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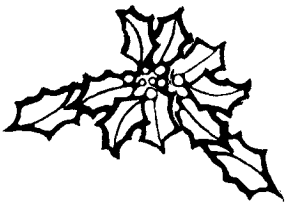


Christmas messages to the profession

From the Attorney-General, Rt Hon Geoffrey Palmer

I am sure all New Zealanders were saddened by the death this year of a former Attorney-General, Sir John Marshall. Sir John was conscious of the wider responsibilities of lawyers to society. This was the theme of many of his speeches to the profession. These responsibilities are certainly no less important in 1988. I take this opportunity to say that I do appreciate the assistance in this which has been given by the profession over the last year.

1988 has seen the enactment of a number of important law reform measures covering a wide range of issues. These include the Coroners, Disputes Tribunals, Imperial Laws, Protection of Personal and Property Rights, and Trustee Amendment Acts. Further changes are on the stocks for 1989. Some of these are currently before the House, including the Defamation Bill, which revises and clarifies the existing law.

Several important measures which strengthen and update our business law have been introduced this year. The Securities Law Reform Bill which deals with insider trading, futures, and nominee disclosure, amongst other things, is perhaps the most important. The Companies Special Investigations Act 1958 is substantially revised and updated by the Corporations (Investigation and Management) Bill. Members of the profession will also be aware of the Securities Commission's proposals for a new regime for takeovers. In addition, I set up a Committee to examine aspects of the sharemarket and report back to me by 31 March 1989. Further, the Law Commission's report on Company Law will be available early next year.

A related exercise is the harmonisation of business law between Australia and New Zealand. I signed a Memorandum of Understanding on the Harmonisation of Business Law earlier this year in Darwin. New Zealand and Australia are moving much closer together as a result of CER. It is desirable to ensure that there are no impediments in terms of business laws to this closer economic relationship. This is an issue of importance to lawyers as well as to other business people.

I have referred in earlier messages to the proposed Bill of Rights. This exercise has been advanced in 1988 with the publication of the Select Committee's final report on the White Paper. The Select Committee recommends the enactment of a Bill of Rights which would be an ordinary statute, not entrenched. I have made it clear that I favour an entrenched Bill of Rights. But I accept the Committee's conclusion that New Zealand is not yet ready for this. The introduction of a Bill of Rights which is an ordinary statute would none the less represent a significant step on the road to New Zealand's constitutional maturity. I hope that the legal profession will participate in the ongoing debate on any Bill of Rights.

I also draw attention to the Law Reform (Miscellaneous Provisions) Bill which makes important changes to a number of areas of the law including children's evidence and the procedural protections for sex offence victims.

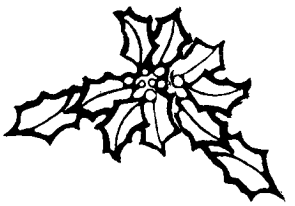
There are also a number of proposals in their relative infancy on which input from the legal profession and others will be essential. The report of the Working Group on Matrimonial Property deals with the legal status of de facto relationships as well as the Act itself. The Crimes Bill, which I intend to introduce early in the new year, will be a substantial revision of the 1961 Act. The Law Commission's report on the structure of the Courts is expected shortly, as is the Roper Committee's report on prisons. These areas clearly demonstrate the interface between the legal profession and the wider community.

The exchange of ideas and debate is a vital part of the law reform process. I had a very useful meeting with the Lord Chancellor Rt Hon Lord MacKay when in the United Kingdom last month. The English Attorney-General Rt Hon Sir Patrick Mayhew paid us a fruitful visit here in New Zealand.

It was also fascinating for me to meet with the Minister of Justice of the Soviet Union when I visited that country recently. Significant legal changes are occurring in the Soviet Union as a result of the policy of perestroika. For example, amendments are being considered which will radically change the constitution to accommodate the determination to establish a separation of powers between the legislative, executive and judiciary. The independence of the judiciary is being strengthened. The criminal code is being heavily pruned with the removal of many of the old political offences (such as the very wide article on anti-Soviet slander). I am sure these discussions were a unique experience for a New Zealand Attorney-General.

I hope that you all have the opportunity over the Christmas break to take stock and a well earned rest. Merry Christmas. □

Christmas message from Graham Cowley, President, New Zealand Law Society



I am grateful to the *New Zealand Law Journal* for the opportunity to send a message not only to members of the legal profession in New Zealand but also to all readers of the *Journal* throughout the world.

There are many issues to be faced by our profession in 1989. I invite readers to consider some of these issues during the relative leisure of the summer vacation period. My contacts during this past year with Law Societies and Bar Associations throughout many parts of the world have convinced me that most issues facing the profession in New Zealand are actually issues facing the legal profession throughout the world.

What are some of those issues?

- Maintaining the availability of legal aid to all persons entitled thereto in the face of sharply rising total costs of legal aid services — throughout all jurisdictions it seems the total cost of legal aid is rising because the personal circumstances of more people are making them dependent on legal aid combined with the complexity of the issues for which aid is granted rather than any noticeable increase in the net return from legal aid work to those practitioners assisting the legally aided.

- Ensuring availability of legal advice and legal services to those increasing numbers of the population who cease to qualify for legal aid but nevertheless having insufficient resources to enable them to pay personally for the legal advice and assistance that they need.

- The proposition promoted as being in the interest of consumers, that in the delivery of legal services "cost" is the most important goal while "quality" is only an optional criterion.

- Suggestions that ethical rules and codes of conduct inhibit competition which is based on the proposition that competition (even if without standards) will always benefit the consumer.

- Concern by private practitioners about issues of limitation of liability at least in regard to commercial clients.

- Suggestions that multi-disciplinary practices can provide benefits to the public that are greater that independent professionalism.

- The very small proportion of practitioners who fail to maintain the high professional standards for which the legal profession is recognised.

These issues go to the heart of the protection that an independent legal profession gives to the citizens by way of independent analytical and responsible advice and assistance. Events during this last year in Fiji, Malaysia, and Singapore (to name just a few instances relatively close at hand) have shown the need for an independent guarantee of citizens' rights and the Rule of Law.

For reasons which I find hard to understand there seems to be a widely held view in New Zealand that "lawyers" are a group of people consumed by self-interest and a desire to protect their own position rather than being seen as an active group of people competing amongst themselves to provide services to and act in the interests of and for the protection of the public generally. This point of view is even held by those who should be aware (and certainly have the ability and resources to make themselves aware) of the ways in which lawyers in fact compete and have responded to the challenges of the deregulated society in which we now live.

With current shortage of qualified lawyers in New Zealand there is choice in employment opportunities and members of the profession have the choice of practising in a corporate scene, in an employed situation or in private practice. Members of the profession have choices of careers and chances to specialise and develop particular interests to better equip themselves and serve the public.

However the very competition that has developed within the legal profession in the last few years causes me some worry and concern. The attributes upon which professional responsibilities have for centuries been based do not lie easily with some essential ingredients of open competition. I am concerned that an excess of competition could result in a lowering of standards. In the long term the people to suffer from a lowering of standards are principally the general public.

In 1988, the profession has faced its responsibilities on the issues that have arisen with great responsibility and candour. I invite all readers of the *Journal* to meet the challenges arising out of the issues that I have mentioned above and to resist moves that may in any way erode or weaken the integrity and independence of our proud New Zealand legal profession.

I wish you all a Merry Christmas and trust that whilst reflecting on the issues I have raised you have a relaxing and happy holiday. □

Case and Comment

Restraining the lender

Lydney Investments Ltd v CFC Commercial Finance Ltd [1988] BCL 890; *Robinson v United Building Society* [1987] BCL 741

The combination of the Credit Contracts Act 1981, the Fair Trading Act 1986, and the all-embracing nature of the emerging lender liability principles of fairness and good faith is to impose on lenders significantly more stringent standards of conduct than have been required in the past. Lenders can no longer conduct their activities and determine their policies and procedures solely by reference to the wide powers which they have traditionally reserved to themselves under their loan documentation. The following cases serve to remind practitioners of how the Courts can regulate and restrict the way in which lenders exercise their contractual rights.

Lydney Investments Ltd v CFC Commercial Finance Ltd [1988] BCL 890

The plaintiff borrowed money from the defendant secured by an instrument by way of security over the plaintiff's launch. Repayments were to be effected by automatic payment authority but due to an oversight by the defendant the authority form was never forwarded to the plaintiff's bank and as a result the first three instalments were not made.

When the mistake was discovered, payment of the outstanding instalments was requested. The plaintiff was not in a position to make immediate payment and in discussions with an officer of the defendant, the plaintiff was told that the defendant would have to rewrite or extend the loan in order to deal with the situation. However that officer left the employment of the defendant shortly afterwards and the defendant refused to recognise the indication given by the officer. Instead it elected to treat the non-payment of the instalments as a default under the loan agreement and proceeded to call up the loan and repossess the launch.

The plaintiff sought an interim injunction to restrain the defendant from enforcing the loan agreement in this way, alleging that the indication given by the officer of the defendant was such as to amount to a variation of the loan agreement or alternatively provided the foundation for a promissory estoppel. That lenders' contractual rights can be abrogated by virtue of the principles of modification, estoppel and waiver is clear; (in respect of mortgagee's sales see "The Mortgagee's Sale – Part I – Waiver" [1982] NZLJ 241). Whilst not having to definitively decide the issue Smellie J did note that the representations of the officer were such that they could by virtue of the doctrine of promissory estoppel, operate to prevent the defendant repossessing when it did.

Principles such as modification, estoppel and waiver can arise in a number of instances. Consider *Nevada National Bank v Huff* (Nev 1978) 582 P 2d 364 where the Court held:

> . . . [A] secured party who has not insisted upon strict compliance in the past, who has accepted late payments as a matter of course, must, before he may validly rely upon such a clause to declare a default and effect repossession, give notice to the debtor that strict compliance with the terms of the contract will be demanded henceforth if repossession is to be avoided.

Whilst the Court there took guidance from the Uniform Commercial Code with its aspects of reasonableness and fairness, it is thought that New Zealand Courts could, with the application of the Credit Contracts Act 1981, reach a similar finding.

The defendant then alleged that at the time of the repossession, the plaintiff was in fact in further breach of the loan agreement in that the insurance on the launch was not in accordance with the provisions of the loan agreement, viz, that it was not insured in the name of the plaintiff nor had the insurance company been notified of the defendant's interest in the launch. The defendant accepted that it only became aware of the breach *after* the repossession, but argued that it was nevertheless entitled to rely on that breach to effect repossession and call up the loan.

Smellie J held that there was a serious question to be resolved as to whether or not the defendant's actions were oppressive in terms of the Credit Contracts Act 1981 noting that the defendant's actions in

> . . . relying upon a fall-back position relating to the insurance default which was unknown at the time of the repossession strikes me as being unconscionable.

Taking into account the balance of convenience and the overall justice of the case the interim injunction was granted subject to the plaintiff bringing all outstanding instalments and penalty interest up to date, rearranging the insurance to comply strictly with the provisions of the loan agreement and undertaking to observe the conditions of the loan

agreement during the term of the interim injunction.

The Credit Contracts Act gives Courts wide powers to reopen credit contracts and to examine the circumstances in which a creditor has exercised a contractual right or power and to determine whether such exercise is oppressive having regard, *inter alia*, to "whether the time given to the debtor by or pursuant to the contract to remedy the default is oppressive having regard to the likelihood of loss to the creditor". [s 11(2)(b)(ii)]

Whilst obviously conditioned by the interlocutory nature of the proceedings, the decision can be indicative of the way in which Courts will in the future apply the provisions of Part I of the Credit Contracts Act to fetter the exercise of contractual rights and powers by lenders. The "likelihood of loss to the creditor", the conduct of the creditor ("in contravention of reasonable standards of commercial practice"?) and the conduct of the debtor (free from fault?) will undoubtedly be seen to be key elements for Courts to take into account. Consider the application of such elements in the following case.

Robinson v United Building Society [1987] BCL 741

The plaintiffs were the owners of a farm property over which was a mortgage to UBS. As a result of the worsening rural economy they became unable to meet the payments due under the mortgage.

UBS issued a s 92 Property Law Act notice which stipulated that if default was not remedied by the date specified in the notice *all* moneys secured under the mortgage would become immediately due and payable. In the event default was not remedied and UBS proceeded with its plans for a mortgagee's sale through the Registrar of the High Court.

Approximately three weeks before the date scheduled for the auction all arrears were brought up to date. However UBS refused to abandon the sale and so the plaintiffs sought an order under the Credit Contracts Act to prevent the sale, on the basis that for UBS to proceed with the mortgagee's sale was, in all the circumstances, exercising a power conferred by the mortgage contract in an oppressive manner.

Tompkins J granted the interim order.

There was evidence that to proceed with a mortgagee's sale of farmland when all payments due under the mortgage had been made, would be in contravention of reasonable standards of commercial practice in the farm lending sector. Evidence disclosed that the general attitude of leading farm lenders was one of tolerance to the farming community.

Further, UBS had given no valid or convincing reasons for proceeding with the sale. On the other hand cash flow statements were produced showing that the plaintiffs were able to meet future mortgage payments to the defendant. Also the information presented to the Court suggested that there was, and would remain, a reasonable equity in the property. Tompkins J concluded:

> In the end, there must be a suspicion that the defendant has not stated its true reason. If that is a desire to receive its money so that it can lend it again at a higher rate of interest, that may well be considered unconscionable.

Courts have been willing to restrain the exercise of a power of sale where *no* default remains outstanding as at the date of sale [see *Morton v Suncorp Finance Ltd* (1987) 8 NSWLR 325]. But today most mortgages are framed so that where there are arrears of interest followed by a failure to comply with a Property Law Act notice, the principal sum will immediately become due for repayment and remain so even if interest is subsequently brought up to date. This decision suggests that notwithstanding the existence of such a provision, Courts may well exercise their jurisdiction to restrain the exercise of a power of sale. It is likely that mere non-compliance with a Property Law Act notice may not now automatically be relied upon by lenders as providing unchallenged authority for their proceeding with a mortgagee's sale.

Courts will obviously be reluctant to interfere with agreed contractual arrangements between lender and borrower, but where the exercise of those arrangements by the lender strays into the area of "oppressiveness" and not in accordance with reasonable standards of commercial practice, Courts will be prepared to intervene in order to achieve the correct balancing of interests in the creditor-debtor relationship. In this regard the Credit Contracts Act is a significant curb on the exercise of contractual rights and powers by lenders.

Stuart Walker
University of Otago

Paternity application — premature birth

Young v Whitton (High Court, Rotorua, No AP 101/87; judgment 12 August 1988) was an appeal heard by Ongley J against the making of a paternity order — on 9 September 1987 — in respect of a child born to the respondent on 29 November 1984.

The respondent gave evidence in the Family Court that she had engaged in a casual sexual relationship with the appellant during March 1984 and possibly into April 1984. The first occasion on which she recollected intercourse was 17-18 March after an air pageant function held at the Opotiki aerodrome. She said that intercourse took place in a van beside the Otara River. She also said that intercourse with the appellant took place four or five times during the succeeding weeks but she could not be exact about that. She was not very specific about the details of the occasions other than the time after the function at the aerodrome. Contraceptives were not used on any occasion. She was quite definite that she had not had intercourse with any person other than the appellant during the period of her association with him.

The respondent admitted in cross-examination that she had had a relationship with another man earlier in the year during which intercourse had taken place. She could not remember specific dates on which it had occurred but said that the relationship terminated on

12 February because the man left town on that date.

The appellant admitted having had intercourse with the respondent on about eight occasions but denied paternity of the child. His account of the first act of intercourse and the events relating to the air pageant episode differed from that of the respondent, but not significantly. In evidence-in-chief he put the period during which intercourse took place as being at the end of February and during March 1984 but, in cross-examination, he said the period was four or five weeks in March and April 1984.

Blood tests were made and admitted in evidence. The interpretation of these tests was:

> the blood groups shown do not exclude Mr Desmond Young from paternity of Michael Whitton. However, they do not prove that he is the child's father, even though the blood groups are compatible with paternity. As a general comment on the probability of this selection of laboratory tests detecting an exclusion of paternity, it has been calculated that, in a New Zealand population, there would be a 98% likelihood of detecting an exclusion if one was present. There would be a small but significant possibility (2%) that an exclusion could still be present in a blood group system outside this range of tests.

The respondent did not know that she was pregnant until her doctor diagnosed that she had a cyst in the ovary and sent her to hospital for a scan, which disclosed her pregnancy. That was on 23 August 1984. She said in evidence that the child was meant to be born on 25 December 1984 but, in the event, was born prematurely. She did not remember when she had her last period prior to the birth.

A medical certificate by Dr Jacqueline Graham was admitted in evidence and was in these terms:

> [The respondent] has asked me to write on her behalf regarding the date of conception of her baby. I have taken the following information into account: her last menstrual period, a scan performed on 23 August 1984, the birth date, 29 November 1984, and the estimation of gestational age at birth. Taking all these factors into account, I would estimate that conception took place between 7 March 1984 and 26 March 1984.

The Family Court Judge commented that he had no reason to doubt the accuracy of this certificate. After reviewing the evidence, he recorded his findings thus:

> that he accepted the mother's evidence that she was not having intimate relations with any other man at the time. She seemed to him to be a witness who was telling the truth and he really had no doubts about the reliability of her as a witness. She could not be expected to remember the exact details which occurred three years ago relating to times and dates. Both parties had agreed on the intimacy that took place in March, both at the Aero Club function and at the other places.

Added to the other features in the case that the blood group testing was not exculpatory of the alleged father but confirmatory of the mother's allegation and that the alleged father wrote to the mother suggesting that it was best for both of them that the child be adopted, he really had no doubt whatever in finding that paternity had been established against the alleged father.

The Family Court Judge expressed himself as satisfied on a balance of probabilities that the alleged father was the father of the child, giving due weight to the gravity of the mother's allegation. He accordingly made a paternity order.

The grounds of the appeal were that the Family Court Judge erred in regarding the results of the testing as being confirmatory of the mother's allegations and that he had failed to give proper consideration to the significance of the child's being alleged to be premature.

Ongley J found it necessary to deal only with the latter ground. Counsel for the appellant submitted that Dr Graham should have been called as a witness in order to satisfy the requirements of the standard of proof. Because she was not called, it was counsel's contention that the Court below was not in a position to assess the reliability of the estimation of the date of conception. Counsel had made the submission at the lower Court hearing that the doctor should be called as a witness, but the Judge did not accede to that proposal and relied on the certificate. Counsel also submitted that it was unfair to his client that no opportunity had been given to cross-examine the doctor on the factors relevant to the formation of her opinion. The Judge had a discretion under s 164 of the Family Proceedings Act 1980 to admit evidence of the sort provided by the certificate. "Evidence adduced in that form," observed Ongley J, "may not, however, be of the same weight as viva voce evidence subject to cross-examination and its nature and effect are open to examination on appeal."

His Honour went on to say that, in estimating the date of conception of the child, the doctor stated that she took into account the mother's last menstrual period, the scan performed on 23 August 1984, the birth date of the child, and the estimation of gestational age. One must assume, he said, that each of those factors was relevant to her decision but whether one was more cogent than the others or whether they were all equally so cannot be assessed from the certificate on its face. It might be inferred that the scan, of itself, did not indicate an expected premature birth for the reason that the initial birth date was thought to be 25 December 1984. The date of the mother's last menstrual period would obviously be relevant to the initial assessment of the birth date of the child. One would ordinarily expect such information to be supplied to the doctor by the mother but there was no evidence as to what, if anything, the doctor was actually told in this regard nor any evidence that the mother purported to be able to recollect the date, or approximate date, of her last period at the time she became aware that she was pregnant in late August 1984. At the time of giving evidence she could not recollect the date of her last period prior to the birth and she did not say that she had been able to recollect it at any previous time or

that she had told the doctor what it was.

The learned Judge observed:

> In view of the respondent's evidence as to the date upon which she first had intercourse with the appellant, the question of the premature birth became a crucial issue in the case. The issue was given greater point by her admission that intercourse had taken place with another man, possibly as late as 12 February 1984. Conception occurring then could reasonably have been expected to result in a normal birth at or about the middle to end of November. On the other hand unless the child with which these proceedings are concerned had been born prematurely it could not have been conceived as the result of intercourse which had occurred at or about the middle of March.

He stated further that acceptance of the doctor's certificate seemed to involve conjecture as to what the mother knew or recollected about the date of her last prior period when she first found out she was pregnant; what, if anything, she told the doctor about that matter; and upon what information the doctor based her opinion in that regard. Assuming that correct information as to the date of the menstrual period was essential to an accurate computation of the date of conception, there was, in His Honour's view, insufficient evidence to establish the accuracy of the information upon which the doctor formed her opinion and, consequently, insufficient evidence to establish the accuracy of the certificate itself.

It was clear to His Honour that, in the circumstances of the case, acceptable evidence that the birth was premature was essential to proof of the appellant's paternity. In this view, the evidence did not meet the standard of proof required in a paternity suit. (Ongley J referred to *T v M* (1984) 2 NZFLR 462, at 463-464, per Woodhouse P) He allowed the appeal, adding that the only course now was for the case to be reheard afresh. The paternity order was set aside and the file was directed to be remitted to the Family Court for rehearing. The appellant was allowed $250 costs.

The decision here must not be confused with *Edmonds v Hutchings* (1982) 1 NZFLR 319. It was there held, in the days when corroborative evidence was still required, that there was no need for corroborative evidence to show that the relevant child was born prematurely, though there had to be corroborative evidence in respect of other material particulars.

