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Independence of Bench and Bar

Much has recently been made of the issue of judicial independence. There is of course a close inter-relationship between the independence of the Bench and that of the Bar. This was briefly and admirably expressed by Mr Justice Hardie Boys on 28 January this year on the occasion of the admission of newly qualified barristers and solicitors in Christchurch. His Honour's remarks are a timely, relevant and eloquent reminder to all lawyers, and accordingly are published this month in place of the usual editorial comment.

This will be a proud and memorable day, not only for you who have now been admitted to the profession of the law, but also for those, family friends and sponsors, who have supported and encouraged, and perhaps endured you, through the arduous and no doubt trying years of study that now, you may think, lie behind you. It will rightly be a day of satisfaction and celebration — for a goal achieved, an ambition fulfilled, perhaps a sacrifice made worthwhile. Like so many great occasions, this one is marked not only with joy but with solemnity, to remind us of the true significance of the step we have taken. Without I hope casting a pall over the happiness of the day, I would like to say a little about this other aspect for which we are all ceremoniously, if quaintly, bedecked.

The writer of the Epistle to the Hebrews spoke of being compassed about by a great cloud of witnesses. I think similar imagery appropriate on admission day. For him, they were the men of faith who in generations past had carved out the history and the culture of his people.

For us they are men of faith too, faith in liberty and justice under law, by whose courage, integrity and intellectual prowess we in our day have been assured of the essential freedoms upon which our whole concept and practice of civilisation are based. For you have joined a profession which for centuries has been at the heart of constitutional and social enlightenment: from whose ranks have come many of the great men whose names adorn the pages of our history.

That might sound very high flown and a little irrelevant — but the point is this: our liberty has not been lightly won, and the struggle to maintain it is never ending.

One of the prime purposes of law is to contain the exercise of power. But power is a sweet thing and most reluctant to be contained. Thus it is that one of the first targets of a tyrant is the legal system — to obtain subservient Judges and a submissive Bar. He must subdue both, for they are interdependent.

Much has been said lately, and it has been timely, about the independence of the Judges. No matter how well intentioned, any detraction from that basic principle must be shown up and denounced in the clearest and strongest terms. For in a society such as ours the danger is not so much a direct usurpation of power, but its accumulation by a process of gradual erosion, which goes unchallenged because of indifference and a lack of vigilance. A sure way to create those conditions is by denigrating the institution of the law itself, its concepts and its practitioners, whether they be Judges or academics or members of the practising profession. Put an institution into disrepute and no one will lament its demise.

Thus Thomas Erskine, described by Lord Denning as perhaps the greatest advocate of all time, put the profession, and professional duty, in proper context when he said:

> "I will forever, at all hazards, assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the English constitution, can have no existence."

Dignity, independence, integrity. Those are the qualities which have marked the cloud of witnesses we have about us today. Those are the attributes which you must strive to develop and maintain in your own practice of the profession. They may not always earn you the most money, or the greatest popularity — but they will bring you the highest respect, and your pursuit of them, your practice of them in your office and in the Courts, and in the whole of your life will be the most lasting contribution you can make to your profession and to the rule of law.

Case and Comment

Contracts — Arbitration

The House of Lords has again considered the contractual nature of an arbitration clause in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1982] 3 WLR 1149. Those who read the Court of Appeal's decision would have been struck by its reluctance to accept the prior decision of the House of Lords in *Bremer Vulkan Shiffbau und Maschinenfabrik v South India Shipping Corporation Limited* [1981] AC 909. These cases are probably the most important arbitration cases since the House of Lords decision in *Heyman v Darwins Limited* [1942] AC 356. Because of the complexity of these cases and the issues which they involve, this note concentrates only on the contractual aspects of the decisions and only a few brief comments are made. The objective is primarily to draw attention to the decisions, which appear to have gone largely unnoticed in New Zealand.

1 Bremer

In *Bremer*, the plaintiffs contracted to build five ships for the defendants. The defendants brought arbitration proceedings five years after the last vessel had been delivered. The defendants did not serve their points of claim on the plaintiffs until April 1976. The plaintiffs contended that the defendants' conduct had been such that, had their claims been the subject matter of litigation, the Court would have dismissed the claims for want of prosecution. The plaintiffs further contended that, in the circumstances, the Court should enjoin the defendants from further proceeding with the arbitration. Finally, the plaintiffs sought a declaration that the arbitrators had power to issue a final award dismissing the defendants' claims, just as the Court can dismiss proceedings for want of prosecution.

All of the Judges, at each step of the appellate process, accepted that a fair arbitration was no longer possible. While Donaldson J and the Court of Appeal were prepared to grant an injunction to prevent the defendants from proceeding with arbitration, the House of Lords, by a majority three to two, considered that an injunction should not be granted.

Dismissal for want of prosecution — Injunction

The plaintiffs referred to *Allen v McAlpine* [1968] 2 QB 229, where it was recognised that the High Court has jurisdiction to dismiss Court proceedings for want of prosecution. The plaintiffs sought a declaration that an arbitrator has power to dismiss arbitration proceedings for want of prosecution. In *Crawford v AEA Prowting Limited* [1973] QB 1, Bridge J concluded that an arbitrator does not have this jurisdiction. The Judge considered that arbitration proceedings must be distinguished from Court proceedings. In the Judge's view, the latter are adversarial in nature and place the onus clearly upon the plaintiff to prosecute the claim. On the other hand, arbitration proceedings place an obligation on both parties to co-operate and to seek interlocutory directions from an arbitrator where appropriate. Because both parties are under this mutual obligation to seek directions, Bridge J considered that an arbitrator could not have jurisdiction to dismiss proceedings for want of prosecution.

In *Bremer*, at first instance, Donaldson J considered that Bridge J's distinction between Court proceedings and arbitration proceedings was unsound and that both types of proceedings are essentially adversarial in nature. In Donaldson J's view therefore, an arbitrator has jurisdiction to dismiss proceedings for want of prosecution. This jurisdiction is not inherent but derives from the fact that parties to arbitration procedings impliedly clothe an arbitrator with similar authority to that of a Judge. In the present case, because there was a real risk that a fair arbitration could not now take place, Donaldson J considered that it was appropriate to declare that this was a case where the arbitrator could dismiss proceedings for want of prosecution. The delay by the defendants in delivering the points of claim was inordinate and inexcusable and the plaintiffs had been prejudiced by that delay.

On the authorities, Donaldson J did not consider that the Court has a supervisory jurisdiction which would enable it to grant an injunction to restrain a party from proceeding with arbitration in circumstances where, had Court proceedings been concerned, the Court would have dismissed the proceedings for want of prosecution. A Court could only grant an injunction if there was a legal or equitable right deserving of protection. (See repudiation, infra.)

While the Court of Appeal agreed with Donaldson J that there was a real risk that a fair hearing could no longer take place, it was unanimous in rejecting Donaldson J's view that an arbitrator has jurisdiction to dismiss arbitration proceedings for want of prosecution. (See particularly Lord Roskill's judgment.) No authority could be found to support the existence of

such a jurisdiction.

However, Lord Denning considered that the High Court has an inherent jurisdiction to grant an injunction where it would be just and right to do so eg in arbitration proceedings, where inordinate delay by a claimant makes a fair hearing impossible. Alternatively, Lord Denning (like Donaldson J) considered that an injunction could be granted to protect a legal or equitable right eg where an arbitration agreement has been repudiated or frustrated. (See infra.) Lord Roskill preferred this latter analysis.

Delivering the majority judgment in the House of Lords, Lord Diplock considered that in both of the lower Courts, the plaintiffs had argued that the Court has jurisdiction to restrain a party from proceeding to arbitration and that this jurisdiction is analogous to the Court's jurisdiction to dismiss Court proceedings for want of prosecution. (This is, with respect, not correct. Nor is it how the case was pleaded before the House of Lords. A more accurate summary of the arguments put forward in the Court of Appeal is given by Lord Brandon in *Paal Wilson*, infra.) Lord Diplock considered that lower Courts had accepted the analogy upon the basis that arbitration proceedings, like Court proceedings, are essentially adversarial in nature. However, Lord Diplock considered that the analogy was inappropirate and that the two types of proceedings must be distinguished. The High Court's power to dismiss proceedings for want of prosecution derives from its inherent jurisdiction to control its own procedure. The supervisory jurisdiction of the High Court over inferior tribunals is statutory in derivation. The Supreme Court of Judicature Act 1873 vested in the High Court the supervisory jurisdiction which it had exercised before the Act.

Accordingly, Lord Diplock considered that it had to be determined whether, before the Judicature Act, there were any instances where the Court had asserted a jurisdiction to supervise or control the conduct of consensual private arbitration ie to supervise the conduct of arbitrators. There were no such instances. Lord Diplock could not agree with Lord Denning that the High Court has an inherent jurisdiction to supervise the conduct of arbitrators. The Court could therefore only grant an injunction in circumstances were there was a legal or equitable right to be protected eg in the case of repudiation or frustration. (See infra.)

On the question of an arbitrator's power to dismiss proceedings for want of prosecution, Lord Diplock agreed with Bridge J in *Crawford* and the Court of Appeal in the present case. An arbitrator does not have jurisdiction to dismiss arbitration proceedings for want of prosecution. However, as Bridge J had remarked by way of obiter in *Crawford*, an arbitrator can direct a claimant to give proper particulars of his claim within a limited time failing which the arbitrator could debar the claimant from tendering evidence of any claim which he had not given the required particulars. It was common ground that the plaintiffs had not sought such an order from the arbitrators in the present case.

Repudiation

While Lord Denning considered that the High Court had an inherent jurisdiction to grant an injunction to supervise the conduct of arbitrators, Donaldson J, Lord Roskill and the House of Lords considered that if the Court has jurisdiction to grant an injunction to restrain a party from proceeding with arbitration, it can only be to protect a legal or equitable right. The right of a contracting party to treat himself as discharged for breach for the repudiation of the other party would be such a right.

Donaldson J considered that it was implicit in an arbitration agreement that each party would use reasonable endeavours to bring the matter to a speedy conclusion. Any unjustifiable delay by a party would constitute a breach of that agreement and if the delay was inordinate, the breach might be repudiatory. The Judge considered that the defendants had been guilty of a repudiatory breach in the present case and that the plaintiffs had a legal right to treat themselves as discharged for breach. This right would be protected by the grant of an injunction to restrain the defendants from proceeding with arbitration.

In the Court of Appeal, Lord Denning considered that a term should be implied by law into an arbitration agreement that the claimant will proceed with reasonable despatch and that the respondent will not baulk the claimant by devious manoeuvres. Both parties must co-operate. If the claimant delays unjustifiably, and if these delays are so inordinate as to frustrate the object of the agreement (so there can no longer be a fair hearing) the claimant will have committed a repudiatory breach. (With respect, it is submitted that the combination of the concepts of frustration and repudiation is not helpful. Frustration is a doctrine which relates to supervening events beyond the control of the parties.)

Lord Roskill considered that a term should be implied, as a matter of law, that the claimant would not be so dilatory in prosecuting the claim as to defeat the whole purpose of the agreement to arbitrate by making a fair hearing impossible. In the present case, the defendants had breached that term. The delay was so inordinate as to amount to a repudiatory breach. The fact that in no previous case an injunction had been granted in similar circumstances was immaterial — equity has never proceeded along tramlines. The Court would grant an injunction to protect the legal right of the plaintiffs to treat themselves as discharged for breach.

In the House of Lords, Lord Diplock agreed that an injunction could be granted to protect a legal or equitable right (citing *Siskina v Disdos Compania Navira SA* [1979] AC 210). Such a right would be the right of a contracting party to treat himself as discharged for the repudiatory breach of the other party or for frustration. Lord Diplock accepted that an arbitration agreement could be "brought to an end" by repudiation or frustration and that in such a case, the parties to an arbitration agreement could obtain an injunction to prevent the other party from proceeding. The justification for the injunction in these circumstances would be to prevent the innocent party from being harrassed by the making of a purported award against him which, on the face of it, will be enforcable against him, thus forcing him to incur the cost of resisting its enforcement. However, the authorities disclosed no case where an injunction had been granted upon the basis of repudiatory

breach before an award. Lord Diplock analysed the nature of an arbitration agreement to ascertain why this is so.

In the Judge's view and contrary to the view of Donaldson J and Roskill LJ, "if" an obligation is to be implied to proceed with reasonable despatch, it is a mutual obligation, not unilateral ie not upon the claimant only. (Lord Macmillan may have been thinking along these lines in *Heyman v Darwins Limited*, ibid, at 373-4. Lord Macmillan stated that the appropriate remedy for the breach of an arbitration agreement is its enforcement.) While a serious breach of obligation under an arbitration agreement could amount to a repudiation, mere delay in prosecuting the claim could not because both parties are under a mutual obligation to co-operate. Lord Diplock considered that Donaldson J and Roskill LJ regarded the implied term to proceed with reasonable dispatch as unilateral and not mutual because of the principle of *Allen v McAlpine* (supra). However, in Lord Diplock's view, the principle of *Allen v McAlpine* only applies to Court proceedings, which are to be distinguished from arbitration proceedings. One of the main distinctions is that at the outset of arbitration proceedings, neither party knows whether he will be claimant or respondent and accordingly, the agreement creates a mutual obligation to proceed with reasonable dispatch in all future arbitrations. This contractual obligation is exemplified by s 12(1) of the Arbitration Act 1950 (see s 4(1) and the Second Schedule (cl 6) of the Arbitration Act 1908 (NZ)) That section states that:

> The parties to the reference . . . shall . . . submit to be examined by the arbitrator . . . and shall . . . produce before the arbitrator . . . all documents . . . which may be required . . . and do all other things which . . . the arbitrator may require.

Further, the principle of *Allen v McAlpine* was designed to combat a particular mischief. That was the situation where the plaintiff's case was inordinately delayed as a result of his solicitor's negligence. If the claim was dismissed for want of prosecution, the plaintiff could sue his solicitor for negligence. Accordingly, *Allen v McAlpine* can not be used to found a unilateral implied term upon the claimant to proceed with reasonable dispatch. The obligation is mutual and neither party can assert the breach of the other party as a defence or in order to obtain an injunction. Accordingly, in the present case, even if the defendants had repudiated the contract, the plaintiffs could not assert the breach of the defendants because they were also in breach of the mutual obligation to co-operate.

While the majority of the House of Lords looked to the question of a repudiatory breach giving the "innocent" party a legal right deserving of protection by the grant of an injunction, Lords Fraser and Scarman took a different approach. Lord Fraser (dissenting) considered that the plaintiffs had an equitable right not to be harrassed by arbitration proceedings which could not lead to a fair hearing. While there was no previous authority on the point, Lord Fraser considered that the previous cases were only illustrative of the Court's jurisdiction to grant an injunction and not determinative. The lack of precedent was not a bar to the grant of an injunction in the present case.

Lord Scarman (also dissenting) considered that the plaintiffs had a legal right to a fair arbitration. In his view, this right generally arises from the judicial element inherent in the arbitration process and is independent of contract. It arises as a matter of natural justice. The Courts will act to prevent injustice where necessary (save where statute forbids). This right is implicit in the fact of contract and can be expressed by an implied term that each party has a right to a fair arbitration. Obstruction of this right will be a breach of contract and may be a repuditory breach. In cases where there is a repudiation, an injunction will be granted to prevent harassment. Because the parties do not know, when they enter into the arbitration agreement, whether they will be claimant or respondent, there cannot be a mutual obligation to co-operate (as opposed to a unilateral obligation not to obstruct). The arbitration procedure, like Court proceedings, is adversarial.

Summary

In *Bremer*, the majority of the House of Lords refused to restrain the claimants from proceeding with an arbitration despite the fact that it was generally recognised that a fair arbitration was no longer possible. Five of the eight Judges who considered the case would have granted an injunction for one reason or another.

2 Paal Wilson

In *Paal Wilson*, the respondents contracted in 1969 to sell a ship to the appellants. A dispute arose in 1972. The appellant buyers served their points of claim on the respondents in February 1974 and the respondents served their defence in June 1974. There were a series of delays in proceeding with arbitration and in August 1980, the sellers sought a declaration that the arbitration agreement had been discharged by repudiation, frustration or abandonment (mutual rescission). Staughton J regarded the *Bremer* case as precluding him from finding that the buyers had repudiated the arbitration agreement but nevertheless concluded that the agreement had been discharged by frustration. The Court of Appeal upheld the decision of the Judge at first instance on the frustration point but in addition, held that there had been a repudiation or an abandonment of the contract by agreement between the parties. The House of Lords unanimously reversed the decision of the Court of Appeal.

Repudiation and frustration

Staughton J accepted the decision in *Bremer* as stating that parties to an arbitration are under a mutual obligation to prevent delay and that delay on the part of the claimant cannot amount to a repudiation. However, the Judge considered that the agreement had been frustrated because a fair hearing was no longer possible and that an injunction should be granted.

In the Court of Appeal, Denning MR took a narrow view of the ratio of *Bremer*. His view was that the respondents in that case had failed to apply for directions and were thus in breach of their contractual obligations. They were not entitled to equitable relief because they were at fault. It was immaterial that the claimants had failed to apply for directions. Had the claimants been seeking relief, and had they failed to apply for directions, they would have breached a *separate* obligation. This would be a repudiatory breach. Lord Diplock's statements as to the mutual obligations of the party to co-operate were therefore to be treated as being obiter. Further, the present case was distinguishable from *Bremer* because the respondent sellers had not defaulted. The claimant buyers were guilty of a frustrating delay which made a fair trial impossible and this delay amounted to a repudiatory breach.

(Again, it is submitted that the fusion of the terms frustration and repudiation is not helpful.) Alternatively, the agreement was frustrated.

Kerr LJ considered only the issue of frustration. He considered that *Bremer* decided firstly, that there is no inherent jurisdiction to dismiss arbitration proceedings for want of prosecution and secondly, that by virtue of the mutual obligation of the parties to co-operate, neither party could rely on inordinate delay alone as being a repudiatory breach. However, in Lord Kerr's view, these mutual obligations can only arise once the claimant has initiated the arbitration process and it is necessary to consider whose obligation it is to take the initiative at any point of time. If it is the claimant's responsibility, the respondent can hardly be under a mutual obligation to co-operate if the claimant has been dormant. In the circumstances, Lord Kerr considered that the mutual obligation to co-operate never come into play because the plaintiffs had not taken the initiative in prosecuting the claim with reasonable dispatch. The agreement had been frustrated.

While Griffiths LJ did not hide his dislike of the *Bremer* decision, he nevertheless followed it. Like Staughton J, Lord Griffiths considered that the effect of the decision in *Bremer* is that parties to an arbitration agreement are under a mutual obligation to proceed with reasonable dispatch. Neither party is entitled to leave sleeping dogs lie and neither party can enlist the aid of equity to obtain an injunction. Both parties are obliged to apply to the arbitrator for directions so that mere delay will be insufficient to amount to a repudiation of the agreement. Further, as the delay is self induced (in the sense that it is the result of the inactivity of the parties) it cannot constitute a frustrating event.

Although repudiation was not an issue pleaded before the House of Lords, Lord Brandon, delivering leading judgment, confirmed that Lord Diplock's statements in *Bremer* as to the mutual obligations of the parties form part of the ratio of that case. Accordingly, it was not conceptually possible for either party to claim that the other had repudiated the arbitration agreement by merely failing to prosecute the proceedings, ie by merely delaying. In the present case, Lord Brandon and Lord Diplock agreed with Lord Griffiths that there had been no frustration.

Abandonment

This was an issue only in the House of Lords. It was consdered that there had been no mutual abandonment on the facts.

Summary

As in the *Bremer* case, it was generally accepted there was a real risk in the present case that a fair arbitration hearing could no longer take place. However, this time unanimously, the House of Lords considered that an injunction could not be issued to restrain the claimants from proceeding with the arbitration merely because of the delay. The House of Lords confirmed that it is unlikely that an arbitration agreement can be repudiated before an award has been made because both parties are under a mutual obligation to apply for directions. A fortiori, mere delay will not constitute a frustrating event. Further for an arbitration agreement to be regarded as having been abandoned by agreement, a clear agreement must be spelt out and for this purpose, inactivity on the part of both parties will not normally suffice on its own.

While the decisions have not apparently been welcomed, the Lords of Appeal appear to have no doubts in *Paal Wilson* as to the correctness of their decision. This is exemplified (to some extent) by their refusal to depart from the *Bremer* decision by using the freedom afforded by the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

Commentary on both decisions

The cases are of obvious importance to the New Zealand scene. The Arbitration Act 1908 only governs the basic arbitration machinery. It does not deal with the contractual obligations of the parties to an arbitration agreement. (Cf Lord Diplock in *Bremer*, at pp 985-987.) Further, the issues raised by these cases do not appear to have been considered in New Zealand either in the Courts or by the text book writers. The fact that the House of Lords in *Paal Wilson* gave a unanimous judgment is to some extent overshadowed by the fact that five of the eight Judges in *Bremer* and three of the eight Judges in *Paal Wilson* reached a contrary conclusion in principle, and by the fact that the commercial Judge, Mustill J, clearly preferred this contrary conclusion when delivering his decision in *Japan Line Ltd v Himoff Maritime Enterprises Ltd (The "Kehrea")* [1983] 1 Lloyds Report 29. (The case was heard before *Paal Wilson* went to the House of Lords.)

While a New Zealand Court might be inclined to follow the persuasive authority of two House of Lords decisions, it is submitted that it cannot be conclusively predicted which approach would in fact be followed. In the meantime, a respondent who is faced with delays by the claimant would be well advised to apply to the arbitrator for directions (unless it is clear that the claimant has otherwise repudiated the arbitration agreement). If the analysis of Lord Diplock is accepted, the respondent will not be able to cancel the contract pursuant to the provisions of the Contractual Remedies Act 1979, as s 7 largely reflects the principles that would be applied at Common Law.

