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Privy Council Appeals

Earlier this year, the Attorney-General indicated that consideration was being given to the abolition of the right of appeal to the Judicial Committee of the Privy Council. He indicated some of the considerations seen as relevant and invited contributions to the debate on the desirability of such a move. There has been surprisingly little response to that invitation. This could be misinterpreted by those proposing to make a change.

One important response came from the organised profession. The Council of the New Zealand Law Society announced that it was unanimously opposed to the abolition of appeals. Though there may be individual members who take a different view, it can be safely assumed that the Council's opinion represents that of the majority of practising lawyers.

We are not, of course, informed of the reasons for the Council's decision though we may speculate on the main grounds. Lawyers are accustomed to the notion of onus of proof. Those advocating change must establish either that there is dissatisfaction with the present arrangements or that a better system can be established. Neither has so far been demonstrated.

The membership of the House of Lords and the Judicial Committee is similar. Occasionally, a Judge of a superior Court within the Commonwealth will join the Committee, as Sir Garfield Barwick did when he was Chief Justice of the High Court of Australia, but most of the Committee's members are Law Lords whose normal duties involve them in sitting as the final Court of Appeal within the United Kingdom. Through the Judicial Committee we have access to the very best lawyers practising in a community almost 20 times our size. It is no disrespect to our own Judges to suggest that a final Court of Appeal consisting of those chosen as Lords of Appeal in Ordinary will almost certainly be more distinguished than one recruited from a smaller number of barristers.

There is also the advantage in the similarity of our legal systems. New Zealand received its constitution in 1853. It bears no resemblance to those drafted for Canada, Australia, India and Pakistan or those established in the final days of the Empire. Even those devised by New Zealand for its former overseas territories were not modelled on its own constitution. Neither the United Kingdom nor New Zealand has constitutional protections of the kind known in these written constitutions. We have no bill of rights or fundamental rights in the sense used in a written constitution. Instead, reliance is placed in both legal systems on the common law or on statutes which themselves are in no way protected from later amendment.

Members of the House of Lords can therefore be expected to move easily into their role as our final Appellate Court. They do not need instruction, as was formerly necessary, on the constitutional provisions peculiar to the country from which the appeal came. Nor can the Judicial Committee be seen as somehow lacking in knowledge of or unfamiliar with our customs and way of life.

It has been said that the continuance of the appeal right represents a form of subjugation, an acceptance of an inferior and historically earlier status. Certainly, some of the newer members of the Commonwealth saw the appeal provision in that light and others found the interpretations of the written constitutions out of touch with the expectations of their communities.

New Zealanders have rarely demonstrated their concern with form, rather than substance. It took us many years and a world war to adjust to the new notions of Commonwealth introduced by the Balfour Declaration of 1926 which was given legislative form in the Statute of Westminster in 1931. We have possessed legislative power to abolish appeals to the Privy Council for at least 60 years, but have not found it necessary or desirable to do so. The fact that we have the choice to continue to allow appeals to the Privy Council or to make better arrangements is the answer to those who suggest that we are in some way subordinate to another legal system.

It is sometimes said that an appeal to the Privy Council is a costly business. To the individual appellant this is undoubtedly true, but looked at from the point of view of New Zealand, it is a surprisingly inexpensive Court. Even if, as is assumed to be the case, a contribution is made to the salaries of the members of the Court, this is likely to be insignificant when compared with the cost of maintaining not only the members of any final Appellate Court substituted for it but also their accommodation and related services. Those who have visited the High Court building in Canberra will be able to make their own comparisons.

To our knowledge, no detailed study has been made of the contribution made by the Privy Council to our jurisprudence. That it is substantial is incontestable. Every law student is familiar with the landmark decisions of the Privy Council, whether it be in land law or administrative law, and every practitioner feels more comfortable if his proposition has the support of that august body.

Even the House of Lords has bowed to the authority and influence of the Privy Council. The wartime decision in *Duncan* v *Cammell, Laird & Co* [1942] AC 624 was finally overturned in favour of a narrower doctrine of crown "privilege", already accepted by the Privy Council.

The abolition of appeals to the Privy Council would not only remove that body from our hierarchy of Courts but also see the introduction of an entirely different doctrine of precedent. The established position of the Privy Council within our legal system as an independent final Appellate Court with access to the very best legal talents of a much more numerous community is, it would seem, at risk.

The case for change has not been made.

J F Northey
Professor of Law

High Court Appointment — Mr Justice Tompkins

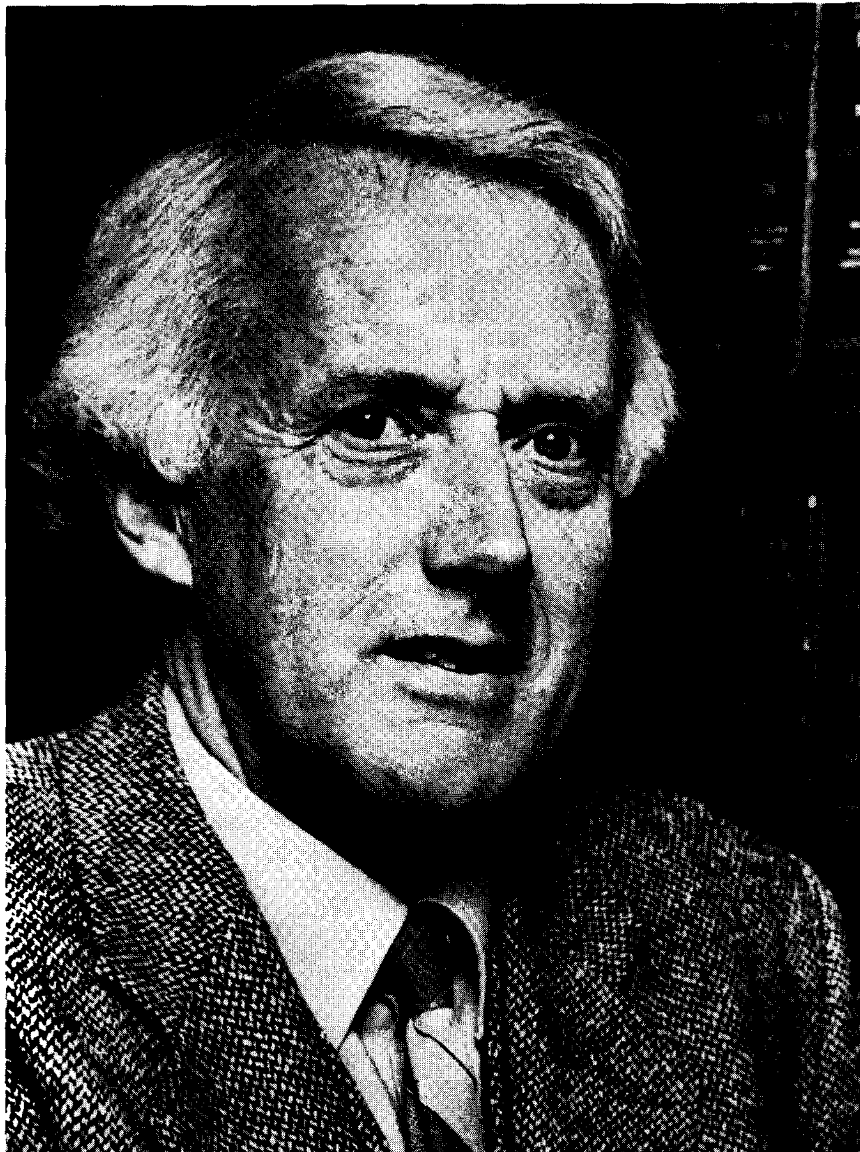
The appointment has been announced of Mr D L Tompkins QC to be a Judge of the High Court. He joins that select group of sons who have followed their fathers on to the Bench.

The new Judge is from Hamilton. He served as a member of the Council of the Hamilton District Law Society and was President of the Society in 1969 and 1970. He has been a Council member of the New Zealand Law Society and was Vice-President in 1979 and 1980. He has taken a significant part in matters concerning Lawasia, and is presently Chairman of the New Zealand Law Society's Lawasia Committee and a member of the Council of Lawasia.

Mr Tompkins has been Chancellor of the University of Waikato since 1981 and is a member of the Council of Legal Education under the Law Practitioners Act. He is also Chairman of the New Zealand Law Society Education Committee. Mr Tompkins is the President of the Outward Bound Trust of New Zealand.

The new judge is aged 53 and is married with two sons and one daughter. He was educated at King's College, Auckland and he graduated from Auckland University in 1952. He was for 17 years a partner in a Hamilton firm of barristers and solicitors, and commenced practice solely as a barrister in Hamilton in 1971. He was appointed a Queen's Counsel in 1974.

Mr Justice Tompkins will be located in Auckland.



Case and Comment

Matrimonial property and bankruptcy — a sequel

In my casenote on *Re Abbott* [1982] 3 All ER 181, which was published in [1983] NZLJ 2, I commented that the question at issue in that case — the effect of a spouse's subsequent bankruptcy on a matrimonial property settlement — had not yet come before the Courts in New Zealand. I was wrong. It had already done so, but in an unreported decision, the judgment in which has only recently been made available to me through the kindness of one of the counsel involved. The decision is that of Thorp J in *Whitehead v Whitehead* (High Court, Auckland, 12 October 1982, M No 1791/80).

The facts are simple. A matrimonial property settlement provided for payment to the wife of $60,000, half the estimated value of three properties owned by the husband, one of which was the matrimonial home. The husband became bankrupt approximately 16 months later, and a substantial deficit in his estate caused the Official Assignee to seek an order declaring the settlement void. He relied on s 47(1) of the Matrimonial Property Act 1976, the relevant portion of which is as follows:

> ...any agreement, disposition, or other transaction between the husband and the wife with respect to their matrimonial property and intended to defeat creditors of either spouse shall be void against those creditors and the Official Assignee, and any such agreement, disposition, or other transaction which is not so intended but which has the effect of defeating such creditors shall be void against such creditors and the Official Assignee during the period of two years after its making.

There was no evidence of any intention to defeat creditors and the Official Assignee relied solely on the second ground in subs (1), ie, that the settlement had the effect of defeating creditors. Thorp J decided that the settlement was void, a decision reached solely on the basis of the section, and the judgment contains a useful discussion of its interpretation.

The first question of interpretation answered was that the correct time for judging the effect of a settlement on creditors is not when it is made, but at the time an application to the Court to determine its validity is made. The second question was also one of time. In this case, the correct time for determining who was a creditor affected by the settlement. Again, the decision was that the matter had to be looked at when the application was made, and not at the time of the settlement.

The third point argued was whether, in order to be void, the settlement had to be the exclusive or dominant cause of loss to the creditors, or whether it was sufficient for it to be merely a contributing factor. It was decided that it need not be the sole or even a major cause, but that it must be at least a significant factor and that the onus of proving that it is rests on the Official Assignee. The final question was whether the settlement had to make the debt completely irrecoverable. The decision on this point was that a settlement could still be void even though there was not a total loss to creditors.

Two final points which may assist in placing this decision in context. Firstly, if the settlement is solely of the matrimonial home or of a share in the matrimonial home, s 47 will not necessarily apply. It will only do so if the amount of the settlement is more than the "protected interest" which s 20 gives to a spouse in the event of his or her partner's bankruptcy, a point made clear by Hardie Boys J in his judgment in *Walsh v Powell* [1982] MPC 180 at 182. Secondly, the question of the effect of the Joint Family Homes Act 1964 was not argued in this case and, if applicable, could also effect the outcome of a contest between a matrimonial property settlement and the Official Assignee.

Johanna Vroegop

Powers of constables and traffic officers — Transport Act 1962, ss 66, 68B

Two recent cases, *Hohaia (Police) v Roper* (unreported, High Court, Wellington, 23 Feb 1983 M534/82 and *Maxwell v Police* (unreported, High Court, Masterton, 22 June 1983 M3/83) provide considered and specific interpretations of the effect and extent of powers of constables and traffic officers, pursuant to ss 66 and 68B of the Transport Act 1962. The judgments, whilst necessarily dealing with different fact situations and interpreting the sections from different perspectives are, nevertheless, complementary. Not only are they a guide to proper use of these powers, but they also neatly (but presumably not intentionally) resolve a current legislative dilemma besetting the Government.

Section 66 of the Transport Act 1962 states:

> 66. *On demand by constable or traffic officer, user of vehicle to stop and give name and address* — (1) The user of a vehicle shall stop at the request or signal of a constable or traffic officer in uniform or of a traffic officer who is wearing a cap, hat, or helmet which identifies him as a traffic officer, and on demand give him his name and address and

state whether or not he is the owner of the vehicle, and, if he is not the owner of the vehicle, shall also give the name and address of the owner.

(2) Any person commits an offence who fails to comply with any provision of subsection (1) of this section, and may be arrested by any constable without warrant.

Section 68B of the Transport Act 1962 states:

68B. *Powers of constables and traffic officers* — (1) Every constable or traffic officer, if for the time being in uniform or in possession of any warrant or other evidence of his authority as a constable or traffic officer, is hereby authorised to enforce the provisions of this Act and the Road User Charges Act 1977 and any regulations or bylaws for the time being in force under either of those Acts, and in particular may at any time —

(a) Direct any person being in charge of or in any vehicle, whether on a road or not, or any person on any road to furnish his name and address and give any other particulars required as to his identity and give such information as is within his knowledge and as may lead to the identification of the driver or person in charge of any vehicle:

(b) Inspect, test, and examine the brakes or any other part of any vehicle on any road or any equipment thereof or any licence or document resembling a licence displayed thereon:

(c) If the constable or traffic officer believes on reasonable grounds that a vehicle on a road causes an obstruction in the road or to any vehicle entrance to any property or that the removal of the vehicle is desirable in the interests of road safety or for the convenience or in the interests of the public —

(i) Enter, or authorise another person to enter, the vehicle for the purpose of moving it or preparing it for movement; and

(ii) Move, or authorise another person to move, the vehicle to any place of safety.

(d) Direct the driver or person in charge of any vehicle on any road to remove the vehicle from the road or any specified part of any road, if the constable or traffic officer believes on reasonable grounds that it causes an obstruction in the road or to any vehicle entrance to any property or its removal is desirable in the interests of road safety or for the convenience or in the interests of the public.

(1A) In paragraphs (c) and (d) of subsection (1) of this section, the term "road" includes any land vested in or under the control of the Crown or any local authority.

(2) Any such constable or traffic officer, if he believes on reasonable grounds that any vehicle does not comply with the provisions of any regulations for the time being in force under this Act, may, by notice in writing given to the driver or owner of the vehicle, direct that the vehicle be not used on any road, and that notice shall continue in force until the vehicle has been made to comply with the provisions of any such regulations as aforesaid:

Provided that any such notice may be subject to a condition to the effect that the vehicle may continue to be used to reach any specified place for repair or may continue to be used for a given time or under limitations as to speed or route or otherwise.

(2A) Any such constable or traffic officer, if he believes on reasonable grounds that any vehicle on any road is not in a safe condition to use the road, may affix or cause to be affixed to the vehicle a notice to that effect in a form prescribed by the Minister by notice in the *Gazette* and may give to the driver or owner of the vehicle a notice in a form prescribed by the Minister by notice in the *Gazette* directing that the vehicle shall be removed from the road and shall not be used on any road until —

(a) It has been inspected by an officer of the Department authorised by the Secretary; and

(b) The officer is satisfied that the vehicle is in a safe condition for use on the road; and

(c) A new certificate of fitness or permit or a new warrant of fitness, as the case may require, has been issued for the vehicle by an officer of the Department and is displayed on that vehicle:

Provided that any such notice may be subject to a condition to the effect that the vehicle may continue to be used on a road to reach any specified place for repair.

(2B) Where any direction is given under subsection (2) of this section, the owner of the vehicle shall not use that vehicle on a road until a new certificate of fitness or permit or a new warrant of fitness, as the case may require, has been obtained for and is displayed on that vehicle.

(2C) Every person commits an offence who removes, obscures, or renders indistinguishable a notice affixed to a vehicle pursuant to subsection (2A) of this section, unless a new certificate of fitness or permit or warrant of fitness, as the case may require, has been obtained for that vehicle.

(3) Every person to whom any direction is given pursuant to this section shall comply with that direction, and no person shall do any act which is for the time being forbidden pursuant to this section:

Provided that no person shall be deemed to have committed a breach of this subsection in so far as it relates to a prohibition under subsection (2) or subsection (2A) of this section, unless the Court is satisfied that the constable or traffic officer had reasonable grounds for believing that in all the circumstances of the case the prohibition was necessary in the interests of the safety of the driver or person in charge of the vehicle or of any other person or of the public.

(4) Any person who is authorised by a constable or traffic officer to —

(a) Enter a vehicle for the purpose of moving it or preparing it for movement; or

(b) Move a vehicle to a place of safety — may do so, but shall do everything reasonably necessary to ensure that the vehicle is not damaged in the course thereof.

(5) Any person who —

(a) Has possession of a vehicle as a result of its being moved under subsection (1)(c) of this section; and

(b) When requested at any reasonable time to do so by a person who produces satisfactory evidence to the effect that he was lawfully entitled to possession of the vehicle immediately before it was moved, fails to deliver possession of the vehicle to that person forthwith — commits an offence against this Act, and is liable to a fine not exceeding $1,000.

The facts in *Roper* were as follows. Two constables on mobile patrol saw a car being driven on the incorrect side of

the road. It was not possible to stop the car at that time. Shortly thereafter the same car was seen again and it was generally being erratically driven. This time the patrol stopped the car. R, as driver, was asked for her name and address. She complied. She was told by a constable why she had been stopped *and* that *she was to remain stopped* whilst the constable inspected the vehicle. Three "bald" tyres were discovered on R's vehicle and she was instructed to *"remain where she was until Ministry of Transport assistance was obtained to write the vehicle off the road"* (see s 68B(2) esp).

R became agitated and a verbal altercation occurred between her and the constable. The upshot was that despite a further warning not to do so, R drove off. The constable's right arm had been held in the "stop" position in front of the windscreen and the moving vehicle struck it. No injury resulted. R was pursued by the patrol and despite repeated requests by the constables, failed to stop her vehicle again until in the driveway at her address. She was arrested, not without difficulty, pursuant to the provisions of s 66(1).

She subsequently appeared before the District Court on a variety of charges arising from the incident. In relation to the alleged breach of s 66(1)

> The District Judge determined that it had been proved beyond reasonable doubt that the respondent had carelessly used a motor vehicle in Bowen Street and that the vehicle had been used with a tyre having less than the required tread. He accepted, however, that once the respondent had been stopped pursuant to s 66 of the Transport Act 1962 and had given her name, address and other particulars required by the section, then there was no further power for the constables to require her to remain.
>
> The District Judge held that all their actions subsequent to the respondent supplying those particulars were unlawful and that s 68B of the Act did not assist the Police. He accordingly dismissed the two informations relating to failing to stop and resisting a constable on the basis that the Police had wrongly exercised their powers. He held, further, that the whole matter had got out of hand and also out of proportion to the offences committed. He accordingly decided justice would be done by dismissing the remaining two informations.

The Police appealed. Three questions were asked in the case stated. Two related to procedural matters and the third was stated thus:

> When a police constable has completed his action under s 66 of the Transport Act 1962 does s 68B (2) of that Act give a constable power to require the driver of a vehicle to which the subsection applies to remain where he or she is, along with the vehicle, until a traffic officer can be brought to the scene to issue the written notice required by the subsection?