P R H Webb
University of Auckland

Unnecessary paternity proceedings — a small but practical point

In *Makea-Burt v Fasso*, (Family Court, Hastings; 29 July 1988; No FP 020/69/87), Judge B D Inglis, QC, had before him paternity proceedings brought by the mother of two children born on 4 July 1986 and 15 June 1987. It had been established in evidence that the father in each case had had his name entered in the Register of Births as the father of each child and that he had signed the relevant forms in person.

The case, His Honour said, required him to draw attention to s 73(1) of the Family Proceedings Act 1980. So far as relevant here, that subsection states that

> No person who is not married to the mother of a child, and has never been married to the mother, or whose marriage to the mother has been dissolved before the conception of the child, shall be liable as a father to maintain the child unless . . .(d) His name has at any time been entered pursuant to the Births and Deaths Registration Act 1951 in the Register of Births as the father of the child; or . . .(f) He has, in any proceedings before the Court, or in writing signed by him, acknowledged that he is the father of the child.

As His Honour observed, these provisions were each sufficient to establish liability for maintenance in the present case. As both requirements had been fulfilled

> it [was] accordingly quite unnecessary for the further step of applying for a paternity order to be taken in order to establish liability against the father under s 72 of the Act for maintenance.

His Honour mentioned this matter because proceedings of this kind had been insisted upon by the Department of Social Welfare as a condition of paying the mother the DPB. He drew attention to the point that liability could be established by other means, as in the present case, so that the Department of Social Welfare would know for the future that proceedings for a paternity order were "quite unnecessary" if other provisions of s 73 of the Family Proceedings Act 1980 applied. As the evidence His Honour had received concerning the birth registration records "naturally justifie[d] a paternity order without more", an order was granted.

The application for a maintenance order was adjourned sine die. Since the Department appeared to His Honour to have put either the applicant or the Legal Aid Fund to the unnecessary expense of commencing unnecessary proceedings, he considered that the Department should pay the costs.

P R H Webb
University of Auckland

Spycatcher afterthought

Mr Wright is not an admirable character. His book is full of vanity and preposterous self-justification, and most of its revelations serve no useful purpose. Yet there is just enough in it to highlight the necessity for setting bounds to the duty of discretion among the state's, even its most secret, servants.

. . .

Loyalty and discretion are splendid virtues. But even they can be angels of darkness disguised as angels of light. Discretion about what? Loyalty to whom and to what? Conflicts arise, and government or party interests cannot make absolute claims over their resolution. A system of referral outside such interests would be a considerable step towards minimising conflicts of loyalty and guarding against real treachery or individual self-indulgence or bad judgment.

John F X Harriott
The Tablet (London)
22 October 1988

An anatomy of the practice of law in 19th century Auckland

By Professor Russell Stone, University of Auckland

This paper is the inaugural lecture of Professor Russell Stone of the History Department at the University of Auckland. It was delivered on 26 July 1988. It is also being published in the New Zealand Journal of History *Vol 22, No 2, with the full scholarly apparatus of footnotes. The paper is published as a matter of general interest for legal practitioners.*

The nineteenth century saw the rise in the western world of the professional classes. And in their forefront were lawyers. As commercial services in Britain expanded, so did the demand for legal skills. As early as 1840, according to Sir George Stephen, there was "scarcely any important transaction in which a merchant can engage that does not more or less require the counsel of his solicitor". During the age of Victoria the process accelerated enormously.

In the Antipodes over the same period, lawyers became considerable men of affairs. In nineteenth-century New Zealand, politics and administration were thickly peopled by men trained in law.

But it was in the world of buying and selling that the qualifications of this profession were at their most marketable. In commerce and conveyancing the arcane skills of solicitors proved indispensable. Indeed so close were the connections of lawyers with banks, with capitalists providing money at interest, and with merchants, that they are rightly to be seen as the great facilitators of colonial business. In this regard they were much more akin to the solicitors of Scotland than to any English counterpart.

Various histories

This being so, is not our ignorance of the actual workings of early New Zealand legal practices remarkable? Where firms have written of themselves, the accounts have generally been slight; perhaps because they have been put together for in-house consumption! Granted, the histories of the New Zealand Law Society – national and district – have been much more substantial.[2] But they have been limited to those objects to which such a professional group applies itself – standards of conduct ("no touting"!), elimination of interlopers, qualifications, maintenance of the profession's monopoly and so on – or, where not, have tended to be celebratory in tone and anecdotal in emphasis. The image of a nineteenth century practice one is left with is a somewhat romantic one, of often eccentric partners occupying chambers where Dickensian clerks perch on high stools before sloping desks engrossing parchment deeds in a good round hand. But what provided a legal firm's bread and butter, to use a favourite phrase of the profession, or what really was the nature of daily dealings between lawyer and client, such matters remain much of a mystery.

Or so it seemed to me when I first embarked on my research into the formative years of the Auckland law firm, Russell, McVeagh, McKenzie, Bartleet, which was founded 125 years ago. My task was complicated because records of the early years of this firm which have survived, were fragmentary and discontinuous, a not unusual situation among the pioneer practices of a city which has built and rebuilt itself, and is rebuilding yet again today; where the constant shifting of offices, and intractable problems of preservation and storage, have led to a grievous loss of records. But fortunately in the case of this practice, some important records have survived; and particularly one thinks here of 15,000 pages of copy-book pressings of Opinions and Bills of Costs. These I have used in conjunction with certain archives from early firms like Jackson & Russell, McKechnie & Nicholson, and Hesketh & Richmond. Combine what these say with the nineteenth-century minutebook of the council of the District Law Society and one is able to provide some kind of anatomy of the practice of law in Auckland one hundred years ago.

The profession

Logically one should deal first with the city's lawyers collectively, as a professional class. The formation of the "Law Society of the District of Auckland" on 28 March 1879 (by enactment of the 1878 District Law Societies Act) is properly to be regarded as simply giving an institutional expression to an already established sense of regional identity and professional unity that was to be found among lawyers in the city. It is known that a Law Society of sorts existed in Auckland in 1861. And the province's practitioners periodically acted with surprising unanimity in the years thereafter.

It would be mistaken to put this down to mere provincial particularism. There was also an undoubted sense of collegiality that must be related to the physical proximity of the main law practices of the town. In *Brett's Auckland Almanac, 1886*, 55 lawyers chose to

list themselves as practising within the city. Their offices could all be contained within an imaginary circle of a hundred metres radius, and these lawyers were entirely confined to five streets: lower Queen Street north of Wyndham Street which had 17 practitioners, Wyndham Street between Queen Street and Albert Street 11, Shortland Street (once the main business thoroughfare) 10, High Street 10, and Vulcan Lane 8.

With every fellow practitioner's office a brief step away, little wonder the habit developed of lawyers attending on one another in person, and that as a matter of course. They and their staffs also mingled in the nearby Magistrate's and Police Court, the former Wesleyan Chapel on the terrace facing High Street, on which site were also located the Land Transfer Office, Deeds Office and Stamp Office. (Because the legal fraternity was so indulged by this dimension of convenience, it was inclined to complain that the Supreme Court at the far end of Waterloo Quadrant was "inconveniently" remote from the business centre and "far from the chambers of all the legal firms" — *Cyclopaedia of New Zealand II*, 1902, p 272.)

It can be appreciated, therefore, why a sense of neighbourliness and professional solidarity grew up among Auckland lawyers in spite of the adversarial stance which they, through the nature of their calling, were often obliged to assume. This cohesiveness was strengthened by social factors. Practitioners often had links with firms where formerly they had been articled. (What a network extended from the practices of the three Russell brothers — Thomas of Whitaker & Russell, James of Jackson & Russell, and John B of Russell & Campbell!)

Familial links were found in the Whitakers, the Campbells, the Hesketh, the Buddles, the Coopers, the Dignans, the Jacksons, the Brookfields and others. The interaction of legal and family links is most dramatically illustrated in the relationship of the two brothers Hugh Campbell, and James Palmer Campbell, not only partners in the same firm, but each married to sisters, daughters of a former Resident Magistrate, RC Barstow. The links extended beyond the hours of work and into the social field. A number of the lawyers lunched together at the Northern Club, and to a lesser extent at the Auckland Club.

Auckland and Otago

If one were to compare the legal fraternities of the two main commercial centres of a hundred years ago, Dunedin and Auckland; to the Otago Law Society must be ascribed the greater moral authority, often expressed in the initiatives taken on the profession's behalf on the national scene. (Iain Galloway in *Portrait of a Profession*, 1969, pp 330-341.) For the reason of propinquity that I have here presented, Auckland lawyers could be regarded as having, perhaps, the stronger sense of corporate identity. No such doubt need attach, however, to the intimacy of connection between Auckland law and Auckland business. Nor to the extent to which those lawyers were integrated within the local business community. Once again it was the *physical* blending of law offices and commercial concerns, that in the context of Auckland's emergence as a commercial and financial centre after 1860, was most at work.

A narrow strip on either side of the Queen Street valley lying between the Union Bank in Victoria Street and the Customhouse Building (which housed a number of government offices and the Native Land Court as well) contained not only all the main legal firms, and all the government offices to which lawyers would need to refer, but every merchant house, bank or insurance company with which they would have occasion to deal. Thus every important lawyer became in effect friend and neighbour of members of the city's business elite.

Indeed it was said of some of Auckland's early commercial lawyers that they were so much in contact with business they began to capture some of the entrepreneurial flair of their clients. But the contagion could work either way. The most highly speculative of Auckland's businessmen in the last century was in fact a lawyer, Thomas Russell. It was he who infected the merchants, bankers, and company promoters. Not they him. He forced the speculative pace.

The law office

It is of interest to consider the practicalities of a nineteenth-century law office; who were the staff, and what was their function? The nineteenth-century legal profession was hierarchical and male. Practitioners were held in awe by their support staff who invariably called them "Sir". They had almost a professional uniform. A century ago, according to Eliot Davis, in *A Link with the Past*, 1948, "nearly all lawyers [in Auckland] would be known by their high silk hats and morning coats". And in Court — what if unpaved streets and unpainted pioneer buildings were without? — counsel there were expected to wear a wig and gown, winged collar, a dark coat and bands. Edmund Spenser had remarked centuries before: "The person that is gowned, is by the gown put in a mind of gravitie." Though few colonial barristers would have known the quotation, all would have agreed with its sentiment. They also attempted to retain the elaborate punctilio of English Courts. Colleagues were addressed as "my learned friend".

A recent history suggests that such a term embodied an ill-justified pretension; that the standard of legal education in Auckland was "deplorably low". (Keith Sinclair: *A History of the University of Auckland*, 1883-1983, 1983, p 37) Even when university classes in law became available, clerks-in-training, we are told, preferred "the easier law professional examinations to qualify as solicitors"; and after a special 1898 Act solicitors could become barristers by a "back door principle". As a blanket judgment this is harsh. Professional examinations were by no means nugatory. And there are instances of men who had no training other than articling who, though largely self-educated, were also extraordinarily well read, and as barristers had a formidable knowledge of case law. Robert McVeagh was such a man.

Almost until the end of the century the support staff of the office was entirely male. Apart from clerks in training who aspired to practise, there were, in the larger firms, general clerks, book-keepers, a full-time engrosser and a junior or two. E W Alison who became a junior clerk in the 1890s at 8/- per week, spoke of what he had to do. (in *A New Zealander Looks Back*, 1947, pp 156-60) He kept the petty

cash, acted as messenger of the chambers for the delivery of documents or mail. He might assist full clerks to file documents at the Courts or at the District Land Registry Office. At the day's end he was expected to copy letters and each bill of costs in the copying press. His job was also regularly to index the copy-books.

Until the mid-nineties all letters and documents were written in a fair round legal hand. The chief, but not sole, responsibility for this was held by the engrosser, who would sit at a large table inscribing, sometimes on parchment, in a special script (almost a minor work of art) that was derived from an ancient court hand. In an emergency, other staff might be called on to engross. Typewriting machines when first introduced about 1894 were usually operated by male "typewriters", the word used then to describe not the machine but its operator. But before the century was out, women typists were being employed. In a sense they used this machine to batter a breach in the wall enclosing a male preserve.

Women in the law

Staying with this metaphor, one may say that if there is a majority of women studying in the Faculty of Law of Auckland University in 1988, it has been a case of a fortress stormed rather than a boon granted. Carl Norris tells how "the advent of the first girl into a law office in Hamilton" before the First World War "produced consternation among the clerks, who seriously considered adopting some more conservative calling." And at the professional level, where right of entry really counts, women had no place. Before the nineteenth century was out, Dunedin had its first woman barrister, and solicitor, Ethel Benjamin. Not until 1906 was Eliza Ellen Melville enrolled as solicitor in Auckland. In 1907 Geraldine Marian Hemus joined her. Then there is a gap before Rebecca Pallot was enrolled in 1921. There were no further admissions of women as solicitors in Auckland before 1930, by which date *no* women had been admitted as yet to the Bar in the Northern Judicial District. These facts tell their own story.

Because legal and commercial offices were so close together in Auckland at that time, it was common for solicitors to attend on clients (or vice versa) in person. It has already been mentioned how there was hand delivery of mail. But perhaps distrust of the postal service was justified. When a client of Russell & Campbell wrote in 1886 to complain that some deeds of dedication had not been returned, the firm initiated its inquiries. "We attended at Post Office", a letter later recorded, "where we found deeds and plan had been duly posted, but former had been eaten by rats."

Telephones came into use in legal offices about 1882. The first time that Russell & Campbell actually charged for a phone consultation was in April 1886. A "lengthy attending" upon a Mr Connell, an agent by telephone over an arbitration matter led to a bill of costs of one guinea.

Personal delivery of documents could reveal gradation of status. So could consultations. The humbler clients living in the suburbs were expected to come to the practice-office to sign documents or to have a consultation. But with somewhat more important clients, when deeds were to be delivered or signatures obtained, clerks would go to them, by horse-bus, horse-tram or steam-ferry, and the ticket costs would be included in the bill. Partners consulting well-to-do clients in their own homes would go in private transport or hire a cab, but in view of the importance of the account, generally no claim for travelling expenses would be made.

One clerk recalls that his firm, in order to attract custom, or to flatter a client, would deliberately avoid using public transport, would hire a hansom instead, or even a four-wheeled cab. "I always felt", he wrote wryly, that "this was done to impress the client, who either walked or used the horse trams." Here surely was a perfect bit of "rain-making", a century before that piece of legal jargon was ever heard in New Zealand.

Years of expansion

I now propose to look at the practice of law first between 1863 and 1885, years of expansion, and then between 1886 and 1895, years of commercial depression. The viewpoint adopted will be that of the firm of John Benjamin Russell. It is not, however, the particularity of *this* firm which is our concern but the developing framework of business and law within which that practice operated.

In January 1863, the twenty-six-year-old Russell was admitted, as had become the custom, into the dual profession of barrister and solicitor; to be one of the 32 lawyers officially enrolled to practise in the Northern Judicial District. Shortly after, he went in to the register of public notaries; a qualification that soon helped to attract the custom of sea-captains, shipping agencies, the Bank of Australasia next door to his office, and merchants.

His first office was a room above an ironmonger's shop in the brick building at the corner of Shortland and Queen Streets. The shoreline was, in the 1860s, a short step away, just beyond modern Fort Street. 1863-65 were boom years, during which this young lawyer, as a jack-of-all-trades, built up a busy and prosperous little practice. In January 1865 he confessed to a friend that "My practice is so increased . . . every night is occupied at home until late. When not at work I am wearied of the pen."

Recession

Two years of business recession followed, and Russell's fortunes slumped. By 1868, however, the new Thames gold fields ended the town's commercial demoralisation. Once again, JB Russell had much to do, with the surge of conveyancing and company formation taking place about him. Even when the gold fields fell away in the 1870s, his practice continued to grow, benefiting from the pronounced mercantile character that Auckland — both city and port — began to develop in that decade.

He acquired a number of clients involved in the import trade, the most important of whom was AH Nathan. His prize capture, however, was the account of the Auckland Harbour Board set up in 1871. The port was revolutionised in the 1870s, not by the growth of trade though (to be sure) the tonnage passing through the port doubled in those years, but because of the policy of development based on overseas loans sanctioned by the general government. With this borrowed money great capital improvements were made; wharves were extended,

and, through reclamation, hundreds of acres of endowment land came into the Harbour Board's hands.

Such things involved Russell's firm in a considerable variety of legal activities: framing bye-laws, prosecuting for breaches of the same, devising a variety of leaseholds, proceeding to recover unpaid rentals, and the constant providing of opinions. The expertise in local body work which Russell acquired – he was also solicitor on retainer to the Auckland City Council – helped him to draw in the newly-formed Waitemata County Council as client in 1877. But it seems that with the incorporation of new local bodies, and the confusions of jurisdiction which followed upon the ending of the provincial system of government in 1876, even apart from the ambiguities of Pakeha and Maori land titles, all local lawyers had a field day, illustrating yet again Bentham's dictum that "The power of the lawyer is in the uncertainty of the law".

Growth of business obliged Russell to take on more support staff, and then successively to take in partners, AET Devore in 1873, and Theophilus Cooper in 1878, both men of considerable ability. Russell gave up bar work and became the business specialist in the practice. By 1884 "his advice", it was said, "is eagerly sought [by clients] on all intricate and difficult matters related to business pursuits . . . and conveyancing". (*New Zealand Herald*, 14 October 1884)

The letter-pressing books of "Opinions", and of "Bills of Costs" in Russell McVeagh's archives enable us to reconstruct the practice in these crucial years. What is clear is that the firm was strong in just those elements of economic activity which were showing sustained growth and promise at that time: maritime affairs, municipal capital works expansion, timber-milling, financial agency work, and land speculation – aptly described by J H Rose of Jackson & Russell as "the great industry of the Auckland Province" between 1865 and 1885.

Russell's success was not unique. A number of the town's practices prospered equally over the same years. Between 1873 and 1883 inflows of public and private capital created an atmosphere of expansion during which Auckland, no less than the southern provinces, boomed.

Nature of business

Here should be categorized the main kinds of work carried out by law firms in the 1870s and early 1880s. First on the list must be conveyancing which provided most solicitors then not just with their bread and butter, but with some of their jam as well. Russell's costs books show that well over half his fees (by value) came from legal services arising out of the buying and selling of land and the processing of mortgages. Land transfer work was by no means straightforward in those years. Making a title more secure by bringing a deed under the Torrens system of registration might involve much extra work if the deed proved defective: the requisitioning of a survey, recording declarations by previous owners, searching at the Maori Land Court, and so forth. Moreover, because mortgages in those uncertain times were customarily for five years or less, remortgaging came around frequently, and hence there were further calls on the lawyer's services.

In the average practice, the majority of clients figure in the Bill Books but once. They were generally people of humble means, for whom the sale, purchase and/or mortgage of property was perhaps the sole encounter that they would have with a legal firm. But a core of clients appears again and again in the conveyance accounts: the prize clients – banks, local bodies (with leases, convenants, road dedications), land agents, and land speculators. Many legal practices acted as agents for country solicitors as well, carrying out filing, stamping and registration for them at the District Land Transfer Office or the Supreme Court.

Appreciate how central was property-work to every practice and you understand why the Auckland District Law Society was determined to hunt down that perpetual bane of the profession, the unqualified conveyancer who undercut the solicitors' charges. In its early years the Council acted against "unprofessional persons" doing conveyancing work. Here are two instances: there was a Te Aroha land broker who "is in the habit of preparing transfers and assignments of Business & Residence sites", and on another occasion, an agent who "charged certain fees for drawing up two Bills of Sale". In 1885, the Council decided to prosecute for forgery an agent who "prepares deeds and does notarial work".

Debt recovery

Laypersons may be surprised to hear, but lawyers probably not, that the professional service most in demand after conveyancing was debt-recovery or securing the position of creditors. The received idea we sometimes have of Victorians not launching out into business until they could pay their way, is largely a fiction. In pioneer Auckland, few settlers had money-capital behind them. At all levels, the bulk of business was conducted on credit. And since shopkeepers, tradesmen, lessees of hotels and other "little men" had a position which could be suddenly imperilled by a business downturn, sickness or other mishap, constant vigilance was needed by creditors or their attorneys to ensure that debts were paid, promissory notes honoured, and interest instalments met. The steps in process of debt recovery then were much the same as they are today, so they need not be spelled out.

Norris in writing of the profession in the Waikato has suggested the full weight of the law was more commonly allowed to fall on defaulters then: "Many more writs per head of solicitors issued than is now the case." (*Portrait of a Profession*, p 368) In Auckland perhaps this was so as well. Certainly some local citizens were pertinaciously litigious. But the preferred goal of Russell & Devore, no matter how vengeful the mood of the client, was to recover what they could of the debt, rather than break the debtor: that latter option must be the policy of the last resort. The firm's feeling was that it was better to anticipate the problem.

Where clients approached the firm and voiced concern at some shop-owner or publican getting behind in his payments, Russell & Devore or Hesketh & Richmond, would move to prepare Bills of Sale over all items of unencumbered stock or personal property or to get the debtor's signature attached to a Deed of Assignment. Where things

had deteriorated beyond that, the usual course advised by the firm was *not to press* for a petition in bankruptcy but to talk the debtor into the signing of a Deed of Arrangement. In such a case the creditor would at least get *something*; even if that was no more than having assigned to him such dubious assets as the book debts owed to the insolvent debtor.

Depressed years

Before this account turns to how law firms fared during the depressed years, 1886-95, it is necessary to speak of JB Russell once again. Early in 1883, when he was 46, his practice was doing so well and he was in such comfortable circumstances, that he bought a fine new Epsom home, planned a world tour for himself and his wife and their seven children, and began reconstructing his firm so that he could phase himself out of it, first by working part-time, then later, retiring entirely in favour of his son when he turned 21 and had been admitted to practise. In June 1883 he dissolved his partnership with Devore and Cooper, and proceeded to take in two new partners, brothers from the Waikato, Hugh and JP Campbell. In 1884 he set up in new offices for Russell & Campbell, in Wyndham Street, and later in the year, confident that his future was assured, set off with his family on his two-year world tour.