If the plaintiff does not prosecute the claim with reasonable dispatch and irrespective of whether Lord Diplock's analysis is correct, a respondent to arbitration proceedings can (as Bridge J and Lord Diplock have suggested) apply to an arbitrator for an order that the claimant delivers particulars without delay. If the claimant fails to comply with the arbitrator's direction, the respondent can expect the arbitrator to debar the claimant from prosecuting the claim. While this may be an expedient move upon the part of the respondent, it may be questioned whether, in conceptual terms, the respondent should have the onus to take the initiative rather than to wait and see what the claimant does (and if necessary, apply for an injunction to restrain the claimant from proceeding in cases of inordinate and extreme delay). If Lord Scarman is correct in asserting that there is no mutual obligation to co-operate, then it would be possible in some circumstances to regard the claimant as having repudiated the arbitration contract and this might be sufficient to entitle the respondent to an injunction. If Lord Diplock's analysis is correct, it may be that an injunction could still be granted either on the basis of Lord Fraser's analysis (to protect an equitable right not to be harassed by arbitration proceedings which cannot lead to a fair hearing) or that of Lord Scarman (a legal right, inherent in the arbitration process, to a fair arbitration).

It is submitted that the reasoning of Lord Scarman should be preferred to that of Lord Diplock. The fact that the parties have agreed to have their dispute resolved by arbitration should not constitute a basis upon which to impose an obligation on (or to assume that an

obligation has been undertaken by) the respondent to co-operate with the claimant or to seek directions. Arbitration proceedings are adversarial and the obligation should be on the claimant to prosecute the claim. Further, it may be questioned whether s 12(1) of the Arbitration Act (UK) 1950 supports Lord Diplock's analysis at all. While the section clearly states that the parties agree to submit their dispute to arbitration and that they will co-operate with the arbitrator (ie submit to his directions) it is submitted that the section does not necessitate the conclusion that the parties accept a mutual obligation to co-operate with each other. Such an obligation conflicts with the adversarial nature of the proceedings.

However, if it is to be accepted that the parties to an arbitration agreement are under a mutual obligation to co-operate, the situation where both parties are in breach of that obligation requires further consideration. In that case, Lord Diplock stated (in *Bremer*) that neither party could resist the enforcement of the agreement by asserting the other party's breach (and further, a breach of that obligation could not be a repudiatory breach). With respect, it may be questioned whether Lord Diplock is correct. If there is an obligation to co-operate, it may be reasonable to presume that it is essential to the agreement ie that the mutual promise to co-operate is an essential promise. (It may also be however, that the promise to co-operate should be regarded as an innominate promise as varying degrees of co-operation may be required.)

The law of dependent promises states that a party seeking to enforce a contract must have performed, or be ready and willing to perform, his dependent (essential) promises. Accordingly, the fact that both parties are in breach of the obligation to co-operate should only mean that neither party can enforce the agreement. It follows that each party should have a defence if the other party seeks to enforce the agreement. This defence would presumably be a legal right which could be protected, in the Court's discretion, by the grant of an injunction (even though equity will not usually assist a party in breach of his own obligations). However, as Lord Diplcok stated (in *Bremer*), arbitration contracts are not easily classified in traditional contractual terms and the issues raised by the cases clearly require further consideration.

S Dukeson

Mareva injunctions: two recent cases

The remarkable popularity of applications for Mareva injunctions has prompted two Judges in recent months to underline the original purpose of this type of relief and to call for vigilance against its abuse. In *De Vries v De Vries* (HC Christchurch A33/83 29 April 1983) Hardie Boys J opined:

> Whilst the Mareva injunction is a relatively new and still developing legal technique, its use must, in my view, be carefully limited to the circumstances for which it was devised.

Lloyd J was similarly minded in *P C W (Underwriting Agencies) Ltd v Dixon* [1983] 2 All ER 158 where he emphasised (at p 162) that:

> The purpose of the jurisdiction is not to secure priority for the plaintiff; still less, I would add, to punish the defendant for his alleged misdeeds. The sole purpose or justification for the Mareva order is to prevent the plaintiffs being cheated out of the proceeds of their action, should it be successful, by the defendant either transferring his assets abroad or dissipating his assets within the jurisdiction: see *Z Ltd v A* [1982] 1 All ER 556 at 561,571; [1982] QB 558 at 571, 584 per Lord Denning MR and Kerr LJ

In *De Vries v De Vries* an application was made by the defendant to set aside a Mareva injunction. The injunction had been granted to the defendant's parents to prevent him from disposing of or removing from New Zealand a stereo unit and a motorcar, pending the trial of the action by the parents against their son for recovery of moneys lent.

In order to obtain the injunction initially the plaintiffs, by affidavit, demonstrated that they fulfilled the relevant criteria established by the case law since 1975. That is to say, they showed a "good arguable case" in respect of their cause of action; they adduced evidence of the defendant's ownership of the assets in question; they evinced a belief in the danger that the defendant, unless restrained, would remove from the jurisdiction or otherwise dispose of the assets pending the outcome of the litigation. This danger, in their view, arose from the fact that at the time of the original application the defendant was in Holland, had expressed intentions to relatives to remain there and had articulated his need for the proceeds from the realisation of the assets. In all the circumstances it appeared just and convenient to grant a Mareva injunction.

By the time the present application was heard, however, the situation had altered. The defendant had married in Holland and brought his new wife to New Zealand. In an affidavit he stated that they both intended to remain here permanently. This intention was disputed by the plaintiffs — but no evidence to substantiate their opinion was forthcoming.

Having considered the defendant's affidavit and learned of his intention to bring a counterclaim for a sum in excess of the plaintiffs' claim, Hardie Boys J discharged the injunction.

Several important points arise from the case.

First, the defendant's return to this country did not *of itself* prevent a Mareva injunction being granted. Although the early cases dealt with defendants who were foreign based or foreigners, more recent decisions (for example, *Barclay-Johnson v Yuill* [1980] 1 WLR 1259; *Prince Abdul Rahman v Abu-Taha* [1980] 1 WLR 1268; *Z Ltd v A-Z and AA-LL* [1982] 1 All ER 556) have adopted the view that all defendants must be treated on an equal footing — thereby precluding any suggestion that a plaintiff is in a more favourable position as regards a Mareva injunction if the defendant is a foreigner or foreign based. The importance of the physical whereabouts of the defendant as an evidential factor in determining whether it increases or decreases the risk that he will dispose of the assets in advance of judgment.

In the instant case, while the defendant was in Holland it seemed likely that it might dispose of the assets pending the outcome of the litigation as he required the money and was in trouble with local creditors in New Zealand. On his return, however, the risk of this occurring decreased: he had outlaid money for both his own and his wife's airfare; he swore an affidavit that they both intended to remain here, and he intended to bring a counterclaim for an amount greater than the plaintiffs' present claim.

Secondly, Kerr LJ in *Z Ltd v A-Z and AA-LL* [1982] 1 All ER 556 at pp 571-572 stressed that the jurisdiction ought not to be abused. In *De Vries v De Vries* his warning was heeded. A Mareva injunction was not to be granted simply to afford the plaintiff security in advance of judgment while, at the same time, exerting pressure on the defendant to settle the action. Rather, per Kerr LJ at p. 572:

> ... Mareva injunctions should be granted, but granted only, when it appears to the Court that there is a combination of two circumstances. First, when it appears likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum. Second, when there are also reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, in whole or in part, but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him.

Although both conditions were met when the injunction was originally granted, in these proceedings it was evident that the situation had now changed. As to the first of Kerr LJ's "circumstances": the defendant'scounterclaim for more than the amount of the plaintiffs' claim did not make it likely that the plaintiffs would "recover judgment against the defendant for a certain or approximate sum". Referring to this point Hardie Boys J said:

> On the material before me I must give the counterclaim the same prima facie weight and accord it the same bona fides as I did the plaintiffs' own claim when I granted them their injunction. On this basis the two cancel each other out.

As regards the second "circumstance": the defendant's return here coupled with his intention to remain diminished the force of the plaintiffs' affidavit to the contrary.

Finally, Hardie Boys J acknowledged throughout his judgment the importance of examining "all the circumstances of the case" before a Mareva injunction is first granted or, as in this case, an application for a discharge is heard. The single most compelling reason for the grant or continuation of a Mareva injunction is to be found in the defendant's intentions in respect of the assets which could meet a judgment, should it be awarded in the plaintiffs' favour. With this in mind His Honour examined the relevant evidence before him: namely, the amount of the claim; the family nature of the dispute; the defendant's return to New Zealand; his intention to remain here, and the existence of the counterclaim. He concluded:

> In all the circumstances I am not persuaded that there is any real risk of the defendant disposing of these assets in such a way that will remove them from the plaintiffs' reach should they be successful in their action and he fail in his counterclaim. Accordingly I think it proper to dissolve the injunction.

Thus a clear intention to confine the Mareva jurisdiction within the bounds outlined in *Z Ltd v A-Z and AA-LL* (supra) was displayed and is to be welcomed. The growth in the number of applications for Mareva injunctions in recent years has led to increasing refinements in the necessary conditions for a grant. *De Vries v De Vries* is a timely reminder not to neglect the original roots of this rapidly developing plant.

A similar warning is to be found in the recent English case of *PCW (Underwriting Agencies) Ltd v Dixon* (supra) on an application to vary a Mareva injunction. The relevant facts of that case are: the plaintiffs were Lloyd's managing agents who managed the underwriting business of several Lloyd's syndicates. The defendant was a member of Lloyd's and chairman of the plaintiff company. The plaintiffs sought to recover secret profits which they alleged the defendant had made out of the plaintiff's affairs in regard to certain reinsurances. Pending the trial of the action, a Mareva injunction was granted over all of the defendant's assets within the jurisdiction save that he was permitted to draw reasonable living expenses not exceeding £100 per week. The defendant, however, maintained that he required £1,000 per week for reasonable living expenses and that he also needed to have access to £77,500 to meet outstanding debts and pay legal expenses incurred in defending the action. He applied for a variation of the injunction on those terms.

The plaintiffs opposed the variation claiming that a Mareva injunction as initially ordered was justified in principle, or, alternatively, that such an injunction ought to remain unaltered on the wider ground that the defendant's assets constituted a trust fund which should be preserved so that if the plaintiffs were successful in the action they could have recourse to that fund by tracing in equity.

Lloyd J rejected both arguments and ordered the variation on the terms applied for.

As Hardie Boys J did in *De Vries v De Vries*, Lloyd J referred to Kerr LJ's judgment in *Z Ltd v A* (supra) to emphasise that powerful and useful as the Mareva procedure is, its original purpose and justification must not be lost sight of lest the order be abused. The sole purpose or justification of the order, he stated, was to forestall a defendant preventing a plaintiff from enjoying the proceeds of his action, should it be successful, by the defendant either transferring his assets abroad or dissipating them within the jurisdiction.

Not disputing that, in this case, the plaintiffs were entitled to a Mareva injunction, the Judge indicated that they were not, therefore, entitled to exercise undue pressure on the defendant. Suggesting the figure of £100 as reasonable living expenses verged on doing just that. Considering the defendant's commitments and known standard of living, Lloyd J commented at p 163:

> ... I have been led to wonder whether the real purpose in putting forward so low a figure and in failing or refusing to agree any increase was to exert pressure on the ... defendant to settle the action. If so then this case would fall within one of the two abuses mentioned by Kerr LJ in *Z Ltd v A*.

This line of inquiry was pursued little further by the Judge. It does, however, serve notice on potential applicants that ploys which appear to breach the spirit of the jurisdiction will not go undetected. Indeed, recourse to the spirit of the jurisdiction led the Judge to conclude that "dissipating assets within the jurisdiction" did not include reducing the defendant's standard of living below that which he normally enjoyed. Nor should it prevent him from paying bills as they fell due. At p 162:

> I am not going to attempt to define in this case what is meant by dissipating assets within the jurisdiction or where the line is to be drawn; but wherever the line is to be drawn this defendant is well within it. It could not possibly be said that he is dissipating his assets by living as he has always lived and paying bills such as he has always incurred. . . . The Mareva jurisdiction was never intended to prevent expenditure such as this. . . .

Approval for this view was found in the earlier case of *Iraqi Ministry of Defence v Arcepey Shipping Co SA, The Angel Bell* [1980] 1 All ER 480 where Robert Goff J held that it was consistent with the policy underlying the Mareva jurisdiction that the defendant should be allowed to pay his debts as they fell due.

For these reasons it was clear to Lloyd J that the defendant's application

to vary the terms of the order must succeed.

This decision is sound in principle. It also highlights current judicial trends. Although it breaks no new ground on the subject of Mareva injunctions, it *does* emphasise to prospective litigants the Courts' tendency and eagerness to look to the fundamental principles of the jurisdiction when determining cases. Failure by plaintiffs to have adequate regard to these principles is unlikely to go unnoticed if the degree of vigilance against abuse evinced by Hardie Boys J and Lloyd J is indicative of the judiciary as a whole.

The plaintiffs' alternative argument against the variation is noteworthy for its practical potential as a measure additional to a Mareva injunction to ensure that trust funds are not dissipated before judgment.

The plaintiffs submitted that the case involved a fund which in equity belonged to the members of the syndicates. They were therefore entitled, it was alleged, to restrain the defendant from using other people's money to meet his bills or pay for his defence. In their opinion, it was irrelevant to the claim for the injunction that some of the defendant's own money may have been mixed with this "trust money".

Lloyd J refused to support the injunction on this ground. He distinguished the cases of *A v C* [1980] 2 All ER 347 and *Chief Constable of Kent v V* [1982] 3 All ER 36 (both cases concerning the right to trace in equity in pursuance of a proprietary claim) on the basis that the claims in those cases related to specific identifiable bank accounts. In his opinion the present argument failed, first, because (at p 164) "... it is difficult to regard the whole of a man's assets as a fund ..." and, secondly, because, in any event, it would not be just in all the circumstances to reduce the defendant's standard of living to secure what was, as yet, only a claim by the plaintiffs. And it would be even more unjust that the defendant should be prevented from defending himself properly merely because the plaintiffs say that in doing so he is using somebody else's money.

Thus justice and convenience required that the defendant should be allowed to defend himself, pay his bills and enjoy his accustomed standard of living, whether the case was put on the basis of the Mareva injunction or the wider jurisdiction to trace in equity.

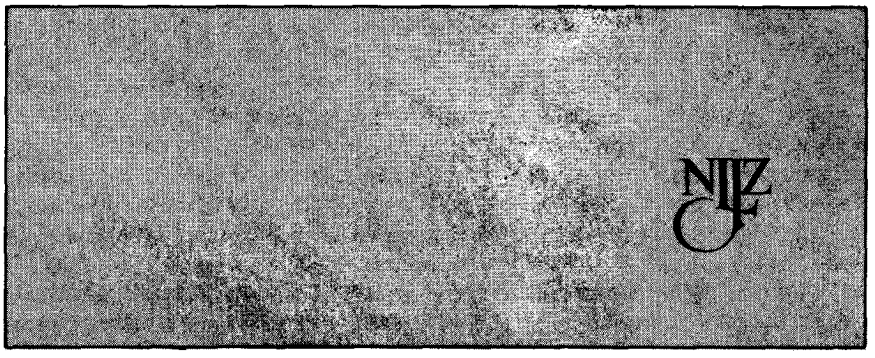
Although the practical effects of the two lines of argument were identical in this case the distinction between them is clear. The object of tracing in equity in pursuance of a proprietary claim is to secure the trust fund itself so that it should be available if the plaintiff should prove his claim. On the other hand, a Mareva injunction does not entitle a plaintiff to any security. The purpose of that jurisdiction (at p 164):

> ... is not to provide the plaintiffs with any form of pretrial attachment. It is simply to prevent the injustice of a defendant removing or dissipating his assets so as to cheat the plaintiff of the fruits of his claim.

This difference will be noted by practitioners dealing in Chancery matters where an injunction to prevent a plaintiff dissipating a trust fund may prove a more profitable order than a Mareva injunction (see *A v C* supra and Ackner LJ in *A J Bekhor & Co Ltd v Bilton* [1981] 2 All ER 565 at 573).

By way of conclusion it may be stated that the chief importance of both decisions is to be found in their statement and clarification of the basic principles pertaining to Mareva injunctions. Both Judges dealt swiftly and soundly with the law and produced results which on the facts appeared just and convenient. Thus the jurisdiction which has grown at a tremendous pace is not rambling out of control. Its original principles still guide the Judges. It is to be hoped that such will continue to be the case.

J K Maxton
Lecturer in Law



Naming rights— defined and explained

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"Naming rights" is an expression usually used in connection with substantial central city office buildings. Naming rights can apply to virtually any type of commercial building in more or less any location. Nevertheless, a naming right as a recognised, definable and quantifiable aspect of office accommodation leasing is generally associated with some degree of prestige inherent in the building, its location, or the lessee seeking the naming rights.

What distinguishes naming rights?

It is a right granted by a building owner, to a lessee in a building, to name that building.

It is the right which a head lessee or a major lessee in a building may expect or require of the building owner.

As a privilege or right additional to the right of occupancy, the right to name a building should have an added, and assessable, value.

What specific rights are usually conferred?

The lessee will be granted the right to select a name for the building. The expectation is that the building will generally become recognised and known by that name and that it will therefore achieve some sort of local landmark status. By thus entering into the everyday geography and language of those who use the building and frequent the area in which the building is situated, its name becomes a form of subliminal advertising, while at the same time enhancing the status of the organisation to which the name belongs.

The lessor should of course retain the right to approve the name proposed by the lessee. An unfortunate choice of name could adversely affect the lettability and the value of the lessor's building.

The name will be prominently displayed over or near the main entrance to the building and on the tenant directory board in the main lobby.

The lessee company's name or trade brand or logo or whatever will be at the

top of the building on one or more elevations.

The lessee will be able to display the building name, as its address, on its notepaper and on all its promotional literature.

All the other lessees in the building will have to use the building's name as their address on their notepaper and the like, thus providing further free publicity.

Who wants naming rights?

Some lessees, more than others, will be interested in naming rights. Those most likely to be interested will be the large national, international and multi-national companies. Among these will feature:

- Airlines
- Oil companies
- Banks
- Finance houses
- Life offices
- Insurance companies
- Building societies
- Industrial concerns
- Conglomerates

Such lessees will be particularly interested if the building houses the head office or principal New Zealand offices.

Finance institutions in particular, since they are the most likely to have the necessary funds to invest in property, will often erect and own the office buildings they themselves occupy. These will bear their owner's name. This is not "naming rights" in a marketable sense: the owner/occupier of a building can do what he likes about naming his own property.

It is this inherent right of a building owner which motivates a lessee to be attracted to naming rights in order that the lessee may appear to be owner. It is easy for the public to assume that an organisation whose name graces a building is also the owner of that building: this impression can provide added credence to the financial strength and stability of the lessee organisation whose name is on a building.

The name selected in terms of a naming right will invariably be a commercial or industrial name. There is unlikely to be any value in a name which may be chosen for sentimental, political, locational or other such reasons. There are lessees such as the State Services Commission whose clients see no commercial value in naming the buildings they occupy.

Naming rights are not the same thing as advertising rights. Some less than prestigious buildings have large blank walls which lend themselves to the painting or placing of advertisements on the surfaces. Some buildings are suitable for illuminated sky signs. These forms of display may have no relationship to any occupancy of the building. Naming rights must attach to an occupational lease in the building which is to be named under a naming rights arrangement.

How are naming rights formalised?

Modern leasing techniques will cater for naming rights within the office lease document either as additional provisions within the body of lease clauses or as a special schedule at the end of the lease. It is not particularly appropriate to print all the relevant provisions into a standard lease for a building when there can be only one beneficiary in respect of naming rights in any one building. For example, the "BOMA Standard Office Lease" is silent on naming rights but there is a blank schedule labelled "Special Provisions". This could accommodate the naming rights and naming rent provisions. Whatever method is adopted, it is certainly essential that the respective rights and obligations of the lessor and lessee be carefully spelt out in legally enforceable documentation.

This should cover such things as:

- Name selected for building and/or lessor's right to approve name yet to be chosen and any subsequent changes.
- Locations of the name/logo/signs in, on and around the building.
- Who pays for all the signage and any changes.
- Duration of the naming rights — usually tied to the lease term.
- The link between occupancy and naming — it may be desirable to specify a minimum space occupancy below which the right to name may revert to the lessor.
- Maintenance and repair of signs — they have to be kept up to scratch if the building's image is not to suffer.
- Cost of power and the like for any illuminated signs.
- Insurances.
- Provisions for review of naming rent.

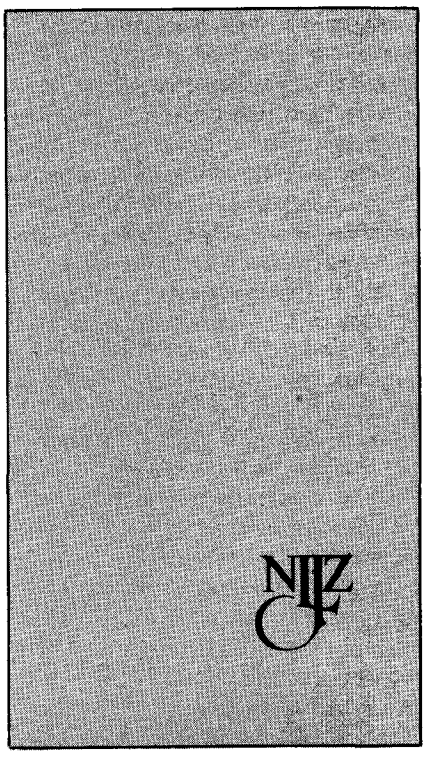
How is a naming rent reviewed?

This can be a very simple and straightforward matter which should not raise any problems. Once the initial rent for naming rights is agreed upon only two aspects require to be covered. The first is a provision for its review at the same time as each review of the office accommodation rent. The second is that the naming rent shall increase by the same percentage as does the office accommodation rent.

One further aspect which may need to be considered and perhaps catered for is that of building outgoings. If the special provisions relating to the naming rights have been adequately drawn up they will cover the special operating costs attributable to signage. In this event no further outgoings should arise. There would seem to be doubtful justification for the application of full service charges such as those payable under a "net" lease. Certainly the net lease principle can be applied to the naming rent, but a naming rent is not on all fours with an occupancy rent.