His Honour, Quilliam J, dealt with the matter in the following way. He said:

> There are at least two separate obligations cast upon the user of a motor vehicle by [s 66]. The first is to stop at the request of a constable or traffic officer. The respondent complied with that obligation. The second is, on demand, to give his name and address and certain other particulars, and it would seem that that obligation creates several different offences. The respondent, however, complied also with all her obligations in that regard. The approach taken by the District Judge was that, once those two obligations had been complied with, then the duty to stop had been exhausted and there was no power for the constable to make any further demands on the respondent.
>
> There is, I think, a danger of reading the obligation to stop created by s 66(1) as an obligation to stop solely for the purpose of compliance with a request for name, address and other particulars. I am unable to see that it is to be limited in this way. Section 65 of the Transport Act creates an obligation to stop in the special circumstance of an accident having occurred and there have been several decisions concerning the meaning to be given to the word "stop" in that context. There is also the obligation under s 68C to stop when directed to do so for the purpose of regulating traffic. However, *the only general power to require a driver to stop is that contained in s 66(1). It is plain from the general scheme of the Act that the power given by that subsection is meant to apply in a much broader way than simply to enable the name and address to be obtained.*
>
> (emphasis added)

His Honour then referred to the provisions in s 68B(1) and (2) and observed that

> Nowhere in s 68B is there any provision expressly authorising a constable or traffic officer to stop a driver for the purpose of exercising any of the powers given by the section. It cannot, of course, have been contemplated by Parliament that those powers could only be exercised at a time when the driver either happened to be stationary or had stopped voluntarily. Plainly, for the purpose of "enforcing the provisions of this Act", the constable or traffic officer may exercise the power given by s 66(1) to stop the driver and, moreover, he may do so "at any time". I can see nothing in the Act to say that a constable or traffic officer may stop a driver for one purpose only. If, having stopped him for a particular reason, the constable or traffic officer then sees other matters which require his attention, I cannot accept that he is obliged to allow them to pass without investigation and to wait until the driver has moved off and then stop him again.

As stated by His Honour, s 65(1) of the Act imposes an obligation on drivers to stop their vehicles after being involved in motor accidents. In *Houten v Police* [1971] NZLR 903, Richmond J considered the meaning of "stop" for the purposes of s 65(1) and concluded that it meant "to stop and remain stopped". This approach obviously attracted Quilliam J in *Roper* for he said:

> It is, I consider, proper to read s 66(1) in a similar way so that the obligation imposed is to stop and remain stopped for such a period as may be reasonable to enable the constable or traffic officer to carry out the duties cast upon him by the Act. This will be a matter depending on the circumstances of each case. I do not suggest that a driver having been stopped for one purpose must then remain while an exhaustive search is made in order to find whether perhaps there has been some breach of the Act or the Regulations. Where, however, the attention of the driver is drawn with reasonable promptitude to some further matter which has become apparent, then I think the obligation to remain stopped continues. If, for example, a driver had been stopped and had given the particulars required of him and, in the process, had given the constable or traffic officer reasonable cause to believe that he had recently consumed alcohol, the obligation to remain would continue in order to enable a

> breath test to be administered. It could hardly be suggested that the reason for stopping had run its course and that the driver must be allowed to continue on his way and then be stopped again.

Consistent with these comments, His Honour ultimately stated his answer to the particular question in the case stated in the following terms:

> A combination of the power to stop contained in s 66(1) of the Transport Act and of the powers contained in s 68B enable a constable to require the driver of a vehicle to remain where he or she is for such period as may be reasonable to enable the constable to carry out the duties cast upon him by s 68B, notwithstanding that the driver may have complied with a request to supply the particulars referred to in s 66(1).

Consequently the appeal was allowed.

The facts in *Maxwell* were as follows. M was driving his motorcar and was being followed by police in a patrol car. The police decided to stop M because of his speed. He was called upon to stop by means of the public-address system but failed to respond. M later denied hearing the calls over the public-address system but said he had seen the "flashing" lights on the patrol car, and had seen a passenger in the patrol car flashing a torch into his, M's, face. The Judge disbelieved his denial as to hearing the calls to stop. M eventually stopped his motorcar in a driveway at his intended destination. He was subsequently charged with and convicted of an offence under s 66, that is, being the driver of a motorcar, failed to stop when signalled to do so by a constable in uniform. M appealed against his conviction. A principal ground of appeal was that "the learned Judge erred in law in holding that a constable has an absolute and uncircumscribed right in law to stop a vehicle under s 66".

Before His Honour O'Regan J, counsel submitted that on the ordinary reading of s 66 the powers conferred upon constables and traffic officers by that section are exercisable only in relation to the administration of the Transport Act 1962. He cited several authorities including *Roper*, supra. His Honour pointed out, however, that in *Roper*

> the powers the constable sought to exercise were powers conferred by other sections of the Transport Act and the learned Judge held that such were lawfully exercised. (The case) *was not concerned with the exercise of other powers of police constables conferred by other statutes or at common law.* (Emphasis added).
>
> I think it profitable to contrast s 66 with s 68B of the Act. The latter is a section devoted to the definition of express powers and authorities of constables and traffic officers "if for the time being in uniform or in possession of any warrant or other evidence of his authority as a constable or traffic officer". Section 66, on the other hand is concerned with obligations imposed by law on users of motor vehicles. It is true that the section contains inferential as opposed to express powers. Obviously "if the user of a vehicle is obliged to stop at the request or signal of a constable or traffic officer in uniform..." and give the prescribed information on demand then such a constable or traffic officer must needs have the authority to give such a signal and to make such a request and such demand. *The words of the section give no warrant whatsoever for construing it or any part of it in a way to impose any prerequisites* (other than those as to the means of identification prescribed) *to or limitations upon the exercise of those powers.* (Emphasis added).

M's appeal failed.

Clearly then, the *Maxwell* and *Roper* combination indicates wide authority in police constables and traffic officers to effectively enforce the provisions of the Transport Act 1962 by means of stopping vehicles on roads for any reason whatsoever. *Roper* makes it clear that once stopped, a driver and vehicle must remain stopped so as to enable the constable or traffic officer to exercise their powers under s 68B, or otherwise enforce the provisions of the Act.

What is equally clear however, is, that each case must be dealt with on its own peculiar facts. What is or is not a reasonable period to require a driver and vehicle to remain stopped is to be assessed according to each unique set of circumstances.

Equally important are the implicit limitations on the use of s 66. Whilst neither *Roper* nor *Maxwell* "spell it out", it is submitted that it would be entirely inappropriate to invoke the power to stop under s 66 or the power to inspect, etc under s 68B for reasons unrelated to enforcement of the provisions of the Transport Act 1962: these are specific powers in particular legislation, intended to facilitate enforcement of only that legislation.

Beyond all of these things, however, the cumulative effect of the two cases in one particular respect is of great significance, that is, random stopping of motorists to enforce the breath-alcohol and blood-alcohol provisions of the Act. Over recent times vigorous public debate has been heard as to whether Parliament should or should not legislate for "random stopping".

It was suspected, suggested, argued — and rejected — that random stopping powers already existed. Now, their Honours appear to have (conclusively?) resolved the matter.

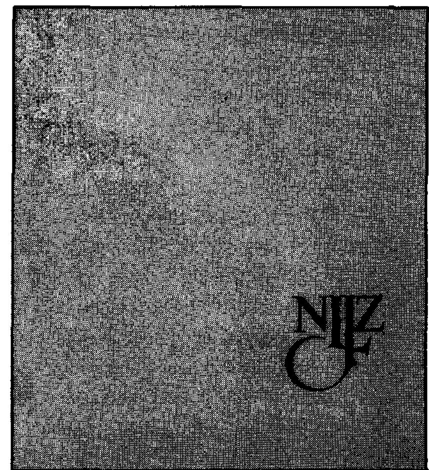
In *Maxwell*, O'Regan J is utterly unambiguous in his declaration that the power to stop under s 66 is completely unfettered.

This stand underlines Quilliam J's approach in *Roper*, especially in the light of the particular and no doubt deliberate example His Honour gave as a reason to require a motorist to remain stopped: he referred, as earlier stated, to commencement of the breath-alcohol procedure, albeit suspected intoxication of the driver was not the original reason for stopping the vehicle pursuant to s 66.

Given some recent situations involving exchanges of alternative views between Judges and politicians, one might justifiably remain a little doubtful as to which interpretation of the true extent of existing enforcement powers under the Transport Act 1962 is to be accepted — judicial or political. But, if one would follow *true* constitutional and legal precept, then, it is submitted that their Honours' views must carry the day.

Parliament makes the law and, in creating ss 66 and 68B it has done so. The Judges must interpret and apply Parliament's laws and, in *Roper* and *Maxwell*, their Honours have done just that.

Clearly. Precisely. They have had the last word. Or have they?



Mining and Land: A conflict over use 1858-1953

Dr Terry Hearn

In this article the author, who is a Lecturer in Geography at the University of Otago, looks at the historical social and economic background to the many amendments to the Mining Act during this century, and to the legal and political implications of changes in public attitudes to conservation and sources of energy.

Economic growth in nineteenth century New Zealand was based upon the transformation of natural resources — land, forests, minerals — into the food and industrial raw material requirements for a rapidly expanding British economy. For a new society — and one as preoccupied with material progress as that established in New Zealand — the goal of maximum production could be attained most readily, it was widely supposed, by allowing the untrammelled exploitation of those resources and the unfettered exercise of private initiative and enterprise. Much of the relevant legislation, and mining law in particular, was thus based upon the Benthamite principle that the "invisible hand" of providence, the unrestricted private pursuit of profit, would ensure the general good and the community's prosperity and progress.

For much of the nineteenth century the *laissez-faire* assumptions on which resource-related legislation was based went largely unchallenged. In 1871 a Dunedin journal did argue that it was the State's responsibility not only to promote economic development but also to ensure the wise use of resources[1]. The notion that "private interest ... [was] sufficient to ensure economical use of material" was challenged, the rapid clearance of New Zealand's indigenous forest cover being cited as "a standing refutation of such a theory" and an instance in which "Individual immediate interest [had] overmastered all sense of social responsibility, if it ever existed".[2] The debate in Parliament in 1874, however, on the New Zealand Forests Bill, a measure which proposed the reservation of a small proportion of the colony's forest cover as State forests, revealed only limited sympathy for restraint in resource use or for conservation.[3] The Bill's provisions were described as constituting an infringement of the rights of individuals, Government having, it was suggested, "altogether too great a desire to become paternal".[4] The wisdom of Government, opponents of the measure, insisted, was not superior to the self-interest of the people, and that self-interest would determine whether and when conservation measures were necessary. Underlying the rejection of the Bill was a conviction that economic growth required greater not less resource exploitation and that Parliament should seek to create the appropriate institutional framework.

Similar arguments were voiced with respect to the mining of agricultural land, the *Evening Star* declaring in 1871 that the community as a whole possessed an interest in the preservation of the soil resource and that Parliament should devise some means whereby soil once mined could be made available for settlement and cultivation.[5] Opposition from miners to any measure which promised to impede their industry, however, was fierce. The policy embodied in nineteenth Century mining law (beginning with The Gold Fields Act 1858) thus reflected the community consensus in favour of immediate, untrammelled exploitation. Mining was viewed generally as a constructive industry in which the miner compelled the earth to yield its treasure for the benefit of the community. Indeed throughout the nineteenth century Parliament manifested a willingness to facilitate the industry's operations by authorising the expropriation of private property and property rights where they obstructed mining enterprise.[6]

Gold Dredging and Agricultural Land

The rapid expansion of the gold dredging industry in Otago and Southland, where the number of working dredges rose from 69 in 1895 to 151 in 1902, stimulated a wide ranging debate over the policy of mining law as it related to agricultural land. To the opponents of the mining of such land — led by T Mackenzie (MHR Waikouaiti) and J Allen (MHR Bruce) on behalf of settlers in the districts concerned — the recovery of its mineral wealth represented an end use of the resource. Its allocation to the industry was thus permanent and irreversible and the opportunity cost — agricultural production in perpetuity — therefore excessive.

They also insisted that much of the industry's activities represented "merely a ruinous and wasteful system of gambling", little effort being made to assess the auriferous value of land in any systematic fashion or to identify the relative economic costs and benefits of alternative uses.[7] It thus followed that the State should seek to preserve "the staple productive resources of the country" by, if necessary, withdrawing land from the operation of mining law or, in the case of freehold land, expropriating it for resale under conditions which prohibited mining.[8]

The mining industry responded to its critics by insisting that only land rich in gold would be mined, that the area likely to be affected would consitute only an insignificant proportion of New Zealand's land resource, and that any loss would be offset by rising land productivity elsewhere.[9] Further, the industry argued that dredging improved land that was otherwise swampy, cold and sour[10] and that any mandatory

restoration conditions would render mining unprofitable.[11] Such was the vigour with which the industry pursued that argument that the Minister of Lands in 1905 conceded that any attempt to limit dredging or sluicing "would be disastrous to the industry".[12]

For its part the Government, at least up to 1908, minimised both the loss of land by mining and the social and opportunity costs involved while insisting that since most of that affected was freehold to place restrictions on its sale or use or to cancel mining rights granted over Crown land would establish substantial claims for compensation. Seddon (Premier 1893-1906) thus insisted that "to attempt to prevent ... (owners in fee simple) selling for mining purposes would bring a hornets' nest about our ears".[13] Those owners, the Government maintained, were best able to judge the most appropriate and profitable manner of the use of their land.[14]

And profit there was in the disposal of land for mining. Among many landowners in the productive Waikaka Valley who were to do likewise, James and William Paterson in 1899 sold the mining rights over 240 acres for £20 per acre, 10 percent of the gold obtained, and 1,200 fully paid up £1 shares in the capital of the company to be formed to dredge the land.[15] Certainly many landowners opposed the expropriation of their land on the grounds, as Seddon had noted, of interference with the rights of property. The greater the prospect of an immediate capital gain the more vigorously were those rights defended. Landowners argued, too, that any restriction imposed on their right to sell or mine would amount to a "tax" intended to conserve what the community conceived to be its interest in the conservation of soil.

The debate in fact revolved around a central issue, namely, whether in the interest of resource conservation and sustained yield the Parliament should impose social controls on the private use of New Zealand's land resource or whether the land market and private interest should be allowed to effect its allocation among competing users and thereby ensure its most productive utilisation. Those advocating controls insisted that a free land market did not exist since mining law assured the industry of access to land and indeed accorded primacy to its requirements. The claim that the market constituted an efficient allocative mechanism was also disputed on the grounds that it emphasised immediate or short-term private profits and benefits while discounting both social and opportunity costs, a careful assessment of the latter in particular being essential if the market were to operate effectively. Private benefit was not, therefore, necessarily synonymous with social gain so that State intervention was essential to protect wider public interests. The allocation, use, and management of the land resource were matters too important to be left to the operation of market forces. The opponents of controls insisted upon exactly the converse.

The Mining Amendment Act 1910

It was not until 1908, by which time the mining industry's accelerating contraction was apparent, that Parliament considered for inclusion in mining law a clause to provide that "Wardens shall have power when granting any license, either in respect of Crown or private lands, to impose such conditions, terms or reservations as shall tend to obviate the destruction of the surface of pastoral or agricultural land the subject of the license". Although a modest concession to the arguments of the resource conservationists, that clause was regarded by the Otago and Southland Gold Mining Employers' Union as "far too drastic".[16] The Bill, containing the clause was dropped, as was a similar measure in 1909.

The destruction by dredging of orchard lands in Central Otago in 1910 resulted in its inclusion as s 10 of the Mining Amendment Act 1910. Being prospective and discretionary in application and lacking in both clear directions to the administering authority and enforcement and penalty provisions, the section proved ineffective. Its vague, hesitant character clearly reflected Parliament's recognition of a prevailing community consensus opposing a further extension of State controls over private property or the activities of private enterprise. It also reflected the determined opposition of the Mines Department to any measure which promised to emasculate the mining industry.

The Mining Amendment Act 1919

The mining of agricultural land was considered anew by the National Efficiency Board, a body established in 1916 under s 3 of the War Regulations Amendment Act 1916 to undertake inquiries "with a view to enable the Government to make provision for the organisation and development of industries, for the enforcement of public and private economy, and generally for increasing national efficiency...".[17] In a report to the Board, the Mines Department conceded that considerable areas of largely freehold agricultural land had been destroyed.[18] Further, the Rivers Commission of 1919-1920, established to investigate problems of silting and flooding with respect to rivers in Canterbury, Otago and Southland, cited the mining of riverine lands and the unrestrained discharge of mining debris as a major contributor in the case of the Clutha, Taieri and Maerewhenua Rivers. The Commission also identified in detail the damage which such discharge had inflicted and estimated the costs of remedial works for the three watercourses at £263,000.[19]

The outcome of these investigations was s 12 of the Mining Amendment Act 1919. Section 12(1) required the Warden to whom an application for a mining licence — but for dredging purposes only — had been made to submit the application to the local Commissioner of Crown Lands for his assessment of the agricultural and pastoral value of the land concerned. Where the land, "whether Crown land or not", was considered suitable for such purposes, s 12(2) required the Warden to impose such terms, conditions, and reservations as were necessary "to prevent, so far as practicable, the destruction of the surface of the land or the rendering of it unfit for pastoral or agricultural purposes". The section did not provide for the reservation of such land or its withdrawal from the operation of mining law while it remained prospective in application. Further, since those mining land held in fee simple were not required to hold mining licences, s 12 clearly could be and in practice was readily circumvented. It was incorporated, nevertheless, unaltered into the Mining Act 1926.

The Mining Amendment Act 1934

A considerable resurgence of mining activity during the 1930s was complemented by efforts of the Government to encourage exploration and investment in the industry. The Mining Amendment Act 1934 was thus intended to encourage the expansion of the industry. While it was welcomed by the mining industry, to landowners the measure indicated a clear preference on the part of the State for "problematical" mining over permanent land settlement and sustained primary production.

Of particular concern, was a section

enacted as a subsection to s 218 of the Mining Act 1926. It provided that no terms, conditions, or reservations entered upon any mining licence to protect agricultural land "shall be of such a nature that the cost of complying with them is likely to be greater than the improved value of the land affected for *agricultural or pastoral purposes* at the date on which the application for the mining privilege was filed in the Warden's Court". Since there was little land, at least in Central Otago, of a value that would even approach the cost of restoration after mining the effect of the provision was to nullify s 218. Mining companies soon made it clear that they intended to utilise the provision to the full. The only concession made with respect to the protection of agricultural land was an extension of s 218 to embrace applications for sluicing as well as dredging purposes.

After the passage of the Mining Amendment Act 1919 applications for dredging licences and, after the enactment of the Mining Amendment Act 1934, for both dredging and sluicing licences, were referred to the Commissioner of Crown Lands in the district concerned. On the basis of his investigation the Commissioner could lodge an objection to the granting of a mining licence application. But the effect of an objection was to require a Warden to impose conditions intended "to prevent, *so far as practicable*, the destruction of the surface of the land" rather than to decline to recommend the granting of an application by the Minister of Mines. Any such conditions could be met, of course, by citing s 22(b) of the Mining Amendment Act 1934, by the mining company purchasing the land concerned, or by the company entering into an agreement to mine with the owner. All three courses of action were followed. Indeed, the enactment of s 22(b) owed much to the mining companies' claims that compensation paid for land itself constituted a significant developmental cost without the additional cost of restoring land.