By the time he returned in May 1886 Auckland was revealing yet again why it had earned the name of "The Grave of Enterprise". (*Cyclopaedia of New Zealand*, II , p 61) The business community was falling apart. And in the general commercial collapse some of Russell's oldest clients were being swept into bankruptcy. No longer could Russell count on being able to phase himself out of the firm. The reduced earnings of the practice simply did not allow the luxury of a sleeping partner. Thus it was he had to resume full-time work once again, remaining at his desk until he was mortally stricken a year before his death in 1894.

The later 1880s and early 1890s were years characterised by bankruptcies, forced sales, the winding up of insolvent concerns, and the efforts of banks, creditors and surviving companies often ruthlessly to reconstruct their position. Trade statistics showed by the end of 1890 the beginnings of an export-led recovery for the colony. But morale remained low among entrepreneurs. Not until 1896 did Auckland's business leaders fully recover their confidence.

Stagnant business might be expected to mean lean times for lawyers. And thus it proved; although not immediately for the city's larger law firms. A commonplace among historians is to speak of 1885-1895 as a period of banking crisis. What is less well-known is that this decade was equally a period of crisis for the legal profession. Being a going concern with sound clients, however, the practice of Russell & Campbell did as well as any.

But like all legal firms, once the bottom dropped out of the property market, conveyancing fell off dramatically. By 1893, Oliver Nicholson complained, his office was lucky if it executed one land transfer in a week.

Local Body work

The sheet anchor of JB Russell's practice in these depressed times, however, was legal work for two local body clients – the Auckland Harbour Board and the Waitemata County Council. After 1890 they were joined by Onehunga Borough Council, but financially it was much less significant to the firm.

One dwells upon the Harbour Board account because it illustrates how, even with a falling-away of business (in this case a shrinkage of tonnage passing through the ports of Auckland and Onehunga and therefore a loss of revenue), a client could in fact increase his call upon the services of a lawyer during a slump. In fair economic weather or foul, breaches of bye-laws inevitably continue – "furious driving" by carters on wharves was an occupational failing. But in hard times, litigation is more likely to arise (as happened with the construction of the Calliope Dock over disputed contracts); there is also an added need to pursue the growing number who default on rates or rents, and to consider objections to property valuations or requests for the adjustment of leases signed in more prosperous times.

Liquor trade

Most lawyers suffered from the loss of clients; merchants, shop-owners, land agents and others who went to the wall. The strengthening of accounts of clients in the liquor trade, in some measure, however, compensated for Russell & Campbell. It must be recalled that the 1890s saw the consolidation of the financial base of the main Auckland breweries and liquor wholesale merchants, by merger or by fresh capital infusions, thus enabling them to gather together so many additional "tied houses" that they became substantial hotel owners in their own right.

Here was much consequential work for lawyers: drawing up agreements over leases, or bills of sale to cover liquor sold on credit to the lessee, quite apart from advising clients on issues arising out of the burgeoning complexities of licensing law. Nor can this strengthening of the relationship between certain of the commercial lawyers of Auckland and the liquor interest be dissociated from the rise of the prohibition movement expressing itself in fierce local option battles. The firms of Russell & Campbell, and Hesketh & Richmond benefited – to name but two – but even more so did McKechnie & Nicholson who acquired the Hancock & Co account; and advocates skilled in licensing matters such as Thomas Cotter (later a KC), were beneficiaries as well.

Financial investment

An aspect of legal business the depression revolutionised was the investment in money entrusted for lending on security. Once banks entered their period of acutest crisis (1889-92), and were curtailing loans without mercy, the scramble of businessmen to get accommodation was greater than ever. But because it was a time of commercial failure and the risk to lenders great, unusually high rates (up to 25 per-cent) could be demanded by solicitors.

With the stagnation of business in the early 1890s the difficulty lay not in getting in trust money to lend out, but in finding safe avenues in which to invest it. Russell & Campbell simply deposited some of their unutilised trust funds in the

Bank of Australasia and paid over the interest to their clients. Oliver Nicholson complained in 1892 that local capitalists were forced by the paralysis of business confidence to place their spare money on fixed deposit in the Banks at 5 percent. He went on to explain to his partner:

> If suitable investments would only offer I could do business, I could lend out for Walter Scott a £1,000.0.0, Major George has a large sum which he would invest, and I have others with whom I could place smaller amounts. [But] everything appears at a standstill.

This phenomenon incidentally was repeated in the great slump forty years later. It has been said that between 1930 and 1933 there was seldom less than "forty million pounds held on fixed deposit by the banks looking for safe investment". (G Fraser, *Ungrateful People*, 1961, p 43)

Scapegoats

In more than just a financial sense, however, are the early 1890s to be looked upon as years when the profession was under siege. With times hard there is always a search for scapegoats. When the directors of banks and building societies were being damned right and left, why, critics asked, should lawyers be spared? Wyndham Street, on the left-hand side of which were three of the five big practices of the city (including Russell & Campbell) became nick-named "Wind-'em-up Street"; their role in winding-up bankrupt concerns appearing to cynics as an instance of the way in which lawyers battened on the misfortune of others.

Feeding upon stories of Sir Frederick Whitaker's poverty at the time of death (December 1891) and of the financial straits of his partner, the expatriate Thomas Russell in London, the rumour began to fly during the winter of 1892 "that *one* of the largest firms in Auckland was in 'queer street'." Oliver Nicholson reported further:

> The firm was referred to as the firm in "Wind-em-up Street" and later as W & R [Whitaker & Russell] . . . . One rumour went as far as to say that "W & R were carrying on under police supervision". At any rate the firm of W & R have had a very unpleasant month and rumours are still afloat. The other large [law] firms have had a similar bad time, clients withdrawing their deeds and money, left in their hands for investment.

Some weeks later the same young lawyer complained "how readily the public grasped at the vaguest rumours".

> So far as W & R were concerned the rumours were *without* the slightest foundation. No doubt a large amount of trust money was withdrawn from them, in common with other law firms, and the shaken confidence of some of their clients must have affected them.

Symptomatic of the prevailing suspicion of the profession was the introduction by Sir George Grey into Parliament in 1892 of the Law Practitioners Bill, preventing lawyers from "placing all moneys in one account" which had led some practitioners (Grey averred), "to the first step in crime which led afterwards to most disastrous results". After the bill became law, lawyers had to pay all clients' money into a separate trust account at a bank. Shortly after, the integrity of lawyers was questioned in Auckland yet again when the *Herald* reported an eminent southern practice to be in difficulties through rash investment of trust moneys. (*New Zealand Herald*, 30 December 1892) Even in Auckland, wrote Oliver Nicholson, the legal profession had suffered "a great shock", for, (he added self-righteously), "the honest will have to suffer for the dishonest." The dishonest were in fact rarely to be found anywhere in the colony's legal profession. Unwise investment of trust funds generally arose from inexperience rather than turpitude.

Lawyer's and accountants

The perspective now shifts from client to lawyer in order to consider how the deepening of the depression is reflected in professional work. Russell & Campbell's records show how clients scrambled to their lawyers to strengthen their position; for example by getting additional collateral from debtors, or to take action over dishonoured promissory notes or unpaid calls on shares, even to prepare judgment debtor summonses to get debtors to Court before they in the phrase of the day, "went down the Pacific slope", and "levanted" on the Sydney or San Francisco steamer.

Another great growth area for lawyers in these depressed years was acting as trustees in bankruptcy. It had long been the view of the Law Society that this work should be done by solicitors alone. As far back as 1882 the Council had written to the Court Registrar solemnly urging him not to "facilitate the operations of unauthorised persons" in "Bankruptcy work". (Minutes of Auckland District Law Society, 15 March 1882) The "unprofessional persons" (another commonly used term) they wanted to check were clearly accountants, not as yet an officially incorporated society.

During the depression, however, the special skills which accountants (some with British qualifications or some with considerable experience in the offices of the Government Auditor or Official Assignee) brought to the complicated tasks of supervisor in winding up insolvent estates, led Official Assignees increasingly to call on them to act rather than lawyers. Sir Geoffrey Heyworth recalls that the accountancy profession in Britain "grew to strength in the shadow of the bankruptcy Courts and throve on commercial failure, even on wrongdoing". The Auckland experience suggests that this could well have been the case in late nineteenth-century New Zealand, too.

Fees

There is evidence that commercial stagnation depressed the fees which lawyers could charge. In 1886 the hourly charge for attending on a client was one guinea, with broken hours calculated in terms of thirds or quarters. By 1891 the fee of 6s.8d. appears so frequently, though reference to an exact time is no longer given, we may assume that this reduced figure had become the hourly rate. Attending on a client in his home "for a whole evening" by 1891-92 carried a bill of only £1.1.0.

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Auckland's Supreme Court and some memories

By James Cowan

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> Hear ye, hear ye, hear ye! All manner of persons are strict commanded to keep silence . . . Draw near and give your attention . . .

It is many a year since I heard Court Crier Henry Martin, taking post in the witness box, give dignified declamation to the old-fashioned formula for the opening of the criminal sessions in the Auckland Supreme Court. Martin had been a sergeant of police and in the Supreme Court he found a comfortable life's-end job that was better than a pension. With his stalwart gowned figure and his long beard he seemed the presiding genius of the place as the lofty Court-room echoed to his well-rounded call for reverent attention in the name of our Sovereign Lady the Queen . . . . I wonder if the ceremony is carried out with such whiskered solemnity to-day?

Said to have been modelled on a Tudor castle in Warwickshire, the architecture of Auckland's Supreme Court is more befitting to the august business of high justice than that of any other court building in the Dominion. Its arched doorways and medieval looking windows, its outer hall of feudal-castle aspect, its antique pillars and passages, the lichen-crusted carved heads in stone, gargoyle-like, that curiously adorn its exterior red brick walls, and the Court-room wood carvings, all are in keeping with tradition and give the place an atmosphere that enhances the respect due to a great British institution. That this architecture, and the respectable distance of the Court from the business heart of the city, may in some respects be inconvenient for modern requirements is also in keeping with the tradition of the Law.

One's youthful first view and impression of Auckland's already venerable Supreme Court was not likely to pass lightly from the memory. It was the final scene in the long and thrilling drama of the Caffrey and Penn piratical tragedy. Edging in between two of the biggest policemen Ireland ever produced, one had a close-up look-in at a death sentence. White-bearded Judge Gillies on the bench slowly placed the black cap on his head and pronounced the few terrible words that sent two men to the scaffold. John Caffrey, a sailorly-looking fellow, strong and well-made of frame, with a short dark pointed beard, stood in the dock alongside a man of very different cut of jib, a weedy, nondescript, one-time waterfront oyster boy. These two had been the crew of the cutter *Sovereign of the Seas*; the story of the Great Barrier murder, and the runaway voyage across the Tasman Sea with Harry Penn's light-o'-love, Grace Graham, has all the bones and makings of a high-light movie. Caffrey, it seemed to me, was a good sailor suddenly involved in crime; for his mate no one could feel much pity.

The presiding Judge throughout the Nineties was Mr Justice Connolly. His Honour was rather a contrast to the grave figure of Judge Gillies. He was inclined to be querulous, and witnesses who wouldn't or couldn't speak up sent him into fits of exasperation. As the long day wore on, in some tedious case, his grumbles grew, and counsel as well as witnesses came under his displeasure. "It's a shame," an old reporter used to say, "he can't smoke on the Bench. If the old man could only have his pipe, what a relief it would be." True enough, no doubt; but the old man was quite a different soul in his private room.

An old identity of the Court was the late Mr George Brown, Native interpreter. He lived on the slopes of Constitution Hill, below the Court, and he was always on the spot as the official "Kai-whakamaori" when Native cases were on trial. The half-caste son of an early Taranaki settler, he had received a good English education, and his soft exquisitely careful enunciation of both English and Maori was a pleasure to the ear. Courteous, even courtly, George Brown was the product of the Native Office at a day when there were some distinguished men associated with it, and he had been a protege of Governor George Grey.

Watching the Bar at its work, one soon came to admire such a fine lawyer as the late Mr Edwin Hesketh, quiet, but keen, painstaking in the extreme, scrupulously fair in his methods, masterly in his marshalling of arguments, a truly brilliant pleader. He was the fine rapier of the Bar. There were others who typified the slashing sabre, and the primitive bludgeon. Some learned friends were picturesque of language, and displayed a certain flair for a telling climax when addressing a jury. The

late F E Baume was one of these. Clever, handsome in quite a robust Italian tenor manner, he was a well-practised orator; he cultivated his voice assiduously, he could use soft or loud pedal at the appropriate moment, and he had a strong sense of humour. One remembers how he could put on the sentimental appeal in his address to the jury, and often with success.

There was once another lawyer, the terror of the young police constable in the witness-box, and even the well-seasoned detective; he shone as a cross-examiner. His peculiar genius had full play as counsel for the defence. When in hot action his profile bore something of a resemblance to a shark in the act of biting. That at any rate was the impression which prompted a pencil caricature with which one of our artists of long ago decorated the press-box ledge.

One has memories of such prominent members of the Bar as Theo Cooper, afterwards Judge — unpretentious, quietly alert, earnest; his partner, A E Devore, decoratively dignified, with his beautiful silky white beard; C E Button, the one-armed lawyer; Joseph A Tole, Crown Prosecutor, stern, a fine speaker, sometimes a bit of a bully in his manner, but with a redeeming touch of Irish humour and just a suspicion of a brogue, though New Zealand-born; W J Napier, smart, suave, persuasive; E W Burton, afterwards Magistrate; youthful and debonair Jackson Palmer, M H R, who became Chief Judge of the Native Land Court, and who was, I think, the youngest barrister to appear in an important trial—he put up a stout but hopeless fight for the defence in the Caffrey and Penn murder case. All these have passed away.

Some of their junior contemporaries and colleagues have since attained the dignity of seats on the Supreme Court Bench or eminence in the political world.

One remembers also a certain eager young Maori law-student striding briskly up steep Shortland Street, on his way to the Court to file papers. He was articled to Devore and Cooper, and studying for his LLB. Sometimes he would have his nose in a book while he walked, more leisurely, with a bright eye cocked for a telegraph pole or a hurrying pedestrian. He showed the writer one of the books he was studying so intently; it was no law tome, but Kipling's *A Fleet in Being*, then just out.

Perhaps in those enthusiastic days of the Nineties young Apirana Ngata dreamed of a brilliant career at the Bar, but there was a wider field awaiting him, as political leader and industrial organiser of his people.

Many a long and oft-times weary day, prisoned in the old press-box, one studies perforce the methods and mannerisms of the Bar. Many a newspaper man, I am sure, after some experience of this kind of the Bar at close quarters, could assume wig and gown and go through all the motions, and the "talkie" too, and make quite a fair understudy to "my learned friend" in any interesting criminal case. There was one old-timer, a *Herald* reporter, "Billy" Robinson, wildly whiskered, more like a backblocks farmer or bushman than a newspaper toiler, who had a perfect genius for unravelling intricate civil cases and giving an intelligible digest of some action in banco of which the rest of us could make nothing but a thundering headache. He was as keen as any smart criminal lawyer, too, in following up a baffling trail. His reports were a model of accuracy, and he gave a helping hand to many a junior puzzled by some maze of the law.

In and about the Court-room one encountered some unusual types, made some queer acquaintanceships. Once there was a grey old tattooed Maori from Kawhia, giving evidence in some local case, who wore slung over his shoulder wherever he went a small leather satchel. Jokingly I asked him, after he had left the box, if this bag was full of gold. "No," he said, with a grin, "but the things it holds bring me in the gold." He opened and showed a set of tattooing implements, the several kinds of small iron and bone chisels, the little tapping mallet, flax tow, and balls of black pigment, made from soot, obtained by burning certain shrubs and bark, mixed with oil—all the apparatus for decorating the chins and lips of brown beauty. Thirty shillings to £2 per head was the fee, and old Menehi was combining his free trip to town as a witness with profitable business as a "tohunga-ta-moko."

There was another ancient, from a Rotorua village, a most mournful-visaged old fellow by the name of Tamarangi, who was the chief witness in a Maori-bank case. He had been appointed the banker for his tribe, and the cash was kept in a flax kit, which was secured to the top of the centre-post in his whare. Some bandit, supposed to be a *pakeha*, raided the banking-house in the owner's absence and walked off with the whole of the assets, including the kit. The Bank of Te Ngae perforce closed its doors, and the unfortunate manager had a particularly uncomfortable interview with his clients in a body, as he told the Court.

Now and again a Maori prophet appeared in the dock to pay the penalty for some anti-Government fanatic rowdiness of one kind or another, from pulling up survey pegs to raising armed forces against the Crown. Mahuki, of the King-country, was one, Hone Toia, of Hokianga, was another of the fiery patriots. At a later date there was the long-haired, many-wived prophet Ruatapu, of the Urewera Country. Mahuki was the last of the Rohepotae Hauhau leaders. Tall, gaunt, black-bearded, wild-eyed he looked the complete fanatic. His eyes blazed, he tugged at his beard as he addressed the Court through the interpreter. "Mahookey," the police with one accord named him; his anti-Government attitude was quite a touch of the Old Sod. He died in the gaol hospital, a rebel to the last. □

Oral evidence

A dip by BBC TV into its archives this week threw up an exchange between a keen young reporter and a man in a soft hat, pictured gloomily regarding a tombstone. "Mr Bannister," said the first, thrusting out his microphone, "as a long-time friend of the great author Ben Burrows, can you tell us how he came to be buried in this churchyard?"

"Well," replied the other after mature consideration, ". . . he died."

New Law Journal
14 October 1988

The origin of the legal system in New Zealand

By Charles Hutchinson, Queen's Counsel of Auckland

In this article the author looks at the history of the establishment of a system of law in New Zealand starting in 1840. This is an interesting and useful piece of historical exposition. Most of the emphasis at present is on the Treaty of Waitangi but in this article the author looks at the practical effect of proclamation of British Sovereignty over New Zealand through the establishment of a working legal system.

On 17 August 1840 the Imperial Parliament passed an Act (Cap LXII) concerning the administration of justice in New South Wales and Van Diemen's Land. Section 2 provided as follows:

> That it shall be lawful for Her Majesty by letters patent to be from time to time issued under the Great Seal of the United Kingdom to erect into a Separate Colony or Colonies, any Islands which now are, or which hereafter may be comprised within and be Dependencies of the said Colony of New South Wales.

Section 3 enabled Her Majesty by any such letters patent to authorise any Number of Persons not less than Seven, including the Governor or Lieutenant Governor of any such new Colony to constitute a Legislative Council. Such persons were from time to time to be named and designated by Her Majesty to hold office at Her Majesty's pleasure. The Section continued

> [A]nd that it shall be lawful for such Legislative Council to make and ordain all such laws and Ordinances as may be required for the Peace, Order and good Government of any such Colony as aforesaid.

The Section then went on to provide that

> in making Laws and Ordinances the Legislative Council shall conform to and observe all instructions as Her Majesty with the advice of Her Privy Council shall from time to time make for its guidance. Provided always that no such instructions and no such Laws or Ordinances shall be repugnant to the Law of England but consistent therewith, so far as the circumstances of any such Colony might permit. Provided also all such Laws and Ordinances should be subject to Her Majesty's Confirmation or Disallowance.

There were machinery provisions concerning the same in Section 2.

> By Royal Charter bearing date the 16th November 1840 Her Majesty Queen Victoria did erect the Islands of New Zealand and all other islands adjacent thereto within certain limits in the said Charter into a Separate Colony thereafter to be known as the Colony of New Zealand.

The Charter set up an Executive Council to advise and assist the Governor of the Colony of New Zealand and the administration of the government thereof and authorised the Governor to summon as the Executive Council such persons as from to time to time be named and designated by Her Majesty under her Signet and Sign Manual addressed to the Governor. The Governor with the advice and consent of the Council could pass Laws and Ordinances provided these were not repugnant to the Law of England and consistent with any instructions and were subject to Her Majesty's confirmation or disallowance. The Governor was authorised and empowered to constitute and appoint Judges and in cases requisite, Commissioners of Oyer and Terminer, Justices of the Peace and other necessary officers and Ministers for the due and impartial administration of Justice. The Governor was also granted full power and authority as he should see occasion to remit fines and penalties payable to the Crown but not exceeding the sum of £50 and to suspend payment of any such sum above £50 until Her Majesty's pleasure shall be made known to the Governor.

The Governor was granted full power and authority to grant any offenders convicted of any crime in any Court a free and unconditional pardon or a conditional pardon.

On 3 July 1841 Ordinance 1 of Session 1 was passed by the Governor with the advice and consent of the Legislative Council declaring that so much of the Laws of New South Wales should extend to and be in force in the Colony of New Zealand as had already been and could be applied thereto from and subsequent to the date of Her Majesty's Royal Charter and indemnifying the Lieutenant Governor and other officers for certain Acts done and performed between the date of the Royal Charter and the passing of the Ordinance.

On 22 December 1841 Ordinance No 1 of Session II was passed establishing the Supreme Court of New Zealand. Section I created the Supreme Court of New Zealand.

The following sections set out the jurisdiction of the Court and the rights of audience as follows:

1 The Court shall have jurisdiction in all cases as fully as Her Majesty's Court of Queen's Bench, Common Pleas, and Exchequer, at Westminster have in England.

2 The Court shall also have all such equitable jurisdiction as the Lord High Chancellor of Great Britain hath in England.

