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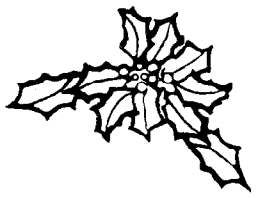

Charity and the law

It is appropriate to recall at the Christmas season that charity is considered the most significant of the Christian virtues. St Paul was quite adamant that of all the Christian virtues, the greatest of them is charity. And the Gospel according to Luke, has the story of the Good Samaritan, a story told in reply to a lawyer's question about how to inherit eternal life. Even in those days the question of inheritance would appear to have been very much in lawyers' minds.

As in all good cross-examination the lawyer knew the answer before he asked the question, because when Christ responded by asking him what he read in the scriptures the lawyer was immediately able to quote the passages from Deuteronomy and Leviticus on love of God and love of neighbour as oneself. This most lawyerly gospel episode, has two questions from the lawyer being replied to by two questions from Jesus; and with the lawyer being incidentally commended for his knowledge of the law.

It was this episode that was used by Lord Atkin in his well-known passage in *Donahue v Stevenson* [1932] AC 562 in giving a legal rather than a moral answer to the rabinnical lawyer's second question as to who was his neighbour. Christian morals are certainly not the law of the land. Even though in *Taylors Case* (1676) 86 ER 189 it was held that Christianity was part of English law. This was a legal concept gradually eroded during the 19th century, and effectively disposed of in 1917 in *Bowman v The Secular Society* [1917] AC 452.

It was in the *Bowman* case that Lord Sumner enunciated the doctrine which is usually associated with his name to the effect that

> with all respect for the great names of the lawyers who have used it, the phrase "Christianity is part of the law of England" is really not law; it is rhetoric . . . One asks what part of our law may Christianity be, and what part of Christianity may it be that is part of our law?

This is the extract from Lord Sumner's judgment that is most commonly referred to and quoted. But within the same paragraph Lord Sumner recognised that at best there was a problem of the relationship between law and morality, and he could be said at worst to have moved back and confused the issue. He wrote:

> "Thou shalt not steal" is part of our law. "Thou shalt love thy neighour as thyself" is not part of our law at all. Christianity has tolerated chattel slavery; not so the present law of England. Ours is, and always has been, a Christian State. The English family is built on Christian ideas, and if the national religion is not Christian there is none. English law may well be called a Christian law, but we apply many of its rules and most of its principles, with equal justice and equally good government, in heathen communities, and its sanctions, even in Courts of conscience, are material and not spiritual.

Thus spoke Lord Sumner in 1917; but within 15 years in 1932 — Lord Atkin expressly applied, as part of English Law, the love of neighbour principle from the Good Samaritan parable, in the most influential tort decision of the 20th century, *Donahue v Stevenson*. The "neighbour principle" is now one of the commonplaces of the law of negligence. That the relationship of law and religion remains complex and relevant was illustrated by the revival of the issue in the early 1960s in the intellectual debate between Lord Devlin and Professor Hart, and carried on subsequently by so many others.

It is also of course in such a general question as that of charities as a legal concept that the influence of Christianity on our law can be seen. Not that the legal concept of charity and the Pauline doctrine are identical, but undoubtedly there is a relationship, indeed a dependence of one on the other.

In English law and ours, charitable purposes must be for the public benefit, although not all public purposes are charitable. The situation is explained in *Halsbury* (4th ed, vol 5 para 512).

> Not every object which is beneficial to the community is charitable. The preamble to the ancient statute of Elizabeth I, sometimes referred to as the Charitable Uses Act 1601, contained a varied list of charitable purposes, and made it clear that at least those purposes were charitable.
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> The objects enumerated in the preamble were as follows: the relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning and free schools and scholars of universities; the repair of bridges, ports, havens, causeways, churches, sea banks and highways; the education and preferment of orphans, the relief, stock or maintenance for houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.
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> The list was not exhaustive; but to decide whether a

> beneficial purpose is beneficial in a way which the law regards as charitable, it has been the practice of the Courts to refer to the list in the preamble ... Notwithstanding that neither the ancient statute nor the preamble are now on the statute book, it is still the general law that a purpose is not charitable unless it is within the spirit and intendment of the preamble. The preamble never had any statutory operation, and the vast body of case law derived from it is unaffected by its repeal.

In New Zealand there is a sense in which charitable purposes can be said to be effectively defined by the Commissioner of Inland Revenue who declares what types of gifts are for charitable purposes in order to qualify for deductions under the Income Tax Act 1976 and the Estate and Gift Duties Act 1968.

The law of trusts has been affected by the concern with the legal protection and indeed encouragement of charitable purposes. This is the basis of the doctrine of cy-pres. According to David Walker in the *Oxford Companion to Law*, charitable trusts are an ancient category of the law.

> They are known in England from the time of Henry VI and became more important after the suppression of the monasteries. The court's equitable jurisdiction in such cases is probably derived from the Crown's prerogative to act as trustee of funds devoted to charity, where no trustees or objects have been selected. The Court of Chancery always regarded with peculiar favour trusts deemed charitable. The modern law originates from the Statute of Charitable Uses of 1601 and was affected by two statutory doctrines, those of superstitious uses and of mortmain. Superstitious uses had as their purpose the maintenance or propagation of religious rites or usages not tolerated by the law; this doctrine was mitigated by statutes removing disqualifications of various categories of dissenters, so that many trusts originally for superstitious uses became valid as charitable trusts. The doctrine of mortmain provided that no gift or conveyance whereby lands were alienated to a corporation, lay or ecclesiastical, was valid, but the land thereupon became forfeit to the overlord. It was frequently evaded by the use of trusts and in time the Crown came to have the power to dispense with the doctrine by granting licences, while charters and statutes also frequently contained exemptions from the Mortmain Acts. Most of the earlier legislation was replaced by the Mortmain and Charitable Uses Acts, 1888-91.
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> The differences between the law as to charitable and private trusts are that if the trust shows a general intention to benefit charity only it will not be allowed to fail, in the last resort the court being always ready to give effect to the settler's intention by ordering the preparation of a scheme for its administration; that if a testator specifies an object which becomes impossible or impracticable, the court will devote it to a similar object which is nearest to the testator's original intention, provided always that there has been a clear indication of a general intention to benefit charity; that charitable gifts are not within the rules on perpetuities; that restrictions on the conveyance of property to charities are imposed by various statutes and that there are special rules relating to the alienation of property by a charity; and that where the income of property is applicable for charitable purposes only and is so applied, no income tax is payable thereon.

The New Zealand Government has recently been involved in a conflict with religious groups about taxation; and the Court of Appeal has drawn a distinction for land tax purposes between ordinary income by way of donations and that involving "commercial" activities. These episodes illustrate the continuing and complex relationship that does exist between politics, the law, and morality in the widest sense.

An example of a charity for the purposes of learning approved by the Commissioner is the Alexander Turnbull Library Endowment. This Library, with the benefit of a donation for publicity purposes from Bell Gully Buddle Weir, has recently put out two very useful and informative brochures that are available free from the Library at PO Box 12349, Wellington. Essentially the Library is seeking support in its work of collecting, preserving and improving the dissemination of knowledge of New Zealand's heritage. The Alexander Turnbull Library is of particular significance for the legal profession because it is the repository for the papers of some of New Zealand's leading lawyers, and legal firms.

The Library is not just seeking monetary bequests. It seeks also to be the first institution that would be considered by people wishing to donate books, documents, manuscripts, tapes and other such items. It has, and seeks to augment a substantial national collection. It serves as a research institution and is now able to preserve its collection in ideal conditions.

The manuscript collection of the Library is described in the brochure as being comprehensive and varied. The sort of materials sought by way of donation or bequest are not only those of important people, although these are certainly wanted too of course. The brochure describes the collection in this way:

> It includes the papers of such national figures as Katherine Mansfield, Frances Hodgkins, Sir Donald McLean, Elsdon Best and our notable history makers, past and present; the papers of organisations and businesses, such as the National Council of Women, the New Zealand Maori Purposes Fund Board, the Polynesian Society, Bethune and Hunter; and the diaries, letters and personal papers of the many ordinary New Zealanders, Maori and Pakeha, whose experiences contribute to our national character.

This institution is of course not the only one that comes within the general category of those having charitable purposes. The concept of charity in the law, based on a positive moral virtue, is a wide one. It is a traditional category that owes its impetus and its wide acceptance to the historical reality of Christianity as a social motive force.

The argument of how, if at all, law and morality are related will undoubtedly continue. Some parts of the argument often sound too abstract, and are too often couched in slogans. While, for instance, it is undoubtedly true that laws are made by men for men (and women of course), it should not be overlooked that men are distinctively creatures of conscience, and not just creatures of consciousness.

P J Downey

Case and Comment

Setting aside dispositions under s 44 of the Matrimonial Property Act 1976

May v Close and Close (High Court, Christchurch; 7/88; 11 July 1989) is noted because of the light thrown by Hardie Boys J on s 44(1)(a) and (b) of the 1976 Act. The former paragraph empowers the Court to order that any person to whom the relevant disposition was made and who received the relevant property otherwise than in good faith and for valuable consideration, or his personal representative, shall transfer the property or any part of it to such person as the Court directs. The latter paragraph empowers the Court to order that any person to whom the relevant disposition was made and who received the property otherwise than in good faith and for adequate consideration, or his personal representative, shall pay into Court, or to such person as the Court directs, a sum not exceeding the difference between the value of the consideration (if any) and the value of the property.

The Family Court had held that a matrimonial property cruiser had been disposed of by Mr Close to Mrs May in order to defeat the claim or rights of Mrs Close. Pursuant to s 44(2)(a), the Court had ordered Mrs May to transfer the cruiser to Mrs Close and the Official Assignee as tenants in common in equal shares. Mr Close had been adjudicated bankrupt after the Family Court hearing but before judgment. Mrs May appealed.

This cruiser had been purchased in 1982 for $12,000, financed partly by a loan from Australian Guarantee Corporation (NZ) Ltd. (AGC). As security, Mr and Mrs Close executed a deed transferring the cruiser to that company by way of mortgage.

They also agreed to mortgage their home. The cruiser was used as a family chattel until their separation in August 1984. By then, Mr Close and Mrs May had begun an association. They subsequently began to live together. The cruiser was kept, however, at the Closes' former matrimonial home, where Mrs Close lived. In May 1985, problems beset the business which the Closes had formerly run in partnership. Economy was advised and the upshot was that the Closes agreed that the cruiser should be sold towards the summer, when a better price was likely, and should be stored meanwhile with the company through which it had originally been purchased.

In mid-July 1985, Mr Close sold the vessel to Mrs May for $8,000. She paid for it out of her own resources. The vessel went into her possession. Mr Close continued to use it. He repaid $6,586 to AGC, to which Mrs Close had already paid $510, being two instalments. Mr Close spent $120 on new clothes and put $232 into his bank.

There was conflicting evidence as to the value of the boat. The lower Court was satisfied that the transaction had not been an arm's-length one, that the vessel was worth more than $8,000, that the valuation figures Mr Close had obtained were simply to give the appearance of adequate consideration, and that Mr Close and Mrs May had conspired to defeat Mrs Close's claim and to ensure Mr Close's continued use of the boat.

Counsel for Mrs May did not dispute the above on the appeal, but thought that the Court below had not been justified in concluding, as it had, that the boat was worth $13,000. Hardie Boys J considered that, in the circumstances and on the evidence, that figure was the correct one.

Counsel also sought to say that the Closes did not own the boat, that their interest in it was merely the equity of redemption and that it was only the equity that had been transferred to Mrs May. Hardie Boys J held that this argument was irrelevant. Whatever interest was transferred, he stated, it was "property" within the meaning of s 44, and clearly the husband's intention was to defeat his wife's claim to the boat. He had meant Mrs May to have ownership and possession, and that was what he had accomplished. The exact legal mechanism was beside the point.

Counsel's principal submission, however, was that the case ought not to have been dealt with under s 44(2)(a) at all but should have been dealt with under s 44(2)(b), so that Mrs May should have credit for the $8,000 paid by her.

Hardie Boys J considered paragraph (a) and stated that the holder would be protected only if both requirements were satisfied, viz, that there must be good faith and valuable consideration. A volunteer who received in good faith was not exempt. Protection might be afforded by s 44(4) where the recipient had acted in good faith and had altered his position in reliance on having an indefeasible interest. A person who paid valuable consideration yet acted in bad faith was not exempt either; unless the Court invoked subs (3), which enables it to make any further order it thinks fit for the purpose of giving effect to its order under subs (2). That was plainly, in his Honour's view, the basis on which the Family Court Judge had proceeded. He had obviously been satisfied that Mrs May had not acted in good faith. He had said that he could not regard Mrs May as an unfortunate victim of Mr Close and added that they were "both in this together." Because

Mrs May had received the boat otherwise than in good faith and for valuable consideration, the lower Court had ordered a transfer under paragraph (a). Hardie Boys J continued:

> At first sight there may seem an inconsistency between this view of paragraph (a) and the wording of paragraph (b). Paragraph (a) deals with the situation where the holder has received the property "otherwise than in good faith and for adequate consideration," and enables the Court to order payment of the difference between the consideration and the true value. It might thus be thought – which really was [counsel's] submission – that each paragraph deals with different circumstances and that the Court's powers are limited according to the circumstances: the power to order a transfer limited to absence of consideration and the power to order a payment limited to inadequacy of consideration.
>
> However, I consider that the correct view is that the two paragraphs are not mutually exclusive. If the sole complaint is of inadequacy of consideration, then only paragraph (b) is available. But where there is bad faith, and inadequate consideration, the two paragraphs cover the same ground. A person who pays inadequate consideration and acts in bad faith is caught under both. It is for the Court in its discretion to determine which remedy should be invoked.

Hardie Boys J went on to note that the Family Court had not explained why an order for transfer was chosen to be made rather than one for a payment and that it seemed that the transaction had been seen to be a conspiracy against Mrs Close. Nor had that Court considered the consequences of the order made, viz, that Mrs May would have to look to Mr Close's bankrupt estate to recover her money, some of which had been applied in repaying a debt for which Mrs Close was jointly liable. His Honour agreed with the lower Court that Mrs May ought not to benefit from the scheme. On the other hand, she ought not to be penalised.

If the Family Court order stood, Mrs Close would apparently be able to obtain the cruiser from the Official Assignee in part satisfaction of the dividend she would be entitled to in Mr Close's bankruptcy – a result which would be advantageous to the children in her custody. Although she had concurred in agreeing to sell the boat, so also had Mr Close, with whose conduct Mrs May was so closely linked. The justice of the case called for Mrs Close's claim to the cruiser to succeed rather than Mrs May's.

It was held that the ordering of the transfer had been right, but that, under s 44(3), the lower Court ought to have required Mrs Close to reimburse Mrs May. Accordingly, Mrs Close should repay $3,284, as being half the AGC repayment. Mrs May would have to look to Mr Close or his bankrupt estate for the balance. It was not within the Court's power to do anything about the $510 instalment money paid by Mrs Close.

Mrs Close was ordered to pay the $3,284 into Court. It was to be paid out to Mrs May on the Registrar's being satisfied that the transfer had been effected. No order for costs was made.