The Mining Amendment Act 1941

The mining industry was thus subjected to further scrutiny, a survey of the impact of dredging being carried out in 1941 by a committee of officers of the Lands, Forestry, and Mines Departments. Its conclusions were, first, that only from five to ten percent of the total area of land then being dredged or likely to be dredged was in any way suitable for agricultural or pastoral purposes; second, that the productive value for farming purposes of that area was estimated to be £2 per acre whereas the comparable figure for gold mining purposes was put at between £800 and £1,200 per acre; and, third, that in most cases the stacker type of dredge had to be used which, together with the fact that in its original state the land possessed only a very thin layer of soil, made levelling and resoiling of the tailings uneconomical and indeed impracticable.

For those reasons the Government decided that "the national interests ... [were] best served by permitting the land to be dredged for its gold content". An area of 7,070 acres then held under 11 dredging claim licences was valued for farming purposes at £16,800 whereas the value of the gold recoverable by mining was estimated at £16,750,000.[20]

A policy was suggested, however, with respect to *future* operations. The major elements of that policy were, first, that dredging of land suitable for agricultural or pastoral purposes was not to be permitted except with the prior approval of the Minister of Lands; second, where in the opinion of the Forestry Department, tree-planting could be undertaken with a reasonable prospect of success appropriate conditions were to be entered upon the licence; third, that where levelling, resoiling and regrassing were possible, again appropriate conditions were to be entered; and, fourth, where resoiling and tree-planting were impracticable a levy of £7.10s per acre of land was to be imposed on the holders of the dredging claims other than those sited in riverbeds. Such moneys were to be applied in improving other land in the vicinity of the claims. Subsequently the mining industry was informed that the Government had decided to make resoiling of "good or potentially good farming land" a condition of all licences "even if compliance therewith would render dredging operations uneconomical".[21] Such a provision had been included in mining leases issued in Victoria (Australia) after 1906 while in 1909 the Victorian Government had instructed the Department of Mines not to issue leases over either Crown or private land the value of which exceeded £3 per acre.

Section 16 of the Mining Amendment Act 1941 did not embody all elements of that suggested policy. It did provide, however, that in the case of any licence *to be* issued or renewed for *dredging* purposes, whether over Crown or private lands, the licensee was required to pay the State £7.10s for each acre dredged. There were exemptions, the levy not being payable if the licensee, "to the satisfaction of the Commissioner of Crown Lands", rendered the land "fit for agricultural or pastoral purposes". Further, payment was not required in respect of land which in the opinion of the Minister of Mines was "totally unfit for agricultural, pastoral, or afforestation purposes" or which "will not be injuriously affected by dredging operations".

The section thus represented an effort by Parliament to recover some of the social costs of mining activities and to provide an indirect financial incentive to miners to restore land. "Restoration" remained inadequately defined, however, while the committee's suggestion that dredging of land suitable for agricultural or pastoral purposes be not permitted except with the prior approval of the Minister of Lands had not been incorporated into the measure. To the extent that the Act proposed indirect financial incentives rather than direct regulatory controls it constituted a relatively weak form of intervention. It was, moreover, inexpensive to administer, s 16(1) simply requiring mining licensees each quarter to furnish to the Department of Mines a statement of the area dredged and the amount of levy therefore payable. It must also be acknowledged, however, that the Mining Amendment Act 1941 did reflect an acknowledgement by Parliament of the impact and social costs of mining.

The Mining Amendment Act 1941 was part of a larger effort to deal with the causes and consequences of the accelerated erosion of much of the South Island high country and in particular the implications for the development of the country's hydro-electric resources now required by a rapidly industrialising economy. Thus the Minister of Mines in 1948 observed that "many considerations in the national interest, such as the destruction of land of potential value for agricultural or pastoral use, river control, soil erosion, and the development of hydro-electric schemes, which were of slight concern in the past must now restrict the field available for mining".[22]

Section 10 of the Mining Amendment Act 1953 thus required the submission of all applications for dredging and sluicing claims in respect of both private and Crown Lands to the local Commissioner of Crown Lands and Catchment Board. The former was required to report on the suitability of the land concerned for agricultural purposes and the latter to assess whether any grant would conflict with the purposes of the Soil Conservation and Rivers Control Act 1941. Even if neither the Commissioner of Crown Lands nor the Catchment Board opposed

any grant the Warden was empowered to issue a licence subject to terms and conditions intended to prevent the destruction of land. As in the case of all previous legislation the Act's provisions were prospective and did not apply to land owned in fee simple without any reservation of the minerals to the Crown and for which a mining licence was not required.

The measure did further, however, the transfer of responsibility for the administration of the law relating to prime land from the Mines Department and Warden's Court to specialised institutions with statutory obligations in respect of erosion, river control and flood prevention. Mining thus became one of a number of productive uses to which the country's resources could be put, its demands and impact now to be assessed and evaluated with respect to other potential uses.

Conclusion

By 1953 the permissive-promotional character of nineteenth century mining law had been modified considerably. The restrictions imposed, however, owed less to the arguments of the resource conservationists than to a growing public appreciation of the social costs of untrammelled mining enterprise, new and rapidly increasing energy demands, and to the dwindling economic significance of the mining industry. Past policies in fact were still being justified in terms of "the great contribution that goldmining... made to the early economic development of New Zealand. ..."[23] Ironically, the imposition of restrictions on the industry's use of land (and water) were justified in the interests of the most efficient and productive utilisation of the country's resources, and therefore its prosperity, the very arguments once advanced in support of a permissive mining law.

1 *Evening Star* 22 July 1871
2 Ibid 11 March 1874.
3 See G Wynn, "Conservation and Society in Late Nineteenth Century New Zealand", *New Zealand Journal of History* 11, 2 (October 1977), pp 124-136.
4 *New Zealand Parliamentary Debates,* 16, 1874, p 356.
5 *Evening Star* 30 April 1871.
6 See TJ Hearn, "Riparian Rights and Sludge Channels: A Water Use Conflict in New Zealand, 1869-1921", *New Zealand Geographer* 38, 2 (October 1982) pp 47-55.
7 *Tuapeka Times* 29 September 1906.
8 *Otago Witness* 17 June 1903, *Evening Star* 17 April 1903, and *New Zealand Parliamentary Debates* 133, 1905, p 58.
9 *Otago Daily Times* 21 and 22 March 1905.
10 *Taieri Advocate* 5 August 1905.
11 *Mataura Ensign* 25 March 1905.
12 *New Zealand Parliamentary Debates* 137, 1906 pp 806-807.
13 *Otago Witness* 17 June 1903.
14 Ibid and also *New Zealand Parliamentary Debates* 1905, pp 615-616.
15 Defunct Company File 517, Hocken Library.
16 *Alexandra Herald* 9 December 1908.
17 *Appendices to the Journals of House of Representatives* H43, 1917, 17.
18 National Archives Mines Department File M12/123.
19 *Appendices to the Journals of the House of Representatives* D6, D6B, D6D, 1920.
20 Ibid C2, 1941, 3.
21 Ibid 1.
22 Ibid C2, 1948, 2.
23 Ibid C2, 1950, 3.

Scale of Fees

J C LaHatte

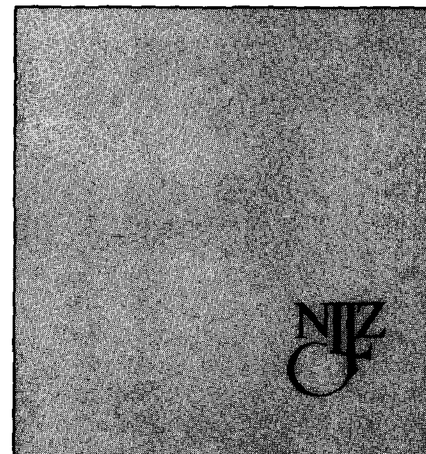
This contribution from a Taumarunui practitioner develops a slightly different approach to the issues raised earlier [1983] NZLJ 137 and [1982] NZLJ 215, by Mr Sorley of Stratford on the subject of the scale of charges for conveyancing transactions and associated professional work.

I read with some interest Mr Sorley's note in the May issue of the *Law Journal.* From what I can gather the scale fees are soon to be history but in addition the professional monopoly on conveyancing is also now at risk. This is a far more serious problem than removal of the scales. From what I can gather the Consumers Institute has decided not only that solicitors' scale fees are evil but that our monopoly on conveyancing is just as sinful. They base this on the argument that there should be more competition in the area of conveyancing.

In addition there appears to be a strong feeling among some Government members of Parliament against the monopoly. In view of the fact that professional skills are involved in conveyancing and surgery I await eagerly for a call from Consumers Institute for do-it-yourself appendix removal kits or perhaps design-your-own bridge kits.

What I believe the profession is facing is a major attack from a relatively small pressure group. The Law Society in England have survived such an attack but have also there lost scale fee. I agree with Mr Sorley about the scale fee but feel that it is a necessary sacrifice that we will have to make to retain the conveyancing monopoly and keep the wolves of the Consumers Institute at bay. I understand that informal scales for many areas of work exist in some parts of New Zealand. I feel strongly that especially in country areas that solicitors will get together to set what they consider to be a reasonable fee and encourage their fellow practitioners to go along with such suggestions.

Consumers Institute may well argue that that is a good reason for removing our conveyancing monopoly and I am pessimistic about retaining this. However I am encouraged by the example of California where apparently most transfer of land is completed by the vendor and purchaser personally. There is also apparently an amazing amount of litigation over the resultant mistakes and frauds. This may be a reflection on more litigious Californians but does to me raise some substantial questions for those who would attack the monopoly.



A JUDICIAL COMMISSION? SOME COMMENTS ON THE INDEPENDENCE OF THE JUDICIARY.

K J Keith, Professor of Law, Victoria University of Wellington.

A paper by Mr A A T Ellis QC on the question of judicial independence was published in (1983) NZLJ 206. That paper was given at a meeting of the New Zealand Society for Legal Philosophy on 5 May this year. At that meeting Mr Ellis' paper was commented on by Professor K Keith. This article is based on the comments he then made.

I wish to approach this question by reference to the principle of the independence of the judiciary. That idea received considerable emphasis in the report of the Royal Commission on the Courts. The Commission saw it as an "imperative" principle. At another point in its report it asserted that the principle had no limitations.

I wish to consider the principle by reference to:

1 The role of the Courts, as seen by the Commission;
2 The position of administrative tribunals; here I will look at what some have seen as attacks on the independence of tribunals and Courts; and
3 Aspects of the Royal Commission's recommendations relating to the proposed Judicial Commission.

The Role of the Courts

The Royal Commission, under the broad heading the Judiciary, expresses the following opinion:

> the independence of the judiciary is of such value to our society, as the only real bulwark against arbitrary exercise of power, that any erosion of judges' independence must be resisted.[1]

With respect it is false to proclaim judicial independence as the only real bulwark against the arbitrary exercise of power. Such a proclamation, read literally, denies the principle of the sovereignty of parliament. Recall Dicey's agreement with the statement by Leslie Stephens that parliament has the *legal* power to provide for the murder of all blue-eyed babies.[2] As a matter of law, the Courts cannot deny that sovereignty. This leads to my second point which is that much of the operation of our constitutional, legal, and governmental power — as in a case like that just mentioned — is restrained by convention, by morality, by good faith, by practicality, and by respect for minorities.

Consider for example the debate which surrounded the enactment of the National Development Bill and particularly the proposal that would have excluded the jurisdiction of the Courts. In that case the argument, carried on in part by reference to constitutional principle, was an argument against the "arbitrary exercise of power" directed at Parliament rather than at the Courts. And Parliament, of course, responded to that argument. Or consider in the present context the practices which have already been developed about the appointment of Judges. Again the power is one in the hands of the politicians. Again there is no legal restraint on its abuse for partisan political purposes. But once again practice and perhaps convention restrain that abuse. Or consider the standing orders and practices within Parliament which reflect understandings about the way in which the activities of Judges are to be commented upon.[3] Or consider the recent real concern about was was seen as an inappropriate conferral on one man of judicial powers and advisory and executive functions. In all of these cases the real legal power of the executive or parliament was subjected to restraints other than through the Courts. The arbitrary exercise of power was stopped.

Even in a constitutional system in which the Courts have much greater power, it is false to think that the Courts are "the only real bulwark". Consider the very wise words of a great American judge, Learned Hand:

> What do we mean when we say that first of all we seek liberty? I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon Courts. These are false hopes, believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no Court can ever do much to help it. While it lies there it needs no constitution, no law, no Court to save it.[4]

No doubt Learned Hand is overstating the position a little. But recall the fact that the Supreme Court in his system had less than 100 years before in effect upheld the legality of slavery in *Dred Scott v Sandford* (1857) 19 How 393, and it required a civil war and amendments to the constitution to introduce the bulwarks against that arbitrary exercise of power by one man over another. And of course major international wars have been fought in the name of democracy.

Historically too, I have some doubt about the connection, at least in the very strong form in which it is presented, between the independence of the judiciary and the protection of the individual against the arbitrary exercise of power. It was after all the great Sir Edward Coke who probably made the most important judicial contribution to establishing central principles of our constitution — that the King, possibly even Parliament, was subject to the law, and that the King had no power to make laws or to judge[5] — and he did that while holding office at pleasure. As Mr Ellis reminds us, he was in fact dismissed from office.[6]

I do not here develop the arguments for the independence of the judiciary. The Royal Commission appears to take

them for granted. The arguments turn on the functions of the Judges; they must be able to decide matters which come before them without fear of consequences, especially for their continued tenure of office and their continued income. That proposition must in turn be based on the characteristics of the matters they decide. These characteristics relate first to the parties: if the Judges are deciding matters to which the government is party they must be independent of the government. Second, they relate to the very nature of the matter: in general it is of the essence of adjudiciation that it be confined to the evidence and other material introduced in the course of the inquiry and that accordingly extrinisic material not be considered. By contrast the political processes involved in the making of most legislation and many governmental discretionary decisions are, of course, open ended and not confined in that way.

My final reflection under this heading is to note that the "only real bulwark" claim is an interesting one to make for a group which is not elected, which is not representative, which is not responsible in the constitutional sense, and which is not subject to rejection by popular decision. You might like to compare the group of Judges with another group of well qualified people, also well paid by the taxpayer, also facing no real prospect of a salary cut, also potentially in receipt of good superannuation, and also involved in important decisions affecting the state and individuals. These people, senior public servants are involved as *advisors,* and as *servants* to those who are elected, representative, responsible, and subject to rejection by the people. It is that last group, the political executive, who have the power to make the decisions. The question raised by the contrast leads into my second topic. The topic can be introduced by this question: who is to do what?

2 Administrative Tribunals

It is not enough to focus on the independence of the judiciary alone. The independence of the judiciary can become insignificant if some of the powers of the judiciary are moved to other bodies which are not protected by that independence, see *Bribery Commissioner v Ranasinghe* [1965] AC 172, 192, or if important public powers are created and are never conferred on those officers protected by their independent position. Consider for example the whole complex of law relating to the membership of New Zealand society; until recently that law was almost entirely within administrative discretion. In the last few years there have been substantial moves, both by way of review through the Courts[7] but even more by way of legislation,[8] to subject this activity to independent scrutiny, in part through the Courts. That allocation of power is of vital significance, it seems to me, to discussions of independence.

We need to have rather clearer criteria than are sometimes elaborated for the choice between ministers, tribunals, and Courts when power is being created and conferred or transferred. I do not have time at the moment to go into that question.[9] I would limit myself to aspects of the operation of tribunals and to possible threats to their working by reference to ideas of independence.

First of all there is the power over appointments. The recent dispute between Mr Minogue MP and the Prime Minister and Minister of Justice brought to mind earlier controversies about the appointment process. In 1963 the jurisdiction of the Courts to determine the indecency of books was removed and conferred on a specialist tribunal. In 1967 Mr Hanan, the Minister of Justice, said in a debate in the House that it was clear that the Indecent Publications Tribunal was not meeting the will of parliament. He hoped that the tribunal would interpret the will of Parliament and use the power which it had. In response to a question from an opposition member about what he was going to do about this failure, Mr Hanan said that he would appoint people "who will give effect to parliament's wishes". He implied a few moments later that he would appoint new personnel at the time when the current members' terms expired.

He would not of course be able to make that statement about Judges interpreting the Indecent Publications Act, in part because the opportunity for new appointments does not arise in the same way nor with the same frequency, in part because of the general rule that the conduct of Judges cannot be discussed in Parliament except upon a substantive motion, and in part because of the wider understandings about the independence of the judiciary. That particular exchange reminded some of a similar controversy in 1946. On that occasion the Minister of Lands wrote to the Chairman of the Hamilton Land Sales Committee in the following terms:

> Dear Sir, ... On several occasions my attention has been drawn to press reports of the meetings and decisions of the Hamilton Land Sales Committee. I have asked for official reports and after considering them very carefully have reluctantly come to the conclusion that you are not rightly disposed to, nor have a true appreciation of, the principles which the Act seeks to apply. Moreover, on several occasions it would appear that your dealings with Crown officers and witnesses have been biased and unduly harsh.
>
> In view of these facts neither I nor the administration can have the confidence in your chairmanship that is necessary for the effective operation of the Act. As I do not want to create a situation that may cause you the slightest public embarrassment, I respectfully suggest that you tender your resignation from the office of Chairman of the Hamilton Land Sales Committee.[10]

In the debate in the House of Representatives on a want of confidence motion based on this action two completely contrasting views were expressed about it. On the one side the opposition argued that "there has been an unprecedented political interference with an important part of our judicial system":

> Because the Minister has been dissatisfied with the judgment of one of the Courts of the land, he now endeavours to push a highly respected citizen from the position to which he was appointed by this Government, in order that he may be replaced by someone who will give judgments that will suit the government and the minister. Justice is a fundamental part of our system of government.

The government saw the position taken by the opposition as "absolutely absurd; it is grotesque".

> Here we have the leader of the Opposition telling the House that, because the Government insists on legislation been carried out in the spirit in which was passed, it has no right to hold office ... As Minister of Rehabilitation, and Minister of Lands, I have a definite duty to perform.

The government stressed that the members of the committee held office during the pleasure of the Governor-General in Council. They did not have tenure. Their position was analogous to that of

Land Board members and in respect of those the position had long been established that the government would not place on any Board a man known to be antagonistic to the government's land policy. Appointments were political. The government stressed that the body, while quasi-judicial, was not analogous to the regular Courts. The committees did not adjudicate on persons; they assessed the value of land. So Mr Fraser, the Prime Minister, said that the committee did not affect individual rights or individual personal freedom and in response to an interjection to the effect that land sales committees vary contracts he replied that the freedom and liberty of the subject are not affected by that.

The recent debates about appointments to Courts and tribunals have made it clear that there is a political input, both through cabinet and caucus, into the appointment of tribunal members. There is at least in part a contrast with judicial appointments in the practice and in the law:[11] indeed in the 1946 debate Mr Fraser in resisting an argument by analogy, raised the question whether Magistrates, who then, like members of the land sales committees, held office at pleasure, should not have a different status. That was indeed conferred by the Magistrates' Courts Act 1948. The debates and the 1946 and 1967 controversies point to the fact that in this area there is a tension between, on the one hand, the independent administration of the law and, on the other, the right, even the obligation, of the government to see its policy carried through.