4 The Court shall also have exclusive jurisdiction in all questions relating to Testacy and Intestacy, and the validity of Wills of personal property, as fully as any Ecclesiastical Court hath in England. The Court shall also have exclusive power to grant Probates of Wills and Letters of Administration of the Estates and Effects of deceased persons, and to take order to the due passing of the accounts of the Executors and Administrators of such persons.

5 The Court shall also have power to appoint and control Guardians of Infants and their Estates, and also Committees of the persons and estates of idiots, lunatics, and such as being of unsound mind, are unable to govern themselves and their Estates.

6 The Court shall not take cognizance of any criminal case where the offence shall have been committed previous to the 14th day of January 1840.

10 The Court shall consist of one Judge, who shall be called the Chief Justice of New Zealand, and of such other Judges as Her Majesty shall from time to time be pleased to appoint: Provided, that it shall be lawful for His Excellency the Governor to appoint such Judges provisionally until Her Majesty's pleasure shall be known. The Judges of the Court shall hold their office during Her Majesty's pleasure.

13 There shall be enrolled in the Court, to practice therein as Barristers, such persons only as shall have been admitted Barristers or Advocates in Great Britain or Ireland, or such as shall be admitted hereafter within the Colony under the authority of any Law that may hereafter be passed for that purpose; and to practice therein as Solicitors such persons only as shall have been admitted as Solicitors, Attorneys, or Writers, in one of the Courts of Westminster, Dublin, or Edinburgh, or Proctors in any Ecclesiastical Court in England, or shall have served such term of Clerkship with a Solicitor of the Court as shall be required by the General Rules thereof. All persons so enrolled shall be removable from the Rolls of the Court upon reasonable cause, whensoever and wheresoever the same may have arisen.

14 The Barristers of the Court shall be allowed to act as Solicitors, and the Solicitors of the Court to act also as Barristers, for the period of five years after the passing of this Ordinance, unless the Court shall in the mean time make order to the contrary; any such order may extend to the whole Colony, or may be restricted to any part thereof, as to the Court shall seem fit.

On 15 March 1842 Ordinance XIX Session II was passed which repealed Ordinances of Session I and Sections 2 and 3 thereof provided:

> "2 No Law, Act, or Ordinance of New South Wales, shall hereafter be of any force or effect whatever within the Colony of New Zealand.
>
> 3 This Ordinance shall come into operation on the 25th day of April 1842."

On 4 April 1842 Her Majesty by Letters Patent amended and extended the limits of the Colony of New Zealand. It would seem that the Letters Patent were never published in New Zealand but on 1 November 1842 Willoughby Shortland as "The Officer Administering the Government" by Proclamation set forth the substance thereof.

On 13 January 1844 Session III Ordinance 1 was passed. This Ordinance replaced the Supreme Court Ordinance No 1 of Session II and re-enacted the sections thereof which are set out above. On 26th September 1844 the Supreme Court Rules Ordinance was passed being No 1 of Session IV. This Ordinance confirmed the Rules, Forms and Tables of Fees settled by the Judges of the Supreme Court pursuant to the powers conferred upon them under Section 25 of the Supreme Court Ordinance. These rules inter alia repeated the rules concerning the right of Audience as extended in Ordinance No 1 Session III so as to include "such persons as shall have established themselves in the exercise of their profession on or before the 22nd day of December 1841". Rule 41 provided as follows:

> ADDRESS OF COUNSEL
>
> Upon every trial of an issue of fact, the plaintiff or his counsel shall briefly state the facts which he means to prove, without comment thereon, and shall then proceed to the proof thereof. Likewise the defendant or his counsel shall, if he means to call any witnesses, state briefly the facts which he means to prove, without comment thereon, and shall then proceed to the proof thereof. When the whole of the defence is closed, the plaintiff or his counsel shall observe generally upon the case, and after him, in like manner, the defendant or his counsel. The Judge shall then sum up the evidence to the Jury.
> The like rule shall be followed in criminal cases.
> By the term "plaintiff" in the foregoing rule, shall be understood the party on whom the proof of the affirmative side of the issue shall lie. By the term "defendant" shall be understood the party on which the proof of the negative side shall lie.

Unfortunately this rule was not re-enacted and this principle has fallen into desuetude. It suffices to mention that in the first ten years of the colony there were created by Ordinances County Courts, a Court of Request, Quarter Sessions and

Police Magistrates and Resident Magistrates Court, but these Courts did not alter the principles of the law which were applicable.

In 1845 and thereafter from time to time English Laws Acts were passed in which certain amendments of Acts of the Imperial Parliament became part of the Law of New Zealand. However in 1858 the English Laws Act 1858 was passed by the General Assembly, which provided as follows:

THE ENGLISH LAWS ACT, 1858 — No 1

> Whereas the laws of England as existing on the fourteenth day of January, one thousand eight hundred and forty, have until recently been applied in the administration of justice in the Colony of New Zealand so far as such laws were applicable to the circumstances thereof: And whereas doubts have now been raised as to what Acts of the Imperial Parliament passed before the said fourteenth day of January, one thousand eight hundred and forty, are in force in the said Colony: And whereas it is expedient that all such doubts should be removed without delay: BE IT THEREFORE DECLARED AND ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows: — 1. The laws of England as existing on the fourteenth day of January, one thousand eight hundred and forty, shall, so far as applicable to the circumstances of the said Colony of New Zealand be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of justice accordingly. 2. This Act may for all purposes be cited as "The English Laws Act, 1858".

In order to complete the legislation concerning the application of the Law of England to the Colonies the Imperial Parliament passed The Colonial Laws Validity Act 1865 which rendered void and inoperative any Colonial Law which was repugnant in any respect to the provisions of any Act of Parliament extending to the Colony to which such law relates or repugnant to any Order or Regulation made under any such Act of the Imperial Parliament.

Gradually over the years the power to make laws in respect of New Zealand by the New Zealand House of Representatives has been increased until the present time when the only prohibitions remaining are that the House of Representatives may not alter the succession to the Throne or the Royal Titles.

In 1854 The Secondary Punishment Act was passed which provided inter alia

> WHEREAS by reason of the difficulty of transporting offenders beyond the seas it has become expedient to make temporary provision for the substitution of other punishment in lieu of transportation: BE IT THEREFORE ENACTED by the General Assembly of New Zealand as follows:
>
> PENAL SERVITUDE FOR TRANSPORTATION — 1. after the first day of January, one thousand eight hundred and fifty-five, no person shall be sentenced to transportation.
> 2. Any person who, if this Act had not been passed, might have been sentenced to transportation, shall be liable, at the discretion of the Court, to be kept in penal servitude within the Colony for such term as hereinafter mentioned.

The Act provided for a scale of terms of penal servitude to be substituted for terms of transportation. Section 7 commenced as follows:

> And whereas there are divers persons now in custody under sentence or order of transportation, who cannot be consequently be sent beyond the seas

and continued by substituting for such sentences or orders terms of penal servitude within the Colony. Although in the preamble it refers to making "temporary" provision, sentences or orders of transportation were never re-introduced.

On 4 June 1854 The Supreme Court Practitioners Act 1854 was passed which extended the class of persons who could be enrolled as barristers or solicitors to those persons who had practised as barristers, solicitors, attorneys or proctors in any Court in Australia or in Van Diemen's Land. In the intervening period the right of a barrister to practice as a solicitor and vice versa had been renewed from time to time.

In 1860 The Supreme Court Act 1860 was passed which repealed The Supreme Court Ordinance of 1844 and the Amendments thereto and The Supreme Court Rules Ordinance No 1 Section IV of 1844 and the Amendments thereto. The repeal of these Acts required the passing of the The Law Practitioners Act 1860 which preserved the position of barristers and solicitors until the passing of the Law Practitioners Act 1861. The latter Act re-enacted the previous rights and entitlement of persons to be placed on the Roll of Barristers and the Roll of Solicitors.

There were new provisions which affected both barristers and solicitors.

The methods whereby a person could be enrolled as a solicitor were extended. As regards barristers s 10 provided as follows:

> In New Zealand barristers of the Supreme Court shall have all the powers, privileges, duties and responsibilities that barristers have in England.

This section has been re-enacted in the later Law Practitioners Acts namely s 12 of the Act of 1882; s 11 of the Act of 1908; s 7 of the Act of 1931, and s 13 of the Act of 1955. And is now section 61 of the Law Practitioners Act 1982.

Sections 59 and 60 of the 1861 Act empowered the Judges to make rules calling upon persons who were enrolled as barristers and solicitors to elect upon which of the two Rolls they desired to remain. It is reasonable to presume that the object thereof would have been to split the legal profession in New Zealand into two branches.

These two sections were repealed by The Law Practitioners Act 1882 and not re-enacted.

On 1 January 1907 an Order in Council was passed which provided

as follows:

> In exercise of all the powers and authorities vested in him or on his behalf His Excellency the Governor of the Colony of New Zealand acting by and with the advice of the Executive Council of that Colony hereby makes the following regulations with respect to the appointment; of King's Counsel.
>
> 1 The appointment of His Majesty's Counsel shall be made only by the Governor in Council, but with the concurrence in each case of His Honour the Chief Justice.
>
> 2 On every appointment a fee of five guineas shall be paid.
>
> 3 For every licence to appear against the Courts in which the services of His Majesty's Counsel is dispensed with a fee of one guinea shall be paid.
>
> 4 [This dealt with the payment to and dispersal of the above fees].
>
> 5 Except when acting for the Crown His Majesty's Counsel shall not appear in the Supreme Court or the Court of Appeal unless a junior from outside his own office appears with him not in any inferior Court unless upon Special retainer and a fee of at least ten guineas. (See 1907 *NZ Gazette* Vol 1 page 240).

The Attorney-General having satisfied himself that all who intended to apply to be appointed as King's Counsel had done so forwarded the applications to the Chief Justice. On the 7th June 1907 (See 1907 *NZ Gazette* Vol 1 p 1938) the following persons were appointed King's Counsel: Francis Henry Dillon Bell; Martin Chapman; John George Findlay, Attorney-General; and Charles Perrin Skerrett all of Wellington: Joseph Augustus Tole and Frederick Ehrenfried Baume of Auckland: Thomas Ingram Joynt and Thomas Walter Stringer of Christchurch: John Henry Hosking and Saul Solomon of Dunedin.

A person holding a certificate of enrolment both on the Barristers Roll and the Solicitors Roll may act in either of both capacities. The only exception being that:

> no practising Barrister of the rank of King's Counsel shall also practice as a solicitor, either alone or in partnership with any other solicitor and no certificate under s 45 of the Principal Act [Law Practitioners Act 1908] shall be issued to any such barrister, but this provision shall not apply to any barrister in New Zealand at present holding the patent of a King's Counsel.

This is Section 3 of The Law Practitioners Amendment Act 1915 which was passed on 12 October 1915.

It is manifestly plain from the brief outline of the Ordinances and Acts of Parliament

(a) That the Law of New Zealand, from the commencement of the Colony, save for the period from 3 July 1841 to 15 March 1842 when the Laws of New South Wales were applicable, was only the Law of England.

(b) For the first 20 years the only members of the profession were lawyers who were qualified either as barristers or solicitors in the United Kingdom or those who had been bound or articled in New Zealand to such qualified lawyers.

(c) The first Judges had also qualified in the United Kingdom before being appointed to the Bench.

(d) The true interpretation of many of the statutes had been made by the English Courts before and after such statutes were applicable in New Zealand.

(e) The principles of the Common Law were brought to New Zealand by the first lawyers and Judges. □

Recent Admissions

Barristers and Solicitors

R V M Allen	Dunedin	9 February 1988
J M Beard	Christchurch	25 November 1988
T L Beard	Christchurch	25 November 1988
S T Bennett	Christchurch	25 November 1988
A R J Bowers	Christchurch	29 September 1988
L A Buxton	Christchurch	25 November 1988
N D Cocurullo	Dunedin	16 June 1988
S L Collins	Dunedin	21 October 1988
R J Cox	Christchurch	25 November 1988
H M Dassanayake	Auckland	7 October 1988
P H De Bres	Christchurch	25 November 1988
W S Dunn	Dunedin	16 June 1988
S C England	Christchurch	25 November 1988
J G Greene	Christchurch	25 November 1988
J L Gosney	Dunedin	16 June 1988
K M Haggit	Dunedin	16 June 1988
A J Harding	Dunedin	16 June 1988
P D Hattaway	Christchurch	25 November 1988
C D Hilson	Christchurch	25 November 1988
P R Holm	Christchurch	25 November 1988
B M Hutchins	Dunedin	16 June 1988
M D Joseph	Dunedin	16 June 1988
M G Kirkland	Dunedin	16 June 1988
A G E Lee	Dunedin	16 June 1988
C K Lee	Dunedin	16 June 1988
D S Lester	Dunedin	16 June 1988
M D Lloyd	Christchurch	25 November 1988
S G McOmish	Christchurch	25 November 1988
S C Mee	Dunedin	16 June 1988
R W Muir	Dunedin	16 June 1988
G C Novak	Dunedin	16 June 1988
R J O'Connor	Christchurch	25 November 1988
S F Peart	Dunedin	17 November 1988
L M C Penno	Dunedin	16 June 1988

Changing partners: expectations and performance?

By Michael Simmons, LA, LLM, FBIM MinstM

In this article, reprinted with permission from Solicitors Journal, *23 September 1988, the author looks at what will be required of the future partner.*

The old distinctions between partners were glib but very satisfactory for a number of years, finders, grinders and minders. In practice, the grinders were very much in the ascendant numerically. Most firms rarely needed more than one minder, and finders were also fairly thin on the ground.

After all, those with extrovert tendencies enabling them to be good salesmen could make their fortunes in insurance and allied fields without the need to spend years qualifying in our profession. Nevertheless, there seemed to be enough to go around.

It has also become possible to supplement the activities of the natural "rainmakers", or main providers of clients in firms, by adding marketing programmes, which, if adhered to by most partners, are relatively effective for client retention, cross-selling additional services, and even obtaining new clients.

Can we now sit back with an air of self satisfaction? The answer, as usual, is a negative one. While we seem to be faced with a rising volume of work, the competition for the better areas becomes more fierce. Firms are growing larger and more complex to manage. It is no longer sufficient for a partner to restrict his or herself to one area, and expect others to carry the burden. We all need to be more rounded practitioners, if we are to reap the full rewards.

The modern partner

I am indebted to William C Cobb, the well known American law firm consultant, for his piercing analysis of what is required of the modern partner. We all start as project workers dealing with the job in hand, and many of us up to now had not progressed beyond that stage. It will no longer be sufficient for our partners so to restrict themselves. The next stage of evolution is that of project management. Here, the partner involves others in the work, which is normally of a large and more complex nature. The work is broken down so that component parts are dealt with by others in the firm in accordance with their abilities and seniority. The principle is to produce the work in the most economic and effective way, so that costs are reduced to the client, while at the same time the firm does not allow low level work to be done by high level employees, who cannot charge their full economic rate because the market will not stand it.

Team management

From project management, the partner growing in stature moves on to team management. The team can start as quite a small entity, of, say, one assistant, but can gradually expand to a whole department, or ultimately to the whole firm. Man management skills have to be learned and deployed, so as to get the best out of all concerned in the clients' interests, and also those of the firm. Economic criteria are still important, but true skills of leadership have to be displayed.

The reader may feel exhausted at this point by the sheer breadth of skills which our paragon of a partner will have to learn and display. However, we have by no means finished. The team manager then moves on to become a client manager. In some firms, this function is called the billing partner. This partner is responsible for quality control in respect of the clients' expectations and will be responsible for client retention, cross-selling and generally making sure that the client remains loyal to the firm and, if possible, increases the flow of work. A great deal of "clout" resides with the partners who control a firm's major clients, who often have a disproportionate say in the partnership's counsels.

Even this formidable talent, added to all those mentioned before, is not enough. The true stars are those partners who go on to become client originators. These are the "rain-makers" of the great American firms and there are a few household names also in the English legal profession, while many others continue to plough their lonely furrows in a more modest manner. While there are natural salesmen among us, nevertheless more and more of us will have to acquire these particular skills of marketing and selling. Necessity is a hard taskmaster and no doubt charm schools will arise, which will teach us the required techniques. Canada has already produced a video programme entitled "Rainmaker", which purports to teach us the skills in the comfort and privacy of our own homes or offices.

The well rounded partner of the future will be multi-faceted and will combine all five skills in the Cobb

catalogue, but even this will not be enough. The team manager may well move onto the business management side of the firm, as the firm will combine business and professional management activities in tandem. Sometimes these will be dealt with by separate individuals, and sometimes partners will be expected to display both aspects. A great deal will depend upon the size and breakdown of the firm in question.

Recruitment and training

As recruitment and training play a greater role in our professional lives, so partners will be expected to involve themselves effectively in those aspects of the work as well. As firms grow even larger, a large number of those activities, as with management, will be delegated to professionals in those particular fields, but we know that delegation is not the same as abdication, and we will have to be involved in the overall planning and supervisory positions controlling those activities.

At least the new range of activities predicted for us will not allow boredom. The partner of the future will always be involved in the task of self improvement through new experiences and training. It is going to be an exhausting business to live up to the expectations of our peers.

Looking backwards, the partners of the past led a very cushioned existence with secure and captive markets providing a good livelihood. The winds of change are bringing competition from within and without our professions. Survival of the fittest can be a hard principle to have to endure. We must make certain that we condition ourselves to rank in that category. The youth of Sparta were hardened for battle from a very early age. Their training never ceased. Our professional training will have to take into account the new skills as early as possible, and we will continue to learn them throughout our professional lives.

The partner of the future will be a talented animal. This article is addressed to the partner of the present, who is rather like the jam in a sandwich. It is possible to look back with nostalgia at the professional life of the past, and forward with some trepidation to the professional life of the future.

It is those earth shaking adjustments, which we are all going to have to face to equip ourselves with those new skills, which are currently reducing us to fear and trembling. Anyone for early retirement? □

Continued from p 424

So did "all evening engaged preparing a draft assignment". Charges were obviously down. Winding up a deceased estate usually brought in £3.3.0; drawing up a simple will £1.1.0.

The gloomy outlook for the profession also seems temporarily to have reduced the number of students studying law. There were no admissions to practise in 1891. Some practising lawyers were themselves having a hard time of it. The Council of the Law Society in the same year lamented that Mr Keetley "one of the oldest members of the Bar practising in Auckland" was "in reduced circumstances" and unable to pay his Society fees. By 1893 so many solicitors had defaulted paying practising fees that the Council decided not to institute proceedings against them as "the financial position of the Society did not justify such expenditure".

It is not known what the practice of Russell & Campbell earned in the early 1890s. Those records have not survived. But those of another (though smaller) firm, McKechnie & Nicholson, have. These are informative. The trend of the annual profit and loss accounts of that firm was steadily downwards to a trough in 1894: in that year, after the payment of salaries, there was a net loss of £5.8s.6d. Thereafter, as the economic spell over the colony began to break, the profits of McKechnie and Nicholson picked up. By 1897 there was a full recovery.

Conclusion

By stopping at 1897 as is now done is to introduce an artificial disjunction, because the history of a profession is like all history, a continuum. Indeed the title of this lecture embodies a misconception. To provide an anatomy of the legal profession is to imply that that profession is static, dead like a cadaver on a dissecting table.

The reality is that the profession, like Auckland between 1863 and 1896, was in constant flux. Contrast the rough-hewn settlement of 12,000 European settlers in 1863, with the urban centre of 1896 — nearly 60,000 people living in a city and suburbs with substantial buildings and modern amenities. The world of business had become more recognisably modern, and more complex too, regulated and conditioned by a host of new laws concerned with law tenure, property taxation, bankruptcy, and much else, all undreamt of thirty years before. Lawyers responded to these new needs. Whatever one says of the profession at this time it must never be regarded as inert. Its response and adaptation to changes in colonial business were unceasing. One suspects that such dynamism would characterise the profession of law in Auckland today, no less than it did a hundred years ago. □

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1 See eg Ross Gore, *Chapman Tripp & Co: The First Hundred Years*, Wellington, 1975; J H Rose, *Jackson Russell: A Scrapbook History*, Auckland, 1983. Excellent material on the mortgage-work of lawyers is in Margaret Galt, "Doing Well for Bella: Foreign Mortgages in the New Zealand Financial System, 1885-1901", *New Zealand Journal of History*, XVIII, 1 (April 1984), pp 50-65; and even more fully in M N Arnold [Galt] "The Market for Finance in Late Nineteenth Century New Zealand with Special Reference to Rural Mortgages", M A Thesis, Victoria University of Wellington, 1981.

2 Robin Cooke, (ed), *Portrait of a Profession; The Centennial History of the New Zealand Law Society*, Wellington, 1969; D F Dugdale, *Lawful Occasions: Notes on the History of the Auckland District Law Society 1879-1979; M J Cullen, Lawfully Occupied: The Centennial District of the Otago District Law Society*, Dunedin, 1979.

In support of private property

By Rodney P Hide, Research Officer, Centre for Resource Management, Lincoln College

This article is in response to that of Richard Boast in the October issue of this Journal [1988] NZLJ 361 in which he discussed the major constraint of town planning on property rights. He defended the present situation and in particular he criticised two reports, one of them from the Economic Development Commission in November 1987 advocating what can be most simply referred to as a more market approach to town and country planning.

In a recent article Mr R P Boast claimed that the principle that private property should be secure from interference was no more and no less valid when analysing planning law than many other contrary principles that one might employ ([1988] NZLJ 361, 364). It is just as valid, he stated, to assume that there are no private rights in land, or alternatively, to assume that private rights must sometimes be overridden by certain public interests.