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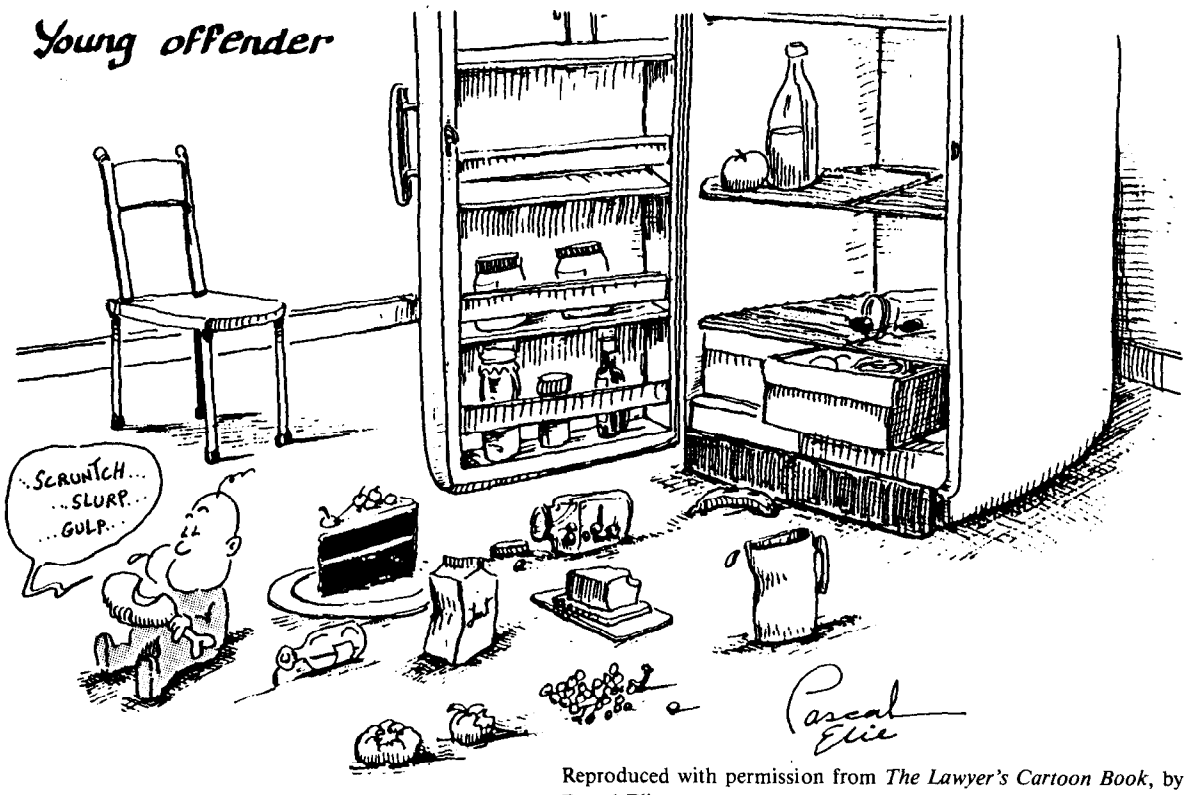
University of Auckland



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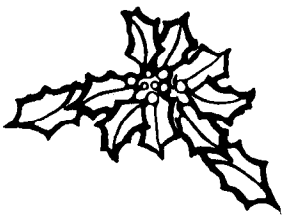
Christmas Messages



From the Attorney-General, Rt Hon David Lange

I am advised that it is traditional for the Attorney-General to greet the profession at Christmas time and I am happy to comply. It is good that the traditions of the law and the church should coincide if only once a year. I am of the generation of law clerks who saw to it that Easter was also observed by a lengthy absence from the office but Mammon put an end to that.

It is appropriate to reflect on the year and to contemplate the year to come. During the year past I was translated into an Attorney-General. What I at first assumed would be an honorific with the risk of its becoming a sinecure has become an absorbing demanding task. The welter of litigation arising from Maori aspiration and the increasing propensity to seek judicial reviews or invoke the Official Information Act means that there is a full time job out of Cabinet.

The profession has been under considerable stress and subjected to the public spotlight as never before. The corporate embalmers have prospered, criminal legal aid lawyers maligned, the Fidelity Fund molested and new arrangements for funding legal aid and education introduced. Throughout it all the profession has made substantial and reasoned contributions to the invigilation of many legislative proposals often under considerable pressure and I thank those who have given unselfishly of their expertise to improve some proposals or torpedo others.

1990 will be significant for the profession. The Commonwealth Law Conference is a major international event which will demand the maximum commitment from host lawyers. The arrangements look good. The Conference should be the jewel in the Prime Minister's 1990 Crown. I was pleased to succeed Geoffrey Palmer following the major reforms he introduced as Minister of Justice and Attorney-General. He has the same view about my old job. I wish you a Happy Christmas and a prosperous New Year. □

From Graham Cowley, President New Zealand Law Society

I thank Butterworths and the Editor for allowing me this opportunity to send a Christmas message to you.

When I prepared a similar message last year I indicated that there were many issues to be faced by our profession in 1989. That prediction proved to be correct. The New Zealand Law Society and members of the profession generally have faced those issues in a strong and determined way during 1989 but sadly many of the same problems are still with us.

> Much is still made of the rising cost of legal aid and legal services – sadly the criticism is directed at the legal profession whose responsible members are making considerable personal and financial sacrifices to keep the legal aid systems in this country operating. The criticism ought more properly be directed at the social issues and personal attitudes in our community which create the demand for such extensive legal aid and legal services.
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> Little has been achieved to ease the burden of that great section of our community who fail to qualify for legal aid but have insufficient resources to enable them to pay personally for adequate and proper legal advice and assistance when they need it. There is no indication in the Legal Services Bill (presently being considered by the Justice and Law Reform Select Committee of Parliament) or in the Government announcements on the introduction of the Bill that there is any political resolve to address this important issue.
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> A very small proportion of practitioners continue to fail to maintain the high professional standards for which the legal profession is and ought to be recognised. Consequently they generate unjust criticism of the profession as a whole and in some instances cause financial cost to their professional brethren. Hopefully the more responsible members of our profession are learning the importance of noticing warning signs and reacting properly to them.
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> The volume and speed of new legislation challenges the ability of Parliament itself and the legal profession to ensure that it is correct. Worse still, it is now problematical whether the majority of the legal profession can claim to "know the law" yet our constitutional conventions deem such knowledge on the part of each and every man, woman and child in the country.

I do not suggest that the position regarding any of these issues has become worse during this past year but neither do I believe that the circumstances surrounding any of them have improved. It is obvious that the efforts made by the legal profession, individually and collectively, in these areas during 1989 have not been sufficient to turn the tide in regard to those important isues amongst others.

I hope that in 1990 greater efforts by members of the profession individually and by this Society in the collective name of the profession will ensure that we address and confront these issues which are important to preserve the Rule of Law, the freedom of the individual, equal access to justice for all, and the independence and integrity of our profession.

On behalf of the Council of the New Zealand Law Society I wish all readers of the *Journal* a happy and relaxing Christmas so that we can enter upon 1990 and the new decade ready to meet the many challenges that lie before us. □

LAWASIA 1989 Hong Kong Conference

Lawyers' and bankers' confidentiality and possible conflicts arising between them.

By Dr F Reichenbach, past President of the International Bar Association and Chairman of the IBA Confidentiality Committee.

The rights of confidentiality between a lawyer and his client and between a banker and his client spring from different legal sources. As a result, where lawyers and bankers are involved in the same transaction, conflicts may arise, which might be damaging to the common client both seek to serve. These conflicts become even more serious when the transaction involves lawyers and bankers from different countries, each observing a different legal regime.

It is the purpose of this address to outline possible gaps between lawyers' and bankers' ability to comply with their clients' wishes and requirements regarding confidentiality. An analysis of this appears all the more desirable as in important business matters bankers as well as lawyers are increasingly involved in cases on their clients' behalf. And for these clients it may be of vital importance that confidentiality should be fully safeguarded.

To begin with therefore it will – in cases of this kind – be an important function for lawyers to inform their clients of the confidentiality situation, to warn clients of possible confidentiality gaps and to attempt to find legal ways and means of closing these gaps.

In matters of tax a clear distinction in terminology is made between what we call "tax avoidance" which is fully legitimate and "tax evasion" which lacks legitimation. I submit that the same distinction can be made in matters of clients' confidentiality privilege. Lawyers will have to attempt to find a legitimate solution for clients' requirements and, should the case arise, to warn them against illegal methods which may perhaps be the only way to close a confidentiality gap and eventually cause substantial damage not only to the clients' own interest but perhaps also to clients' lawyers themselves.

Lawyers, wherever they are in the world, know the extent to which they are able to safeguard their clients' confidentiality interests within their own local rules and regulations. But are they always aware of the extent to which this protection remains or is eroded where the co-operation of banks is involved in business deals and transactions? And even if a lawyer knows the relevant rules to which banks in his own state or country are subject, will he necessarily know what confidentiality protection bankers and/or lawyers are able to offer elsewhere? It is common knowledge that a chain is as strong as its weakest link. Similarly confidentiality in a lawyer's international and in a client's/lawyer's/bankers' deal is only as strong as the weakest part of the team.

I have considerable doubt that sufficient attention is given to this problem area in a good many cases. And this is increasingly true at a time when international business is growing rapidly and expanding beyond national borders.

To leave for a moment considerations of a more theoretical nature, let us look at a small number of practical cases where lawyers and bankers have to collaborate for clients. The following enumeration in no way purports to be complete and is intended only to give us some examples of the type of business we are referring to.

One of the very common cases I wish to mention is the lawyer who, as his client's legal adviser, drafts a will and who is appointed in the will as the client's executor. After the client's death he finds that the estate involves relationships with banks, possibly in different countries with different banking confidentiality rules and also different tax laws. Confidentiality problems may arise for the lawyer/executor which he has to analyse and handle very carefully, probably in conjunction with the deceased client's heirs who may themselves reside in various countries. Their wishes regarding confidentiality may conflict with the lawyer's duties in connection with the bank accounts.

Another example: A client instructs a lawyer to open a bank account in his, the lawyer's name as a trustee for the client as beneficial owner. There are countries where this is possible without the banks requesting the lawyer to make any declaration about the beneficial owner's identity, background or the sources from which the capital to be invested originates. But there are other countries, such as at present my own country, Switzerland, where disputes have arisen between the Bar and the Bankers' Association and the Federal Supervisory Authority for banks.

This because attempts are made to force lawyers, by lifting their duties of confidentiality, to reveal, if not the client's name, at least to vouch for his trustworthiness and to confirm that they have knowledge

of the sources of clients' assets which are to be invested with the bank. If I comment on the situation in Switzerland, it is for two reasons:

(1) Because Swiss legislation has for a great many years had a reputation for being most liberal as regards the confidentiality protection that bankers and lawyers can give to their clients and
(2) because the present problems and differences of opinion between lawyers, bankers and authorities are symptomatic of the conflicts which may face lawyers who endeavour to protect their clients' confidentiality to the maximum.

The Swiss Federal Court ruled that a lawyer who was instructed by clients for the sole purpose of opening a bank account without disclosing to the bank at its request the client's name could not refuse disclosure by reference to his statutory duty of confidentiality. I do not think that this judgment can be criticised because the confidentiality privilege and the lawyer should not be abused by investors who interpose a lawyer between themselves and a bank solely for the purpose of non-disclosure.

But the situation of a lawyer who acts as legal adviser to his client for, say, a whole, possibly complex transaction or even as legal adviser on a general long-term basis is quite different. For lawyers who enjoy a basic privilege in their own country I urge strongly that they should strive to safeguard it so that they can avoid having to reveal a client's name by waiving their duty of legal confidentiality and once this principle is undermined, where will it lead to?

Confidentiality requirements could become particularly important for clients in cases of pending mergers and takeovers of various kinds, friendly or unfriendly, leveraged buy-outs and the like. A premature leak could cause substantial damage to the parties involved. In this type of business transaction, clients could find themselves in a particularly delicate situation with not only diverging commercial interests but also with conflicting confidentiality rules applicable to their own lawyers and bankers, and perhaps also with the opposite parties' lawyers and bankers being located in quite different jurisdictions. If the safeguarding of confidentiality is of major importance for clients, their lawyers should carefully examine the overall confidentiality situation at the outset and before a decision is taken about the method of structuring and organising the intended transaction.

As a final example of patterns of business where lawyers' confidentiality may not only be of high legal but also of major commercial importance for clients, I would like to mention the case of lawyers being company directors as members of a company's board or trustees of a foundation. If a person, although a practising lawyer, acts as director or trustee only, it is apparent beyond any doubt that he cannot invoke his confidentiality privilege in any way but there are cases where the lawyer, particularly where he is a company's sole director, acts in a dual commercial and legal capacity. And often as a result of an agreement of mandate with his clients, he also holds the company's shares as a trustee for them. In some countries he can be made to reveal the clients'/shareholders' name, in others not.

In some countries banks are becoming increasingly demanding in their requests to director/trustee lawyers for information about the beneficial ownership, or source of finance or a whole range of information relating to shares they hold. To what extent are lawyers permitted or possibly legally compelled, based on their confidentiality status and obligations, either to refuse disclosure or alternatively, depending on the legal situation, to give answers to such questions which have been put to them by the bank or banks involved?

In the past lawyers and bankers were usually able and anxious to collaborate without problems of major significance as far as the protection of their clients' confidentiality requirements was concerned. It is only more recently, that the rapid increase in international crime and the consequent growth in attempts to launder very large amounts of money which are the proceeds of criminal acts – and the subsequent investment of these vast sums – has led to a situation from which conflicts between bankers and lawyers' confidentiality rules have arisen.

It is logical that this development is especially apparent in countries where bankers' and lawyers' confidentiality rules have not only been previously particularly protective to lawyers' and bankers' customers but also where according to long established practice it was customary for many investors to make their investments through lawyers as their trustees or through trusts or companies of various kinds without being compelled to register or otherwise publish names.

Conflicts of this kind result, I submit, from two main causes. First of all bankers' and lawyers' confidentiality status is, as we have already mentioned, generally based on different legal grounds.

Furthermore in most countries different bodies supervise banks and lawyers, in accordance with different rules and regulations. It is therefore not surprising that lawyers' clients and bankers' customers are looked at by the competent regulatory authorities in quite different ways for the same kind of business. Conflicts in matters of confidentiality are therefore almost inevitable for this additional reason.

I submit that it is the international lawyers' community's duty to protect their worldwide clients' confidentiality privilege from constant and progressive erosion. Earlier today we have heard that this privilege has its roots in ancient times and has been reconfirmed repeatedly since. But on the other hand, and this is important, I believe that no rights of any kind justify abuse for obviously illegal purposes. In other words: clients should not be able to reach an illegal goal by abusing a lawyer's confidentiality duty for this sole purpose.

Now it is easy to make this statement which sounds rather impressive in theory. But, if we look at the actual legal and practical implementation, we will soon find material obstacles. To find, or at least to approach, a solution we have, as I believe, first to make a

distinction between transactions fully carried out within a state or country, where the lawyers and bankers involved are resident, and transborder, international deals performed with the assistance and involvement of lawyers and bankers in different countries or states.