The same tension can appear when we turn to consider a second matter: the law to be applied. This is particularly so with tribunals making decisions in the area of economic policy. Consider, for example, the position of the Broadcasting Tribunal, the Commerce Commission and some of the licensing authorities. In the first place, the legislation is often open textured with broad references to public interest. Secondly, it will sometimes empower the government to give directions to the tribunal. Such a power would not be seen, I take it, as proper in the case of Judges. Once again the choice of tribunal, rather than Court, has consequences for the independent administration of the law.

The wish of the government to retain an involvement in the work of tribunals may have consequences for a third matter: the binding effect of tribunal decisions. There is an increasing number of cases in which tribunals do not decide but rather give advice to the government. One tribunal, the Waitangi Tribunal, has indeed no function other than to investigate, report, and, if appropriate, recommend to the government or Parliament. It has no powers of decision. Other bodies, while primarily bodies which decide, sometimes with the government as a party, in an increasing number of cases now investigate, report to the Government and, as appropriate, recommend. That is so in respect of the Planning Tribunal, not only under some of the provisions of the Town and Country Planning Act, but also under mining legislation, the National Development Act, the Public Works Act and in proposed provisions in the Fisheries Bill.

Again there is a tension in this area. It is obviously of the essence of a Court or a judicial body that in general it decides and its decisions are binding.[12] There is also a danger that a body which normally decides will have its general position prejudiced if it is at the same time seen as a body advisory to the government with the consequence that its reports are subject to rejection or adaptation to meet the will of the government. There are however arguments in favour of this development. In some of the areas in which this advisory function operates, the government previously had completely unfettered executive power. It was not obliged to establish an enquiry, to allow those affected to participate in a hearing, or to receive a public report on its proposed actions.

So far I have been talking about the various ways in which the executive government can become involved in the working of tribunals, some would say to the point of an inappropriate interference with that working. What I now wish to mention is parliamentary intervention by way of legislation in the workings of tribunals and Courts. There were three major instances in the course of the last year in which Parliament overruled the decisions of statutory bodies and Courts.[13] The decision in question was made by a body appointed independently, proceeding according to open and independent process, handing down a binding decision according to law, but all that — or much of it — has been put to one side by legislative action taken, of course, on the initiative of the executive.

Last year's cases are ones about which there can be a good deal of disagreement and dispute,[14] although there is no doubt that they show that it is much too simple to say, as the Royal Commission does at one stage in its report, that the principle of judicial independence has no limitations. Plainly in some situations the government has the ultimate responsibility to advise Parliament to change law which is seen as unsatisfactory. But what are the identifiable limits on Parliament's power? In what circumstances is legislation like that which removed New Zealand citizenship from many Samoans, granted the Clyde water right, or overturned the Court of Appeal decision in the wage fixing case legitimate? I do not have time to pursue those questions here. I can however make the point that such exercises of power abrogate in large part such guarantees as the independence of the judiciary provided in the particular cases.

3 The Royal Commission proposals relating to a judicial commission.

I will limit my comments to the questions of appointment and discipline. So far as appointment is concerned I have no special knowledge of how the present procedures actually operate. Like Mr Ellis, I do however wonder whether the proposed procedures would make a difference. Would different people actually be consulted? Might it not also be the case that the proposed procedures are rather too complicated? One central point to note is that the executive government would still be making the appointments. The matter would be still in the hands of the Minister of Justice and, if they wish, his ministerial colleagues. Here I would call attention again to the fact that in the recent discussions about appointments to tribunals and Courts a clear line was drawn: it seems generally accepted that there was very little if any political input into the positive act of appointing judicial officers. By contrast cabinet and caucus clearly do have a role in the appointment of tribunal members. To return to a point that I made earlier, the allocation of power between tribunal and Court accordingly has important consequences for the independence, or the relatively non-political character, of the appointment process.

So far as the power to investigate the conduct of Judges and their removal from office is concerned, I find some difficulty in understanding the proposals of the Royal Commission. Once again, I do not know enough about the detailed facts about what currently

happens now. I would however like to make two points about the proposals. The first is to call attention to the fact that there are in practice several informal controls and other checks which do not involve the revocation of the appointment or official disciplinary action. Simon Shetreet discusses them in a most interesting way in a book to which the Commission refers.[15] He considers the role of the press, appeal and review Courts, the Bar, and other informal checks. He also calls attention to the variety of ways in which politicians, and in particular parliamentarians, can comment on the work of Judges without invoking the formal impeachment procedures. Our own experience provides us with instances over the years of these processes in operation.[16]

My other comment relates to the proposal in the report that consideration be given to the provisions of the Canadian Judges Act 1971. That legislation empowers the Judicial Council in Canada to consider complaints and to make a recommendation to the Minister of Justice that a Judge be removed from office on the grounds of incapacity or disablement. The grounds can be established by reference, among other things, to the Judge having failed in the due execution of his office.

A recent case which has given rise to a good deal of controversy must, I think, give us pause in considering that proposal. The case involves Mr Justice Berger.[17] The Judge had been active, before he went on to the bench, in various civil liberties and Indian rights issues. In November 1981 he gave a speech and wrote an article in which he pointed to deficiencies, as he saw them, in the proposed Charter of Rights then being considered for adoption by the Canadian Parliament. He called attention to the failure of the draft to recognise aboriginal and treaty rights and he criticised the denial to Quebec of a veto over constitutional change. This lead to a complaint by a Judge to the Judicial Council and to the appointment of a committee of investigation.

The committee of investigation held that Berger J had acted in a way that was unwise and inappropriate by becoming embroiled in a matter of great political controversy. His action would support a recommendation for removal. The committee however stopped short of that. Since the issue had not been determined before it was possible, it thought, that Berger J and other Judges were under a misapprehension as to the nature of the constraints upon Judges. The full Canadian Judicial Council did not go as far as its committee. It thought that while Berger J's actions were indiscreet, they constituted no basis for a recommendation for removal from office. It said that members of the judiciary should avoid taking part in controversial political discussions except only in respect of matters that directly affect the operation of the Courts.

The Chief Justice of Canada, Bora Laskin, joined the fray. At the Canadian Bar Association's Annual Meeting later in 1982 he stressed that Judges were forbidden to become involved in political issues. The Judge must remain impartial and be seen to be impartial. What was in issue in the Charter were critical political and constitutional matters then under examination by the entire Canadian ministerial establishment. The Judge had no warrant to interfere in them. Berger J, for the most part, appears to have remained aloof from this controversy. He did however make the point that the Council had no power to reprimand. No such power was conferred by the statute.

One of my two comments on this case relates to that point. It does seem to me that there is a very great danger in an official body having or claiming an intermediate power of the kind that was exercised here. If independence is an important principle should it not be the case that governmental or other official interference in the independence of a particular Judge should arise only at the point where that interference can lead if anywhere to removal? My other, and final, point is to return to the proposition that there is a range of other informal ways in which objection can be made to what is seen as inappropriate judicial activity. We do not need to go back very many years in New Zealand to find a similar controversy about the involvement of a Judge in a matter of public dispute.

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1 Report, Royal Commission on the Courts (1978), para 642 and see also paras 248 and 644.

2. Dicey, *The Law of the Constitution* (1st ed 1885) ch 1.

3 Eg Standing Orders of the House of Representatives, s.o.86(3)(a) and 181; Erskine May: *The Law, Privileges, Proceedings and Usage of Parliament* (19th ed. 1976) 368, 427-428; and Shetreet, *Judges on Trial* (1976) ch VIII. There are also less well defined understandings about the relationship, in terms of comment, between the judiciary and executive; see eg The Berger case, n 17 below. They have also been under recent strain in New Zealand.

4 "The Spirit of Liberty" (1944) in Dilliard (ed), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (1953) 189.

5 *Prohibitions del Roy* (1607) 12 Co Rep 63, 77 ER 1342; *Dr Bonham's Case* (1610) 8 Co Rep 113 6, 118a, 77 ER 646; and the *Case of Proclamations* (1611) 12 Co Rep 74, 77 ER 1352.

6 See the great Fuller article, "The Forms and Limits of Adjudication" (1978) 93 Harv. L Rev 351. The International Academy of Comparative Law has recently been considering on the basis of national reports, judicial responsibility. See eg Cappelletti, "Who Watches the Watchmen"? (1983) 31 AM J Comp L and Glenn, "La Responsiblité de Juges" (1983) 28 McGill L J 228. With Shetreet and the report and documents referred to in n 17 below, they provide extensive references to the material on the judiciary.

7 Compare eg *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, CA with *Pagliara v Attorney-General* [1974] 1 NZLR 86.

8 Citizenship Act 1977, s.19 (but note its limited scope); the 1977 and 1978 amendments to the Immigration Act 1964 establishing rights of appeal to the Minister, the Deportation Review Tribunal, and the High Court; and the broad appeal provisions in the Passports Act 1980, ss 9 and 10.

9 For a discussion of the court-tribunal choice see Robson (ed), *New Zealand: The Development of its Laws and Constitution* (2 ed 1967) 155-161.

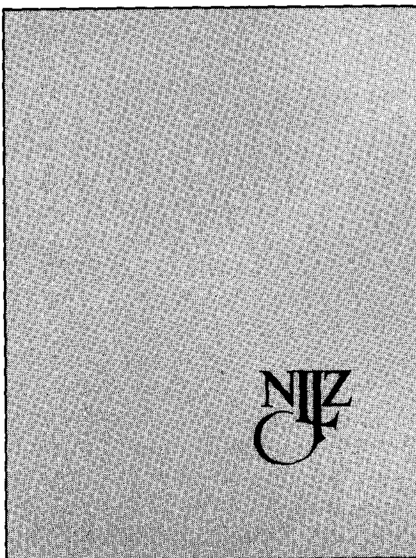
10 *New Zealand Parliamentary Debates*, vol 273, p 604. The debate was a lengthy one, extending over three days. For a discussion of it see Robson, *New Zealand: The Development of its Laws and Constitution* (1 ed 1954) 114-117.

11 While some tribunal members hold office at pleasure the majority have a fixed term of appointment (commonly three years) and are subject to a standard set of grounds for dismissal.

12 Recall that the United States Supreme Court refused very early in its history to give advisory opinions and that the Australian High Court held unconstitutional a statute which conferred powers on it to give advisory opinions, *Hart and Wechsler's The Federal Court and the Federal System* (2d ed 1973) 64-70; *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

13 Citizenship (Western Samoa) Act 1982, Clutha Development (Clyde Dam) Act 1982, and Economic Stabilisation Amendment Act 1982. The first Act preserved the particular judicial decision and provided for the grant of citizenship to many of those affected indirectly by it and to others as well.

14 Eg Mahon, "The Courts under Attack" [1982] NZLJ 342; McLay, "Citizenship (Western Samoa) Act" *New Zealand Foreign Affairs Review* October-December 1982, 5 (edited version [1982] NZLJ 353); and Downey, "Human Rights — The New Dimension" [1983] NZLJ 17.
15 Op cit, n 3 above, Part IV.
16 The following are a few very random points:
(a) *The press:* the case in 1979 of a District Court Judge in Palmerston North who made what were widely seen as disparaging remarks about a de facto wife;
(b) *Appeal: Fleming v Commissioner of Transport* [1968] NZLR 101 (consistent imposition of penalties greatly in excess of norm); for an unusual reverse case — the rebuking of a higher Court by a lower one — see the protest of Bench (and Bar) against the judgment of the Privy Council in *Wallis v Attorney-General* (1903) NZPCC 730; Sir Robert Stout CJ returned to the issues in a more general context the following year; "Appellate Tribunals for the Colonies" (1904) 2 Comm LR 3, 4-5.
(c) *Review: Healy v Rauhina* [1958] NZLR 945 (bias, failure to give fair hearing)
(d) *The Bar:* New Zealand Law Society, *Code of Ethics* para 4.23, and Cooke (ed) *Portrait of a Profession* (1969) 56, 78; (1877) 2 NZ Jur (NS) 102.
(e) *Parliament:* for some aspects of the Barton Case see (1877) 2 NZ Jur (NS) 159, 163, 184 (see also 166 and 153), (1878) 3 NZ Jur (NS) 83, 139, 151
(f) *Criminal prosecution:* Crimes Act 1961, s 100.
The relevant provisions are set out in the Report, 410-412.
17 I have taken my account from *National* October 1982 and Martin, "Criticising the Judges" (1982) 28 McGill LJ 1, 28-29. The Council resolution, the report of the Committee, and the associated documents and now available, (1983) 28 McGill LJ 378. Berger J has since resigned, *National* May 1983.



Barristers' fees

At the conclusion of the recent criminal trial for murder R v King, Flyger and others (Unreported, Christchurch, July 1983) Holland J had to consider the question of whether there should be special fees for counsel as the accused were on legal aid. His Honour commented on the unsatisfactory level of legal aid, and also considered the basis of assessing counsels' fees with particular reference to some supposed "hourly rate." Holland J had commented on an earlier occasion on the proper basis for the remuneration of counsel in New Zealand. This was a civil case Re JBL Consolidated Ltd (in Receivership) and Others (unreported High Court, Auckland M1950/80, 20 August 1982). In that case the Judge, in declining to accept an hourly rate, fixed fees on a global basis at a level lower than the Receiver would have agreed to, calculated at an hourly rate. Because of the importance to the profession of His Honour's approach to the question of fees for barristers the minute he issued on 6 July 1983 is published in full.

Counsel have seen me seeking a special fee under reg 12 of the Offenders Legal Aid Regulations 1972 on the grounds that exceptional circumstances render such a course desirable.

All five accused were legally aided and each was originally charged with murder. Special reasons existed to justify separate counsel nothwithstanding the provisions of reg 7 and not only was each accused assigned separate counsel, each was also assigned second counsel. The case was serious and complex and it was originally anticipated that it would take three weeks. The disruption to practitioners of a long case is considerable and the need for second counsel was clearly established, although the availability of second counsel must have some material effect on the claim for a special fee.

The Offenders Legal Aid Regulations are notoriously out of date and inadequate in the light of inflation. Nevertheless the Courts must not legislate. The adequacy of the Regulations is a matter for the Government but the totally inadequate fees provided have severely limited the number of experienced counsel willing to accept assignment and the Court is anxious to provide for those few who do, and who consequently have more than their fair share of inadequately rewarded work, in as generous a way as possible without effectively re-writing the Regulations.

In carrying out the distasteful task of determining the appropriate scale of fees for individual counsel the Court is required to have regard to five factors:

(a) The seriousness of the offence charged;
(b) The complexities of the legal or factual issues involved;
(c) The skill, labour, and responsibilities of the practitioner in the conduct of the case;
(d) Whether the transaction or proceeding is one of a number or series of transactions or proceedings which are similar or which arise out of the same set of circumstances;
(e) Such other factors as the Court thinks fit.

Although the factors are relevant to the respective scales they also seem to me to be appropriate in considering applications for special fees.

In the present case there can be no doubt as to the seriousness of the offence charged. It was originally murder but reduced to manslaughter after hearing legal argument. Manslaughter, however, carries with it a maximum sentence of life imprisonment.

There were here complex legal and factual issues involved. Not only were there the complexities which frequently arise in a joint trial but there were difficulties which arose because of the inability scientifically to prove the

precise cause of death, the effect of intoxication on a joint charge of manslaughter and the problems which arose because of the number of accused who had made statements to the police inculpating co-accused. Further problems occurred because it was apparent from the nature of the allegations that there was a likelihood of some degree of mental abnormality in some or all of the accused.

The above factors apply to all accused and are in themselves quite sufficient to justify a special fee. One accused, however, had the benefit of a Queen's Counsel whose experience in defending persons charged with crime in the Supreme Court and High Court goes back over 35 years. Another had the advantage of a very experienced counsel who has likewise been defending persons charged with crimes for 20 years or so. In the case of the other three counsel none had been qualified for 10 years. What I am saying is not to be regarded as criticism of their professional standards and I am conscious that notwithstanding their relatively short experience they had the responsibility of leading. Nevertheless, their lack of experience meant that, in accordance with the Regulations, they cannot claim as a special feature the skill which can be claimed by a Queen's Counsel and a barrister of 20 years' experience of trials. It is important to the administration of justice that senior counsel should be available for important and complicated trials and they should have some reason to expect special treatment when they have been assigned to such cases.

Counsel, when they saw me, presented a united front seeking the same remuneration in each case. They sought $250 per half day for each leading counsel with full scale 3 or $85.50 per half day for each junior counsel. They each sought $40 per hour for approximately 75 hours of preparation for leading counsel and provision for many hours preparation at an appropriate rate for juniors. Since seeing counsel I have received memoranda setting out particulars of time spent out of Court. No doubt as a result of an indication given by me when all counsel were present counsel for King has departed from the submission that all counsel should be treated the same. He seeks $300 per half day for the trial and 75 hours preparation at $55 per hour.

I am not willing to treat all applications in the same way. I am also satisfied that the amounts sought fail to reflect the element of financial contribution from the profession which is implicit in all legal aid work. Further the responsibility and consequent stress during a joint trial with ten defence counsel is not as great or as continuous as is the case where the total defence is in the hands of one. In addition it is necessary to have some regard to the provisions of the Regulations, inadequate and all though they may be. The maximum scale is $85.50 per half day and the maximum hourly rate of preparation is $13.50 with a maximum of 6¼ hours for all indictments other than murder or treason where no limit is prescribed.

In the case of a scale it is no doubt necessary to have hourly rates for preparation and half day rates for appearances. In the case of a claim for a special fee I do not consider that time spent should be the sole controlling factor. Some practitioners will require a great deal more time than others, or may spend a great deal more time than is justified in pursuing unnecessary investigations. In addition some will needlessly waste time in Court while others, without any prejudice to their clients, will restrict themselves to relevant matters. The hourly rate is for a tradesman but not for a professional person. It favours the less competent and the less experienced. I am certainly not derogating from the importance of industry and conscientious research required in all cases but that industry and research must be shown to be worthwhile.

It is my view in the case of a special fee that consideration of the foregoing including the time taken, the skill displayed, the seniority of counsel, the responsibility, and the other factors prescribed in the Regulations, particularly the rates of remuneration provided for in normal cases, and the fact that counsel were assigned in the lower Court and received some remuneration which must be deemed to cover some part at least of the overall preparation will render it usually more appropriate to award an overall fee for the brief. I am not aware of any authority in the Commonwealth which has held that an hourly rate is the appropriate method of remuneration for a barrister. The amount of time spent is clearly a material factor but can only be justified if all barristers are of equal skill and expertise. This method of charging has crept into the New Zealand scene no doubt because of the fusion of the two branches of the profession but there is now a substantial separate Bar in New Zealand and those barristers who remain in partnership with solicitors should not be remunerated by the direction of the Court in a manner different from that appropriate for the separate Bar.

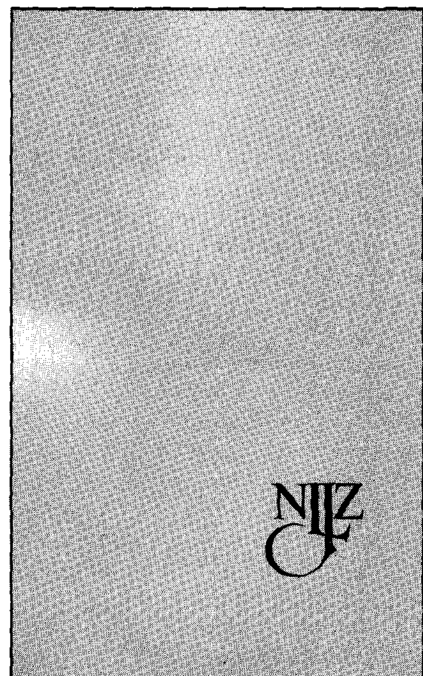
The trial took 17 half days if one allows a half day, as I do, for the fact that the jury returned with a verdict immediately after midnight. There was also argument relating to the quashing of the count of murder and to admissibility of certain evidence and for separate trials by one accused which comprised a further three half days and a further appearance on sentencing. The Regulations would provide for approximately $2,000 to leading counsel with $1,500 for junior counsel except for one case where junior counsel would receive only $1,000 because he is in the same office as his leader.