What is the consideration payable for a naming rent?

Recent research has established an emerging consistency in the level of naming rents for office buildings. To determine a naming rent the best method to employ is the selection of a percentage of the appropriate gross annual floor rental. These factors will depend on the geographical location of the building and the number of office floors in the building. It is recommended that in negotiating a naming rent advice be sought from experienced property managers, valuers and leasing agents.



Wrecks on the New Zealand coast

Piers Davies

The author is an Auckland practitioner, and he wrote an article on salvage on the New Zealand coast that appeared in [1982] NZLJ 39.

Nowadays, most vessels which get into distress off the New Zealand coast are salvaged immediately. This was not always so and there are over 2,000 reported wrecks, most of which are lost without trace. Those that are identifiable are scattered around the New Zealand coast, including the Three Kings, Chatham and Auckland Islands. There are also several wrecked aircraft belonging to the RNZAF.

Usually such wrecks are of a curiosity value only, apart from their anchors, propellors and other removable metal parts, unless they carried passengers with jewellery (the *Tasmania*) or cargo that would not be affected by submerging in water eg bullion (the *Niagara*, the *Elingamite* and the *General Grant*). Major salvage operations on such wrecks are normally not for the purposes of raising the hull but to obtain this valuable cargo or jewellery.

Legal demarcation between wrecks and salvage

One of the legal issues debated between maritime lawyers is the stage at which a wreck is no longer subject to "salvage" in the true sense of the word. Some legal authorities believe that once the immediate period of danger has passed, the wreck cannot be the subject of "salvage" services. The High Court of Singapore held this view in *Simon v Taylor* [1975] 2 Lloyds Law Reports 338 over a cargo of mercury raised in 1971 from the wreck of the German Submarine U859 sunk in the straits of Malacca in 1944. The Singapore Court based its decision on the definition of salvage services in *Halsbury* Vol 35 (3 Ed) at p 731, para 1109.

Other authorities take the contrary view, in particular Mason J and Stephen J in *Robinson v Western Australian Museum* (1977) 51 ALJR 806 over the wreck of the *Vergulde Draeck* a Dutch East Indiaman sunk in 1656 off the West Australia coast, and the English cases *The "Tubantia"* [1924] p 78, and *Morris v Lyonesse Salvage Co Ltd* [1970] 2 Lloyds Law Reports 59.[1]

In New Zealand, the Shipping and Seamen Act 1952 does not differentiate between recent and longstanding wrecks.

Section 348 (2) of the Shipping and Seamen Act 1952 defines "wreck" as including:

> Any ship or aircraft which is abandoned, stranded, or in distress at sea or in any river or lake or other inland water, or any equipments or cargo or other articles belonging to or separated from any such ship or aircraft which is lost at sea or in any river or lake or other inland water.[2]

The Ministry of Transport continues this approach in practice and uses the word "salvage" in its wreck licensing agreements. I believe that a New Zealand Court would follow this more pragmatic approach in preference to the purist view of *Simon v Taylor*.

The Receiver of Wreck

The powers and duties of Receiver of Wreck in dealing with wreck, are contained in Part IX of the Shipping and Seamen Act 1952. Most of these powers and duties do not have any time limitation and apply to historical wrecks as well as to vessels in distress. The Receiver of Wreck is usually the Superintendent of Mercantile Marine for the local port and his duties in relation to longstanding wrecks are carried out in practice by the Ministry of Transport, Marine Division, as a whole through its wreck licensing system.[3]

Ownership of a wreck

At the time of a maritime disaster, the question of ownership of the vessel concerned is relatively easy to determine. The Lloyd's Register of Shipping contains details of the vessel's current owners and these usually have an agent in New Zealand. The position becomes much more complex with older wrecks.

The most likely situation is that the ownership of the hull continues with the registered owner of the vessel. The hull insurers will have declared the vessel a total or constructive total loss and will have reimbursed the owners, but neither the owners nor the insurers will normally abandon the vessel completely.

Instead, their rights are usually handled and co-ordinated through The Salvage Association of London. This organisation was established in 1856, and has branch offices in many countries throughout the world. The Salvage Association operates in close association with Lloyd's of London and is represented in New Zealand by the Lloyd's Agents in the various ports. However, inquiries should be directed to the Head Office in London.

The Salvage Association has found from its experience that there are only a few instances, such as the *Torrey Canyon*, where the owners have abandoned the hull to the world at large. If a wreck within New Zealand territorial waters is abandoned or appears to be abandoned by its owners and insurers, then the Ministry of Transport considers that it belongs to the Crown as bona vacantia.

In some instances the wreck will have been a naval vessel and ownership will have remained with the government of the country concerned.[4]

Tracing the owners of a wreck becomes more difficult and complex the older the wreck is as the owners or insurance underwriters may have gone out of business or merged with other companies. The Salvage Association's records, which include records of major casualties and losses referred to it by underwriters, are reasonably complete back to 1860. Before 1860 the question of ownership and insurance is particularly difficult to establish.

Attitude of hull owners and underwriters

The hull underwriters under British and

New Zealand Law become entitled to the remains upon settlement of the insurance claim for a total or constructive total loss but they usually do not take up their entitlement to ownership and are only prepared to do so if they are satisfied that:

(a) There are no expensive liabilities attached or likely to be attached to the wreck eg an obligation to remove the wreck from a habour.
(b) There are worthwhile proceeds to be obtained from their share of the sale of the wreck.
(c) The vessel's owners, if traceable, are willing to effect the sale.

This last point can create difficulties. The registered ship's owner usually does not appreciate that he is still the legal owner of the sunken property, but when this is made clear to him, he quickly realises that all his efforts to transfer the title in the property will only result in the obligation to offer the sale proceeds to the underwriters. Another complication can be that the hull may not have been fully insured, so both the registered owner and the insurers will have to agree on how any salvage recovery is to be apportioned.

Ownership of cargo and personal effects

Establishing the ownership of the hull is only part of the problem. The vessel may contain a number of valuable items which belong to different owners and insurance underwriters including:

(a) Radar or navigation equipment on hire, or oil or coal bunkers belonging to a charterer.
(b) Cargo — ownership of this will probably have passed to the cargo underwriters, with each bill of lading carrying separate beneficial interests.
(c) Personal effects of the vessel's owners and crew.
(d) Personal effects carried as cargo or by passengers — jewellery can be of particular value, and ownership will remain with the passenger and his or her estate or with any underwriter involved.
(e) Mail, belonging to the Postal Authorities.
(f) Miscellaneous items, which can include fishing gear snagged in the wreck or salvage gear entangled from a previous operation.

If tracing the owner or insurer of the hull of an old wreck can be a difficult operation, the position over tracing ownership of valuables and cargo is even more difficult and time-consuming. There can even be the situation where the hull is being treated as bona vacantia but the cargo is subject to the claims of the owners or underwriters.

Consequently, people trying to negotiate with the various owners and underwriters of a wreck and its contents, often find it difficult to make any headway unless there is a substantial bounty at issue eg the gold bullion on the *Niagara* or the Rothschild jewellery on the *Tasmania*.

Ministry of Transport salvage agreements

The Ministry is prepared to grant "salvage rights" to a wreck for a period of 12 months subject to certain stated conditions. The Ministry has a standard Salvage Agreement-Wreck form which provides for an application fee of $40 for the first year with a renewal fee of $10 and a ten percent royalty from the sale of scrap metal or any other items of wreck, except where the items are sold to a local public museum or the National Museum.

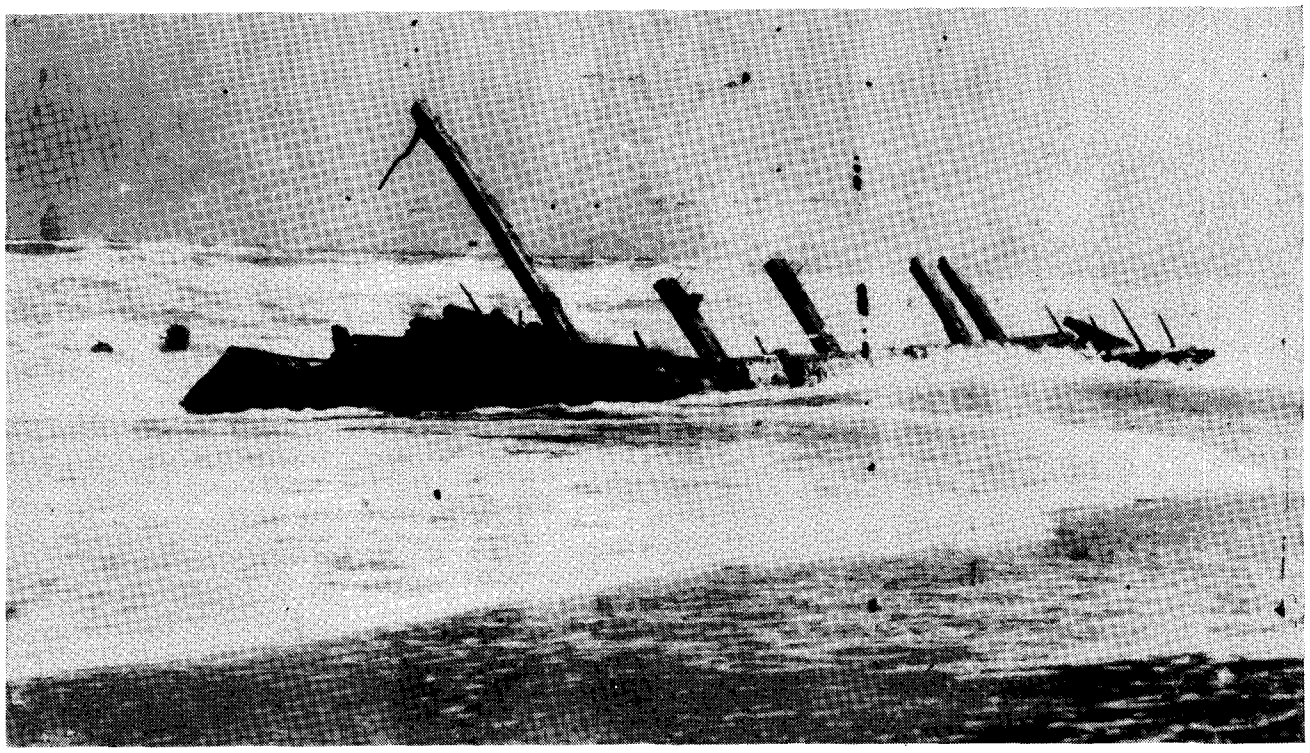
This Salvage agreement is not transferable and is subject to cancellation at any time.

The agreement specifically provides that it gives no protection of the salvor's interest. It reminds the salvor that the grant of a right is without prejudice to claims by The Salvage Association, London, or any other party which has ownership or an interest in the wreck.

It also requires the licensee to deliver all goods salvaged to the local receiver of Wreck in compliance with s 348 of the Shipping and Seamen Act 1952.

The salvor must also submit a list of all material salvaged and how it has been disposed of to the Ministry and The Salvage Association.

The salvor is required to obtain the permission of the relevant Harbour Board or local authority and to protect the environment of the wreck and use appropriate preservation techniques on articles of historical value that are



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found.

Finally, the salvor must comply with all relevant legislation including the Construction Act 1959, the Historic Places Act 1980 and the Antiquities Act 1975.[5]

The salvor will also need a permit from the Department of Lands and Survey if the wreck is adjacent to one of their reserves, for example, Auckland Island.

Historic Places Act 1980 and the Antiquities Act 1975

The Historic Places Act 1980, s2, specifically includes a vessel as an "archaeological site" where the wreck occurred more than 100 years ago and "is or may be able through investigation by archaeological techniques to provide scientific, cultural or historical evidence as to the exploration, occupation, settlement or development of New Zealand".

Consequently, any salvor looking at a wreck that is more than 100 years old must have discussions with the New Zealand Historic Places Trust to see whether the Act will apply to the wreck concerned or not. If the Trust decides that the wreck is an archaeological site, then it will probably grant an archaeological site permit subject to various conditions. There is no standard agreement, the conditions are negotiated in detail in relation to the particular wreck, but they would normally include the requirements that:

(a) An accurate measured plan be taken of all major parts of the wreck before it is disturbed,
(b) An inventory be kept of all items recovered from the wreck recording the circumstances in which they were found and a plan of their distribution in relation to the wreck,
(c) A written report covering:
  (i) a historical account of the wreck; and
  (ii) the methods used in the recovery of all salvaged materials; and
  (iii) the methods employed in conservation treatment of the materials recovered; and
  (iv) where the objects recovered had been placed.
(d) A condition that the relevant provisions of the Antiquities Act 1975 are complied with.

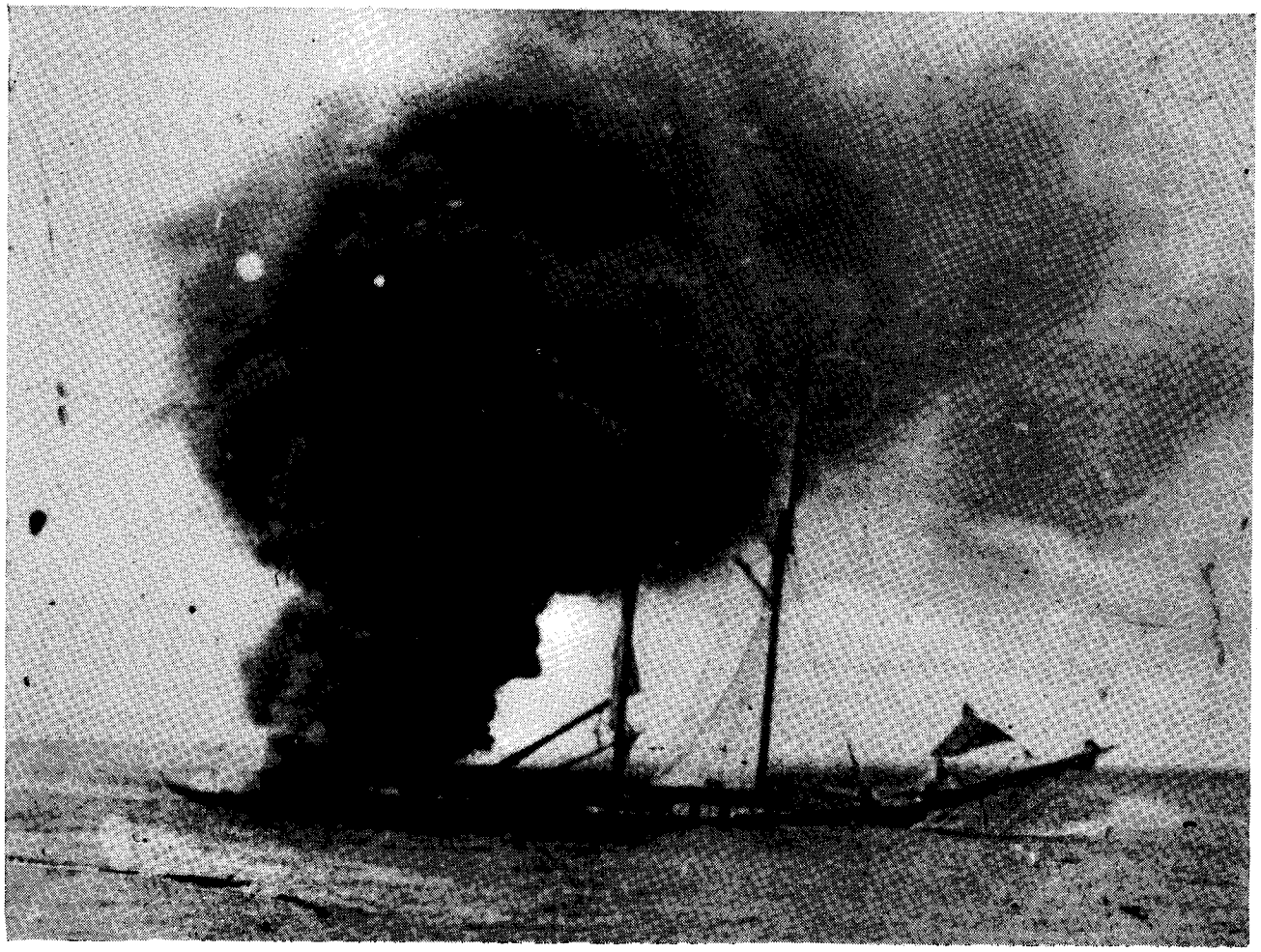
The Antiquities Act 1975 includes strict controls over all "artifacts" and "antiquities" recovered from a wreck. "Artifacts" are chattels of essentially Maori or Polynesian origin made in or brought to New Zealand prior to 1902, and any found after 1 April 1976 are deemed to be prima facie the property of the Crown, s11.[6]

An "antiquity" is any chattel more than 60 years old, if it has a sufficient degree of association with New Zealand. The term can include the ship itself, but in practice it is applied to curio-type items eg ship's cannons, anchors and brass porthole covers.

Rights of appeal exist under the Historic Places Act and the Antiquities Act to the Minister of Internal Affairs, or in the case of artifacts to the Maori Land Court.

Wrecks and Harbour Boards

Once the salvor has obtained the necessary licence from the Transport Department and any necessary permit from the New Zealand Historic Places Trust, he must also check with the local Harbour Board or other local authority having jursdiction of the wreck to make sure that there are no particular requirements. Sometimes, the Harbour Board



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may want the wreck removed from where it has sunk, as one of the conditions of its approval.

Harbour Boards have their own powers under s 208 of the Harbours Act 1950 to remove wrecks and obstructions if the owner or agent of the wreck concerned cannot be found or fails to remove the whole of the wreck when called upon.

Disposal of recovered wreck

Once the recovered property has been handed to the Receiver of Wreck in accordance with s 348 of the Shipping and Seamen Act 1952, he is then obliged under s 350 to post a notice on the Customhouse nearest to the place the wreck was found setting out a description of the property and any distinguishing marks.

If no owner establishes a claim to any such notified wreck, then one year after the property came into the possession of the Receiver of Wreck it becomes the property of the Crown. The Receiver of Wreck then sells the property and makes an appropriate salvage payment to the salvor and the balance goes into the Consolidated Account, s 352 (3).

However, because of the uncertainty and the 12-month delay involved, most salvors prefer to have traced the owner and negotiated how the recovered property is to be disposed of before expending the time and money involved in a salvage operation.

Consequently, the first steps for anyone finding an old-time wreck are:

(a) To contact the head office of the Ministry of Transport, and

(b) To make enquiries with organisations like The Salvage Association and the Guildhall Library which houses Lloyd's Casualty Records, to trace all those people who may have an interest in the hull and its contents.

Negotiations between owners and salvors

The Salvage Association regularly negotiates on behalf of the wreck's owners and insurers. There is no hard and fast scale involved, but each matter is negotiated on its particular facts and usually a percentage of the net salved value of the recoveries is fixed.

Salvors may end up buying out the owner's rights to a wreck or its contents as an alternative to a percentage split on the property salved.[7]

Appropriate arrangements can also be negotiated about the presentation of curio items to a local museum.

Problems with the present legislation

Problems with fossickers and pillagers are as common to wrecks and underwater archaeology as to land based archaeology. The difficulties arise not with the professional diver and salvor, but from irresponsible amateurs who either do not know or care about the damage caused by their scavenging as they remove evidence that would establish the age, type and identity of the vessel concerned. Nor do they appear to be worried that their activities are illegal.

The Ministry of Transport wreck licensing system has helped to reduce this problem and so also has the Historic Places Legislation and the Antiquities Act, but the situation is far from ideal.

Possible changes to the legislation

Marine archaeologists have argued that all shipwrecks over 100 years old should automatically become the property of the Crown. This suggestion would amount to a confiscation of the original owner's or underwriter's rights.

The Parliamentary Assembly of the Council of Europe has adopted a scheme of protection to extend to all man-made items underwater for more than 100 years with a discretion to extend protection to such items of a later date or to exclude from this protection items which would otherwise have been included. It has also accepted a recommendation that the law of salvage and wreck be specifically excluded from applying to items protected under this scheme.

Although there would also be benefits from this scheme, I believe that the exclusion of the rights to salvage would deter enterprising professional salvors from doing the necessary preliminary enquiries. It is unlikely that the limited resources of Government and local body archaeological services in New Zealand would be able to investigate sea wrecks while so much land based archaeological work remains.

The Salvage Association suggests that the year 1860 be the cut-off point for the preservation of wrecks. This has the advantage of certainty and is also the year at which reliable records become available. However, a number of interesting wrecks occurred after 1860 and I believe the 100-year limit will be more satisfactory in the long run.

None of the above proposals would prevent the activities of the scavengers who would ignore any such legislation just as they ignore the present legislation. Because New Zealand has so much coastline, the enforcement of any wreck control legislation must be spasmodic and often ineffective.

Future action

The real answer to these problems is to encourage the public to take a more responsible attitude towards shipwrecks, and this, like all other matters of historical preservation, is essentially a matter of public education.

I believe that it would be preferable for the government and the New Zealand Historic Places Trust to concentrate on this educative aspect over the next two years and then thoroughly review the effectiveness of he legislation in 1985 in consultation with all interested partes.[8]

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1 For a more detailed analysis, see *O'Keefe*, Vol 1 No 4 September 1979 *Maritime Law Association of Australia and New Zealand Newsletter* p 17.

2 The corresponding UK legislation is more restricted and complex because it blends together the old Common Law rights and the droits of Admiralty, see *Halsbury* Vol 35 (3 Ed) p 721, para 1092.

3 The Wreck Districts Notice 1980.

4 If a naval vessel is sunk in wartime with loss of life, the wreck may be classified as a War Grave and permission to salvage is seldom given. This is the case with the *Prince of Wales* and the *Repulse* sunk off northern Malaysia during the Second World War.

5 Copies of the Salvage Agreement are available from the Head Office of the Ministry of Transport, Wellington.

6 *The Attorney-General of New Zealand v George Ortiz* recently before the House of Lords, provides an interesting example of what can happen if an artifact is smuggled out of New Zealand. The UK Court of Appeal decision upheld by the House of Lords is reported in [1982] 2 Lloyd's Law Reports 224.