However, a person concerned with consistency cannot simultaneously accept that private property should be (a) secure, (b) non-existent, or (c) subject to social or political control. As a matter of logic he must reject at least two of these principles. Mr Boast himself, despite his claim that the three principles are equally valid, proceeds in his article to reject the first and to assume that private property should be subject to some form of political or social control.

I myself consider secure property to be the valid principle. I am nevertheless eager to learn, and by putting the argument for private property as best I can, I am hopeful that Mr Boast will rise to the challenge and through the good offices of the *Law Journal* contribute to my education. I am keen to learn what is wrong with the principle that property should be private and secure from interference. Maybe then I will understand the rationale of present planning law.

My argument in support of private property rests on the proposition that people should be free and that they should be allowed to prosper. I present the argument in two parts. The first part is concerned with freedom, the second with prosperity.

Private property and liberty

I believe people should be free. A man is free when he can expect to shape his course of action in accordance with his present intentions. He is not free when someone else or some other group has the power to manipulate his circumstances so as to make him act according to that person's or that group's will rather than his own. He is then coerced to act not according to a plan of his own but to serve the ends of another. A person so coerced is unable to use his own intelligence or knowledge or to follow his own aims and beliefs.

I consider such coercion evil. It is evil because it eliminates an individual as a thinking and valuing person and makes him a mere tool in the achievements of another person or group. Such coercion is also wasteful because it restricts the use of the information and knowledge that is dispersed amongst the many that live in society. Those with the power to coerce must inevitably have only a subset of available knowledge and information. Planning authorities simply cannot grasp all the knowledge and information contained in the individual minds of those who make up society. Full use can be made of available knowledge and information only by allowing people to be free to follow their own objectives as they best see fit.

Freedom requires that an individual's circumstances be unable to be shaped at will by another. There must be some set of circumstances in the individual's environment that cannot be interfered with by others. Such a set of circumstances has only ever been provided by private property. Private property allows each member of a society to ascertain what particular objects he may command for his purposes. It thereby provides each individual with the secure expectations that he needs if he is to plan, that is, to use his own intelligence and knowledge and to follow his own aims and beliefs.

Although coercion is evil some is nonetheless necessary. Private property can only be enforced, and individual freedom thereby secured, through coercion. The use of this necessary coercion is kept to a minimum where it is used only by the state and only to enforce known general rules. The law, rather than stating who owns what, provides the general rules by which it is possible to ascertain from particular facts who owns what. General rules prevent the manipulation of individual circumstances and so help to prevent unnecessary coercion.

It is sometimes implied that private property allows an individual to use what he owns just as he chooses. This is not so. A landowner, for example, may not use his land in an unreasonable fashion and thereby interfere with a neighbour's enjoyment of his land. The common law of nuisance thereby delimits the respective rights and duties of landowners, albeit somewhat vaguely. A property owner cannot do as he likes; he has duties as well as rights.

The conclusion from the foregoing argument is that a person cannot be free if the power that the

state has to enforce his property is used to rearrange that property. Waimea County Council, for example, recently used planning law to make the logging of native timber a conditional use. Native timber on private land cannot now be cleared or milled without first obtaining the Council's permission. Through the manipulation of their property landowners have been made to serve not their own interests but the interests of the Council and conservationists. Present planning law thus diminishes freedom: it allows people's property to be manipulated so as to have them serve interests other than their own.

Private property and markets

Economics allows us to understand why the coercive manipulation of property is unnecessary and thus how freedom is possible. It explains how those in society can each use their own knowledge and information to pursue their own aims and beliefs and yet co-operate in a social order. Economics explains, moreover, how wealth can be created within society and how each member can benefit from the freedom of others.

The lessons that economics provides can be illustrated through application of its four core principles[1] to the taking of trees in Waimea County.

Principle #1: Prices matter. The first principle of economics is that prices matter. If the price of a thing goes up then, all other things being equal, less of it will be demanded. There will be a strong demand for nature conservation, for example, as long as conservation can be achieved by taking property rights rather than buying them.

Principle #2: Opportunity costs are prices. The second principle of economics is that opportunity costs are prices. Although Waimea County Council can take the rights to the trees without paying for them, there is nevertheless a cost. That cost is the value of the opportunities forgone when trees are conserved. In the Waimea County example the opportunity cost is the value of the trees to the local chipmill along with the value of any alternative use to which the land could be put. There is a price to conservation, and in this instance it is paid by the landowner.

Principle #3: Decisions are made at the margin. The third principle of economics is that decisions are made at the margin. It is the value placed upon conserving an additional stand of trees that is important, not the total value of all the trees conserved. Conservationists and the Council may well prove more particular about which stands of trees they wish conserved if they must pay for them.

Principle #4: Trade is a positive-sum game. The fourth principle of economics is that trade is a positive-sum game. When one party buys the rights to a stand of trees in order to conserve them, both they and the landowner are better off as a consequence. Both parties to the trade gain. If they each did not expect to gain from the trade they would not have agreed to it. It is through the gains from trade that wealth is created. The taking of rights, for whatever reason, is a zero-sum game. One party's gain is another party's loss. Wealth is not created but merely redistributed. In Waimea County, for example, the conservationists gained at the expense of the landowners. Planning processes that rearrange property are, however, worse than zero sum. Planning processes themselves cost. They are negative-sum games in which wealth is dissipated rather than redistributed.

Coercive manipulation of property

These four core principles of economics allow us to understand not only why the coercive manipulation of property hinders prosperity. The coercive manipulation of property is unnecessary because where property is secure individuals and groups of individuals can use their own intelligence and knowledge and pursue their own aims and beliefs by rearranging their property through trade. Rights to native trees need not be taken in order to conserve trees because conservationists, and those who act on their behalf, can always buy the necessary rights. If they are not prepared to buy a particular stand of trees then that says something about the relative value they place upon that stand.

Trade, moreover, rearranges property in a co-operative way. Rather than using the power of the state to take rights, conservationists can negotiate with landowners for the rights to the trees. Such rearrangements of property require negotiation and only proceed where both parties agree to the trade. The price mechanism thus harmonises conflicting interests.

Planning processes do not harmonise conflicting interests. The success of one group is only achieved at the expense of another. In so far as they enable property to be manipulated coercively they also paradoxically reduce the ability of people to plan. After the Waimea County Council's decision, for example, landowners elsewhere must wonder if their councils will likewise remove their rights to their trees. Their ability to form secure expectations, and thereby to plan, has been compromised. Planning processes also hinder people's ability to prosper. By replacing the market they prevent the realisation of the gains that can be had from trade and in so far as they involve unnecessary coercion they also preclude the benefits that the entrepreneurial skills of free men can confer on a society.

Conclusion

The case for private property secure from interference is a strong one. I await to learn why planning law does not diminish freedom or hinder prosperity, or of the other higher values it promotes. I want to know why David Hume was wrong when he wrote the following:[2]

> Property must be stable, and must be fixed by general rules. Though in one instance the public be the sufferer, this momentary ill is amply compensated by the steady prosecution of the rule and by the peace and order which it establishes in society. And even every individual person must find himself a gainer on balancing the account; since without justice society must immediately dissolve, and every one must fall into that savage and solitary condition that is infinitely worse than the worst situation that can possibly be supposed in society.

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1 I am indebted to Professor Terry L Anderson of Montana State University for so summarising economics for me.

2 David Hume, *A Treatise of Human Nature* Bk III Pt II Sect II (1739).

Carta Forestae rediviva: or, Lessons from history

BY D J Round, Lecturer, Faculty of Law, University of Canterbury

The recent reorganisation of government departments and the creation of State-owned enterprises led Mr D J Round to recall the medieval laws of England concerning forests. He draws some amusing and interesting historical parallels.

Before the Conquest, and for a good while after it, England was a vast forest of oak, beech and ash, with towns and villages only islands in this wilderness, and a squirrel might travel from one coast to the other without setting foot on the ground. The Conquest did nothing to change this. Indeed, such was the passion of the Norman and Plantagenet kings for hunting that for two centuries thereafter forests, afforestation, the Forest Law and the oppressions and exactions of officials arising therefrom, were matters at the forefront of men's minds, complained of often and remedied in charters. The Conqueror himself, who, as the Anglo-Saxon Chronicle tells us, "loved the great game as if he had been their father", afforested the forest still known as the New Forest, as well as other places.[1] The monastic chroniclers make much of the fact that his son, the good and open-handed William Rufus, met his death in that same forest, and suggest that his death there was some sort of divine judgment on the afforestation, forgetting that that particular one was his father's, and not his own.[2] Henry I (Beauclerc) promised in his coronation charter of liberties[3] that "the forests, by the common agreement of my barons, I have retained in my own hand as my father held them", ie that lands afforested in his elder brother's time would be disafforested. Henry II (Curtmantle), however, made no concessions in his Assize of the Forest of 1184, (also known as the Assize of Woodstock) but promised on the contrary that "no trust shall be put in the fact that hitherto he has had mercy . . . upon those who had offended in regard to his venison and his forests"![1] His charter, unlike most other forest charters, is a firm assertion of royal rights, although many of the matters it deals with are those perpetual ones well-known to any forest administrator, here or there, now or then: the unauthorised clearance of forest (cc 3, 5, 7, 8 and 9), the powers and supervision of officials, their derelictions of duty (cc 4, 5 and 6), the forbidding of unauthorised weapons in the forest (c 2) and of hunting by night (c 16) and the regulation of dogs.[4] But, needless to say, afforestations and the depredations of forest officials were among the complaints made against bad King John and remedied in Magna Carta. (Cc 44, 47, 48 and 53 of the original charter of 1215) In 1217 these provisions of the Great Charter were extracted and put into their own charter, the *Carta Forestae* we all know, which, as Bishop Stubbs says in his *Constitutional History*, "was probably no less popular or less important that the Great Charter itself. (The *Carta Forestae* appears in our statute books as a re-enactment by Edward 1 (28) Edw 1) of the re-issue by Henry III (9 Hen III) but is not in force in this country.) The *Carta Forestae* disafforests certain woods and grounds, defines the classes of people liable to answer summons of the forest, limits and regulates range-making, scotale, swanimotes,[5] chimmage, tolls and pleas of the forest, and grants freemen certain liberties as to the use of their own lands in forests. For all that, several chapters do preserve royal rights.

Much fascinating detail could be mentioned concerning the later history of the forests. Further disafforestations were made up until 1327, when 1 Edw II st 2 c 1 fixed the boundaries of royal forests as at that time. By Henry VIII's time it was thought necessary, or at least expedient, to obtain Parliament's authority for the afforestation of lands around Hampton Court, and to compensate the tenants. (This forest was made, we read in the second volume of Dasent's *Acts of the Privy Council*, because the king had "waxed hevy with sickness, age and corpulence of body, and might not travayle so readily abrode, but was constreyned to seke to have his game and pleasure ready at hand".)

Charles I attempted to fill the exchequer, and incurred great unpopularity by imposing penalties and exacting fines for breaches of the almost forgotten boundaries and laws.[6] But such a parade of creaking learning might not be to the taste of our age.[7] Nevertheless, certain lessons for our time do emerge from the shade of oak and beech.

In this age of deregulation, when liberty is the cry on everyone's lips, and rich men disinterestedly take it upon themselves to fight for the precious freedom of the poor to work long hours for less than a living wage in unpleasant or even dangerous conditions, if that is what the poor genuinely want, let us not forget that liberty has its prices. ("O Liberty!" cried Mme Roland before the guillotine, "How many crimes are committed in thy name!") The Charter of the Forests gave to the

great many liberties to do what they wanted with their own forests, and removed many oppressions of the lord king and his servants. The Charter was good for liberty, but it was not so good for the forests – and where are they today? Today is an appropriate time to remind ourselves that liberty and environmentally sound management do not always go hand in hand.[8]

We must admit, however, that one – only one – of the reasons for the unpopularity of the forest law was the abuse of their powers by the officers of the forest and the oppression of the forest dwellers. Our modern constitution is better at supervising officialdom, and our people less quiet than the English of that time.[9] Nevertheless, from time to time one has doubts as to the dreadfulness of some of these oppressions. Were they all really infringements on private rights and, freedoms, or were some of them, at least, merely diligent and proper behaviour by royal officials which impeded self-aggrandising and unlawful private actions? Christchurch may furnish a topical example. The Department of Conservation, the successor to the wardens and verderers of the forest law, and which is charged with the administration of the public lands entrusted to its care, has just refused a private developer permission to erect a restaurant in a scenic reserve with high botanical values. (The Mt Cavendish Scenic Reserve on the Port Hills.) The reserve was given to the nation by a local farmer in 1913. Local bodies, however, as well as the frustrated restaurant builder, seem to consider that they have some proprietary rights in this public property, and are complaining in aggrieved tones of "meddling", "irresponsibility" and "pathetic" and "totally unreasonable" actions by the Department of Conservation. Given the wrong sort of chronicler, the lawful and totally reasonable behaviour of the Queen's servants could well be misrepresented in Law Journals five hundred years hence as oppressive. One sympathises with the good verderers of the twelfth century just doing their jobs.

A momentary digression from the forests may be forgiven. When the golden dragon was gored on the gonfalons of Normandy, the Normans felt obliged to make certain laws regulating the relationship between Norman and Anglo-Saxon. The most memorable of these, mentioned in the *Dialogue of the Exchequer* and the earlier *Leis Willelme* is presentment of Englishry – the requirement that the hundred where the corpse of any man is found slain by an unknown hand, must offer proof that the victim was English, or else pay a substantial fine (*murdrum* – whence our word *murder*. The fine was abolished by Edward III). These laws fell gradually into desuetude as the effluxion of time and the course of nature made the distinction between English and Norman meaningless, and indeed impossible, to draw. May it not be that in this way the present discord between Maori and European New Zealander will eventually be solved? We are, perhaps, still one or two centuries away from this happy fusion of the races, but if we just keep smiling and remember that after 200 years it will all be plain sailing, all will be well.

To return to the forests. The same reorganisation of government departments that led to the establishment of the Department of Conservation led also to the creation of the Forestry Corporation and the Lands Corporation, two of new state-owned enterprises established under the State-Owned Enterprises Act 1986. How much longer they remain state-owned remains to be seen. To these enterprises were transferred large areas of public land. That transfer marks a significant loss of public control over the use of large areas of land, and the loss of revenues therefrom.[10] The power of capital has, in this and other ways over the last several years, been considerably augmented. Time alone will reveal the wisdom of these actions. Into whose hands will these lands pass now? Our history contains at least one other striking large-scale transfer of lands from public to private hands. When Henry VIII stole the lands of the monasteries he failed to keep them as the demesne of the Crown but instead, short of ready cash, allowed them to be bought for a madrigal by the sixteenth-century equivalent of the members of the Business Table.[11] The Crown's poverty then led to frequent parliaments and was a Good Thing, although a civil war and a revolution were needed finally to establish parliamentary supremacy. Let us hope that the battle between parliament and capital can be more amicably settled. □

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1 Afforestation, of course, does not mean what it usually does to us, the planting in treeless places. Afforestation was rather the declaring of land to have the legal status of forest, and thus be subject to the forest law, the forest courts and the officers of the forest. Such land would be largely wooded already, but might well (as in the case of the New Forest) include villages and many habitations within it, all of which, with their inhabitants, were subject to the Forest Law. Royal forests might well also include forests the property of lesser men, who could still use them as they pleased except that "they could not make essart, purpresture or waste without the King's licence" (*Select Pleas of the Forest*, Selden Society, Vol 13, xxv). An essart or assart was the destruction of the forest and its reduction to a state of cultivation, the greatest offence and trespass against the forest law. A purpresture is an encroachment of the forest. Waste here signifies an abuse by tenants within the forest of rights which they possessed, such as lopping wood. Essart, purpresture and waste are therefore the abuse and destruction of the forest to the detriment of the beasts of the chase – the destruction of the vert to the detriment of the venison.

2 There is evidence to suggest that Rufus was not the victim of a mere hunting accident, but went knowingly and willingly to his sacrifice as the Divine Victim in the practice of the old religion. For this theory and many curious details, see Margaret Murray, *The God of the Witches*.

3 C 10. This is the charter which begins "know that by the mercy of God and by the common counsel of the barons of the whole Kingdom of England I have been crowned King of the same realm".

4 This is the "lawing" of dogs. In c 14 "he orders that the lawing of mastiffs shall be performed wherever his wild animals have peace or are accustomed to have it". Lawing is the mutilation of a dog by removing the claws of one or both forelegs, thus rendering it impossible for it to pursue game. C 6 of the Charter of the Forests of 1217 describes it: "and such lawing shall be done by the Assize commonly used, that is to say that three claws of the forefoot shall be cut off by the skin" – *"tres cotelli abscindantur sine pelota de pede anteriori"*.

5 Which, as we all know by now, have nothing to do with *swans*, but are rather meetings of *swains*, a certain species of rustic. The Old English *swan* meant a swineherd.

6 In Sir Edward Coke's time there were 69 royal forests, of which all but two (Hampton Court Forest and the New Forest) had been created before the period of record. Between 1632 and 1637 Justice

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Company directors' spheres of responsibility:

Primary and secondary duties

By P D Giugni, LLM, MScSoc, Solicitor of the Supreme Court of New South Wales, and Dr John L Ryan, BA, BCL, PhD, Barrister-at-Law (NSW), (Gray's Inn), (NZ), (Canada)

An article on recent cases on the duties of directors was published at [1988] NZLJ 403. This present article looks more specifically at the question of the duty that directors owe to the creditors of a company. The cases considered are mainly Australian, but particular attention is given to the New Zealand Court of Appeal decision in Nicholson v Permakraft *[1985] 1 NZLR 242. The conclusion of the authors is that the primary duty of the director is to the company, but they note a judicial tendency to expand the duty to creditors.*

1 Introduction

When analysing the structure of the modern day company, it is helpful to recall its genealogy. Prior to 1844, apart from chartered companies and statutory companies created by Act of Parliament, most of the day to day company business had been conducted, at least from 1720 onwards, by companies based upon a deed of settlement which made use of a combination of trust principles for property holding and a management scheme derived from partnerships. From 1825 there was growing pressure in England to devise a business form which would facilitate the advance of corporate commerce. The advent of the registered joint stock company in England was delayed until 1844 because of the marvellous efficiency of the prevalent deed of settlement unregistered companies. These companies existed outside the common law system because companies with transferable shares had been proscribed by the Bubble Act of 1719. In 1844 the legislature decided at last to accept ease of incorporation by the simple device of registration. The Companies Act (1844) was not totally a new departure, in that although it accepted incorporation by registration, numerous sections of that Act and the schedule to it reflect the prior deed of settlement company structure. The attractiveness of this Act was that it did away with the necessity of a special application to the Crown for Letters Patent to ensure legitimacy and provided an automatic device for incorporation by registration when a company furnished specified information concerning itself and complied with simple regulations. The Act incorporated companies but did not at that date extend limited liability to the individual members, which was postponed until 1855. A notable feature of the Act was the introduction of a scheme of provisional registration designed to be a preliminary step which would lead to complete registration on the expiration of a twelve-month period. The deed of settlement comprised the constitution of the company under which there had to be not less than three directors and the deed also contained a covenant (now implemented in s 78 of the current Australian Act) on the part of every shareholder with a trustee on behalf of the company to pay for the shares taken and to perform the other requirements contained in the deed. On the same date legislation was passed to provide for the winding up of the affairs of joint stock companies. The Act of 1844 was replaced in 1862 and the latter act provided the basis of Australian company law and the inception of the Australian practice of slavishly accepting British company law. (AC Castles, *An Australian Legal History* (1982), 456.)

From the inception, both the management and the administration of companies was delegated to the directors. During the period from 1844 until the turn of the century, because joint stock companies had been founded upon the dual principles of the law of trusts and partnerships, there was confusion respecting the exact nature of corporate personality. This was put to rest in *Salomon v Salomon and Co Limited* (1897) AC 22. This acceptance of corporate personality accompanied the principle that where the company suffered an injury it was for the company itself to sue to redress the damage. Because of some of the complications which flowed from that rule of procedure, its application was tempered to an extent in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189. With respect to the position of directors and their responsibilities, the applicable law flows from those two cases, and it is now a principle of general acceptance that the directors owe their duties and responsibilities to the company and to no one else. Spasmodically, pressure has grown to widen the ambit of that responsibility. For example, it has been suggested from time to time that the structures of *Percival v Wright* (1902) 2 Ch 421 are too restrictive in

that they exclude shareholders from the reach of directors' duties except in special situations! In addition to calling for wider recognition of the role of shareholders in this context, other voices have suggested that the responsibility of directors should be broadened to include wider sectional interests including creditors.

2 The Liability of Directors

A. Sphere of primary responsibility

Few lawyers woud be prepared to die in the last ditch defending a proposition that company law is an example of a scientific paradigm. Credit can be taken however for the fact that over the years in the hard practical forum the responsibilities of company directors have been hammered out with some degree of certainty.

Generally speaking, those responsibilities run directly to their companies. In this context company is interpreted to mean company as a whole. The locus classicus is that of Evershed MR, in *Greenhalgh v Arderne Cinemas Limited* (1951) Ch 286, 291:

> The second thing is that the phrase, "the company as a whole" does not . . . mean the company as a commercial entity, distinct from the corporators: it means the corporators as a general body.

