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The press and public policy

TWO recent — and apparently unrelated — developments are of particular interest to those who believe that the Fourth Estate (ie the gentlemen and women of the press) is more than just a name. The first is a study by law lecturer Jane Kelsey and criminologist Warren Young which analyses public reaction to media reports of gangs. The second is a speech (delivered 9 August) by the Minister of Justice, the Hon J K McLay, which concerns itself with the possible effect media coverage may have upon our criminal justice system.

The Kelsey/Young study pulls no punches. It concludes that the press helped create a gang "problem" by exaggerating the extent of their activity during 1979. Media coverage, according to the study, on many occasions inaccurately ascribed major disturbances to gangs, as in one story entitled, "Bar in Shambles after Gang Brawl". We discover (in fact in the same story near the bottom) that the fracas was initiated by the locals. In other cases, where there was in fact gang trouble, press reports were couched in emotive language. One example involved a confrontation of two gangs (a hundred people) which was described as "a battlefield strewn with blood, bodies and broken glass". Yet the hard facts failed to bear out this description — only three gang members were admitted to hospital.

If the study were simply limited to documenting media mistakes, its findings would probably be quickly forgotten. Its enquiry extends far wider, however. It purports to draw a link between press coverage and public reaction. According to the study, response to gang reports seemed to follow as inevitable: community panic, new police tactics, stiffer penalties in the Courts, and legislative intervention. The study's conclusion does not confine itself to gangs: essentially how a society thinks and acts can stem from its response to media perception of events.

Press reaction to the study was predictably critical. The media, through its editorial columns, pointed out that the gang problem was real and that people were entitled to be concerned. Readers were also reminded that journalists subscribe to high ethical standards. It would be folly to dispute either claim. Whether or not there is a gang "problem", there certainly is a gang presence, a phenomenon worth reporting. The duty of a journalist is to report the truth, elusive in the best of circumstances, but many people would accept that the media is more successful than other institutions charged with similar responsibilities. Nevertheless, the study raises important issues and is worthy of serious consideration.

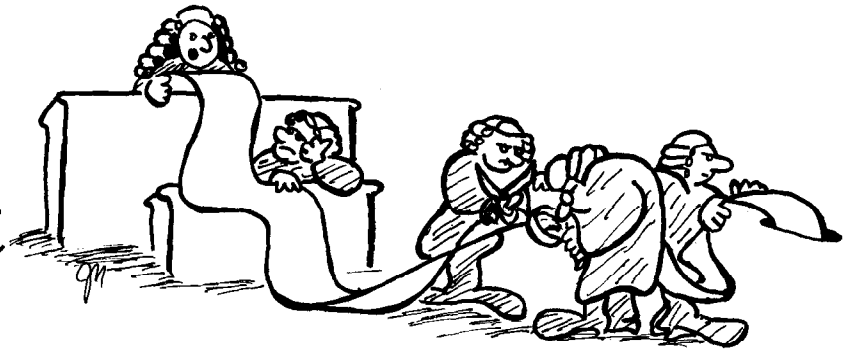
The Minister in his speech was not critical of the press; however his thesis contained strong parallels to the Kelsey/Young study. He included an overseas example of the type of public panic alluded to in the study, this time in relation to media coverage in New York City of a "crime wave" against the elderly. The Minister noted that community attitudes can be influenced by the media, often to the detriment of all concerned.

The Minister's immediate concern is that Justice Department plans for a more enlightened penal policy, which rely upon a "caring community", may be frustrated by press reports that reinforce popular conceptions of fear and distrust toward offenders. Accordingly, the Minister announced that his department is contemplating a study of how media representation of crime may be influencing public attitudes. That study is apparently proceeding.

One must emphasise that the Minister's remarks are not the standard politician's reaction to adverse news coverage. Rather, it is an acknowledgement of the considerable influence exercised by the media. In this context — without threat to freedom of the press — it is appropriate for our policy-makers to consider the influence of the media when they are making decisions. As the term implies, the Fourth Estate is an unofficial public institution, and accordingly (noting that the definition is wide enough to include this publication) it should expect — and willingly accept — close scrutiny.

John McManamy

Case and Comment



Voidable preferences — two cases

THERE is a steady stream of unreported judgments on voidable preferences flowing from the Courts of late. This is, perhaps, an indication of the volume of insolvent liquidations. When a company's assets are insufficient to pay its creditors, the liquidator will be concerned to maximise the available assets by whatever means are available to him. Section 309 of the Companies Act 1955 gives him a potent weapon. The section operates to invalidate transactions whereby one or more of the company's creditors are given a preference over the other creditors, as long as three requirements are satisfied: Firstly, the transaction must have taken place within two years of the commencement of the winding-up; secondly, the company must have been unable at the time to pay its debts as they fell due from its own money; and thirdly, the transaction must have been entered into by the company with the intention of giving a preference.

Two of the recent decisions are here chosen to illustrate two important aspects of s 309. The first case, *Re Demolition and Roading Contractors (NZ) Ltd* (Christchurch M 114/80, 9 August 1982, Cook J) shows that the law regarding voidable preferences may be affected by other bankruptcy rules, and also, it is submitted, illustrates what the basic purpose of s 309 is. In this case, the directors of the company had current accounts with the company on which they would draw for their salaries. It was the practice for the Annual General Meeting each year to fix the salary levels for the forthcoming financial year, thus determining the level of drawings. At the next AGM the salaries for that year would be approved, with the result that a credit corresponding to the approved amounts would be made to the current accounts, thus cancelling out accumulated debits.

At the AGM for the year ended 31 March 1977 (held on 16 September 1977) it was resolved that no salaries for the directors be approved for the year ended 31 March 1977. Cook J found that the result of this was that debits accumulated during this period became advances by the company to the directors — an asset of the company. However, he also accepted that the parties never intended that the directors should have worked for nothing during that period. In substance, the directors had agreed to forgo salaries temporarily, to help the company through a difficult financial period. It was really no more than a postponement, not a cancellation.

In February 1978, within the two year period before the commencement of the liquidation, a resolution was passed at a shareholders' meeting that the directors should have credited to them the amounts which they had previously agreed to forgo. The liquidators sought to upset this payment under s 309. The first point to be noticed is that there was no cash payment made to the directors; all that occurred was a credit entry in the current accounts. Cook J thought it relevant that this was so.

Looking at the credit entries, Cook J referred to s 307 of the Act, which imports into company liquidations certain of the rules of bankruptcy. In particular it imports s 93 of the Insolvency Act 1967, which allows the off-setting of mutual debts as between a bankrupt and another person. He held that the two debts, that is, the accumulated debits and the credit entries, were capable of being set-off against each other in an account. Therefore, had the set-off not in fact been made when it was but at the time of liquidation, each director had owed money to the company in respect of drawings and in return had been owed money by way of salary, then the directors would have been able to claim a set-off.

He concluded:

> A set-off made in the books of the company at the time when the salaries were approved would appear to be equally valid.

In substance, then, the directors agreed to forgo their salaries temporarily, but the company remained liable to pay them at some future date. To that extent the directors were creditors of the company. However, they owed the company an equal amount in respect of the accumulated debits.

When the company credited the current accounts it really only declared the pre-understood position — that it was not intended that the directors should ever occupy the position of true creditors of the company for the purposes of s 309.

In any case, when the company credited the accounts it fulfilled its liability to pay the salaries while at the same time reducing its assets due to the loss of the sums owing by the directors. It therefore reduced its assets and liabilities by equal amounts, so that the net pool available for distribution to the other creditors was unharmed. Since no other creditors' interests would be prejudiced, there was no reason for seeking to bring the transaction within the ambit of s 309 which is only aimed at upsetting transactions which give preference to one or more creditors in circumstances where the giving of that preference would reduce the amounts which the other creditors could expect to be paid. This, then, was a common-sense decision.

The second case, *Re World Style Builders Ltd* (in receivership and voluntary liquidation) (Christchurch M 511/79, 30 August 1982, Hardie Boys J), highlights one of the more difficult aspects of s 309, the need to prove an intention to give a preference. One would have thought that, to be fully effective, a provision which was aimed at preferences should ideally look to the effect of the particular transaction (as is the position in Australia), rather than at the intent of the "preferrer".

The requirement of intention has given rise to some unusual consequences. For instance, it has been held that a payment made to a creditor after threats to sue have been made cannot amount to a preference, since the lack of voluntariness negatives any intention to prefer: *Re Johnson, ex parte Wright* (1908) 99 LT 305.

Similarly, a payment made to a creditor for a collateral purpose will not be caught, so that, if a company pays its bank amounts owing in order to retain the goodwill of the bank, there is no intention to prefer: *Re FLE Holdings Ltd* [1967] 3 All ER 553.

In *Re World Style Builders*, the liquidator sought an order that the bank repay money paid to it by the company, one month before the company went into voluntary liquidation. It was alleged that the payment was made with a view to giving a preference to B, who had guaranteed the company's indebtedness to the bank. It was agreed that the company was insolvent, so the only matter in issue was the company's intention. Basically, the company had been facing financial difficulties. It was a spec-builder, which was finding difficulty in selling the houses which it built. Trade creditors were not being paid, and the bank was pressing for a substantial reduction of the company's overdraft. The guarantor arranged for two companies of which he was a director to advance money to the company sufficient to meet the obligation to the bank, as well as some other commitments. The significant point, as stressed by Hardie Boys J, was that the guarantor, in arranging the loan, intended that part of it be used to pay the bank. The company was not a free agent in the matter. In paying the bank, it was merely carrying out the direction of the lender. That being so, Hardie Boys J found that there was not the requisite intention on the part of the company to give a preference. The absence of voluntariness was said to negative it:

> However, so far as it was a free agent, I think its intention was to reduce the financial pressures upon it so that it could continue in business and clear avenues for further borrowing.

It might well be argued that the company, through its officers was well aware from the outset that any loan raised through the medium of the guarantor would be required to be applied at least in part towards paying the bank. It seems a little artificial to say that the company was merely acting at the direction of the guarantor. However, the second aspect of Hardie Boys J's judgment raises interesting questions. In particular, if the *effect* of a transaction is to give a preference then should that be enough? It is submitted that this would be going too far. If such an amendment were to be made to s 309, then there should also be enacted some form of saving provision, which would prevent s 309 from operating in circumstances where the company received a genuine benefit in return. One example might be the clearing of avenues for further borrowing, as in the instant case. The most important point is that it is detriment to other creditors which must be safeguarded against. The gist of the rules regarding unsecured creditors is that they rank pari passu in a liquidation, and nothing untoward must be done to disturb that position, unless there is no liquidation looming. The enactment of such a proviso might help to distinguish cases where genuine attempts are made to resurrect a company's fortunes, from those where one creditor gets a preference in fact, but not at present in law, merely by reason of his having threatened to sue the company.

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Insurance — parties to contract

IN *Challenge Finance Limited v The State General Manager* (CA 68/81, 30 July 1982) Wrightcars Limited assigned (by way of mortgage) its interest in a motor vehicle to Challenge Finance Limited which then entered into a hire purchase arrangement with Peeni. Peeni insured the vehicle with State noting Challenge's interest on the policy. On facts that are not material, the motor vehicle was lost and Peeni could not be located. Wrightcars indemnified Challenge in terms of the assignment and requested Challenge to make a claim against State under the policy which Peeni had taken out. State turned down Challenge's claim and the matter was brought before the Courts. The Court of Appeal allowed Challenge's claim. The underlying assumption behind the Court of Appeal's judgment appeared to be that there was a direct contractual nexus between State and Challenge. Further, it was considered to be irrelevant that Challenge had suffered no loss.

It will be recalled that the contract of insurance in the present case was concluded between Peeni and State, although the interest of Challenge was noted on the policy. It is presumably obvious that the mere fact that Challenge's interest had been noted did not make Challenge a party to the contract of insurance. In order for Challenge to be a contracting party, it would be necessary to assume that Peeni had contracted with State as agent for Challenge, instead of, or in addition to, contracting on his own behalf. This would entail the assumption that, Challenge by its agent Peeni, intended to observe and perform the various terms of the insurance contract, or at least, promised to pay the premium.

With respect, it is submitted that this is not generally the intention of a finance company or mortgagee where it exacts a promise from a hire-purchaser or mortgagor to take out insurance and to have the interest of the finance company or mortgagee noted on the policy. The intention is simply to ensure that, as a matter of practice, the insurer pays out a claim to the finance company or mortgagee before paying out to the owner of the chattel or property. Further, the fact that it is the practice of an insurance company to send an invoice for the premium to the finance company or mortgagee when the hire-purchaser or mortgagor defaults only demonstrates that it is in the interest of both the insurance company and the finance company or mortgagee that the premium be paid. It does not demonstrate that the finance company or mortgagee is contractually liable to pay the premium. It would seem that the matter of contract was not argued by counsel for State. If it had been, the Court of Appeal would have been forced to analyse the formation of the insurance contract in more detail. (If the Contracts (Privity) Bill is enacted, Challenge might be able to bring an action against State in circumstances where it was not a party to the contract.)

It is also submitted that it gives rise to some confusion to assimilate insurance for the full value of a chattel and insurance to cover all of the

respective interests in the chattel. It is important to distinguish between these two concepts because it is possible to insure a chattel for full value (ie in monetary terms) but not to insure on behalf of all parties who have an interest of some kind in the chattel. It may be doubted on the facts of the present case whether Peeni intended to insure on behalf of Wrightcars. Even if this was his intention, it does not of itself explain why Challenge could recover against State on behalf of Wrightcars. As Challenge had suffered no loss itself, the Court's decision seems to fly in the face of the principle that the contract of insurance is a contract of indemnity.

In this respect, the Court of Appeal referred to a number of cases. Of these, it is submitted that only *Hepburn v A Tomlinson (Hauliers) Limited* [1966] AC 451, is worthy of note. *Hepburn's* case is a decision of the House of Lords, which rests principally on the decision of *Waters v Monarch Fire & Life Assurance Co* (1856) 5 E & B 870. In the latter case, Lord Campbell said with respect to insurance taken out on behalf of all interested parties:

> It would be extremely inconvenient if such an insurance was not allowed, although the plaintiffs had no order from the owner of the goods to insure, and the plaintiffs never told the owner that they had insured.
>
> [The] contract is to pay or make good all such damage or loss as shall happen by fire to the property mentioned in the policies — not the mere particular interests which the plaintiffs might have in the property, but the whole value of the property.

His Lordship then said:

> The [insured] will be entitled to take sufficient to cover their own interest in the goods, and may be regarded as trustees of the remainder for those parties who have the ulterior interest in the property. There are authorities to show that the owners of the property although they had given no orders to insure, or had the fact of an assurance of their property communicated to them, may at any time ratify the insurance.

The judgments of Wightman and Crompton JJ, though briefer, are to similar effect.

With respect, the statements of Lord Campbell avoid the issue. The question may be asked why the insured is to be regarded as a trustee in respect of those proceeds, which represent the interests of the third parties. The answer must surely be that the third parties have authorised the insurance on their behalf. Unless this is the case, there is no basis upon which a trust should be imposed with respect to the insurance proceeds. Can this proposition be reconciled with Lord Campbell's statements? As a matter of authority, it seems that it can.

First, an agency can be brought into existence by ratification (*Wilson v Tumman* (1843) 6 Man & G 236, 242; and *Ancona v Marks* (1862) 7 H & N 686). All that is required is that the agent purported to act as agent at the time. So, in the present case, Wrightcars could later ratify the insurance provided that Peeni purported to insure on its behalf (*Keighley, Maxsted & Co v Durant* [1901] AC 240. Cf the anomalous doctrine of the undisclosed principal whereby the principal may adopt the contract provided it was made with his authority, notwithstanding that the agent did not indicate that he was acting on behalf of his principal). Secondly, having ratified the insurance, a trust will be imposed in equity in favour of the principal with respect to that part of the insurance proceeds which are not personally due to the agent. (*London & North Western Railway Co v Glyn* (1859) 1 E & E 652, 660 per Wightman J.) The difficulty in the present case is that it is unlikely that Peeni indicated that he intended to insure on behalf of any principal other than Challenge.

It is unclear from the authorities whether this agency principle is distinct from the concept of a goods policy. Where goods are insured, cases such as *Hepburn* and *Waters* demonstrate that it must be determined whether the policy is a goods policy (insurance for full value irrespective of who suffers loss) or a policy insuring the limited interest of the insured. In both cases, and in *Challenge Finance Limited v State*, the Courts construed the policies as goods policies. In such a case, as between the insurer and the insured, it follows that the insurer promises to the insured that it will indemnify him in respect of losses suffered by any or all of the parties whose interests have been insured. In making a claim therefore, it is immaterial whether the insured has personally suffered loss. However, as between the insured and the third parties, it has already been stated that if the insured did not purport to act as the agent of the third party principal at the time that the insurance was arranged, the principal cannot ratify the insurance and a trust cannot be imposed in the principal's favour with respect to the insurance proceeds. It is therefore submitted that it is not sufficient, to enable an interested party to recover the insurance proceeds, that the goods were insured for full value and in respect of all interested parties unless the insured purported to act as agent at the time for that interested party (that party being named or identifiable at that time).

While the decision in *Challenge Finance Limited v State* can be justified, the judgment of the Court of Appeal did not fully consider the difficulties to which the claim gave rise and in particular, glossed over the need to reconcile current insurance practice with orthodox contractual doctrine:

- The Court assumed that there was a contract of insurance between State and Challenge. No reasons were given for this assumption and it can only be justified upon the basis that Peeni contracted with State as the agent for Challenge.
- The Court assumed that it was the intention of Peeni (and therefore, on the facts, Challenge) to insure on behalf of all interested parties. This assumption can be doubted on the facts.
- The Court allowed Challenge to recover against State even though it had suffered no loss. Accepting that Challenge was a party to the insurance contract, this result can be justified only on the basis that State had promised Peeni (and therefore Challenge) that it would indemnify Peeni (and therefore Challenge) in respect of losses suffered by those parties whose interests had been insured by Peeni. However, it is not at all clear that Peeni purported to act as agent for any interested party other than Challenge so that it is difficult to see that Wrightcars could later ratify the insurance and become beneficially entitled to the insurance proceeds.

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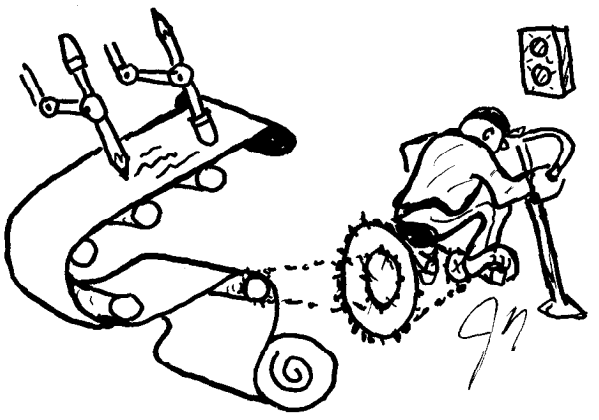
Law Reform



Securities Amendment Bill

THE Securities Amendment Bill was introduced on 21 September 1982. However important provisions in the Securities Act 1978 have not yet come into force, in particular those in Part II which relate to offers of securities to the public. The regulations which were to have been promulgated under the Act have also failed to appear. Now it seems that the Securities Commission, which is responsible for drafting the regulations, has proposed amendments to the Act. The more significant of these amendments and other important features of the Bill are outlined below.