In cases of the type of business first described we have already pointed out, but it should be repeated, that problems arise because lawyers' and bankers' confidentiality rules are based on different legal grounds. This applies in civil law as well as in common law countries. I am therefore of the opinion that national legislation must provide for rules which clearly define in respect of which deals, transactions, investments and the like, where lawyers represent a client to a bank, lawyers are to be made to abandon their confidentiality obligations. Such legislation alone appears a suitable remedy against an embarrassing situation where different supervising bodies, those for bankers and those for lawyers, apply different criteria for the same type of business in which lawyers and bankers are involved.

I believe that bar associations and law societies have a specific and important part to play. This is to convince the general public and legislators that, whilst lawyers are certainly opposed to helping the spread of serious crime, the public's right to the protection of their legal advisers' and representatives' basic confidentiality must not be impaired by any not strictly essential or exaggerated interpretation as to which lawyers'/bankers' transactions should be earmarked for a loss of confidentiality protection.

I submit also that it should be a pre-condition that the moneys involved must originate from an act which under national legislation is criminal in itself. It is obviously absurd that a lawyer should be made to sacrifice his client's confidentiality privilege in a transaction which is the result of an act which is not illegal under his own local legislation.

We conclude that in view of the specific lawyers'/bankers' relationship the relevant transactions leading to a loss of lawyers' confidentiality must be determined as restrictively as possible and must have their origin in a criminal act under national law.

This being said, we must however give some consideration to another aspect of the situation. As already indicated, it happens that banks, possibly at the request of associations to which they belong, but under no obligation from national laws and regulations or from case law, request from lawyers the formal disclosure of privileged information before they will accept funds for investment or engage in other transactions of various kinds. As a result lawyers, who perhaps for quite legitimate reasons are not freed by their client from confidentiality obligations, have either to refuse to act for the client or have with his approval to choose as counterpart a bank in another country. I believe that this has detrimental consequences not only for lawyers but also for the banks in the countries concerned. It therefore appears that each instance of lifting of lawyers' confidentiality, also in their dealings with banks, should have its roots in legislation. The abrogation of confidentiality should not be a playground for differing interpretations either by branches of the administration or by the law courts.

But we should now consider the problems facing a lawyer who has to deal on behalf of his client with a bank in another country, lawyer and bank being subject to different local legislation and jurisdiction. Whilst legislation applying to lawyers practising in the bank's country may deprive them of their confidentiality privilege for a specific type of business transacted with banks, this may not be the case where the lawyer acting is resident.

Lawyers in other countries and jurisdictions should be aware of such situations and should know that, whilst at home they might be protected, such protection may not exist elsewhere, particularly in their dealings with banks. At this stage I wish to draw your attention to the manual which the IBA's Confidentiality Committee is preparing for publication, the editors of the manual being Prof David Edward and Miss Laura Bartell who are both with us today. The manual will give information about the confidentiality situation in each country on a worldwide basis for the specific use of lawyers doing business outside their own national borders.

And finally attention should be given to cases where lawyers are asked to disclose privileged knowledge through international legal assistance requests by another country. It is a basic principle of legal assistance in criminal matters that the action for which information is sought must be considered criminal in both countries involved. In lawyers'/bankers' cases this means that the source of the funds to be invested has to be considered criminal and subject to prosecution under the laws of both countries.

But, as we all know, this is not by any means always the case. To take an historical example, large funds were invested abroad at the time of prohibition in the USA. Prohibition was considered unreasonable in a great many countries. And for the present I only mention moneys invested elsewhere for reasons of tax avoidance or in order to avoid foreign exchange restrictions or, last but not least, funds originating from drug traffic. In some countries even where drug trafficking as such is illegal, the investment of moneys resulting from it is still not considered legally inadmissible.

Allow me now to sum up. Lawyers' clients' confidentiality privilege is generally speaking under increasing pressure of erosion. And where lawyers and bankers have to serve the same client problems may become more serious because of the different legal regime to which each of them is subject at the national and even more acutely at the international level. When defending themselves against the erosion of their confidentiality status lawyers should therefore use all their influence to encourage legislators to co-ordinate clearly confidentiality rules where lawyers and bankers are involved in the same transaction in the service of the same client. And statutory abolition of lawyers' confidentiality in specific cases of this kind should take place only in the most restrictive manner possible, limited to such cases where abolition could be expected to prevent serious crime. I appeal to the Bar Associations and Law Societies of the world to pay careful attention to this matter and to co-operate on an international basis. □

LAWASIA 1989 Hong Kong Conference

The professional secret of the lawyer in the 1990s

By David Edward, Salvesen Professor of European Institutions, University of Edinburgh.

Towards the end of his book *On Law and Justice*, Ross said this:

> In different cultures institutions take different shapes. Shaped once by causes we cannot comprehend, the institutions are continued by a cultural tradition and supported by a legal consciousness reflecting that tradition. The tradition and this sentiment, however, are not unchangeable, but do change in time. It is tempting to assume with the historical school that they live their own organic life. Actually, however, they must be assumed to change under pressure of experience and needs, but in a way we cannot control. The fundamental institutions change along with the evolution in the community, possibly even by revolutions, but they are outside the province of rational politics.[1]

I am sure that, when he spoke of "fundamental institutions", Ross did not have in mind anything like the Professional Secret[2]. Yet in the minds of many lawyers in Europe today, the Professional Secret has acquired the status of a fundamental institution.

The principle that a lawyer should not be required to disclose what his client has told him can be traced at least as far back as the reign of the Emperor Constantine[3]. The European Court of Justice has found that it is "a principle common to the laws of the Member States [of the European Community]"[4], and the obligation of confidentiality is recognised by the Bars of the European Community as being "the primary and fundamental right and duty of the [legal] profession"[5]. It is significant that totalitarian states, although they claim to recognise the principle that a lawyer must preserve the confidences of his client, have made, and still make, an exception where it is in the interests of "the State" or of "the Party" to require him to tell what his client has told him.

It is true that, even in western Europe, the principle of confidentiality between lawyer and client has been given concrete expression in the law in different ways. The law of my country is different from yours, and the law of both is different from that of France. As Ross says, institutions take different shapes in different cultures. But, at least at first sight, it seems reasonable to say that the Professional Secret is, in some sense, a "fundamental institution" the treatment of which by the organs of the state is, in some way, a test of whether we live a free society.

So it is worth asking whether it is really true, in Ross's words, that this institution has been "shaped by causes we cannot comprehend", that it "must be assumed to change under pressure of experience", and – perhaps most important – that any discussion of it lies "outside the province of rational politics". To put the matter another way, can we identify a hard core of principle, which is worth preserving and which ought not to be allowed to change under the pressure of experience?

These questions are all the more important because there is ample evidence that those who shape the policies of government are suspicious of the idea that a lawyer's office should, as it were, enjoy the privileges of the confessional and be immune from the long arm of the law. If lawyers believe that the Professional Secret is fundamental to the practice of their profession, and that it can and should be respected and protected by the state in a free society, then it is not enough simply to assert that this is so. We must attempt to bring the subject within the realm of rational political discussion.

Indeed, I agree with Ross when he says in the last paragraph of his book that

> The role of the lawyer as legal politician is to function as far as possible as a rational technologist: in this role he is neither conservative nor progressive. Like other technologists he simply places his knowledge and skill at the disposal of others, in his case those who hold the reins of political power.[6]

Another way of saying the same thing was suggested to me by a senior official in Brussels: the aim of the professional lawyer when dealing with government should be to express "l'interet desinteresse de l'avocat" – the disinterested interest of the lawyer.

As a matter of history, the idea that the relationship between lawyer and client is a relationship of confidence can, as I have said, be traced at least as far back as the Roman jurists. The Digest[7] lays down the rule that an advocate should not be allowed to testify in a cause in which he has acted as advocate. And the Code[8] declares void any contract between an advocate and a litigant "quem in propria recepit fide". The Latin phrase, "quem in propria recepit fide", is almost untranslateable. It illustrates the startling economy of the Latin language. But it emphasises both the trust which the litigant must have in his advocate and the duty of the advocate to preserve the confidence of his client. Although in both cases the Roman jurist is laying down a negative rule

(that an advocate cannot be required to testify, or that an advocate cannot enter into a valid contract with his client), it is clear that these rules go beyond mere legal technicality. Underlying the rules, there is a sense of moral obligation to preserve and protect a relationship of confidence.

The same idea occurs repeatedly in later writings. For example, Advocate-General Gilbert Desvoisins, addressing the Parlement of Paris in 1728, said that

> It is beyond doubt that the religious faith of the secret is essential to the Bar as a profession . . . The advocate and legal adviser is necessary to the citizen to safeguard and defend his property, his honour and his life . . . The confidence of his client is, above all, necessary for him to perform [the important role the law assigns to him]. Where secrecy cannot be assured, confidence cannot exist.[9]

A century later, a British Lord Chancellor said

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to [the legal profession], or to any particular disposition to afford them protection . . . It is out of regard to the interests of justice which cannot be [upheld], and to the administration of justice which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts and in those matters affecting rights and obligations which form the subject of all judicial proceedings . . . Deprived of all professional assistance, a man would not venture to consult any skilful person or would only dare to tell his counsellor half his case![10]

It is, I think, important to stress the moral or ethical element in the doctrine of the Professional Secret since it is here, if at all, that there is, in Ross's phrase, a cause that we can comprehend. It has been suggested that the lawyer's obligation to preserve the confidentiality of what his client has told him is merely a contractual obligation — that it is an obligation which arises out of the private contractual relationship between lawyer and client. If it is a purely private obligation, then it can be overridden when the higher interests of society require it. Others have said that the Professional Secret must be seen as an exception to the ordinary rules of law — the rule that a witness must tell the truth in court or, more generally, the rule that a citizen must not obstruct the investigation of crime by the duly authorised officials of the state. Exceptions to the ordinary rules of law must be construed strictly and this applies as much to the Professional Secret as to any other exception.

If we remain at this level of legal technicality, it becomes very easy to argue that the legal rules protecting the Professional Secret are no more than an expression of a passing phase in the evolution of society, subject to change under the pressure of experience and needs. The nature and values of society change. Indeed, there are new threats to the survival of western society as we know it. Drugs, terrorism, tax evasion and the multifarious forms of corporate manipulation and wrong-doing all contribute in their own way to the subversion of the values which our systems of law are meant to uphold. Given these changes and these new threats, it is perhaps reasonable to ask why the lawyer should not be required, like other men, to tell what he knows and make available any information or documents which may be relevant to discovery of the truth.

There are two ways of answering this question. The first relies specifically on the role of the lawyer as part of the machinery of justice. As the French put it, the advocate is "l'auxiliaire de la justice" — the auxiliary, or helper, of justice. The performance of the lawyer's function may *appear* to suggest that he is the opponent of public authority. But that is only so because our system of justice requires that someone should be cast in that role. Like Ross's uninitiated observer of the game of chess who sees only what the players do without knowing why[11], the observer of the game of justice sees only the lawyer as the opponent of the police, the public prosecutor or (sometimes) the judge. So far from helping the process of justice, the lawyer's function seems to the uninformed observer to be that of obstructing it. But, for the players who understand the game, this is an essential element in the game as a whole.

Our system of justice (and it does not matter, in this respect, whether we are talking about the common law system, the Scandinavian system or the civil law system) — our system of justice requires what we in Scotland call a contradictor since it is through the process of argument and counter-argument, thesis and antithesis, that the way to the truth and a just result will be found. We therefore cast the advocate in the role of contradictor. It is his task to put forward all the arguments and objections which the client would put forward for himself if he could.

To perform that role adequately, the advocate must, to some extent at least, put himself in the shoes of his client. He must know what his client knows and this means, in turn, that his client must be honest with him. To change the metaphor slightly, they must play with the same hand of cards. The other players cannot insist that the advocate and his client should play with their cards face up on the table. That would be contrary to the rules of the game.

That might be a sufficient answer to our problem, provided that we continue to play the "game" of justice in the same way, according to the same rules. But we are no longer playing the same game in the same way. The process of justice, in the sense of what happens in courts of law, is only one part (and often a small part) of what the modern lawyer does. Moreover, modern ideas and modern technology are leading to new concepts of the process of justice, even in that limited sense. We have to look further, and more deeply, to find a moral principle which is adequate to justify the doctrine of the Professional Secret today and in the 1990s. We need a more sophisticated answer.

The first clue to the answer lies, I think, in the word "secret". The European Convention on Human Rights recognises the right to privacy — the right of the individual to keep his private affairs immune from intrusion by the state. We may be foolish to think that there are

secrets we can keep to ourselves, but we are entitled to try, and we should not be required to explain our reasons for doing so to anyone. That is why Article 8 of the Convention puts the matter in the way it does.

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Note that the Article begins by stating the principle, and then states the permissible exceptions to the principle. It is for the state to justify intrusion into the private affairs of the individual, not for the individual to show cause why the state should not do so.

So it is wrong to suggest that the doctrine of the Professional Secret is an exception to the ordinary rules of law and that, because it is an exception, it must be construed strictly. On the contrary, the law protecting the secrets of the individual is an expression of a positive rule of law. It is the exceptions to that rule which must be construed strictly. This conclusion can be supported by reference to Article 10 of the Convention which protects the right of freedom of expression. Paragraph 2 of that Article reads:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, *for preventing the disclosure of information received in confidence*, or for maintaining the authority and impartiality of the judiciary.

Here, again, although it is expressed as a ground for derogating from the right of freedom of expression, the right to protect information received in confidence is treated as a positive right.

The second clue lies in the form of words used in the Penal Codes of most of the western European countries. The model on which they are based appears to be Article 378 of the Napoleonic Code of 1810. Article 378 said this:

> Doctors, surgeons and other officers of health, as well as pharmacists, midwives, and all other persons who, by reason of their status or profession, are entrusted with the secrets of others, and who, unless the law requires them to do so, reveal those secrets, shall be punished by imprisonment and a fine.

Note that lawyers are not specifically mentioned, though they are mentioned in the Codes of some other countries including your own. The French Code extends quite generally to all those who "by reason of their status or profession are entrusted with the secrets of others".

From this phrase the French writer Charles Muteau[12] developed the idea of "le confident necessaire" — the necessary confidant — an idea which has been adopted by the French courts in interpreting the successors to Article 37B of the Napoleonic Code.[13] The underlying idea is that, whether he would voluntarily do so or not, there are some circumstances in which the citizen cannot avoid disclosing the secrets of his private life to other people. These people must know the truth — and, as far as possible, the whole truth — if they are to be able to help.

Seen in this light, the relationship of confidence between lawyer and client is simply one example of a wider phenomenon. The doctor can cure only if he knows all the symptoms and the circumstances in which a disease may have been contracted. Similarly, the lawyer can give useful advice only if he knows *all* the facts that are relevant to the problem he has to solve.

This goes far beyond the scope of criminal prosecutions and civil lawsuits. The scope of the law is now so wide that there are many aspects of life where the individual may need the help of a lawyer without going anywhere near a court. If the principle of the Professional Secret is to have any meaning, it must apply to all circumstances in which the lawyer, by reason of his profession, becomes the necessary confidant of the individual.

Indeed, it becomes all the more important to assert this principle as modern technology and the modern development of the law enhance and extend the armoury of the state. As the weapons available to the authorities of the state become more powerful, the citizen becomes all the more in need of help and protection from the lawyer who knows what weapons of defence are available to him and knows how to use them.