7 Sometimes the salvor is lucky, the French Government recently sold the rights in a wreck for one franc.

8 Practitioners interested in the subject are also referred to the recent articles about Salvage in the [1982] NZLJ at pp 39 and 345, the paper "The Legal and Practical Consequences of Wreck" by Captain G A Pallett, and Messrs B H Giles and A F Grant, presented to The Maritime Law Association of Australia and New Zealand 1982 Conference, and the *Wreck Book* and *New Zealand's Shipwreck Gallery* both by Steve Locker-Lampson and Ian Francis which catalogue the wrecks on the New Zealand coast.

"Do we need a Judicial Commission?"

A A T Ellis QC

Earlier this year the New Zealand Society for Legal Philosophy, which has branches at Auckland and Wellington, invited Mr A A T Ellis QC to give a paper on whether there was a need for a Judicial Commission. The paper is published herewith. Professor Ken Keith was invited to comment on Mr Ellis' paper at the meeting, and his response will be published in the next issue of the New Zealand Law Journal.

I shall assume for the moment that you are all familiar with what is meant by a "Judicial Commission". I shall further assume that, at least for the moment, you have an open mind as to whether you think we need one or not. If my first assumption is incorrect, you will certainly have an open mind.

I am acutely aware that this address is to a philosophical society with academic inclinations. I have felt obliged therefore to treat my discussion of the proposed Judicial Commission in more depth than would otherwise have occurred to me. The administration of justice and the jurisdiction of our Courts has always been essentially pragmatic. We have tended to follow patterns established elsewhere, especially in England and Australia. Innovation or philosophical reassessment has not been notable in this branch of our legal system. I concede that pragmatism and emulation is a sound philosophy. It is simply not a particularly interesting one. The intellectual and social excitement of our approach to the control of the Judiciary has faded into the past. I will endeavour to revive that excitement for a moment tonight. To do so I must paint a short historical picture starting in the early 17th century in England. I begin with the following quotation:[1]

> James and his Parliaments grew more and more out of sympathy as the years went by. The Tudors had been discreet in their use of the Royal Prerogative and had never put forward any general theory of government, but James saw himself as the schoolmaster of the whole island. In theory there was a good case for absolute monarchy. The whole political development of the sixteenth century was on his side. He found a brilliant supporter in the person of Francis Bacon, the ambitious lawyer who had dabbled in politics with Essex, and crept back to obedience when his patron fell. Bacon held a sucession of high legal offices, culminating in the Lord Chancellorship. He maintained that the absolute and enlightened rule of the King with the help of his Judges was justified by its efficiency, but his theories were unreal and widely unpopular.

In the context of my address I ask you to reflect not only on Bacon's lasting reputation as a legal philosopher: he was the first to be appointed to the rank of Queen's Counsel and one of the very few Judges to be dismissed from office.

The subsequent conflict centred on the nature of the Royal Prerogative and the powers of an Act of Parliament. At this point the common lawyers, headed by Chief Justice Coke, stepped to the forefront of English history. Coke declared that conflicts between Prerogative and Parliament should be resolved not by the Crown but by the Judges. Thus Coke was not at first on the side of Parliament and he maintained a constitutional position for Judges similar to that now exercised by the Supreme Court of the United States of America.

James I had a very different view of the role of his Judges. He first tried to muzzle Coke by promoting him from the Court of Common Pleas to King's Bench. This did not achieve the King's purpose so he dismissed his Chief Justice in 1616. Legal historians tend to agree that Bacon was more constitutionally correct than Coke.

It took the revolution and the execution of Charles I to produce the Bill of Rights of 1688 to establish the supremacy of Parliament, and the Act of Settlement 1700 which to this day establishes the independence of the higher judiciary, at least, from the control of the executive arm of government.

I can say now that current resistance to a proposed Judicial Commission has in part referred explicitly to the provisions of the Act of Settlement 1700. Our thinking now therefore encompasses those tempestuous days when the concept of judicial independence was in the crucible.

I will dwell a little longer on my historical resume, to draw one or two distinctions.

Sir Mathew Hale was able to say:[2]

> The Courts are of two kinds: Courts of Record. Not of Record. First the Courts of Record, there is this diversity vis Supream, Superior, Inferior. The Supream Court of this kingdom is the *High Court of Parliament* consisting of the King and both Houses of Parliament.
>
> The Courts I call Superior include the High Court and the Courts I call Inferior include the County Courts.

I have modernised the text following the quotation. The independence I have stressed was protected for the Superior Courts, but probably not for the inferior Courts.

This hard won independence is expressed in our Judicature Act 1908 when it defines the tenure of office for a High Court Judge. It provides that the commissions of the Chief Justice and other Judges shall continue in full force during good behaviour, notwithstanding the demise of Her Majesty, and that it shall be lawful for Her Majesty upon the address of the House of Representatives to remove any Judge from his office and revoke his commission and for the Governor-General in Council to suspend any such Judge upon a like address. The Governor-General in Council can suspend a Judge until Parliament sits. In addition the salary of a Judge may not be diminished during the continuance of his commission. The position is similar in England:[3]

> The Crown or its Ministers may not interfere with the ordinary course of justice.... The Crown may not bring pressure to bear upon the Judiciary through fear of dismissal, since Judges hold office during good

behaviour subject to the power of removal by Her Majesty on an address presented to her by both Houses of Parliament.

On the other hand District Courts are the creatures of statute and its Chief Judge and Judges are appointed pursuant to it by warrant under the hand of the Governor-General. The distinction between appointment by Her Majesty and her Governor-General has little practical significance. However, Her Majesty it seems would be able to appoint a District Court Judge under the Royal Powers Act 1953. She can and has personally appointed a New Zealand High Court Judge within living memory.[4]

The District Courts Act also provides that the salaries of Judges shall not be diminished during the continuance of appointment. However, the Governor-General may if he thinks fit remove any District Court Judge for inability or misbehaviour. This is a significant difference between the two Benches. Speaking historically, James I would have considered his Judges in the same constitutional position as our District Court Judges.

In the context of a Judicial Commission I should refer to the position of Queen's Counsel. Counsel are appointed by Her Majesty and hold office during "our pleasure". Perhaps there is a constitutional limbo between Benches inhabited by lost souls in black silk, still mourning the death of Queen Anne.

To be complete I would be obliged to elaborate on the constitutional position of Justices of the Peace, Judges of the Maori Land Court and the Arbitration Courts, Commissions and Tribunals of various sorts. Important though they be, time does not permit. I shall only refer to such in passing.

With such a preface you may be expecting that the proposed Judicial Commission flies in the face of high constitutional principle, and concedes power to the executive government. I think you will find this is not necessarily so.

A convenient summary of the essential proposal is to be found in the report of the Royal Commission on the Courts presented in 1978. The Commission recommended as follows:

"1. A Judicial Commission should be established to consist of:
The Chief Justice (Chairman)
A Supreme Court Judge
The Chief District Court Judge
The Solicitor-General
The Secretary for Justice
Two members nominated by the New Zealand Law Society and appointed by the Governor-General.

2. The Judicial Commission should exercise unified control over caseflow and day-to-day administration of the Courts.

3. The Judicial Commission should in connection with Judges, have the power to recommend appointment, arrange study and refresher programmes, and provide the means of dealing with complaints.

4. The Chief Court Administrator should be secretary of the Commission.

5 The Judicial Commission should report to Parliament annually."

As you will know, following upon the report, the Magistrates' Court was reformed into the District Court headed by the Chief District Court Judge: the Family Court as part of the District Court was established with its own Chief Judge, and District Court Judges were warranted to conduct certain criminal jury trials, and the Supreme Court (note Sir Mathew Hale's titles for the Courts) became the High Court. In other words nearly all the major recommendations were implemented.

In October 1980, Mr Geoffrey Palmer, as he now is, asked a formal question of the Minister of Justice in the House of Representatives:

> Has the government decided to implement the recommendations of the Royal Commission on the Courts to establish a Judicial Commission to carry out the functions in relation to the administration of the Courts, and in relation to the appointment of Judges and complaints against them?

The Hon Mr Quigley replied for the Minister that these recommendations were still under consideration. They still are. It would be wrong in my view to assume that this was due to tardiness or default on the government's part. I have already plainly indicated the stumbling block in the way. And I shall elaborate.

For a proper understanding of the Royal Commission's recommendation it is necessary to refer to the report in detail. I cannot avoid a full quotation in order to do justice to the substance:

A Judicial Commission

643. The administration of justice is a costly process. The best allocation of judicial manpower is a management dilemma. Patterns of organisational responsibility should be developed to fit the unique place that the judicial system fills in our society. In other words, our courts should be well run. Who should run them? We have considered several possibilities.

644. Should it be the government? The principle of an independent judiciary inherited from British constitutional law has no limitations. The government has no right to apply external pressure to the Court system, and does not, either by assigning Judges to hear particular cases or in any way influence their decisions. There are, therefore, certain restraints placed on the government which mean it cannot entirely run the Courts.

645. Should it be the Judges? This may sound well in theory, as the Judges occupy a focal point in the Court system; but the prime duty of a Judge is to hear cases and not to administer.

646. Should it be both the government and the Judges? Should the government be responsible for administering the Courts and the Judges be left purely to adjudicate? The answer, in our opinion, is not a simple one. Although convenient, the distinction between administration and adjudication is not always clear in practice. The two functions may well come into conflict when responsibility is ill-defined. In our opinion, the present system shows the results of that conflict.

647. We consider it is both necessary and desirable that the Courts should be managed by a single authority, representative of those groups who have a prime interest in the administration of justice. This administrative body should, in our view, possess additional functions including making recommendations for appointment to the Bench, arranging study and refresher programmes for Judges, and providing the means of dealing with complaints against them.

648. We would name this authority "the Judicial Commission".

649. A striking feature of submissions to this Commission was the interest in the Courts shown by many sections of the public. It is recommended that consumer groups should report to the Judicial Commission. The Secretary for Justice and the Solicitor-General, as well as the two Law Society representatives, should be sufficient to represent the wider public interest.

651. In addition to the functions already described, the Judicial Commission would have a monitoring and recommendatory operation. The Judicial Commission should review the sentencing jurisdiction of District Court Judges sitting without a jury. One of the most important functions of the Judicial Commission will be to ensure that there is regular consultation between the Chief Justice, the Chief District Court Judge, and the Chief Court Administrator who, as we have elsewhere said, will be the key triumvirate in the administration of justice: it is only through a flexible co-operation of Judges and administrators that the Courts can be run efficiently.

654. Although the problems associated with divided responsibility should lessen or disappear with a Judicial Commission, the Government would still maintain its overall responsibility and authority with regard to the administration of justice. It would achieve this by its powers of appointment of Judges; by its control of all Court finances and the employment of Court staff; and by the power to legislate over all matters affecting the Courts.

While I do not know details of submissions made to the Commission on the topic I do know that the New Zealand Law Society strongly supported the proposal for a Judicial Commission. I know, too, that opinion among the Judges differed, and High Court Judges were reported as "resisting the recommendation" as recently as last year.[5]

A series of questions can be formulated to assist in the analysis of the proposal, but for my purposes I think it better to focus on the larger matters. In my view it is of the essence to endeavour to separate administrative and judicial functions when approaching this question. By this I do not mean the distinction drawn in Aristotle's *Politics*. He suggested that there is no administrative demand in the judicial decision of causes and that judicial application of law should be a purely mechanical process.[6] I am sure many over-worked Judges would be delighted if this distinction were properly drawn. My distinction is practical, and as I have said, essential.

If the proposal for a Judicial Commission should be seen as administrative it would not I suggest threaten judicial independence and freedom.

I therefore propose to divide the recommendations into the two categories. I accept that some overlap exists, so I have placed such functions in both categories:

Administrative:
(a) Administration of the Courts
(b) Control over case-flow
(c) The power to recommend appointments
(d) Arrange study and refresher programmes

Judicial:
(a) Control over case-flow
(b) The power to recommend appointments
(c) The means of dealing with complaints

The present recommendations must be assessed against what has happened since they were made. While a Chief Court Administrator has not been appointed, the Assistant Secretary for Justice (Courts) looks very like him. The Chief Justice, Chief District Court Judge, the Secretary for Justice, the Solicitor-General and the President of the New Zealand Law Society meet informally approximately once a month to discuss the very matters that would concern the proposed Judicial Commission. I understand it even labours under the title "Pro Tem Judicial Commission". Executive or List Judges have been appointed in Court centres (for both High and District Courts) to allocate the workload of cases.

This has effectively dealt with all but appointments to the Bench and the method of dealing with complaints against Judges.

Other matters which have to a greater or lesser degree had a practical solution are judicial conferences, refresher courses, seminars, and consultation on such important matters as sentencing techniques and uniformity. Such developments can, in my opinion, be nothing but beneficial, and it is a developing area of training and exchange of information. Room for improvement must still exist: for example, disparity in sentencing on heavy transport offences.[7] If a Judicial Commission has a role to play in such matters it would be one of development and co-ordination.

You will have noticed that the mixed judicial and administrative function of allocating cases to particular Judges, is performed by Judges. This answers the criticism that such a function must not be carried out by the servants of the executive government. I understand the system of allocation of cases has been innovative and effective both for the litigant and the judicial person-power available. Plainly, however, the executive Judge must work closely with the Court staff. Other aspects of the Court list must be dealt with elsewhere, for example chronic overloading. Such a subject would be appropriate to a Judicial Commission, but it must not deal with the allocation of individual cases, if it is to avoid the possible accusation of interfering with the judicial process.

The pragmatic approach has progressed quite a way. I understand the hurdles of draft amendments to the Judicature Act and long memoranda have been reasonably gently pushed to the side of the road to reform. Two important topics remain: appointments and complaints. It is fair to say that misunderstandings have arisen.

The appointment of Judges and Queen's Counsel has a mystery surrounding it, both delphic and collegiate. In the words of the film director conducting auditions, "Don't bother to ring us, we'll ring you" would probably be sound advice for any aspiring barrister or solicitor of sufficiently long standing. Public policy is, however, less concerned with the personal aspirations of would-be Judges than with the confidence that is inspired by knowledge that the best person is chosen for the job. The Prime Minister (for Chief Justice), the Attorney-General for High Court Judges and Queen's Counsel, and the Secretary for Justice for District Court Judges, have to be informed of those available and suitable.

Only in the case of Queen's Counsel is the procedure now reasonably well established and the type of consultation assured. This revolution occurred in November 1980 when the Chief Justice announced details of a new procedure to be followed to replace the "informal approach" for silk. This was based on an agreement between the Chief Justice and the Attorney-General. An interesting history of the procedure is recorded in the *New Zealand Law Journal* [1981] NZLJ 114. It had been previously suggested that the Judicial Commission would decide or recommend the procedure but of course this was not to be.

In the case of District Court Judges, the present informal consultation is between the Secretary for Justice and the President of the local District Law Society. Approaches are made both to and by prospective appointees. No doubt other inquiries are made as appropriate. This convention is re-

latively recent. It is hard to see how a Judicial Commission as envisaged by the Report of the Royal Commission would itself be in a much better position than the Secretary for Justice without a local inquiry such as I have mentioned. The very number of District Court Judges (up to 84 as at 1981) makes this inevitable. Specialist Judges for Town Planning, Maori Land Court, Arbitration, or other Tribunals, require special consideration and information.

In the case of the High Court and Court of Appeal Judges the position is in some ways simpler but more subtle. There are only 27 places to fill including that of Chief Justice and five Judges in the Court of Appeal including its President. A total of 32 Judges. Generally speaking they are selected from the main centres.

As an aside I should record that little is said in this context of the Judicial Committee of the Privy Council, our highest Court of Justice beneath Parliament. Appointment is by Her Majesty. It is Her Council. Six sitting New Zealand Judges, namely the Chief Justice and the five permanent members of the Court of Appeal, are Privy Councillors and available to sit at No 11 Downing Street. There is an obvious convention.

Appointment, to avoid the word promotion, to the Court of Appeal is usually from the High Court Bench. No doubt consultation is between the Attorney-General and the Chief Justice and Judges of both Courts. Appointment has, however, been made direct from the Bar.[8] No doubt the Judicial Commission as envisaged by the Royal Commission Report would be consulted or perhaps told of proposed appointments. It is plain that consultation would not be so meaningful at this level.

The office of President of the Court of Appeal has followed an "oldest inhabitant" precedence to date. I do not think it is a convention and the appointment must be considered "open" from time to time and in the hands of the executive government.

The office of Chief Justice is again in the hands of the executive government. Anyone who has been involved in Law Society affairs over the years or has talked to ancient Attorneys-General on the topic will know the speculation that takes place when an appointment is imminent. I have been given versions covering the past four appointments that reflect the very stuff of politico-legal life. It cannot be otherwise. The appointments are momentous exercises of power and judgment at the highest level. I doubt if the Judicial Commission's views would assist the ultimate decision of the executive much in such cases.

Appointments to the High Court are made by the Cabinet and preferably after consultation with the President of the New Zealand Law Society at least. Not always. Not necessarily. It is possible to say that some appointments have had "political" background, whatever that may mean. Sir Robert Stout was a threat as a potential political rival of the then Prime Minister. Sir Alexander Herdman was Attorney-General before his appointment and left his seat on the Bench to stand again unsuccessfully. I understand H G R Mason could have accepted appointment. It was very much the mark of the man that he did not.

It would be unreal to suggest that able and suitable lawyers may not have political affiliations. The important thing is that unsuitable and insufficiently able lawyers should not be appointed as a political reward. I know of no instance in New Zealand where this has been done.

I find it hard to see how formal consultation with or recommendation by a Judicial Commission could improve the resulant choice. Such can conceivably embarrass an appointment. I would like to think that wise government will consult as widely as necessary on important non-political matters such as this. I would need examples of abuse of the power of appointment before I would favour an overt statutory provision, however tidy it might be. The full argument in favour of the Judicial Commission's involvement is in the report.[9]

As a pragmatist I would say, however, that I feel sure that if a Judicial Commission were established, as I hope it will be for other purposes, the appointments to both Benches will be discussed and suggestions made. Perhaps the law draftsman could use the word "may" rather than "shall" in the empowering section he draws.

Before I part with this topic I mention two further things. First I do not detect any desire by the prospective members of the Judicial Commission to venture opinions or recommendations outside their proper spheres of interest. Secondly I do not think the question of public confidence (or the confidence of the legal profession) is adversely affected by the present system. Others may have different views. I think the question of public confidence is vital in the next question.

And finally as a footnote may I remind you that judicial appointment can still be reviewed by the Court. You will remember Mr Justice Edwards' first and void appointment, *Buckley v Edwards* (1892) NZPCC 204.

I pass to the vexed question of complaints against the Judiciary and the concept of discipline within its ranks. The matter was again thoroughly treated by the Royal Commission[10] and its recommendations were:

1. The law and custom relating to the removal of Judges should be embodied in a comprehensive statute; such statute should provide for removal only, and fully protect the principle of judicial independence.
2. All complaints concerning the conduct of Judges (short of removal) should be made in writing and referred to the Secretary of the Judicial Commission.
3. Complaints which might be justified should be referred by the Secretary of the Judicial Commission to the Chief Justice, the President of the Court of Appeal, or the Chief District Court Judge as appropriate.

The Commission was to act as a postbox and sorting house. To my mind there can be no doubt that if a Judge can face censure or removal following complaint procedures that fall short of the present convention and law, the security of his tenure and independence are seriously threatened. On the other hand those of you with experience in this limited field will know the acute nature of the dissatisfaction and resentment felt on occasions against Judges. Of course such feelings may sometimes be groundless, perhaps most are. There is no real redress without enlisting draconian powers. I think we should now all agree with Justice Oliver Wendell Holmes that law is not a "brooding omnipotence in the sky" but a flexible instrument of social order whose practitioners are amenable to some degree of control. A bad Judge is easily seen as a tyrant.

The classic apology for judicial aloofness is in Plato's *Republic* on the subject of "Justice and the State":[11]

> The state which we have founded must possess the four cardinal virtues of wisdom, courage, discipline, and justice. It will have wisdom because of the knowledge possessed by the rulers, courage because of the courage of the auxiliaries, and discipline because of the harmony

between all three classes and their common agreement "about who ought to rule". Finally, justice is the principle which has in fact been followed throughout, the principle of one man one job, of "minding one's own business", in the sense of doing the job for which one is naturally fitted and not interfering with other people.

I accept that there is merit in accepting our Judges as we find them, but we find it as hard to bear delays or rudeness in a Judge as anyone else. I think complaints of this sort are different from complaints about competence due to illness or age, where the concern is just as much for the Judge's well-being as for the public.

I was much moved years ago by a caption to a fine judicial photo of Judge Learned Hand[12]

> Fill the seats of justice with good men, not so absolute in goodness as to forget what human frailty is.

Judges are human. Some develop frailties for all the well-known reasons: Private reasons affecting family and health, loneliness, prejudice and advancing age. I accept that some procedure is necessary to protect and reassure the public. I regret that I cannot see it in the form of a Judicial Commission set up as a judge of the Judges. I do not read the Royal Commission's Report as recommending this. It suggests a receiving and postbox function. To this I can find no objection. Subsequent proposals may be otherwise.

On the other hand I do strongly support a recognised function of each Bench to maintain its own standards. This is a collegiate view. As members of one of the three learned professions[13] Judges are by inclination and training able to manage their own affairs. (I think Plato was right.) However, they must be seen to do so. The public has always demanded that those who stand for public office display their wounds. In this respect the election and re-election of Judges such as occurs in some of the United States of America resolves the issue, at least in theory.

The absence of a recognised avenue for complaint and satisfaction can have drastic consequences and give rise to much unhappiness *(Gazley v Wellington District Law Society* [1976] NZLR 452. Conflict between bench and Bar, and Bench and the public is nothing new. The great power vested in the High Court to deal with citizens for contempt of Court has in the past greatly discouraged strong criticism. Some Judges have regarded the due respect owed to their office as personal and an excuse for licence. Fortunately such cases are rare.