Giving consideration to all the foregoing matters I authorise that the scales in the Schedule to the Regulations should be exceeded by providing for fees as follows:

Fees of all counsel for all matters in High Court

Accused	*Leading Counsel*	*Junior Counsel*
King	$5,000	$2,000
Flyger	$3,500	$2,000
Genet	$3,500	$1,750
Jackson	$4,250	$2,000
Rewi	$3,500	$2,000

Disbursements and witness expenses where appropriate shall be determined by the Registrar.



Recent developments in New Zealand water law

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This article is an expanded version of a paper given to the 1982 Water Conference of the New Zealand Institution of Engineers and the Royal Society. The authors are partners in an Auckland law firm.

1 Introduction

A central feature in the evolution of New Zealand's water law since the early 1970s has been the degree to which development of basic principles has been the product of litigation as opposed to legislative or administrative action. In a number of critically important areas of water resource management the Planning Tribunal, the High Court, and the Court of Appeal, have played a dominant role. The need for recourse to the judiciary in matters affecting water resources might be seen as resulting solely from the legal complexities and ambiguities inherent in the Water and Soil Conservation Act. There is no doubt a substantial element of truth in this suggestion but other contributory factors can be identified.

First, New Zealand's water resources have in recent years become less capable of meeting the increasing and varied demands of prospective users. This situation has inevitably produced conflict and such conflicts have been difficult to resolve without litigation especially since the Act falls far short of being a definitive code on water law.

Secondly, the growth of public interest environmental concerns during the 1970s has raised questions concerning the proper limitations and constraints to be placed on the development and use of water resources.

Thirdly, it is apparent that there is increasing pressure on the Planning Tribunal to extend its decision-making into substantive areas of policy. The Tribunal does not welcome the invitation. The Clyde Dam Water rights litigation, which will be discussed in more detail below, is the clearest example of this. The comments of Judge Treadwell in the first Planning Tribunal decision (*Annan v National Water and Soil Conservation Authority* (1981) 7 NZTPA 417 [*Annan (No 1)*]) and the observations of the Planning Tribunal (No 2 Division) at the second stage when the Crown water rights were refused (*Annan v National Water and Soil Conservation Authority* (1982) 8 NZTPA 369 [*Annan (No 2)*] are worth recording especially in view of the controversy surrounding that litigation and its sequel, The Clutha Development (Clyde Dam) Empowering Act 1982. The constitutional propriety of that legislation has been seriously questioned by many observers, notably Professor F M Brookfield ("High Courts, High Dam, High Policy: The Clutha River and the Constitution" [1983] NZ Recent Law 62).

In his separate dissent in *Annan (No 1)* Treadwell D C J said at (1981) 7 NZTPA 438:

> I cannot refrain from making some comment on the inadequacy of the Water and Soil Conservation Act 1967. I am forced into a position of dealing with an Act which contains few guidelines. If it is the wish of Parliament that the Planning Tribunal become an arbiter on the use of energy within this country then the Act should expressly say so. I am however faced with trying to extract law from a statute which is lamentably lacking in any specific direction. I think it would be safe to say that never in the history of legislation in New Zealand has the long title to an Act been used so frequently in an attempt to find guidelines. In the absence of any specific direction I am not however prepared to give a judicial cloak to a policy decision of Government when the Crown has placed a specific provision in the Act which, if it chooses to use, removed the matter from the judicial process.

In dealing with costs in *Annan (No 2)* after the Crown's application for water rights had failed, the Planning Tribunal referred to a letter from Crown Counsel to the objectors counsel and stated at pp 375-376:

> The letter from Crown Counsel dated 5 September 1980 speaks for the Government. The applicant is a Minister in that Government. The contents of the letter indicate a possibility that the Government may proceed with the construction of a High Dam at Clyde, notwithstanding an adverse decision from this Tribunal. Yet the applicant Minister, by making his application pursuant to s 23 of the Water and Soil Conservation Act 1967 had, in law, submitted himself to the jurisdiction of this Tribunal. If as the letter states, "much wider issues of policy are involved in this matter than could properly be said to be within the jurisdiction of the Planning Tribunal..." the matter should not have been placed before a judicial Tribunal with a limited jurisdiction.

In some ways the prominence given to specific development projects and particular environmental concerns has masked or postponed the need for a hard look at a number of water resource management issues where the potential for litigation in the years ahead seems considerable. Such matters include the future status of "notified uses" under the 1967 Act and the manner in which these should be subject to review in the light of future resource management concerns; the question of priorities between competing users in the event of water shortages and in the light of the gradual diminution of New Zealand's available water resources in certain areas; and the continuing difficulties of integrating water resource planning and decision-making into land and maritime planning systems under the Town and Country Planning Act 1977 (despite the preliminary moves in that direction contained in s4(3) and the Second Schedule of the Town and Country Planning Act 1977 and 69(1) of the Town and Country Planning

Regulations 1978).

It is not possible in a paper of this length to examine a definitive list of problem areas. Instead we will concentrate on selected important developments in water law in which the judiciary has played a leading part. However, we do not mean to suggest by this approach that the most accurate picture of water law is necessarily obtained from the reading of a few important appellate decisions. The Courts decide only what litigants choose to put before them and Regional Water Boards in their daily application of the Act clearly play a significant role. This role has become even more important as Boards have faced the increasing pressures associated with the management of water resources and the limitations of the existing legislation have become apparent. In this situation the Water Boards have often been forced to improvise. These improvisations have tended to create a situation where there is a discernable and growing difference between the law as written (what one would glean from reading the Water and Soil Conservation Act) and the law in action (what one will encounter in practice is seeking to obtain water rights). This situation has been accentuated by cases under the National Development Act 1979 which have produced novel and complex questions and led to further innovations.

2 Water quality — Classification and water right conditions

From the legal viewpoint there can be no doubt that one of the more significant developments in relation to water quality management and control was the judgment of Mr Justice Cooke in *Water Resources Council v Southland Skindivers Club Inc* [1976] 1 NZLR 1. The main issue in the case was the "residual" SD classification given to the bulk of Southland's coastal waters by the Water Resources Council, but converted to SB by the Planning Tribunal on appeal. In the course of his judgment, Mr Justice Cooke noted that there was nothing in the evidence or argument to suggest that in setting the SD standard the Council foresaw a particular demand to accommodate waste discharges likely to significantly lower water quality — the Council was "simply keeping options open to the Regional Water Board". The learned Judge decided that the approach taken by the Water Resources Council was inconsistent with the Act. Four reasons were advanced for this conclusion:

(a) There was nothing in the Act to justify the idea of residual omnibus classes.
(b) Secondly, if such a classification were confirmed the minimum standards it contained would in practice be looked upon as all that was required and an objector seeking the imposition of terms consonant with a higher standard, even if it was only the existing standard in fact, might unjustifiably be faced with an onus. This was wrong because when existing water quality is likely to be lowered any onus should be the other way. For I think it is plain from reviewing the Act as a whole that Parliament has no intention of permitting a reduction in water quality unless it can be shown to be justified in the public interest. In other words the statute provided for a qualified policy of non-degradation.
(c) Thirdly, the Act claims to promote a national policy and to consign large sections of the waters in the various regions to classes which may be lower than the existing quality, leaving the various regional water boards to decide in invidual cases to what extent, if at all, standards above the minimum will be arrived at, would be the antithesis of a national policy.
(d) Finally, the minimum classification approach would apparently permit a classification to be given without prior examination of whether there is likely to be any necessity to permit the lowering of the actual quality of the waters. In general waters should not be classified below their existing quality unless it can be foreseen that in those waters there will probably be discharges or uses which should reasonably be accommodated there and which — notwithstanding all reasonable safeguards, controls or treatment — are likely to lower the quality significantly.

Following this decision the Council cancelled two final and six preliminary classifications covering a substantial area of New Zealand including Otago, North Canterbury, Auckland and Wellington. Further action in relation to classification is presumably awaiting the review of the Water and Soil Conservation Act. In the meantime, the problems arising from the absence of classifications has been noted by the Planning Tribunal (Number Two Division) in *Pikarere Farm Ltd v Porirua City Council* (1979) 6 NZTPA 545, 549 where the Tribunal stated:

> We would observe that the lack of water classifications and in particular the lack of such classifications in coastal waters likely to be subject to urban pressure is making administration of the Water and Soil Conservation Act difficult at appellate level. The object of the Act is to have the waters classified and at that stage all interested parties have a chance to be heard and to appeal if necessary. Once the classification becomes a final classification, applications for discharge rights would be reasonably easy to control. The minimum standards are set forth in the Act and potential dischargers know that they cannot drop below the minimum but that a higher standard may be imposed in respect of any particular discharge. We were virtually invited in the present case to embark upon a study of potential classification (which is not our function) and to then fit the discharge within some form of national classification. . ."

The doubts surrounding the water classification system following the Southland decision have undoubtedly created something of a hiatus in terms of establishing nationally based receiving water standards. The recent OECD report on *Environmental Policies in New Zealand* (1981) notes at p 62 that "the major criticism which can be levelled at the system as it is operated at present . . . is that it tends to result in the progressive degradation of bodies of water to the lower water qualities consistent with a particular classification — existing high qualities will not be maintained". It would also seem worth reflecting on the further comment in the OECD report at p 63 that, "it is likely that the demands of modern societies like that of New Zealand will continue to be for the progressive improvement of water quality. . ."

As a result of the uncertainties over classification it appears that the major initiative in developing water control quality standrds has moved to Regional Water Boards. Conditions on new waste discharge rights, at least for major industrial or urban discharges, appear to be moving toward much more stringent and sophisticated standards than the generic minimum standards provided in the Schedules to the Water and Soil Conservation Act. Given the vagueness and imprecision of the latter, particularly in relation to the control of effluents containing toxic substances or

nutrients, this is hardly surprising. It may not be too soon to ask whether the increasingly demanding approach to discharge conditions, often involving the imposition of both effluent and receiving water standards in water rights, has made the concept of nationally based minimum standards irrelevant. It may now be more appropriate to consider the establishment of specific national guidelines on selected toxic substances, nutrients, or other pollutants of concern, which Water Boards can utilise in setting effluent or receiving water standards. For example, in relation to certain heavy metals such as zinc, cadmium, or chormium there appears little guidance available to Regional Water Boards to assist in setting levels for the protection of human health or the environment.

The discharge right granted for the synthetic petrol plant at Motonui in North Taranaki (see The National Development (NZ Synthetic Fuels Corporation Limited) Order 1982 SR 1982/37, Cl 5(c) and Fourth Schedule, *Re An Application by NZ Synthetic Fuels Corporation* (1981) 8 NZTPA 138, 159-165 and *North Taranaki Environmental Protection Association Inc v Governor-General* [1982] 1 NZLR 312 CA) illustrates just how far water right conditions have been taken. This right may be seen partly as a product of the peculiar pressures associated with major projects proceeding under the National Development Act but it does indicate the extent to which at least one Regional Water Board has gone in controlling a major industrial discharge into unclassified coastal waters.

One notable aspect of the right is the extensive monitoring obligations which incidentally impose a substantial financial burden on the grantee. It might be argued from a legal standpoint that these obligations go well beyond the ambit of the Water and Soil Conservation Act. However, it is apparent from a brief review of other major new industrial discharge rights that such monitoring obligations are no longer unusual. In this context it is interesting to note that, as recently as July 1980, the Planning Tribunal stated a case to the High Court which included the question whether a Water Board could require the grantee of a discharge right to meet the cost of analysing monitoring results in excess of $10 per annum! The outcome of this case (*Friends of Nelson Haven and Others v Nelson Regional Water Board* (1981) 8 NZTPA 234) and recent decisions of the Planning Tribunal, (*J L Sprague and Others v Northland Catchment Commission*; Decision No A17/82 and *Amoco Minerals (NZ) Ltd and Others v Hauraki Regional Water Board* (1982) 8 NZTPA 344) is that the power of Water Boards to impose reasonable monitoring obligations related to the exercise of a right have been confirmed. It is clear, however, that the reasonableness of such conditions will be closely examined and conditions requiring a grantee to bear the cost of testing in the nature of "policing" will not be permitted.

It is perhaps surprising that in the light of the importance of monitoring to water quality management, particularly in the absence of an effective or fully operative classification system, that such little guidance has been provided by the legislature on this topic.

3 Water allocation — Water rights

The Act does not set out explicitly the considerations relevant to the determination of an application for a water right. In determining appeals related to the grant of rights the Planning Tribunal has therefore had regard to the long title to the Act, to those provisions which set out the specific functions and powers of the National Authority, and to the sections describing the duties of the Regional Water Boards and specifying the matters to which they must have regard. From this approach there emerged in the early Tribunal decisions a balancing test which has now become firmly established. The importance of the recent decision of the Court of Appeal in *Keam v Minister of Works and Development* [1982] NZLR 319 is that this balancing test has been approved at the highest judicial level. Thus through a process of extensive litigation the generalities of the Act in relation to water right determinations have been considerably refined by the judiciary.

The leading judgment in the Court of Appeal was given by Cooke J. This judgment is of such important that it warrants extensive citation. He said at pp 322-323:

> As to the criteria to be applied on an application, the 1967 Act, while profuse in its long title and its enumeration in ss 14 and 20 of the functions and powers of the Authority and the Regional Boards, does not specify any list of relevant considerations for deciding applications under ss 23 and 24 and appeals thereafter. There are in s 21(3A) express requirements concerning rights to discharge into natural water that has been classified, but they do not affect the present case. Parliament has pointedly refrained from tying the hands of the administering tribunals by hard-and-fast requirements. Clearly it would be wrong for the Courts to do so. But to give effect to the broad purposes of the legislation, general working rules or guidelines can be evolved, as long as they are not elevated into something inflexible.
>
> *It is as a useful general test of that kind that I understand the Planning Tribunal's proposition in its decision in this case that any proposed use of natural water should be a beneficial use, and that the loss which might follow from the taking of the water should be weighed against the benefit which will result from its use. In cases where some adverse effect may follow from the exercise of the right applied for, during the term of the grant, the kind of balancing envisaged by the Tribunal appears to be only a matter of common sense and thoroughly in accord with the purposes of the Act.*
>
> But there may be cases where the Tribunal's broad test will be inappropriate, at any rate if read literally. For example there might be an application to abstract some water for a limited term from a source of supply so abundant that during that term there is no reasonable possibility of any shortage at all or any other consequence damaging to anyone. In that kind of case it would be wrong, I think, to apply the benefit test in any exacting way. Then it should be enough that the applicant wished to have the right for some legitimate purpose which he considered of benefit to him. A weighing of advantages and disadvantages is not required if there are no signifficant disadvantages.
>
> That is consistent with s 20(5)(c), which is one of the provisions detailing the functions of Regional Boards and was referred to by the Tribunal as indicating a principle to be applied on water right applications. As the Chief Justice points out, while para (c) does require a Board to promote inter alia "the conservation and most beneficial uses of water within the region", it is prefaced with the qualification "So far as may from time to time be necessary to meet in full all demands for or in respect of natural water within that region..." It is a provi-

sion concerned with competing demands.

On Tribunal's findings of fact, which were open on the evidence, the present case was one where both advantages and disadvantages fell to be weighed. In a broad sense there were competing demands. On the one hand, the public interest in the exploration of the field for geothermal power resources, and the particular private interest of the timber processing plant. On the other, the public interest in preserving the field undisturbed for scenic attraction and scientific study. *In my opinion the Tribunal acted properly in setting out to weigh the competing interests.* The fact that the Minister of Energy, as the authority having control over geothermal energy, was promoting the project was obviously a point in favour of the application; but the Authority and the Tribunal would not have been entitled to treat it as automatically a decisive point. (Emphasis added.)

The importance of this case is underscored by the fact that it was relied upon by Casey J in his much-publicised decision involving the Clyde Dam water rights: *Gilmore and Ors v National Water and Soil Conservation Authority and Minister of Energy* (1982) 8 NZTPA 298. In that case each of the four member majority of the Planning Tribunal in *Annan (No 1)* which upheld the grant of the rights had carried out a balancing exercise but with the limitation that they refused to look at the end use of the power generated because they considered they were not legally entitled to do so. Mr Justice Casey referred to *Metekingi v Rangitikei-Wanganui Regional Water Board* [1975] 2 NZLR 150 where Cooke J had ruled that "soil conservation" can include the retention of land for the purposes of production and may be an important matter for consideration when dealing with an application for a water right.

Casey J then concluded that the Planning Tribunal, while correctly accepting that land use was one of the matters the Authority was required to take into account as part of its function of promoting soil conservation (and while recognising the loss of valuable orchard and farm land was a major factor), had erred in law by refusing to consider evidence about the likelihood of the Aramoana smelter project actually proceeding. It was held that that question could be highly relevant in the circumstances of a case where the need for a high dam and the inundation of so much more land was found to be due solely to the smelter's need for that power by 1985-86.

The concluding comment of Casey J (1982) 8 NZTPA at p 304 was as follows:

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

As is well known, the Planning Tribunal in *Annan (No 2)* having reconsidered the evidence in the light of the direction of Casey J allowed the objectors' appeals with the consequence that the Crown water right applications were refused. On one interpretation of the decision of Casey J it might have appeared necessary for the Planning Tribunal to assess the desirability of the end use of a particular water abstruction as part of the overall balancing of interests. This interpretation would certainly have derived some support from the judgement of a Court of Appeal in the *Keam* case. However, the Planning Tribunal, no doubt reluctant to become an alternative public decision maker, gave the judgment of Casey J a narrow interpretation. The critical parts of the Planning Tribunal decision in *Annan (No 2)* (1982) 8 NZTPA 369, at pp 370-371, 372-373 were as follows:

...The Directions of the High Court are contained in the judgment of Casey J and we will not repeat them here in full, but for present purposes, we take the critical passage to be that which appears on p 304 as follows:

"On the Tribunal's conclusions the future existence of the Aramoana Smelter is at the very heart of the decision favouring a high dam, with its widespread inundation. The question of whether the smelter will proceed could therefore be of critical importance in the balancing operation between the interests affected by the grant of the water rights. In failing to consider that question (through its refusal to consider the end use of the power) the Tribunal deprived itself of the ability to take fully into account the promotion of soil conservation (ie land use) and the other interests it was required to consider under the Act, and which will be prejudiced by the extra flooding caused by the high dam. For those reasons I must answer Question A(i) 'No'.

(The question referred to was: 'Was the Tribunal correct in law in refus ing to consider the end use of the power which the Second Respondent seeks to generate?')".

The question of the actual relevance and the weight to be attached thereto was left in the hands of the Tribunal but we found difficulty in reconciling that proposition with the actual answer given. It is however clear that the Tribunal was not being invited to embark on an enquiry as to whether a smelter *should* exist but merely whether it *will* exist. The expression "end use", as used by His Honour in the circumstances of this case, therefore has a more limited meaning than has been attributed to it in many other cases which have come before the Tribunal in the past. This is made clear near the foot of p 303 where His Honour says:

"The appellants' point is that the contemplated 'user' may never come into existence."