This is, I think, what the European Court of Justice had in mind when it said in the *AM&S* case [14] that, in the Community legislation on control of competition:

> . . . care is taken to ensure that the rights of the defence may be exercised in full, and the protection of the confidentiality of . . . communications between lawyer and client is *an essential corollary to those rights.*

It is here, therefore, that I find the hard core of the doctrine of the Professional Secret. It lies in the defence of the individual against all forms of oppression, injustice and maladministration. And I see no reason why that hard core of principle should not be as relevant to life in the 1990s as it has been since the reign of the Emperor Constantine.

Having said that, the fact that we have identified the hard core of principle is only a beginning. There are probably very few politicians who would be prepared to dispute, in public at least, that the privacy of the individual should be protected. The problems that arise, and are likely to arise in the 1990s and beyond, are more complex and less likely to attract public sympathy.

The *AM&S* case arose in the course of an investigation by the

Commission of the European Communities into an aluminium cartel. The parties concerned were multinational corporations, not private individuals. The existence of a cartel, if proved, was of considerable concern, not only to the Commission as competition authority, but to everyone in the Community who might happen to be, in one form or another, a consumer of aluminium or a user of products made from aluminium. Why should legal rules devised for the protection of individuals be invoked by multinational corporations to protect themselves against investigations which might show that they have been involved in an arrangement designed to enrich themselves at the expense of millions of individuals?

In answer to this question, one argument was that the corporation — the "person" created by the law as opposed to the person created by nature — is nevertheless a person for the purposes of the law. Legal rules devised for the protection of natural persons must apply equally to legal persons and no distinction should be made between them.

I must say that this argument, by itself, has never seemed to me to be particularly persuasive. If the law can create "persons" in the form of commercial corporations, the law can surely define and limit their rights and obligations. There is no reason in logic or in law why those rights and obligations should be precisely the same as those of human individuals. Indeed, in point of fact, they are different in many respects.

On the other hand, there are practical reasons why the corporation should be treated in the same way as the individual. There is at least one world-wide enterprise which includes many subsidiary companies but is ultimately controlled by a single individual. He, as an individual, holds the shares in the operating companies and controls their policy. Because he chooses to operate as an individual, would it be right to give his "secrets" greater protection than those of companies whose policy is controlled by a Board of Directors elected by thousands of individual shareholders?

Equally, there are many cases where it is more convenient for a single individual, or the members of a family, to run a small business through the medium of a limited company. Formally speaking, they may be the directors of a company, but the decisions they make as directors are exactly the same as those they would make as individuals. Can we say to them that, because they choose to operate as a company (as the law allows them to do), their "secrets" are no longer entitled to protection? Perhaps we can; but it seems to me that this would produce unacceptably inequitable results.

This may, in itself be a sufficient reason why the principle of confidentiality between lawyer and client cannot reasonably be confined to the relationship between a lawyer and those of his clients who are individuals. But there is also, I think, a more fundamental reason. Here I go back to the idea of the lawyer as the auxiliary or helper of justice.

The judicial process is an attempt to formalise the tensions that exist between the citizen and the state or, in civil cases, between one citizen and another. The formal rules help to reduce tension and contribute to the cool and rational solution of difficulties. Experience may show that the rules have to be changed to suit modern conditions and ideas. But the underlying tensions and difficulties remain. They are a part of the real world, which becomes formalised in the courts of law.

The role of the advocate in the courts of law is an essential part of that formal process. Without him, the formality of the process would lose much of its purpose since it is designed to reproduce, in a formal context, the debate about rights and obligations which must take place in order to resolve the underlying tensions and difficulties.

If we move out of the courts, we find the same debate about rights and obligations, whether it is the debate between the multinational corporation and the authority that regulates competition, the debate between the municipality and the person who wants to build a house, or the debate between tax-collector and taxpayer. Although the debate is less formal than it would be in the courts of law, it is nonetheless a debate which has to be conducted within a framework of legal rules. Ross says in his book on *Directives and Norms*:

> Legal rules govern the structure and functioning of the legal machinery. By "legal machinery" I mean the whole set of institutions and agencies through which the *actes juridiques* and the factual actions we ascribe to the state are undertaken. It includes the legislature, the courts, and the administrative apparatus to which belong the agencies of enforcement (especially the police and the military). To know these rules is to know everything about the existence and content of the law.[15]

One does not have to agree with Ross's conclusion to accept his proposition that the "legal machinery" includes the whole of the legislative, judicial and administrative apparatus through which the state acts. And it is fundamental to our conception of a state based on the rule of law that the whole of this apparatus should operate within a framework of legal rules.

Further, as Ross says earlier,

> . . . it is necessary for the establishment of a norm that it be followed not only with external regularity (that is, with observable conformity to the rule), but also with the consciousness of following a rule and being bound to do so.[16]

In other words, those who administer the law must not only be seen (objectively) to do so in accordance with the legal rules, but must feel themselves to be under a moral compulsion to do so.

Within the judicial process, the presence of the advocate reinforces the moral compulsion to act in accordance with the rules. Experience shows that the same holds true in other circumstances where the apparatus of the state is brought to bear on the citizen. Where a lawyer is present to act on behalf of the citizen, those in authority will usually be more careful to act in accordance with the legal rules. Sometimes, of course, this is not what the client wants. He wants the authorities to bend the legal rules in his favour. If so, he will probably be better off without a lawyer.

But this only goes to show that

the lawyer can and does play an important role in sustaining the framework of legal rules within which public authority (in all its forms) has to operate. If this is correct – and I hope you will agree with me that it is – the same reasons which justify the principle of confidentiality between lawyer and client in the context of the judicial process apply equally outside that context. The lawyer as "advocate" and legal adviser is an "auxiliary" of the rule of law. Through his participation in the process of public administration – the process by which the abstractions of the law are applied to factual circumstances – the lawyer helps to ensure that the process is carried on according to known rules impartially administered.

So there are positive reasons why no distinction should be made between the individual client and the corporate client. The reasons relate, not to the identity of the client, but to the role of the lawyer in society.

At this point, let me try and summarise my conclusions so far. First, the principle of the Professional Secret has its hard core in recognition of certain fundamental rights of the individual. Second, the principle is a positive rule of law, any exception to which must be justified. Third, although the principle exists primarily to protect the individual, it cannot be limited to protection of the individual. Fourth, when properly understood by those in authority, the principle can be seen to serve the rule of law rather than to undermine it.

All this presupposes, of course, that the lawyer is honest, and that his role is confined to that of advocate and legal adviser. But this is not always so. Not all lawyers are honest, and the role of the lawyer in the late twentieth century – particularly in your country and mine – goes far beyond the traditional fields of advocacy and legal consultancy. In the fields of taxation and corporate affairs epecially, it is difficult to draw a clear line of demarcation between the situation where the lawyer is purely an independent legal adviser and the situation where he is fully involved in the process of taking decisions. Indeed, in the British system at least, the solicitor is the agent of the client. He must, for some purposes, step fully into the shoes of his client so that his acts are, in law, the acts of the client. The relationship between agent and client in that sense is not the same as the relationship between legal adviser and client which the principle of confidentiality was designed to protect.

This gives rise to serious difficulties in applying the law, and those difficulties are likely to increase as we move into the 1990s. The root of the problem appears to be this. Even if we accept the principle that communications between lawyer and client are and ought to be confidential, how are we to discover whether, in a particular case, the lawyer is acting as advocate or legal adviser or simply as agent of his client? And how do we guard against abuse of the principle by unscrupulous lawyers?

The theoretical answer of the law is simple. The principle of the Professional Secret exists only to protect the confidential relationship between the client and the lawyer in his capacity as advocate and legal adviser. Where the lawyer steps outside this capacity – whether it is to assist his client in wrong-doing or, more generally, to act for his client in some other capacity, the principle does not apply. So, in order to find out whether a communication between lawyer and client is protected or not, the first step is to find out the purpose for which, and the circumstances in which, the communication was made.

But here we are faced with a paradox since it is difficult, if not impossible, to discover the purpose without first discovering the nature of the communication itself: in order to discover whether a communication is protected from disclosure, the communication itself must be disclosed in order to discover its purpose.

This was one of the principal underlying issues in the *AM&S* case. The Commission did not seriously dispute that the principle of confidentiality ought to apply in competition investigations (although the French government did). The problem arose because the company which was being investigated claimed that certain documents were protected and ought not to be seen at all by the Commission's inspectors. The Commission, with some reason, contended that the company could not be allowed to decide for itself which documents should be disclosed. The inspectors must at least be allowed to see the documents in order to decide whether the company's claim was justified or not.

The company, on the other hand, pointed out that this gave rise to two difficulties. First, the Commission would effectively become judge in its own cause. Second, even if the inspectors could make no formal use of confidential documents, such documents are quite likely to contain clues to the existence of other documents or other information which would not be protected. So, by an indirect method, the inspectors might be able to obtain information which they could not have obtained without access to confidential documents.

The solution adopted by the Court of Justice was to require the documents in question to be delivered to the Court in a sealed envelope. The Court then made a list of the documents and gave a brief description of them without mentioning their contents. On this basis it was possible for the Commission and the company to argue in open court whether the documents were entitled to protection or not and for the Court to give judgment.

On the whole, this solution seems to have been accepted as a reasonable solution to the problem. It is certainly acceptable to Scottish lawyers becuse it is the method we use in our own system. I imagine that Danish lawyers also would find it acceptable since, under your Code of Procedure, it is the judge who has to decide whether a communication between lawyer and client should be disclosed or not.

We have to recognise, however, that what is easy for us to accept may be more difficult for others. In our systems, the judge is not expected to be an investigator. In other systems the judge is expected to seek out the truth. So the judge is in a position very like that of the Commission's inspectors. As Ross pointed out, "In different cultures institutions take different shapes."

If we step outside the narrow context of our national legal systems into the wider context of the European Community, it may not be possible to find solutions which satisfy everyone.

We can, however, learn from each other, and there are two features of French and Belgian practice which are, I think, worth studying. Both depend on the special position of the Batonnier in the French and Belgian Bars.

As you may know, there is no national Bar in France or in Belgium. There are more than 180 autonomous Bars in France and 26 in Belgium, organised on a regional basis. Each has its own leader, the Batonnier, elected by universal suffrage of its members. As the directly elected leader of a local Bar, the Batonnier occupies a special position of trust. An advocate who is faced with a professional problem can consult the Batonnier and, if he does what the Batonnier recommends, he is protected against being accused of professional impropriety.

The right of the individual advocate to consult the Batonnier makes it possible for him to get independent professional advice if he is in doubt whether he should disclose something said or written to him by his client. It is also possible for the advocate to ask that the Batonnier or his representative should be present when his office is searched. Indeed, the French Code of Penal Procedure requires the investigating judge, before carrying out a search of an advocate's office, "to take all appropriate steps beforehand to ensure that the professional secret and the rights of defence are protected".

The Code is now being revised, but the French Bars have secured an agreement with the Ministry of Justice on three essential points:

> (1) The office of an advocate can only be searched by an investigating judge, not by the police or other authorities;
> (2) The judge must state the purpose of the search and allow time for the Batonnier or his representative to be present;
> (3) Although the Batonnier cannot prevent the judge seizing a document, he can state that, in his opinion, a document is protected by the professional secret and ought not to be seized; and he can insist that this be recorded in the record of the search.

I understand that it is intended that a similar basis of understanding should be reached with the fiscal and customs authorities.

Such a system obviously depends on the immediate availability of a person such as the Batonnier whose authority is recognised, both by the members of the Bar and by the public authorities with whom they have to deal. It may be much more difficult to arrange here or in Britain. But the crucial point, I suggest, is this: It may be true that, in today's society, a lawyer cannot be allowed to invoke the Professional Secret as a way of avoiding all investigation by the authorities of the state. But the investigating authorities of the state should equally not be the sole judges of whether documents or information should be disclosed. Protection of the underlying principle calls for an independent arbiter or intermediary.

The independent arbiter or intermediary is necessary for other reasons too. Recent cases in different countries have illustrated the problems that follow from the greater mobility of the lawyer. Can his briefcase be searched when he crosses a frontier? Must the customs authorities limit their search to discovering whether the lawyer is carrying drugs, arms or other contraband? Or can they read the papers they find? If they can read them, can they pass the information they find there to other authorities who may be interested?

The computer, too, brings new problems. Information in computers is both more and less accessible to investigating authorities. Rules devised for a world in which people communicated face to face or in writing will not necessarily be adaptable to the world of electronic data processing and electronic mail — not to speak of the infinite possibilities of wire-tapping and electronic surveillance.

These new techniques call for new safeguards. The appropriate form of safeguard will depend on the custom and attitudes of the country. In your country and in mine, we would probably be content to rely on the impartial intervention of a judge. Nevertheless, we must be sure that procedures are available to provide quick and effective recourse to a judge. We must also establish a basis of understanding between the public authorities and the authorities of the profession in order to ensure that problems of confidentiality are taken seriously and can be resolved in a cool and rational way. It is undesirable, and I think dangerous, that such problems should be treated as if they concerned only the individual lawyer and the individual client. If, as I have sought to argue, a fundamental moral principle is at stake, the problem concerns all of us.

So there *is* room here for rational political debate. The starting point must be the mutual acceptance by politicians and lawyers that we are concerned with the problem of translating a principle as old as the Christian era into legal terms and legal methods appropriate to the end of the twentieth century. I have tried, in this lecture, to contribute to that debate by playing the role which Ross assigned to "the lawyer as legal politician" — I have tried to be, as far as possible, "a rational technologist, neither conservative nor progressive". Whether I have succeeded, I must leave it to you to judge. □

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1 Ross, *On Law and Justice*, Stevens, London, 1958, p 375.
2 In this lecture, I use the phrase "the Professional secret" to refer, in the first place, to the doctrine or principle of law that communications (written or oral) between a lawyer and his client are confidential and, in the second place, to all the subordinate rules of law and procedure which are designed to ensure that this confidentiality is protected.
3 Digest 22.5.25 (de testibus), quoting the late Roman jurist Aurelius Arcadius Charisius.
4 Case 155/79 *AM&S Europe Ltd v Commission*, [1982] ECR 1575, points 18 ff of judgment.
5 Declaration of Perugia on the Principles of Professional Conduct, adopted by the Consultative Committee of the Bars and Law Societies of the European Community, 16 September 1977, para IV.1.
6 *On Law and Justice*, p 377.
7 *Cit sup*, note 000.
8 Codex 2.6.6.2 (de postulando).
9 For the full text, see Chauveau & Helie, *Theorie du Code Penal*, Bruylant-Christophe, Brussels, 1860-63, p 277, n 3.
10 Lord Chancellor Brougham in *Greenough v Gaskell*, 1833, 1 My & K 98.

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LAWASIA 1989 Hong Kong Conference

The constitution of the Philippines: An overview

By Dr Serafin Guingona of the Philippines, a member of the Commission which drafted the 1986 Constitution.