It is helpful to pause here and delineate the exact position of directors in the company constitution. The company is incorporated by an act of the state through the registration process. That act of incorporation also recognises the company as a separate and distinct juristic person. It is that juristic person, the creation of the state, to which the directors owe their duties. If that entity suffers damage at the hands of the directors or through their neglect, the entity can take action in the Courts to redress that wrong. The constitution of the company, comprising: the Act, the memorandum and the articles also enumerates various powers given to the directors. Historically the Courts have interpreted the latter documents so directors possess a degree of power which cannot be assailed by the shareholders once they have vested it in those directors. At the same time the Courts have created developed legal conventions which control the directors in the exercise of such powers. Shortly stated, these conventions are summed up in the phrase that the directors must use their powers for the benefit of the corporation as a whole. A subsequent gloss to this is that the directors must also use their powers for the purposes for which they were bestowed upon them. The tenet of this paper is that the scheme of the organisational rules, namely those respecting corporate entity, directors' constitutional powers, coupled with the philosophy of non-intervention by the Courts to interfere with such powers, constitute the whole of the law regarding directors' duties. That is the package.

The package comprises the sphere of the directors' primary powers and sight must never be lost of the focus of these powers. The focus runs between the directors and the corporation as a whole. An understanding of this concept explains why directors cannot obtain for themselves special privileges through one of the instruments of the company constitution such as the articles because this would erode the primacy of that power by clouding the characteristics of the recipient. The question would arise, is the director acting as a director (primary power) or in some other capacity (secondary power). The equation is concerned only with primary power, that power vested in directors in their capacity as trustees or fiduciaries for the company. Seen in this light the doctrine of primary power can be viewed as completely self-contained.

B Sphere of secondary responsibility

Some random examples of the primary power of directors are their rights to allot shares, declare dividends, make calls and so forth. In all such situations directors owe a direct clear duty to the company.

During the course of exercising such direct powers the directors can always invoke their discretion and indeed shareholders would expect them to do so. If an allotment of shares is to be made the directors will want to consider, often in an intuitive manner, all sorts of matters ancillary to that main fundamental decision. To whom should the allotment be made, should one institution be preferred over another, should domestic holders be favoured over foreigners. This is part and parcel of the implementation of the primary decision but is collateral or peripheral to it. It is a matter of shadow, shadings and inflections; the bold stroke has already occurred when the decision to make the allotment came into existence. The High Court put it this way:

> Directors in whom are vested the right and the duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts.[2]

Both the primary sphere and the secondary sphere alluded to above must be seen to be self-contained. It is accepted that there can be some overlap here, but both spheres must remain whole. When the segment of one sphere is made to intersect the inferior sphere a problem of divided responsibility arises. This can be illustrated by some recent examples of the judicial approach to the position respecting company creditors and the responsibility imposed on directors by the Courts to these creditors. This position is best adumbrated in a recent case in New South Wales.

3 Directors and Creditors

In *Kinsela and another v Russell Kinsela Pty Ltd (in Liq)* (1986) 4 ACLC 215 the New South Wales Court of Appeal was concerned with a situation involving a family company which had for some time conducted a funeral business within the state. The company's affairs had reached a stage wherein it appeared the company might collapse because of financial difficulties and steps were taken designed to preserve certain of its assets from its creditors. An agreement was reached whereby the company would lease to two of its directors the freehold premises from which the company conducted its business at a rental apparently below the then current market rental and containing an option to purchase the premises at an exercise price favourable to the two directors. This agreement received the approval of all shareholders in general meeting.

Upon the company's liquidation the liquidator sought to have the lease agreement, which contained the option for purchase, set aside. The New South Wales Court of Appeal unanimously agreed with the finding of the trial Judge, Powell J, that the lease was voidable and that the liquidator was entitled to have the Court set it aside. In the course of his judgment the Chief Justice, Sir Laurence Street, said:

> the lease was not ultra vires and void as exceeding the capacity of the company. It was, however, entered into by the directors (albeit with unanimous approval of all of the shareholders) in breach of the duty to the company in that it directly prejudiced the creditors of the company.

With respect it is suggested that it was unnecessary for Street CJ to focus attention on the prejudice to the creditors. What was done breaches the rules regarding expropriation of company property as epitomised in *Cook v Deeks* (1916) 1 AC 554 where it was held that directors cannot divert to themselves property rightfully belonging to the company, since in Equity the title to that property always remains with the company, and shareholder ratification is of no validity.

At an earlier date the directness of the duty owed by directors to creditors was examined in New Zealand. There the Court of Appeal in *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 was concerned with a similar situation and the liquidator on behalf of the company took action against the directors to recover the amount of a dividend which had been paid to shareholders by way of a distribution of capital profit. He argued that the capital profit, which was lawfully available for distribution, should have been retained in the company in the interests of existing and future creditors. The basis of this argument was that the company was in a state of near insolvency at the time of the payment. At the trial of the action White J held that in making the dividend payment, the directors were in breach of their duties as directors and ordered them to refund the whole amount to the company. The directors limited their appeal to the question of breach of duty as directors, and the appeal was upheld. In his judgment Cooke J invited counsel to make submissions on the issues of "philosophy or policy involved". He found that although the duties of directors are owed to the company, the facts of particular cases may require the directors to consider the interests of creditors.

> For instance, creditors are entitled to consideration, in my opinion, if the company is insolvent, or near insolvent, or of doubtful solvency, or if a contemplated payment or some other course of action would jeopardise its solvency.

He also raised the question of business ethics, in that directors have to consider whether what they do would prejudice their company's practical ability to discharge promptly debts owed to current and likely trade creditors; and he was able to add

> to translate this into legal obligation accords with the now pervasive concepts of duty to a neighbour and the linking of power with obligation.

He was obviously impressed by the fact that companies existed under the umbrella protection of limited liability, saying that the recognition of duties to creditors was justified by a belief that limited liability was a privilege. He went on to add

> irresponsible structural engineering — involving the creating, dissolving or transforming of incorporated companies to the prejudice of creditors — is a mischief to which the Courts should be alive.

What is clear is that Cooke J was influenced by the reasoning of Viscount Haldane and he makes reference to this. What should be recalled is that Lord Haldane was speaking in 1911 (See *Attorney-General for Canada v Standard Trust Company of New York* (1911) AC 498.) and at that time it was not uncommon for members of the House of Lords and other members of the judiciary to take a critical approach to the idea that ordinary commercial people should be protected by limited liability as of right. England has a long history of ambivalence towards collectivism. The creation of trade unions was restricted for long periods and the idea that ordinary tradesmen and others could band together and become incorporated by a simple procedure of registration caused much judicial misgiving. When limited liability was introduced in 1855 it was conditional upon the company's name concluding with the word "Limited". This device was to be the red flag to right thinking members of society. Some remnant of this idea still persists.

4 Striking a balance: the advent of limited liability

The evolution of limited liability is punctuated by a repeating pattern of public concern respecting the ability of directors to use the limitation to the detriment of creditors. As early as 1854 when the Commission on Mercantile Law ((1985) British Parliamentary Paper XXVII (1791) 445) examined the question of limited liability it gathered evidence running to over three hundred pages. A reading of that evidence discloses that the witnesses were of all shades of opinion but the Report was not in favour of the limitation of liability. This can be contrasted with the position in Ireland where limited liability existed in the form of limited liability partnerships from 1782 and the company law of England in this respect lagged behind France, Italy, Belgium and America. (*Eclectic Review* (1852) IV (NS) 668 "The Responsibility of Joint Stock Companies")

One witness said that limited liability would increase fraud, seriously affect commercial credit, and stimulate excessive speculation. William Cross claimed that in limited liability companies the directors would push the great credit given to them by the new device, to the greatest possible extent, and as a consequence would borrow too much instead of "keeping their operations rather within the compass of their own capital". (*Report* (1854):216)

In 1855 the first Limited Liability Act, 18 and 19 Vict c 133, became law. A short act of nineteen sections, it was passed not as an independent measure but as an intended graft on the Act of 1844. The Act limited the liability of the shareholders to the amount of their shares. Lord

Bramwell, in his evidence before the commission, suggested that such companies should be labelled, and the Act provided (s 1) that all companies under the Act must append "Limited" to their title.

Under the Act the directors of existing eligible companies were empowered, with the consent of three-quarters of the shareholders, to have their association formed into a limited liability company. In the appendix to the commission's first report there was set out at length the Massachusetts statute relating to joint stock limited liability companies. One section (RS Mass c 38; sect 23) of this Act stated that if the directors paid a dividend when they knew the company to be insolvent, or when they knew it would render the company insolvent, they were jointly and severally liable for all the debts of the company existing at that date, and all debts afterwards contracted, as long as they remained in office. But the amount of their liability was not to exceed the amount of the dividend paid. Any directors absent from the meeting at which the dividend was disclosed, or if present who objected to it and filed such objection with the clerk of the company, were exempted from liability. This section was adopted (s 9) into the English Act. It is to be noted that there is a clear distinction drawn here between directors and shareholders.

A company law historian has suggested that at first glance it was surprising to find that the directors under this section were held liable and not the shareholders. He argues that in this respect the directors kept nothing from the shareholders, they reported to them and submitted accounts, and also were directed by the resolutions of the general meeting adopting or confirming a dividend. But he points out that in the earlier history of companies the directors were the trustees of the joint stock fund formed under the deed of settlement. Shareholders were subscribers to that fund and were at the mercy of the directors for, under the deed of settlement their power of interference with the directors was very limited, and it was usual for judicial interpretation of the deed to give the shareholders as little power as possible to meddle with the directors. For those reasons he concludes, this section held the directors liable to safeguard the interests of the creditors. (C A Cooke, *Corporation, Trust and Company* (1950) 154, 155)

George Sweet claimed that had it not been for this section shareholders in limited liability companies, taking dividends out of what he called the creditor's fund, would be liable in Equity to account to the creditors. This section, he contended, merely gave the creditors a further added right to proceed against the directors. It did not however deprive them of their existing remedy against the shareholders. To hold otherwise, he suggests, would enable shareholders to sweep away the total company assets, leaving only a few insolvent directors to be sued by the creditors. But he concludes that under the Act the directors were liable as principals, and not merely as sureties, and that the execution under the section would go against the directors and not against the company. (Company Act (1855)) The *Law Magazine* in the same year took the view that all the directors, in order to escape liability, were obliged to file their objection. This statement is patently incorrect for the section itself excuses absent directors without requiring any objection, to the declaration of the dividend, on their part. (54 *Law Mag* (1855), 257)

There were other liabilities placed on the directors by this Act, eg for not using the name of the company on bills and notes the directors were liable to a fine of £50, and were personally liable on the notes unless paid by the company. This made them liable only as sureties. Or if the directors advertised an increase in capital before it was registered with the registrar, they were liable (s 6) to a fine of £50. But Sweet has commented that this penalty was very small when it was remembered that a company might have had only three directors, which would mean a total fine of only £150, while in many instances the profits reaped, due to an increase of nominal capital, could have amounted to a great deal more.

The directors were prohibited (s 10) from lending money belonging to the company to any shareholders. For breach of this section the directors would be held jointly and severally liable for both the amount of the loan, and the amount of all the debts of the company contracted after the loan was made. Sweet claimed that this was a strong section since under it the directors had no right of reimbursement from the company, or from the borrower, for the borrower had to pay the amount of the loan directly to the company. (G Sweet: op cit 153, 59)

If the company lost three-quarters of its capital the directors were obliged (ss 13, 14) to take steps to have the company wound up. From that event any director appointed to the company was subject to the approval of the Board of Trade.

The provisions of this first limited liability Act are being examined in some detail to illustrate the fact that the original mould had been cast with great care and that a balance had been struck between the feasibility of company operation and the protection of creditors. The philosophy of this Act was almost solely concerned with the safety of the creditors. All those sections respecting directors, indirectly or directly concentrated on the fact that the capital fund of the company was required to remain intact, to enable creditors to collect on their debts owing by the company. All the penalties imposed on directors had that result in view.

Only 46 companies had been registered under the 1855 Act when it was repealed in the following year by a much more complete Act: 18 and 20 Vict c 47; containing 116 sections, which also repealed the 1844 Act. By this Act provisional registration was abolished and incorporation was by registration under which companies were to be formed by memorandum and articles of association. The memorandum replaced the old form of deed of settlement. Articles of association were set out in Table 3 of the Act, but its provisions were optional. On this matter Robert Lowe said, "Having given gentlemen a pattern, the State leaves them to manage their own affairs and has no desire to force on these little republics any particular constitution. (*Hansard*: CXL 134; (Herbert Spencer; (1854) *Edinburgh Rev* 420, also likened company management to the government of a republic.) The foundation principles of company legislation have altered little since the original

Act. For this reason it is important to recall that although the original statute went to considerable lengths to safeguard creditors there is no suggestion in any of its provisions of a direct duty running from directors to creditors.

One author was very critical of the Legislature's policy of non-intervention, and wrote that the Act almost exempted directors from personal liability.

> They are not responsible for errors in judgment and they can only be dismissed at the triennial ordeal of re-elections. They are not now punishable even for mutilating books of accounts, cooking accounts, etc, as under the repealed Act, the new law seems designed, in all its provisions and omissions, for the encouragement of fraud by giving it impunity. (Edward Cox; *Joint Stock Companies* (1856) vii)

Lord Thring, able to give an official view on the matter since he was employed by the Board of Trade in the actual preparation of the Act, disclosed that it was a deliberate principle that the allocation of management power should be left to the company itself and even if the shareholders adopted the whole of Table B, it only contained provisions necessary for the protection of the public. (Thring: *Joint Stock Companies* (1856) 9, 14)

As far as directors are concerned this Act made no advancement over previous acts. The section rendering directors liable (s 14) for payment of a dividend when the company was insolvent was retained from the 1855 Act. Charles Wordsworth, perhaps the foremost authority on companies at this time, suggested that the objection of a director under this section should be filed with the registrar and not with the company clerk in order to prevent collusion. (Wordsworth: *Joint Stock Companies* (1859) 6)

Curiously, Thring, despite the fact that he had a hand in the preparation, took a violent dislike to the section, and claimed that it was inaccurate and would probably become a dead letter. He displayed a strange ignorance of its origin claiming that it was adopted from the New York law, when in fact it came from Massachusetts, and he criticised the section because it was inconsistent with the remainder of the Act. What he neglected to add was that it was inconsistent only because it was far more demanding and sensible than the other sections respecting directors and their duties. A strong adherent to caveat emptor he continued his attack by heaping much of the blame for fraud, in the management of companies money to directors when they were ignorant of their character. No system could be devised to protect shareholders from the frauds of directors, he added, and consequently he called for criminal responsibility to be imposed on directors. (Thring: (1856) 45)

In 1858 the *Law Times* denounced this Act as "The Rogues' Charter", and blamed many "rascalities" conducted under it on the directors. (*Law Times*, March 25, (1858) 14) The *Law Magazine* stated that the Act in no way clarified matters but rendered all rules and regulations more uncertain; "Nothing", it concluded, "has so obstructed the healthy development of the joint-stock principle, as this uncertainty of the law." (9 *Law Mag* (1860) 109)

As always, the opposition to this legislation also concluded that the Act would deter good men from becoming directors, since directors would be liable for every false figure in every balance sheet. (1857) 29 LT Mag 1857, 121) That was one of the objects of the Act, of course, to ensure that the directors would at least check the accounts and such criticism neglected to understand that if a director acted honestly he had nothing to fear. By contrast the *Times* claimed, in support of the Act, that it would stop the respectable directors from recklessly signing the accounts which were prepared by dishonest colleagues, and was a step forward in providing honest management for companies. (*Times*, July 9, 1857, p 10) One author stated of the Act that henceforth all directors should assume everything to be done improperly and incorrectly if they were unable to understand it and added that the Act had been passed as a direct result of the excitement caused by the Royal British Bank conspiracy. (HL Morgan: *The Liabilities of Directors* (1858))

The consequences of the legislative upheaval 1844-1862 may be stated as follows. *First*, these statutes established a policy of complete freedom of government which was left in the hands of incorporators. No mandatory scheme of government is to be found in the statutes, nor a mandatory constitution or even required constitutional provisions. This was deliberate policy on the part of the legislature which drew on the past experience of partnerships and unincorporated associations where the parties involved had no choice (since they operated outside the law) but to establish their own individual constitutions and formulate their own rules. In theory this was admirable enough but it showed some ignorance of power politics and the acquisitive nature of control. In pactice it enabled the directors to gain complete control of companies and aided by some rather odd decisions, to build control into something which looked surprisingly like control by right. What is clear from the legislation at this time is that this result was not that intended by the legislators. *Second*, these acts did not spell out detailed rules regarding the liability and responsibility of directors. Again reference must be made to the background of unincorporated associations where all depended on mutual trust and the relationship between controllers and controlled was formulated on the doctrines of the law of trusts. This scheme of administration followed a pattern similar to that of trustee and beneficiary and the rules of equity proved adequate to safeguard the latter and ensure that the directors lived up to those responsibilities implied by equity into the type of situation operating. Since the title to power of the administrators was derived from the beneficiaries they were responsible to them. Again practice parted company from theory and the absence of stated restrictions on directors in these statutes gradually engendered an assumption that such responsibilities were not enforceable. Allied to this the Courts decided that it was not their business to interfere in the internal workings of companies. *Third*, companies during this period were granted two distinct unique rights; incorporation as of right; limited liability. But these privileges demanded almost nothing in return. Again there is the

repeating pattern of assumption that the former existing practices would carry over into the newly created companies. However a procedure was thereby established under which parliament opted out of a direct supervisory role over companies. Consequently the view gained ground that it would be wrong for the legislature to make any later inroads on this policy by demanding, eg a greater degree of accountability from directors, or that directors be made liable if they make misleading statements in a prospectus. Again vested interests grew rapidly – since directors were not positively held to a high standard of care in a specific section of a statute this meant that it would be almost some sort of interference with the freedom of contract to impose liability in a later enactment. Henceforth whenever directors' liability was increased an immediate outcry issued from the city. The cumulative effect of this carries over into the present time.

The proceeding paragraphs have been included here in keeping with the suggestion made by Cooke J in the *Permakraft* case to examine both the philosophy and policy involved in this matter.

5 Insolvency: present or impending

A disconcerting feature of the present state of the law on this topic as it is derived from the cases is the uncertainty of the nature of the insolvency which concerns the Courts. Perhaps to a degree unusual for Judges there is use made of terminology which is somewhat lacking in exactitude or definitiveness. This characteristic will become more obvious when the cases are further reviewed.

The New Zealand Court of Appeal was also directly influenced by the findings in *Re Horsley and Weight Limited* (1982) Ch 442, regarding payments made by directors at a time when a loss could have been caused to the company creditors, in which the English Court of Appeal held that the directors at the time of the payment in question should have appreciated or have known that the payment was likely to cause loss to creditors or threaten the continued existence of the company. Adopting this reasoning Cooke J found that a payment to the prejudice of current or continuing company creditors, when a likelihood of loss to them ought to have been known to the directors, is capable of constituting misfeasance by the directors. It is also significant that Cooke J found that the unanimous assent of the shareholders would not be enough to justify the breach of duty to the creditors. In his approach to the case Somers J held that before the directors could be found liable they must be shown to be guilty of some misfeasance, something in the nature of a breach of trust. In the instant case he found that this must be a misapplication of the company's property. It is suggested that Somers J, in his succinct judgment, was able to spell out in simple terms the ambit of the directors' responsibilities in such situations

> In the case of an insolvent company, at least in the sense that its liabilities exceed its assets, directors in the management of a company must have regard to the interests of creditors. *That is because according to the order of application of assets on a winding-up, they are trading with the creditors' money.* It has been suggested that when the solvency of a company is doubtful or marginal, it will be a misfeasance (probably not capable of being ratified or exonerated by shareholders) to enter into a transaction which directors ought to know is likely to cause a loss to creditors.

It is clear that Somers J was of the view that it is not necessary to torture some new direct line of responsibility from directors to creditors since the intervention of the winding-up alters the composition of the corporate package and activates other rules.

By contrast the uncertainty of the basis for the argument that creditors may be owed a duty directly by directors can be seen in the following passage from the decision of Richardson J who says (p 463)

> If a company is solvent in the sense of its assets exceeding its liabilities there can, I think, be no question of a separate duty to creditors: they have their ordinary remedies if their accounts are not paid. *If it is insolvent the creditors have an interest in the company and the directors might be said to have a duty to them for creditors' money is then at stake.* It is in the intermediate situation of near insolvency or doubtful insolvency that greater difficulties of legal principle arise.

On reflection it could be suggested that it would be very brave counsel indeed who would argue in open Court for the application of a principle which was dependent upon: (a) an intermediate situation, (b) near insolvency, (c) doubtful insolvency. Experienced counsel might be forgiven for commenting that usually Judges will be concerned with something more definite than a nebulous solvency situation, especially when the consequence means severe liability for directors. Legal advisors familiar with the winding-up process will know well the care which must be taken in the mathematical quantification of the debt which will found a commercial insolvency which will activate the summary winding-up procedures under the Companies Act. Surely the question of non-feasance as opposed to misfeasance would also have to be taken into account.

The case of *Grove v Flavel* (1986) 4 ACLC 654 concerned a prosecution under s 124(2) of the Companies Act 1961 and therefore is not directly relevant here. In his judgment Jacobs J relied on *Walker v Wimborne* (1975-1976) 137 CLR and quoted from the judgment of Mason J who stated

> any failure by the directors to take into account the interest of creditors will have adverse consequences for the company as well as for them.

This Judge was also concerned with the possibility of insolvency and said

> if that is the principle which dictates the "duty" of a director to have regard to the interest of creditors when the company is known to be insolvent there can be no reason in principle why knowledge of a real risk of insolvency should not attract the same duty.

Here again there is the uncertainty of the application of the duty.

It is suggested that a detailed

examination of the reasons advanced in the preceding cases will enable some principles to be listed. Before that is done it is helpful to examine some comparative material, and for convenience that material is confined to the situation involving company groups.