Under the present legislation, securities (apart from those which are exempted under the Act) may not be offered to the public unless there is an accompanying prospectus or authorised advertisement. The Bill amends s 38(d) of the Act which states that an authorised advertisement shall contain "no other information or matter except information or matters of a kind specified in regulations made under the Act". This was felt to be too restrictive in that any other material which was included, however innocuous, would contravene the Act. Section 38(d) will now state that an advertisement must merely comply with the Act and all regulations under the Act. As a consequence s 70 of the Act will also be amended so that the regulations may state what shall be excluded as well as included in advertisements and prospectuses. Therefore neither the issuer nor presumably the Securities Commission will be as constrained as was the case previously. A further delay must now be anticipated before the regulations come into effect, as the regulations are of course dependent on the Bill passing into law.

The 1978 Act is concerned with the information which is contained in prospectuses. The Act also makes provision for "authorised advertisements" which must contain references to prospectuses which are registered under the Act. However the powers of the Commission in respect of authorised advertisements were not as extensive as those which it possessed for prospectuses. The Bill extends the powers of the Commission to enable it to prohibit advertisements. Currently it may only prohibit the prospectus. The definition of an advertisement is also clarified. At the same time the opportunity has been taken to bring the civil and criminal liability of those who issue advertisements which contravene the Act into line with the penalties for prospectuses.

The Bill extends the definition of the circumstances in which an offer of securities has been made to the public, although further clarification is required. In particular the Act will still exempt offers made to persons "who in all the circumstances can properly be regarded as having been selected otherwise than as members of the public".

There is some relaxation of the present provisions relating to statements which indicate an intention to make an offer of securities to the public. A limited amount of information may be released without attracting liability under the Bill. For example a statement of intention which includes a mere description of the securities and rates of interest is now exempt. Practitioners should note that the Bill introduces the concept of a "contributory mortgage broker". The contributory mortgage broker is a person who is not the mortgagor but who offers for sale to the public or manages interests in contributory mortgages. The Bill will extend civil liability to contributory mortgage brokers in order to protect those who have subscribed for an interest in such mortgages and who have suffered loss or damage as a result of any breach of the regulations. Contributory mortgage brokers may also be ordered by the Commission to cease offering securities to the public if the Act or regulations have been contravened.

Finally, under the present legislation, no allotment of a security which has been offered to the public may be made unless the balance sheet which accompanies the prospectus is less than nine months old. The Bill would permit the issue of interim balance sheets which must comply with the regulations. This device will maintain the currency of the prospectus without the necessity of issuing a new balance sheet. It will also diminish the likelihood of offers being made only in the nine months from 31 March, at which date most companies will have prepared accounts. At present it must be tempting to make offers within this period to avoid the expense of drawing up another set of accounts.

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Rape law reform

FOR some time now, the Department of Justice and the Victoria University of Wellington Institute of Criminology have been engaged in a study to determine whether there needs to be made any changes to the law of rape (including both its substantive and its procedural aspects) or to the procedures which have evolved for processing rape complaints through the criminal justice system. By January 1983, a report arising from this study should be in the hands of the Minister of Justice, who commissioned the study with a view to introducing rape reform legislation next year.

The focus of the study has been the amelioration of the effects experienced by rape complainants subjected to a criminal justice system which traditionally concerns itself almost exclusively with the accused. The Department of Justice and the Institute of Criminology have been making an effort to seek out the views of those with either a personal or professional interest in the victims of rape. This effort culminated in their sponsoring, along with the Mental Health Foundation and the Advisory Committee on Women's Affairs, a national symposium on rape, held in Wellington on 11 and 12 September 1982. There were approximately 75 participants in the symposium, travelling from as far away as Whangarei and Dunedin. Among the participants were rape victime, Judges, defence and prosecution lawyers, academics, rape crisis and other counsellors, members of the police, and members of Parliament.

The symposium was opened by the Minister of Justice, who emphasised the need for the criminal justice system to offer as much protection as possible to rape complainants without detracting from the rights of the accused. A series of papers was then presented — with ones by Mr Justice Jeffries on the substantive and evidentiary law of rape, Ken Stone on prosecuting in a rape case, Bruce Buckton on defending in a rape case, and Rosemary Barrington on police processing of rape complaints eliciting the most outspoken comments.

Among the issues canvassed during the symposium were whether the law should focus on the violation of physical integrity that is rape or on the bodily injury (or threat of bodily injury) that so often accompanies rape and whether it should focus on actual intercourse or on intent to have intercourse. Other substantive law issues discussed were spousal immunity, making rape a genderless offence, and widening the concept of rape to include the forcible invasion of any bodily orifice by any object. Perhaps the issue with the most unclear answer was whether the actual word "rape" should be retained in the law or replaced by a term like "sexual assault".

The discussion of procedural law reform was mainly concerned with matters of evidence. Much attention was centred on abolishing the special corroboration warning for rape cases and the recent complaint rule. Also discussed was the desirability of requiring juries to be told that lack of resistance by a rape complainant does not mean there was consent. The possibility of written depositions becoming the norm in rape cases was also canvassed. Extremely contentious was the suggestion by some participants that the principle of the accused's right to silence needed to be rethought.

Reform of legislation was by no means the sole area for discussion. Just as much attention was given to the procedures which the criminal justice system has evolved for dealing with rape complainants. A suggestion was made that Crown prosecutors should always handle the preliminary hearings in rape cases and that such hearings should always be presided over by Judges. Much debated was the idea that prosecutors should brief rape complainants, at least to the extent of informing them about such matters as the need for cross-examination and the need for the accused to be present in the Courtroom. There was also discussion about ways to make rape complainants more comfortable, such as allowing testimony to be given while seated, doing away with wigs and gowns, and allowing rape victims to have a "friend in Court" (perhaps legally trained). Earlier stages of the criminal justice system were also discussed, with suggestions being made for more collaboration between the police and rape crisis centres as to methods of dealing with rape complaints.

There was also a fair bit of discussion about changes that needed to be made in the attitudes of society as a whole if any changes implemented in the criminal justice system were to have the maximum positive effect. The debate on societal attitudes revolved around such topics as sex role stereotyping in the media and the classroom and the myths about rape (eg "women enjoy being raped").

No resolutions were adopted on any of the issues discussed at the symposium (nor were any such resolutions ever envisaged by the symposium's sponsors). The symposium was meant to be a forum for the exchange of ideas among persons who, while they had widely differing perspectives on the problems of rape victims, all shared a deep concern about those problems. In that, the symposium was a success.

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Distributions from share premium accounts

FOLLOWING are extracts from the report of the Property Law and Equity Reform Committee:

[The Minister of Justice] referred to this committee for consideration a request from the Trustee Companies Association that the Trustee Act 1956 be amended to authorise trustees, who receive on behalf of the Trust distributions from companies' share premium accounts or other capital revenue accounts, to treat such distributions as income between income beneficiaries and residuary beneficiaries.

. . .

The practice of making distributions from share premium accounts in lieu of or partly in lieu of dividends has developed in New Zealand during the last decade and according to information provided to the committee, would appear to be a trend which is likely to continue for some time yet.

Distributions from the share premium account are treated as a reduction of share capital pursuant to s 64 of the Companies Act 1955 and must therefore be treated as capital in the hands of the recipient. In this respect they must be distinguished from other distributions from capital reserves which can only be made by way of dividing profits and thus whether called a dividend or bonus or any other name, are payable to the income beneficiary.

. . .

Where the will, deed, or other instrument creating the trust authorises the trustees to treat distributions from share premium accounts as income for the purposes of the trust notwithstanding that they are capital in nature then the problem facing the trustees in balancing the interests of life tenant and remaindermen is to some extent, overcome. Otherwise it appears that trustees may be faced with the following difficulties:

- Because such distributions are capital they are the property of the remaindermen and not available for the life tenant unless the remaindermen are sui juris and consent to payment to the life tenant.
- Trustees who are required, or

consider it desirable, to maintain the income of a life tenant at a certain level, are frequently obliged to elect to receive a dividend, where the company provides the right to make such an election as an alternative to receiving a distribution from the share premium account. Where no such election is available the life tenant is deprived of the benefit of the distribution.

- Trustees can be discouraged from maintaining an investment in a company making distributions from its share premium account in lieu of dividends because of the need to produce an appropriate income for the life tenant.
- Corporate trustees operating pool holdings are put to considerable trouble in separating and maintaining individual classifications for their various shareholders, for some of whom it is appropriate to receive the capital distribution while for others an election to be paid a dividend from income, is necessary.

The working paper suggested that if as the result of the committee's investigations the need for amendment was established, it should be effected by an extension of the powers of trustees under the Trustee Act 1956. The powers should be extended to include the power for trustees in their absolute discretion to pay income beneficiaries of the Trust distributions from the share premium account of any company in which the trust holds shares. This power should be limited to share premium distributions where, as a term or condition of the authority for the distribution, it is a requirement that a capital replacement fund be provided by the company from revenue sources, or to that portion of the distribution which is subject to the requirement for a capital replacement fund. These conditions are considered necessary for the protection of residuary beneficiaries whose interest in the capital of the company is otherwise diminished by the distribution from the share premium account.

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The report noted that those who responded to a previous working paper were almost unanimously in favour of amendment. The committee further recommended that the Income Tax Act 1956 be amended to clarify the income tax situation.

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The report also drew attention to s 4(1DA) of the Trustee Act 1956. According to the report, the section is defective in that it "requires the transfer from revenue sources to a capital replacement fund in the financial year of distribution". This can prove very difficult for a trustee to check. The report suggests "that a trustee should be able to rely upon the certification of the secretary of the company making the distribution, as to compliance with the requirements of the legislation". It further recommends that the section be redrafted to ease the restrictions on payments from other capital sources.

Law reform — in defence of the present system

IN the August edition, "Law Reform" noted the proposal of Geoffrey Palmer MP for a Law Reform Commission. Palmer's views follow previous commentary, particularly an article by professor D L Mathieson in [1978] NZLJ 442 and submissions made by the New Zealand Law Society to the Minister of Justice early in 1981. To date, however, the debate has been rather one-sided. Accordingly it is refreshing to find that G S Orr, formerly Secretary for Justice and now a professor of law at the Victoria University of Wellington has made a thoughtful and vigorous reply to the earlier arguments.

In [1981] Canterbury Law Review 288, Orr first points to the positive aspects of the present system, namely that forty out of seventy-one recommendations made by the five standing Law Reform Committees have been implemented by the legislature and that many of their reports have been highly regarded by overseas law reform agencies, an enviable record.

Orr admits to deficiencies, but is against advancing weaknesses in the present system as a basis for replacing it with something totally new, particularly when a different system may be either undesirable or unworkable. For example, Orr rejects the Law Society's contention that a Law Reform Commission is necessary for the "huge tasks" ahead, such as codifying complete branches of the law. This presumes that such codification is necessary and desirable (which may not be the case). Further, the huge tasks, if beyond the range of the small committees, would most likely be beyond the competence of the modest full-time body proposed by the Law Society and others.

Orr notes that proposals for a Law Reform Commission have been influenced by the existence of similar commissions overseas. However, little comparative analysis has been done in terms of success rate or cost benefit. Finally, Orr alludes to the spectre of a Law Reform Commission intruding upon the legislative process and argues that a legislative programme should not be "subsumed by a non-elective, non-responsible body of lawyers".

In conclusion, it is Orr's view that the Law Society (and presumably others) have "failed to make out a convincing case for fundamental changes to our existing law reform structures".

Law reform — Victoria style

VICTORIA's new Government will be observed with interest by many. According to their law reform manifesto the Government proposes, inter alia, to enact an entrenched Bill of Rights, introduce an effective Freedom of Information Act, consolidate statute law, establish an office of Director of Public Prosecutions, review Court staffing levels, abolish all appeals to the Privy Council, boost legal aid and expand the role of the Victorian Legal Aid Commission, establish a single law reform body to replace existing agencies and committees, put emphasis on dealing with corporate crime, and reform sale of land procedures. There would be police reform measures which would include emphasis on the notion of community policing and the establishment of an independent tribunal to hear complaints.

It must be noted that all political parties excel at promises, and performance is another matter entirely. The Government's inexperience presents an additional complicating factor.

Inter Alia

The Forensic Fables

ALTHOUGH his *Forensic Fables* are appearing regularly in the *NZLJ*, no mention has yet been made of the author. When they were first published he was described simply as "O", which came from Theo, as Theobald Mathew (1866-1939) was universally called.

His father was Sir James Mathew, the first Judge of the Commercial Court in England. Theo practised as a barrister until he was over seventy years old and like his father, never took silk. He first came to public notice in 1896 as the editor with (Sir) Malcolm MacNaughten of the Commercial Cases, which were the reports of the proceedings before the Commercial Court. He must have had a good practice in that Court since Gilchrist Alexander, writing of life at the Bar in the 1890s in *After Court Hours* says that Theo Mathew "used to exhibit proudly a list of about 40 summonses for disposal before his father Mathew J in one day in the Commercial Court".

But he was much more than a lawyer. Far beyond legal circles he was well known as one of the great wits of his generation. *The Dictionary of National Biography* says that at the luncheon table, in chambers, at the Garrick Club, and elsewhere he would express himself in swift and impromptu sayings which were treasured and repeated and "came to be an unwritten saga of plaisanteries".

It is said that the jokes were not tainted by any kind of malice, which must be one reason why it was said in an obituary notice that "no-one in the Temple was so widely known or so well-beloved". Although it may not be "tainted by any kind of malice" the following example of Theo's humour does show a certain sharpness: a gentle barb. Asked one day during lunch in Hall whether he had read the recently published book entitled *The Judicial Wisdom of Mr Justice McCardie* Theo turned to a companion and remarked "A slender volume, I think".

His reputation as a wit was enhanced by his *Forensic Fables*. These first appeared in the *Law Journal* (UK) in 1925 and they were quickly re-published in the *NZLJ* at that time. Theo also drew the pen and ink illustrations which accompany each fable. The original set of fables were published in a book in 1926. They were followed by *Further Forensic Fables* (1928) and by two series of *Final Forensic Fables* (1929 and 1932).

Many of the personalities of the day were only thinly disguised in the stories. In *The Family Story*, Lord Denning says that he was "the double-first" in "The Double-First and the Old Hand". (As might be expected, the Old Hand, an experienced personal injuries lawyer Martin O'Connor, roundly defeated the Double-First who "had a Disastrous Day").

Those who read the Fables closely will discern a clever and perceptive mind behind. It was the mind which produced various essays and articles which appeared in the *Law Quarterly Review*, the *Juridical Review*, the *Cambridge Law Journal* and elsewhere. These articles and others were collected into *For Lawyers and Others*, published in 1937, which is one of the few diversionary books for lawyers which is readable, instructive and interesting. Theo delved into unusual corners of the law and his researches were very thorough. Being a wit, he could convey the facts with ease. Judges can read all about the history of judicial salaries (how high, how low); QCs can discover why they wear the black silk gowns they do (it was the mourning costume worn at Queen Mary's funeral and the KCs took a liking to it); literary lawyers can read of Dr Johnson and the Old Bailey. There is something in it for everyone. Theo Mathew was a lawyer who leavened the law: and how necessary such people are.

Aesop's Fables have survived from the 6th century BC, partly because he used animals as his principals instead of humans, and partly because his stories deal with elementary moral truths. It is much more difficult to write enduring fables of lawyers since the stories will all be set in a particular social era: in Theo's case, Edwardian England. The *Forensic Fables* may not therefore survive as long as Aesop's Fables but at a distance of only 50 years, they are still as pleasant as they were when they were first published.

Anthony Grant

Codd's last case

READERS may wonder what it's like serving a sentence of judicial restraint. The noted satirist, A P Herbert speculated on the matter and came up with a story on the Judge who finally let himself go. Entitled "Codd's Last Case" from a book of the same name (Methuen & Co Ltd, 1952), it is worth quoting from at length.

At the Old Bailey today, after counsel's closing speeches in the Burbleton Burglar case, the aged Mr Justice Codd summed up to the jury. He said:

Gentlemen of the jury, this is a trial for murder — or maybe manslaughter. A man's life hangs — pardon — depends upon your decision: and you will, I know, approach your task with due solemnity. So do I. But this is the last case that I shall ever try. Once I'm

back in the old flannel bags in the garden that old Chief will never coax me into a Court again, whatever epidemics may decimate the Bench. You, gentlemen, have spent two or three days in a Court of law, and already you are longing to get back to civilisation. I have been here for fifty years. Imagine it! Fifty years of quarrelling and crime, quibbles and costs, adulteries, assaults, burglaries and motor-accidents. "Running-down cases" we call them. Remember the story about old Hewart, when he was Lord Chief Justice? Someone asked him how he enjoyed his life on the Bench. "It's all right," he said, "when any legal business crops up. But I seem to spend most of my time adjudicating on disputes between insurance companies arising out of collisions between two stationary motorcars, each on the right side of the road, and blowing its horn." Ha! Yes, I thought you'd like that. Don't look so shocked, Sir Roger. Mind you, gentlemen, I'm not complaining. We like the life, of course: and we live a long time, I can't think why. But fifty years, you may decide, is just about enough. You may think, having heard all the evidence — pardon me, I was forgetting — you want to hear about this case.

Well, there is the prisoner, George Rungle. He's killed a burglar, there's no doubt about that. But he looks a good chap, you must agree. I believe he is a good chap: and I may as well tell you at once that I'm on his side —

Sir Roger Wheedle (for the Crown): Milord! The jury can hardly —

The Judge: Of course, Sir Roger doesn't like that. I didn't expect he would. By the way, gentlemen, that's another big thing about my future. I shan't have to listen to any more speeches by my dear old colleague, Sir Roger Wheedle. You've heard one or two. I don't say they're not *good* speeches — they are: but you know what I mean. Going up now, aren't you, Sir Roger? Treasury briefs and all! The next thing, you'll be Solicitor-General. Which are you going to be, Conservative or Labour? Difficult to say just now, I suppose. Anyhow, you'll go far. You'll never sink to the Bench, like me. £5,000 a year, less 2. Well, about this case. As I have said, there's no doubt that Mr Rungle killed this burglar.

Sir Ronald Rutt (for the defence): Milord, with great respect, that *is* one of the points on which —

The Judge: Now, what's the matter with you, Sir Ronald? By the way, how's your father? Dear old Ethelred! The battles we used to have! And how your dear father used to bristle! "Bristle"! Yes, that's the word. And now he's up in the Court of Appeal. "Lord Justice Rutt." Soon be a Lord of Appeal, I shouldn't wonder. "Baron Rutt." I shall laugh, rather. Old Wool's there already. Can't be a day less than 103, But there he is; blowing off like a juvenile grampus. You've done well, too, young Ronald. I can see you President of the Board of Trade. And I'm still a miserable *puisne* in the King's Bench Division. Tomorrow I'll be plain Sir Humphrey Codd again. Never mind. About this case:

The prisoner killed the burglar. And what a good thing! If I have a chance, I'll kill a burglar too. . . .

. . .

But, of course, gentlemen, you are the jury: and you are well entitled to say that I am talking nonsense. Pray consider your verdict.

The Foreman stood up and called for three cheers for his Lordship. Then, without leaving the box, they found the prisoner Not Guilty.

The Judge: Discharge the prisoner. Goodbye, Mr Rungle. Kill all the burglars you can. But don't forget to say "Stop!"

Worth quoting

"IT all gets back to an appraisal of human nature. This is just as important in assessing evidence in planning cases as in any other type of case. Planning is made for people, not people for planning." In *Cromwell Property Resources Ltd v Wellington City Council* 6 August 1982, the Number Two Division of the Planning Tribunal (Chairman His Honour Judge E B Robertson) summarised in the above way part of the evidence of a planning witness, and added, "we accept this realistic appraisal. . . ."