SOME SALIENT FEATURES

From October 16, 1986, (the day after the draft Constitution was submitted by ConCom President Cecilia Munoz Palma to the President of the Philippines, Mrs Corazon C Aquino, in the presence of the members of the 1986 Constitutional Commission at Malacanang) and for more than 100 days thereafter up to January 31, 1987, the members of the Constitutional Commission conducted an education and information campaign nation-wide to explain to the people the various provisions of the draft constitution with emphasis on the new ones. Such effort of course was not all that was done to properly and adequately inform the electorate of the content of the draft Constitution to enable them to make an intelligent appraisal in reaching a decision whether to vote for or against its ratification. All forms of communication were availed of – TV, radio, print – including periodicals and magazines and other similar publications as well as materials published by the Commission itself which included among others copies of the proposed constitution in English and in Filipino, a Primer as well as materials on the draft constitution in comic magazine form.

In the campaign and education effort conducted by the Commissioners, who were assigned particular areas from Laoag in the north to Basilan in the south and who attended open-air rallies, public forums in government offices, schools and auditoriums and convention/barangay halls as well as in private houses where members of Homeowners Association, for example, were invited to attend etc, they almost invariably referred to the draft constitution as being *pro-life, pro-people, pro-poor, pro-family* and *pro-Filipino.*

The present Constitution is *pro-life* in that it protects the unborn child from the moment of conception, thus prohibiting the enactment of any law which would allow abortion. It bans, subject to exception dictated by our own national interest, nuclear weapons in our territory; it abolishes the death penalty except that for compelling reasons involving heinous crimes, Congress may reimpose the same.

There can be no doubt regarding the *pro-people* orientation of the 1987 Constitution. Pro-people provisions are found in various Articles of the Constitution. They include the articulation of general policies protecting the right to health, to a well-balanced and healthful ecology and to quality education. More specifically, the Constitution provides in Sections 15 and 16 of Art XIII thereof for the Role and Rights of People's Organisation which would enable the people to pursue and protect their legitimate and collective interests and aspirations. It also provides for sectoral representation in the Congress of the Philippines representing labor, peasant, urban poor, indigenous cultural communities, women, youth and such other sectors as may be provided by law, except the religious sector. For three consecutive terms after the ratification of the Constitution, ten *per centum* (10%) of the total number of representatives, including those under the party-list system, will be filled by the sectoral representatives. The Constitution has also introduced the system of initiative and referendum whereby the people can directly propose and enact laws or approve or reject any act or law or part thereof passed by the Congress or any local legislative body. It has also provided for the system of initiative (in the part of the Constitution which is traditionally referred to as the "Constitution of Sovereignty" – the Article containing provisions concerning the amendment or revision of the fundamental law) where the people can directly propose amendments to the Constitution.

The concern of the present Constitution for the poor (*pro-poor*) is highlighted by the inclusion of a new Article entitled "Social Justice and Human Rights" (Art XIII) which contains policies that would bring about the alleviation of the plight of our brethren who had

been often referred to during the Commission's deliberations as the underprivileged and the marginalized – among them the landless farmers and farm workers, the subsistence fishermen, the urban or rural poor dwellers, the workers (including government employees who have been extended the right to strike in accordance with law). These workers would be entitled not only to the rights of self-organisation, collective bargaining and negotiations, peaceful concerted activities and to security of tenure but also to humane conditions of work as well as a living wage.

The Constitution has provided also a separate Article on "The Family" (Art XV) (supporting the assertion that our fundamental law is *pro-family*) where the Filipino family is recognised as the foundation of the nation and commits the State to strengthen its solidarity and actively promote its total development. Marriage, as an inviolable social institution, has been declared to be the foundation of the family and is to be protected by the State. Among the rights specifically provided under this Article are: (1) the right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood; (2) the right of children to assistance, including proper care and nutrition; (3) the right of the family to a family living wage and income; (4) the right of families or family associations to participate in the planning and implementation of policies and programs that affect them; (5) the right of elderly members to be taken care of by the other members of the family in addition to the protection that is extended to such elderly members by the State's social security programs.

As to the *pro-Filipino* thrust of the fundamental law, the following provisions might be mentioned: (1) Filipino control of the economy; (2) Filipino control of educational institutions; (3) a Filipino national language; (4) Filipino technology; (5) Filipino control of mass media and advertising; (6) Filipino management and control of public utilities; (7) reservation to Filipinos of: (a) certain areas of investments; (b) the practice of all professions; (8) development of a reservoir of national talents, and (9) preservation of a Filipino national culture.

Aside from the above features of the 1987 Constitution, this paper would dwell on some innovations affecting the Legislative Department, The Executive Department and the Judicial Department.

Legislative Department (Article VI)
A significant innovation, as far as the legislative department is concerned, as earlier stated, refers to the composition of the members of the House of Representatives. Representation in the lower House has been broadened to embrace various sectors of society; in effect, enlarging the democratic base. It will be constituted by members who shall be elected in the traditional manner representing political districts, as well as by members who shall be elected, as provided by law, through the party list system from among candidates of registered national, regional and sectoral parties or organisations. The legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum.

The term of office of the Senators shall be six years and no Senator shall serve for more than two consecutive terms. The Members of the House of Representatives shall be elected for a term of three years and no Member of such House of Representatives shall serve for more than three consecutive terms. All Members of the Senate and the House of Representatives shall, upon assumption of office, make a full disclosure of their financial and business interests. They shall notify the House concerned of a potential conflict of interest that may arise from the filing of a proposed legislation of which they are authors. The records and books of accounts of the Congress shall be preserved and be open to the public in accordance with law, and such books shall be audited by the Commission on Audit which shall publish annually an itemized list of amounts paid to and expenses incurred for each Member. The heads of departments may upon their own initiative, with the consent of the President, or upon the request of either House, as the rules of each House shall provide, appear before and be heard by such House on any matter pertaining to their departments.

Executive Department (Article VII)
Commissoner Joaquin Bernas, in his sponsorship speech on the Article on the Bill of Rights, said:

> Incidentally, we spent the most time perhaps on this . . . because of reflections on the experience under martial law. And many of these reflections are an effort really to prevent the reoccurrence of things which happened during martial law. (RECORD OF THE CONSTITUTIONAL COMMISSION, Vol I, p 675)

Although Cr Bernas was referring specifically to the section on investigation of persons for the commission of an offence (which adopted the *Miranda* doctrine in a more expansive version), the truth is that many provisions contained in the 1987 Constitution were proposed, discussed and approved with such reflections in the minds of the members of the Commission. This is true with regard to provisions contained in the Article on the Executive Department. In the said Article, the executive power is vested in the President of the Philippines who possesses similar broad powers given to the Chief Executive under the 1935 Constitution. But conscious of the abuses perpetrated by the former President turned dictator, some of these powers have been curbed. As Commander-in-Chief of all the Armed Forces of the Philippines, he may, when the public safety requires it, suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law. However, in order to exercise such powers there must be an actual invasion or rebellion and not just an imminent danger thereof. Although the President may exercise these powers on his own authority, Congress may revoke such proclamation or suspension. Unless revoked, such suspension or proclamation shall be effective for

a period not exceeding sixty days unless extended by Congress.

Martial law does not suspend the operation of the Constitution nor supplant the functioning of the civil Courts or legislative assemblies, nor does it automatically suspend the privilege of the writ. The Supreme Court is mandated to review, in an appropriate proceeding filed by *any citizen*, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of habeas corpus or the extension thereof and promulgate its decision thereon within thirty days from filing.

Judicial Department (Article VIII)

The judiciary occupies a vital and indispensable part in our system of government. It has been variously referred to as the "ultimate guardian of the Constitution" "the bulwark of democracy" and "the conscience of the government." The judiciary, particularly the Supreme Court which is admittedly the highest and final arbiter of legal questions, assumes judicial supremacy through the duty and authority of the courts to declare statutes (as well as acts of officials of the Executive Department) unconstitutional. As pointed out by Dean Vicente Sinco,

> The Constitution of the Philippines assumes the power of declaring statutes unconstitutional to be inherently a judicial function when it places within the jurisdiction of the Supreme Court all cases in which the constitutionality of any treaty, law, ordinance, or executive order and regulation is in question. (Vicente Sinco, *Philippine Political Law*, 2nd revised ed, p 417.)

But of course, the right to exercise what is referred to as the power of judicial review – particularly the power and the duty of interpretation and construction of laws in relation to the fundamental law – has in the distant past been a subject of strongly opposing views. Thus Robert Yates of New York is quoted as saying,

> Men placed in this position will generally soon feel themselves independent of heaven itself. (Yates as quoted in Edward S Corwin, *Court over Constitution*, Princeton University Press, 1938.)

John Marshall's response to this criticism was,

> To what quarter will you look for protection from an infringement on the constitution, if you will not give the power (to) the judiciary? (Jonathan Elliot, Ed, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 2nd ed, Vol III, p 503)

The above-cited controversy was laid to rest with the promulgation of the landmark *Marbury v Madison* decision where *inter alia* it was held,

> It is emphatically the province and duty of the judicial department to say what a law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the Constitution – if both the law and the Constitution apply to a paticular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or decide conformably to the Constitution, disregarding the law – the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If the courts are to regard the Constitution as superior to any ordinary act of the legislature, then the Constitution, and not such ordinary act, must govern the case to which they both apply. (1 Cr 137, 2 L Ed 60-1803)

In *Angara v Electoral Commission*, 63 Phil 139, 158, our Supreme Court said,

> . . . when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them.

In the more recent case of *Demetria et al v Alba*, 148 SCRA 208, our Supreme Court ruled,

> Indeed, where the legislature or the executive branch is acting within the limits of its authority, the judiciary cannot and ought not to interfere with the former. But where the legislature or the executive acts beyond the scope of its constitutional powers, it becomes the duty of the judiciary to declare what the other branches of the government had assumed to do as void. This is the essence of judicial power conferred by the Constitution "in one Supreme Court and in such lower courts as may be established by law" (Art VIII, Section 1 of the 1935 Constitution; Art X, Section 1 of the 1973 Constitution and which was adopted as part of the Freedom Constitution, and Art VIII Section 1 of the 1987 Constitution) and which power this Court has exercised in many instances.

As to the role of the Supreme Court vis-a-vis the exercise of judicial power, our Supreme Court said,

> By tradition and in our system of judicial administration, the Supreme Court has the last word on what the law is. It is the final arbiter of any justiciable controversy. There is only one Supreme Court from whose decisions all other courts should take their bearings. (*Ang Ping v Regional Trial Court, 154 SCRA 77)*

And again, in another case, the Supreme Court made the following pronouncement,

> The Supreme Court is supreme – the third great department of government entrusted exclusively with the judicial power to adjudicate with finality all justiciable disputes, public and

private. No other department or agency may pass upon its judgment or declare them "unjust." (*Eva Maravilla-Ilustre v Intermediate Appellate Court*, 148 SCRA 382)

Perhaps this was what was in the mind of Charles Evans Hughes when he observed that "the Constitution means what the Supreme Court says it means."

Notwithstanding the above, it has often been said that the Judicial Department is the weakest among the three theoretically co-ordinate and co-equal Departments of government. Chief Justice Roberto Concepcion, who served as Chairman of the Constitutional Commission's Committee on the Judicial Department, began his sponsorship speech on the proposed provisions on the Judiciary, thus,

> I will speak on the judiciary. Practically, everybody has made, I suppose, the usual comment that the judiciary is the weakest among the three major branches of the service. Since the legislature holds the purse and the executive the sword, the judiciary has nothing with which to enforce its decisions or commands except the power of reason and appeal to conscience which, after all, reflects the will of God, and is the most powerful of all other powers without exception. (*Record of the Constitutional Commission*, Vol I, p 434.)

The Constitution vests the Judiciary with additional powers to make it meaningfully independent. Such independence is sought to be enhanced by making it immune from intrusions from the other branches of government, so that it can be an effective guardian and interpreter of the Constitution and the protector of the people's rights. Or as Justice Story says,

> The independence of the judges is the great bulwark of public liberty and the great security of property. (Joseph Story, Miscellaneous Writings, p 414).

The President's power to appoint members of the Judiciary shall be subject to the provision that only recommendees from a Judicial and Bar Council created under the supervision of the Supreme Court may be appointed to vacancies for membership in the High Tribunal and for the positions of justices and judges of lower courts. Appointments to the Judiciary shall not be subject to confirmation by the Commission on Appointments.

The salary of the Chief Justice and of the Associate Justices of the Supreme Court, and of Judges of lower courts shall be fixed by law. During their continuance in office, their salary shall not be decreased. Congress may not deprive the Supreme Court of its jurisdiction over cases enumerated in the Constitution. Neither shall any law be passed reorganising the Judiciary when it undermines security of tenure. The Supreme Court shall have administrative supervision over all courts and the personnel thereof, and it shall have the power to appoint all officials and employees of the Judiciary. Moreover, the Judiciary shall enjoy fiscal autonomy. Appropriations for the Judiciary may not be reduced by the legislature below the amount appropriated for the previous year and, after approval, shall be automatically and regularly released. There was even a proposal, in response to the recommendation of the then Chief Justice Claudio Teehankee to allocate an amount of not less than three percent (3%) of the national budget to the Judicial Department, which allocation shall be automatically appropriated and regularly released. This proposal was not accepted by the Committee on the Judicial Department because the amount could increase from year to year; the important thing, the Committee said, being that there is a fixed budget for the Judiciary to be automatically appropriated and automatically released. Commissioner Monsod's reaction to the above proposal was,

> Mr Monsod observed that a fixed percentage for the Judiciary could be an arbitrary allocation that could pre-empt the other budget priorities and that time may come when the Judiciary would have more funds than it would need . . . Mr Monsod suggested the institutionalization of safeguards that would ensure fiscal autonomy for the Judiciary without putting undue burden on the budget by means of an arbitrary allocation. (*Journal of the Constitutional Commission*, Vol I, p 221)

Another matter that drew the attention of the Commissioners was the Committee proposal to change the vote required for the Supreme Court to render a decision sitting *en banc*. As finally approved, what would not be required for a declaration of unconstitutionality would be "the concurrence of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon." This of course is a deviation from the requirements in previous Constitutions – in the 1935 Constitution, a vote of two-thirds of the Members of the Supreme Court was required while in the 1973 Constitution a vote of ten members (which is two-thirds of the membership of fifteen) was necessary. In answer to the objection raised by some Commissioners regarding the reduction of the number of Justices of the Supreme Court needed to declare a statute or an executive act as unconstitutional to as few as five Members (five being the majority of the quorum of eight of the fifteen-member Court), Chief Justice Concepcion said that he could not see why a single trial court judge could rule on the matter of constitutionality while five Justices of the Supreme Court may not. He further argued thus,

> . . . the two-thirds vote requirement is favourable to the Executive because it would need more votes than the ordinary case to declare an act of the Executive unconstitutional. (*Journal of the Constitutional Commission*, Vol I, p 213.)

The concurrence requirement as now provided for is made more stringent with the proviso that the Members of the Supreme Court who concur must have *actually* taken part "in the deliberations on the issues in the case and voted thereon," thus precluding the instances of possible practice of having a decision, penned by one Member of the Court, merely being

passed around for the signatures of other Members without the benefit of a previous discussion among them on the merits of the case regarding the facts and the law involved.