...The Tribunal has no evidence before it from which it can find that a smelter will be built or is likely to be built. Thus the case for the applicant is not established in that important respect. ...The only evidence bearing directly on the likely advent of a smelter is that of Mr Ellis. That evidence does not assist us greatly in deciding the issue now before us. His evidence starts from the unproven premise that a smelter will be built, and then seeks to persuade the Tribunal that the economics of smelters are such that it *should not* be built using power from the Clutha River. To rule on whether or not the smelter *should* be built is well beyond the scope of the enquiry we are called upon to make. ... Consequently, having found that there is either no or insufficient evidence which could lead us to find that a smelter is likely to be built, we are driven to the conclusion, upon the evidence before

us, that DG3 (high), with its consequential inundation of valuable land, should not be built. Therefore the decision of this Tribunal is that the appeals are allowed and the applications are to be refused.

Whether the wide or narrow view of the balancing test gains acceptance in the future will be of great interest.

4 Wild and Scenic River Protection

That part of the Water and Soil Conservation Amendment Act 1981 dealing with wild and scenic river protection may be seen as legislative recognition that the concept of multiple uses was not being utilised effectively to deal with situations involving the protection of non-consumptive uses. Apart from orders establishing minimum flows under s14(3)(o) there was no means by which preservation of rivers in their natural state could be initiated or accomplished and the establishment of minimum low flows could not necessarily guarantee the extensive kind of protection envisaged by the 1981 Amendment. For example, it might be possible to design a dam or other development which might radically alter or detract from the natural character or qualities of a river and yet comply with an established minimum flow. The 1981 Amendment provides, as is shown by s 20D(2), a more comprehensive form of protection designed to preserve or protect not just the values linked with a defined minimum flow of the river but also the broad mix of natural qualities or specific characteristics which are associated with the particular river.

The 1981 Amendment appears virtually certain to require judicial examination before its meaning may be clearly defined. It is characterised by labyrinthine application procedures relating to water conservation orders and the absence of clear statutory criteria or guidelines to aid both applicants and the decision making authorities. Difficulties of the latter kind were mentioned in the Report of the Committee of the National Water and Soil Conservation Authority on the Motu River Application lodged by the Queen Elizabeth II National Trust. The Committee noted at pp 4-5:

> Section 20B(6) states those matters the Authority or committee shall take into account:
>
> "(a) All forms of water-based recreation, fisheries and wildlife habitats;
>
> (b) The wild, scenic, or other natural characteristics of the river, stream, or lake;
>
> (c) The needs of primary and secondary industry and of the community; and
>
> (d) The provisions of any relevant regional planning scheme and district scheme."

The question is should the committee investigate whether the river itself (ie the bed, sides of the channel and the water) has wild, scenic or other important natural characteristics; or should the committee investigate whether the river *taken together with its setting* has wild or scenic characteristics? Similarly, to what extent can the nature of the adjoining landscape be considered when assessing the worth of the river for water based recreation and wildlife habitats? Mr Hulbert argued that the wording of the Act lends some support to a consideration of *just the river*.

On the other hand he noted the object of the Act is "to recognise and sustain the amenity afforded by waters in their natural state. . . ."

Mr Hulbert relayed the Water Resources Council's wish that the application be treated on its merits but that these legal uncertainties be aired.

The committee acknowledges the interpretation difficulties raised on behalf of the Water Resources Council. In arriving at its assessment of the application the committee considered the combined nature of the river and the valley sides. It did this with a measure of unease and feels legislation to clarify Parliament's intent is desirable.

The Order recommended to the Minister of Works and Development by the Council requests a substantial length of the Motu between the Falls and the sea to be preserved as far as possible in its natural state and specifically prohibits the construction of any dam within the protected area. The Order is currently the subject of an appeal by the local power board to the Planning Tribunal. The decision of the Tribunal may resolve some of the legal difficulties referred to above.

5 The Waitangi Tribunal

This Tribunal operates under the 1975 Treaty of Waitangi Act. Until its recent recommendations related to the protection of traditional Maori fishing grounds in North Taranaki coastal waters it had not attracted great attention. It may be said with certainty that the position is bound to change. Of particular interest and concern will be the question of the inter-relationship of this Tribunal's decisions with prior decisions of the Planning Tribunal on the same subject.

The findings of the Waitangi Tribunal (at p 5) were:

(a) That the reefs and river referred to in this claim constitute significant and traditional fishing grounds of specific hapu of the Te Atiawa people.

(b) That the hapu are prejudicially affected in that the reefs and associated marine life suffer from various degrees of pollution and that those near to the mouth of the Waitara River in particular are badly polluted and stand to be polluted further.

(c) That certain reefs near Motunui are likely to be deleteriously affected by the construction of the proposed ocean outfall associated with the synthetic fuels plant.

(d) That there are insufficient planning requirements to provide an adequate assurance that the river and reefs will not be further polluted as a result of further development and growth in the area and that in any event insufficient recognition is given to the Maori interest in the coastal and inland waters to ensure the protection of that interest in existing mechanisms for planning and control and in legislation governing the use of the seafood resource.

(e) That the Treaty of Waitangi obliges the Crown to protect Maori people in the use of their fishing grounds and to protect them from the consequences of the settlement and development of the land.

(f) That the Treaty of Waitangi obliges the Crown to ensure that priority is given to the Maori interest in fishing grounds but an appropriate priority is not given, or is not able to be given by Department of State and other bodies whose duties are prescribed by statute.

(g) That the Treaty of Waitangi obliges the Crown to provide for legislative recognition of Maori fishing grounds and to confer upon the hapu most closely associated therewith certain rights of control.

(h) That it is not inconsistent with the spirit and intention of the Treaty of Waitangi that the Crown and the Maori people affected should confer on matters arising thereunder and agree to alter the incidence of the strict terms of the Treaty in order to seek acceptable practical solutions for any par-

ticular case. The Te Atiawa people have stated a desire to establish a workable compromise in this case and our recommendations are a reflection of that.

Thereafter the Tribunal recommended (at p 6) that:

(a) That the proposal for an ocean outfall at Motunui be discontinued and

(b) That the Crown seek an interim arrangement with the Waitara Borough Council for the discharge of the Synthetic Fuels Plant effluent through the Waitara Borough Council's outfall.

(c) The establishment of a Regional Planning and Co-ordinating Task Force to propose medium term plans for development in the region and the provision of infrastructures and ancillary services commensurate with projected growth. In the first instance the Task Force should direct its attention to the replacement of the defective Waitara Borough outfall, and in the long term to the provision of land-based treatment plants.

(d) The establishment of an inter-departmental committee to promote legislation for the reservation and control of significant Maori fishing grounds, the recognition of Maori fishing grounds in general regulatory and planning legislation, to improve existing provisions for the assessment and control of particular work projects that may impinge on Maori fishing grounds, and to effect certain miscellaneous amendments.

Although the Waitangi Tribunal has only the power of recommendation some of its observations raise questions of great difficulty and sensitivity. It is not possible to examine them in this paper but the following passage (at pp 34-35) will illustrate the point:

The legality of the [Planning] Tribunal's decision in extending the outfall was subsequently challenged by the claimant (Aila Taylor) representing the Ngatirahiri hapu and others in review proceedings before the Court of Appeal. The Court concluded that the Tribunal had not acted unlawfully in ordering the outfall extension and that the allegations concerning the absence of a "fair hearing" on this point were not sustainable.

Before us the Te Atiawa claimants reiterated their concerns. The question that Aila Taylor had consistently posed to expert witnesses before the Planning Tribunal was whether they could guarantee that there would be no pollution of the reefs. It appears that before that Tribunal, as before us, that guarantee could not be given. (It may not have been only coincidence that in seeking a "guarantee" Aila Taylor chose to employ a word that is also employed in the Treaty of Waitangi.)

The local hapu are by no means convinced that even the stringent conditions attaching to the Motunui water right will not result in a measure of pollution. Nor are we. Evidence adduced by the Commission for the Environment through Professor M W Loutit suggests that much further study is needed on the marine discharge of chemical wastes, and although this evidence did not pass unchallenged, it appears to us that further research is necessary to remove present uncertainties.

Additionally the Maori people hold strongly to the view that serious consequences will result from the physical destruction of parts of a reef. To them every stone must be left unturned, and if that is not done, the mobile marine inhabitants of the reefs will move away.

In our view it is not entirely relevant to consider whether the Te Atiawa contention is corroborated by scientific evidence. Indeed we question the extent to which scientific evidence should be preferred. The Maori lore on the conservation and preservation of natural resources, as inherited by word of mouth, represents the collective wisdom of generations of people whose existence depended upon their perception and observation of nature. We do not consider that the weight given to scientific evidence should be such as to denigrate the worth of customary lore, or to inhibit Maori people from relying upon it. In the final analysis it is the test of experience (and the generations of the future) that will determine the worth of scientific postulates.

The local hapu consider further that they will suffer a cultural pollution of the reefs with the discharge of human and other waste in proximity to them.

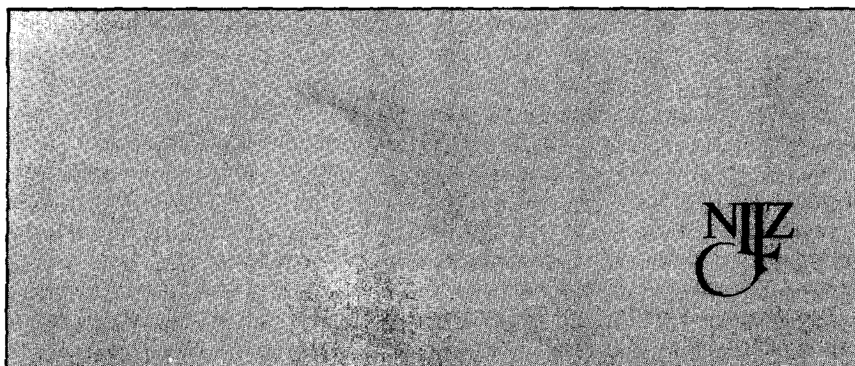
6 Civil liability of Water Boards

The preceding discussion should have highlighted the increasingly difficult task of the Regional Water Boards. A recent High Court judgment involving the Waitara Borough outfall near New Plymouth, mentioned in the Waitangi Tribunal Recommendations, opens up the possibility of successful civil claims for damages where it can be shown that a Regional Water Board has failed to ensure compliance with the conditions of a water right. In *R & D Roach Ltd v Waitara Borough Council and Taranaki Catchment Commission and Regional Water Board* [1982] NZ Recent Law 347 the plaintiff was the owner of a motor camp at Waitara, leased from the Waitara Borough Council. The plaintiff alleged that since October 1978 the Waitara beach and the river mouth had been fouled and polluted by the effluent from a pipeline laid by the Council to discharge sewage and industrial waste into the sea and that in consequence the plaintiff had suffered a marked loss of income from camp fees, a marked depreciation in the value of the motor camp and "inconvenience, upset, disruption, frustration and worry". The two defendants sought to have certain allegations in the Statement of Claim struck out on the grounds that they disclosed no valid cause of action. It must be stressed that this case was confined to a consideration of preliminary legal points and it remains to be seen whether the plaintiff's evidence will be sufficient to allow it to succeed when the full trial is held.

For the purposes of this paper it is not necessary to describe the allegations against the Borough Council in detail. The allegations formulated against the Water Board were as follows:

Negligence in the exercise of the Board's powers and duties under the Water and Soil Conservation Act 1967 in:

(a) Granting the right to discharge sewage and industrial waste in the location and/or on the terms



and conditions so granted;
(b) Failing to approve sufficient and/or proper and/or effective conditions to the grant;
(c) Failing to enforce and ensure that the Council comply with the terms and conditions of the grant.

It was held that neither the alleged negligence of the Board in granting the right to discharge effluent into the sea nor its alleged failure to impose adequate conditions could give rise to a cause of action in tort. Thus the first two allegations set forth above related to matters within the area of the Board's legitimate discretion and were struck out from the Statement of Claim. The Judge pointed out that the plaintiff's remedy, if the discretion to grant the water right had been wrongly exercised, lay in the field of administrative law only.

However, the Learned Judge pointed out that different considerations applied to the allegation of negligence in failing to enforce the conditions of the grant because the statute not only gave the Board jurisdiction to grant water rights but also gave the Board power to police the exercise of such rights. That was a separate and distinct function of the Board and relying on recent English decisions in the field of negligence, His Honour refused to strike out this allegation.

7 Concluding observations

In the aftermath of the High Court and Planning Tribunal decisions in the Clyde Dam case there has been criticism of the performance of the judiciary in the water law field. We consider the criticism is unwarranted. The judiciary has strived to ascertain accurately the true objectives of the Water and Soil legislation and thereafter to implement the will of Parliament so far as it has been discernible. The decisions have sometimes been progressive but never doctrinaire and overall they may be characterised as essentially pragmatic. This is seen most clearly in the judgments in the *Keam* case.

The Water and Soil Conservation Act and the accompanying interpretative judgments in this field now constitute a reasonably sound and coherent modern water law although there are some areas where carefully drawn legislative amendment are desirable.

With increasing competition for water resources it seems most unlikely that the onerous duties of the Regional Water Boards will in any way diminish. In this situation litigation will remain an important mechanism to resolve the conflicts between competing claimants and to clarify the inevitable legal uncertainties which arise from time to time. Thus, the role of the Judiciary will continue to be as important as it has been over recent years.

Correspondence

Dear Sir,

I wish to raise a point about the provisions of the Contracts Privity Act 1982.

Section 6 of the Act provides that a promise to which s 4 of the Act applies or any obligation imposed by that section may be varied or discharged at any time:

(a) By agreement between the parties to the deed or contract and the beneficiary; or
(b) By any party or parties to the deed of contract if —
 (i) The deed or contract contained, when the promise was made, an express provision to that effect; and
 (ii) The provision is known to the beneficiary. . .; and
 (iii) The beneficiary has not materially altered his position in reliance on the promise before the provision became known to him; and
 (iv) The variation or discharge is in accordance with the provision.

Take the following situation. A promisee has bargained for a promise from the promisor for the benefit of a third party. The beneficiary has not altered his position in reliance on that promise (and may not even know that it has been made). The promisee has a change of heart and no longer wishes the promisor be bound by his promise in favour of the beneficiary. The promisee wishes to discharge or vary the contract and the promisor is agreeable. In these circumstances, no-one could reasonably argue that the contract should be discharged or varied without the consent of the beneficiary.

However, in terms of s 6 of the Act, the parties to the contract may not vary or discharge it unless there is an express provision in the contract giving them this right. The parties can make an application to the Court under s 7(1)(a) to discharge or vary the contract, but only if the reason for their not otherwise being able to discharge or vary the contract is because the "variation or discharge of that promise . . . is precluded by section 5(i)(a). . ." of the Act ie an application can be made where the parties would otherwise have been entitled to discharge or vary the contract pursuant to s 6, but are not so entitled in the circumstances because the beneficiary has materially altered his position in reliance on the promise. The provisions of s 7(1)(a) are therefore of no use in the example postulated by the writer.

No doubt, it could be argued that it would have been prudent to insert an express provision into the contract to deal with the question of discharge or variation. However, not all contracts are drafted by solicitors. Even if the particular contract has been drafted by a solicitor, the parties may have had reasons for not advising the beneficiary of the promise and, *a fortiori*, of any provision that may have been inserted allowing the parties to discharge or vary the contract.

If the position is anomalous, it derives from the fact that the Contracts Privity Act emphasises the rights of the beneficiary and the obligations of the promisor more than the intention of the promisee.

S Dukeson

Company Law: Liability for failing to keep sufficient accounting records

M J Ross

The author is a regular contributor to the Accountants Journal. A previous article by him on company reconstructions was published in [1982] NZLJ 421. He is on the teaching staff of the Department of Accountancy and Law, Auckland Technical Institute. In this article he draws attention to the obligations imposed by the 1980 amendment to the Companies Act 1955.

Trading as a limited liability company may prove a more risky venture since the passage of the 1980 Amendment to the Companies Act 1955.

The Amendment made substantial changes to the law concerning the keeping of accounting records by companies. It has widened the sanctions for a failure to maintain sufficient accounting records and, in particular, the Amendment holds the officers of a company in default contingently liable for the company's debts.

The Amendment deals with accounting records in two broad subsections. The first, s 151(1), speaks in general terms as to the end use of accounting records. It requires accounting records to be arithmetically correct, to be able to provide cash flow information to management, to enable end of year accounts to be prepared, and to enable the annual accounts to be audited. Section 151(2) gives an indication of the specific accounting records required to achieve these ends.

A failure to maintain sufficient accounting records as required by s 151 can lead to civil and criminal liability.

Criminal liability is imposed by s 151(7). Prosecutions can be brought against both the company and its officers.

Civil liability is imposed by s 319. The section provides that officers and former officers of the company may be held liable for the debts of the company if the company is wound up insolvent and there has been a failure to comply with s 151.

An application may be made under s 319 by the Official Assignee, the liquidator, a creditor or any contributory.

The Court, in its discretion, can hold the officers of the company liable for all or part of the debts of the company. In exercising its discretion the Court is obliged to take into account that a failure to keep sufficient accounting records has:

- — contributed to the company's insolvency, or
- — failed adequqately to dislcose the extent of the company's assets, or liabilities, or
- — delayed the orderly winding up of the company.

This imposition of an unlimited contingent personal liability has caused some alarm. Since the passage of the Amendment there has been a noticeable reluctance by some professional people to accept office as directors or secretaries of companies.

Three questions arise:

- — who is an "officer" for the purpose of s 319?
- — what is the extent of an officer's liability for the debts of the company?
- — what defences are available to an officer in breach of s 151?

1 Definition of an officer for the purposes of s 319

The term "officer of a company" is not necessarily limited to the position of a director or secretary. Section 2(1) of the Companies Act 1955 states the term officer "includes a director, manager or secretary". The definition is not exhaustive.

The 1982 Amendment to the Companies Act 1955 extended the definition of a director to encompass persons fiilling the role customarily occupied by a person in the position of a director.

At common law the term "officer" has been held at various times to include a "de facto" director, manager, receiver, liquidator, and auditor. Each may incur liability under s 319.

(a) "de facto" director

A person not appointed as director, but acting as such, can come within the definition of an officer of a company. In *CAC v Drysdale* (1978) 22 ALR 161 a "director" was charged with failing to act honestly and use reasonable diligence in the discharge of his office. The defence argued that the accused was not a director. He had been appointed to fill a casual vacancy on a board of directors and the articles of association for the particular company stated that such appointments were temporary and were to be confirmed at the next annual general meeting. The director had not stood for election at the following annual general meeting. The High Court of Australia held that the word "director" extended to de facto directors. The relevant definition in Australian company law, like s 2(1) of the Companies Act 1955 describes a director as any person occupying the position of director.

(b) manager

Section 2(1) of the Companies Act 1955 includes a manager within the definition of an officer. There is common law authority that a manager is any person in a managerial or supervisory position. In *Re a company* [1980] CL 138 the question at issue was whether a subordinate manager of a company was an officer subject to the Court's jurisdiction in an investigation of possible fraud. Shaw LJ at 144 said:

> The expression "manager" should not be too narrowly construed. It is not to be equated with a managing or other director or a general manager. As I see it, any person who in the affairs of the company exercises a supervisory control which reflects a general policy of the company for the time being or which is related to the general administration of the company is in the sphere of management. He need not be a member of the board of directors. He need not be subject to specific instructions from the board.