Law centre news

THE initial refusal of the Council of the New Zealand Law Society to grant waivers (see the 1981 Amendment to the Law Practitioners Act) to the Wellington Community Law Centre in order that it could employ a solicitor full-time was the cause of concern in professional, Justice Department, and law centre circles. The problem was ironed out for the time being when the Executive Committee of the Law Society by a slim majority granted an interim waiver. The Law Centre now has a solicitor on its payroll. The issue of a permanent waiver will come up for consideration again when the Council meets in late November. If the matter is resolved (assuming that an accord can be reached between the Law Centre and the Law Society) it will have been the culmination of more than four months of negotiations.

Testing your clairvoyance

WHAT is your ability to see into the future ten years hence? To each of the propositions below write a simple yes or no. Make an entry in your diary to look at this page in 1992. In the meantime continue to get on with your life:

- All appeals to the Privy Council will be abolished.
- The conveyancing monopoly will be a thing of the past.
- Part of the burden of delivering legal services to the public will fall on a salaried group of lawyers under the control of some sort of quango.
- The number of lawyers will have doubled.
- Of new admittees to the profession, the majority will be women.
- There will be at least five women High Court Judges.
- The wearing of wigs will only be used for ceremonial occasions.
- There will be a constitutionally entrenched Bill of rights.
- Australia and New Zealand will have a uniform commercial code.
- A significant proportion of the profession will be employed as in-house solicitors by large companies.

Scoring: If, after ten years, you discover that one of your answers is correct, consider yourself a person of uncanny prescience.

John McManamy

Words

Intelligible drafting

THE New Zealand Law Society has established a Committee to promote the adoption of simpler and more intelligible drafting. Its role will be to initiate and co-ordinate efforts to this end. The objective is greater clarity and simplicity consistently with the need for precision.

It is also proposed to organise a travelling seminar on this topic in late February. In preparation for this the Committee invites practitioners to send in examples they may come across of clauses or documents which are either very bad or very good from the point of view of clarity and simplicity. The *Law Journal* invites its readers to send any such material to it for passing on to the Committee. We also invite readers to send to us suitable examples of very good or very bad drafting from which we may choose the best and worst respectively for publication — and for your comment.

To whet the appetite, the *Law Institute Journal* of September 1978 quotes a fascinating example:

> The Commonwealth of Massachusetts requires all automobile insurance policies to be approved as to readability. To overcome the reluctance of the industry the State Division of Insurance drafted a standard policy of which the following is a section dealing with compulsory insurance:

In 1976, the Standard Policy read as follows:

> 1 Coverage A
> Division 1 — Bodily Injury Liability — Statutory — The Commonwealth of Massachusetts — (This Coverage is Compulsory)
>
> The company will pay on behalf of the insured, in accordance with the "Massachusetts Compulsory Automobile Liability Security Act," Chapter 346 of the Acts of 1925 of the Commonwealth of Massachusetts and all Acts amendatory thereof or supplementary thereto, all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law and damages to others for bodily injury, including death at any time resulting therefrom, or for consequential damages consisting of expenses incurred by a husband, wife, parent or guardian for medical, nursing, hospital or surgical services in connection with or on account of such bodily injury or death, sustained by any person or persons during the policy period as defined in Item [3] of the declarations and caused by the ownership, operation, maintenance, control or use of the insured motor vehicle upon the ways of the Commonwealth of Massachusetts or in any place therein to which the public has a right of access.
>
> This division of coverage A is subject to the following provisions:
>
> (1) No statement made by the insured or on his behalf, either in securing this policy or in securing registration of the insured motor vehicle, no violation of the terms of this policy and no act or default of the insured either prior to or subsequent to the issuance of this policy, shall operate to defeat or avoid this coverage so as to bar recovery by a judgment creditor proceeding in accordance with the Laws of the Commonwealth of Massachusetts. The terms of this policy shall remain in full force and effect, however, as binding between the insured and the company, and the insured agrees to reimburse the company for any payment made by the company under this policy on account of any accident, claim or suit involving a breach of the terms of this policy.

●

This was redrafted, with the end result more clear and precise (and capable of being read):

> There are four Parts to Compulsory Insurance. They are called Compulsory Insurance because Massachusetts law requires you to buy all of them before you can register your auto. No law requires you to buy more than this Compulsory Insurance. However, if you have financed your auto, the bank or finance company may legally insist that you have some Optional Insurance as a condition of your loan.
>
> The amount of your coverage and the cost of each Part is shown on the Coverage Selections page.
>
> Your Compulsory Insurance does not pay for any damage to your auto no matter what happens to it.
>
> Part 1, Bodily Injury To Others
>
> Under this Part, we will pay damages to people injured or killed by your auto in Massachusetts accidents. Damages are the amounts an injured person is legally entitled to collect for bodily injury through a Court judgment or settlement. We will pay only if you or someone else using your auto with your consent is legally responsible for the accident. The most we will pay for injuries to any one person as a result of any one accident is $5,000. The most we will pay for injuries to two or more people as a result of any one accident is a total of $10,000. This is the most we will pay as the result of a single accident no matter how

many autos or premiums are shown on the Coverage Selections page.

We will *not* pay:

1 For injuries to guest occupants of your auto.
2 For accidents outside of Massachusetts or in places in Massachusetts where the public has no right of access.
3 For injuries to any employees of the legally responsible person if they are entitled to Massachusetts workers' compensation benefits.

The law provides a special protection for anyone entitled to damages under this Part. We must pay their claims even if false statements were made when applying for this policy or your auto registration. We must also pay even if you or the legally responsible person fails to co-operate with us after the accident. We will, however, be entitled to reimbursement from the person who did not co-operate or who made any false statements.

I L McKay

Elegant prose — an example from the Bench

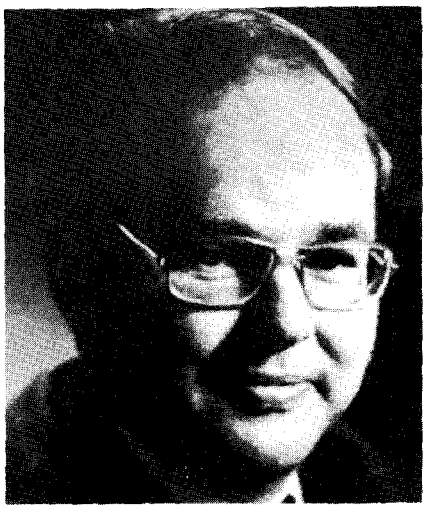
THE following passage from a judgment of Mahon J is a further reminder of the loss which the profession has suffered from the untimely retirement of a man who was not only a distinguished Judge but also a master of elegant prose.

The case, *Smallbone Nominees Ltd v Waikune Holdings Ltd* is an unreported case in the Wellington Supreme Court, No A416/77, in which His Honour gave judgment on 24 February 1978. The plaintiff claimed possession of premises held by the defendant as sublessee in a commercial block in Palmerston North called "Gemini House". The defendant's predecessor in title had been convicted of operating a brothel under the guise of a massage parlour, but the defendant proposed to operate a totally legal and innocent massage parlour. Nevertheless other tenants of the building were unhappy. The Learned Judge said:

> [The witness] referred to the difficulties he had experienced in soliciting prospective tenants. It even appeared that a mere reference to "Gemini House" was frequently the occasion of unseemly jest. [He] went on to describe a further feature of the activities of the defendant which gave rise to a subsidiary objection, this time of an olfactory nature. The massage services of the defendant involved the use of pine oil, and the aromatic redolence of this substance permeates the entire building, in particular the upper floors. [The witness] did not go into further particulars, but I assume that the infiltration of this scent, intrinsically foreign to an office building, might also convey to a sensitive tenant a lingering reminder of those past iniquities which had sullied the reputation of Gemini House.

Peter Haig

Mr Justice Eichelbaum



ON 29 October, before a crowded Wellington High Court, Mr Justice Eichelbaum was welcomed to the High Court Bench. His Honour was admitted as a solicitor in 1953 and as a barrister in 1954. He was a senior partner in the Wellington firm of Chapman Tripp and took silk in 1978. For seven years he served on the Council of the Wellington District Law Society, and recently completed a three year term as President of the New Zealand Law Society. His interests include tennis, having been a provincial representative player.

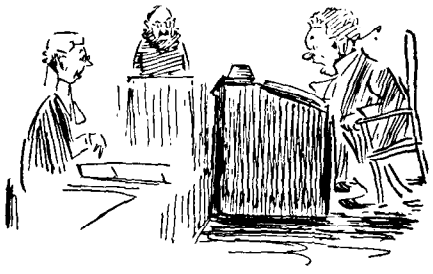
The Right Honourable Sir Ronald Davison, the Chief Justice, the Minister of Justice the Honourable J K McLay, and the President of the New Zealand Law Society Mr Bruce Slane were among those wishing the new Judge well. Mr Warwick Gendall, speaking for the Wellington profession, praised His Honour for "his wide knowledge of the law, as a determined but scrupulously fair advocate, for his unshakeable integrity and courage, his modesty and his gift of wise silence." He added that "very many Wellington practitioners with whom he dealt could not have found a kinder man nor one who, despite his dedication to his clients and to the law, had his thumb more firmly on the pulse of human nature."

In wishing the new Judge all the best upon his new career it is fitting to recall the conclusion of his closing address at the Law Conference last year:

> I have every confidence in the future of the Court system, the law and the profession. . . . I think the future of the law is exciting. If I were a young man faced with the choice of careers I would opt for the law with all the enthusiasm I had when I first started.

Forensic Fables

Greatest hits from the [1929] NZLJ



The beginner who thought he would do it himself

A Beginner, in the Temporary Absence of his Leader, Found Himself Opposed to a Big Pot in the Commercial Court. Though Greatly Alarmed, the Beginner Bore himself Bravely. To his Surprise and Delight the Beginner Managed to Cross-Examine the Big Pot's Principal Witness with Such Effect that he Needed a Good Deal of Rehabilitation. Rising to Re-Examine, the Big Pot Airily Observed to the Principal Witness: "I suppose What You Meant by Your Last Answer was this," and Proceeded to Tell the Principal Witness Quite Clearly what he Meant. When the Beginner made a Dignified Protest the Judge Smilingly Suggested that the Big Pot might Shape his Question rather Differently. The Next Day the Beginner was in a County Court. The Plaintiff (for whom the Beginner Appeared) having Made an Awkward Admission to his Learned Friend on the Other Side, the Beginner Thought he would Employ the Excellent Formula of the Big Pot. He did so. The Scene that Followed Beggars Description. The County Court Judge in a Voice of Thunder Ordered the Beginner to Sit Down. He then Rebuked the Beginner for his Gross Misconduct and Discussed the Question whether he would Commit him for Contempt, or Merely Report him to the General Council of the Bar. Finally he Expressed the Hope that the Incident would be a Lesson to the Beginner and Directed that the Case should be re-Heard on a Later Date before a Fresh Jury.

Moral: *Wait till You're a Big Pot.*

The emeritus professor of international law and the Police Court brief

THERE was once an Emeritus Professor of International Law. His Learning was Stupendous. He was a DCL and LLD Many times Over. The Public Orators of Oxford, Cambridge, Durham, Sheffield, Birmingham, and Aberystwyth (to Mention only a Few) had Striven in Their Best Latin to do Justice to his Erudition when he Presented himself to Receive their Honorary Degrees. One of them Enquired *"Quae Regio Terrae Vestri Non Plena Laboris?"* Another Greeted him as *"Scientiae Pene Novae Inclytus Propugnator."* A Third Remarked that he was *"Maxime Egregius Philosophus."* A Fourth that he was *"Spectatissimus Doctor."* And a Fifth, who Proclaimed him to be *"Juris Inter Omnes Nationes Observandi Peritissimus,"* was Thought to have Hit the Right Nail on the head. Four Massive Tomes which the Emeritus Professor had Compiled Entitled "Peace and War", "The Doctrine of *Renvoi*", "The Three-Mile Limit", and "The Declaration of Paris, Its Genesis and Implications", had been Translated into French, German, Spanish, Russian, Urdu, and Chinese. The Emeritus Professor had a Considerable Beard, Large Spectacles, a Weak Voice and Flat Feet.

When he was at the Height of his Fame it Happened that the Private Secretary of the Baratarian Ambassador, being Short of Cash, Endeavoured to Stabilise his Finances by Means of a Stumer Cheque and so Placed himself within the Grip of the Law. An Intelligent Solicitor, Hastily Summoned to the Embassy, Advised that the Emeritus Professor should be Retained At Once to Defend the Private Secretary. It was Clearly a Case, he said, in which the Privilege of Exterritoriality should be Invoked and None but the Emeritus Professor could Deal Adequately with that Difficult Topic.

The Emeritus Professor, Duly Briefed, Proceeded to the Mulberry Street Police Court. With him he Took some Two Dozen Volumes of Text-books and Reports.

When the Emeritus Professor Seated himself in the Pen Provided for Counsel the Dock was already Occupied. The Magistrate Asked the Emeritus Professor whether he Appeared for the Accused. He Replied in the Affirmative and Began his Discourse.

The Emeritus Professor Led Off with a Few Pages of *Westlake* and *Hall*, and then, Warming to his Work Read Several Cogent Passages from *Grotius*, *Puffendorf* and *Bynkershoek*. He Dwelt, in Particular, on the Second Half of Chapter XIII. *("De Foro Legatorum")* of the last-named Authority. The Magistrate Appeared to the Emeritus Professor to be both Obtuse and Impolite. He Repeatedly Tried to Stop the Emeritus Professor's Argument, and said, More than Once that he Could not Hear or Understand what the Emeritus Professor was Saying. After Forty-Five Minutes the Magistrate Ordered the Emeritus Professor to Sit Down. The Emeritus Professor (who by this Time was Referring the Magistrate to Bergbohn's *Staats-Vertrage Und Gesetze als Quellen des Volkerrechts*) went on Unmoved. When the Emeritus Professor at last Resumed his Seat after Reading All the Judgments in *The "Parlement Belge,"* 4 PD 129; 5 PD 197, he had been Speaking for an Hour and a Half, and the Magistrate was Foaming at the Mouth. To the Amazement of the Emeritus Professor the Magistrate Told the Defendant that he had Aggravated his Offence by Employing a Lunatic to Defend him and Sent him to Prison for a Month. It was not till the Next Day that the Emeritus Professor Realised that he had Gone to the Wrong Police Court and that the Defendant on whose Behalf he had Delivered his Oration was an Italian Costermonger who had Obstructed the Traffic with his Barrow and Assaulted the Police.

Moral: Choose Your Tribunal Wisely

Letter from Apia

Peter MacAlevey

The author is a Dunedin practitioner who took up an appointment as a Magistrate in Western Samoa. He and his family have lived there for a little over a year. Following are some of his impressions.

SAMOA has enjoyed recent attention in the New Zealand press and it may be of interest to your readers to know a little more about the country.

Western Samoa comprises two main islands, Upolu and Savai'i, with a total population of approximately 160,000. Apia in Upolu is the most populous centre. My family and I have lived here for the past year.

The term "matai" is often used in connection with Samoa. A "matai" is a titleholder and there are titles great and small. The history of some titles is the history of Samoa. In the past the Tongans invaded and were eventually ejected from Samoa. As they made to sea the leader of the Tongans called to the Samoan leader, "Malietau Malietoa" (Brave warrior, well fought). The title, Malietoa, was bestowed in consequence and has descended to present times. The Head of State is His Highness Malietoa Tanumafili II. A title can descend to the sons of a titleholder in precedence of age. There is no strict necessity for a title to descend in such a way and on the death of a matai the family decide who is to succeed. The major titleholders of a village meet in "Fono" (Council) and make the decisions necessary to run the village.

Aside from the individual voters roll, which provides universal suffrage for a small section of the community, only a matai may vote for a Member of Parliament or be a candidate. The Western Samoa Court of Appeal has found that the existing system of suffrage is constitutional and what is known as the matai system has survived its first serious challenge.

In Samoa the choice of a name for a child has few limitations. Some are the Samoan renditions of familiar European names, eg Filipo, Siaosi (Philip and George). In other cases the whole vocabulary is called in assistance, eg Fa'amasino (Judge), Tipolo (Lemon) and, following the Public Service strike, twins called PSA and PSC. Some words adapt themselves particularly well to Samoan pronunication, eg Saline (Sah lee nay) and this has also been used as a name. The Christian name is the more important and is used for all purposes save those occasions where it is necessary to record a full name. If a father named Filipo has a son named Tipolo the son will be called Tipolo Filipo. The situation becomes a little more complicated if Tipolo becomes a matai and takes a title. If the title were "Nu'u" then Tipolo would become Nu'u Tipolo. If Tipolo had a son, Siaosi, before he received his title, his son would then have a choice of names, ie Siaosi Tipolo of Siaosi Nu'u.

A title is bestowed in a special ceremony and recorded in the Land Titles Court. To use the above as an illustration Tipolo would be the only one entitled to use the title "Nu'u". He could however consent to the title being split and the same title being bestowed on another person. This accounts then for the fact that often a number of people seem to have the same title. The most important titles are not split in this fashion but are always held by one person.

In 1914 New Zealand troops landed at Apia and effectively ended the dominion of the Kaiser and introduced the common law. The present judicial structure comprises

- The Chief Justice, until now an expatriate, sitting in the Supreme Court.
- Two Magistrates, one local, one expatriate sitting in the Magistrates Court.
- Samoan Judges dealing with minor offences. The Samoan Judges could perhaps be compared to the New Zealand Justices of the Peace save for their jurisdiction in the Land and Titles Court. This Court has jurisdiction over disputes involving titles and customary land.

The Magistrates Court is really the same familiar workplace known to many New Zealand practitioners. As might be expected, there are interesting local differences and one of these involves the concept of the "Ifoga" or apology. It is a social mechanism of important consequence. It frequently happens in a criminal case that a complainant will attend Court to tell the Court that the matter has been settled in accordance with "Fa'a Samoa" (Samoan custom).

Traditionally the form of the Ifoga was that members of the family of the wrongdoer would sit outside the house of the injured party bearing gifts. They would be ignored for a certain period followed by speeches of apology and reconciliation. Interestingly, the presence of the wrongdoer at an Ifoga was not considered an essential element.

In some cases the Ifoga can pose sentencing difficulties. But the essence of law and indeed sentencing is that it should be pragmatic. Sometimes an apology is an appropriate matter to consider in sentencing and on other occasions it cannot be.

I had an interesting illustration of this determination to settle differences before me. A misunderstanding arose in a village and youths of one family fought with the youths of another. Four young men were charged with assault. The father of one defendant addressed the Court:

> This has now been settled between the families and there is no more trouble. I'm not going to put up with any trouble or nonsense. You'll see that one of my sons has a black eye. He didn't get that in the fight. I gave it to him.

A smile of paternal satisfaction blessed the features of the peacemaker as he concluded his submission.

The prison system in Samoa may be of some relevance to New Zealand in the light of current suggestions concerning penal reform. The prison is a minimum security institution. Prisoners are confined during the night but during the day some of them are sent to work in the community. Others work on the prison farm. Prisoners are granted weekend leave to travel home to their families. Those who misbehave or escape ultimately spend a period in the security block. The prisoners then spend the day in a compound surrounded by high walls.

Naturally there are some who abuse the system and abscond or commit

further offences on weekend leave, but on the whole the system would seem to have great merit. Now that the previous conviction list in New Zealand takes the form of a computer printout, in some cases it seems to assume the proportions of a concertina. Here recidivism is a known but relatively uncommon phenomenon.

Every two months there is a Court circuit of the island of Savai'i. The Court sits at a different place each day. Court is usually held in a traditional Samoan house or "fale". The Magistrate generally enjoys a sea view from these Courts. My wife and two year old son invariably accompany me on the Savai'i circuit. On our first visit our son was a source of interest to the local children. They would touch him on the head and say "Palagi" (European). Timothy caused some amusement when he got out of the car at a village, went up to a little Samoan lad, touched him on the head, and said "Palagi". He, of course, by that time, thought it was a normal greeting.