But decidedly one of the salient inclusions in the Article on the Judicial Department in our fundamental law is the definition of judicial power as including the duty "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government." This duty has far-reaching implication. The Supreme Court cannot, like Pilate, wash its hands from its responsibility of reviewing acts of public officials and offices, as the Supreme Court had done during the Marcos administration, where vital issues that concerned civil liberties and human rights were summarily left unresolved on the ground that they were "political questions." In the words of ConCom President Cecilia Munoz Palma,

> For the first time and breaking all traditions in the history of the Judiciary in our country, judicial power is now expressly defined in the Constitution as to include the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction. What does this mean? Former Chief Justice Roberto Concepcion in his dissenting Opinion in *Javellana v Executive Secretary* has the answer: When the grant of power is qualified, conditional or subject to limitations, the issue whether or not such considerations have been met is justiciable or non-political and the courts have a duty rather than the power to determine whether another branch of government has kept within constitutional limits. With this broad definition of judicial power therefore, our highest Tribunal can no longer evade adjudicating on the validity of executive or legislative action by claiming that the issue is a political question. (*Record of the Constitutional Commission*, Vol V, p 1010.)

C Herman Pritchett of the University of California has this to say of the "Political Question" doctrine,

> It is now generally assumed that the Supreme Court must be available to answer any constitutional question. Self-restraint counsels the Court to reach constitutional issues reluctantly and to be chary of disagreeing with legislatures or executives . . . But self-restraint is not the ultimate in judicial wisdom. The Court's primary obligation is not to avoid controversy. Its primary obligation is to bring all the judgment its members possess and the best wisdom that the times afford, to the interpretation of the basic rules propounded by the Constitution for the direction of a free society. (C Herman Pritchett, *The American Constitution*, 3rd ed, p 139.)

Illustrative Cases

Justice Louis Brandeis, speaking of judges, once said,

> His authority to make determinations includes the power to make erroneous decisions as well as correct ones. (*Swift & Co v United States*, 276 US 211, 331-332).

There are those who say that there were a number of decisions rendered during the martial law regime which were patently erroneous. Perhaps it would be best to leave the final verdict to history as to whether the decisions referred to were truly erroneous or not. For the benefit, however, of the non-Filipino delegates to this LAWASIA Convention, perhaps it might be worthwhile to give a brief commentary about some illustrative cases rendered during the martial law regime including facts, issues and court rulings on said cases.

Aware perhaps of the following citation from Ex Parte Milligan, 4 Wall 2, by Dean Vicente Sinco that "Being justified by necessity alone, martial law rule is limited to the duration of the emergency," Mr Marcos had to look for and devise measures to amend the pertinent provisions on martial law under the 1935 Constitution as well as to provide for a legal, and even perhaps a constitutional, authority to continue the imposition of martial law indefinitely without any regard as to any pre-condition for termination thereof.

On November 29, 1972 after the declaration of martial law, the 1971 Constitutional Convention was said to have approved its proposed Constitution of the Republic of the Philippines. The Court did not take judicial notice of the fact that a number of ConCom delegates were in detention for having refused to sign the document. The next day, President Marcos issued Presidential Decree No 73, "submitting to the Filipino people for ratification or rejection of the Constitution of the Republic of the Philippines proposed by the 1971 Constitutional Convention . . ." The plebiscite was set for January 15, 1973. On December 7, 1972, Charito Planas filed with the Supreme Court a case against the Commission on Elections and other respondents to enjoin them from implementing PD 73, contending that there was no freedom of speech and assembly and that there was no sufficient time to inform the people of the contents thereof. More or less identical actions were subsequently filed by others including the incumbent Secretary of Justice Sedfrey Ordonez. On December 17, 1972, Marcos issued an order temporarily suspending the effects of Proclamation 1081 for the purpose of "free and open debate" on the proposed Constitution. On December 23, he postponed the plebiscite. Then on January 7, 1973, General Order No 20 was issued postponing the plebiscite set for January 15 "until further notice." The same General Order suspended the Order of December 17 suspending the effects of Proclamation 1081. But as early as January 1, 1973, according to that day's issue of the *Bulletin Today*, Marcos had announced the issuance of Presidential Decree No 86 organising the so-called Citizens Assemblies. Later, it was announced that these assemblies would be asked to respond to several questions, reference to which were

announced in the newspapers (more specifically, the *Bulletin Today* issues of January 3, 5, 10 and 11). The January 11 announcement included six additional questions, two of which were as follows: (2) Do you approve of the new Constitution?; (3) Do you want a plebiscite to be called to ratify the New Constitution? The returns with respect to the afore-cited six questions were to be reported in a form. Said form contained as annex thereto corresponding "clarificatory" comments. On question No 3, the comments were:

> The vote of the Citizens Assemblies should already be considered the plebiscite of the New Constitution.
>
> If the Citizens Assemblies approve of the New Constitution, then the New Constitution should be deemed ratified.

Although the above information came out in the *Bulletin Today* on January 11, the so-called Citizens Assemblies were supposed to have been held beginning the day before, January 10, up to January 15. In the morning of January 17, one and a half days after the supposed end of the consultation period of the Citizens Assemblies, while the Supreme Court was holding a hearing on the Plebiscite cases, the then Chief Justice received a telephone call from the then Secretary of Justice informing the former that Marcos had signed Proclamation No 1102 which announced the "ratification by the Filipino people of the Constitution proposed by the 1971 Constitutional Convention." The proclamation averred that,

> "WHEREAS, fourteen million nine hundred seventy-six thousand five hundred sixty-one (14,976,561) members of all the Barangays (Citizens Assemblies) voted for the adoption of the proposed Constitution, as against seven hundred forty-three thousand eight hundred sixty-nine (743,869) who voted for its rejection; while on the question as to whether or not the people would still like plebiscite to be called to ratify the New Constitution, fourteen million two hundred ninety-eight thousand eight hundred fourteen (14,298,814) answered that there was no need for a plebiscite and that the vote of the Barangays (Citizens Assemblies) should be considered as a vote in a plebiscite . . ."

In view thereof, Marcos then certified and proclaimed that "the Constitution proposed by the nineteen hundred and seventy-one (1971) Constitutional Convention has been ratified by an overwhelming majority of all the votes cast by the members of all the Barangays (Citizens Assemblies) throughout the Philippines, and has thereby come into effect." Parenthetically, it might be noted that (1) the Citizens Assemblies consultations were held at a time when, under General Order No 5, all "media of communications" were taken over and controlled by the government and (2) the report of the result of the consultations was submitted by the so-called President of the National Association or Federation of Provincial or City Associations (composed of presidents of the Citizens Assemblies of each barrio) and, as observed by Chief Justice Concepcion, this person who was from Pasig, Rizal,

> was not even a member of any barrio council since 1972, so that he could not possibly have been a member on January 17, 1973, of a municipal association of presidents of barrio or ward Citizens Assemblies, much less of a Provincial, City or National Association or Federation of Presidents of any such provincial or city associations.

It is important and relevant to note that the New Constitution that had just been "ratified" contained a very broad proviso which conveniently favoured Mr Marcos and legitimized and even constitutionalized "all proclamations, orders, decrees, instructions, and acts promulgated, issued or done" by him. Naturally, this proviso would include Proclamation 1081 as well as his General Orders implementing the same, such as the proclamation that Marcos "shall govern the nation and direct the operation of the entire Government including all its agencies and instrumentalities in my capacity . . . as such commander-in-chief of all the armed forces of the Philippines." (General Order No 1)

The constitutionality of the martial law proclamation of Mr Marcos could be considered either on the basis of the 1935 Constitution or the 1973 Constitution. Logically speaking, its constitutionality should be determined pursuant to the provisions of the 1935 Constitution because it was the fundamental law existing and effective at the time of its proclamation on September 21, 1972. The 1973 Constitution, on the other hand, would perhaps have relevance after its ratification (assuming that the ratification was valid) because of the previously cited proviso in its Transitory Provisions – Art XVII, Section 3(2) – making the proclamation of Marcos "part of the law of the land." Marcos assumed executive and legislative powers and curtailed that of the Judiciary. Although in General Order No 3, Marcos ordered that the Judiciary "shall continue to function with its present organization and personnel, and shall try and decide in accordance with existing laws all criminal and civil cases", he specified a number of exceptions, first and foremost of which was the following:

> Those involving the validity, legality or constitutionality of any decree, order or act issued, promulgated or performed by me or my duly designated representative pursuant to Proclamation No 1081, dated September 21, 1972.

Was the Proclamation No 1081 constitutional under the 1935 Constitution valid? If not, would the aforementioned proviso in the 1973 Constitution have a retroactive effect which would do away with its initial unconstitutionality?

If we go by judicial pronouncements, we would find no clear-cut answer as to the constitutionality of Proclamation No 1081. Although in the Plebiscite cases, initiated by Charito Planas and others, the Supreme Court took judicial notice of such proclamation, no resolution was

made because the issue had not been explicitly raised and, in the opinion of the Court, it would not be proper to resolve any issue which had not been adequately argued. In subsequent cases concerning the alleged ratification by the Citizens Assemblies (including *Javellana v Executive Secretary*, 50 SCRA 30), no decision on the constitutionality of Proclamation No 1081 was reached because again the said issue was not raised before the Court. The Court dismissed the cases because six of the ten justices voted in favour of valid ratification and only four dissented. Wherefore the Court held that "there is no further judicial obstacle to the New Constitution being considered in force and effect." It was not until the so-called Martial Law cases, decided on September 17, 1974, that the martial law proclamation issue was squarely submitted to the Supreme Court. By then the members thereof had taken their oath of allegiance to the new constitution. In its decision, the Supreme Court, by a vote of six justices in favour and five against, held that whether the proclamation of martial law was justified by the condition in the country at the time was a political question and hence not justiciable. In its majority opinion the Supreme Court held,

> . . . the question of validity of Proclamation No 1081 has been foreclosed by the transitory provision of the 1973 Constitution Art XVII, Sec 3(2) . . .

With the above decision, the more than one decade of the martial law regime of Mr Marcos became inextricably woven into the fabric of our country's history.

Conclusion

The following is an excerpt from the sponsorship speech delivered on October 12, 1986 in plenary session by the writer of this paper, in his capacity as Chairman of the Sponsorship Committee of the 1986 Constitutional Commission.

> Eighty-seven years ago on January 21, 1899 the first Philippine Constitution was promulgated. Three generations and a revolution later, the 1986 Constitutional Commission has drafted a new Constitution which, like the Malolos Constitution, reiterates our commitment to the principles that sovereignty resides in the people, that ours is a representative form of government, that individual rights shall remain inviolable.
>
> Today, we have completed the task of drafting a Constitution which crystallizes the political, social, economic and cultural beliefs and aspirations of the Filipinos of the eighties. At the same time, it is a charter with breadth and elasticity which would allow future generations to respond to challenges which we, of this generation, could not foretell.
>
> As we present the proposed fundamental law, we pray that our humble efforts would pave the way towards the establishment of a renewed constitutional government which we were deprived of since 1972, that these efforts would ensure that the triumph at EDSA so deservingly won by the people shall continue to be enjoyed by us and our posterity for all time, that these efforts would result in the drafting of a democratic Constitution — a Constitution which is the repository of the people's inalienable rights; a Constitution that enshrines people's power and the rule of law; a Constitution which would seek to establish in this fair land a community characterized by moral regeneration, social progress, political stability and economic prosperity; a Constitution that embodies vital living principles that seek to secure for the people a better life founded on security and liberty for all.
>
> Madam President, on behalf of this Commission's Sponsorship Committee, I have the honour to move for the approval of the draft 1986 Constitution.

The response of the Members of the Commission was most heart-warming. The above-cited motion was approved on second reading without objection. □

Down and out in the "Big Apple"

The latest edition of the grocery magazine *Super Marketing* contains a cautionary tale of what can go wrong when environmental initiatives get out of hand.

For several years the city of New York has had a law imposing a compulsory 5 to 10 per cent deposit on drink cans or bottles. This was originally intended to stop people dropping litter, but more recently it has turned into an incentive for people to go around collecting empty bottles to reclaim the deposits.

Keenest of the bottle pickers are the city's many thousands of down-and-outs, who have got into the habit of collecting sackfuls of cans and bottles and turning up at supermarkets to cash them in.

Fed up with having queues of often evil-smelling dossers jamming their aisles waiting for refunds, some supermarket chains have imposed a limit of only 10 bottles a head per day. In response, the dossers — backed by both environmentalists and the New York Attorney General are suing the supermarkets on the grounds that the imposed limit is not only illegal but also allows the drinks industry to cream off an estimated additional $83 m in profits each year in the form of unclaimed deposits.

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Responses to court delays: A Canadian practitioner's perspective

By J David Murphy, Faculty of Law, University of Hong Kong

> "The lawyer, by training, opportunity, and experience is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. The lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be *bona fide* and reasoned."
> The Law Society of Upper Canada, *Professional Conduct Handbook*, Commentary to Rule 11.

This paper offers an overview of recent attempts in one Canadian jurisdiction, the province of Ontario, to address the problem of delays in civil proceedings. It also touches briefly on an important development in criminal procedure brought about by the Canadian Charter of Rights and Freedoms.

A DELAYS IN ONTARIO CIVIL COURTS — RECENT DEVELOPMENTS

For the purposes of this brief overview, only trials in the High Court of Justice, Supreme Court of Ontario will be considered. For a detailed description of the Ontario courts from both an administrative and judicial perspective see the Hon T G Zuber, *Report of the Ontario Courts Inquiry*, 1987 (hereinafter, "Zuber Report") ch 7.

(i) Introduction

Several features of the Ontario civil litigation process which are not found in some other Commonwealth jurisdictions should be noted as these, by their very nature, engender delays in the conduct of actions. The most significant is the right of *viva voce* examination for discovery of all parties adverse in interest. (Rules of Civil Procedure, O Reg 560/84, Rule 30.) As would be expected, examinations for discovery vary in length according to the difficulty of the case, the number of documents produced, the number of parties and the amount at stake. In complex commercial cases discoveries lasting several weeks at a time and spread over two years are not uncommon. Discoveries lead to settlements, but rarely to settlements early in the process.

A plaintiff has a certain amount of control over the progress of the action in so far as he can note the case ready for trial (thus precluding himself from taking any more interlocutory steps) and 60 days thereafter to list the case for trial. (R 48). In theory the defendant is then obliged to complete all pretrial procedures such as discovery and interlocutory motions before the case is reached for trial. Interlocutory motions dealing with such matters as security for costs, production from third parties, and reattendance on discovery are very common.

In practice a defendant is rarely "forced on" if he has any credible excuse for failing to complete pretrial steps. This is not often a practical problem because it presently takes almost two years for a High Court action commenced in Toronto to reach trial after it has been listed for trial. This does not include the one or two years which will have elapsed before the case is listed for trial. In the Supreme Court of Ontario fixed trial dates are rarely granted, so that the majority of litigants "ride the list" until a case is called for trial.

By contrast, fixed trial dates are the rule in all the courts of Quebec, Alberta and British Columbia, the three next largest provinces after Ontario. For some empirical studies of court delays see B Holman, "Pace and Patterns of Civil Litigation Prior to Placement on the Trial List" (1986), 6 Windsor Yearbook of Access to Justice 194 and studies cited therein; The Hon A McEachern, CJBC Sup Ct, "The Statistics of the Vancouver Trial List" (1987), 45 The Advocate 211; and Judge R M Bourassa, "Study of Time Factors Involved in the Disposition of Cases in the Territorial Court, Northwest Territories" (1988), 12 Provincial Judges Journal 20.