I must refer to the present practical position. Various agencies receive complaints against the Judges. The Chief Justice and Chief Judge receive a substantial number of complaints direct. The Law Society receives some. The Justice Department, the Attorney-General, the Prime Minister and the Solicitor-General even the Governor-General, all receive their share. In all cases if the complaint deserves pursuit it will end up with the Chief Justice or Chief District Court Judge or the local senior Judge. In cases where the complaint has merit some ameliorating remedy may be effected, but the complainant is unlikely to be told so, unless by implication of a delay rectified or some such.

I think the present position taken by some Judges is that this aspect of "due process" is a price to be paid for judicial independence, itself beyond price. In my view this aspect of a proposed function of a Judicial Commission should be left in the hands of the Judges to develop and refine. Statutory provisions on this topic would be inappropriate and I suggest that we, too, should agree with Thoreau and Gandhi[14] that that government is best which governs the least.

I do not presume as did Mr Justice Story in his commentaries on equity jurisprudence when he said:[14]

> Here these commentaries are regularly brought to their close according to their original design.

However, I believe I have now traversed the main issues. In recognition of my distinguished and erudite audience I come to my last abstruse reference. I hope that even for the lawyer "the description in plain language will be a criterion of the degree of understanding that has been reached".[16] In my view we do need a Judicial Commission to undertake the administrative functions I have described that do not impair the fundamental independence of the Judiciary.

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1 *A History of the English Speaking People* Vol II, p 124, W S Churchill.
2 *"The History of the Common Law"*, Hale, 4 ed p 27 (1779).
3 *Halsburys Laws of England* 4 ed Vol 8 para 910. As to procedure and reported cases see para 1108.
4 Mr Justice Richardson, 1977.
5 *Evening Post* 7 June 1982.
6 See the treatment in *"An Introduction to the Philosophy of Law"*, Roscoe Pound, Yale University Press 1959 p 53.
7 Submission of NZ Road Transport Association to Select Committee on Transport Amendment Bill (No 5) 27.4.83
8 Sir Timothy Cleary, 1957.
9 Paras 658 to 665.
10 Paras 703 to 719.
11 Plato *"The Republic"*, Penguin 1955, Lee.
12 The Family of Man, Museum of Modern Art, New York 1955.
13 For a latter day apology for continuing to limit it to 3 see Irving Younger's article (available on request from the author).
14 Selected writings of Mahatma Gandhi, Faber, 1951, p 244.
15 3 ed (1920) para 1532.
16 Werner Heisenberg *Physics and Philosophy*, Harper 1958, p 168, as quoted in *The Dancing Wu Li Masters*, Zukav, Hutchinson, 1979.

Road signs and the right-hand rule

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The author is Senior Lecturer in Law at the University of Otago. This article is extracted from a longer paper he wrote on the jurisprudential background to the demise of the right-hand rule. The extracts that are boxed are taken from the longer paper.

Generations of road users in New Zealand have been brought up to believe in the right-hand rule. In general terms this requires the driver of any vehicle to yield the right of way at any uncontrolled intersection to any other vehicle reaching the intersection from the driver's right. So long as most intersections remain uncontrolled, the correlation between facts and law (in this case between roading as it exists and traffic control as prescribed) is such as to justify our regarding this control as one of legal rule. It would be otherwise were most of our intersections to become controlled intersections by which our so-called right-hand rule would then become the exception. For so long as our right-hand rule remains a rule, therefore, traffic law in New Zealand is differently prescribed from in the United Kingdom. There, unlike here, traffic law has traditionally been characterised by such notices of warning as "major road ahead" and signs to stop.

Road Signs and Road Rules

These two traditions of traffic control are not merely superficially but radically different. They have each quite different jurisprudential foundations. Traffic control in the United Kingdom is, broadly speaking, based on road signs. Traffic control in New Zealand has only quite recently broken with its long heritage of road rules. The difference is one of jurisprudence. Traffic control in the United Kingdom is founded on brute psychology — the unthinking association of ideas and the inculcation of habitual response. The aim seems to be to drive on the roads by conditioned reflex rather than rule of law. Offences there, such as those created by s14(1)(b) of the Road Traffic Act 1960 (UK) and connected with traffic generally, arise from failure to comply with traffic signs. It has long been otherwise in New Zealand. Here the foundation has been one of abstract legal rule which required of each road-user an exercise of intellectual judgment in its application. It is only with the recent demise of the right-hand rule and the extensive proliferation of all sorts of road signs that New Zealand must be taken to have followed the United Kingdom by substituting a psychological for a legal basis in traffic control.

> What remains to be said generally of road signs and road rules, and this now against the right-hand rule, is that it entails a process of intellectualisation at every intersection. This may be very hard for some people. Paradoxically it may be hardest for intellectuals — they seem doomed to go on debating the criteria not only for making but also for marking the simplest decisions.

Road signs oust New Zealand's right-hand rule

This paper presents grave doubts whether any belief in the continuing applicability of the right-hand rule to New Zealand can be well-founded. These doubts are confirmed by a legal history of the right-hand rule. All that can be given here is a gross outline of it. Nevertheless this is enough to manifest a strange cultural and legal paradox. At a time when in so many different ways New Zealand is searching out her own individuality,[1] and anxious to establish autochthonous roots apart from the secondhand sovereignty of the old country, she changes the basis of her traffic control largely to follow suit.

The heyday of the right-hand rule witnessed its simplest expression. The Traffic Regulations 1956,[2] as their explanatory note claims, purported to redraft the right-hand rule of the earlier regulations of 1936[3] in simpler language without any alteration in principle.

> *Right Hand Rule at Intersections*
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> 11(1) A driver of any vehicle (other than a tram) approaching an uncontrolled intersection shall yield the right of way to any other vehicle approaching or crossing the intersection from his right:

In 1956 this could be proclaimed as a general rule to which there were but two main exceptions, the first relating to turning vehicles, and the second to vehicles under the control of stop signs. The jurisprudential nature of the right-hand rule as a rule is borne out by the legislative form of the regulation, which continues by way of drafting the two main exceptions by way of proviso. For the purposes of comparing the jurisprudential nature of reg 11(1) of the Traffic Regulations 1956, which formulates and expresses the right-hand rule at intersections as a rule, with the legislative form of its successor, reg 9(1)-(4) of the Traffic Regulations 1976, in which the rule as stated becomes one of observing stop and give-way signs (and to which the former right-hand rule becomes an exception), the provisos to subcl (1) and subcl (2) to (4) also need to be noted:

> Provided that where one only of the vehicles is turning or about to turn to its right or is under the control of a stop sign the driver of that vehicle shall yield the right of way to the other vehicle:
>
> Provided also that, where both vehicles are turning or about to turn to the right, the provisions of this subclause shall not apply.
>
> (2) At uncontrolled intersections, the driver of any vehicle other than a tram shall yield the right of way to a tram.

(3) Every driver approaching or crossing an uncontrolled intersection shall yield the right of way to every other vehicle entitled to the right of way under the foregoing provisions of this regulation, and if necessary for that purpose shall stop his vehicle.
(4) A driver shall not increase the speed of his vehicle when approaching or crossing any uncontrolled intersection at which any other vehicle has the right of way under this regulation.

We would do well to remind ourselves that the legislative power for traffic control is not just formally delegated from Parliament to the executive under the Transport Act 1962, but operationally to the individual who decides where to erect a notice, and to the fellow who actually digs the hole and sticks it up or paints the road. Indeed in any system of traffic control by signs the last mentioned fellow may have the most say.

By 1958 another exception was made to the right-hand rule relating to vehicles under the new give-way signs. Offsetting this first indication of an increasing legalism, however, the right-hand rule became simplified in fact by the disappearance of tramcars.

It is true that this heyday of simplicity enjoyed by the right-hand rule is denied by the explanatory note to the Traffic Regulations 1976. The note claims an even simpler form of the right-hand rule to be advanced by the 1976 regulations. As we shall see, however, this claim by way of explanatory note is very much at odds with the substantive regulations and therefore quite incorrect.

The jurisprudence of rules, exceptions, and mere instances

It is at this point that it becomes vital to ascertain whether in 1956 the right-hand rule was indeed the reality which the then regulations professed. This has to do with the way in which the enterprise of law-making, or as we usually call it legislation, is related to the administration and enforcement of law and in turn to the facts. A failure to apply, administer, and enforce the professed rules of law, is simply a failure in law-making, being one of Fuller's eight routes to legislative disaster.[4] Applying the law is integral with its making, both being component parts of the enterprise of legislation.

If we travelled along the roads of New Zealand in 1958, then, would we encounter more stop and give way signs than we would apply or rely on the right-hand rule? In short, the extent to which the so-called rule is applied and administered tells us a great deal about the status of the rule. Indeed, a so-called rule of law which is not applied firmly enough, or which allows more exceptions to it by way of proviso than there are opportunities for its observance, is hardly any rule of law at all. Instead, in so far as the exceptions are allowed or enforced, they may well become the rule, and the purported rule the exception.

In 1958, on the strength of most travellers' recollections, there were far fewer stop and give-way signs than opportunities to exercise or observe the right-hand rule. The right-hand rule was then as most travellers recollect, truly the rule, and stop and give way signs the exception. But by 1982 it must be the conclusion of most motorists that road signs have proliferated to the point of replacing the rule — and sometimes even to the point of replacing the road, for this is no longer to be driven over, but in terms of road signs, a road which also has to be read. It is a moot point, however, whether roads can also work as maps. To serve both functions surely requires a new technology.

Relating unruly exceptions to rules, no less than relating the unruly administration of law to its initial aspirations, usually requires at least an intellectual revolution. Roads and traffic control are no exception. Evolution, for all its advantages, usually entails increasing complexity. The need for law and society under this sort of strain, brought about by lack of rules, constant change, and increasing incomprehensibility is to simplify. It takes a radical like Thoreau both to profess and practise his own exhortation to "Simplify, simplify!" — for which anti-social suggestion, when put into practice by his refusal to pay his taxes, he was simply stuck in jail.[5]

"Don't loiter on a pedestrian crossing" instructs the Traffic Code, but to take that advice on many occasions simply means walking briskly towards certain death.

The chance to revolutionise and simplify the legislative drafting of rules and exceptions in New Zealand was unfortunately as cursorily dismissed as Thoreau was to Concord jail. This happened when our Court of Appeal reversed the Supreme Court judgment of Haslam J, by way of appeal in *Leveridge v Kennedy* [1960] NZLR 1. The result of this tricky and highly controversial case has been to continue and confirm the confusion over provisos in legislative drafting. It can have been no "accident" that respondent counsel's metaphysical argument on the relation between rules and exceptions in *Leveridge's* case was provoked by the issue of the right-hand rule.

The reversal of Haslam J's judgment by the Court of Appeal in *Leveridge's* case substantiated and upheld one of the biggest blots in the legislative drafting of New Zealand's Statute Book and its subordinate regulations. The casual and arbitrary drafting of provisos going back to the medieval history of conflict between Crown and commons, was upheld. The opportunity to reform the use of the proviso throughout the common law of Commonwealth countries by insisting that it adhere to the logic of rules and exceptions was turned down. It could hardly be asked by RAR Bennion[6] in this as he did in another context of our statute law "are they so much more enlightened in New Zealand as to regard legislation as the main branch if not the trunk of jurisprudence?"

Most but by no means all of New Zealand's legislative draftsmen dismissed the argument upheld by Haslam J in *Leveridge's* case as frivolous and stupid. Despite the majority accord between draftsmen and judiciary reached on the final outcome of the case, however, it is interesting to note how the use of provisos has since diminished in New Zealand legislation. Indeed the Traffic Regulations 1976, in purporting by their explanatory note to restate and further simplify the right-hand rule, avoided the proviso form.

Leveridge's case, for all that in law it confirmed the continued use of a confused proviso, has thus had something of the opposite effect in legal history. The decision is an interesting example of the effect legal history can have contrary to the authority of substantive law. The case also has a prophetic quality, for as we shall see it foretold the demise not only of the proviso (by missing the point of the argument) but the demise also of the right-hand rule in traffic law.

Both the demise of the proviso and the right-hand rule are made obvious by the Traffic Regulations 1976. There is no longer any heading, as appeared in the 1956 regulations "*Right Hand Rule at Intersections*". The explanatory note to the 1976 regulations describes the changes to be matters of simplification and explicitly mentions the right-hand rule as having been re-enacted (if, indeed, it is ever true to talk about regulations being enacted or re-enacted) "in simpler form but without [subject to subclause (4)(b)] altering its effect". When one examines this so-called re-enactment, however, one

finds that a new concept of "Giving way", originating in SR 1956/217, regs 11, 12(1), 12A; SR 1958/115, regs 4, 5; SR 1960/135, reg 2; SR 1962/86, reg 6; SR 1975/195, reg 2 has been substituted for any mention of the right-hand rule. Indeed what remains of the right-hand rule at intersections is so reduced in content and postponed in expression as not to be any sort of rule at all. This is clear from the legislative form of reg 9, and from the factual state of affairs pertaining to traffic intersections (particularly urban intersections) througout New Zealand.

... a system of traffic control by road signs is deficient in so far as it depends on motorists seeing every sign. ... you cannot be sure that every notice when placed will always continue to remain there, or if electronic will continue to function, or in any case even when assiduously looked for will always be seen. Indeed the more signs there are to be seen, the more likely it is that any one will not be noticed, and even if they are all seen, the less significant each one becomes for itself in context.

The legislative form of reg 9, as it appeared in 1976 uncomplicated by subsequent amendments which are beside the point, is as follows:

9. Giving way — (1) Every driver approaching or entering an intersection on a roadway where traffic moving in the direction in which he is travelling is controlled by a stop sign at or near the intersection shall —

(a) Stop his vehicle before entering the path of any possible traffic flow at such a position as to be able to ascertain whether the way is clear for him to proceed; and

(b) Give way to any vehicle approaching or crossing the intersection from a roadway not controlled by a stop sign.

(2) Every driver approaching or entering an intersection on a roadway where traffic moving in the direction in which he is travelling is controlled by a give-way sign at or near the intersection shall give way to any vehicle approaching or crossing the intersection from a roadway not controlled by either a stop sign or a give-way sign.

(3) Except where subclause (1) or subclause (2) of this regulation applies, every driver turning or about to turn shall give way to any vehicle not making a turn, and every driver turning or about to turn to his left shall give way to any vehicle approaching from the opposite direction and turning or about to turn to its right.

(4) Except where any of the foregoing subclauses of this regulation applies, every driver approaching or crossing an intersection shall give way to any vehicle approaching or crossing the intersection from his right.

(5) Notwitstanding anything in the foregoing subclauses of this regulation, a driver using an approved siren or a red flashing or revolving light under the authority of these regulations may enter and cross an intersection at a speed not exceeding 20 kilometres an hour taking due care to avoid a collision with other traffic.

(6) The provisions of this regulation shall not apply to any intersection while it is controlled by traffic signals, a traffic officer, or a police officer.

Not even the most ardent Darwinist has been heard to advocate the right-hand rule as a means of eliminating the unfit in life's struggle for survival. Indeed the chances are nearly as much against the cautious at the mercy of the incautious. And the thoughtful but dithery intellectual tends to drive in a world in which the mean or middle path of Aristotle is far more real than his own middle line on the road.

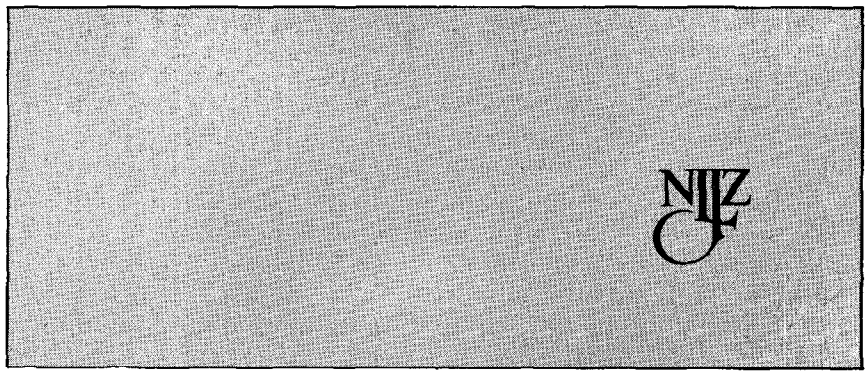
As a mixed question of facts and law, that is to say both of law-making as an abstract enterprise and law-enforcement as a practical undertaking, it may be clearly concluded from a comparison of the former and present legislative forms that road signs have ousted New Zealand's road rules. The first principle of operation stated in the present regulations relies on road signs, the first stated exception to that principle reserves what remains of the right-hand rule. In legal form no less than legal function, New Zealand's right-hand rule has ceased to be any sort of rule at all by becoming instead an exception. Its true status is nevertheless still disguised unless we appreciate its real significance — not as an exception to another legal rule but rather as an exception to a different system of social control.

Whether both are ultimately subject to the rule of law as a matter of jurisprudence or instead reflect an opposition between law and social science as earlier suggested, is a moot point reserved for more abstract consideration later. Until then the reader might care to consider and come to his own conclusions about reg 127A (as inserted in the Traffic Regulations 1976 by reg 4 of the Traffic Regulations 1976, Amendment No 6). This purports to allow the introduction of yet a new species of traffic sign, this time, according to the explanatory note, "for experimental purposes only". A consequential amendment is thereby required to reg 18(1) of the principal regulations applying to places controlled by traffic signals. This is done by the addition of the following further unhappy proviso:

> Provided further that where at any such place there are traffic signs that have been erected pursuant to a notice given under regulation 127A of these regulations, then, in so far as the directions given by the traffic signals are inconsistent with those given by the traffic signs, every person (including a pedestrian) using the roadway at that place shall comply with the directions given by the traffic signs and not those given by the traffic signals.

In the writer's opinion, this proviso is one ipsa loquitur. In speaking for itself, what could be more self-evident of its own legislative disaster.

1 See Keith Sinclair, *A History of New Zealand* (1980) Epilogue — The Search for National Identity pp 322-330.
2 SR 1956/217.
3 SR 1936/80.
4 Fuller, *The Morality of Law* (1964) Ch II.
5 Henry Thoreau, *Civil Disobedience* (1849) and Edward Hepburn *Introduction to Walden* (Edito-Service SA Geneva).
6 Francis Bennion *Statute Law* (1980) p 9.



Waitangi Revisited

Te Atiawa's Vindication: A reply to Mr O'Keefe

David V. Williams
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Mr J A B O'Keefe's carping criticisms of the Waitangi Tribunal's Report on the claim by Te Atiawa to Maori fishing rights in North Taranaki in [1983] NZLJ 136 ought not to pass without comment. That Maori spirituality was taken into account by the Tribunal and by the Commissioner for the Environment in assessing the degree of pollution in seafood resources caused Mr O'Keefe to be seriously troubled. One can only respond that lawyers are perpetuating the monocultural domination and oppression of 19th century colonialism if they fail to recognise and respect Maori spiritual and cultural factors when arriving at decisions affecting Maori people. As the Governor-General, Sir David Beattie, observed on Waitangi Day in 1981:

> We are not one people, despite Hobson's oft-quoted words, nor should we try to be.[1]

To adopt a bicultural rather than a monocultural understanding of the history of Aotearoa/New Zealand involves arguments and value judgments outside the normal scope of *New Zealand Law Journal* articles. However, certain other aspects of Mr O'Keefe's criticisms of the Waitangi Tribunal indicate a fundamental misunderstanding of the proper role of the Tribunal in our legal system. It is submitted that this Tribunal should not be constrained by the cautious and restrictive approaches to questions concerning the Treaty of Waitangi which have always been adopted by Courts of Record in New Zealand.

Courts of Record (including the Planning Tribunal)[2] have the responsibility of adjudicating between parties to litigation, and they must arrive at a determination which binds the litigants. Such determinations establish legal principles which may be applied in other cases. When questions of vested property rights or interests are concerned, the Courts tend to be particularly keen to rely upon those fixed and certain rules which will least disturb vested rights. Courts have been faced with arguments based on the broad and loosely worded principles of the Treaty of Waitangi, which is in two languages (with the Maori version being only a rough translation of one of the English versions) and which has a dubious status in international law as well as in municipal law.

When faced with such arguments, they have invariably sought some means of avoiding the necessity for giving full legal effect to the promises contained in the Treaty. The standard response has been to rely upon the doctrine that a treaty cannot be enforced in the Courts except in so far as its provisions have been legislatively incorporated into the municipal law. The leading case is *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308; [1941] NZLR 590, a decision of the Privy Council cited by Mr O'Keefe. Courts also have tended to sidestep difficult issues unless really forced to deal with them. The reluctance of the Supreme Court and the Court of Appeal to "grasp the nettle" in the bed of the *Wanganui River* cases led to a long saga of litigation and the necessity on two separate occasions to pass special enabling legislation.[3] In one important case, *In Re Ninety Mile Beach* [1963] NZLR 461, 466-467, North J candidly admitted that there would be "startling and inconvenient results" if the "far-reaching claims" made by the Maori appellants were held to be well-founded.

Courts have never been prepared to go behind legal transactions in order to inquire into the moral niceties of compliance or otherwise with the solemn undertakings of 1840. The guiding principle remains that laid down by Prendergast CJ in 1877 in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 73, 78 — albeit that slightly different words might now be used:

> But in the case of primitive barbarians, the supreme executive government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exists no known principles whereon a regular adjudication can be based.

It is submitted, however, that the Waitangi Tribunal is a tribunal which now may examine and call in question the acts of the executive government in so far as they affect the "rangatiratanga" guaranteed by the second article of this Treaty. Indeed it is precisely because the Tribunal does not have to make a "regular adjudication" that it need not baulk at entering a field for which there are no clearly defined principles. Mr O'Keefe seems to have been unaware of the fact that the Tribunal is deemed to be a commission of inquiry.[4] In certain respects it has the power and status of a District Court,[5] but commission of inquiry proceedings are inquisitorial in nature rather than adversarial[6] and the Tribunal's jurisdiction is merely to inquire and to recommend.