The Privy Council decision in regard to citizenship has had important consequences in both Samoa and New Zealand. Our country administered Samoa for almost 50 years and during that time many Samoans travelled to and from New Zealand. When Western Samoa became an independent nation a treaty of friendship was concluded with New Zealand. History prevents Samoa being treated simply as another foreign country. Many New Zealanders have relations living in Samoa and a special relationship clearly exists between Samoa and New Zealand. A special relationship would also seem to exist between Australia and New Zealand and one feature of this has been the freedom of trans Tasman travel. Why have we treated Samoa differently? The essence of the problem is not really citizenship but access. It is true that

many Samoans would like to settle in New Zealand and perhaps join their families already there. Some with a similar sentiment lack the finance to travel. However it is also true that many Samoans are not interested in living in New Zealand. They wish to remain in their own country. Some with the ability to travel have decided that there are more favourable options than New Zealand. This is illustrated by emigration patterns to Australia, Hawaii and the United States.

The spectre of an exodus and a Samoan elbow at every porthole really has no substance. Following the recent Privy Council decision many Samoans were pleased to learn that they were New Zealand citizens. They were pleased because it both confirmed an historical association and their membership of a wider community. It is my impression that New Zealand has lost considerable standing in the Pacific over its hasty protocol arrangements. In these times the Samoan saying "la fili i le tasi se agava'a" (Let the sea determine the quality of the canoe) could perhaps be considered. This proverb refers to misfortune as a test of friendship. Despite the fact that the origin of the misfortune should not lie on one of the friends one can only hope that the people of Samoa will take a broader view.

The Royal connection

Hon Nigel Wilson QC

A popular text in the nursery when I was a child read: "God Could Not Be Everywhere So He Made Mothers". I do not attempt to defend this denial of His omnipresence — I simply use the idea to illustrate why we have a Queen of New Zealand and a Governor-General. The "daily round, the common tasks" of a Monarch cannot, even in this electronic age with its array of telecommunication facilities, be performed from the other side of the globe, so commonsense requires, and the Constitution provides, a deputy on the spot — the Governor-General. He is the Queen's alter ego in the Dominion, giving the Royal Assent to Bills passed by Parliament, signing Orders in Council and the Commissions of Royal Commissioners, Judges and officers of the armed forces and the police, receiving foreign Heads of State, exercising the Royal Prerogative, opening Parliament and attending other royal occasions such as Waitangi Day. He does not give the royal approval to the award of honours, nor does he appoint his successor; but almost everything else that the Monarch could do if in New Zealand can be done by the Governor-General.

In theory and in popular belief the Monarch appoints his deputy, but in this, as in the exercise of the other powers of a constitutional Monarch, he acts on the advice of his Ministers. Before New Zealand acquired independent nationhood with its own constitutional Monarchy (under the Statute of Westminster) the choice of Governor-General was made on the advice of United Kingdom Ministers in consultation with the Government of the Dominion and a convention had been established under which the person chosen was a distinguished resident of the United Kingdom who had not been actively engaged in politics either in the Dominion or in the United Kingdom. This convention continued to be followed after the Monarch acted on the advice of New Zealand Ministers, until the last decade.

The purpose of this article is to note the changes then made and to consider their effect on the institution of monarchy, on New Zealand, and on the appointee.

The first New Zealand-born Governor-General of this Dominion was Sir Arthur Porritt, but his appointment did not represent a departure from the convention because at the time of his appointment in 1967 he had been permanently resident in England for many years, and he returned there when his term expired. (Lord Freyberg, of course, was born in Australia.) The first real break with tradition came when Sir Denis Blundell, born and permanently resident in New Zealand, was appointed to succeed Sir Arthur Porritt. The complete break came when Sir Keith Holyoake, who was not only born and permanently resident here but had also been actively engaged in politics in this country for most of his adult life, including 12 years as Prime Minister. Sir David Beattie has lived here most of his life although, like Lord Freyberg, he was born in Australia. He has never been politically active.

How important are the conditions of non-residence and aloofness from politics which applied under the convention? The latter has clearly been considered to be of the utmost importance because of the popular identification of the Governor-General with the Monarch. It is true that the power (or, indeed, the right) of the Monarch to interfere in politics is very limited, but appearances count for a great deal. If the Monarchy is to remain part of our constitution it is necessary that both our Monarchs and our Governors-General be persons against whom there can be no imputation of political bias. That is the foundation of a secure constitutional Monarchy — as history shows. When Queen Victoria came to the throne the Monarchy was so unpopular in Britain that its survival as an institution was in jeopardy. By her wise policy of appearing aloof from politics she left it more firmly entrenched than ever before and her successors, adopting the same attitude, have consolidated that position. Even during the agony preceding the Abdication the question was never whether there should be a

King but whether Edward was a suitable person to be that King.

It was during those same anxious days that the *Times* of London criticised the appointment as Governor-General of South Africa of Patrick Duncan, an Englishman who had been deeply involved in South African politics. Said the *Times* editorial, with reference to this involvement: "It is the position — the position of the King's deputy no less than that of the King himself — that must be kept high above public reproach or ridicule, and that is incomparably more important than the individual who fills it." The parallel with the appointment of Sir Keith Holyoake is obvious. For the first time in living memory the appointment of a Governor-General of this Dominion was criticised on constitutional grounds — his political involvement. It is generally agreed that Sir Keith carried out his duties impeccably, but if he suffers from nightmares the prospect of a political crisis during his term of office must have been high on his list of horrors. He — and we — were spared that, but the institution of Monarchy suffered because the Queen was seen to choose a former National Party leader as her deputy. Not for the first time that Party's Ministers had shown themselves ignorant of or insensitive to constitutional principles when they advised that choice. One hopes it will be the last time.

The need for the condition of non-residence is neither so obvious nor so strong, but there are valid arguments in its favour. The chief of these was expressed in the same *Times* editorial in these words: "The King's deputy, like the King himself, should be invested with a certain detachment and dignity, which need not at all preclude his contact with all sorts and conditions of people, but which are not so easily put on as a change of clothes." The Queen may "go walkabout" without losing that mystique which is so important an attribute of a Monarchy, the survival of which depends to a great extent on the psychological need of her people to look *up* to her — to feel that she is *with* them, but not *of* them. In achieving this she has the advantage of life-long training and years of experience with a background of generations of royal forbears. The best of our "imported" Governors-General — such as Lord Bledisloe and Sir Bernard Fergusson — succeeded admirably in presenting this picture of the Monarch, but in doing so they were undoubtedly helped by the fact that they were not personally known to New Zealanders. Familiarity in this case does not breed contempt, but it rarely inspires the awe properly due to the Monarch's "other person". The "detachment and dignity" to which the *Times* referred are doubly difficult for a Governor-General to attain in relation to people most of whom have known him (personally or by repute) long before his appointment and some of whom have known him all his life. New Zealanders are notoriously bad at distinguishing the office from the individual. Lacking the training and tradition of the Monarch, or the easy assumption of station of the upper-class English, Scots or Irish the "local boy", however able and however worthy, cannot hope to emulate them in this respect and to that extent the Monarchy is depreciated.

Another important factor is the independence of the Governor-General vis-a-vis the Government. As the Queen of New Zealand's deputy he is reponsible to her, not to the Government; but the facts that he is nominated by the Government and that his salary and allowances are paid by the New Zealand Treasury create an undesirable appearance of patronage on the one hand and of obligation on the other. One of the great advantages of an hereditary Monarchy is that the Monarch is beholden to no person or group for the Crown. It is his by right of succession established by Parliament. Independence of the Government, as well as aloofness from politics, is therefore presumed; but that presumption does not apply to a Governor-General who owes his appointment to the Government of the Dominion. If he is an overseas resident it is unlikely that his independence will be questioned, but if he lives here ill-disposed persons will tend to wonder about the possibility of "tags", expressing their doubts, perhaps, in the rhetorical question, "Why pick *him*?" implying, of course, "Why not *me*?".

One of the other conventions of the office of Governor-General was that he should depart these shores before his successor arrived and that he should not return, even for a private visit, for some years. That convention is not applied to a New Zealand resident Governor-General. Obviously he cannot be expected to pay for his service with exile, but he is expected to keep a low profile. We now have two former vice-regents living in New Zealand. As it would be inappropriate for them to return to their former occupations they receive a pension, but their status in the community is not defined, or, if it is, the definition is not public property. Has provision been made for them in the official order of precedence for formal occasions? How does one address them? Do they retain the courtesy title of "Excellency" in the same way as a retired High Court Judge is, by courtesy, addressed as "Judge"? Or do they revert to their position of ordinary citizens, to be treated by their friends and acquaintances with the same easy familiarity as in their pre-vice-regal days? Uncertainty in these matters is bound to cause some social constraint which the earlier arrangement avoided.

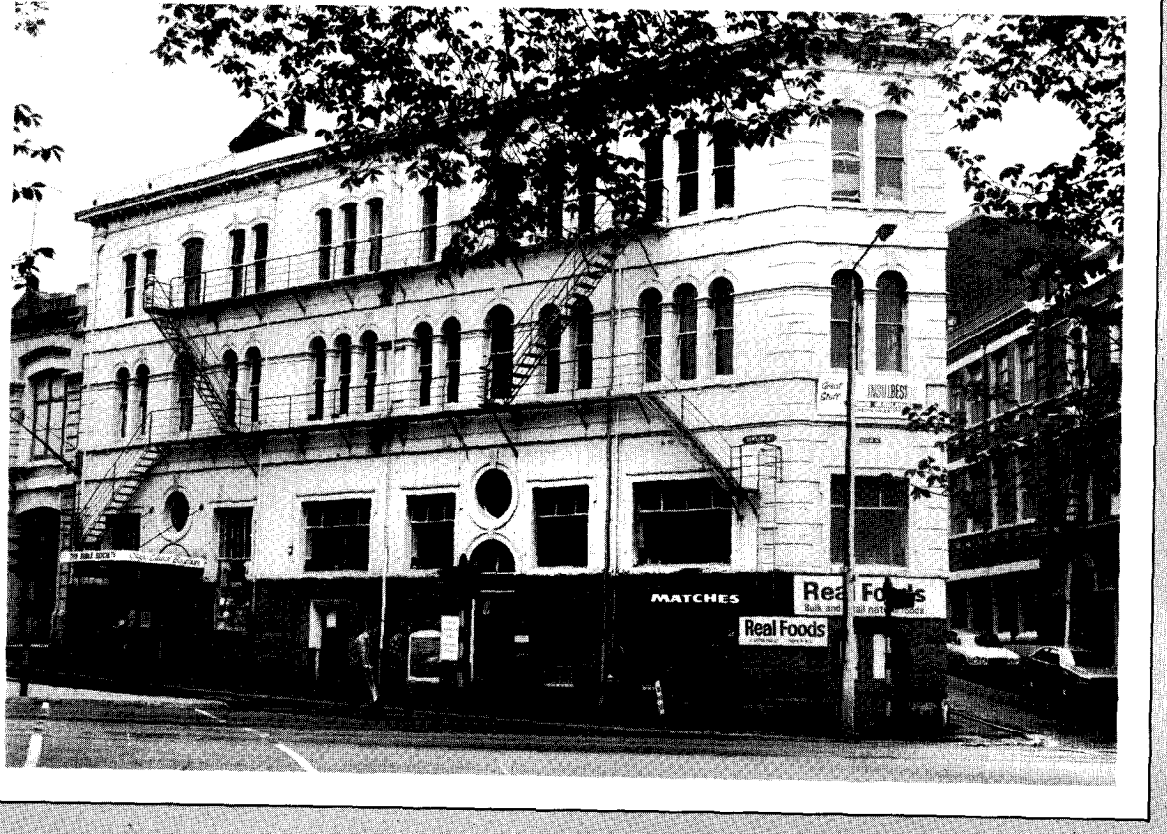
It is interesting to speculate on the reason for the change of policy. Chauvinism and the conservation of overseas funds are both possibilities; or it may be that the belief that a real Kiwi would give the Queen a more sympathetic report on affairs in New Zealand weighed with the Cabinet. It must not be forgotten, of course, that Australia introduced the practice of having residents as Governors-General long before New Zealand adopted it. That precedent, however, is not a happy one — witness the bitter quarrel between Gough Whitlam and Sir John Kerr. Whatever New Zealand's reason, the result is to blur the real role of the Governor-General, which is not merely to represent the Queen in New Zealand in the exercise of her royal powers but also to keep her properly informed on matters which might affect the Monarchy in her remote kingdom in the Antipodes, and to keep alive and real in that kingdom the image of a constitutional Monarch. In the exercise of the royal powers it is essential that her deputy be, and appear to be, apolitical. In his reports it is essential that he be, and appear to be, completely objective. In presenting the image of the constitutional Monarchy to her subjects it is necessary that he combine, as much as possible, her qualities of detachment with warmth, dignity with graciousness, and that he be distinguished in his own right. In a population as small as New Zealand's it is rare to find anyone who combines these qualities. We are indeed fortunate in our present Governor-General.

And, finally, when may we expect a female Governor-General?

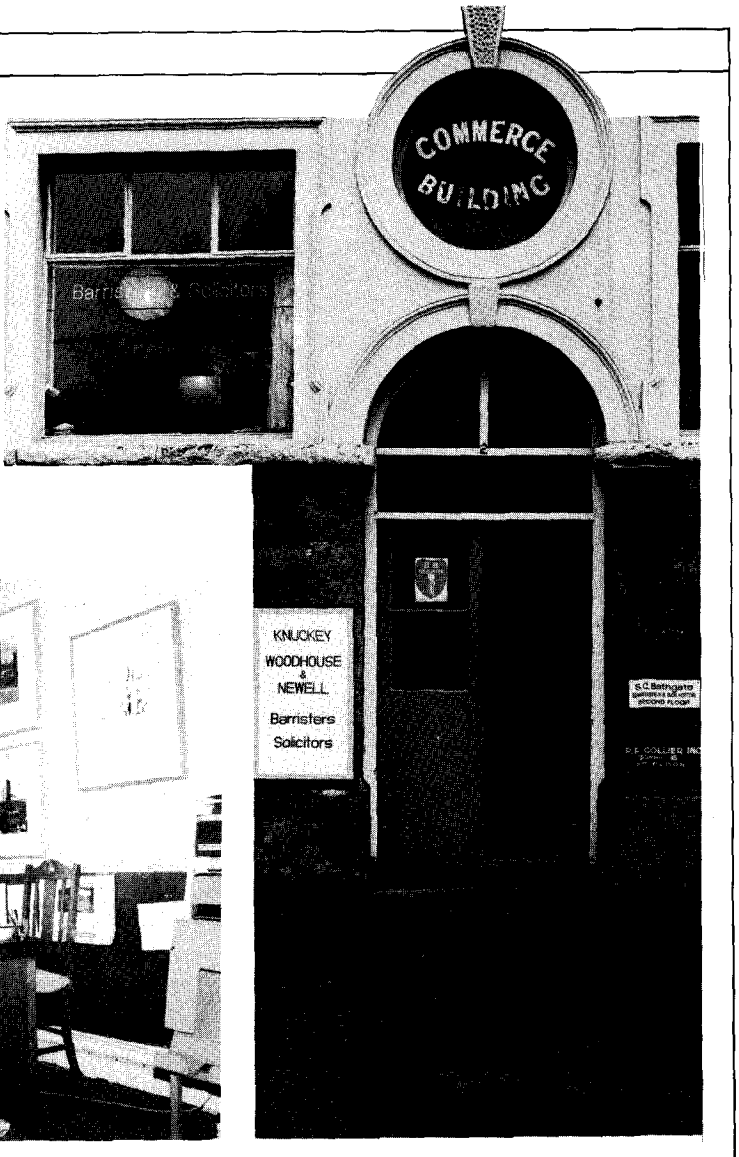
The bohemian law office

This is the second in a series of articles on New Zealand law offices

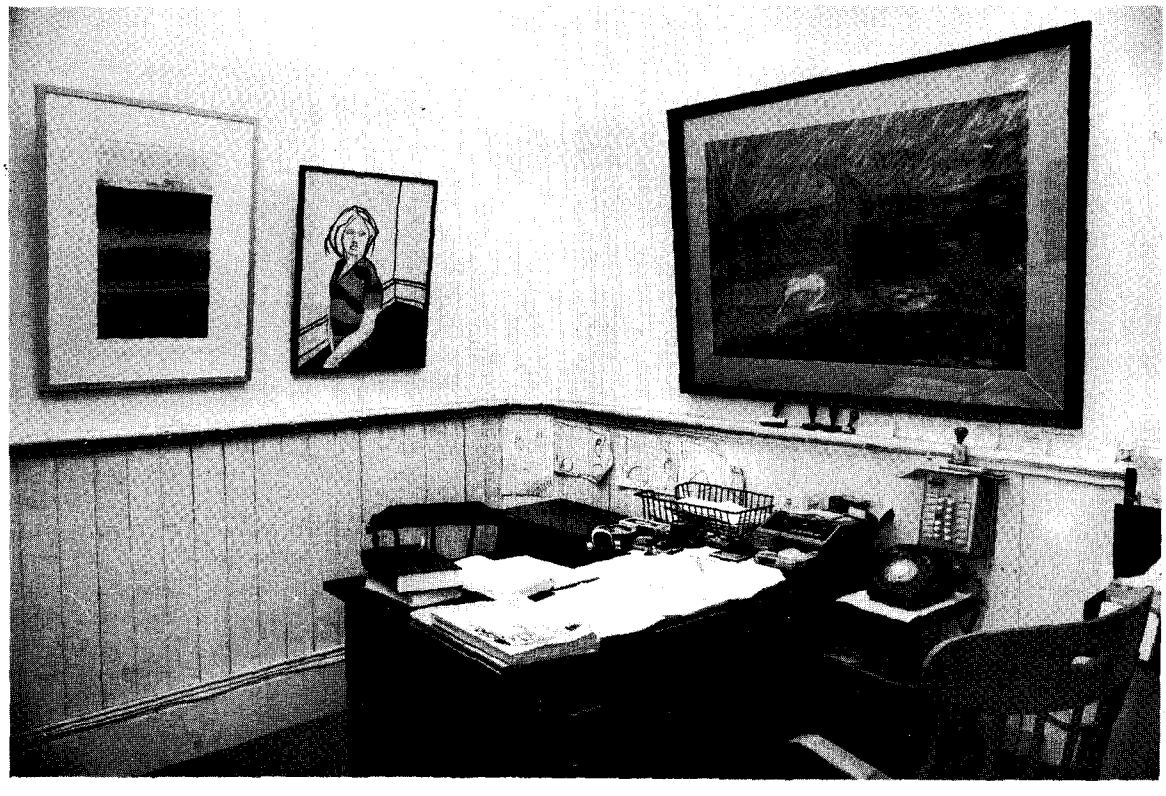
THE Dunedin firm of Knuckey, Woodhouse & Newell occupies space on the first floor of a building Utrillo might have painted. Today, Utrillo might choose instead to rent a room. If turn of the century grandeur has given way over the years to low rent, the building has occasioned no loss in character — merely a shift in emphasis from a stately to bohemian. That quality admirably suits the office featured on these pages.