6 A comparative approach

In various jurisdictions it has been seen as desirable to introduce measures to counteract situations which can arise within company groups and facilitate inter-group transactions at the expense of outsiders, including creditors. American bankruptcy Courts have developed what is known as the Deep Rock doctrine. (*Taylor v Standard Gas & Electricity Co* (1939), 306 US 307 – the Deep Rock Oil Corporation was the insolvent company.) Under that doctrine where there has been an unlawful or improper intermingling of the affairs of holding and subsidiary companies, any claim by one group member against another is postponed to the claims of outsiders.

The various American state jurisdictions, company insolvency apart, hold that the legal position of a creditor is similar to that of a shareholder and he is not ordinarily permitted to recover damages directly in an action against directors. The US view is that there is no duty of care between director and corporate creditors but that such duty runs only to the corporation. The view is also advanced that to enable a creditor to take suit in his own right would be to encourage an attempt to secure payment of his debt from assets which belong to all creditors.

West Germany has addressed the problem of corporate groups by providing for three different types. (Joint Stock Companies Act, 1965) In the case of the "integrated group", provision is made for the group of companies to be placed under one control and the separate entity status of the subsidiary can be disregarded. However, the holding company assumes liability for the debts of its subsidiary.

7 The problem of associates

To the problems of abuse or even of innocent management of accounting principles inherent in company groups there must be added the special risk of a conflict of interest arising during insolvency. When directors of an insolvent corporation cause it to enter into dealings with a related corporation or with some other associated party, for instance an "associated person" within the meaning of that term in tax legislation, then the transaction deserves close scrutiny. It is not for nothing that the law of preferences has been developed in bankruptcy. As an indication of differing attitudes it should be noted that Australian legislation provided for the avoiding of preferences even though the transaction was entered into without intent to prefer, at a time when English law provided that only fraudulent preferences were voidable.

What is clear is that the directors of an insolvent company may not act in a way which results in a depletion of its assets and a corresponding increase in the value of an associate. One might recall the words of Windeyer J in *Gorton v FCT* (1965) 113 CLR 604 at 627:

> At two o'clock on 19 May, 1960, Mrs Abel was a woman of considerable wealth. Fifty minutes later she was not as well off as she had been, and each of her nephews was better off than he had been.

Fraud is not necessary. The law demands that directors should not only avoid self-enrichment but should also obey standards which will prevent a conflict of interests from arising.

> The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointer amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. (Lord Parker, *Vatcher v Paull* (1915) AC 372, 378)

For present purposes what is of prime concern is impending insolvency.

Sight should not be lost of the fact that this whole process does not amount to a newly "translated legal obligation" as a duty to consider the interests of creditors in the exercise of directors' powers, rather it is an expression of the duty to the company as a whole, and the duty to obey the imperatives of legislation and general law in the context of insolvency. No doubt differing degrees of the possibility of a conflict of interests arise as financial considerations become more urgent, but it must be borne in mind that a trading corporation, although insolvent, requires as much attention to be paid to its health as to its sickness. Concern for the patient's recovery will be alleviated by the Chief Justice's comment that:

> Courts have traditionally and properly been cautious indeed in entering boardrooms and pronouncing upon the commercial justification of particular executive decisions. (*Kinsela & Anor v Russell Kinsela Pty Ltd* (in liq) (1986) 4 ACLC 215 at 223)

To an extent this echoes Robert Lowe's earlier description of companies as little republics.

In this context it is useful to consider the facts of the cases most relevant to the issue.

Walker v Wimborne & Ors (1976) 50 ALJR 446 involved behaviour by directors which was found by the High Court to constitute misfeasance within the terms of the Companies Act 1961 (NSW). That decision was cited by Street CJ in *Kinsela* as recognition of the obligation by directors to consider the interests of creditors. It was also relied upon in *Grove v Flavel* (1986) 4 ACLC 654 and has become a leading authority.

The actions of the directors in *Kinsela*, *Permakraft*, and *Grove* have already been outlined. Each case involved transactions with associated parties in the context of insolvency. In *Permakraft*, the one case in which the actions of the directors were upheld it was found that there were sound commercial reasons for the steps taken. (*Nicholson & Ors v Permakraft (NZ) Ltd (in liq)* (1985) 3 ACLR 453 at 463) The other two did not properly admit of that conclusion.

Too much should not be read into the question of the directors' ambit of commercial judgment here.

Theoretically Courts express extreme reluctance about entering boardrooms but on occasion a line must be drawn. An illustration of this can be taken from the law of taxation, in that usually Judges proclaim that the Commissioner has no right to dictate business policy to a company (see *Cecil Bros Pty Ltd v FC of T*(1964)111 CLR 430.) There are instances where company behaviour is so palpably uncommercial that the Courts feel forced to intervene to prevent what appears to be commercial foolhardiness (see *Ure v FC of T* 82 ATC 4100 and *FC of T v Ilbery* 81 ATC 4661.)

What needs to be said is that the behaviour of the directors in the other cases (*Kinsela*, *Grove*) was wrong according to established concepts of the directors' duties added to their obligations to act within the law in other respects. The relevant decisions are explicable on the basis that what the directors did constituted a breach of their obligation to their company, and it is unnecessary to redevelop basic concepts to achieve an appropriate result. Certainly, the circumstances do not enable the Courts to formulate some nebulous innominate duty running directly from directors to creditors.

The statement of Mason J in *Walker v Wimborne* (1976) 50 ALJR 446 at 449 that:

> In this respect it should be emphasised that the directors of a company in discharging their duty to the company must take account of the interest of its shareholders and its creditors

recognises the primary function of the duty. This view is reinforced by the words preceding that statement that the trial Judge had tended to obscure the fundamental principle that each of the companies was a separate and independent legal entity and that

> it was the duty of the directors of Asiatic to consult its interests and its interests alone in deciding whether payment should be made to other companies.

In short, the duty is a duty to the company. The act of the directors [in consulting "Asiatic's interests alone"] will require consideration of the relevant commercial consequences of the payments. Such a decision while not necessarily taken in furtherance of the interests of creditors must necessarily involve a consideration of them. It is not appropriate to translate that accepted procedure into a duty to act "in the interests of" the creditors and in pursuance of those interests as if they represented the shareholders of the company as a whole.

The dangers in such a course are evident in the statement by Jacobs J in *Grove* that:

> True it is that in the case of *Walker v Wimborne* the company . . . was in fact insolvent at the time of the impugned transaction, *but there is nothing in the statement of Mason J to suggest that it is insolvency that gives rise to the duty to take account of the interests of creditors.* (*Grove v Flavel* (1986) ACLC 654 at 660)

It follows on that reasoning that the mooted requirement that directors should have regard to the interests of creditors in an insolvency context can be widened to embrace any activity of the company whether insolvent, nearly insolvent, of doubtful insolvency or not.

When and in the event that a situation should arise which requires a recasting of the accepted duties of directors so that certain specified interests should be taken into account, a better approach is that adopted by the UK when, in 1980, legislation was introduced which required directors to have regard to the interests of the company's employees in general, as well as the "interests of its members." for the present, in Australian jurisdictions, the directness of the duty running from directors to creditors is solely dependent upon the mechanics of the winding-up process. If some form of a contingent (direct) liability is to come into existence, it is suggested that the only legitimate way to achieve this directness would be by amending the legislation.

8 Conclusion

It is suggested that the selected cases which have been examined here could at best be used to argue that some Courts have displayed recently a tendency to expand the duties of directors to encompass a primary direct duty to creditors. The purpose of this paper is only to depict this tendency and to call for care to be taken. Nothing in the cases alters the fundamental proposition that the directors' line of duty runs to the company.

Put shortly, the position regarding the director-creditor relationship is as follows. While the company functions, the legal rules in operation confine the directors' direct duty to the company as a whole. Special provisions of the law immediately come into operation if storms appear on the horizon, such as the membership of the company falling below the required minimum or the company trading with no real hope of meeting its debts. Those and similar situations are pre-programmed in the existing legislation. Then at a second, even more dramatic stage, the entire method of play can be altered by the formal intervention of a winding-up order.

Beyond the legislation directors incur liability where their action amounts to misfeasance and their maladministration leads to damage where the circumstances admit of breaches under either the laws of contract or of tort. At present there seems little need to expand the frontiers of that liability.

But except as aforesaid there is no other established intermediate stage and the legislature has consciously refused to recognise an intermediate stage. For the Courts to attempt to establish one is improper and flies in the face of the intention of parliament — the illegitimate inroads made by the judicial movement towards lifting the corporate veil should not be repeated in the director-creditor circumstances. □

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1 See *Allen v Hyatt* (1914) 30 TLR 444 where the Court was able to convince itself that in special circumstances directors may act contractually on behalf of shareholders and the responsibilities which flow from that special contract can be visited upon the directors for their dereliction of contractual duty. More recently *Percival v Wright* has been directly attacked and in this regard see Mahon J in *Coleman v Myers* [1977] 2 NZLR 225 (on appeal 298).

2 See, for example, *Harlow's Nominees Pty Ltd v Woodside Lakes Entrance Oil N L* (1968) 121 CLR 483, 493.

Books

Statutory Interpretation: Problems of Communication

By Jim Evans

Oxford University Press, 1988, xi and 318 pp. Price $NZ40.00 (limp) ISBN: 0 19 558189

Reviewed by D F Dugdale

The work under review is concerned with statutory interpretation, not statutory drafting. But the approach of the interpreter determines the practices of the draftsman. An excessively detailed drafting style is the obvious reaction to an over-literal method of interpretation.

It was the custom of Henry Beyle aka Stendhal to read several paragraphs of the *Code Napoleon* every morning after breakfast *pour prendre le ton*. It is perhaps not altogether easy to imagine a contemporary local novelist starting the day by dipping into the *Reprinted Statutes of New Zealand*. Nor would it be universally welcomed if say Mr Maurice Gee's next novel were to read as if it were from the pen of Mr Walter Iles. But it is unfair to measure against the achievements of the continental draftsman who is free to adopt the spare and sinewy style of the signpost those of his common law counterpart who is compelled as a defence against construction of an excessively minute type to employ the flabby prose of an instructional manual for the feeble-minded.

A rising tide of statute will soon have swamped the few islands of judge-made law that remain. This process will accelerate if as a consequence of the short-sighted chauvinism of the present administration we no longer have a Privy Council to correct the errors of the Court of Appeal so that that task has to be performed by act of Parliament. It is plain for example that the tort of negligence has in New Zealand reached such a pass that a reforming statute will be unavoidable.

The paramountcy of legislation makes it highly desirable that law students should as part of their training be confronted with the problems of statutory interpretation. It is as a teaching aid that Dr J F Evans, a senior lecturer at the Auckland University law school, has written the volume under review. The book is in case-book style with besides Dr Evans' own text extensive quotation from decided cases and writers on philosophy and jurisprudence and such pedagogic apparatus as suggested discussion topics and problems.

The author's approach is fairly signalled by his subtitle "Problems of Communication". He begins by reminding us that a society which employs written rules has to cope with the difficulties inherent in such reliance. The more obvious of these are common to all types of verbal communication. There is a need for example for speaker and audience to share a common understanding as to precisely what a given word used in a particular context means. There are the problems of ambiguity (some nifty examples here) and of vagueness ("there is a lot that is not yet well understood about vagueness"). There are plain mistakes. In the light of *Conlon v Ozolins* we might add to Dr Evans' catalogue of relevant communication errors that of overrating the sophistication of the target audience.

But not all problems of statutory interpretation can be diagnosed as those attendant upon divining the purposes of the legislature. It is scarcely appropriate to talk about the intention of the legislature when a statutory rule is applied to something not invented when the Act was passed, or even when it is applied in a circumstance to which it is reasonably clear that the legislature never turned its mind. Might it not be more useful or more candid to approach the interpretation of a statutory rule by applying the rule to all, and only, those cases to which the legislature's reasons for the rule apply and which we believe it intended to include in the rule on account of those reasons, provided that the case is one which "we believe a natural person who had made the judgment upon which the rule was based (and not retracted it) would want the rule to apply to if they were aware of any exceptional circumstances existing in the particular case"? Dr Evans calls this "The Method of Developed Judgment".

All this is good stimulating stuff which Dr Evans' brighter undergraduates should thrive on.

A statute is indeed a form of communication. But it is a particular form of communication, a command. So that between the words of the statute and its application in practice there lie not only the process of understanding the communication but also a preparedness to obey the command. A Judge's approach to issues of interpretation reflects his views of his constitutional role in relation to that of the legislature. The Judges who decided *Heydon's* case in 1584 knew their place. So did the Victorian Judges who formulated the famous statements of the golden and literal rules of interpretation.

In New Zealand today, however, the judicial lions discontented with their position under the throne, claim the right to leap up on to and prance about upon the seat of government and to jostle aside that seat's rightful occupants.

So let us end as we began by sparing a thought for the parliamentary draftsman. Not only is he up against the communication difficulties Dr Evans describes for us, but until the lions are put down or corralled in some kindly cattery he must also contend with the possibility of sheer judicial indiscipline. In these circumstances he is doing well if he succeeds (as the author of the provisions considered in the *Maori Council* case manifestly failed to do) in making his statute judge-proof. It would be asking too much to expect literary elegance as well. □

Promiscuity and sexually transmitted diseases:

Are there questions of right and wrong behaviour?

By Neil D Broom BE (Met) (Melb) PhD, MRC Project Director in Biomechanics, School of Engineering, University of Auckland and Charles E F Rickett, MA (Oxon and Cantab) LLM (Cantab) BD (Melb), Senior Lecturer in Law, Victoria University of Wellington.

The authors begin with a brief examination of the recent literature on sexually transmitted diseases. They argue that this establishes a clear causal link between increased sexual freedom in society and the alarming increase in the incidence of disease. The basic response to this has been one of treatment. The authors question the ultimate effectiveness of such a response. Little has been done to challenge the behavioural origins of sexually transmitted diseases. The "safe sex" campaign has been important, but the authors argue that there must be an open recognition of the essential ethical implications in the area of human sexual behaviour. They conclude that a more responsible safe sex campaign requires vigorous prescriptive input on the nature of human relationships, beyond a concentration solely on the mechanics of the sexual act.

Introduction

There is overwhelming evidence that the radical changes in attitude to sexuality and to sexual behaviour during the last 25 years have resulted in an enormous increase in the incidence of all sexually transmitted diseases (hereinafter STDs). (see fn 1-8.)

In 1981 it was reported that the WHO predicted approximately 250 million new cases of gonorrhoea and 50 million new cases of syphilis annually throughout the world! Today, however apart from the classical venereal infections, we face a new generation of STDs, principally viral and bacterial in origin, that are considerably more common than the older types. During the last 20 years the number of conditions for which sexual transmission is of epidemiological importance has increased from five to more than twenty, and sexually transmitted syndromes now encompass inflammatory sequelae, malignancies, and the acquired immunodeficiency syndrome AIDS. (Brown S T, Zacarias F R K , Aral S O: "Sexually transmitted diseases in developing countries: prospects for control." *World Health Forum* 1987; 8: 97-101)

STDs and sexual behaviour

Where standards of sexual behaviour are altered to allow for increased promiscuity there is ample statistical evidence of a concomitant increase in venereal infection. (Wilcox R R: "A world-wide view of venereal disease" *Brit J Venereal Dis* 1972; 48: 163-176) A brief examination of the venereal literature demonstrates clearly the potentially tragic consequences of unchecked sexual freedom.

Pelvic inflammatory disease (PID) is usually diagnosed in young sexually active women and generally arises from an ascending microbial infection of the cervix where damage to the tissues surrounding the uterus results. (see fn 1) There is good evidence that having multiple sexual partners provides a significant risk factor for its development.[2] It has been described as the most significant of all the STDs in American medicine (see fnn 3 & 9) with approximately a million acute episodes annually. (See Brown, Zacarias & Aral, supra). Of these, nearly a quarter of a million affected women are hospitalized and half of them undergo surgery. The risk of ectopic pregnancy and, as a result, foetal waste and maternal mortality, is increased by over 10% and involuntary infertility by nearly 20% in women who have had more than one attack of PID. (see fn 1) The statistics of the problem are alarming, but the cost in terms of human suffering cannot be underestimated, and the following all too familiar case study quoted from Catterall (see fn 1) with permission illustrates this tragic aspect:

> Sheila starts her active sex life when she is 17 with a boy she has known for several years. Her local family planning clinic puts her on a contraceptive pill. After three years she and her boyfriend part company. Later she meets a young man at a party and after a few weeks they have sex together. Shortly afterwards she notices that Michael, her new boyfriend, is behaving strangely, being evasive

and avoiding situations that might lead to sex. Three weeks later she has colicky lower abdominal pain, slight vaginal discharge, and fever. When seen in our clinic she has an acute gonococcal PID necessitating hospital admission for antibiotic treatment and bed rest.

Michael now reappears, very concerned about Sheila's illness. He tells her that the night before having sex with her he had been to a party, got drunk, and found himself in bed with a complete stranger. When a urethral discharge and burning on micturition developed he went to a clinic where gonorrhoea was diagnosed. When he was also told how important it was to make sure the girls were examined and treated he did not mention Sheila. He thought he ought to talk to her but he could not bring himself to do so.

Sheila recovers and is soon free of symptoms. She leaves hospital two weeks later after several examinations and tests. Three weeks later the inflammation recurs and she is re-admitted. Laparoscopy reveals bilateral moderately severe inflammation of the fallopian tubes and *C trachomatis* is grown from her cervix. Treatment with bed rest and tetracycline enables her to go home from hospital three weeks later.

Catterall then comments:

> Sheila asks questions about the future. Will she be able to have babies? Have the germs done any real harm inside? If she has children will they be normal? What about a tubal pregnancy? Will sex now be painful in the future? Is she likely to have another attack? If the statistics are correct there is a 50% chance of relapse, since she had a mixed infection, a one in three chance of being sterile, a 25% chance of dyspareunia, and a 10% chance of an ectopic pregnancy. As Sheila says, the discomfort was bad enough, but sterility, recurrent infection, and painful intercourse are the things that preoccupy her now.

Chlamydia trachomatis referred to in the above case history is also known to be an important cause of non-gonococcal urethritis, epididymitis and proctitis in men.[9] Further, it is well recognised that infants born through an infected birth canal are likely to become infected with *C trachomatis* (ibid). The reported risks to the neonate of conjunctivitis and pneumonia are respectively 18 to 50% and 11 to 18% (Schachter J, Grossman M, Sweet R L: "Prospective study of perinatal transmission of *Chlamydia trachomatis*" *JAMA* 1986; 255: 3374-3377)

One of the most common causes of genital ulceration is the sexually transmitted *Herpes* virus. These viral infections cause recurrent, painful eruptions, making sexual intercourse painful, and readily cross-infect. Babies may be infected at birth, particularly if the mother has a primary attack at the time of delivery. Neonatal herpes may be fatal or result in severe damage to the central nervous system, eyes, skin, or liver. Treatment remains unsatisfactory and with present medical knowledge infection has been described as a virtual "sentence for life". (see fn 1)

There is also evidence that the *Herpes simplex* virus may be an etiological factor in the development of cervical neoplasia although its causative role has not been firmly established. (Briggs R M, Paavonen J: "Cervical intraepithelial neoplasia", in Homes K K, Mardh P, Sparling P F, Wiesner P J (Eds): *Sexually Transmitted Diseases*; McGraw-Hill, 1984: 589-615; and see fn 4). Aral and Guinan report that women infected with type 2 *herpes simplex* virus have about a seven times greater risk of cancer of the cervix than those never infected. (Aral S O, Guinan M E "Women and sexually transmitted diseases." In Holmes K K, Mardh P, Sparling P F, Wiesner P J (Eds): *Sexually Transmitted Diseases*; McGraw-Hill, 1984: 85-89.)

Cytomegalovirus, hepatitis B and papillomavirus are also frequently sexually transmitted. A primary infection of cytomegalovirus during pregnancy frequently results in brain damage, blindness, microcephaly, mental retardation, cerebral palsy, and even death of the baby. The virus is found in the female genital tract, in semen, saliva, and the throat. (see fn 1) Further, the cytomegalovirus is sexually transmitted among homosexual men and it is thought that anal intercourse in which there is the exchange of semen is a primary means of cross-infection. (Collier A C, Meyers J D, Corey L, Murphy V L, Roberts P L, Handsfield H H: "Cytomegalovirus infection in homosexual men." *Am J Med* 1987; 82: 593-601.)

The Hepatitis A and B viruses are sexually transmitted among homosexual males and Hepatitis B is sexually transmitted among heterosexual partners of persons severely infected with the virus. There is now a convincing link between Hepatitis B infection and cancer of the liver.[10,11]

The Human papillomavirus or HPV, also known as the "genital wart virus" or "condylomata acuminata" is also sexually transmitted. It is commonly found as anal warts in homosexual men and there is a clear association with anal intercourse. These warts are also common on the male and female genitals, frequently forming large embarrassing masses. They may ulcerate, develop secondary infections, haemorrhage or create mechanical problems by virtue of their large size (Oriel J D: "Genital warts" in Holmes K K, Mardh P, Sparling P F, Wiesner P J (Eds): *Sexually Transmitted Diseases*, McGraw-Hill, 1984: 496-507.)

That cancer of the cervix may be an STD has been recognised for well over a hundred years. As early as 1842 it was noted that uterine cancer appeared to be less frequent among unmarried women than married women, and almost never among nuns (Briggs and Paavonen, supra). Sexual abstinence as a protection against cervical cancer was clearly demonstrated in a French-Canadian study by Gagon involving more than 13,000 nuns. (Gagn F, "Contribution to the study of the etiology and prevention of cancer of the cervix of the uterus." *Am J Obstet Gynecol* 1950; 60: 516-522.) Conversely, prostitutes have long been known to be at high risk for this disease. (Briggs and Paavonen, supra)

While there is evidence that the *herpes* virus may be implicated in the development of cervical cancer the main suspect is now thought to be HPV[12] with sexual transmission via a male reservoir of the virus.[13]

Some comments from the recent medical literature are relevant:

> It is now possible to state that over 10% of cancer and pre-cancer lesions contain the hallmarks of papillomavirus infection (Coppleson M, Elliot P, Reid B L: "Puzzling changes in cervical cancer in young women." *Med J Aust* 1987; 146: 405-406.)