This weakness of adjudicatory power should be understood as a strength. The fear of unforeseen results cannot be a bar to a conscientious investigation of the applicability of the principles of the Treaty of Waitangi to the facts of any particular claim. The recommendations should relate to such a conscientious investigation and

should leave consideration of any "startling and inconvenient results" to the persons who receive the Tribunal's recommendations. It is Ministers of the Crown who must then decide how the Government should acquit itself, as best it may, of its obligations to respect Maori proprietary rights.

If the Tribunal is to be true to the Long Title of the Act by which it was established, then it must seek the observance and confirmation of the principles of the Treaty of Waitangi. This purpose cannot be achieved by "pulling punches" for fear of disapproval by the government of the day. If a government wishes to pursue a particular course of action, then any praise or blame attaching to its decision may well be relevant factors. The Waitangi Tribunal, however, has the single brief that it should make recommendations relating to the practical application of the Treaty having regard to all the circumstances of particular claims.

In the writer's submission the Tribunal should be congratulated for its brilliant presentation of the issues relating to Maori fishing grounds in general and to the seafood resources in the reefs adjacent to Waitara and Motunui in particular. Waitangi Tribunal hearings held in 1977 under the previous Chairman were a great disappointment to the Maori applicants. The Tribunal decided not to make any recommendations with respect to Maori fishing rights in the Waitemata and Manukau harbours even though it was satisfied that a conclusion could be reached on whether or not customary fishing rights had been extinguished since 1840.[7] On the present occasion the Tribunal has properly fulfilled its statutory duty to act as a commission of inquiry to inquire into and report upon the practical application of the Treaty of Waitangi.

1 *New Zealand Herald*, 7 February 1981, p 12.
2 S 128, Town and Country Planning Act 1977.
3 See E J Haughey, "Maori Claims to Lakes, Riverbeds and the Foreshore" (1966) 2 NZULR 29, 33-39.
4 Treaty of Waitangi Act 1975, Second Schedule, cl 8.
5 S 4, Commissions of Inquiry Act 1908.
6 See *Royal Commissions and Commissions of Inquiry* (Government Printer, 1974) pp 5-6, 16-17, 24-25, 31-32.
7. See J D Sutton, "The Treaty of Waitangi Today" (1981) 11 VUWLR 17.

The Proposed Abolition of the Scale of Fees

R J Sorley, a Stratford practitioner, writes further to his article in [1983] NZLJ 187 on the scale of fees and legal ethics.

THE proposal to introduce into Parliament legislation aimed at abolishing scales of professional charges should be resisted with all our strength. The proposal is the greatest single threat ever seen to the practice of law as a learned and honourable occupation and it endangers the public interest in the provision of professional services.

We have not even begun to grapple with the philosphical and social consequences of the abolition of the scale. In the last decade we have seen great changes in social relationships. They have been recorded by sociologists, journalists and historians. But what of the changes in our professional relationships? What has happened and who is recording them?

If we are to admit competition what of the sacred solicitor/client relationship? We have witnessed recently a great erosion of the old values. The prosperous client is prized more highly than the old family client of modest means. We are jealous of our clientele and regard them as our private property. We evaluate our clients by the size of their pocket books.

Take this test: A prosperous young couple calls on you. They think their solicitor has overcharged them on a recent purchase of realty. Do you explain that they have only been charged the minimum scale fee and tell them they are wrong? Or do you accept them as a prized addition to your prosperous commercial clientele?

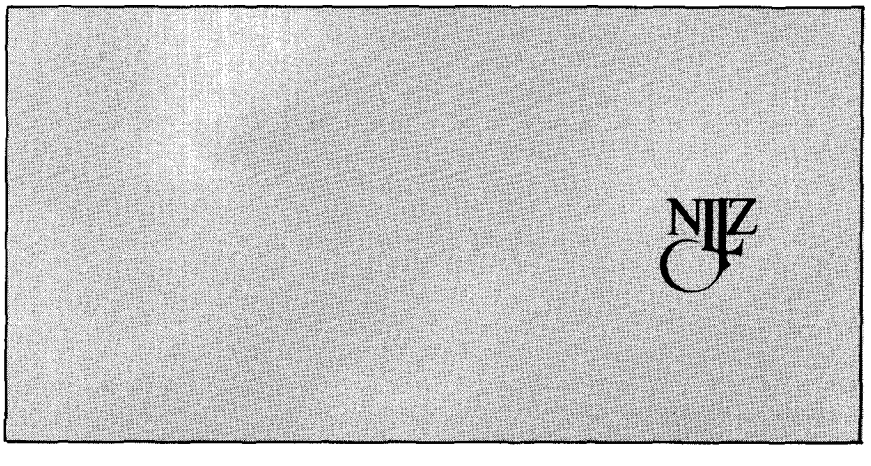
Ask yourself these questions:

Do you, a successful professional man, try to browbeat a colleague into accepting your views in a conflict situation? Do you bring all your weight to bear and then, if you don't succeed, do you categorise your opponent as lacking integrity, unreliable, obstinate, irrational? Or do you honestly try to have the conflict resolved by using the diagnostic tools of our profession?

Have you recently resorted to ad *hominem arguments in an attempt to get* the best possible results for your clients? Is success the only criterion, and does it justify your undermining, irreparably, good professional relationships?

The question is what kind of profession do we want to nurture? Already we see the younger solicitors becoming tainted by the need to show a respectable financial return. Fee analysis makes them competitive inside the practice; and the rot spreads beyond the practice.

Take away the scale of fees, introduce open competition, and God help the profession! We are already at the stage when, according to the leader of a recent seminar, "we don't talk to each other". How will it be when we are practising in complete isolation, hellbent on showing that we are more efficient, more reliable, our "end product" much cheaper, than anything our colleagues can do. Will we, by then, be unable to remember when the practice of law was a profession like medicine and divinity?



Books

Rebel Advocate. A biography of Gerald Gardiner.

By Muriel Box. Published by Gollancz Limited. New Zealand Publisher Hutchinson Group (NZ) Ltd. 242 Pages, New Zealand Price $38.75

Reviewed by Sir John Marshall

Those lawyers who met Lord Gardiner when he was in New Zealand for our triennial extravaganza at Rotorua in 1969 may recall a tall, slim dignified man pleasantly austere, shyly reserved, but when he addressed the conference holding our attention and stimulating our minds with his lucid and precise address.

Dick Wild and I had lunch with him on one occasion. I found that he had no small talk. He was cautious about political issues, but penetrating and incisive on the causes of law reform and the pursuit of humane justice so near to his heart.

Those first impressions are confirmed in this biography as the kind of superficial opinions commonly formed about this extraordinary man. But for those who knew the depth and breadth of the real man, the picture was much more complicated, attractive to some and less so to others, but never dull. Lord Elwyn-Jones, his Labour successor as Lord Chancellor, described him as a man of great humanity and great modesty, immense intellectual ability, and great personal friendliness. Lord Hailsham, his immediate Conservative successor, found him to have very austere morals, not without humour, but not a warm approachable man. Richard Crossman, in his notorious diary, referred to Lord Gardiner in Cabinet as a tight lipped Quaker liberal but so good and so noble that Crossman wanted to do what he could to help him. To Mr Justice Howard he was a dangerous Socialist fanatic. To Miss Pat Malley, his private secretary, he was a perfect gentleman. Truly a diverse and controversial figure.

This biography is by Muriel Box, who is Lord Gardiner's second wife. A biography written by a wife is likely to be sympathetic and this one certainly is. But at least in this case the wife is herself already a successful author, publisher and film producer and, having married Lord Gardiner when he was seventy years of age, she is writing mainly about a life in which she was not involved. There are instances and information in the book which could only have come from Lord Gardiner himself, and this is acknowledged in the introduction; so to that extent the book has some elements of autobiography and is none the worse for that.

Lord Gardiner's father was a wealthy merchant who made a fortune from owning coal mines and also owning the ships which carried the coal to the lucrative Continental market. Sir Robert Gardiner received a Lloyd George Knighthood after contributing £15,000 to a worthy cause. During Gerald Gardiner's boyhood the family lived in the lap of luxury in a country estate with 29 servants. Sir Robert was a man of strong character and firmly held Conservative opinions. It is unusual but not unknown for a young man brought up against this kind of background to rebel. Gerald Gardiner did just that. But it was not a sudden revolt. It was a gradual intellectual response to external influences.

At Harrow a radical master introduced him to socialist and pacifist ideas and to the *New Statesman and Nation*. His father's response was one of intense indignation, but the seeds were sown. The patriotic fervour of the 1914-1918 war, at the end of which Gardiner was 18, intervened to defer intellectual rebellion. He joined the school cadets and gained a commission in the Coldstream Guards just as the war came to an end.

He then went up to Oxford and became immersed in the life of the University. He became President of the Oxford Union and of the New Reform Club and also of the Oxford University Dramatic Society. Possibly because of these demanding commitments he took a very poor fourth class degree. His success as an amateur actor led him to consider a career on the stage, but his father put a stop to that and sent him off to study with a tutor for the Bar examinations. He spared no expense in furthering his son's career and continued to do so for many years.

The Socialist seeds sown at Harrow remained dormant but by the time he came down from Oxford they had taken root and began to sprout. The experience which finally set them growing vigorously was his exposure to the trials and tribulations of the working class in the 1926 General Strike in which he was a reluctant special constable. After that he was committed to the political left without being or wishing to be a politician. In his early days at the Bar he became a member of the Haldane Society, a group of Socialist lawyers, until that society became infiltrated by Communist lawyers and was disaffiliated from the Labour Party. He then formed and became the first Chairman of the Society of Labour Lawyers.

His interest in the political arena was concentrated mainly on law reform. He served on the Law Reform Committee for many years. He campaigned passionately and persistently for the abolition of capital punishment. He was active in the Howard League for Penal Reform, the International Commission of Jurists, the National Marriage Guidance Council, the Campaign for Nuc-

lear Disarmament and the World Disarmament Convention and at the end of 1972 he became both an undergraduate student and at the same time Chancellor of the Open University.

Because he was a pacifist he felt that he could not fight in the Second World War but he gave up his then lucrative practice and served unselfishly and courageously with the Friends Ambulance Unit.

He was admitted to the Bar in 1925. He began as a pupil in the chambers of St John Field, which cost his father £100. He earned nothing in the first two years, three guineas in the third year, gradually increasing to £140, to £750, to £1,500 a year and then to considerably higher figures as his reputation grew. In the meantime his father provided him with £700 a year on which to survive. As a rising junior he appeared with some of the great lawyers of the 1930s such as Sir Norman Birkett and Sir Patrick Hastings. He took silk in 1948 and was soon in great demand.

The author confesses that in the interests of space she has not mentioned many of the famous cases in which Lord Gardiner was involved, and this is disappointing for lawyers. Even the cases which are included are dealt with in a rather superficial way from a legal point of view and only a few are described in detail. Some of the notable cases in which he was instructed include the Nunn May treason trial, the *Newsweek* contempt of Court case, and *R v Penguin Books* which resulted in the release of Lady Chatterley and her lover from a long confinement under the law of obscenity.

He was involved in many defamation cases and acted as standing counsel for the Beaverbrook Press, but he also appeared for the *Times* and the *Daily Worker*. Some of his diverse clients in libel cases included Randolph Churchill, Harry Pollitt, the Communist leader, Evelyn Waugh, Oswald Mosley, Leslie Cannon, and the Electrical Trades Union. He apeared for Leon Uris in the sensational libel action brought by Dr Dering involving the novel *Exodus* and the medical experiments carried out on prisoners in the German concentration camps. This case provided the material for the novel and television film *QB VII* (short for Queen's Bench Division, Court VII).

His style of advocacy had no frills or histrionic tricks. He spoke quietly and quickly, his voice scarcely altering in tone or inflection. His art was that of understatement, not declamation. But he was a perfectionist and a tireless worker. He prepared his cases with much care in great detail, with the result that his arguments were precise and lucid.

His biographer claims that he was not ambitious. He had no wish to be a Judge or a Member of Parliament and he was a reluctant Peer. On one occasion when he stood for Parliament as a Labour candidate for West Croydon in the 1951 election he was glad to find that he had lost on election day. But greatness was thrust upon him when he became Lord Chancellor.

The Lord Chancellor, by a curious converging of historical evolution, combines in his person the judicial, legislative and administrative functions which flies in the face of the constitutional concept of the separation of powers. It says much for the integrity of successive Lord Chancellors, at least in modern times, that this triple role of Judge, politician and administrator, anomalous though it may be, is regarded as the highest prize in British public life, except for the office of Prime Minister. Lord Gardiner, it would generally be agreed, filled this high office with great distinction. Once in office he made the most of his opportunities to promote and achieve many of the reforms of the law to which he had earlier devoted so much of his time and energy, including the establishment of the Law Commission which now provides for the continuing oversight and updating of the existing law in England, and separately in Scotland.

When a second wife writes a biography of her husband, it is intriguing to read what she has to say about the first wife. In this case it is not a happy tale. Lord Gardiner himself apparently was reluctant to talk about it, so the author no doubt relies on other sources.

As the story goes, Gardiner met and fell in love with Lesly, his first wife, when she was still married to an alcoholic husband. He was then 25 and in his first year at the Bar. A divorce quickly followed and they were quickly married. He did not know until after the wedding that his wife was 10 years older than him, nor did he know until 30 years later that his wife had borrowed £500 from a mutual friend to pay for their expensive honeymoon at Monte Carlo and that the loan had never been repaid. The impecunious barrister then found that he had to cope with an extravagant wife in a small London flat. After the birth of a daughter, their only child, they went to live in the country but life was far from smooth and debts accumulated until Sir Robert came to the rescue. They moved house frequently.

At the age of 40 Gardiner had a love affair with a woman barrister. He asked his wife for a divorce. She refused point blank. They continued to live under the same roof. An armed neutrality existed between them, gradually replaced by resigned acceptance of the status quo and finally of each other. But in the end when Lady Gardiner, then in her seventies, became ill with cancer, Gardiner, then the Lord Chancellor, offered to retire and look after her and she refused to allow him to make that sacrifice. She was, it appeared, devoted to him and her death affected him deeply. His daughter Carol perhaps summed the marriage up when she told the biographer wife, "Though the bad times were awful, the good times were marvellous".

The title *Rebel Advocate* is perhaps not entirely appropriate. He certainly rebelled against his Tory background but his warm relationship with his father and his family was unbroken and he continued to live a comfortable middle class life and to have his hair cut at the Savoy! As a member of the Bar he observed its time honoured traditions. He acted for anyone who sought his services irrespective of their political views or social status and he took an active part in serving the profession, reaching his highest office as President of the Bar Council.

It does not appear that he had any sporting interests but he had a great love of the theatre and seldom missed a London play. Although he was a pacifist he was not a conscientious objector and he served his country as well as any pacifist could. His socialism at the most could only be described as pale pink. Rather than a rebel he appears in this biography as a progressive liberal reformer in search of a just and humane society.

This is not a definitive biography but it is a sympathetic life story of a man of great intellectual integrity and brilliant talents, devoted to the service of his fellow men, not only in his own country but wherever injustice reared its ugly head. Lawyers would find it a fascinating, if inadequate, story of a great advocate and law reformer, and their spouses might also read it for its deep human interest.

Correspondence

Dear Sir,

The Bay of Plenty is a region that has blossomed over recent years with the kiwifruit boom. All lawyers have been busy. Conveyancers have been happily acting on subdivisions of land into smaller blocks and preparing transfers and mortgages in awesome sums. For common lawyers, the industry has proved a fruitful (?) source of litigation and many writs filed in the Rotorua High Court and plaints in the local District Courts are in some way related to the industry.

Although conveyancers are suffering a decline in work loads as a result of the consequences of the Income Tax Amendment Act (No. 2) 1982, the same is not necessarily so for common lawyers.

The following passage was observed recently in a Statement of Defence to be filed in a matter in the Tauranga District Court:

> *AND FOR A FURTHER DEFENCE* the Defendants say:
>
> 7. *THE* Second Defendant had purchased the said property for the purposes of undertaking horticultural development and thereby reducing his tax liability.
>
> 8. *ACCORDING* to the Minister of Finance and Prime Minister the Right Honourable R D Muldoon, anybody who thought that the right to deduct orchard development expenditure against income from other sources was to continue was a fool.
>
> 9. *BY* reason of the matters aforesaid the Second Defendant was of unsound mind at the time of making the alleged contract and incapable of understanding the same as the Plaintiff then well knew and is thereby discharged from any obligation to the Plaintiff.
>
> 10. *THE* Second Defendant pleads and relies on the doctrine res ipsa loquitur.

It is probably best if the pleader were to remain anonymous.

Yours faithfully,
"De Minimis"

Dear Sir,
Re: Computers for data retrieval

Thank you for your editorial on "Precedent and Computers" [1983] NZLJ 93. As is well known, access to a greatly expanded library of decisions is now possible in the United States and Europe through such programmes as West-Law and Sheppard Citations, Lexis and Eurolex, and there is no reason why such access could not be employed in New Zealand in some way in the near future.

Obiter of the House of Lords, etc, against the use of unreported decisions in the cases you cited ignores the potential of word processors which should extend to the Judges' chambers as elsewhere. Delays in producing the printed report of a decision can mean that justice is denied. An alternative system linked to a Justice Department computer and to the New Zealand Council of Law Reporting would enable their Honours to review the final drafts of their judgments on a visual display unit permanently sited on their desks and linked to their associates' word processors. Judicial signature would initially be replaced by the push of that final button of approval which would enter the decision into an electronic bank for us all to draw upon instantly.

If necessary, subsequent editing for grammatical, etc, reasons could be carried out at leisure, but in the meantime, electronic drafting in that way would provide, for the first time in the history of the common law, every decision of every judge becoming available to the litigant by retrieval to a commonly accessible bank.

Remembering that the major difference between a reported and an unreported decision is the intervening value judgments of an editorial system, is it not time that the consumer made his or her own decision as to the relevance of a judicial decision, leaving the editorial work for grammatical, etc, mistakes? Present culling is for economic reasons of publishing costs as much as any other and it is suggested that such reason is not valid when discussing the administration of the system of justice.

In any event, a small increase in filing costs could cover any administration costs incurred by every judgment being so deposited. As they are already being typed, the only cost would be the introduction of a word processing system at least in every High Court similar to that existing in the Court of Appeal. Thus the extra costs enabling instant access by the profession, etc, would come only from storage and retrieval and would be covered by retrieval fees.

By such a system we would achieve the rapid dissemination of judgments in the way presently enjoyed in the United Kingdom. Their Lordships may well rail against the unreported judgment when English judgments are so quick to be published. In New Zealand we have a good opportunity to embark on an electronic system as soon as possible.

Yours faithfully,
S E K Reeves

Ups and Downs

A truck driver who flew a deckchair five miles into the sky has come down to earth with a bump ... and a $1,500 fine.

When Larry Walters strapped himself into the deckchair attached to 42 weather balloons and took off from San Pedro, Calif, he just wanted a low flight over the Mojave Desert. But the wind didn't co-operate and he found himself at 16,000 feet drifting past airliners.

So he drew out his personal baggage, a pellet-gun, and shot himself down, one balloon at a time. He landed on some power lines.

The Federal Aviation Administration charged him with, among other things, not filing a flight plan and having no balloonist's licence. A charge that the deckchair flew without an airworthiness certificate was dropped on the grounds that deckchairs do not need to be airworthy.

Walters was pleased about one thing, though. The magazine *Ballooning* said his flight had topped the 3,740-foot altitude record for flights in hot-air clustered balloons. Unfortunately the record will not go in the books because he wasn't sanctioned to make the flight.

This story was supplied by a District Court Judge who saw it in a Los Angeles newspaper during a recent trip. His comment was that "For myself, I would have thought the initiative and courage was worthy of a section 42 discharge." Truly a Judge who is properly prepared to take a fair, large and liberal view of the law!

Non-Industrial matters in industrial relations

A J Geare

Mr Geare is a senior lecturer in Industrial Relations in the University of Otago. *In this article he discusses constraints which have been imposed on the working of parts of the Industrial Relations Act by the narrow view taken in Arbitration Court cases of the key expression "industrial matters".*

Introduction

A principal characteristic of the New Zealand Industrial Relations system is that the major legislation, the Industrial Relations Act 1973 (the Act) provides procedures for settling union-management conflicts which in theory will be used in preference to sanctions such as strikes whenever peaceful negotiations fail to reach an acceptable solution. Such procedures include conciliation and arbitration, and the personal grievance and disputes procedures. They are not strictly compulsory however in so far as a society of workers is free to choose not to register as an industrial union under the Act. However, there is very strong pressure on a society to register, resulting from a combination of provisions under the Act, which under certain circumstances can place an unregistered society in a very precarious position. As a result, most societies choose to register as industrial unions of workers.

It is clear that the legislation has been created under the belief that not only are conciliation and arbitration effective — the original legislation, Industrial Conciliation and Arbitration Act 1894 (ICA Act), was part entitled:

> An Act . . . to facilitate the settlement of Industrial Disputes by Conciliation and Arbitration

— but also, in some value sense, an improvement on collective bargaining and strikes. Thus the present legislation is part entitled:

> An Act to make provision for improving industrial relations. . . .

It is arguable whether it is ever possible to generalise that a system of conciliation and arbitration is necessarily superior to a system of collective bargaining — or vice versa. The objectives of the parties and how well they are achieved, their relative power positions at any point in time, and the value judgments of those rating the systems will all influence the decision as to which system is superior. Nonetheless the legislators appear to have come to a decision, and favour conciliation and arbitration. It is thus imperative that the procedures created by the legislation be able to cope in practical terms with union-management conflicts. As Denniston J stated, as quoted in *Taylor & Oakley v Mr Justice Edwards and others* (1900) 18 NZLR 876 at 878-9, the arbitral tribunal:

> would, to be fully effective, be expected to have power to do and order all things which could legally be done or agreed to by agreement between an employer or body of employers and his or their employed.