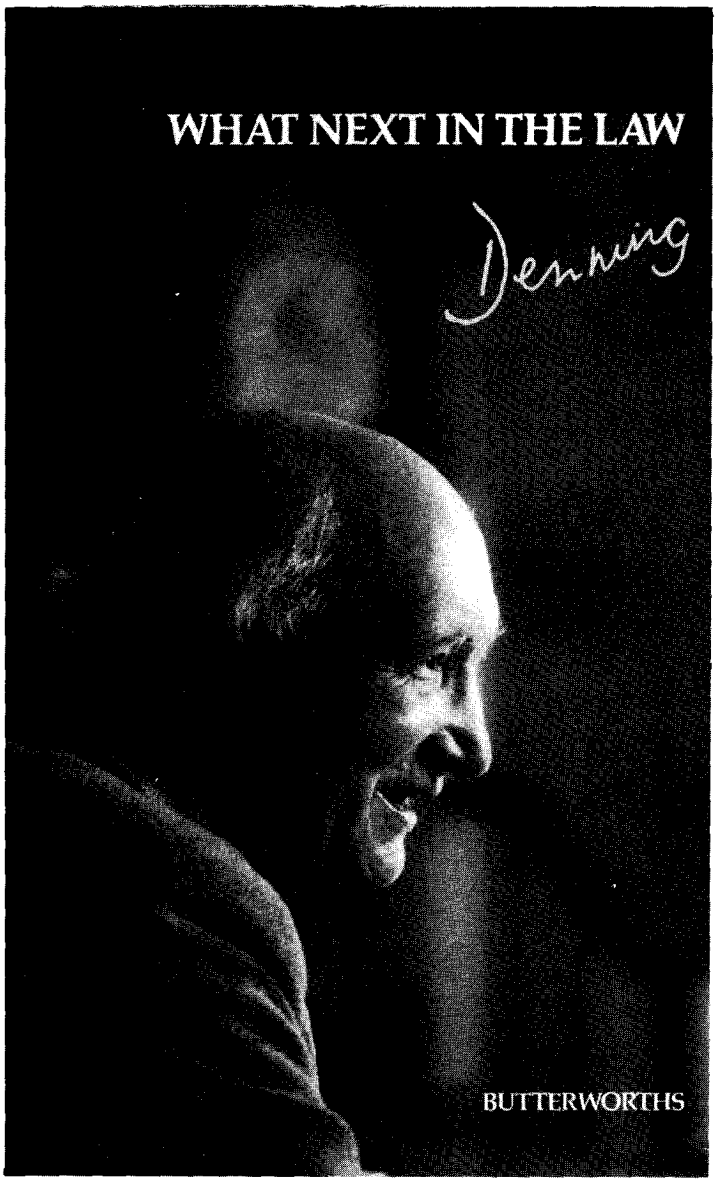


Two partners, a secretary and a part-time clerk spend their working days surrounded by an art collection that is beyond compare and furniture and fixtures that are beyond belief. The end result is carried off with consummate style.



The art collection represents the efforts of the firm's founder, Maurice Knuckey, now a consultant partner. The practice underwent a change last year when Knuckey left its operation to the two present partners, Richard Woodhouse and Michael Newell. Both partners — who find the office eminently suited to their needs and to their clients — intend to carry on in the Knuckey tradition.





Reviewed by Anthony Grant

LORD Denning is like religion: the mention of his name is enough to divide a room into squabbling factions.

And the same holds true for Court rooms. I was recently told by a High Court Judge that I should not cite a case to him: "Is that one of Lord Denning's decisions?" and if so, to put it away. And there are other Judges who feel the same way. (Lord Denning, it should be added, could do the same. Only a year ago I heard him say in a lighthearted moment in his Court that "we never pay any attention to them" in a reference to the House of Lords. It should also be added that judging by their faces, his two colleagues did not seem to think this remark as amusing as Denning did.)

The acerbic Professor Griffith of the London School of Economics has explained why Denning has this effect:

> . . . your assessment of Lord Denning as a Judge will depend on whether you like his highly subjective view of justice. And the likelihood is that you will like his prejudices when they match your own.[1]

For "prejudices" read "opinions".

He has published four books in four successive years and the expurgated version of his fourth, *What Next in the Law* is now available.

The purpose of all of his books appears to have been to expound his judicial philosophy and to seek to convert people to his way of thinking. In *The Discipline of Law* (of which Professor Griffith said "we must assume that the title is meant as a joke")[2] and *The Due Process of Law* he referred to various fields of law which he has actively sought to develop.

In *The Family Story* he set out the principles which have guided him as a Judge and in *What Next in the Law* he says:

> I decided to reach forth to the reform of the law in the several branches where it is most in need of reform — and where there is or should be — a reasonable prospect of it being achieved. . . .
>
> So I thought: some spur is needed so as to get things done. Then I added, with undue presumption: My book shall be the spur. I will try to make things interesting — not only to lawyers — but also to others who may be concerned. Perhaps then something may be done.[3]

It was that kind of attitude which led another critic to say (of *The Due Process of Law*) that "the whole book is irreparably marred . . . by the author's overweening self conceit. [The book] is a most extraordinary paean of self-praise."[4]

Before dealing with his reforms, he has a short section on some "great reformers" of earlier days: Bracton, Coke, Blackstone, Mansfield and Brougham. He says that they set an example of the need for clear exposition and resilience to criticism. He then moves on to the fields in which reforms should be made: trial by jury, legal aid, personal injuries, libel, privacy and confidence, whether there should be a Bill of Rights (he now says not) and he concludes by reprinting his televised Richard Dimbleby lecture on the misuse of power. Many of the reforms have been suggested before, such as the need for complex cases of fraud to be tried by special jurors or a Judge with assessors. One or two are extraordinary. For instance his sixth recommendation in the libel section is simply "That all technicalities should be abolished."

He tries to make things interesting for his reader with sentences which are sometimes so short as to be tiresome. This is his description of the latter days of Blackstone:

> **Too fat**
> He was not long on the Bench. He had studied too long and too much. He took no exercise. He hated it. He

> ate too much. He got fatter and fatter. He died at the age of fifty-seven. (p 18)

The style was parodied by one reviewer: "The style is unmistakable. And unmemorable. Judicial staccato. Not a cadence in sight."[5] It is a style which seems to have had its origins with Macaulay. One of the four prizes which Denning won at school was *Macaulay's Lays of Ancient Rome*. This, he says he has read "a thousand times".[6] In his introduction to a little book entitled *Macaulay's Lives of Johnson and Goldsmith*, John Downie says:[7]

> The faults of Macaulay's style have often been pointed out. The abruptness and jerkiness of his short sentences, though often impressive and even pleasing at first, become painful from the monotony of repetition.

If the style of writing is tiresome it is at least clear: clear enough to appeal to a very unsophisticated reader, as readers would have to be if they were to believe all that they read. Lord Denning claims, for instance, that "[English Judges] are not, as some suggest, drawn from the upper classes of society. They are — in their birth and upbringing — as mixed a group as you could find." (p 334).

If any answer is necessary to such an unlikely claim it can come from Shetreet who concluded in *Judges on Trial* (1976) that "most English Judges come from the upper middle classes".[8] Although the figures are a bit old now, it is also interesting to be reminded that in 1960, thirty of the High Court Judges had been at Oxford, eighteen at Cambridge, two at London and five had had no university education. Of the fifty-five High Court Judges in 1964, only seven had been to grammar schools and only seven had not been to Oxbridge.[9]

On p 333 Lord Denning refers to claims that he is politically motivated. "What troubles me more is the attack on the judiciary. They fasten on me. They accuse me of being politically motivated. I deny the charge."

One of the many incidents which prompted this complaint arose from a remark which Lord Denning made at the University of Western Ontario on the eve of the 1979 British general elections. He was reported as saying:

> The power which challenges the rule of law most is the power of the great British Unions at present. One of the biggest problems of the law today is how to restrain the misuse of power.

Michael Foot, upset by the assistance which the Conservatives were getting from this unusual quarter, said that Denning "had made an ass of himself". Denning's innocent response at the time was:

> I had no thought of anybody taking notice of me so far away. . . . I had no thought of the election or of any political issues. There was no political context at all. I do not wish to influence people's views and I am very sorry if it should influence people. . . . I said that their (ie Union) power is a challenge to the rule of law, not a threat — that is a very different matter.

He is consistent in his claims to be non-political even if he believes that he is not. In an interview published in the *Sunday Telegraph* on 13 Nov 1977 it was reported that:

> Lord Denning says that he hasn't voted in any parliamentary election since he became a Judge, and can't remember what he voted before that. He has, he added, no political views at all, and says it is as well that that should be known.

It is remarkable that a man who was placed in the first class in both the mathematical final school and subsequently the final school of jurisprudence at Oxford, who was the Eldon Scholar, and the Prize Student of the Inns of Court, should be unable to remember which political party or parties he voted for during the first 45 years of his life.

His knowledge of history has also been criticised. One of the historical claims made in *The Discipline of Law* was subsequently described as "grotesque"[10] and two of his remarks in *The Due Process of Law* were subsequently described as "arrant nonsense" and "astonishingly complacent".[11]

A complacency is seen in many places in this book. He complains, for instance, that under the criminal legal aid scheme, barristers are now paid for "waiting time". New Zealand lawyers with their hourly rates will find it hard to believe the implied suggestion that barristers should remain unpaid as they wait for hours for a case to be called on. Oh, for the good old days when "If (counsel) was kept waiting for his case to come on, that was just bad luck. It was the luck of the draw"! (p 109).

His criticisms have become more strident. What other Judge in modern times would criticise the Government of the day with the words "Scurvy treatment by an ungrateful Government"? (p 157). His criticisms of those who oppose him seem muted by comparison. The Law Lords are simply "those who live in an ivory tower". (p 202).

When he disclaims a House of Lords decision as the product of "two Scots lawyers, one divorce lawyer and one Irish lawyer" (p 174) it is tempting to wonder how he would classify himself. It is likely to be the category of the "great" but although he has earned that position, his writing of books like this does not consolidate it.

In many ways this is a sad book. The title is so full of promise but the themes for the future turn out to be little more than extracts from his own judgments embellished with some historical notes. He is so obsessed with himself ("My View", "I then stated", "I added this comment", "Then I expressed my view" etc) that the eye vainly scans the pages for some diversion. And it ends, like a letter home, with a description of Lord Hailsham's arthritic ankles and his own ailing hip. What was conceived as a serious work ends as a diversion.

Greatness creates its own standards and although this book contains some interesting suggestions for reforms, it does not match the glories of the past.

Lord Scarman said in his review of *The Discipline of Law* that "Vintage Denning, whatever the year is stimulating, heady stuff. It is not to be taken without food: the substance of which lies elsewhere."[12]

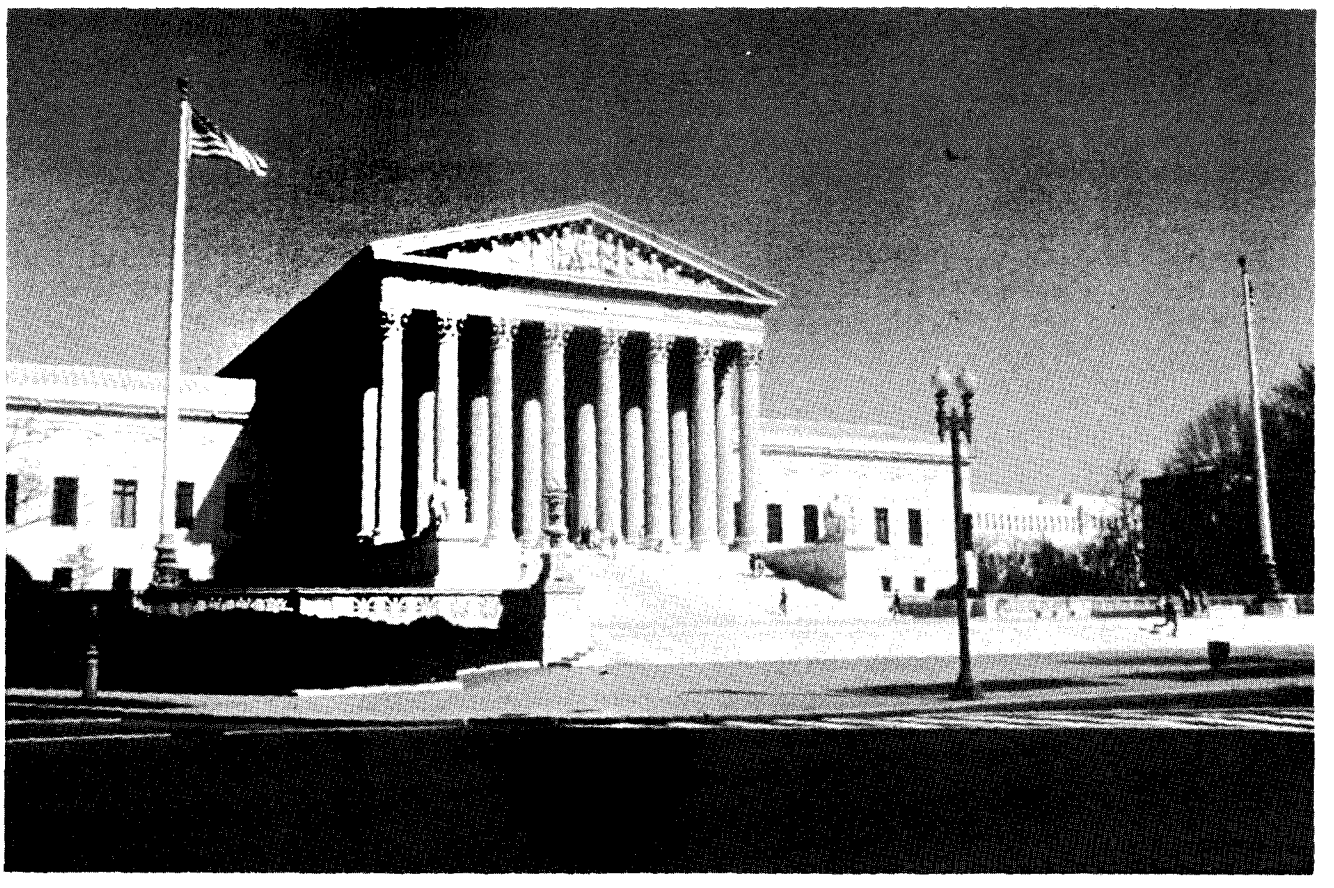
And that is what Lord Denning truly has been: stimulating. As a lawyer he has stimulated the growth of the law for 38 years to the benefit of all who are subject to it. What he has achieved elsewhere will stand long after this book is forgotten.

1 (1979) 42 MLR 350.
2 (1979) 42 MLR 348.
3 Preface v, vi.
4 D F Dugdale [1980] NZLJ 231.
5 (1979) 42 MLR 348.
6 *The Family Story* p 33.
7 Blackie & Son Limited 1901.
8 P 390.
9 Abel-Smith & Stevens, *Lawyers and the Courts* 1967 pp 299, 300.
10 (1979) 42 MLR 349.
11 (1981) 44 MLR 235.
12 (1979) 95 LQR 445.

The Brethren — A second opinion

Peter Haig

Two years ago the NZLJ published a critical review of Woodward and Armstrong's account of the US Supreme Court. A different view follows.



IT is recorded that a member of Queen Victoria's Court, on hearing an account from a returned traveller of certain barbaric excesses committed in his palace by a sadistic oriental potentate, remarked "how very different from the home life of our own dear Queen!"

Readers of Bill Hodge's review of "The Brethren" in [1980] *NZLJ* 239 (especially those who also read Anthony Grant's piece in [1981] *NZLJ* 424 on "Bad Language and the Law") are likely to be led to equally unfavourable comparisons between the conduct of this American Supreme Court (the Judges apparently often foul-mouthed, petty and politicking, as gathered from those snippets) and the perceived dignity, austerity and general irreproachability of the highest Courts of New Zealand or England. Such was my own reaction. It was only a casual recommendation from a colleague that caused me recently to overcome these misgivings and actually read the book.

Having done so, in the course of a single weekend, I endorse about the only favourable comment in Bill Hodge's review — it is indeed "a marvellously good read".

The reason why it is such a good read is that it is both an absorbing tale of the power relationships between top men in a cloistered establishment, reminiscent of some of C P Snow's novels, particularly *The Masters*; and in addition it is about real people, exercising enormous power in the wealthiest country in the world, and deciding social and political issues that filled the headlines in recent memory.

The book is vastly instructive as well as vastly entertaining. While some allowance must obviously be made for a degree of imaginative reconstruction, the essentials are clearly authentic. Three themes stand out — the procedures by which the decisions are reached, the personalities and attitudes of the individual Judges, and the part played by the clerks. These three aspects intermingle in the succession of decisions the account of which forms the basis of the book. An underlying theme is the political environment which, because of the Supreme Court's central place in the American constitution, affects all appointments to the Court and gives a political tinge in some degree to all its activities.

The reader learns exactly how a case is selected by the Supreme Court for determination (a minimum of four Judges must "grant cert"), how it is argued (often half an hour only for

each side) and the process by which a decision is reached, starting with the preliminary conference at which each Judge gives his tentative view and on the basis of which the senior Judge on the majority side assigns, to himself or one of the others on the majority side, the task of writing the judgment. At the same time any Judge in a minority may write a dissent, and a majority Judge may write a "concurrence", ie, an opinion which supports the ratio decidendi but emphasises aspects which the writer considers insufficiently or inappropriately dealt with in the main opinion. All opinions are circulated in draft form to all Judges — sometimes many successive drafts — and frequently in this gestation period Judges change their minds, perhaps in deference to a powerful draft dissent. A practice of Chief Justice Burger that often infuriated his brethren was to cast his own vote wherever possible so that he was in the majority, which entitled him to assign the writing of the judgment either to himself or to one of the Judges likely to give it the emphasis favoured by "the Chief". One important case led to a total of five votes before a decision emerged. The Chief voted initially (in character) with a pass, and then voted twice for and twice against the appeal.

With the aid of the photographs one soon distinguishes the different Judges, all of whom have become by the end three-dimensional figures. The portraits are deliberately confined to them at work. There is no intrusion into their private lives. This is not only (one feels) fair and decent, but also allows that sharp focus which gives a book like this its peculiar excitement and fascination. The Judges are all described with some sympathy (except perhaps Burger). The portraits of the near-blind Harlan, for example, the most respected and dedicated pure lawyer of the lot; of the impetuous, brilliant Douglas, full of angry compassion for the socially deprived yet intolerably arrogant and inconsiderate towards his clerks; of Brennan, the central liberal survivor and tireless worker for consensus. The new Nixon-appointees are described with some sympathy too — one can trace the personal development of each one, sometimes from decision to decision. For example, Blackmun, hopelessly indecisive to start with and yet finally authoring the highly controversial abortion decision; or Stevens, the latest appointee, whose judgments startle his colleagues, some regarding his interpretations of the law as boldly innovative, and others as dangerously unprincipled.

What of "the Chief", Warren Burger? Bill Hodge finds "an incessant character assassination". Readers must make up their own minds. Inevitably Burger figures prominently. He emerges as devious, legally unprincipled, and an example of the Peter Principle — that people get promoted to the level of their own incompetence. Even the other Judges appointed by Nixon seem to have had little respect for his judicial integrity or scholarship. Burger regarded himself, we are told, as a middle-of-the-roader, and if he was over-conscious of the political implications of Supreme Court decisions he was after all recognising a reality. The portrait is of a (relative) mediocrity, hardworking and conscientious according to his lights, who seems to have suffered from a vain determination to show himself the equal of his doughty predecessor Earl Warren. Some readers may detect in Burger a trace of the mentality of Commander Queeg in the famous novel about command neurosis, *The Caine Mutiny*.