> Epidemiological studies suggest that cancer of the cervix is caused by a sexually transmitted infection, and there is growing evidence that certain papillomaviruses may be involved. . . . The increasing risk in recent cohorts of women, which has also been noticed in Britain and Australia must be at least partly due to the sexual revolution of the 1960s and 1970s . . . few would dispute that there has been a profound change in sexual mores, and the impact of this on the risk of cervical cancer was predictable. (see fn 6)

> Cervical cancer is the fourth most common cancer in women. . . . Some women are at greater risk that others. Included in this group are women who:
>
> 1 first had intercourse at an early age
> 2 have multiple sexual partners or women whose husbands or regular sexual partners have had several sexual partners
> 3 possibly have genital viral infections, in particular genital herpes and genital papilloma (wart) virus
> 4 are on immuno-suppressive drugs. (see fn 5)
>
> This disease would become less common if men and women had fewer sexual partners, and probably if there were more frequent use of barrier methods of contraception. Even if such changes occurred, however, they would not benefit the thousands of women who have already been exposed to the causal agent. (see fn 6)

> The evidence suggests a major role for the male in the transmission of the aetiological agent. In a recent study one third of women who were the sole sexual partners of men with penile condylomata for twelve months or more developed CIN (cervical intraepithelial neoplasia).[14]

> There is increasing evidence that the male with condylomata places his female partner(s) at risk of CIN and possibly neoplasia in other areas.[15]

Most recently Zunzunegui et al have demonstrated that the sexual behaviour of the husband is a primary determinant in cervical cancer risk (Zunzunegui M V, King M C, Coria C F, Charlet J: "Male influence on cervical cancer risk." *Am J Epidem* 1986; 123: 302-307.) Further, in an earlier epidemiological study, Rotkin [16] has reported that onset of sexual activity before the age of 17 and multiple sexual partners are powerful discriminating variables in the aetiology of cervical cancer. He argued that early coitus exposes the cervical epithelium to risk when it is most readily available for transformation.

Berget [17], also in an earlier study, found that the earlier the first childbirth, the greater the risk of cervical carcinogenesis. He calculated the relative risk to be 3.37 for first childbirth under 17 years and 0.16 for childbirth over 24 years. Fujimoto et al (see fn 8) have suggested the female reproductive tract is more vulnerable to external insults early in life.

The evidence supporting induced abortion as a significant risk factor in cervical cancer is to a degree confusing, but cannot be ignored. Rotkin's 1973 study in this respect was limited and he concluded it had little bearing on risk. Groenroos reported a close relationship between abortion and cervical cancer. (Groenroos M: "Etiology of premalignant cervical lesions in teenagers." *Acta Obstet Gynecol Scand* 1980; 59: 79-81. Fujimoto et al, see fn 8, consider that the cervical repair process after abortion is too important to disregard.

STDs: Their philosophical and moral implications

This brief survey of just a fraction of the available literature clearly highlights the potentially far-reaching consequences of the so-called "sexual revolution". The intimacy of the sexual union provides a biologically efficient means of transferring infectious agents. The more promiscuous a person is, the greater the risk of contracting or passing on STDs. Some STDs are killers, many cause much physical suffering and can leave lasting emotional or physical damage. Further, there is a vast cost to society in general. What can be done — what ought to be done — as we face this increasingly difficult problem?

The blame for the alarming rise in STDs has tended increasingly to be apportioned to an attitude, said to be still prevailing in our Western societies, that considers STDs to belong to a category of diseases fundamentally different from other categories.

Yankauer [18], in a recent editorial in the *American Journal of Public Health*, sees the failure to have adequately funded research on STDs in the past as a consequence of "*moralistic attitudes that equate these diseases with sin*", Brandt [19] in tracing the social history of STDs in the United States since 1880, is even more explicit:

> Since the late 19th century venereal disease has been used as a symbol for a society characterized by a corrupt sexuality. . . . The very term which the venereal disease control movement took for itself in the 20th century — social hygiene — makes explicit this association . . . venereal disease came to be seen as an affliction of those who wilfully violated the moral code, a punishment for sexual irresponsibility. . . . Venereal disease became a rallying point for concerns about sexual mores and a more generally perceived social disorder. In its transformation from a biological entity to a social symbol, venereal disease has defied control.

A similar viewpoint was presented by a majority of legislators and health professionals in New Zealand during 1985/86 as part of their ultimately successful argument for the decriminalisation of homosexual acts between consenting male adults at a time when the problem of AIDS was to

a large extent confined to the male homosexual community. It was repeatedly argued that by deliberately dissociating the behaviour (ie the act of sodomy) from any questions of rightness or wrongness a new social climate would be created more conducive to the detection and therefore the prevention of the spread of AIDS.

It is also significant that the NZ Family Planning Association, an agency playing a key role in the education of young people to the risks of STDs, makes the following statement in its booklet *Growing Concerns* (1985):

> Being "clean" or "nice" has nothing to do with it. These infections can be caught the same as any other sort of transmittable infection like sore throats or colds, etc. Anyone can catch them. Having sexual contact with someone else is how you catch STDs. The more partners, the more contact, the more risk. (p 13)

In a strict biological sense the FPA booklet is correct in implying that there will be little difference between the *mechanisms* of infection for STDs and any other transmittable infection. However, can the matter of the transmission of STDs really be adequately dealt with only in a biological context? There is, it is suggested, a fundamental difference between the transmission of a flu virus through sharing the same milk jug handle at morning tea or being sneezed upon in a public place, and the transmission of a genital *herpes* or AIDS virus through sharing the act of sexual intercourse. In the one instance there is an unintended transmission of an infectious agent with no moral or ethical implications. The sharing of milk jug handles at morning tea is regarded as a morally neutral activity. It is not, furthermore, a subject for *legal* control, except perhaps in the case of a somewhat perverse legislator or, rather interestingly, where there is a threat of a dangerous disease of epidemic proportions. Likewise, the manner of sneezing is hardly an activity with moral aspects per se. In the instance of sexual intercourse, however, there is a clear moral component.

It is possible to appeal to a metaphysical basis (eg divine law, the prescriptive force of inherited social custom, etc) to assess the morality of sexual behaviour, but for the sake of brevity this will not be attempted here. However it is clear that on a classical utilitarian basis alone — the principle being "the greatest good (or happiness) for the greatest number" — the issue of sexual behaviour takes on serious moral dimensions. Sexual intercourse involves choice (usually in both parties, or at least in one). With the alarming increase of STDs, it has to be recognised that this choice carries with it the potential not only for life, ie procreation and mutual sexual fulfilment, but also for death. When promiscuous sexual behaviour can lead to diseases of epidemic proportions, we have a clear social issue.

Furthermore, if we fail to draw a fundamental distinction between sharing milk jug handles and having sexual intercourse, do we not reduce the sexual union to a valueless, mechanistic act, in essence no different from any other biological function such as the digestion of food or the growing of toe nails? Can this really be for the greatest good?

Interesting, the FPA, while stating emphatically that being "clean" or "nice" is not relevant to the problem of STDs, also warns that multi-partnered sex will expose the participants to an increased risk of STD infection. If, as the context suggests, the FPA uses the terms "clean" and "nice" to refer to attitudes and values of rightness and wrongness in sexual behaviour, there is, as we have shown, overwhelming evidence from the medical epidemiological literature that being or not being "clean" and "nice" has every bit to do with the prevention of STD infection.

Technology can of course reduce this potential risk, but serious problems remain. Our society's collective response to the current AIDS crisis — the so-called "safe sex" campaign — has made a significant contribution. However, while the use of condoms will reduce the risk of cross-infection, they do not provide absolute protection (Penington D G: "The AIDS epidemic — where are we going?" *Med J Austral* 1987; 147:265-266) Goedert [20] has recently reported that condoms failed to prevent HIV transmission in 3 of 18 couples and views their use as a "secondary strategy". In an Australian sample of 70 homosexually active men 14% reported "a few breaks" and 13% "many breaks" (Ross M W: "Problems associated with condom use in homosexual men." *AJPH* (letter) 1987; 77: 877.)

From a biomechanical perspective, little more than a rudimentary appreciation of the mechanical strength of thin membranes would seriously question the claim that "safe sex" is assured when a micron-thin layer of latex alone in a mechanically demanding environment is charged with the responsibility of preventing the passage of a potentially lethal disease.

Can our society avoid making social judgments even if these are also moral in nature about human sexual behaviour and still be responsible in its approach? There are those in the medical profession whose attitude has been to limit their response to one of treatment rather than to challenge the behavioural origins of STDs. Meheus[21] typifies this viewpoint:

> STDs are related to sexual behaviour, which can hardly be influenced. . . Health education aimed primarily at altering sexual behaviour is not a good approach. Such education easily adopts a moralistic undertone and risks being counter-productive. Furthermore, sexual behaviour depends much less on what the person knows than on what he or she prefers and values in life.

But can the possibility, or desirability, of asking serious questions about the rightness and wrongness of all types of sexual behaviour be so easily dismissed? The medical profession readily presents serious prescriptive challenges to human behaviour in many other areas, eg eating habits; exercise habits; work habits; drug, tobacco and alcohol usage; even the use of nuclear energy.

These challenges are often based on moral considerations. Utilitarian reasons alone (eg prevention of disease costs the community less than treatment of disease) reveal a quality of "oughtness" about this issue. But cost considerations aside, why is good physical health regarded as an important value? It

seems that ultimately we will accept a "value" or "moral" proposition beyond which we cannot find, or do not need, other reasons. "It is good to be physically healthy" is, it appears, for many doctors, such a proposition. Further, good physical health is also important in so far as it is the result of a check on attitudes or habits which are regarded as revealing wrong values. Where greed, selfishness or irresponsibility for example cause harm to physical health, these values are criticized not only because there is such harm but also because they are held to be wrong per se.

It seems, then, that many forms of human behaviour are subjected to moral judgment, and that this judgment is seen to be in itself an obvious and good thing. The AIDS crisis itself has clearly demonstrated that certain sexual activities when threatening actual human survival, must and can be altered. There is now wide reporting of significant behavioural changes in the homosexual community in response to the so-called "safe sex" campaign.[20,22]

The campaign cannot on its own terms avoid articulating a clear moral requirement. Penington, supra, in assessing the future prospects of AIDS control in Australia writes:

> It is essential for those who are at high risk of infection, or who carry the infection, to accept the responsibility never to place another person at risk without their knowledge and consent; such persons must modify their sexual behaviour accordingly.

This is a clearly prescriptive statement, pointing out that the ultimate concern is one of values!

Conclusion

Does not a more responsible "safe sex" campaign require vigorous input on the nature of relationships, beyond concentrating essentially on the mechanics of the sexual act? Casual sex by its very definition is nearly always characterised by a "hit and run" mentality and largely excludes the possibility of truly knowing one's partner in a total sense, including a knowledge of disease. Only if a couple are in a trusting and committed relationship can there be any real certainty that the act of sexual intercourse will not carry a potentially significant risk of STD. If chastity outside of a trusting and committed relationship, and fidelity within it, are values which if worked out in practice offer a significant level of protection against a whole spectrum of diseases with such debilitating and destructive consequences, ought not our society to be fearless in promoting them? Ought not doctors to challenge the rightness of the values (or lack of values) being expressed in the encouragement of sexual promiscuity?

Human lives are at risk in this crucial area of sexuality. Dare we pretend that the values which lie behind our sexual behaviour don't matter? Some behaviour has consequences which present serious questions about the rightness of the values behind it — other behaviour has consequences which give good reasons for the rightness of the values behind it. □

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Law in a lift

What do you do when, on the eve of moving office, British Telecom cut off your firm's telephones six hours ahead of schedule and leave you with apparently no way of completing a major property transaction on behalf of one of your clients?

According to a story currently doing the rounds, when this recently happened to one firm in the City, the head of the commercial property department had enough gumption to realise that the emergency telephone in the office building's lift would not have been affected by the disconnection.

For the next three hours he and the client therefore set up temporary office in the lift and successfully concluded negotiations over the emergency telephone. Meanwhile, the rest of the firm found themselves taking some unanticipated exercise: they had to use the stairs.

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The Trial of Socrates:
A matter of conscience
(Is the party whip system justifiable?)

By Mark W Gobbi, Teaching Fellow in the Faculty of Law at the University of Otago. Bachelor of Science in Foreign Service 1983, Georgetown University; Juris Doctorate 1986, University of California, Davis.

One of the more intractable aspects of democratic government has been the development of parties. And within parties there are factions, as for instance in the Australian Labour Party where they are institutionalised to the extent that the factions have to be represented on a proportional basis in the Cabinet itself. In this article Mark Gobbi criticises this general tendency and argues that all political decisions should be matters of conscience. The question might then be asked, whose conscience in each separate case, that of the representative or that of the majority of those represented? And what then of the minority conscience? And, finally, what then of the prudential judgment? This article is a contribution to the debate on these questions, which the author makes clear are not new ones.

Recently Members of Parliament have been debating the reformation of New Zealand's liquor consumption laws. Given the moral and political sensitivity of the issues involved, Members of Parliament were given the privilege of being "free from the whip" and allowed to vote on the proposed changes as a matter of conscience. Presumably many of the laws enacted by New Zealand's parliamentarians, and by representatives in other party systems around the world, are the product of following party policy rather than one's own conscience. Centuries ago Plato wrote that a man named Socrates gave his life in defence of the proposition that *all* decisions should be made as a matter of conscience.

Plato wrote his account of Socrates' death when Athens' reputation outstripped her greatness! His Socrates attributes Athens' decline to decisions based on a blind acceptance of established conventions. Driven by divine inspiration, Socrates challenges the status quo by looking for virtue through philosophical inquiry, rather than the existing institutions of the political community. Ultimately, he calls for personal responsibility that rests on insight into the nature of things and on consciousness. He argues that one can only act rightly from insight, and that insight flows from reason, not from opinions based on custom or impulse without sense or justification. Moreover, one can only reason correctly if not deluded by society or one's self; hence, the admonition: *know thyself.*

Socrates' efforts to replace the rule of blind acceptance with the rule of reason engenders the animosity of those who fear change. Consequently, he is indicted by the enemies of rational criticism, those who revel in the reassuring and binding force of instinct, the authority of tradition, and the power of irrational religious experience.

At his trial, Socrates faces the indictments of impiety and corruption. He is charged with impiety by those who feel threatened by the destruction of existing political and religious values, and who cannot bring themselves to sacrifice these values for a new, unproven will. Socrates' accusers also charge him with corruption to justify their anger against the one who teaches the young how to show up the ignorance of those whom the city honours as outstanding in virtue. Just as the indictment represents the concerns of Socrates' accusers for what is established, the jury hearing Socrates' case represents the general public of Athens, a political community that depends for its unity and survival upon opinions and traditions held in common. Ironically, Socrates' defence questions and corrodes these beliefs.

Socrates defends himself by posing as a judge of his accusers. He impeaches his accusers' beliefs because they are based on faith and trust, not on knowledge. Socrates sees such beliefs as self-deceiving ignorance. He cannot conceive of a greater injustice than the false belief in one's wisdom. According to Socrates, impiety is ignorance; the essence of virtue lies in knowledge. His accusers are unjust because they do not honour knowledge, but that which is customary and accepted. They are members of a "long line of those who pretend to know without really knowing, and carry out responsible undertakings without proving themselves fit for them by adequate insight and formation of character." (R Guardini, *The Death of Socrates*, 27, 1948)

The trial comes down to Socrates' concern for virtue and his accusers' pursuit of wealth, honour, and power. Socrates defines the law as what the law intends, not as what is customary and accepted. Piety requires understanding the validity of the morally good as something divine, and living up to it even at the cost of any temporal loss, be it

wealth, honour, power, or life. One should think of nothing before justice. Since Socrates' accusers put themselves before justice, they are found guilty under the principles which Socrates judges. Cognisant of their guilt, Socrates' accusers sentence their judge to death without considering his advice.

Socrates' would-be solution to Athens' ills is based on the principle that the conscience will produce proper decisions. The first step is to admit that one knows nothing, which implies the rejection of all beliefs. The second step is to recognise that piety is knowledge, which implies the acceptance of a life devoted to seeking the truth. The last step is to make decisions based on a rational consideration of what is true/good/holy. The decision process is governed by an awareness of Socrates' maxim: never commit injustice. This conscious approach will prevent the blind acceptance of the irrational decisions that brought Athens her woes.

Paradoxically, Socrates' arguments raise three objections to his philosophy. First, he requires the destruction of much that is old and excellent; second, his exhortations, if followed by all, would turn Athens into a chaotic mass of questioners which would destroy the very conditions which allow Socrates to philosophise; and third, his position of questioning established conventions in the *Apology* appears to contradict his position of obeying the laws, even if applied unjustly, in the *Crito*.

The first objection fails on the grounds of progress. In history, one value must always give way for another to emerge. Although Socrates is destroying much that is excellent, he is ushering in a superior good, one that shall survive Athens.

The second objection fails because Socrates is speaking only of those who educate the young, Athens' leading citizens. Those who determine the laws and customs of the community decisively affect the formation of character and the concept of virtue that guides the young. Socrates insists that an "educator must know what it means for men to be noble and good; he must know the virtue of the human being and citizen; . . . his knowledge must be grounded in sober reflection on the nature of man," (T West, *Plato's Apology of Socrates*, 114, 1979) not on instinct or custom.

The last objection can be laid to rest in two ways. First, if Socrates obeys the hypothetical Court order to stop philosophising in the *Apology*, he would be disobeying the source of his divine mission, his god, which would be unjust. The Court order sentencing Socrates to death is binding in the *Crito* because the law is requiring him to suffer injustice, rather than commit injustice. Second, the *Phaedo* reveals that the contrast between the defiance of the *Apology* and the submissiveness of the *Crito* rests not so much on the distinction between doing and suffering injustice, as on the proposition that to do otherwise in either case would require Socrates to disobey his conscience. Essentially, Socrates sees the conscience as the instrument for making valid decisions.

In sum, Plato's Socrates wants to change the rules of the decision-making process that brought Athens her woes. His solution begins with consciousness and knowledge: self-awareness and an awareness of the reality in which one lives and interacts. Socrates wants Athenians to assume personal responsibility for their lives by deciding their fate on the basis of rational analysis, not on the blind acceptance of traditional religious or political values.

Sadly, the political party whip tradition encourages elected representatives to base their decisions on factors outside their consciences. By granting their members the privilege of voting on the proposed liquor law changes as a matter of conscience, the existing political parties in New Zealand have suggested implicitly that many of New Zealand's laws are the product of blind adherence to party policy. Socrates would argue that those representatives who bend to the will of the whip are individuals who would put other considerations ahead of what he calls justice: *following one's conscience.* □

For a discussion of the political setting in which Socrates' trial took place, see Finely, "Was Socrates Guilty as Charged?" in *Perspectives in Western Civilization* 23 (1972).

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Seats, (the Eyres of the Forest) were revived and held by Lord Holland, Chief Justice in Eyre. In Rockingham forest, for example, the bounds were enlarged from six to sixty miles, and the Earl of Salisbury was fined £20,000, the Earl of Westmoreland £19,000 and Sir Christopher Hatton £12,000. The long Parliament, needless to say, finally fixed forest boundaries, and provided that no place at which a forest court had not been held for sixty years before the beginning of Charles I's reign was to be accounted forest.

7 *The Times* of July 1983 contained letters from several correspondents on the subject of the taste of venison. Some objected that the venison from well-fed farm-raised deer lacked the genuine taste of wild venison. Others replied that, in the British Isles anyway, wild deer are still found only at the extreme limits of their ancient range, in sparse and cold country, and that the plump young deer of the forest which our medieval ancestors ate probably tasted more like today's farmed deer than like the bits of aged gamey string now shot on the moors.

8 Even the new state-owned enterprises have as their principal object "to operate as a successful business" (s 4, State-Owned Enterprises Act). Economics can scarcely look three years into the future, let alone three hundred, and is, in its present state, quite incapable of any reckoning of long-term environmental costs. Fritjof Capra's *The Turning Point* contains some excellent severe criticism. It is a superficial parade of learning indeed which will mention Adam Smith's *Wealth of Nations* with the reverence due to Holy Writ and the accumulated wisdom of our ancestors, and neglect (say) St Thomas Aquinas' or Aristotle's views on the responsibilities of private property and obligations to the community. With the fatuous optimism of the invisible hand let us contrast Keynes' remark that "Capitalism is the belief that the nastiest of men for the nastiest of motives can work together for the common good". Needless to say, Adam Smith made no calculations of environmental costs.

9 But even then one had to be careful:

The Saxon is not like us Normans. His manners are not so polite,
But he never means anything serious till he talks about justice and right.
When he stands like an ox in the furrow with his sullen set eyes on your own and grumbles "This isn't fair dealing";
my son, leave the Saxon alone.

Kipling, *Norman and Saxon*. Cf the Duke of Wellington: "The English are a quiet people".

10 The State-Owned Enterprises Act was designed so that Ministers of the Crown and Parliaments might have very little control over the actions of these enterprises. The power of Ministers is minimal, and parliamentary' scrutiny virtually non-existent; see ss 13 and 14.

11 Let us avoid the expression "Business *Round* Table", which debases a fine legend. Any similarities between our modern Galahads of business and Sir Galahad are purely coincidental – and probably non-existent.

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