Limitations of the Act

The Act, however, fails to provide practical means of settling all likely conflicts between unions and management because it is restricted in a number of ways. It can function only if a "dispute" exists as defined by the statute. Such disputes are further classified as being of "interest" or of "rights". Although the Act creates procedures for their settlement, these procedures do not cover all possible disputes.

Under s 2 of the Act, a dispute is defined as:

> . . . any dispute arising between one or more employers or unions or associations of employers and one or more unions or associations of workers in relation to industrial matters.

The limitation imposed by the final words "in relation to industrial matters", though by no means the only part of the Act to present problems, is of prime importance, and is the subject of this paper.

The Act is powerless to help settle a conflict if the subject is defined as a non-industrial matter. Indeed the legislation tends to imply that conflicts over such issues just would not arise — possibly because the legislators think they should not, or just hope they would not. Unfortunately however, just blithely stating that there should not be disputes over "political" or "social" or "managerial" issues does not cause them to go away. It is an indictment of the conciliation and arbitration system, or those responsible for it, that the only contribution the legislation can make as regards conflict over such issues is to provide, under the Commerce Amendment Act 1976, penalties for strikes over non-industrial matters.

This paper will consider how industrial matters are currently defined by law and, with reference to cases, how the definition is interpreted. It will look at some non-industrial matters which the system cannot deal with because of the restrictions imposed by the definition, and the likely consequences of such restrictions. To conclude it will consider some arguments for amending the legislation.

The definition of industrial matters

While the definitions of industrial matters under New Zealand and Federal Australian legislation are very similar, there are significant differences. Likewise, there have been changes over time in the statutory definition in New Zealand. Hence considerable care needs to be taken before assumptions can be made about the effect of particular judgments on the meaning of "industrial matters".

Section 2 of the Act defines "industrial matters" as:

> all matters affecting or relating to work done or to be done by workers, or the privileges, rights, and duties of employers or workers in any industry, not involving questions that are or may be the subject of proceedings for an indictable offence; and includes —
>
> (a) all matters affecting the privileges, rights, and duties of unions or associations or the officers of any union or association; and
>
> (b) all matters affecting or relating to the preferential employment, or the non-employment, of any person or class of persons, whether a member or members of a union of workers or not, but not so as to prevent any employer from engaging any person who at the time of engagement is not a member of a union; and
>
> (c) all matters that by this or any other Act are declared or deemed to be industrial matters — but does not include any matter relating to the compulsory membership of a union of workers by a person, as a condition of his employment, before such employment commences.

The above definition makes frequent reference to "workers" — a term also defined by the Act. Under the Act a worker is "any person of any age of either sex employed by an employer to do any work for hire or reward".

Interpreting the definition

Consistency is not a factor one notices in decisions on what constitute "industrial matters". For example, in *Magner v Gohns* [1916] NZLR 529 the Court of Appeal was split 3:2 over the interpretation. The important case of *Clancy v Butchers Shop Employee's Union* (1904) 1 CLR 181 was decided on a 3:0 basis, but this decision reversed the majority decision of the Supreme Court which had upheld the Arbitration Court. Thus decisions were only 4:3.

There are three general approaches to the interpretation of the definition — broad, narrow and pragmatic. Judges in the past have taken all three. Judges are of course also dependent on earlier judgments — which either assist them or shackle them depending on the degree of agreement. In some cases the Judges clearly feel very reluctantly compelled to follow earlier decision. Thus Blair J in *Butt and Others v Frazer* [1929] NZLR 636 at 660, found it hard to follow the 3:2 decision in *Magner v Gohns* which chose to interpret the phrase "without limiting the general nature of the above" as meaning "by limiting the general nature of the above". He stated:

> This is a decision of a majority of the Court of Appeal on this point and must be treated as binding on this Court. Were it not for this I would have had some difficulty in construing the section in this manner.

One of Blair J's fellow Judges in the case, Smith J, was more adventurous and distinguished *Magner v Gohns* claiming:

> The reasoning on the point was clearly not essential to the unanimous decision of the Court.

However if earlier judgments could be ignored, then Judges favouring a broad interpretation would probably treat most, if not all, issues likely to be raised by a trade union as being covered by the definition.

For example, a decision to introduce new technology would clearly affect the work to be done by workers. The provision of holiday homes would affect workers' privileges. The granting of pensions to retired workers, or their widows and widowers, can be taken to be a privilege or right of workers notwithstanding that they are no longer employed, since, as Kitto J observed:

> A claim for pensions after the termination of employment is a claim that the rewards of the employment shall include not only immediate remuneration but also, in certain events, a pension either for the employee alone, or for him in the first instance and for his widow after him.[1]

A Judge favouring the broad interpretation could also rule that a conflict as to whether or not a company could export to Chile or South Africa or Argentina is an industrial matter. The reasoning would be that the decision to export, or not, would result in greater or fewer orders for the company. This would undoubtedly affect the quantum of work available. The issue being a matter affecting the amount of work available, it would clearly affect the work "to be done by workers" — and would hence be an industrial matter.

The fact that such a broad interpretation could be taken was recognised with concern by some Judges who favoured the narrow approach. In *Clancy's* case, O'Connor J at 206-7 observed:

> It is well-known that new kinds of labour-saving apparatus are continually being invented and adopted, for instance the automatic fuel feeder. The Railway Commissioners might think it right, in order to reduce expenses in the working of their furnaces, to introduce apparatus of that kind, and it is quite clear that its introduction would very largely affect the amount of work to be done by employees. Could it be contended for one moment that there was jurisdiction in the Arbitration Court to prohibit the use of such apparatus on the ground that it affected the work to be done by the employees, or that it had power to direct what kinds of machinery should be used by the Railway Commissioners in the working of the railways, or in any other of those large businesses that are included in this section. . . .
>
> Once we begin to introduce and include in its scope matters indirectly affecting work in the industry, it becomes very difficult to draw any line so as to prevent the power of the Arbitration Court from being extended to the regulation and control of businesses and industries in every part.

A narrow view of the definition will assume for example that the words "work done or to be done" mean "work actually done or work actually to be provided".

Narrow interpretations also extend to the meaning of "privilege" and restrict it to "privilege contained in awards or contracts of service" and thus ignore unwritten but accepted perks. Also, the definition as a whole may be restricted to apply only to workers

during the period they are actually employed, thus defining as non-industrial such matters as pensions.

The pragmatic approach to the interpretation of the definition produces a very similar result to the broad approach. It contends that legislation concerning conciliation and arbitration in Australia and New Zealand was created to settle industrial disputes, an expression which at that time:

> . . . was not then a technical term; it expressed in popular language a situation with respect to industry that had often happened, and was happening with increasing frequency and ever-broadening application.[2]

and so:

> To hold that a "dispute" causing serious industrial disturbance and public loss could not be dealt with by the Arbitration Court unless the claim refused directly affected both the employees and the employers would, in my opinion, seriously curtail a very beneficial power intentionally given to the Commonwealth Parliament, and I personally cannot concur in such a view.[3]

Judges who favour the pragmatic approach give the impression that they are prepared to overlook the law when it seems to them that it deserves to be overlooked. However, Higgins J in his decision in *Federated Clothing Trades v Archer* (1919) 27 CLR 207 at 215 provides a justification for what sometimes appears as the cavalier approach of the pragmatists. He stated:

> It was suggested here by Mr Starke that an industrial dispute must be about some matter which it is within the capacity of the parties to grant or refuse; and it is said that this definition would exclude from the class of "industrial disputes" a dispute such as that which I dealt with, in compulsory conference, in *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association; Ex parte Victorian Stevedoring etc Co*, 10 CAR 2. In that case the men refused to "sling" flour for export to Java until the price of bread should be reduced from 8d to 6d per loaf. This reduction, of course, was out of the power of the employers; but the men were induced at the conference to leave the subject of the price of bread to the Government and Parliament. If the definition do not fit such a case, so much the worse for the definition; it would be extraordinary if the Court of Conciliation and the President were to be treated as helpless in such a case. Yet the definition would fit well enough if we bear in mind that the employed classes can grant or refuse as well as employers — they can grant or refuse their work. I do not see why an award cannot be made forbidding a union and its members to refuse work on specified grounds — even in the case of a sympathetic strike.

While legal purists may not favour the pragmatic style, it is submitted that it is clearly the most sensible approach from an industrial relations, if not from a legal, viewpoint.

Two recent NZ cases

In both Australia and New Zealand it was the first quarter of this century that saw the highest incidence of cases concerning industrial matters. In New Zealand in particular there have been few cases since the Second World War. However recently there have been two cases of significance. They are *NZ Bank Officers IUW v ANZ Banking Group* (1979) Arb Ct 379 and the *NZ (excluding Northern and Taranaki ID) Law Practitioners — Decision* (1980) Arb Ct 267.

The Bank Officers conflict arose when the ANZ Bank decided to raise the interest rate on the loans it made to some, but not all, staff members. It was reported that:

> The Bank's New Zealand Manager said he was willing to discuss the bank's lending policy with staff but that the Bank Officers Union should not be involved.[4]

The union claimed that there was a dispute of rights. However, before the then Industrial Court could decide if there was a dispute of rights it had to establish there was a dispute in relation to industrial matters.

The Bank claimed the matter was non-industrial and at 380:

> . . . declined to recognise that the applicant as a union has any standing in the matter. It regards the subject as a domestic one between itself and its own staff and in particular points out that neither in the award nor anywhere else is there to be found any provision which makes the availability of cheap or favourable loans a right which may be claimed by staff members.

The union on the other hand claimed the matter affected or was related to the privileges rights and duties of employers or workers. The union clearly weakened its case in Judge Jamieson's opinion by conceding at 380, with regard to the loans, that union members had ". . . not a right to a loan but to eligibility for a loan in accordance with policy".

Judge Jamieson observed there that this would seem to accept that the policy is something to be laid down by the defendant.

His judgment is notable on a number of grounds. First he decided, at 382, that:

> Owing to the similarity of language between the relevant legislation in both countries, the Australian cases are of strong persuasive authority in this country.

It is thus likely that unless the New Zealand legislation is significantly amended future decisions will be influenced by Australian decisions. Secondly, Judge Jamieson appeared to concentrate only on Australian decisions which had taken a narrow interpretation — in particular *Clancy's* case cited earlier, *R v Kelly* (1950) 81 CLR 64, *R v Commonwealth Conciliation Commission, ex parte Melbourne Tramways* (1966) 115 CLR 443, and *R v Portus* (1972) 127 CLR 353. Further, he appeared to take the judgments at face value and it has been claimed that a "deficiency in the Industrial Court's decision is its failure to adequately analyse the Australian cases".[5]

Judge Jamieson's decision favoured a narrow interpretation. He claimed at 384 that:

> The award contains nothing to create any rights or duties in relation to the availability of staff loans. We have had no evidence to suggest that there is any general contract of service which incorporates any such provisions or which creates any obligation on the part of the Bank to make loans on favourable terms to individual employees. We regard the matter of staff loans as not one which relates to the relationship of master and servant, but to be at best peripheral or collateral to that relationship. We repeat that once the employee seeks a loan from the Bank the relationship then arising is that of lender and borrower, or mortgagor and mortgagee.

It is submitted the union's case might have been more effective if their counsel had stressed the difference between a privilege and a right — as indeed did Mr McDonnell in his dissenting opinion. A privilege is not guaranteed to all — that would make it a right — and thus it should not be expected to appear in the award.

The *Law Practitioners* decision relied heavily on the *Bank Officers* case and Chief Judge Horn quoted extensively from Judge Jamieson's decision. It thus appears that once again emphasis was put on those Australian judgments which narrowly defined the subject.

As Chief Judge Horn stated at 269, this case was concerned with:

> . . . whether the establishment of new technology or new machinery, which may result in less jobs or less job opportunities, is an "industrial matter" within the meaning of the Industrial Relations Act.

The Court recognised at 272 that:

> . . . it must be accepted that new technology will destroy existing jobs and will lead, in some instances, to redundancies. Factors such as retraining for other job opportunities must nevertheless be taken into account and doubtless will be looked at from time to time. . . .
> We do not suggest by any means, in this decision, that we wish to impose or suggest that there should be any constraint on full negotiation and bargaining between unions of workers and unions of employers as well as between individual employers and unions on questions of technological changes in industry whether general or particular.

and went on to state at 273 that:

> He would be a foolish employer who, in the present circumstances, did not consult with the union where there was any possibility of a worker being adversely affected, either by status of job or by loss of job. We do see that the consequence to employees resulting from such a decision may well be industrial matters. Methods of operating, even methods of installation, where they affect working or operating conditions, may be within the scope of "industrial matters" and could be covered by award provisions including disputes procedures.

However the majority of the Court was of the opinion that, notwithstanding the above, a decision whether or not to install new machinery was a "managerial decision" and "not within the definition of industrial matters as at present understood".

Australian cases

Judge Jamieson's decision to give weight to selected Australian cases, without analysing them, justifies the following brief survey of the relevant Australian case law.

Clancy's case concerned the question of whether butchers could keep their shops open after the normal working day to carry on business by themselves without their employees. Their employees, not surprisingly, considered this could affect the amount of work available to them in the future, and Griffith CJ at 202 recognised that:

> In one sense this case may fall within the words of the section, but if that view is adopted I do not see how any matter affecting an industry could be excluded because every matter affecting or relating to an industry must directly or indirectly relate to the "work done or to be done" in that industry — that is, to the work which would ultimately have to be done by the employees in that industry. Evidently some limitation of the meaning is necessary.

Griffith CJ thus redefined the phrase "work done or to be done" and claimed the words meant:

> . . . work actually done by the employee or actually provided by the employer to be done, that is, such as he thinks fit to provide, but that they do not in any way refer to the quantity of work which the employer is to provide for the employees.
>
> I think therefore that the expression "work done or to be done" means actual and not hypothetical work, such work as shall be provided; and that they have nothing to do with prescribing what work shall be provided by an employer.

His fellow Judges concurred. With respect, it seems to require very tortuous thinking to arrive at that conclusion.

The *Melbourne Tramways* case was one of a series of conflicts and concerned with the changeover from two-man to one-man trams. Barwick CJ, as quoted by Judge Jamieson, supported the *Clancy* decision and claimed the relationship of employer and employee must be directly involved. This raises the obvious question — if Griffith CJ and Barwick CJ are correct and not simply striving to produce a definition which upholds the concept of managerial prerogative — why did the legislators fail to include such simple additions as "actual" or "directly"? In the *Tramways* series of cases Barwick CJ did a complete about face. In the *Tramways* case cited by Judge Jamieson, Barwick CJ at 451-2 stated:

> There is a world of difference between a demand that no one-man buses shall be used to operate a service and a demand that a conductor as well as a driver shall always be employed upon buses constructed for one-man operation. I may add that I am far from satisfied that a demand that a service operated by two men shall not be changed to operation by one man directly involves "the relationship of employer and employee" within the meaning of the Act, however much the consequence of acceding to it or of refusing it may affect conditions under which an employee may be required to work in the employer's service. Such a demand to my mind is different in kind from a demand that an employee driver of a bus shall when working on a bus be assisted by a conductor. The former, it seems to me, deals only with the nature of the work which the employer shall provide, whilst the latter does deal with what an employee in doing work which is provided shall be required to do in his employment.

When the Union re-worded the subject of dispute to fit what Barwick CJ stated was an industrial matter, he claimed that:

> . . . a real question arises in my mind as to whether or not the respondent union genuinely desires that the driver of every bus or tram shall at all times and in all circumstances be assisted by a conductor [6]

and, since he now added the requirement of "genuineness" to demands, he claimed in a minority decision that the matter — notwithstanding his earlier judgment — was not an industrial matter.

It is surprising that our two Arbitration Court Judges did not consider the later *Tramways* case, which accepted that, so long as the Union worded the subject of its dispute correctly, it could be considered as a valid dispute even though it was

concerned with a managerial decision to alter technology.

Judge Jamieson also made reference to *Kelly's* case and the more recent *Portus* case. *Kelly*, like *Clancy* was over hours of work of butchers shops and the judgment was very similar. It was considered at 84 that it was "obviously not enough" that the hours had an indirect effect. The *Portus* case concerned a union demand that the employer automatically deduct union fees from their employees' wages and pay them to the union. Stephen J's decision typified the narrow approach which holds, somehow, that managerial decisions do not affect employees. He stated at 371:

> The matter demanded must always pertain to the employer-employee relationship so that the subject matter of demands by either party which are, for example, of a political or social or managerial nature will not be industrial matters.

The decision of the Court was that "checkoffs" did not relate to the employer-employee relationship and, as Menzies J argued at 360, it was:

> . . . in truth, a dispute between the association and the banks about whether or not the banks should perform for the association a dues-collecting service.

The *Portus* case illustrates a problem mentioned earlier — of considering judgments made under different legislation. The New Zealand definition of industrial matters includes all matters affecting "the privileges, rights and duties of unions" — while the Australian legislation does not contain such an addition. Hence in New Zealand the practice of check-offs is an industrial matter as it affects the privileges of unions — whatever the Australian position.

A further significant Australian case was *Hamilton Knight*, cited in footnote 1, in which the majority held that a claim for pensions was not an industrial matter since it did not relate to employees but to *former* employees. It follows that not only payment of pensions but, of more significance at this time, the payment of redundancy pay to *former* employees would be a non-industrial matter.

Currently defined non-industrial matters

The two New Zealand cases indicate that the following would be considered non-industrial:

(a) The installation of new technology.
(b) All perks and privileges granted to employees which are not written into awards and agreements.
(c) All matters relating to former employees with the exception of their preferential re-employment.

There is one possible way that such issues could be classified as industrial matters and that is to indulge in "game playing" as illustrated by the *Melbourne Tramways* cases, and would involve redefining disputes. This could only be practised in certain cases — and may not be accepted by the Court. However, in some cases, as in the introduction of VDUs into law offices, the dispute could be over whether persons asked to use VDUs should be allowed a half-hour break every hour to recover from eye-strain, or be given six months training on full pay, etc. In this manner, the dispute does become one relating directly to the work done by the employee.

Consequences

A conflict does not disappear simply because it is defined as being over a "non-industrial matter". The consequence is that unions, if strong enough, will use normal negotiation tactics such as strikes to win their case. The Clerical Workers in the *Law Practitioners* case have appeared to accept the decision against them, but the meat workers have demonstrated that they will not be fobbed off with the notion that the installation of new technology is a managerial matter which should not concern them.

The decision in the *Bank Officers* case resulted in stopwork meetings and strikes and finally, over a year after the dispute started;

> The ANZ Bank agreed to reduce interest rates on staff loans but negotiation broke down when the Bank denied the right of the Bank Officers Union to represent its members on matters outside the award. ANZ staff in several centres voted to take industrial action but on 10 October the trading banks acknowledged the Union's right of representation.[7]

The Commerce Amendment Act 1976 introduced penalties for strikes over non-industrial matters. As expressed elsewhere, "penalties for strike action fail . . . to fulfil a deterrent function, an acceptable punitive function or a reformative function. As such they should be removed from legislation in both explicit and implicit form. . . ."[8]

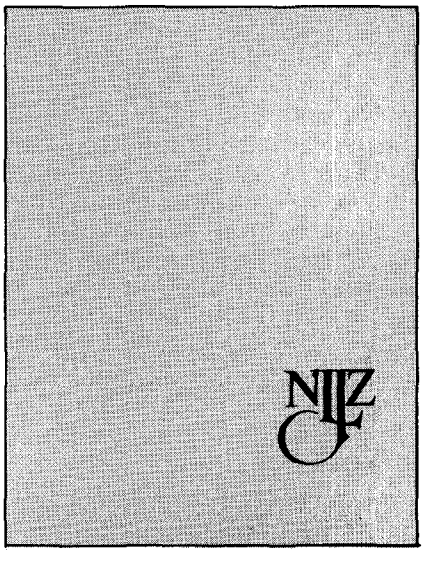
Fines for striking in Australia increased rapidly in the late 1960s. A union secretary was finally gaoled for refusing to pay the fines imposed on his union. The situation is of particular significance to this paper as the union secretary was O'Shea, Secretary of the Tramways Union, and the penalties were imposed because of strikes over the change from two-man to one-man trams and buses. Plowman reports that "A national stoppage was averted and O'Shea released, when a lottery winner paid the union's outstanding fines. . . . New legislation has reduced the maximum fine . . . (and) forced employers away from using penal sanctions as an automatic remedy."[9]

Case for amendment

In the writer's view the case for amending the legislation rests on pragmatic grounds. Conflicts will occur on so-called managerial issues, political issues, and social issues. The system of industrial relations should be equipped to help settle these conflicts. If conciliation and arbitration are considered to be better than strikes — then they should be available for *all* conflicts. If on the other hand conciliation and arbitration are not superior, then the whole system should be reviewed.

The Queensland Industrial Conciliation and Arbitration Act covers in its definition of industrial matters any and every matter relating to a long list of subjects including:

> the subject matter of any industrial dispute including any matter which has caused or, in the opinion of the Court or of the Commission, is likely



to cause disagreement or friction between employers and employees:

and

any matter, whether industrial or not, which in the opinion of the Court or of the Commission has been, is, or may be a cause or contributory cause of a strike or lock-out or industrial dispute.

This pragmatic definition is to be applauded. The ideal definition could be restricted to those two additional points. As pointed out by Higgins J quoted earlier, even if the subject could not be settled by the employer (for example if the conflict was over a political matter) the dispute could still be *considered* by the Arbitration Court and settled by the Court — possibly simply by directing a return to work.

A comprehensive definition of industrial matters will clearly not be a penacea for all industrial relations problems. It will however remove an illogicality from the system and allow the conciliation and arbitration procedures — of which this country is proud — to have the opportunity to settle conflicts.

It is of grave concern that unless "game playing" is practised and tolerated then, under the current legislation, matters of major importance in industrial relations today such as redundancy and new technology could be ruled as non-industrial and therefore beyond the pale of our legislated industrial relations system.

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1 *R v Hamilton Knight, ex parte Commonwealth Steamship Owners Association* (1952) 86 CLR 286 at 332.