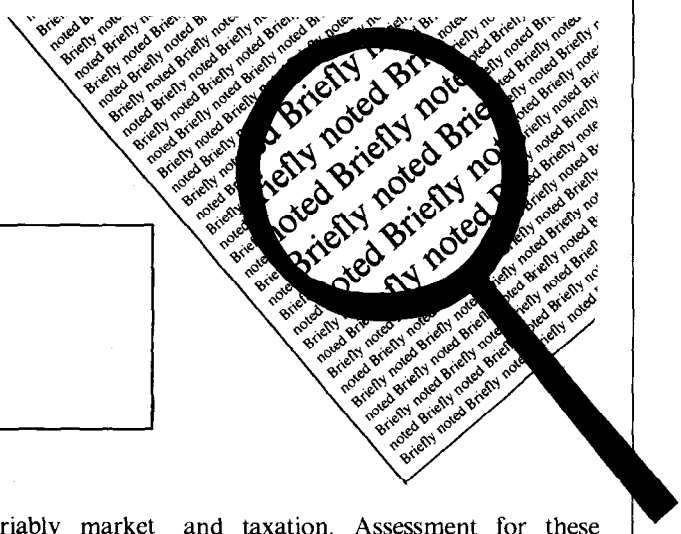
It was the clerks (three or four to each Judge) who provided most of the material for the book, and they remain appropriately undifferentiated and anonymous. But to many readers the extent to which the clerks were privy to (and often helped to shape) the decisions will come as a revelation. Even allowing for the possibility that in talking to the authors the clerks tended to exaggerate their own role, there can be no doubt about their close involvement. They not only did most of the research and prepared many of the draft opinions, but argued with their own Judges and lobbied colleagues in other chambers. A remarkable feature of the organisation was the cohesiveness of the 30 or so clerks as a group, and the consequent interplay of ideas amongst them, like a reflection (but far from a mirror-image) of the interplay between the different Judges.

The account of the process by which decisions were reached is perhaps the core interest of the whole book, and the organic nature of that process is truly striking. The value of the clerks' contributions is illustrated by the reported attitude of Justice Powell, an appointee of the Nixon administration, who made a point of hiring liberal clerks, to act as devil's advocates for him, whose natural bent was conservative. The general effect of this constant give and take between brilliant minds of different generations is hard to assess. At least it made for judgments that were neither superficial or dull.

How authentic is the book? I have not heard of any serious challenge to its main conclusions, although one should probably take certain comments with a pinch of salt. Is it unbiased? Well, not entirely. Any effective writing on controversial themes will carry a degree of personal feeling. I am not persuaded that the authors' feelings of regret for the gradual dismantling of some of the civil rights framework set up by the famous Earl Warren Court distorted their judgment. It is clear that Judges did not by any means vote consistently on "party" lines; and the book certainly does not hesitate to criticise the attitudes of the liberal lawyers or to comment with sympathy on those of the Nixon appointees. The authors, after all, are journalists, not scholars or lawyers; the book is redolent of that combination of intense thoroughness and sustained vitality that characterises the best American journalism. It is in general a book that can be enjoyed alike by liberals and conservatives. The former will generally approve the authors' attitudes, while the latter will take comfort from this record of a continuing swing away from what some may regard as the liberal excesses of the Warren Court.

The story stops in 1976. Many readers will be left pondering the question, what of the last six years? — and hoping that the authors may yet provide an answer — perhaps "The Brethren II"?

Briefly Noted



Of the genus valuation

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THE three land economy professions — valuation, property management and real estate agency — are variously involved in the provision of consultancy services based upon the application of mathematical techniques and intuitive judgments.

The ability to give and receive unambiguous instructions is central to the satisfaction of client needs and expectations. What follows is an attempt to describe four valuation-type processes and to identify the purposes for which each might be appropriate. The processes selected are:

1 Valuation
2 Appraisal
3 Assessment
4 Feasibility Study

Valuation

Value is a factor of demand, not of cost. A valuation is an educated and detailed estimate of the monetary worth of an interest in property. Valuation is market oriented. Generally speaking, a valuation seeks to establish the price at which a property interest ought to change hands on a specific date, usually the actual date of the valuation. It is assumed there is a ready, willing and able seller and a ready, willing and able buyer; and that no unusual circumstances or undue pressures might influence the assumed transaction. This approach to the valuation process produces what is commonly referred to as an open market value. The principles applicable to capital values also apply to rental values. It is only necessary to substitute rent for price, lessor for seller and lessee for buyer.

There are, of course, many purposes for which valuations are required and many uses to which they are put. But the essential element, or starting point, is invariably market value. Having determined what this is the valuer, or the client, can make recommendations, draw conclusions, or otherwise qualify the valuation to meet the specific requirements for which the valuation has been made.

Appraisal

This is *not* just another word for a valuation. It is something quite different. It is a technique which is particularly relevant to the consideration of property investment opportunities. It consists of an analysis of a proposition to determine the implications of proceeding with a purchase or whether the best results are being obtained from a property already owned.

Investment appraisal is the extension of the valuation process or the use of valuation techniques to determine such things as the current value of the property in the open market, its performance in financial terms compared with other such properties, whether it is being put to its highest and best use, whether it is being properly managed, whether it should be bought, or retained, or redeveloped or sold.

The appraisal process is the consideration of options, of opportunity costs, of courses of action. It is necessary to peer into the future and make the best judgment one can as to what is likely to happen to the property under review within a reasonably long term time frame. An appraisal must result in a recommendation to the client.

Assessment

Assessment is the use of valuation methods to establish theoretical market value for purposes or property rating and taxation. Assessment for these purposes is the value of income or real estate calculated according to statutory rules.

Assessment valuation is carried out on a continual basis by central and local government departments. Rolls applicable to defined territorial areas are published at regular intervals in such a way that the entire country is undergoing a constant revue cycle. Property rates and taxes are levied on the basis of these assessments.

While every effort may be made to produce assessments which are up to date it will be apparent that this presents problems. Individual assessments for any particular area are being carried out over a period of time and then all have to be collated to give comparable assessments for that particular area on one particular date. The roll thus produced will then remain in force for several years. Market place values change from day to day. Assessed values do not. The principal requirement for assessments is the need to be seen as being both equitable and uniform.

Feasibility study

The purpose of this type of exercise is to establish viability: will it work, how can it be made to work? It depends on the size, nature and complexity of the proposed project just how comprehensive a feasibility study may have to be to achieve its objective. It might well develop into a series of comparative studies to evaluate the potential of a number of different ways of dealing with a number of alternative sites.

Feasibility involves a detailed examination of the type of development most likely to optimise available resources. Such studies are particularly appropriate to central city commercial

sites, and to decentralised locations, likely to incorporate a combination of land uses: office, retail, entertainment, civic, transport, hotel and other uses.

It usually becomes necessary to adopt a team approach involving other professionals such as architects, planners and quantity surveyors so as to include practical design possibilities and accurate construction costs. The purpose of the exercise is to produce a scheme which complies with client requirements and meets all market criteria.

Conclusion

To summarise and perhaps assist in recalling the nature and application of each of these: a valuation tends to produce a *static* answer concerned, as it is, with determining a value figure at a stated moment in time. An appraisal is *diagnostic* in that it examines and probes and endeavours to provide the best solutions. An assessment is a *statutory* process for the purpose of raising funds for central and local government. Feasibility is *dynamic* in that it tries to make property development projects work and therefore happen.

Role of the planning tribunals revisited

R J Bollard
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IN an article entitled "The Important Role of the Town and Country Planning Appeal Boards" [1973] NZLJ 233, I commented that "often the questions at stake before the Boards are of far greater import than those that confront the ordinary Courts". The underlying point was that the consequences of land use planning decisions are often diverse in effect and generally long-lasting — even to the point of being irreversible. This, of course, is still true today. But land use planning has, in the interim, become steadily more sophisticated and technical — both in its legal framework and in the material contained in district schemes. Indeed, with the passage of new legislation, and the continuing proliferation of reported cases, planning law has tended to become increasingly complicated and esoteric.

Obviously a Tribunal decision must take account of the statutory provisions applicable in terms of the case brought. Hence, in a case under the Town and Country Planning Act 1977, account must be taken (inter alia) of those matters stated to be of national importance under s 3 as are relevant in the circumstances. But the real problem lies in identifying and adequately dealing with all the major issues that could be said to be relevant in the case, so that a sound decision will follow, not only on the merits but at law. On occasion, this can be perplexing indeed, not only for the decision-maker but also the litigant. For instance, a local authority seeking to promote a change to a scheme, or an applicant seeking consent to a proposal, may be placed in quite a frustrating position, bearing in mind the delays likely to occur, should review by the High Court later be sought at the instance of objectors.

The class of case most notable for producing difficulties of the kind mentioned is that where a matter brought into contention by one party or another is found to be inextricably bound up with extra-judicial policy considerations. To elucidate: suppose that a case arises through a major public work, or a proposal for a private enterprise work of widespread interest and concern. Suppose, too, that an important governmental policy decision lies in the background. In such a case the Tribunal's judicial function may be compromised, or at least blurred, by the policy aspects.

In years past, planning bodies have set their face against inquiring into matters of general public policy and cost as part of their judicial function. The following may be instanced from a 1971 decision, *Donald Reid & Co and Others v Dunedin City* 4 NZTPA 75, a case concerning a designation for a proposed public work (at p 80):

> . . . if the number of possible sites for a proposed public work is limited, general town planning principles can lose their dominance in determining the actual choice. In some cases, if the work is to be done at all, the actual choice of site may be determined by matters of general public policy and cost, general town planning principles being only an incidental consideration. If it is the function of the Board to determine in a particular case where the matters of general public policy and cost are to override general town planning principles, that will be a difficult function for the Board to perform: and should not be a function assumed by the Board without a clear statutory direction.

Again, in cases under the Water and Soil Conservation Act 1967, it has been generally understood that the sort of balancing exercise involved in determining whether water rights should issue (eg likely loss from a proposed taking v benefits resulting from the water's use), did not require the Tribunal to inquire into a policy matter — even though that matter might be the "root factor" leading to the rights being sought.

It is probably correct to say that the Tribunal's logical and straightforward approach of declining to consider a policy matter in the absence of any pertinent statutory directive that it should, was not seriously under challenge until the recent Clyde dam proceedings. As a result of Casey J's decision in *Gilmore and Others v National Water and Soil Conservation Authority and Minister of Energy* 8 NZTPA 298, however, the position is not so straightforward.

As is commonly known, the "need" to flood some 1950 ha of rural land originated from the Government's decision to build a high dam so that sufficient extra power might be generated for a new aluminium smelter proposed at Aramoana. The Minister of Energy obtained an initial grant of water rights. Certain local owners whose lands were to be inundated consequent upon the dam proceeding, appealed. The primary issue, as the Tribunal saw it, (*Annan and Others v National Water and Soil Conservation*

Authority and Minister of Energy 7 NZTPA 417), was provision of extra generating capacity for the electricity industry, as against retention of land for agricultural production. As expected, the Tribunal unanimously refrained from examining the end use of the power. To have done so would have meant investigating the merits of the actual smelter decision. Yet having so confined itself, the Tribunal went on to state unequivocally that the need for the extra power arose purely on account of the electricity requirements of the smelter. By a majority of three to two, the Tribunal upheld the grant of the rights. The landowners sought review by the High Court (*Gilmore and Others v National Water and Soil Conservation Authority and Minister of Energy* 8 NZTPA 298). An answer was sought on the question whether "the Tribunal was correct in law in refusing to consider the end use of the electricity". Casey J held at p 303 that "evidence about the likelihood of the smelter proceeding, involving the end use of the power for it, could be highly relevant in the circumstances of this case. . .". He went on to elaborate (at p 304):

> To put the matter beyond doubt, I emphasise that I have decided no more than that the Tribunal misdirected themselves in concluding they could not consider the end use of the power because they mistakenly thought the Act required an approach which made that subject irrelevant. In the balancing operation they were required to undertake, as part of their function in promoting soil conservation and taking account of other interest, I have demonstrated there was a way in which that subject *could* be relevant, and there may be other ways as well. Ultimately, it is for the Tribunal to decide whether the end use of the power and the evidence bearing on it are *in fact* relevant, and what weight (if any) they give to those matters in the deliberations. . . . in this case the Minister's expressed needs are obviously relevant to the questions the Tribunal had to decide. What weight they are given is a matter for its judgment in all the circumstances.

Had His Honour restricted his remarks simply to saying that, in the circumstances of the case, the Tribunal should have considered whether the smelter was likely to proceed, everything, it is submitted, would have been well. Such a course would not have left the question of the relevance of the end use in a state of open-ended uncertainty. Unfortunately, what His Honour stated in order to "put the matter beyond doubt", appears with respect, to have created an opposite effect. If a particular aspect of the end use was relevant, then surely it must have been relevant as a matter of law? On the other hand, assuming it *was* relevant, no one could gainsay the learned Judge's point that the weight to be attached to the evidence bearing on it lay with the Tribunal.

How then is His Honour's decision to be rationalised and explained? If one accepts that the need for the rights hinged on the smelter proceeding, then it would seem reasonable for the Tribunal at least to have considered whether there was a reasonable likelihood of the Ministerial policy being implemented. But His Honour appears to have arrived at his viewpoint as to the relevance of that question by postulating, in effect, that the Tribunal should have considered the end use of the power and then asked itself how it saw the end use as relevant to the proceedings in hand. Adopting this approach, the question arises, how could the relevance of the end use be adequately determined without traversing the whole smelter proposal? And further, how could the Tribunal arrive at a convincing judicial decision when the key to the end use lay in the policy of the Minister — a policy based on wide-ranging economic and other political considerations, well beyond the Tribunal's function to inquire into? Admittedly, the judgment stops short of suggesting that the Tribunal should have considered the merits of the end use. But once an inquiry into the end use is embarked upon, it is hard to see how matters of policy could be suitably divorced from other factors.

Yet perhaps these problems are more apparent than real, and reflect too liberal an interpretation of His Honour's decision. It is possible that His Honour intended that the question of the relevance of the end use should be confined simply to inquiring whether there was an end use, and if so, whether it was likely to proceed; that he never intended to convey any suggestion that the Tribunal should examine the end use in any critical sense; and that all he intended to leave open was the possibility of the end use being relevant in some other "objective" respect, such as the amount of the likely power consumption.

In reconsidering its earlier decision in the light of the High Court review (T P Decision No W37/82 (unreported) 19 August 1982), the Tribunal rather neatly sidestepped any difficulties as to the question of the end use by holding that "the expression 'end use', as used by His Honour in the circumstances of this case, . . . has a more limited meaning than has been attributed to it in many other cases which have come before the Tribunal in the past. This is made clear . . . where His Honour says the 'appellant's point is that the contemplated 'user' may never come into existence'." Hence the Tribunal proceeded merely to consider whether there was sufficient evidence that a second smelter was to be built or likely to be built. On finding that such evidence was lacking, the appeals were allowed and the application for the water rights refused.

No doubt it may be said that, for the purposes of its actual decision, there was no need for the Tribunal to consider the end use in any wider sense than it did. But if the Tribunal had been of opinion that there *was* sufficient evidence that a new smelter would be built, one wonders how it would thence have approached the question of the end use, applying the relevant dicta of His Honour.

To conclude: Over the last decade or so the Planning Tribunal's jurisdiction has been enlarged quite considerably with an impressive range of objection or appeal rights being created under statutes such as the Local Government Act 1974, the Public Works Act 1981 and the Mining Act 1971. Some might go as far as to say that the Tribunals have been vested with some of their new jurisdiction so as to lend an air of judicial independence and respectability to certain "sensitive" areas and thus ease unwanted political pressures from interest groups. Be this as it may, nobody would suggest that the Tribunals lack the perception and experience necessary to fulfil their present role. Nevertheless, that role is not always entirely happy because, on occasion, issues are raised which, in essence, are non-justiciable. It will be interesting to see how the Tribunals approach such cases in future, with the benefit of the experience derived from the Clyde dam controversy.

Company takeovers — too many tribunals, not enough remedies?

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THE recent decision of the Court of Appeal in *City Realties Ltd v Securities Commission* (11 June 1982, CA 179/82) provides an interesting interpretation of the jurisdiction of the Securities Commission. It also highlights the fragmentation of company law, especially the law relating to mergers and takeovers, after the inception of the Commerce Act 1975 and the Securities Act 1978.

In 1980 the Securities Commission commenced a review of the law and practices relating to mergers and takeovers of public and private companies. As part of this review the Commission decided to investigate the takeover offer which had been made by City Realties Ltd for Property Securities Ltd. Among the specific issues which were to be investigated were the circumstances surrounding agreements between various companies and individuals relating to shares and assets in Property Securities Ltd. This investigation encompassed sales of shares by the chairman of the company. The nature of the assets and liabilities of the company were to be examined as well as the adequacy of disclosures in the accounts of the company in respect of the assets and liabilities. In the course of the examination the question was to be raised as to whether or not any director of Property Securities Ltd had a conflict of interests affecting the performance of his duties as such a director. A further aspect was the circumstances surrounding the notice of takeover which had been delivered to Property Securities Ltd and the public announcement by the Chairman of City Realties Ltd that if the offer were to become unconditional, then the Chairman of Property Securities Ltd would become Chairman of City Realties Ltd.

The Securities Commission took evidence from witnesses and a draft report was prepared by the Chairman of the Commission. No further action was taken by the Commission and the takeover proceeded.

The case arose because City Realties Ltd and another company, which featured in the investigation, began judicial review proceedings in the High Court alleging that the Commission was acting outside its jurisdiction in undertaking a specific investigation of the circumstances surrounding an individual takeover bid. In the Court of Appeal the appellant sought a declaration and the quashing of the decision to issue the specific notice that the Securities Commission was to obtain evidence in this matter. An application seeking relief including prohibition and injunction had already been dismissed by Quilliam J in the High Court.

The Court of Appeal, in a judgment delivered by Cooke J, examined s 10 of the Securities Act which states:

> The functions of the Commission shall be —
> (a) To perform the functions and duties conferred or imposed on it by or under this Act or any other enactment; and
> (b) To keep under review the law relating to bodies corporate, securities, and unincorporated issuers of securities, and to recommend to the Minister any changes thereto that it considers necessary; and
> (c) To keep under review practices relating to securities, and to comment thereon to any appropriate body; and
> (d) To promote public understanding of the law and practice relating to securities.

The Court was primarily concerned with the application of paras (b) and (c) and had to decide whether the very general powers set out in the section confer a specific power to investigate particular takeover situations. A further issue arose because the Commerce Commission also has a specific jurisdiction to investigate certain mergers and takeovers under the Commerce Act. In general the Commerce Commission is required to investigate whether such a takeover is in the public interest — an investigation which does not explicitly involve looking to the interests of those who have invested in the company. In the *City Realties Ltd* case the Court held that whilst the legislation in s 10 was broadly defined there was no reason why Parliament should not have seen fit to set up a Commission which had, amongst other functions, the power to review specific takeovers. This viewpoint was confirmed by the Minister of Justice when he introduced the Securities Amendment Bill on 21 September 1982. He stated, referring to the *City Realties Ltd* case that:

> . . . the Court of Appeal has upheld the role of the Commission as a watchdog, and it has been decided not to amend the sections in the Act setting out the functions of the Commission lest that should lead, in any subsequent litigation, to the adverse inference that in doing so Parliament had in some way tried to cut back or limit the power of the Commission as clearly set out and found by the Court.

