one session of Parliament to another or from successive sessions of Parliament, and anything done under any such Act, whether before or after the commencement of this Act, shall be as valid and effective as if the introduction and passing of the Bill, and all other proceedings of the House of Representatives and of any committee in relation to it, had taken place within one session": s 3 of the Legislature amendment Act 1977.

problems of legality that affect it.

(5) Any interpretation of s 12 to authorise the present system of passing Acts but leaving their commencement to be determined by subordinate legislation provides an opportunity for the Executive to administer the Act or some portion of the Act in terrorem. On this basis the Act is used as an instrument of force and not of power whereby citizens are bullied into conducting themselves in accordance with the Act, or worse still in accordance with a course of action irrelevant to the Act. The citizens conduct themselves according to the wishes of the Executive lest the Act be brought into force, or worse still in open bargain with the Executive that it be not enforced. This results in a clear misuse of not only the legislative, but the executive process of government. What can the Judiciary do about it if not in the first place impugn the present system of commencement orders which allows this evil opportunity?

(6) Another consequence of interpreting s 12 to authorise the present system of commencement orders provides a quite different but no less evil opportunity. It enables Acts which have been passed without determined dates of commencement to be ignored by the Executive. Thus the Hovercraft Act 1971 has been one of our statutes for over six years without being brought into force *(g)*. It would be interesting to know all the details of that Act's history in the executive branch of government.

(7) Lastly, and most importantly, we may gauge the intent and purpose of s 12 in relation to commencement orders by considering the very simple and direct means of resolving the legal dilemma of statutory commencement. It is because legislative composition opens the door of legislative comprehension that every Judge (and not just Christie J, as the exception to prove the rule) should first have served as a draftmans. By redrafting the statutory provisions involved we may find out exactly where the fault lies. It does not lie with s 12 of the Acts Interpretation Act 1924, as our preoccupation with interpreting that section to resolve the dilemma of statutory commencement may lead us to believe. If we approach the problem as legislative draftsmen, however, we find that to resolve the dilemma it is not s 12 but the title and commencement provisions of the so-called empowering Acts that are deficient. The remedy is simple, direct, explicit, and in accordance with natural reason and commonsense logic. All that it involves is to preface what is usually subs (2) of the title and commencement section of any Act to which a commencement order is to apply with the words "Except for this section". This results in the following common form of legislative drafting:

"(2) Except for this section, this Act shall come into force on a date to be appointed by the Governor-General by Order in Council." *(h)*

The commencement of what is usually s 1 (dealing with title and commencement) of any Act to which it is intended that a commencement order apply is thus construed to come into operation in accordance with s 8 of the Acts Interpretation Act 1924.

This remedy does not resolve the two issues by which an Act brought into force by a commencement order may be used in terrorem or ignored by the Executive. It does break the illogical circularity and self-contradiction of the present system, however, and at a point which clearly shows that deficiency to be not in s 12 of the Acts Interpretation Act 1924, but in the so-called empowering Acts themselves. It also brings logic and law a little closer in emphasising that the present system of commencement orders is as illogical for law as it is for common sense. What the outcome will be remains unknown. A study of legal reasoning inclines one to remain conservative enough to regard the present system of commencement orders as no more than a lawyer's dilemma. It will be interesting to see when the occasion arises, however, whether the dilemma will be resolved by reference to natural or to artificial reasoning.

(g) The Hovercraft Act 1971 did not come in force, if at all, until 1 June 1977 (SR 1977/125).

(h) This legislative form relies on section 8 of the Acts Interpretation Act 1924. It therefore leaves inexplicit the obvious question of when the section itself comes into force. In doing so it appears to put the cart before the horse - if not indeed to overlook forget the hore altogether. This therefore raises the problem of whether Interpretation Acts are an advantage or a disadvantage to the statute-user. To substitute a more direct, obvious, and explicif form by way of resolving the dilemma of statutory commencement may be done as follows:

"(2) This section comes into force on the passing of this Act.

"(3) All other sections of this Act shall come into force on a date to be appointed by the Governor-General by Order in Council." It will nevertheless be appreciated that this more explicit form is redundant of section 8 of the Acts Interpretation Act.