2 *Australian Tramways Employees Association v Prahran and Malvern Tramway Trust* (1913) 17 CLR 680 at 695, per Isaacs and Rich JJ.

3 Ibid at 715, per Powers J.

4 Bert Roth "Industrial Relations Chronicle", *New Zealand Journal of Industrial Relations* (1977) Vol 3(1), p 1.

5 GJ Anderson "Jurisdiction under the Industrial Relations Act 1973: Some Problems and Issues", *Occasional Paper 24*, Victoria University, 1979, p. 13.

6 *Melbourne Tramways Board v Horan* (1966-7) 117 CLR 78 at 81.

7 Bert Roth "Industrial Relations Chronicle", *New Zealand Journal of Industrial Relations*, (1979) Vol 4(1), p.2.

8 AJ Geare, "Strike Sanctions and Penalties Under New Zealand's Industrial Relations Laws", *Journal of Industrial Relations* (1976) Vol 18(1), p 57.

9 D Plowman, S Deery, C Fisher, *Australian Industrial Relations* McGraw Hill, Sydney, 1980, pp 241-2.

Land Transfer Settlements — are they effective?

This article has been prepared by the Land Transfer Officers' Guild, and suggests some practical changes in current Land Transfer Office registration procedures. These are only proposals and do not have the sanction of the Department. Conveyancing practitioners might care to express their views on the suggestions made, both as to their practicality and their legal significance.

Unless fundamental changes are made to registration procedures currently in use, Land Transfer Office Settlements can be forgotten as a means of protecting the parties when doubt exists of a possible conflict of equities.

Recent changes in the law (Land Transfer Amendment Act 1982, No 22) give some protection in the event that the Land Transfer Office fails to record the existence of a dealing held in the office unregistered. Even so, compensation will not lessen the worry and trouble for practitioners needing to put matters to rights.

Traditionally when one of the parties to a transaction had reason to believe that conflicting equities were a possibility he required a Land Transfer Settlement. This meant that the parties met at the Land Transfer Office at an appropriate time and satisfied themselves that their documents were registrable and would win the race to the register, thereby defeating all other interests which might be in competition. The means to this end is to search the register itself and the daily journal, and to do otherwise would mean running the risk of an action for negligence.

How practicable is it effectively to carry out these requirements?

Practitioners do not seem to realise that since the introduction of the "Bag System" of registration a vital change occurred in Land Transfer Office practice. (By way of explanation, the "Bag System" allows the registration of documents without personal presentation at a counter.)

For practical reasons examination of documents is delayed until numbering and statistical work is completed. It is this delayed examination which defeats the effect of a Land Transfer Settlement. Use of the "Counter System" required the receiving clerk to note the register with the existence of a dealing having the effect of charging, caveating or creating an interest in land *where production of the outstanding copy of the title was not required.* He did this as part of the action of registration. Today the documents are lodged in sealed bags which have been allocated a time and priority number before any examination of the contents has taken place. It is that time and data which is used when a memorial recording the document is entered in the register.

Because of administrative requirements District Land Registrars will not allow a search of unopened bags which may contain registration fees. Any attempt to settle on the register is made without access to the unopened bags and for that reason and the fact that many documents are in the numbering and statistical process, it is impossible to be certain that no competing document exists. The journal only becomes available when all these processes are completed.

Some practitioners have resorted to requiring that no moneys be paid out to the parties until this gap in their ability to search is taken care of by the recording in the register of all transactions up to the time and date of their own dealings. This is not always a practical solution to the problem and if something does go wrong there is again the worry of sorting things out.

A practice has developed in some Registries of keeping a book called a "Caveat and Liens Book". Clerks numbering documents are required to note documents such as caveats, liens, and charging orders as they recognise them. The practice is not particularly reliable and does little to help resolve the problem of the time lapse before the journal becomes available.

What is the Justice Department doing to eliminate these problems?

The State Services Commission in conjunction with the Justice Department has for some years contemplated the provision of a *Land Data Bank* in computer form. It is intended that the Bank will provide information for various organisations vitally interested in land use. The base record would be defined parcels of land and up to date information as to ownership and changes. The practical use of this information to practitioners is open to doubt.

There are two major questions of concern to the practioner which to date remain unanswered.

The first is the ability of the department to provide *up to the second information* on the state of the register. The second is the ability of the computer to store historical information relating to land description or land ownership. Each new entry it seems would serve to cancel previous records. Without the latest information and without access to the historical record, the practioner is left in blind acceptance of available information and has no means of verifying its authenticity. The computer record would provide the starting point for a searcher but he would always need to go to the primary record for authentic up to date information.

Fortunately for one reason or another little real progress has been made in implementing this project. The competition between different government departments to control the means of access to information and therefore its fundamental format, has succeeded in delaying matters to the point that its introduction is spoken of in terms of decades, not years. It is interesting to note that an attempt, politically, to rationalise the activities of the Lands and Forestry Departments is currently meeting the same fate.

In the meantime a further project is being studied by the Departments concerned. This project is the introduction of a *Computer Journal*. The aims and objectives leading to the creation of such a record are set out in Butterworths publication, *Conveyancing Bulletin* at p 27 of Vol 1, issue No 3. The article is headed "Automation in the Land Registry Offices — The First Steps". Inter alia the advantages listed for the practitioner are:

(a) Better facilities for searching the journal. Visual display units will provide an on line facility (instant response) with a remote location capacity linking all of the twelve districts through units sited in the District Offices;
(b) A time and dated hard-copy record of journal searches;
(c) Automated transfer of data to the Valuation Department and the Department of Statistics which will eliminate the preparation of the typed schedule of instruments, and
(d) The facility to offer a full accounting service enabling fees to be paid by monthly charge accounts.

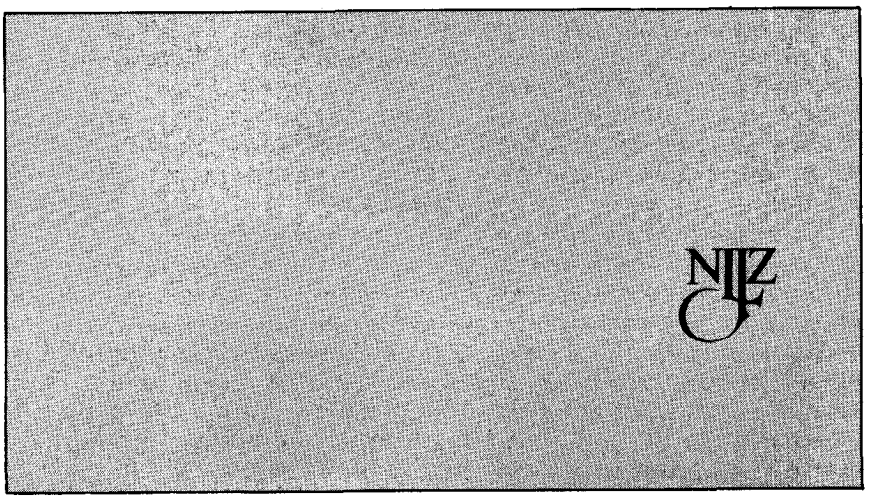
Again the question arises, will the information available be accurate and completely up to date? For the reasons previously stated the answer is that it will not. Registration methods prevent its being so.

No doubt concern expressed by practioners as to the practicability of searching the present fragmented journal has led in part to this investigation. The ruling reiterated in *Bradley v Attorney-General* [1978] NZLR 36 leaves practitioners in no doubt as to their responsibilities in this area and a revision of the present method of preparation would not be before time. Departmental officers have asked for an updated journal themselves. Coupled with a photographic record of the present register they see it as a means of recreating missing folios of the loose leaf register. It would also lead to the preparation of better nominal and lot indices.

Surely one could be excused for thinking that the Justice Department is on the wrong track in emphasising the advantages of a secondary record. Should not the emphasis be on the provision of resources to allow the processing of registration in such a way as to avoid gaps in the available records and to produce an accurate up to date primary record, the register.

To achieve this end three major proposals are suggested:

(1) The larger offices in New Zealand should be broken up into smaller units handling at the most 150 documents a day. Most major offices are organised with one or more registration teams comprising a balanced group of officers to handle this amount of work so that the organisation already exists to accomplish this purpose. It is not proposed to create new Registration Districts but to place satellite teams in geographically strategic places based on local body districts. Control of these offices would be exercised by Provincial Offices based in Auckland, Wellington and Christchurch. They would provide the necessary technical and administrative back up needed, subject to the overall direction of the Registrar-General of Land's office in Wellington.
It has been acknowledged for many years that there are great advantages in establishing these optimum size units provided the registers for the land in their area are housed with them. The bigger offices have always had an internal problem of a race to the register with documents being examined out of priority order. The smaller office is more easily managed and can give personal attention to problem dealings and the public generally.
(2) The process of registration must be undertaken before any attempt is made to create permanent records. The work flow prior to the bag system was:
(a) Counter examination and numbering
(b) Recording
(c) Registration by an Assistant Land Registrar



The present work flow with the bag system is:

(a) Numbering
(b) Recording
(c) Registration by an Assistant Land Registrar

The counter system led to few requisitions and those that were discovered after the counter examination did not affect the priorities created by the registration process.

A proposed work flow with the bag system is:

(a) Drawing the appropriate register for all dealings
(b) Examination and Registration by an Assistant Land Registrar
(c) Recording.

The proposed system would require an amendment to the Land Transfer Act 1952 if memorials signed on the register were to be actioned at a lower level than that of Assistant Land Registrar. At present it is the act of signing the memorial which has the effect of passing the legal estate in land not the signing of the document itself.

It is not anticipated that there would be any great problems in implementing this suggestion. The bag system would be retained and a receipt given for the documents they contained. The examination would take place in the priority of lodgement controlled by drawing the register in that order. No permanent record would be made up of timed and dated documents but of documents with lodgement priority held for examination and registration. Defective documents would be returned unregistered.

Perhaps it should be stated here that the advantage of personal presentation was that defective documents could be discussed over the counter and much unnecessary rejection eliminated. Would it be too much to ask that the bag system be dropped in favour of personal presentation? Many older practitioners will recall that the training they received at the Land Transfer Office counter excelled anything that is available today.

(3) The Justice Department should explore modern methods of communication so that a search of the register can be obtained as desired. This is the area to which the resources and expertise of departmental officers and consultants should be directed.

Overseas Correspondence

Gray Williams

One up, one down for the nuclear industry

Since the mid-seventies, the nuclear power industry has been facing difficult times in the United States. To add to its woes, popular opinion swung sharply against nuclear power after the Three Mile Island incident in 1978. No new reactors are being ordered, cancellation of orders is high, and even some of those under construction may never be put into service. Within this context the US Supreme Court decided two cases relating to the nuclear industry on 20 April 1983. The first case was the most serious for the industry.

Californian law required that before a nuclear plant may be built, a State Commission must determine on a case by case basis that there will be adquate capacity for interim storage of the plant's spent fuel at the time the plant requires such storage. The law also imposed a moratorium on the certification of new nuclear plants until the State Commission finds that there has been developed, and United States through its authorised agents has approved, a demonstrated technology for the permanent disposal of high-level nuclear waste.

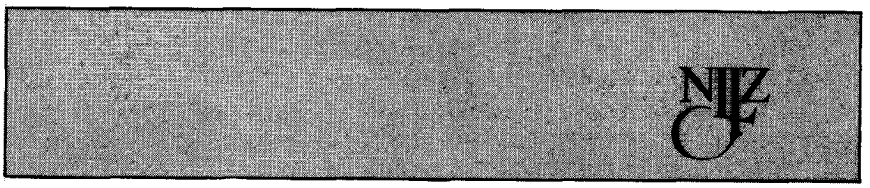
As far as the moratorium was concerned, the Court concluded it was ripe for review (whether there was adequate capacity for interim storage was not ripe) and the issue became whether, under the Supremacy Clause, the Federal Atomic Energy Act of 1954 would pre-empt the Californian law. The Court held that the nuclear industry is regulated both by the United States and by the states. The federal government has the exclusive right to control safety and the "nuclear" aspects of energy generation. Economic questions and whether there is a need for new generators is left to the states. Thus, if the moratorium was viewed as safety related it would be struck down; if it was economically based it would be valid.

The Court accepted the Californian contention that the legislation was aimed at economic problems taking note of the fact that without permanent means of disposal, the nuclear waste problem could become critical leading to exceptionally high costs or shut-downs. The effect of this for the present time at least, is to allow the individual states to prevent the construction of nuclear plants provided they are seeking to do so for economic reasons.

The second case involved Three Mile Island (TMI). When one plant there was involved in an accident, a second plant was ordered shut down to determine if it could be operated safely. Prior to re-opening, the Nuclear Regulatory Commission (NRC) had to consider the environmental impact and any environmental effects of its proposed action (an old joke has it that god made the world in one day, days two through seven he spent drafting an environmental impact statement). Some Harrisburg residents claimed that the accident had already affected their health by increasing their anxiety, tension and fear and that a re-opening would aggravate their psychological problems as well as damage the cohesiveness of their community.

The Court held the Harrisburg resident's claims to be without merit. The agency, said the Court, does not have to look at every impact or effect of its proposed action, only the impact on the environment which, in this case, meant the physical environment. Furthermore, the risk of another accident is not an effect on the environment. Finally, the Court said that psychological health damage resulting from an unrealised risk of an accident is too far removed from the event to be considered by the agency.

The net effect of these cases is that while TMI may re-open, as seven states already have laws similar to California's and twenty-nine states filed briefs to support California's claim, in the forseeable future no more reactors will be built.



Books: Received and shortly noted.

Reviewed by P J Downey

Powers of Entry, Search, Inspection and Seizure in New Zealand. By D L Bates. Published by Brooker & Friend Ltd, pp 720. $38.75

The author says in his preface this book is intended as a ready reference for District Court Judges, Registrars, Justices of the Peace, police officers, lawyers and others. It is a guide and not a treatise. It brings together and reprints the relevant extracts from a large number of statutes and regulations on the topics in the title. There are 205 statutes quoted running alphabetically from the Agricultural Pests Destruction Act 1967 to the Wool Labelling Act 1949, and 137 Regulations from the Admiralty Rules 1975 to the Zoological Gardens Regulations 1977.

The Research has obviously been assiduous. The notes and comments are few but there are some useful pages at the back on miscellaneous considerations. The book is particularly well indexed. The binding is likely to be a problem for a book of its size unfortunately.

Law School. By Robert Stevens published by the University of North Carolina Press, pp 334. $US19.95

Robert Stevens was a Professor of Law at Yale University Law School for 17 years. He is a graduate of Oxford University and has written a book on the House of Lords as a judicial body for the period 1800 to 1976. In this book he has turned his attention to legal education in America from the 1850s to the 1980s.

His general line of approach can be appreciated from the following quotation:

> The centrality of law in American life, coupled with the historical functions of legal education, has insured that the schools have been at the very core of the debates about the profession and its role, as well as the nature of law itself. The history of the United States has, in many ways, been the history of the tension between equality and excellence. The history of the legal profession — and inevitably of the Law Schools — has similarly reflected the clash between elitism and democracy.

He concentrates a great deal on the experience of Harvard University with the development of the case method in legal education. He also looks at the wide variety of legal institutions that have contributed to the creation of the legal profession in the United States as it is today. He puts a good deal of emphasis on what he describes as an unhealthy dichotomy between the professional and scholarly approaches to legal education. In this he sees a conflict between the academics on the one hand and the professional lawyers on the other. This is a book that anyone interested in legal education will find of considerable interest.

Law and Learning — A Report to the Social Sciences and Humanities Research Council of Canada. Available free from the Council through its Information Division, 255 Albert Street, PO Box 1610, Ottawa, Canada KIP 6G4. pp 186 (in English) 212 (in French).

This report on research and education in law in Canada is a very useful survey of the present position there. The emphasis throughout is on developing law as a scholarly discipline. The report finishes with ten pages of conclusions and recommendations. The general nature of these can be ascertained from the comment made by the authors that "the basis of our recommendations on legal education is that legal education must define its objectives explicitly, that among these objectives, the promotion of a scholarly discipline of law must figure prominently, that a variety of objectives requires a plurality of educational strategies, and that appropriate resources must be made available to implement those strategies".

The issues dealt with in this book are important, and have relevance for those who have a responsibility in the field of legal education.

Annual Survey of Australian Law 1982 edited by Robert Baxt and Gretchen Kewley. Published by the Law Book Company Ltd pp 471.

For those interested in Australian law this annual volume will be a useful update. It contains 18 chapters by different authors covering different aspects of the law. It starts with a chapter on the Criminal Law, looks at such matters as Constitutional Law, Trusts, Natural Resources Law, Intellectual Property, Income Tax and Taxation and Administration of Estates among others.

From a general point of view probably the most interesting chapter is that on the legal profession which incidentally quotes a couple of New Zealand decisions on the question of the reasonableness of costs. The editors state in their preface that there are some gaps, the most important of which is Administrative Law. A useful aspect of the work is that each chapter has a select bibliography.

Federal Administrative Law. By Geoffrey A Flick. Published by the Law Book Company Ltd. pp 251. $A35.00 cloth, $A27.50 limp.

The author of this book previously published *Civil Liberties in Australia.* This present work is concerned only with Federal law and not with State law. It deals specifically with three Federal Statutes namely, the Administrative Appeals Tribunal Act 1975, the Ombudsman's Act 1976, and the Administrative Decisions (Judicial Review) Act 1977. The form of the book is to set out the statutes section by section, with a brief commentary on each section. This contains reference to cases relating specifically to the sections, and also other relevant decisions.

The book is likely to be of very limited interest to New Zealand lawyers. It may be of some assistance however on a comparative basis. Few New Zealand cases are cited although it is interesting to see a passing reference to *NZ Dairy Board v Okitu Co-operative* [1953] NZLR 366.

Wills and Intestacy in Australia and New Zealand. By I J Hardingham, M A Neave, and H A J Ford. Published by the Law Book Company Ltd pp 518.

This is a revised and consolidated version of two previous books on Wills and Intestate succession respectively. There are approximately 300 pages on Wills and 200 pages on Intestacy. There is not a separate New Zealand section. There are passing references to New Zealand statutes and also to New Zealand cases, but the New Zealand cases are not discussed in any depth.

Forensic Fables

Lord Pushleigh of Runnymede and his Coat-of-Arms.

Mr. Samuel Pushleigh having been Called to the Bar, Quickly Realised that if he was to Get to the Top he must Take Part in Political Life. So Mr. Pushleigh Became a Friend of the Downtrodden and Oppressed and Joined the Forward Party. He had a Bust of Danton on his Book Case; he Laughed Horsely when the House of Lords was Mentioned; and he Spoke on Countless Platforms in a Loud Tone of Voice in Favour of Votes for Minors, the Destruction of Capitalism, a Single Chamber, the Abolition of the Army and the Navy, and the Nationalisation of Everything that was Left Over. Thirty Years later Mr. (now Sir) Samuel Pushleigh, K.C., Reached the Zenith of his Career. When Title and Coat-of-Arms had to be Decided Upon, Sir Samuel Pushleigh Recalled that an Ancestor (maternal) was Believed to have Fought by the Side of the Black Prince. His Suggestion that he should be the First Baron Crecy of Poictiers was, to his Annoyance, Rejected by the Authorities, and Ultimately he was Gazetted as Lord Pushleigh of Runnymede. But the Coat-of-Arms was All Right. The Crest (a Crowned Cross-Bow. Gules) Surmounted a Shield on which were Quartered First, Three Leopards of England, Proper, Charged with the Fleurs-de-Lys of France, Argent, Secondly, Two Bowmen, Mourant, Sable on a Chevron Topaz, between Three Arrow-Heads in Pale. Emblematical Figures Representing Truth and Justice were the Supporters. On a Label beneath Ran the Proud Motto: *Pour Roy et Loy.*

Moral: *Why not?*

Words

A "Comprise" — an overworked word

The wrongful over-use of "comprise (d)" is very common, regrettably amongst Judges, lawyers and legislative draftsmen whose trade is, after all, words. The following table illustrates the position, and also the abundance of acceptable alternatives to the popular favourite.

WRONG	RIGHT
The parts comprise the whole	The parts compose the whole The parts constitute the whole The parts form the whole The parts make up the whole
The whole is comprised of the parts	The whole is composed of the parts The parts are comprised in the whole
"...any unit comprising part of the development" — Unit Titles Act 1972, s 45(5)(c) (inserted by s 24(2) of the Unit Titles Amendment Act 1979).	"The fee simple estate ... in that part of the land which immediately before the cancellation comprised units shall vest ..." — Unit Titles Act 1972, s 45(5)(b).

B "Thereof" and similar archaisms

Lawyers who support the movement towards simpler drafting, given impetus by Ian McKay's paper at the 1981 Triennial Conference, favour the discontinuance of these forms. (In my view the expression "the same" used as a substitute for "it" or "them" is equally to be condemned.) But all these forms are still rife in practioners' letters, and many Judges, too, seem wedded to them, for they abound in decisions of Courts and Tribunals at all levels.

Happily, our legislative draftsmen set a good example in this respect. A single quotation may suffice:

"... may declare the land ... or any part *of it* to be open for mining" — Mining Act 1971, s 37(5). (Emphasis added.)

P G Haig.

Courts Administration and the Law

J B K Curran
Courts Manager

SHARYN Steel, in her article "Measuring Parliament's Output", published in the *Dominion* 4 April 1983, discusses the large volume of legislation (consolidated, amended or new) passing through Parliament year by year accompanied by an even larger number of Regulations giving effect to policy contained in the Acts. Quotes from the Minister of Justice, the Deputy Leader of the Opposition and others, point out the variety and complexity of the 185 Acts passed in 1982 which, added to the amount of legislation already in existence, totals approximately 800 Acts and almost 4,000 Regulations. As stated in the article, New Zealand's legislation is detailed and it often needs considerable *legal expertise* to decipher it. The point to be made here, which is conspicuous by its absence from the article referred to, is that it is not only lawyers who interpret the law but Court Officers too, who have a *significant role* to play in deciphering, with no little expertise, many of the complexities contained in this vast accumulation of law.