An appeal of a High Court decision normally takes nine to twelve months to be reached after transcripts are prepared (a process which itself can take many months depending on the case). The preparation of written factums adds to the appeal a step which is not found in some other Commonwealth jurisdictions.

(ii) Practice as a result of the "New" Rules of Civil Procedure in force January 1, 1985

The Ontario Rules and practice have historically fostered defendants' delaying tactics. The Ontario Rules were revamped in many respects in the early 1980s in a process that included significant input from

bench and bar. Some of the rules changes were, at least in theory, aimed at discouraging slow-moving and unmeritorious claims as well as litigants' own delaying tactics.

Under Rule 20, motions for summary judgment became available to defendants as well as to plaintiffs. In a case where summary judgment is refused, the issues may be narrowed and a speedy trial ordered. Over-zealous use of the procedure is penalised by costs sanctions when the motion is unsuccessful. Despite the new provisions, the numbers of summary judgment motions brought and the degree of success has not varied substantially from the prior practice.

This, despite recent admonitions that a court should approach motions for summary judgment with "less diffidence and more assurance" than under the former rules: *Greenbaum v 619908 Ontario Ltd* (1986), 11 CPC (2d) 26 (Ont HC); and a lawyer or a judge schooled in the tradition that almost any substantial issue was to be determined at trial requires "a material change in attitude" to give appropriate effect to this rule: *209991 Ontario Ltd v CIBC* (1988), 10 WDCP 355 (Ont HC).

Under Rule 48.14, where an action has not been placed on a trial list or terminated by other means within two years after the filing of a statement of defence, a plaintiff is obliged to attend a "status hearing" before a designated judge to show cause why the action should not be dismissed for delay. (The Rule originally read "one year" but, ironically, the backlog of status hearings became too great.) There was some expectation that this provision would lead to a weeding out of slow-moving, ill-conceived and dormant actions. In practice, however, the plaintiff is virtually always given another chance to demonstrate his intention to proceed. Indeed, actions are rarely dismissed under this rule unless the plaintiff persists in failing to appear.

By Rule 49, Ontario adopted a with prejudice "offer to settle" mechanism which can result in costs penalties for either party depending on the actual monetary award at trial. The effect of this change on pretrial settlements has been negligible.

New Rule 57.07 provides for the award of costs personally against solicitors who are responsible for "undue delay" or other transgressions (the so-called "Torquemada" rule). Judges have been slow to make such orders, and the existence of the new provision has had no effect on trial delays. ("Gross negligence or a failure to carry out professional duty to the court" must be demonstrated before such award is justified: *Cini v Micallef* (1987), 60 OR (2d) 584.)

Various other costs provisions are aimed at discouraging delaying tactics. A party examining a non-party for discovery is not entitled to recover the costs of the examination unless the court expressly orders otherwise. (R 31.10(4).) If the court finds an oral examination out of court was improperly conducted or adjourned it may order the costs of the attendant motion forthwith, as well as any costs thrown away and the costs of any continuation of the examination. (R 34.14(2).) A party who cross-examines on an affidavit on any motion is liable for the party and party costs of every adverse party on the motion in respect of the cross-examination, regardless of the outcome of the proceeding, unless the court orders otherwise. (R 39.02(4)(b).) Costs sanctions in interlocutory proceedings have never been a deterrent to delay, however, largely because of the almost invariable practice of deferring the actual award of costs of all stages of the action until the end of trial. For the vast majority of cases that settle before trial, the prospect of assessed costs rarely enters into the picture in practice.

Long-established rules such as the provision for motions to dismiss for want of prosecution (R 24 (now headed "Dismissal of Action for delay")), have never served much practical purpose. Unless a moving party can demonstrate real prejudice, such as the loss of a key witness, an Ontario action will not be dismissed for delay.

Generally, experience since the advent of the 1985 rules shows that the rules designed to expedite actions and prevent delay have had very little effect on established habits, practices and tactics.

(iii) Informal efforts to expedite actions

For some years Ontario has provided for pretrial conferences in High Court actions. (R 50.) An action cannot be listed for trial unless the pretrial conference is held or waived by the parties. The main purpose of this conference, which is held before a judge who will not be the trial judge, is to settle some or all of the issues. Pretrial conferences never achieved much success because of the parties' frequent poor state of preparedness, their reluctance to put full material before the pretrial judge or, too frequently, pretrial judges' reluctance to offer a firm opinion on the parties' chances of success.

In the recent past, however, the process has been adapted and become useful in cumbersome commercial (notably construction contract) actions involving numerous parties. In a rudimentary form of "mini-trial" without real witnesses, solicitors for parties play out the trial by divulging their evidence, challenging the evidence of other parties, and arguing in a summary way. Experts' reports, in particular, play an important role in this process. These "mini-trials" have led to the settlement of numerous cases where the presiding pretrial judge is prepared to offer his reasoned opinion on the apportionment of liability. Realistically, this *ad hoc* development is probably attributable more to counsels collective despair over the anticipated unwieldiness of the trial than to any altruistic motive.

As for the all-too-frequent plethora of interlocutory motions and reattendances on discovery, an informal practice (see also R 37.15.) has recently developed in large commercial cases whereby a party applies for a "designated judge" to be appointed to hear any and all motions in the case. (This innovation is probably an attempt to copy a process now highly formalised in many United States jurisdictions. For a British Columbia perspective, see The Hon Mr Justice L G McKenzie, "Trying to Cope" (1988), 46 The Advocate 265.) As the designated judge becomes familiar with the case, the motions are expedited and the opportunities for delay reduced. The designated judge becomes an informal pretrial judge present throughout the various stages of the action. Inevitably (and this is arguably his most useful role) he

tends to become more critical of one side's case as the action progresses. This procedural trend, which so far has been limited to a relatively few complex cases, has acquired the label "case management" presumably because the designated judge, often on his own initiative, sets out directions and time limits.

(iv) The "Private Court"

Innovative alternative dispute resolution initiatives, beyond the traditional arbitration and mediation models, have been rare in practice in Ontario. Recently, however, a group of senior Ontario litigation lawyers established a "Private Court" as a commercial venture. The advertising associated with it describes it as "a practical ADR system in Ontario". The Private Court makes available a roster of senior practitioners and retired judges to act as "adjudicators". Unlike the High Court, the Private Court makes some attempt to provide adjudicators who have speciality qualifications. The parties enter into a written submission agreement providing, *inter alia,* that they are bound by the Rules of Civil Procedure and that any order, whether interlocutory or final, is an "award" which is enforceable under the *Arbitrations Act.*

As an initial step, a first adjudicator attempts to mediate and, failing a settlement, a conference not unlike the traditional pretrial conference is held though at a much earlier stage. Clients are encouraged to attend these sessions. If a settlement is not achieved a second adjudicator replaces the first and works with the parties to tailor rules of procedure to the case. Discovery and motions are allowed but motions are only made in writing. The second adjudicator conducts the final hearing, leading to an award.

This version of ADR is not a drastic departure from existing Supreme Court practice. Arguably it is merely a private attempt to make the system work the way the rules of practice are supposed to work. Its value, in theory, is a compression of the time span of the proceeding. Unfortunately, in the few months the Private Court has existed in Ontario, it has attracted very little business.

(v) Recent proposals for structural reform

The one-man commission (Zuber Report, op cit) charged with the task of recommending court reforms reported to the Ontario government in 1987. The report observed that the second most common complaint about the Ontario court system, after the cost of litigation, was that a case takes too long to get to trial.

Mr Justice Zuber focused much attention on the diffuse nature of the court system and the lack of central controls — "a fractured mosaic of individual fiefdoms, which has grown historically in response to immediate needs, short-term planning, political and budgetary expediencies . . .". (Zuber Report at 57, quoting Millar and Baar, *Judicial Administration in Canada* 1981 at 5.) Other related concerns were lack of adequate provincial funding, and the implementation of federal and provincial criminal and quasi-criminal legislation without adequate regard for the impact on the existing court structure.

The recommendations of the Zuber Report included the establishment of a Courts Management Committee consisting of chief justices and senior bureaucrats from the Ministry of the Attorney-General, some attempt at centralisation or at least regionalisation of the courts, guidelines as to the workloads expected of judges (some of them virtually meaningless, *viz*: "It is recommmended that all courts conduct all lines of business, with the possible exception of jury trials, throughout the year, while making appropriate accommodations for the convenience of parties, witnesses and counsel"), and the phasing out of an intermediate tier in the court system, the District Court.

The Zuber Report rejected "case management" on the US model (ie placing designated judges "in charge" of the case from the very beginning) in favour of "caseflow management" (for a theoretical approach to this concept see Millar and Baar, *op cit,* ch 8) described as a process in which "the court becomes involved in the general picture of the movement of the cases through the court and intervenes in individual cases when delays have reached unacceptable levels or procedural complexities require untangling in order to permit the case to proceed". (Zuber Report at 187.) Arguably, the rules have for some time provided the means for this.

A large number of litigation practitioners were of the view that the Zuber Report did very little to strike at the causes of delay in the courts. For some, the one glimmer of hope in the Report was the recommendation for a fixed trial date regime, but it has not been adopted.

The Attorney-General of Ontario has recently announced certain court "reforms", the only significant one of which involves the absorption of the District Court into the Supreme Court. (Supreme Court justices were unimpressed by this form of judicial dilution in the name of efficiency and reportedly have consulted counsel as to the constitutionality of the proposed restructuring. See as well D Brodsky, "Public Perceptions of the Judiciary and the Proposed Restructure of the Ontario Court System" (1988), 22 LSUC Gazette 250.) These proposed reforms are widely viewed as politically-inspired at a time of growing public disenchantment with the courts, and cosmetic at best.

Despite ostensible and real attempts at procedural reform in Ontario, delays still plague the system. The natural delaying tendency of parties remains largely unchecked, and explains in large part the unpopularity of various forms of consensual alternative dispute resolution. In the civil courts, many practitioners would lay much of the blame on judges who, inexplicably, have failed to give full force to existing rules. Within the present regime this is the only way to condition litigants and litigators to streamline their own processes.

Cynical lawyers protest that the current rules of practice, with their roots in the nineteenth century, are no longer capable of surviving in the social and economic system of today. The alternative for them must inevitably be a departure from the adversarial system in favour of a mandatory inquisitorial format in which a much larger number of adjudicators drawn from the ranks of the bar, armed with investigatory powers of production and discovery, conduct the case *ab initio,* finding the facts, applying the legal principles, and determining the

matter in a summary and timely way.

B DELAYS IN THE CRIMINAL COURTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

(i) Introduction

Delays in Canadian criminal courts, particularly in the larger urban areas, have become acute. In parts of Ontario the Provincial Court (Criminal Division) is setting trial dates 12 to 14 months in the future regardless of the anticipated length of trial. (Zuber Report at 54; "Reports on the Administration of Justice in Ontario on the Opening of the Courts for 1988", (1989), 23 LSUC Gazette 4.)

The institutional delays already inherent in the system are compounded by the common practice of granting successive adjournments in criminal court. (See generally D Wilson, "Delays in the Criminal Justice System" (1987) 8 Canadian Criminology Forum 116; MD Walker, "Congestion and Delay in the Provincial Court (Criminal Division)" (1984), 42 UTFLR 82.) In Canada the preliminary inquiry is thought to be a vital part of an accused's rights. However it has also been perceived as "an unnecessary process which not only delays the conclusion of the case, but also gives an accused two full hearings at enormous expense to the public". (Zuber Report at 55.) Some criminal lawyers argue that an improved system of Crown disclosure would eliminate the need for a preliminary inquiry with its attendant delays.

A major development affecting criminal trials occurred with the coming into force in 1982 of the Canadian Charter of Rights and Freedoms (the "Charter") (Part I of the *Constitution Act, 1982* enacted by the *Canada Act 1982* (UK) c 11, proclaimed in force April 17, 1982 (the Canadian "repatriation of the Constitution")). Its key provisions in this context are these:

> 11. Any person charged with an offence has the right
> . . .
> (b) to be tried within a reasonable time;
> . . .
>
> 24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Subsection 11(b) of the Charter has rapidly become a weapon of defence counsel and has given rise to a large volume of applications, either to stay a prosecution or to quash the indictment. (See generally, G Garton, "The Canadian Charter of Rights and Freedoms, s 11(b): The Relevance of Pre-Charge Delay in Assessing the Right to Trial Within a Reasonable Time" (1984), 46 Nfld & PEI R 177; Beaudoin and Ratushny (eds), *The Canadian Charter of Rights and Freedoms* (2nd) 1989, ch 13; The Hon D McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms* (2nd) 1989 ch 12; Laskin et al (eds), *The Canadian Charter of Rights and Freedoms — Annotated* 1989 s 270010 ff.) In six Ontario judicial districts alone, 282 prosecutions were stayed under this Charter provision in 1988. This prompted the Chief Justice of Ontario to comment, "I cannot think of anything more futile and likely to bring the justice system into disrespect with the public than going to all the lengths of investigating and prosecuting a crime, and then having to release the accused because the Government has not provided the resources to determine his guilt or innocence". ((1989), 23 LSUC Gazette 5.)

(ii) Recent cases in provincial courts

A review of recent criminal cases reveals that there is still uncertainty in the application of the Charter provision. The factors to be considered by the court in the exercise of its discretion, and the relative weight to be given them, is not yet settled.

Many criminal courts have required a showing of likelihood or probability of prejudice to the accused in the conduct of his defence, as a result of the delay. *R v Anderson* (1987), 64 Sask R 245 (Sask QB); *R v Layton* (1987), 62 Sask R 267 (Sask QB); *R v Emerson*, unrep CA 83/87 March 23, 1988 (Ont CA). However other courts have expressly rejected the necessity of demonstrating prejudice. (Sask QB). (See, for example, *R v Harris* (1987), 55 Sask R 249.

Other considerations or tests referred to in the recent cases (apart from the actual length of, and reasons for, the delay) include either side's intention to delay *Quebec (Ministre du Travail) c Iron Ore Company of Canada*, [1987] RJQ 1339 (CSQue); *R v Smith*, unrep 80/88 June 1, 1988 Man CA; *R v Brackenbury*, unrep Calgary Appeal No 18632, Alta CA February 1, 1988, timely objection by the accused, *R v Smith*, supra whether the Crown had made adequate explanation for the delay, *R v Asapace* (1987), 58 Sask R 73 (Sask QB) and the relative triviality of the offence. *R v Kays* (1987), 65 Nfld & PEIR 77 (PEICA); *R v Clarke* (1987), 61 Sask R 179 (Sask CA).

In a New Brunswick case (*R v Richard* (1987), 81 NBR (2d) 137 (NBQB.)) an accused was released because a seven month delay in the preparation of transcripts from his preliminary inquiry was said to have caused "inordinate" delay. In a Nova Scotia case (*R v Stewart* (1987) 83 NSR (2d) 204.) there was a similar transcript delay but since it had been caused by an "unusual increase in the crime rate in the judicial district" involved, the delay was excusable. If this is right it produces the startling result that unrelated crimes of others played a role in determining whether the accused would proceed to trial.