The Court of Appeal also held that to permit the Commission to investigate specific takeovers did not amount to any interference with the scheme of the Companies Amendment Act 1963 or the Commerce Act 1975 — the justification being that the Commission cannot make binding orders under s 10 of the Securities Act. This seems rather a strange justification for arriving at such a conclusion because irrespective of whether a binding order can be made by the Securities Commission, the result of the judgment is that both the Securities Commission and the Commerce Commission have the jurisdiction to investigate specific

takeovers. It might be argued that both Commissions investigate situations from a different viewpoint — the Commerce Commission from the perspective of public interest and the Securities Commission in respect of the investors interest. However it seems inefficient to have a situation where two Commissions may investigate a single event. Furthermore if s 10 is to be interpreted broadly, paras (b), (c), and (d) appear to permit an investigation based not only on the interests of investors but also on the public interest generally. In fact para (d) requires the Commission to promote public understanding of the law and practice relating to securities. There is the possibility that in certain takeovers the Companies Amendment Act 1963, the Securities Act 1978 and the Commerce Act 1975 could all provide separate but overlapping jurisdictions. In such situations a fourth arena of jurisdiction — the separate jurisdiction of the Court under case law might also come into contention.

In the *City Realties Ltd* case the Court of Appeal stated, to quote Cooke J that those who were involved in investigations by the Commission were safeguarded by the "standing and sense of responsibility of the Commission, the rules of natural justice and the duty to act with reasonable care".

This statement might be seen as being in conflict with the finding of the Court that a wide interpretation of the powers of the Commission was justified because it could merely recommend or comment. Clearly the significance of an investigation will go beyond the report that is issued. In the case before the Court the parties had seen fit to challenge the powers of the Commission in the High Court and in the Court of Appeal. The consequences of an adverse report could be very damaging to the parties even in the absence of any specific sanction accompanying that report.

It is believed that the case creates the potential for an overlap of jurisdiction as described above, but paradoxically despite the possible involvement of two Commissions in any takeover bid, as well as the application of the Companies Amendment Act 1963 and the jurisidiction of the Courts under case law, there will still be some cases where the determined offeror may slip between all the legislation unscathed if not unscrutinised.

One of the situations where this could occur is exemplified by the case of *Carter Holt Ltd v Fletcher Holdings Ltd* [1980] 2 NZLR 80. Fletcher Holdings Ltd wished to acquire a majority shareholding in Carter Holt Ltd. They did not wish to alert the market immediately. They addressed oral offers to six large institutions which held shares in Carter Holt Ltd. Fletchers wished to acquire not more than 25 percent of the shares because in this manner they would avoid having to notify the Examiner of Trade Practices under Part III of the Commerce Act 1975. Following these offers, Fletcher Holdings Ltd purchased approximately 23.6 percent of Carter Holt Ltd's shares.

Because the Examiner of Trade Practices would have to be informed when 25 percent of the shares were acquired, Fletcher Holdings Ltd entered into an arrangement with another company — the New Zealand United Corporation Ltd, whereby that company would purchase a further 24.9 percent of shares. The New Zealand United Corporation Ltd then undertook to accept the takeover offer which Fletcher Holdings Ltd would subsequently make for all the shares in Carter Holt Ltd. A similar arrangement for a much smaller parcel of shares, some 2.4 percent was entered into with another company. This left Fletcher Holdings Ltd in control of 51 percent of the Carter Holt Ltd shares.

The case, which was taken into the High Court by Carter Holt Ltd, related to the acquisition of the initial parcel of 23.6 percent of shares. Mahon J considered the effect of the Companies Amendment Act 1963 in this transaction. The disclosure provisions of that Act come into operation when more than 20 percent of the shares in a company are being sought (s 2(1)). However His Honour held that because the offer had not been made in writing (see *Multiplex Industries Ltd v Speer* [1966] NZLR 12) and because it was directed to no more than six members of the company (s 3(6)), it was lawful for Fletcher Holdings Ltd to acquire the shares without complying with the disclosure provisions in the Act.

Therefore a manoeuvre which appeared to be a rather cynical attempt to evade both the Companies Amendment Act and the Commerce Act was found to be a legitimate transaction.

Fletcher Holdings Ltd did come to the attention of the Commerce Commission in later proceedings because of the arrangement with the New Zealand United Corporation Ltd to purchase the additional 24.9 percent of shares. If Fletcher Holdings Ltd had merely sought 23.6 percent (or even 24.9) of the shares no further action could have been taken. The point was that Fletcher Holdings Ltd could have acquired a major interest without scrutiny from the market place. In such a case it might be open to the Securities Commission to investigate the matter in the interests of shareholders. In the Fletcher Holdings Ltd case the Securities Commission did invite the parties to discuss the matter with them and there was some liaison with the Commerce Commission but the matter was taken no further. Had the matter been pursued the Securities Commission, under s 10(c) could have merely reported to any "appropriate" body. In these circumstances such comment will be usually too late and of doubtful value quite apart from the difficulty of deciding who or what is an appropriate body to receive the report.

There is another twist to this case. When the Carter Holt Ltd directors learned of the offers they allotted all the unissued capital in the company to two "sympathetic" companies. This had the effect of diluting the Fletcher holding by approximately 50 percent (in terms of control of shares). As Mahon J pointed out at p 7 this might have been challenged under the decision in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 All ER 1126 although the question was not raised in the case. Therefore the Fletcher Holdings Ltd case provides an example of failure by the Companies Amendment Act 1963 and the Commerce Act 1975 to force disclosure. The Securities Commission could have exercised minimal restraints in such a situation other than by issuing a report, and the only protection shareholders would have enjoyed lay under the common law jurisdiction of the Courts — and that only in respect of the activities of their own directors.

A similar situation arose in 1978 when Lion Breweries Ltd attempted to transfer its shares to Androcles Corporation — a Corporation which was wholly controlled by Lion Breweries Ltd. This was purportedly carried out to prevent a rumoured takeover bid but was greeted with outrage by the Lion Breweries Ltd shareholders and the share market generally. Although the scheme never came to fruition neither the Commerce Act nor the Securities Act would have provided an effective remedy. The shareholders best protection lay in the Companies Act 1955 and in the

common law jurisdiction of the Courts (although again this was never actually tested).

What are some solutions, if it is accepted that the law in relation to takeovers and mergers has become fragmented and in some respects inadequate despite the various statutes which touch upon such situations? The following remedies might be suggested. Perhaps the most obvious answer is that the entire law relating to company mergers and takeovers be reviewed with a clearly defined and effective jurisdiction being given to one Commission. Since the Commerce Commission has always exercised a clearly defined jurisdiction in this field, it might be seen as the logical recipient of widened powers under a consolidated takeover statute. Such a statute would permit, at the discretion of the Examiner of Commercial Practices, a review of all sales of shares in public companies. The review could be accompanied by sanctions if either the public interest or the interest of investors were affected detrimentally. The review would be a mandatory requirement when 20 percent or more of the shares in a public company changed hands. The Commerce Commission could also be responsible for enforcing compliance with the disclosure provisions of the Companies Amendment Act 1963 which could be incorporated into the new Act. The provisions of the Act could be amended to require disclosure in all cases where more than 20 percent of shares are sought, whether by oral or written offer, and irrespective of the number of shareholders involved. Such a proposal may sound draconian but it merely consolidates the existing law and adds sanctions to the powers of review which were confirmed by the Court of Appeal in the *City Realties Ltd* case, as well as resolving the problems which were identified in the Fletcher Holdings Ltd case. Under such a proposal the major functions of the Securities Commission would be left intact while the rather nebulous jurisdiction to investigate takeovers, which was recognised in the *City Realties Ltd* case, would be given to the Commerce Commission. Their jurisdiction would be more precisely defined and the Commerce Commission, especially if the services of the Examiner of Commercial Practices (or a similar official) were to be utilised, might be a more efficient investigating agency.

Against such a proposal, it might be argued that the Commerce Commission already exercises a wide ranging jurisdiction in fields as unrelated as restrictive trade practices and pyramid selling schemes. Therefore the Securities Commission with the narrower task of protecting investor interests might seem to be a more appropriate tribunal. However, this might create difficulties as takeovers and mergers are often related to the creation of monopolies, especially in the current economic climate. Monopolies affect the public interest rather than the interests of investors so jurisdiction should be exercised by the Commerce Commission.

A further suggestion might be to amalgamate both the Commerce Commission and the Securities Commission to form a body which would safeguard both the public interest and the interests of investors. It has been a theme of this article, that in some respects both Commissions currently have the potential power to protect the various interests of investors and the public although generally the Commerce Commission is charged with protecting the public interest and the Securities Commission the interests of investors. This proposal would, however create a tribunal of unwieldy size and with enormous powers. Furthermore it is desirable to retain the separate jurisdiction which the Securities Commission performs in scrutinising and regulating offers of securities to the public.

Another possibility might be to leave both Commissions intact and recognise that overlap may be inevitable. However if the existing legal structures were to be retained there should be amendments to the Companies Amendment Act 1963 and the Commerce Act 1975 to provide a common trigger point at which both Acts would come into operation. This might be set at 20 percent rather than 25 percent (under the Commerce Act).

If this final possibility was put into practice the Securities Commission would still be able to intervene at any level of takeover activity. However, it could be armed with appropriate sanctions to deal with cases where the interests of investors were detrimentally affected and where there was no safeguard elsewhere in the law.

In conclusion, the *City Realties Ltd* case demonstrates that the Commerce Commission, the Securities Commission, and the Courts have overlapping and in some cases conflicting jurisdiction in mergers and takeovers. This is unsatisfactory. The law should, at the least, be clarified to eliminate conflicting levels at which intervention or scrutiny may take place. A more appropriate solution might be the consolidation and unification of statutes affecting takeovers with jurisdiction being given to a single Commission.

Land reserve designations reconsidered

Dr K A Palmer

Introduction

ONE of the advantages of an academic writer over a Judge delivering a judgment inter partes is that the writer may, upon having second thoughts about a question, set down those thoughts in a further note. Second thoughts prompt this article.

In the comment on the *Pakuranga Community "Drop-In" Society* case (8 NZTPA 225), under the title "Public Work Designations Unscrambled" [1982] NZLJ 203, the writer added a tail piece concerning the interpretation of s 118A of the Town and Country Planning Act 1977. In particular, with reference to the decision of the (No 4) Planning Tribunal in *Beazley Homes Ltd v Mt Maunganui Borough Council*, (22 March 1982 - A 43/82), the comment was made that the ruling was "correct" that a proposed reserve designation which had not become operative at 1 February 1982 was not preserved. However, a decision in direct conflict with this finding has now been issued by the (No 1) Division in respect of seven appeals, titled *Estate S M Hammond and Others v Taupo Borough Council* (12 May 1982, A61/82 - D526). Due to the conflict between the two Divisions on a matter of some importance, where proposed reserve designations have not become operative at 1 February 1982, the legal position is given further consideration.

Beazley Homes decision

The facts concerned a designation "proposed recreation reserve" shown in the notified review of the district scheme in 1980. The appellant objected to the designation, and the objection was disallowed. Upon appeal, heard on 23 February 1982, appellant submitted that s 36(8) of the Town and Country Planning Act 1977, as amended by s 244 of the Public Works Act 1981 (in force 1 February 1982) removed the power of the Council to designate private land for a work which did not qualify as an "essential work". On the other hand, the respondent submitted that the designation proposal was saved by s 20A(1) of the Acts Interpretation Act 1924 and was not deemed to be removed on 1 February 1982 by virtue of coming within s 118A of the Town and Country Planning Act 1977 (as inserted on that date). As to s 118A, the appellant considered it did not apply to save a proposal to designate land which had not become operative at the material date.

The (No 4) Division of the Tribunal ruled that s 20A was subject to the more specific provisions of s 118A but, in any event, s 20A did not authorise the continuation of a designation which was not for an essential work. As to s 118A, it would save a "requirement" for a proposed reserve, but the Council could not make a requirement as a matter of law itself and the land had not been designated as the proposal, being subject to appeal, had not come into operation and had no legal force. The Council was accordingly directed not to include the proposed reserve designation in the review of its scheme.

Hammond Estate decision

The seven appeals concerned the intention of the Council to designate as "proposed recreation reserve" certain land in the reviewed district scheme. The proposed review, when published, showed "proposed recreation reserve" notation in the scheme. On a preliminary question as to whether the Council had the power to complete the designation of the land after 1 February 1982 for the reserve purpose, it was initially submitted that the reserve could qualify as an essential work, with reference to the various categories of essential work in s 2 of the Public Works Act 1981. In particular, the submission was made that, under para (1) —

> The creation of reserves or wildlife habitats for the protection of rare, endangered, or threatened species of flora and fauna

be interpreted as though "the creation of reserves" was disjunctive and separate from the consequent objectives of protecting flora and fauna. This interpretation was rejected by the Tribunal. The question then posed by the Tribunal was simply "what was the effect of the Public Works Act 1981 on the designation shown in the proposed review scheme?" The Tribunal referred to the saving provision in s 118A and the following words:

> "where . . . any land has been designated in this Act for a public work and the . . . designation is not —
> (b) for an existing or proposed reserve . . . the designation shall be deemed to be removed on the 1st day of February 1982 and the Council shall amend the *district scheme* accordingly".

The Tribunal then referred to the definition of "district scheme" in s 2(1) of the Town and Country Planning Act 1977, which is defined to mean "a planning scheme prepared or in the course of preparation under Part III of this Act and it includes a section of a district scheme and any variation of a district scheme".

Reading this definition back into the words in s 118A, the Tribunal stated:

> Part of the properties of the appellants has been designated therein for proposed recreation reserve. The said s 118A requires that certain designations be removed from the district scheme; but designations for proposed reserves are specifically excluded from that requirement. It therefore follows, in our opinion, that the Public Works Act 1981 has no effect upon the designation in issue in these appeals.

The Tribunal further added:

> Those conclusions are consistent with the general rule that statutes, particularly amending statutes, are prima facie prospective, and that retrospective effect is not to be given to them unless by clear words or necessary implication. To hold that the designation in the proposed review must fall because of the effect of the Public Works Act 1981 would be to give retrospective effect to that Act; the Act itself is clear in

> saying that it is not to have retrospective effect in relation to the designation of land for proposed reserves in a district scheme and it necessarily follows that rights of appeal against such designations are not taken away.

The Tribunal noted that the parties were agreed that the law in force at the time of the hearing should be applied (as stated by the High Court in *Drummond v Bay of Plenty Co-op Dairy Assn Ltd* [1978] 1 NZLR 86, and in *Ireland v Auckland City* (1981) 8 NZTPA 96). The effect of the statutory changes was to deprive a Council of the power to freshly *impose a designation* for a proposed recreation reserve after 1 February 1982 as to private land and, secondly, to deprive a Council of the power to acquire the land compulsorily for a work other than an essential work. Accordingly, the Tribunal ruled that the appeal hearing should proceed on the merits. If the designation was upheld, it could form part of the operative reviewed scheme.

In another decision, *Gregory and Others v Taupo County Council* (14 May 1982, A63/82-D505), the (No 1) Division ruled that it had the power to amend under s 152 of the Planning Act the wording of an existing esplanade reserve designation to clarify doubts as to the boundary line. The alternative question of reimposing a fresh designation was accordingly avoided.

Interpretation issue

The difficulties which have arisen between the two conflicting decisions relate to the meaning of the phrase "where . . . any land has been designated under this Act for a public work", and part of the difficulties has arisen following the introduction of separate systems for incorporating requirements made by the Crown and other local authorities, either under s 43 prior to notification of the first district scheme, or under s 118 at any time thereafter. Where the requirement procedure is invoked, certain explanatory material is required under the Town and Country Planning Regulations 1978, reg 40, and the Council's right is limited to making a recommendation back to the Minister or local authority on the proposals. The requirement may in fact result in a designation if that is the nature of the requirement, but this is not necessarily always the case. A requirement may supersede an existing Council designation, as discussed by Somers J in *Queenspark Community Association (Inc) v Waimairi County Council* (1980) 7 NZTPA 139, 145, and two designations or more may apply to the same land where not directly contrary to each other nor intended to have contemporaneous effect. In essence, one can draw an analogy with first and second mortgages; however, the last requirement or designation would take priority where approved and becoming operative.

As to public works for which the territorial authority (Council) has responsibility, these are incorporated under the power in s 36(8) either by inclusion in the original proposed scheme or a proposed review, or by way of scheme change or a variation of the proposals. During the objection hearings, the Council may of course allow an objection against its own public works provision and delete the provision, but ultimately the provision is likely to take the form of a designation either as to an existing work or a proposed work. The removal of the Council designation requires a formal scheme change, whereas removal of a public work requirement or designation for which the Crown or another local authority has responsibility is effected by mere notice under s 122, against which there is no right of objection or appeal.

The legal effect of a requirement being made under s 43 or s 118 is recognised by s 120 in requiring the landowner to obtain consent from the responsible body before carrying out any further work which may be contrary to the requirement if eventually incorporated into the district scheme. This section clearly recognises that the mere making of the requirement (which may perhaps lead to a designation becoming part of the operative scheme) should have an interim legal effect. The 1980 Amendment, adding subs (5) (to apply s 120 to any provision which the Council may make for a public work), indicates that a proposal to designate land for a Council work is also to have some interim legal effect.

Another area where the problem of the meaning of "designated" arises is under s 82, concerning the owner's right to apply for an order that land subject to a requirement or designation be taken where it cannot be sold, or the designation or requirement removed. Likewise, under s 83, the same question arises as to the power of the Tribunal to make an order that the land be taken where the requirement or designation presents any imminent redevelopment of the land. In both ss 82 and 83 it would appear anomalous if the owner's rights applied upon the mere receipt of a requirement under ss 43 and 118 which may, where subject to appeal, not in fact take operative effect, yet the owner's rights in respect of a designation would, if limited to an operative designation, be suspended for perhaps a year or more, pending final resolution where objections were made and appeals lodged regarding the designation. This anomalous position may in fact apply under s 126, concerning the right to compensation, which applies to a provision in an operative scheme only, which causes injurious affection and does not, therefore, apply to any interim effect of works proposals which may not become operative (see *Paterson Candy International (NZ) Ltd v Newmarket Borough Council* [1977] NZ Recent Law 139: car park designation withdrawn — no right to compensation for loss of property sale in the meantime). However, the limitations and shortcomings of s 126 should not determine the correct interpretation of "designated" as used in ss 82, 83 and 118A.

Requirement saving

The restriction on the right of the Crown and other local authorities to make requirements under ss 43(1) and 118(1) of the Planning Act, namely as to essential work purposes where the land or air space is not owned or leased by the responsible body, is complemented by the transitional provisions in ss 43A and 118A. Under the former provision, the requirement is recognised as perhaps taking the form of a designation where operative and the requirement or designation is deemed removed on 1 February 1982, unless saved as an essential work or being for an existing or proposed reserve, existing or proposed national park, or in respect of land owned or leased by the Minister or local authority. Obviously, s 43A applies to a requirement which may not have become operative on 1 February 1982, but was at that time lawfully made and served under s 43. To the same end, s 118A(1) preserves requirements for the essential work, reserve or national park purposes, or as to land already owned or leased by the Minister or local authority. Again, it is clear that the requirement preserved may be a "proposed" requirement which has not taken effect pursuant to formal approval under s 52. It is only

following approval that the district scheme provisions have the force and effect of a regulation, pursuant to s 62(1).

Accordingly, had in either the *Beazley Homes* or the *Hammond Estate* cases, the "proposed reserve" notation been inserted pursuant to a requirement of the Crown or another local authority, ss 43A or 118A would have preserved the validity of the requirement pending approval or disapproval on appeal, and ultimate incorporation in the operative scheme.

Designation saving

Returning to s 118A and the phrase "where . . . any land has been designated under this Act for a public work . . .", one can apply the basic principles of interpretation, namely by following through the statutory definitions where provided in s 2 of the Act. First, the term "designated" is defined to mean "designated under this Act for a public work in a *district scheme*", and "designation" has a corresponding meaning.