For a manager to incur civil liability for the debts of the company under s 319 it would be necessary to establish that the manager was making policy decisions, rather than implementing policy decisions made by the board of directors. This could arise when a manager has been appointed under the terms of a scheme of arrangement under s 205 of the Companies Act 1955. In *Harris v Shepherd* (1975) 1 ACLR 50, it was ruled that a manager under a scheme of arrangement can be included in the definition of a director. It is the wording of the scheme of arrangement which is decisive. If the manager is given the powers and authority of a director, then the manager has the status (and obligations) of a director.

(c) receiver

Similarly, where a debenture holder has the right to appoint a receiver/manager under the terms of a debenture, a manager acting on behalf of a creditor may become an officer of the company. If the terms of the debenture provide that the receiver who is appointed shall take over the management functions of the company, then by analogy with *Harris v Shepherd,* that person stands as an officer of the company during the period of the receivership. Personal liability is also imposed on receivers by s 345(2) of the Companies Act 1955 for contracts entered into in the course of the receivership.

(d) liquidator

In Australia, there has been one reported case of a company liquidator being held personally liable for the debts of a company.

In *Re Timberland Ltd* (1979) 4 ACLR 259 a partner in the firm of chartered accountants, Price Waterhouse & Co, had been appointed liquidator of two companies. Personal liability attached to the liquidator following gross breaches of statutory duties imposed by the Companies Act 1969 (Vic). Marks J held that a liquidator stands in a similar fiduciary relationship to a company as does a director. The liquidator was held personally liable for losses following a failure to maintain sufficient accounting records during the period of the liquidation.

(e) auditor

The question of whether an auditor is an officer of a company is a moot point. An auditor is not specifically defined as an officer of a company under s 2 of the Companies Act 1955. Under s 165(1) of the Act an officer of the company is specifically disqualified from acting as auditor. There is the tantalising statement in s 165(2) that "references in this section to an officer or servant shall be construed as not including references to an auditor"; it suggests that in some instances an auditor may be an officer of a company.

An auditor has been held to be an officer of a company for the purpose of the misfeasance provisions of the companies act. In *Re London & General Bank (No 2)* [1895] 2 CL 673 the auditor was required to make good dividends improperly paid. The auditor had failed to disclose to shareholders the precarious state of their company's finances with the result that a dividend was delcared out of capital.

The principle contained in this case could be applied to an auditor under s 319 of the Companies Act 1955. If an auditor had failed to establish whether sufficient accounting records were maintained, as required by s 166(1)(a), and the failure to maintain sufficient accounting records contributed to the company's insolvency; the auditor could be held personally liable for the debts of the company.

2 Extent of an officer's liability for the debts of the company

An officer acts as agent for a company. The general rule of agency law is that an agent will incur liability as a principal in his own right unless it is made clear that the agent is acting in a representative capacity on behalf of a principal.[1] The fraudulent trading provisions in s 320 of the Companies Act 1955 extended this general rule. Under that section an officer of a company can be held personally liable on debts contracted on behalf of the company without reasonable belief that the debts would be paid when they fell due. Section 319 goes further. It holds officers of the company liable for all unpaid debts of the company, be they contracted by that officer or other agents of the company, if insufficient accounting records have contributed to the company's insolvency. This liability is not open-ended.

Under s 211(2) the liability imposed on a director or manager lapses one year from resignation. The same section limits the liability of a director or manager to debts incurred up to the point an officer resigned. The section only refers to directors and managers. It does not refer to secretaries, unless it is arguable that secretaries have a limited managerial function since *Panorama Developments Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711. Similarly, it is arguable that s 211(2) also applies to a receiver if that receiver exercises management powers.

If a director or manager has doubts about a company's solvency and the possible imposition of personal liability under s 319, that officer may resign. If the company does not proceed into liquidation within the next year, the officer is free of liability under s 319. If the winding up does commence within 12 months of resignation, then the officer bears a contingent liability in respect to unpaid debts which were incurred by the company prior to the officer's resignation. If the winding up proceeds on the resolution of shareholders, then the date of the resolution is deemed to be the commencement date of the winding up.[2] When a winding up is initiated by a creditor's petition to the High Court, the winding up commences on the date the petition was presented, not the date on which the winding up order was made.[3] The two dates can be several months apart as one creditor's claim is met and a different creditor is substituted for the original petitioning creditor.

The extent of a secretary's liability is unclear. Section 211(2) makes express mention of directors and managers. It can be boldly argued, *expressio unius est exclusio alterius,* that by implication the exclusion of secretaries from the statutory provision means that

the resignation of a secretary is effective immediately and the contingent liability imposed by s 319 does not hang over a secretary's head for a further 12 months.

Section 211(2) is of no relevance to the office of liquidator. The section applies to action taken prior to winding up and a liquidator is appointed on winding up. The effect of *Re Timberland Ltd* was to hold the liquidator liable for losses during the course of the liquidation, not for losses prior to the winding up.

3 Defences available for failing to maintain sufficient accounting records

(i) directors, managers and secretaries.

— criminal liability

A statutory defence is set out in s 151(7). If the prosecution can establish a prima facie case that insufficient accounting records have been maintained to satisfy s 151, the officer may establish in defence that he relied on competent staff to maintain the accounting records. The Act has no provision for employees, who are not officers of the company, to be prosecuted for failing to maintain sufficient accounting records. The officers of the company are not criminally liable for the default of others.

The defence is expressed in the same terms as its predecessor in s 151(3) of the Companies Act 1955, prior to its amendment by the 1980 Amendment. This defence was criticised in a submission before the Macarthur Committee as being too wide. It was put to the Committee that an officer should have sufficient reason to believe that the delegated duty had in fact been discharged. The Committee did not recommend a more restricted defence. It said:[4]

> Such a proposal would place a very onerous burden on directors who have no accounting or financial qualifications and experience, as they would be in effect called upon to judge whether or not the company's financial officers were performing their duties properly.

A defence of delegation presupposes that the directors did have reasonable grounds to believe that a competent and reliable person was charged with the task of maintaining accounting records. This raises the question of the extent to which officers may rely on others. The House of Lords, in *Dovey v Corey*, [1901] AC 477, absolved a director from responsibility for fraud perpetrated by employees in collusion with the auditors. Those responsible for the fraud were servants of the company, not servants of the director, and the director was not vicariously liable for their misdeeds.

So long as the task of maintaining the company's accounting records is left in the control of a person with suitable accounting skills, and a person who has given no indication of being untrustworthy, then an officer would incur no criminal liability under s 151.

It is not an adequate defence to have attempted to compile the necessary accounting records but to have been frustrated by other officers of the company. In *Deputy Commissioner for Corporate Affairs v Ong* (1980) CLC 40.624, the joint secretary of a company was charged with failing to keep sufficient accounting records. In her defence she admitted the company's accounting records were inadequate but said she had been unable to get the necessary information from her fellow officers. They were also charged. The secretary was convicted. The Magistrate ruled that the officers were under a positive obligation to ensure sufficient accounting records were maintained. The Court said the secretary could have answered the obstructive tactics by resigning, by reporting the matter to the Corporate Affairs Commission, or by reporting the matter to other directors.

Penalities on conviction are unlikely to be severe. Maximum penalties are reserved for the worst cases. The maximum penalties imposed by s 151(7) are a fine not exceeding $1,000 or imprisonment for a term not exceeding 12 months. Section 151(7)(b) directs that a term of imprisonment is only to be imposed if there was a wilful failure to maintain sufficient accounting records.

If found guilty, an application for relief under s 468 of the Companies Act 1955 is unlikely to be successful. Section 468 gives the Court power to excuse an officer of a company from liability in respect of any default or breach of duty where the officer concerned has acted reasonably and ought fairly to be excused. The Supreme Court of Victoria in *Lawson v Mitchell* [1975] VR 579 ruled that the equivalent section in Australian company legislation was of no application to criminal prosecutions for failing to keep proper accounting records under the Companies Act 1961 (Aus). This view contrasts with *obiter* statements made by the English Court of Appeal in *Customs & Excise Commissioners v Hedon Alpha Ltd* [1981] QB 818.

— civil liability

Should civil action be taken against an officer of a company under s 319 for failing to maintain sufficient accounting records, the first step that may be taken is to seek a stay of proceedings. An application may be made on the grounds that the civil action may prejudice any criminal prosecution under s 151. This type of application was made in *Re Saltergate Insurance Co Ltd* (1980) 4 ACLR 733 where a former director of the company sought a stay of misfeasance proceedings brought by the liquidator, pending the completion of criminal proceedings. It was argued the director had the right to stay silent in the face of a criminal prosecution. Needham J held that whether justice requires a stay of proceedings depends on the facts in each case. Quoting from the English Court of Appeal decision in *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898 he said the factors to be taken into account were whether publicity about the civil action might influence prospective jurors, or the disclosure of a defence in the civil action may encourage the fabrication of evidence to improve the chances of a conviction in the subsequent criminal trial.

When action under s 319 proceeds, the section itself contains a number of statutory defences.

It may first be argued that sufficient accounting records have in fact been kept by the company. In prosecutions under Australian legislation,[5] expert evidence has been heard from qualified accountants as to whether sufficient accounting records were maintained by a particular company in each instance.

The second ground of defence may be that the officer took reasonable steps to secure the company's compliance with s 151,[6] or had reasonable grounds to believe that the task had been delegated to a responsible person.[7]

Section 468 may be called in aid by the directors, manager or secretary when the liquidator takes action under s 319. The circumstances in which the Court will exercise its discretion is ill-defined. In *Re Day-Nite Carriers Ltd* [1975] 1 NZLR 173 and *Permakraft (NZ) Ltd*[8] the matters to be taken into account were whether the officer concerned had acted honestly and reasonably in the circumstances and whether the officer benefited personally

from the breach of duty.

Section 468 may not be available when it is a creditor who makes application under s 319. In *Customs & Excise Commissioners v Hedon Alpha Ltd* [1981] QB 818 the English Court of Appeal ruled that the equivalent provision in s 448(1) of the Companies Act 1948 (UK) applied only to actions by the company against its officers, not to actions by outsiders against the officers of the company.

(ii) auditors

Should the auditors be found liable under s 319, as officers of the company, they are unable to claim an indemnity from the company's accountants. This point was decided in *Dominion Freeholders Ltd v Aird* (1966) 67 SR (NSW) 150. An auditor was sued following a negligent audit. It was alleged the company had lost certain sums of money because the company's true financial position had not been disclosed. The auditor sought an indemnity from the company's accountants who had presented the balance sheet and profit and loss account for audit. The auditor's action failed. Jacobs JA at 158 said:

> [The auditors] must not rely or depend on company officers for information or representations in respect of matters upon which they are required in the course of their duties to reach an independent conclusion, and, if they do so rely, they cannot shed their responsibility by casting the liability on the company officer or officers concerned.

Relief under s 468 is unlikely to be available to an auditor liable in negligence. The Court of Appeal, in *Dimond Manufacturing Co Ltd v Hamilton* [1969] NZLR 609 expressed doubt as to whether an auditor could ever seek assistance under s 468. The basis of an action against the auditors is proof of a failure to take reasonable care in conducting the audit, or a failure to have exercised reasonable skill in the circumstances. Relief under s 468 is not available since this section requires evidence that the auditor acted "honestly and reasonably" in the circumstances.

Conclusion

Ultimately, the imposition of personal liability for a company's debts under s 319 is at the discretion of the High Court. This point was emphasised by the Minister of Justice, Hon J K McLay on the introduction of the Bill into Parliament. He said:

> I think that Courts would find it very easy to distinguish between reasonable speculation that would lead to either a successful or failed enterprise, on the one hand, and that which was clearly reckless mismanagement on the other. That puts a very high standard of proof that would be required against a director or officer of a company.

It is to be expected s 319 will be implemented in only the most serious cases — where there has been a gross failure to maintain accounting records, raising an inference of fraud.

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1 *Universal Steam Navigation Co Ltd v James McKelvie Co Ltd* [1923] AC 492.
2 S 270.
3 S 224.
4 The *Final Report of the Special Committee to Review the Companies Act* (Government Printer, 1973), para 239.
5 *Re Crimmins (No 1)* [1957] WLR 4.
Gill v R [1960] WAR 91.
Warren v Bartlett (1979) 4 ACLR 354.
Hamilton v Wright (1979) 4 ACLR 142.
6 S 319(2)(a).
7 S 319(2)(b).
8 *Permakraft (NZ) Ltd (in liq) v Nicholson* unreported, High Court, Napier, A 26/78, 15 February 1982.
9 (1979) 427 NZPD 4520.

Butterworths Travel Award Scholar

Mr John D Paton has been awarded the Butterworths Travel Award for 1983 from Auckland University.

After completing secondary school at Queen Charlotte College, Picton, Mr Paton attended the University of Auckland from 1977 to 1981. He graduated with a double degree of BCom. and LLB. (Hons). He gained a Senior Scholarship in law and a Senior Prize in accounting.

Since leaving the University of Auckland Mr Paton has been working in the Commercial Department of the firm of Simpson Grierson. His particular area of interest is that of corporate tax law.

In August 1983 he is commencing studies for a Masters Degree in Law at Cornell in the United States. He intends taking courses in Corporate, Federal and International Tax, Securities, Anti-Trust and Corporate Law. He hopes to work for a year in the United States after completing his degree, and will possibly seek to do a doctorate before returning to New Zealand in late 1985.

Fixtures and chattels

Dr Harold W Wilkinson

The author is a solicitor and a senior lecturer in law in the University of Bristol, England.

When a vendor sells land, what items pass with the land? English and New Zealand law take the same approach. The recent English decision of *Hamp v Bygrave* (1983) 260 Estates Gazette 720 gave the Court an opportunity to discuss the principles involved.

A pile of bricks is a collection of chattels and is personal property. When they are built and cemented together to make a wall they are real property. *Cheshire and Burn's Modern Real Property* (13 ed 1982, pp 136-7) says:

> The primary meaning from an historical point of view of "fixtures" is chattels which are so affixed to land or to a building on land as to become in fact part thereof. Such chattels lose the character of chattels and pass with the ownership of the land ...

It adds that the question of whether a chattel has become affixed to the land is a question of law and the decision in one case is no sure guide in another, for everything turns upon the particular circumstances. *Hinde, McMorland and Sim's Land Law* (1979, Vol 2, para 12.032) says:

> Broadly, a fixture is anything, once a chattel or personal property, which has become so attached to land as to form in law part of the land and to have become real property.

Hamp v Bygrave

After considerable negotiation Mr and Mrs Hamp contracted to buy from Mr and Mrs Bygrave their large dwelling-house set in grounds for £147,500. The agents' particulars had mentioned that amongst the features of the house were eight patio lights, five stone urns about three feet high, a stone Chinese ornament about twenty-one inches high and a large octagonal lead trough of the early eighteenth century. All these were in position in the gardens when the purchasers inspected before contract but after completion they had gone. The vendors agreed that they had taken them. They had already sold some of them. There was a sixth stone urn in the Italian garden, seen on viewing but not mentioned in the particulars, which had gone. The patio lights had been affixed to the walls by screws and the other objects had rested on their own weight, which in the case of the lead trough was considerable.

At one stage in the negotiations the vendors offered to reduce the price by excluding certain stated items from the list but the purchasers did not agree. Eventually a price was agreed which was £2,500 below the vendors' asking price but which included certain stated fitted carpets and internal light fittings.

Before contract the purchasers' solicitors sent the normal form of printed inquiries before contract to the vendors' solicitors and they obtained and returned the vendors' replies. One enquiry said,

> "(a) does the sale include all of the following items now on the property: trees, shrubs, plants, flowers and garden produce; greenhouses, garden sheds and garden ornaments; aerials, fitted furniture and shelves, electric switches, points and wall and ceiling fittings;
> (b) what fixtures and fittings affixed to the property are not included in the sale?".

The reply to (a) was "Yes" and the reply to (b) was "None."

The purchasers claimed in legal proceedings the return of the items or damages for their wrongful removal. The vendors replied that they were entitled to remove them because all except the patio lights were chattels. With regard to the patio lights they said that since the contract had expressly mentioned that certain internal light fittings were to go on the sale, by implication any light fittings not mentioned were not to go on the sale and were to remain the property of the vendors. This argument failed on the ground that if the patio light fittings were fixtures, as they were, they would necessarily pass to the purchasers unless expressly excluded. Boreham J found on the evidence that they had not been excluded. It was true that the exclusion of some items had been discussed as one of a number of suggestions for reaching agreement but he held that the exclusion had never been agreed upon and in the event a different contract had been made.

In view of the replies to the inquiries before contract it appeared at first sight that the vendors were in a hopeless position. Indeed the purchasers argued that the vendors had given a warranty in their replies that all the garden ornaments then in situ, including all those in dispute, were comprised in the sale. Boreham J held this not to be so, for two reasons. The first was that there was a warning or disclaimer prefaced to the replies which said, "These replies on behalf of the vendor are believed to be correct, but the accuracy is not guaranteed and they do not obviate the need to make appropriate searches, enquiries and inspections." The second reason was that, in the Judge's view, the inquiries and replies were not intended to create any warranty, they were "to enable a proper contract of sale to be drawn up". (The authorities on this topic are collected in *Emmet on Title* (ed Professor J T Farrand, 18 ed, 1983, pp 9-11).)

A main argument for the purchasers was that the items were fixtures and passed on a sale unless expressly excluded. What is a fixture? Boreham J said that the answer to that question depended on the application of two tests: what was the degree of annexation and what was the purpose of annexation?

On the first matter, each ornament was either on the land itself or on a plinth which was only in one case, that of the Chinese figure, attached to the land. So no item was fixed or attached to the land and prima facie all were chattels and would not pass on a sale.

On the second matter the Judge said that in judging the purpose of the annexation to the land regard must be had to all the circumstances, including the manner of annexation and the intention of the annexor at the relevant time, *Leigh v Taylor* [1902] AC 157. Each item was of a kind which might either have been intended to be a permanent feature of the garden or which might have been placed in the garden to be enjoyed as a chattel. Three things in the present case gave an

indication of the vendors' intentions: first they listed the items as part of the property to be sold, second they suggested withdrawing them as a means of reducing the purchase price, third they authorised their solicitors to say that the sale included all the garden ornaments then on the property. Thus the vendors regarded all the ornaments as "features of, and part and parcel of, the garden", in the Judge's words. If there had been no convincing evidence of intention the prima facie inference that the objects were chattels would have prevailed.

The second main argument for the purchasers was that even if the objects were still chattels and not fixtures the vendors were estopped by their representations from denying that they passed on the sale. The Judge accepted this argument also. He held that the vendors' references before contract to the items were calculated to induce potential purchasers to act on the belief that they were included in the sale, that the eventual purchasers did so act and that they consequently paid more for the property than they otherwise would have done. It was for the vendors to show that the purchasers had not relied on their assertions, *Greasley v Cooke* [1980] 1 WLR 1306, and this they had not done.

The vendors were held liable to return such of the items as they still retained, to pay £1,200 for the lead trough and £75 each for four stone urns which they had sold.

Principles

In *Holland v Hodgson* (1872) LR CP 328 at 335 Blackburn J said:

> Articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the cirumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend it to be a chattel.

New Zealand law takes the same view. In *Pearce v Hare Rakeno Te Awe Awe* (1913) 32 NZLR 440 a house was supported on piles or blocks let into the ground. it had a permanent brick chimney and fireplace. It was held to be a fixture.