As to this definition, Somers J stated in the Queenspark Community Association case at p 144:

> That definition defines the scope or ambit of, but does not explain, the term itself. A designation is a statement that a particular area of land is used for the purposes specified . . . and the uses to which such land may be put should be conveyed in unambiguous terms. . . .

However, for present interpretation purposes, it is submitted that the key is to apply to the words "district scheme" used in the definition of "designated" the statutory definition of "district scheme" also found in s 2, namely:

> "District scheme" means a planning scheme prepared or in course of preparation under Part III of this Act; and includes a section of a district scheme and any variation of a district scheme.

These definitions apply, unless the context otherwise requires, but, as is well known, there is a strong presumption towards adopting the statutory definition and only rarely will a Court be justified in departing from the meaning prescribed (*Police v Thompson* [1966] NZLR 813, 818, 823, CA). Thus, one may conclude that the phrase in s 118A as to land "designated under this Act for a public work" refers to land which is designated "in a district scheme" and a district scheme includes a "planning scheme in the course of preparation under Part III", and a proposed review is such a scheme in course of preparation pending final approval to become operative. If this conclusion is accepted, then it would appear that the decision of the (No 4) Tribunal in the *Beazley Homes* case is not correct, and the conclusion of the (No 1) Division in the *Hammond Estate* case is correct.

As to variations and scheme changes, a variation under s 47 of the proposed scheme review, which introduced a reserve designation prior to 1 February 1982, should be construed as part of the district scheme in the course of preparation and sufficient to preserve the reserves designation in accordance with s 118A.

Concerning a scheme change which introduced a proposed reserve designation prior to 1 February 1982, the position is not so clear. On the one view, a change cannot be considered as meaning a planning scheme in the course of preparation, as it is merely an alteration to the existing scheme. On the other hand, it would seem anomalous that a proposed reserve designation shown in a published scheme review before becoming operative is preserved under s 118A, yet the same plan provision shown in a notified scheme change is *not* preserved. On this aspect, it may be necessary to fall back upon another saving provision such as s 20(g) of the Acts Interpretation Act 1924, which may continue in force an enactment (the former s 38(a) of the Planning Act) notwithstanding the repeal thereof "for the purpose of continuing and perfecting under such repealed enactment any act, matter, or thing, or any proceedings commenced or in progress thereunder, if there be no substituted enactments adapted to the completion thereof". It is interesting that this saving provision was not considered in the *Beazley Homes* case, whereas the provisions of s 20A were considered and ruled to be inapplicable.

However, as a matter of consistency between the rights and effect of a requirement vis-a-vis a designation, under ss 82, 83 and 118A, it is submitted that the word "designated" should be given a broad interpretation to include designated either under a proposed scheme, under a proposed review of the scheme, by way of a notified change of the scheme, or by a variation of the review or the change. In all of these cases, where the proposed reserve has been notified and designated in fact on the plan or in the scheme (and thereby has an interim legal effect under s 120), the designation should be preserved under s 118A, unless earlier withdrawn by the Council under s 54(3) (scheme change) or under s 61(6) (scheme review) or disallowed by the Planning Tribunal on appeal either before or after the material date of 1 February 1982 (pursuant to s 49(2)(a)) (Council designations) or s 118(8) (Crown or other local authority requirements and designations).

Conclusion

If the interpretation propounded above is accepted, any inconsistencies between a notified requirement and a notified designation will be removed and the owner's rights under ss 82 and 83 will be uniform whether the requirement or designation powers apply.

As to the saving under s 118A, again, the interpretation of a "designation" to include any provision for a public work notified as being included in a review scheme, scheme change or variation prior to 1 February 1982 preserves the consistency between the legal effects of requirements and designations, and allows the perfecting of a procedure commenced prior to the material date. For designations, whether operative or not, which do not fall within the saved categories, the removal of the designations for the future from either the proposed scheme or the operative scheme is entirely appropriate to achieve the statutory intent. The interpretation outlined may confirm the decision in other cases decided after 1 February 1982, for example, *Coleman and Others v Taupo Borough Council* (No 1 Division, 4 February 1982, A18/82-D118) concerning a proposed recreation reserve designation at Waipahihi covering private boathouses on the Taupo lake front, being a designation upheld by the Tribunal. Whether the Council will ever be able to acquire such proposed reserve land compulsorily will, however, depend on the obtaining of an Order in Council declaring the land as needed for "an essential work".

Discovery of documents in civil litigation: the duties of solicitor and counsel — Part I

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Introduction

THE recent decision of the House of Lords in *Harman v Secretary of State for the Home Department* [1982] 2 WLR 338 upholding the conviction of a solicitor for contempt of Court in improperly disclosing documents obtained on discovery is a timely reminder of the very important duties which must be observed by solicitors and counsel in the context of the discovery process in civil litigation. The decision by a majority of three to two also brings into sharp focus some of the competing interests in this area of the law including freedom of communication and the right of the public to information, privacy and confidentiality of litigants' documents, and the public interest in discovering the truth so that justice may be done between litigating parties.

It is proposed in this article to examine the duties of solicitors and counsel arising in respect of the discovery of documents and also to consider the impact upon such duties of the decision of the House of Lords in the *Harman* case. First, reference will be made to the purpose and scope of discovery of documents in civil proceedings, as it is from this that the consequential duties and obligations of solicitors and counsel flow. It will then be apposite to identify and define such duties and obligations as a prelude to an examination of the current application of the relevant principles by the Courts. Some conclusions will then be offered on the question of whether this area of the law is best left for development by the Courts or ought properly to be the subject of legislative intervention by way of modification.

Importance of discovery and its purpose

Two short quotations will serve to illustrate the part which the discovery process plays in civil proceedings:

- *The importance of full discovery.* We would not underrate the importance in our adversarial system of full discovery of documents. It prevents surprise, encourages settlement, and narrows issues.
  Per Lord Scarman in *Harman v Home Office* [1982] 2 WLR 338 (HL) at p 356.

- Discovery, with its attendant processes, inspection and interrogatories, is one of the most important interlocutory procedures in the trial of an action. Properly used, it can help immensely in long and complex litigation. It can also serve to shorten the hearing of otherwise prolonged litigation.
  R P Meagher QC in the Foreword to the 1981 reprint of Bray, *Law of Discovery*, 1885.

There can be no doubt that "discovery" is one of the most critical phases in civil cases. By this process the parties are able to obtain information as to the existence and contents of all relevant documents relating to the matters in issue in the proceedings. The need to ascertain the existence and nature of documents held by the opposite party arises in relation to both claims being advanced on behalf of a plaintiff or defendant *and* the case being put forward by the opposite party.

The possible impact of the discovery process extends from merely ascertaining the scope of the available documentation and other possible evidence to affecting the whole outcome of case. Just one document may influence the entire conduct of the litigation. Moreover, discovery should normally lead to the crystallisation of the main issues and result in irrelevant matters being discarded. Accordingly, it is vital that solicitors and counsel should be concerned to obtain access to all relevant documents which touch upon any of the matters at issue in the case.

Scope of discovery

In view of the importance of the discovery process, it is hardly surprising that discovery of documents is described in 13 *Halsbury's Laws of England* (4th ed) para 1, at p 2, as the obtaining of "full information of the existence and the contents of all relevant documents relating to the matters in question. . .". A succinct statement of law is contained in the judgment of Walton J in *Grant and Anor v Southwestern and County Properties Ltd and Anor* [1974] 2 All ER 465, 476:

> Discovery was an invention of the Courts of equity, and there can be no doubt at all but that the general rule is accurately set forth in *Flight v Robinson* (1844) 8 Beav 22 as follows:
>
> > The general case is, that a defendant is bound to discover all the facts within his knowledge, and to produce all documents in his possession, which are material to the case of the plaintiff. However disagreeable it may be to make the disclosure — however contrary to his personal interests — however fatal to his claims, he is compelled to set forth, on oath, all he knows, believes, or thinks in relation to the matters in question.
>
> Discovery is full and not partial, discovery.

A close examination of the scope of discovery immediately points to the

conflict between the competing interests of ensuring that justice is done in each case and the preservation of privacy and protection of confidential information. This dichotomy of interests was plainly identified by Lord Denning MR in *Riddick v Thames Board Mills Ltd* [1977] 1 QB 881, 895 (CA) as follows:

> Discovery of documents is a most valuable aid in the doing of justice. The Court orders the parties to a suit — both of them — to disclose on oath all documents in their possession or power relating to the matters in issue in the action. Many litigants feel that this is unfair. . . . The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, ie in making full disclosure.

To the interests identified by Lord Denning must be added the further interests of freedom of speech and the right of the public to a free flow of information in respect of matters of public concern. These interests were the subject of judicial consideration in inter alia the *Harman* case, and *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] 1 QB 613. The case of *ITC Film Distributors Ltd v Video Exchange Ltd* [1982] 3 WLR 125 also contains a detailed consideration of the policy factors which apply when documents of an opposing party are obtained by a trick in the precincts of the Court. In recent years the Courts both in England and New Zealand (see, for example, *Lascelles v Wellington Newspapers* [1981] 1 NZLR 440 and *Environmental Defence Society Inc v South Pacific Aluminium Ltd* [1981] 1 NZLR 146 (CA)) have been wrestling with the issue of what should be the proper boundaries of discovery. Almost without exception these cases have involved a careful weighing of relevant policy factors and the differing public interests already noted.

Duties and obligations of solicitors and counsel to ensure full discovery

The most fundamental of the public interests operating in this area is the interest in discovering the truth in civil litigation so that justice may be done between the parties. This in turn carries with it the duty upon all solicitors and counsel to monitor carefully the discovery process and ensure as far as may be possible that clients in civil cases make full and proper disclosure of all relevant documentary material. It is suggested that it is not sufficient simply to allow the client to include in an affidavit of documents the items which *the client* may think fit. This would not be a satisfactory discharge of the obligation which requires a careful investigation by the solicitor or counsel and proper supervision of the client. The duty is neatly summarised in 12 *Halsbury's Laws of England* (4th ed) para 45 at p 39:

> It is his duty to take *positive steps* to ensure that the client appreciates the duty of discovery and the importance of not destroying documents which might have to be disclosed, and in the case of a corporate client to ensure that knowledge of this burden is passed on to anyone who may be affected by it (emphasis added).

Moreover, it was held in *Woods v Martins Bank Ltd* [1959] 1 QB 55 that the duty did not stop at explaining to clients that they must disclose all relevant documents but goes considerably further. Salmon J observed (at p 60) that a duty was owed to the Court carefully to go through the documents disclosed by clients to ensure that no relevant material has been omitted or withheld from disclosure.

The classic authority on the duties and obligations of solicitors is the decision of the House of Lords in *Myers v Elman* [1940] AC 282. That case concerned a claim by a successful plaintiff that the solicitor for one of the defendants should pay the costs of the action on the grounds of professional misconduct in the proceedings. The particular misconduct alleged was that the solicitor had inter alia prepared and permitted his clients to make affidavits of documents which were inadequate and false.

Lord Atkin in the course of his speech considered the question of the solicitor's duty at p 304:

> What is the duty of the solicitor? He is at an early stage of the proceedings engaged in putting before the Court on the oath of his client information which may afford evidence at the trial. Obviously he must explain to his client what is the meaning of relevance: and equally obviously he must not necessarily be satisfied by the statement of his client that he has no documents or no more than he chooses to disclose. If he has reasonable ground for supposing that there are others, he must investigate the matter; but he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge, and if he reasonably decides to believe his client, criticism cannot be directed to him. But I may add that the duty is specially incumbent on the solicitor where there is a charge of fraud; for a wilful omission to perform his duty in such a case may well amount to conduct which is aiding and abetting a criminal in concealing his crime, and in preventing restitution.

It was held that the solicitor could not escape responsibility for misconduct of the type alleged by a plea that the work of preparing the affidavits had been entrusted to and was completed by an experienced clerk. However, on the facts it was decided by a majority of four to one that the evidence was not sufficient to establish misconduct. In the course of his speech, Viscount Maugham observed (at p 293) that if a client should persist in omitting relevant documents from his affidavit "it seems to me plain that the solicitor should decline to act for him any further".

This issue has more recently been the subject of judicial comment in *Rockwell Machine Tool Co Ltd v E P Barrus (Concessionaires) Ltd* [1968] 2 All ER 98. Megarry J (as he then was) stated at p 99:

> In preparing for trial solicitors bear a great responsibility and a heavy burden. Not the least of these burdens is that of discovery. This is of especial weight in a complex case of passing off such as this was. Many litigants (and not least corporate litigants) have little appreciation of the scope of discovery, and the duty of making full disclosure. So often they neither know nor appreciate the requirement that they must search for and disclose to their adversary any document which, in the classic phrase of Brett, LJ in the *Peruvian Guano* case, "may fairly lead him to a train of inquiry" which may either advance his own case or damage his opponent's.

> Accordingly, it seems to me necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after writ issued, not only the duty of discovery and its width but also the importance of not destroying documents which might by possibility have to be disclosed. This burden extends, in my judgment, to taking steps to ensure that in any corporate organisation knowledge of this burden is passed on to any who may be affected by it.

The duties and obligations in respect of discovery spelled out in both the dictum of Lord Atkin in *Myers v Elman* and the dictum of Megarry J in the *Rockwell Machine Tool* case do not appear to have been the subject of comment in any reported New Zealand cases.

Duties arising from discovery—the implied undertaking

The duties referred to above are directed towards ensuring that the Courts can eventually discover the truth in civil litigation. So important is this public interest seen to be that the Courts have held that a competing public interest in preserving privacy and protecting confidential information must take second place. Even though the disclosure by compulsion of a litigant's private and confidential documents constitutes a plain invasion of privacy, such a situation is tolerated out of deference to a higher public interest in ensuring that justice is done in litigation.

However, the potential dangers attendant upon such a practice have been recognised with the result that it has been necessary to afford special protection to litigants who are forced to disclose documents upon discovery. As stated by Lord Wilberforce in *Rank Film Distributors Limited v Video Information Centre* [1981] 2 All ER 76, at p 81:

> [I]t is certainly correct to say that existing law and practice to some extent prevent matter disclosed on discovery in civil proceedings from being used to the prejudice of the disclosing party.

This principle is of long standing and was described in Bray, *Law of Discovery*, 1885, at p 238 in the following terms:

> A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit; . . . nor to use them or copies of them for a collateral object. . . . If necessary an undertaking to that effect will be made a condition of granting an order.

Such a limitation on use has been variously described in the cases; for example, it has been held to preclude use for any "improper purpose" in *Alterskye v Scott* [1948] 1 All ER 469. In *Distillers Co (Biochemicals) Limited v*

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Times Newspapers Limited, supra, at p 621, the protection was described by Talbot J as extending to "any use of the documents otherwise than in the action in which they are disclosed". Lord Denning in *Riddick v Thames Board Mills* (supra) at p 896 opined that "the Courts should . . . not allow the other party — or anyone else — to use the documents for any ulterior or alien purpose". In *Halcon International Inc v The Shell Transport and Trading Co* [1979] RPC 97 (CA) the statement of the law outlined in Bray was accepted as the correct view of the law.

The principle that the use to be made of documents obtained on discovery is thus limited, was also applied recently in England in *Church of Scientology of California v Department of Health and Social Security* [1979] 3 All ER (CA) and *Sony Corporation v Time Electronics* [1981] 1 WLR 1293. Significantly, the principle also found acceptance with the majority in the *Harman* case, see Lord Diplock at p 343, Lord Keith at p 349 and Lord Roskill at p 362.

It is now generally recognised that the obligations flowing from this rule arise from an implied undertaking on discovery that the documents disclosed will not be improperly used. The concept of the implied undertaking was specifically recognised by the House of Lords in the *Harman* case and in particular in the speech of Lord Diplock at p 347.

Although the Courts have recognised the existence of such an implied undertaking, nevertheless in appropriate cases a Court may see fit to impose an express undertaking on a litigating party prior to making an order for production. This issue was considered in the *Church of Scientology* case where the Court of Appeal held that the Court had as part of its inherent jurisdiction power to ensure that the ambit of discovery was no wider than necessary to dispose fairly of the action or to prevent conduct which might amount to an abuse of process of the Court or a contempt. The law is conveniently summarised in the judgment of Stephenson LJ at p 105 as follows:

> The authorities seem to me to show that one party can object to a particular agent appointed by the other party to inspect, and the Court will uphold the objection and restrict inspection to an agent considered suitable, appropriate or approved. They also show that one party can object to the other party, whether an individual or corporation, inspecting, and the Court will uphold such objection and control disclosure in the interests of justice and fairness to both parties, and will restrict inspection to an approved agent on his undertaking not to disclose the inspected document or its contents to others, including his own principal, the party concerned himself or itself. This is established in the case of trade secrets and in the case of press informants on the authorities which I have already cited.

In that case it was held that there should be a restriction on the inspection of the defendants' documents by the plaintiffs as there was a real risk that an unnecessarily wide circulation of information obtained by the plaintiffs on discovery might lead to harassment of persons who had written to the Department of Health. The principles outlined in this case were recently applied in Australia in *Kimberley Mineral Holdings Ltd (in Liq) v McEwan* [1980] NSWLR 210 (CA) and *Registrar of the Supreme Court v McPherson* [1980] NSWLR 688 (CA).

As to the scope of the rule limiting disclosure two further points should be noted. First, as presently viewed by the Courts, the limitation on disclosure is unlikely to yield to the public interest in the free flow of information. This interest was in the case of *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* (supra) described by counsel for *The Times* as "such a wide and vital public interest . . . that it overrode the plaintiffs' private right to confidentiality". However, it was held by Talbot J at p 625 that:

> Whilst . . . the public have a great interest in the thalidomide story (and it is a matter of public interest), and any light which can be thrown on to this matter to obviate any such thing happening again is welcome, nevertheless the defendants have not persuaded me that such use as they propose to make of the documents which they possess is of greater advantage to the public than the public's interest in the need for the proper administration of justice, to protect the confidentiality of discovery of documents. I would go further and say that I doubt very much whether there is sufficient in the use which the defendants have proposed to raise a public interest which overcomes the plaintiff's private right to the confidentiality of the documents.

The second point is that however wide ranging is the obligation to give full and complete discovery and however full the protection flowing from the limitation on use of discoverable material, nevertheless this is not ground for overriding the privilege against self-incrimination. If such a plea is properly raised upon the giving of discovery, then the party claiming privilege will not be forced to disclose the documents. In the recent case of *Rank Film Distributors Limited v Video Information Centre* (supra) the House of Lords considered whether there was any way in which the Court could compel disclosure while at the same time protecting the party giving discovery from the consequences of self-incrimination. It was held that since an express restriction imposed by the Court on the use of any information disclosed would be binding only on the other party to the litigation and not on anyone else who brought a criminal prosecution, disclosure could not be compelled. The comments of Lord Wilberforce at p 82 deal specifically with this issue.

Although the Courts have sought to preserve the integrity of the discovery process, there remain some doubts as to the precise scope of the limitation. What is the breadth of the concept of "collateral object" or "ulterior purpose"? Is the protection so wide as to protect *any use* of the documents otherwise than in the action in which they are disclosed? The significant judicial activity in considering the principles applicable in this area of the law may well be symptomatic of the clear conflict between the differing public interests which operate here. An additional dimension to this conflict is provided by the rule in *Scott v Scott* [1913] AC 417 which provides that except in special circumstances trials are to be conducted in public. Thus there exists the possibility that material disclosed on discovery and produced as evidence may become known to the public unless the Court makes a confidentiality order (see 13 *Halsbury's Laws of England* (4th ed) para 86). It is therefore not surprising that the House of Lords should have been asked to rule upon the important issues presented in the *Harman* case. This case will be considered in Part II.