In *Hamp v Bygrave* (above) Boreham J expressed the view that modern decisions attach much more significance to the purpose of annexation than to the degree of annexation. It appears that by "modern" he meant the decisions of the last hundred years or so, for the same attitude underlay all the speeches of the House of Lords in *Leigh v Taylor* in 1902 and Lord Halsbury LC said (pp 158-9) that workmen had become so much more skilled at putting up and removing "mere ornaments" without damaging the fabric than in the past that a degree of annexation which might formerly have proved conclusive as to intention could now be held not to be conclusive. See also Scarman LJ in *Berkley v Poulet* (1976) 241 EG 911, 242 EG 39 (CA).

Summary

There must be many occasions when the practitioner is asked, "Can the vendor take the light shades/cooker/ dustbin?" The textbooks do not commit themselves to handy lists of what can and what cannot be taken, *Emmet* p 519, *Hinde* para 12.034. The writer, with less caution, suggests that it may be found useful if the principles and cases are grouped into five categories into which may be placed the objects ranging from garden gnomes to bathroom cabinets over which parties have been known to disagree.

1 If the parties reach agreement about whether an object is to pass or not, that is conclusive. Many of the standard conditions of sale (Law Society and National in England, Auckland and District in New Zealand, for example) do not list any objects and the common law will apply in the absence of express provision. Some estate agents' forms used in the Christchurch area include "all blinds, drapes and curtains, electric light fittings, shades and bulbs, gas/ electric ranges, fixed floor coverings . . . as inspected".

2 Chattel. If the object stands on its own weight it is prima facie a chattel and does not pass on sale.

Examples.

Free-standing greenhouses on concrete legs or dollies, *Dibble v Moore* [1962] 3 AER 1465;

A three-roomed structure on two sledges or runners, with a verandah on three blocks built into the ground which kept the rain and weather from the doors of the structure, *Mackrell v Hall and Parker* (1913) 32 NZLR 740;

Six printing machines secured to the building by driving apparatus which was not part of the machines, *Hulme v Brigham* [1943] 1 AER 204;

Electric light bulbs held in by their bayonet fittings, *British Economical Lamp Co v Empire, Mile End Ltd* (1913) TLR 386;

Garden ornaments, even a statue 5 feet 7 inches high and weighing 10 cwt, *Berkley v Poulet* (above);

Garden frames, plants and shrubs in containers, curtains, dustbin, carpets and underlay, lamp-shades,[1] all plug-in electrical equipment,[2] gas cooker.[3]

3 Fixture. If the situation is as in 2 above, but the circumstances show an intention that the article should be part of the land, it will pass on a sale.

Examples.

Cinema seats screwed with nine screws to each pair, installed for the necessary use of the building as a cinema, *Colledge v HS Curlett Construction Co Ltd* [1932] 51 NZLR 1060, also *Vaudeville Electric Cinema v Muriset* [1923] 2 Ch 74;

An elaborate oak mantelpiece, "an essential part of the premises", Stout CJ, *Tait v Watt* (1915) 34 NZLR 446;

Tapestry, pictures in panels, carved statues, sculptured vases, stone lions and stone garden seats "essentially part of the house or architectural design", *D'Eyncourt v Gregory* (1866) LR 3 Eq 382;

Eleven dog grates put into a house in place of the eleven grates already there, with the intention of enhancing the freehold, *Monti v Barnes* [1901] 1 KB 205;

Spoil covering two acres and 30 to 50 feet high, from a slate quarry, the spoil having been on the land for over 30 years, *Mills v Stockman* (1967) 116 CLR 61;

4 Fixtures. If an article is affixed to land, even slightly, it is prima facie a fixture and passes on a sale.

Examples.

A door which matched the fireplace and was "attributed to the brothers Adam," *Phillips v Lamdin* [1949] 2 KB 33;

Patio lights, *Hamp v Bygrave* (above);

The gaselier (burner) on a gas-pipe, *Sewell v Angerstein* (1868) 18 LT 300;

Trees shrubs and garden plants, electrical plugs, switches and wiring, wall and ceiling fittings and flexes, built-in electrical equipment such as an air-conditioner or extractor fan, built-in walk-in wardrobe.

5 Chattels. If an object is affixed to land but the circumstances show that it was not fixed with the intention of enhancing the land permanently, it is a

chattel and does not pass on a sale. Examples.

Tapestries affixed merely to display them and to ornament a room, *Leigh v Taylor* (above);

Milking machinery bolted to the floor "so as to steady the engine and plant", Stringer J, *Booth v Goodwin* [1923] 42 NZLR 703;

Three hundred and forty-five tip-up cinema seats fastened to the floor so as to comply with the local council's safety regulations, *Lyon & Co v London, Midland and City Bank* [1903] 2 KB 135;

A bush sawmilling tramway, 2½ miles long, which was moved as timber was used up, having "no such permanent character as machinery in factories possesses", Stout CJ, *Pukuweka Sawmills Ltd v Winger* [1917] 36 NZLR 81;

TV aerial, bathroom cabinet, bookcases and shelves.

Conclusion

Apart from small but interesting variations in practice, there seems little difference between the New Zealand and the English approach to this matter. In any case of anticipated difficulty the advice of *Barnsley's Conveyancing* (2 ed 1982, p 124) could serve practitioners in both countries equally well, "Where items are numerous or expensive the parties are well advised to regulate the matter formally by a special condition."

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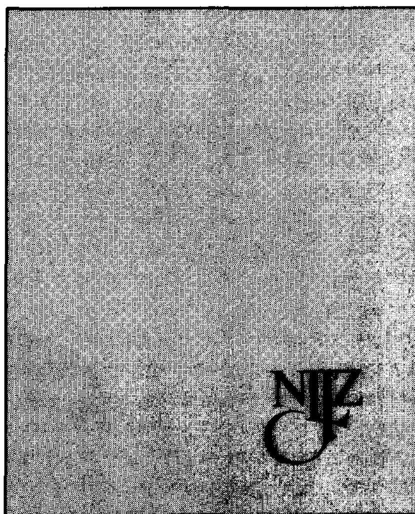
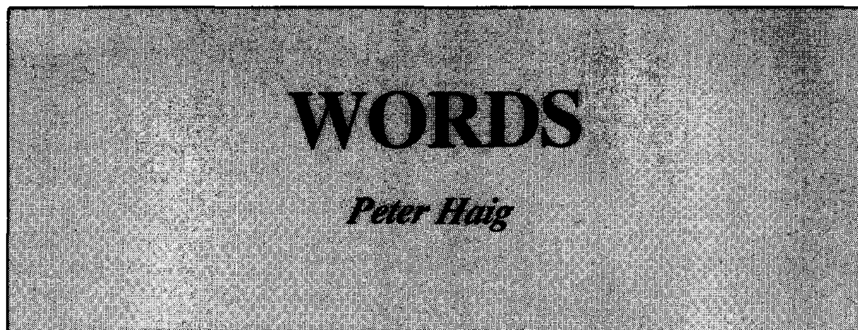
1 In New South Wales, Australia, they would be considered fixtures, Moss, *Sale of Land*, 5 ed p 199.

2 Hinde says that it is conveyancing practice in New Zealand to regard any cooking stove as a fixture, but doubts the justification in law, para 12.033.

3 A fixture in New South Wales, Moss p 199.





Proved or Proven?

We have here a conflict between on the one hand, an accepted usage of longstanding in our legal profession and on the other, a vigorous interloper from common speech, with strong trans-Atlantic backing.

The *Shorter Oxford English Dictionary* firmly gives *proved* as both the past tense and past participle form of "prove", describing the form *proven* as deriving from Scottish legal use (ie the well-known "not proven"). The word *proven* as an adjective is given a separate heading, showing its derivation as a past participle from the original form of "prove" (which was "preve" — hence preve — proven, like cleave — cloven). The dictionary then gives it the following primary meaning "**1.** Shown to be, or to be as stated; demonstrated by evidence." As an adjective (particularly when preceding its noun, as in "a proven remedy") the form *proven* seems unexceptionable. But what of its use as a verb in legal writing?

Proven is common in American legal writing — which is no doubt the reason why it is invading these parts. I suggest there are three reasons why we should resist such a development:

1 Our legal writing should always be as clear and consistent as possible. I am not aware of any statute in England or New Zealand that uses the form *proven*. So long as the standard statutory form is *proved*, the common use of an alternative form by lawyers is bound to be confusing and inefficient.
2. To adopt *proven* would add a linguistic complexity, because while *proved* serves for both past tense and past participle, *proven* will act only as past participle. Thus we can say "the evidence *proved* it" or "it was *proved* by the evidence"; but we cannot say "the evidence *proven* it". Why burden ourselves with this needless distinction?
3. There is well justified doubt about the proper pronunciation of *proven*. The *Shorter Oxford English Dictionary* decrees that in its archiac Scottish legal form the vowel sound should be that in "loaves", while in its modern usage it should be that in "grooves". This anomaly on its own should be enough to tip the scales against *proven* — just as uncertainty about the proper way to pronounce some of the barbarous metrical terms of measurement that have been foisted on us recently encourages the stout resistance put up by many people to their incorporation into common speech and writing.

Rent and Rental

We all know what *rent* is. But what is *rental?*

First, it is of course an adjective derived from the noun "rent" — eg "rental accommodation". But as a noun is *rental* merely a synonym for *rent?*

A very modest degree of research shows that the answer is no. The definition of *rental* in the *Shorter Oxford English Dictionary* (3 ed, 1974 reprint) is not conclusive, but suggests that as a noun the word has little modern significance. The definitions are as follows:

1. A rent-roll. Now *rare*. **b.** An income arising from rents received. Late ME [ie Middle English].

2. The amount paid or received as rent 1637. **b.** *U.S.* Return from the lending of books.

The most helpful legal definition of *rental* appears in the following passage from the judgment of Warrington J in *Re Windham's Settled Estate* [1912] 2 Ch 75, at p 80:

I think "rental" means the total

amount of the rents payable by the several tenants to the landlord or his agent, that it to say, the total amount appearing in the rent-book which I suppose most landowners would keep, shewing the rents paid by their several tenants.

Based on the above authorities, it seems clear that the use of the word *rental* as a noun should be restricted to cases where what is meant is the aggregate of a number of different rent payments, eg "the total rental from the block of flats was $10,000".

To restrict the word *rental* in this way will clearly be an effort for many lawyers and Judges, who delight in using it in general preference to the shorter and blunter word *rent*. This exemplifies once more a besetting linguistic sin of our profession — that of using a longer or more unfamiliar word or expression in preference to the shorter or commoner variant, in the belief that the former sounds more impressive and thus enhances the learned image of the writer or speaker. Other common examples are *advisor* for *adviser*, and (a great current favourite) "in the event that" for "if". Of course other professions are equally — often more — at fault in this matter. But because words are the *only* tools of the legal profession, it behoves lawyers more than any other professional people to ensure that those tools are used with precision.

Rice and Romans

The New Zealand Law Journal for 30 October 1928 contained an actual answer to a question set by an examiner in Roman Law at Otago University. The report does not indicate the marks awarded, nor whether there were any bonus points for the generosity displayed in the conclusion. For that now large part of the profession who never took Roman Law this will be enlightening as to the basic principles of Roman Law, and for those of us who did it will serve as a warm remembrance of the simplicity of those ancient times. It was not a Roman who coined the phrase De minimis non curat lex.

QUESTION: A and B accidentally mix their rice; C wilfully and without permission takes this rice, also eggs and milk belonging to D and makes a pudding. Who is the owner of the pudding? What are the rights of the parties?

ANSWER: The effect of the accidental mixing of the rice is that each remains the owner of his own share. This is a case of *commixtio*. If such things as rice, wheat, cattle, etc, belonging to different persons, are mixed together accidentally, each person remains the owner of his share. I think that C can be dismissed at once. The fact that he acted wilfully and without permission disentitles him to any compensation for his labor. If he had acted *bona fide* he would have had a claim on the owner of the pudding. The fact that C did act wilfully and without permission, however, absolves A and B on the one hand and D on the other from any blame in the dastardly proceding and the party who is decided not to be the owner of the finished product will have a claim on the other for the value of the materials used. The question comes to this: that A's and B's rice has become mixed in an inseparable manner with D's eggs and milk under circumstances which cast no blame on either side. If the articles had been separable the rice would have continued to belong to A and B in proportion to their shares, and the eggs and milk to D. Unfortunately the matter has gone too far for me to be able to come to that happy conclusion. As the articles are inseparable it is necessary to decide whether the rice is accessory to the eggs and milk or *vice versa*. This is much too difficult a question for one inexperienced in everything connected with rice puddings except the eating of them, and I suggest that it be referred to the arbitration of Professor B——— —— and Mrs T————, with Dr I———— as chairman, in order that an authoritative statement on this difficult matter may be obtained. In the absence of such distinguished assistance, I submit — albeit with great diffidence that the eggs and milk are an accessory to the rice, which must, I think, be regarded as the foundation of the pudding. The ownership of the pudding is, therefore, in A and B in proportion to their shares in the rice. D has an action against them *(condictio)* for the value of the milk and eggs. A consideration of the relative values of the ingredients would, I am afraid prove this result to be inequitable, and perhaps the best way to settle the matter would be for A, B and D to fall to and consume the "bone of contention". C might be allowed to scrape the dish.

Western Samoans and Citizenship

The Ministry of Foreign Affairs has asked that the availability of a free bulletin on New Zealand Citizenship and Western Samoans (*Information Bulletin No 4*, March 1983), be drawn to the attention of practitioners and anyone else who might be interested.

This bulletin sets out, from the Government's point of view, some of the issues on the Citizenship (Western Samoa) Act 1982 resulting from the Privy Council decision in the *Lesa* case. It has been published by the Ministry of Foreign Affairs. It contains such material as the decision of the Privy Council, the Protocol to the New Zealand — Samoa Treaty, the Act itself, the statement by the Human Rights Commission and the comment on this by the Ministry of Foreign Affairs, various government press statements and a speech by the Minister of Justice.

The bulletin does not reprint any of the material on both sides of the arguments about the *Lesa* case and its consequences, that appeared in the *New Zealand Law Journal*, viz Mr J McManamy [1982] NZLJ 273; Mr R G Glover [1982] NZLJ 315; Mr E J Haughey [1982] NZLJ 317; Hon J K McLay [1982] NZLJ 353 and Mr P J Downey [1983] NZLJ 17. Nor does it publish those parts of the opinion given by Dr G P Barton to the Western Samoan government which were made in public in Apia.

For those who are interested the Ministry of Foreign Affairs bulletin is available free of charge from the Information Division, Ministry of Foreign Affairs, Private Bag, Wellington.

Overseas Correspondence

Gray Williams, writing from the United States

Indian Law

The names themselves are fascinating: Chief Buck (Ai-yaw-banse), Whitebird, The Big Round Lake, The Sioux, The Chippewa, The Mescalero Apache Tribe, The Suquamish Tribe, The Big River Band, The St Croix "Lost Band", but of course the life of the Indians in the United States isn't always so eloquent. One of the problems that remains concerns the legitimacy of tribal ordinances; the courts recently have had to determine whether these ordinances will stand if they conflct with state laws.

The Mescalero Apache Tribe of New Mexico lives on a reservation of 460,000 acres of which the Tribe owns all but 194 acres. Federal laws allow a tribe on a reservation to adopt a constitution and by-laws which the Mescalero had done. Aware that funds available to them were dwindling, the Tribe had, with the aid of federal money, developed the hunting and fishing resources of the reservation.

As part of this development of the fishing and hunting resources, each year the Mescalero passed ordinances which, amongst other things, established bag limits. Unfortunately for the Mescalero the bag limits which they imposed were different from the state limits (for example, a buck and a doe, against the state limit of a buck only). To compound matters the Tribe did not require a hunting and fishing licence for either Indians or non-Indians who were hunting or fishing on the reservation. The state of New Mexico decided that enough was enough and its Department of Game and Fish began to enforce the state's regulations by arresting non-Indian hunters for illegal possession of game killed on the reservation (the game killed was in accordance with tribal ordinances but not state law).

By the time the case reached the United States Supreme Court in June of this year, New Mexico had conceded that the Tribe had exclusive jurisdiction over hunting and fishing by Tribe members. New Mexico conceded further that the Tribe may regulate hunting and fishing on the reservation by non-members of the Tribe, but the state claimed concurrent jurisdiction over non-members on the reservation and, as a consequence, the state claimed its laws should also apply to fishing and hunting by non-members on the reservation.

In a unanimous, snappy decision, the Court ruled against New Mexico. Indian tribal authority over the reservation has "attributes of sovereignty" and there is on the reservations an immunity from state and local control. Thus, said the Court, the tribes are free to determine rules for their own members on the reservation and the states can intervene only when an Act of Congress authorises it. In relation to non-members on the reservation, the states may at times have concurrent jurisdiction over non-members but only when jurisdiction is not pre-empted by federal laws. Pre-emption does not require an "express congressional statement", instead the courts may look at "federal and tribal interests reflected in federal law".

Indian sovereignty, tribal self-government and self-sufficiency have long been goals of innumerable federal laws, and tribal rights to manage the Tribe's resources would prevail over state law because of these federal laws. To justify imposing additional burdens on an Indian enterprise, the state must show that it is necessary to impose such burdens because of the services which the state performs on the reservation.

New Mexico failed to meet its burden; the fish and wildlife reserves were established and maintained without New Mexico's assistance. New Mexico could point to no on or off reservation effect that required state intervention. The state could show only that its licence revenues would decrease but that loss, said the Court, was insubstantial. Balanced against this minor loss was the fact that concurrent jurisdiction effectively would mean that tribal authority was at the state's pleasure. It would also disturb the tribal-federal relationship that had developed. For these reasons therefore, tribal law took precedence over contrary state law.

A similar decision had been reached by the Court of Appeals in Wisconsin in a case that exemplifies the historical complexities of the problems facing the Indians. The case concerned the St Croix band of Lake Superior Chippewa. In 1825, the US recognised the St Croix's claim to land including the Big Round Lake but over the following years the St Croix ceded the land back to the US (they did however maintain their fishing and hunting rights). In 1854, reservations were established for many tribes but not for the St Croix who soon became known as the "Lost Band". In 1909 an investigation showed that most of the St Croix band were living as squatters on public land. In 1934, the US Congress decided to purchase land for homeless tribes throughout the United States. The US purchased land for the St Croix, including Big Round Lake, but the proclamation which declared the land a reservation did not specifically grant fishing rights in Big Round Lake to the St Croix.

The case at hand involved a St Croix member who fished the lake during the state imposed closed season. The Court had no difficulty in deciding that even though the St Croix weren't specifically granted fishing rights, in establishing the reservation the United States had so intended. However, the St Croix did not have exclusive fishing rights on Big Round Lake, and, on remand, if the state could show that its fishing regulations were reasonable and necessary, then the regulations would be valid against the St Croix member.

Finally, a more clear-cut example of the state of Wisconsin's reasonable and necessary regulations is found in a case concerning Mr Whitebird who is an enrolled member of the Bad River band of Lake Superior Chippewa. Wisconsin law requires all motor boats to have a certificate, Mr Whitebird however was on a non-reservation lake in a boat without a certificate. The Court held that the Wisconsin law would apply unless there was federal law to the contrary and no federal law to the contrary was cited. The Court added that the law was a public safety measure and not a tax, and that public safety could not be accomplished when some boats were numbered and others not. The cases are consistent at least to show that, when on reservation activity is involved, a state will be able to intervene only in limited circumstances.