The Ontario Court of Appeal in R v Askov ((1987), 22 OAC 299. And see *R v Coughlan* (1987), NBR (2d) 199 (NBCA). 81.) focused on "institutional delay", ie the "lack of institutional resources to meet the demands of the criminal justice system", and refused to discharge the accused as a result of such delay. However, there was no conduct either by the Crown or the accused contributing to the delay, no actual prejudice shown by any accused, and no accused objected to any delay.

It is quite unclear, conceptually, why "lack of institutional resources" should be a factor working against the accused on a section 11(b) application when it is now established (*Rahey v The Queen*, [1987] 1 SCR 588.) that delay for which the judge himself was

responsible will form sufficient basis for a successful application.

In *R v McKenney* (unrep 12/88 Man CA May 13, 1988.) the Manitoba Court of Appeal considered a situation of "inept scheduling of cases" and a magistrate reportedly only willing to sit certain hours. The Charter point was moot as the accused had actually been acquitted but the Court raised the interesting possibility of an action for damages.

(iii) Rahey v The Queen

The Supreme Court of Canada recently considered subsection 11(b) of the Charter in *Rahey v The Queen* ([1987] 1 SCR 588.) In brief, the accused was charged with offences under the *Income Tax Act* and his assets were placed in receivership. After the Crown's case before a provincial court judge had closed, the defence moved for a directed verdict. The defence motion for an order dismissing the charges was brought, not in relation to the time from the laying of the charges to trial, but rather after the provincial court judge had delayed for eleven months his decision on the directed verdict.

A full analysis of the four separate sets of reasons (all of which concluded that a stay was the appropriate relief) is beyond the scope of this paper, as is a thorough review of the subsection 11(b) jurisprudence generally. (For this see Beaudoin and Ratushny, *op cit*, McDonald *op cit*, and JFR Levesque, "Trial Within a Reasonable Time" (1988), 31 Crim LQ 55.) However, a few aspects of the *Rahey* decision should be noted.

For four of the eight Supreme Court Justices the prejudice to the accused to be considered by the court encompassed not just prejudice to his ability to make full answer and defence but also, significantly, the civil consequence of the criminal proceedings, that is, the effect on the accused's life and business: the "overlong subjection to the vexations and vicissitudes of a pending criminal accusation (Lamer, J at 605, quoting A G Amsterdam, "Speedy Criminal Trial: Rights and Remedies" (1975), 27 Stan L Rev 525 at 533.) "These vexations and vicissitudes include stigmatisation of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs and uncertainty as to the outcome and sanction. In my view such forms of prejudice leading to impairment of the security of the person may, in and of themselves, constitute a violation of s 11(b) if allowed to fester overlong." (Lamer, J at 605-6.)

The majority held that a stay of proceedings would be the minimum remedy for an infringement of s 11(b).

Dickson, CJ and Lamer, J adopted a "reasonableness" test balancing the impairment of the accused's interest (which they felt ought not to be subjectively determined, but rather presumed) with three factors: waiver of time periods, the time requirements inherent in the nature of the case, and the limitations to institutional resources.

For Estey and Wilson, JJ prejudice to the accused resulting from the delay was the major factor, particularly in view of this accused's ongoing receivership.

The factors considered by Beetz and LeDain, JJ were whether the delay was *prima facie* unreasonable, having regard to the time requirements of the case; the reasons for the delay taking into account the conduct of, and any waivers by, the parties, the conduct of the court and "unacceptable inadequacy of institutional resources"; and the prejudice caused to the accused.

Beetz and LeDain, JJ balked at any test that would consider the accused's personal circumstances, as this would suggest differential application of the Charter. Dickson, CJ and Lamer, J were prepared to consider the impact on the individual's circumstances but, as indicated, preferred an objective standard rather than placing a burden of proof of "anxiety, stress or stigmatisation" on each accused:

> Neither should the varying degrees of sensitivity between individual accused be the focus of the court's analysis. A subjective approach would not only place a well nigh impossible burden of proof on most accused but might also lead to an unacceptable measure of inequality of treatment. The proper approach, in my view, is to recognise that prejudice underlies the right, while recognising at the same time that actual prejudice need not be, indeed is not, relevant to establishing a violation of s 11(b).

Apart from difficulties that will be caused by the different approaches in the four sets of reasons, the Supreme Court decision in *Rahey* gives little guidance on the type of evidence required on s 11(b) applications, the evidentiary burden, or the vexing question of "inadequacy of institutional resources" as distinct from delay attributable to adversaries or judge.

The upshot of the Charter developments is that in a substantial number of Canadian criminal cases, the liberty of the subject is being determined in a process not dissimilar to a civil motion to dismiss for want of prosecution, a proceeding involving a significant discretionary element. Though the criminal court backlog is often largely attributable to logistical impediments such as inadequate facilities, lack of funding and short court hours, the criminal courts will continue to be engaged in considerations of such questions as how "trivial" was the offence, what is a reasonable length of time for the preparation of preliminary inquiry transcripts, or to what extent has the accused's personal or business life been disrupted by the proceedings, in determining whether the accused will proceed to trial. It may well be the case that this entrenched right has only led to a judicial regime so discretionary that the rights of an accused in any given situation of delay cannot be predicted with any certainty at all. □

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11 *On Law and Justice*, p 11 ff.
12 Muteau, *Du secret professionnel, de son etendue et de la responsabilite qu'il entraine*, Maresq, Paris, 1870, cited Lambert, *Le Secret Professionnel*, Nemesis, Brussels, 1985, p 127.
13 Lambert, ibid.
14 Supra, note 4, point 23 of judgment.
15 *Directives and Norms*, London, Routledge & Kegan Paul, 1968, p 91.
16 *Directives and Norms*, p 83, following Hart.

Charitable attitudes to charity

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This article compares the decision of Chilwell J in Re Pettit *with that of the Court of Appeal in* Alacoque v Roache. *The author had considered the Court of Appeal decision in an earlier article at [1988] NZLJ 335. The problem considered is that of a bequest to a non-existent institution; and the interpretation and application of ss 32 and 61B of the Charitable Trusts Act 1957.*

The decision of Chilwell J, delivered on 11 May 1987, but only recently reported at [1988] 2 NZLR 513, in *Re Pettit* reveals a distinctly generous attitude towards upholding a testamentary gift as charitable by the combined application of sections 61B and 32 of the Charitable Trusts Act 1957. In light of my recent criticisms of the decision of the Court of Appeal in *Alacoque v Roache and others,* delivered almost a year to the day after *Pettit* on 17 May 1988 (see [1988] NZLJ 335), as revealing too conservative an approach, it seems appropriate to make some comments about Chilwell J's more charitable attitude.

Mrs Pettit died in 1977. Under her will, the residue of her estate (valued at $303,000) was to be held upon trust "for the general purposes of the DOCTORS WIDOWS FUND the controlling officers of which may be communicated with through the British Medical Journal which is published by the British Medical Association of Tavistock Square London WC1." There was no existing fund of this name, neither was there evidence of such a fund having existed, nor was there any institution which administered a specific fund known as the Doctors Widows Fund. The executors sought the directions of the Court. The defendants included the Attorney-General representing the Crown as *parens patriae;* the statutory next of kin; and five named institutions, of which four did not appear – the Royal Army Medical Corps Fund, the Society for the Relief of Widows and Orphans of Medical Men, the Cameron Fund Ltd, and the Royal Medical Benevolent Fund – leaving only the Royal Medical Foundation of Epsom College represented. These institutions were named because extensive inquiries had been made in England, and these had indicated that each administered funds for the benefit of doctors' widows. Chilwell J stated the essence of the issue thus (at 516):

> It is common ground that if the bequest fails through inability to identify the fund or because the will does not disclose a general charitable intention or because the statutory cy-pres doctrine cannot be invoked there is an intestacy in regard to residue.

1 The background

Chilwell J made an exhaustive examination of the background of the will, including a review of about 900 extracts from the British Medical Journal from 1915 to 1984, all aimed at discovering the testatrix's true intention. Each of the five named institutions was also subjected to an examination of its history and mode of operation. This background analysis takes up 19 of the 40 pages of the judgment.

2 No specific gift

Chilwell J made the following findings as a result of viewing the background material in the context of various arguments presented by counsel.

a The evidence establishes, on the balance of probabilities, that there did not exist at any relevant time an institution or fund called the Doctors Widows Fund, nor did there exist any institution which administered a specific fund known as the Doctors Widows Fund (at 536).

b That Mrs Pettit purported to refer to an established institution or fund is . . . apparent from . . . the will. The use of the definite article, the references to the controlling offices [sic], to the secretary or other officer appearing to be in charge of the administration and to the discharge of the trustees by a receipt given by the secretary or other office all point to be established institution or fund (at 536).

c [S]uch extrinsic evidence as there is does not support the inference, as a question of probability, that Mrs Pettit intended to bequeath her residuary estate to the Royal Medical Benevolent Fund for its general purposes or any of its purposes or to any of the other institutions referred to in this judgment (at 540)

Chilwell J then put forward, in the light of these findings, his view of the next step (at 540):

> The residuary bequest must fail for uncertainty as to object [by which he means specific named institution or fund] unless in express terms or by necessary implication Mrs Pettit has signified *a clear intention to devote her residuary estate to charitable purposes* – a decision to be taken on a fair interpretation of the whole of the will and codicil and, if that has been established, unless it be established that she had *a general charitable intention* in the sense that, having indicated a particular institution to promote a particular form of charity, she is deemed to have preferred the form of charity to the mode (my emphasis).

Two requirements are thus outlined — a movement from intending a gift to a specific institution to intending a devotion to (charitable) purposes, and a second movement from intending a devotion to (specific charitable) purposes to possessing a general charitable intention.

3 The first movement — from institution to purposes

On the face of the will the gift here was made "for the general purposes of" the named institution. It appears that this was of itself enough for Chilwell J to recharacterise the bequest as one primarily for purposes, rather than for a non-existent institution. This was not, however, expressly stated in the judgment at this point, although later in the context of discussing section 61B of the Charitable Trusts Act 1957 this characterisation is clearly adopted (see at 545 in the judgment, and discussed herein). Nevertheless, if the gift is properly characterised as a gift for purposes, say for the general purposes of doctors' widows, the question at common law (ie excluding statute) boils down to: are these purposes *exclusively charitable*? That is, is it "clear on the face of the gift that the trustees are bound to apply the funds to charitable purposes, and that they are not at liberty to apply the funds to non-charitable purposes"? (H Picarda, *The Law and Practice Relating to Charities,* Butterworths, London, 1979, at 147).

Even had Chilwell J meant to retain the characterisation of the gift as to a named institution which had never existed, creating thus what charity law knows as an initial impossibility, he would have faced the issue of purposes. "The Court in such cases looks at the instrument of gift as a whole to see whether it is possible to gather from the context of the gift (1) that the institution would be [exclusively] charitable if it existed, and (2) that there is a paramount [or general] charitable intention" (Picarda, at 250).

In *Pettit*, then, could the gift for purposes be described as exclusively charitable, as being for the "relief of aged, impotent and poor people", and thus within the Preamble to the Charitable Uses Act 1601? Chilwell J stated that there would thus need to be "by necessary implication a clear intention by Mrs Pettit to make provision for the relief of poverty" (at 541). However, no cases were cited to Chilwell J where a trust, gift or bequest to widows had been considered without more, such as expressions in favour of "aged" widows, or connections with other groups, such as "orphans". His conclusion seemed thus to spell the end for a determination in favour of charity (at 542):

> In my judgment the primary sources in the will, from which it would be justified to draw an inference, do not support the proposition that, by necessary implication, the Court can conclude the presence of a clear intention exclusively to make provision for the relief of poverty in the sense of the relief of some necessity or quasi-necessity.

At this point, Chilwell J discussed and applied section 61B of the Charitable Trusts Act 1957 to remove the need for exclusively charitable purposes. More of this herein, but jumping ahead to page 546 of his judgment we find some most interesting observations.

4 The relationship of section 61B and section 32 — A glimpse of the answer to a problem

It is important to cite Chilwell J in full (at 546):

> There is an extent to which s 61B considerations overlap those in s 32 and vice versa. I confess to have found difficulty in my approach to this case in determining whether it is proper to apply s 61B before or after analysing the general charitable intent issue. The Act does not specify any sequence. This trust was an "imperfect" trust provision from the time of the testatrix's death. Section 61B attached to the trust from then. At law the bequest to an institution which never existed would fail and the bequest would lapse unless there is a general charitable intention which enables it to be applied cy-pres. See 5 *Halsbury's Laws of England* (4th ed) para 644. In New Zealand the Court is required to apply s 32(1) if the case falls within that section; to that extent the section has replaced the cy-pres doctrine. See *Re Palmerston North Halls Trust Board* [1976] 2 NZLR 161. This is such a case and no counsel relied upon the Court's former jurisdiction. The issue of general charitable intent however seems to arise because of the provisions of s 32(3) — at least that is the submission of counsel for the Attorney-General who referred to the *Principles of the Law of Trusts* by Ford and Lee (1983) p 938. See also Bradshaw, *The Law of Charitable Trusts in Australia* (1983) p 135. Section 32(3) directs that s 32(1) shall not operate to cause any property or income to be disposed of as provided in subs (1):
>
> > (a) If in accordance with any rule of law the intended gift thereof would otherwise lapse or fail and the property or income would not be applicable for any other charitable purpose.
>
> There is the rule of law as above stated in *Halsbury*. Because the Doctors Widows Fund never existed as an institution Mrs Pettit's bequest to it would lapse or fail and would not be applicable cy-pres for any other charitable purpose unless Mrs Pettit is attributed with a general charitable intention. If no, then the bequest lapses and the next of kin take. If yes, then s 32(1) applies . . .

Several comments are pertinent, and here I shall make reference to arguments I canvassed in discussing *Alacoque v Roache and others*. First, the dictum to the effect that section 32 has replaced the cy-pres doctrine cannot now be accepted as accurate (see [1988] NZLJ 335). Secondly, on the analysis of Chilwell J cited above, *Pettit* clearly represents (without the application of section 61B) an example of the anomaly I referred to in my earlier paper (see [1988] NZLJ 336) — if section 32 supplants the Court's inherent jurisdiction, "the only situation in which the cy-pres doctrine now applies in New Zealand is where s 32(3) applies to exclude s 32(1) and (2)". I repeat

therefore my earlier question (at 336):

> If we are prepared to allow a scheme in other situations [ie property already "held upon trust", or property "given . . . upon trust" inter vivos, where Somers J suggested the applicability of section 32 in initial impossibility cases] despite the absence of a "general charitable intention", what real justification can there be for effectively retaining this requirement in cases of initial failure in testamentary dispositions?

A key difference can be discerned between *Alacoque* and *Pettit*. In *Alacoque* the gift could not possibly be construed as a gift for purposes. It was a gift to a non-existent institution, which thus lapsed, and could only be upheld by finding a general charitable intention. My essential criticism of that decision centred on the very restrictive approach adopted to this latter question. In *Pettit*, however, the gift (as suggested above) could be construed as a gift for purposes. As such, it might have been possible to avoid the restriction of section 32(3), thus allowing section 32(1) to be applied. Assuming the finding of exclusively charitable purposes, there would be no lapse, and therefore section 32(1) would be applicable without the need to go further and discover a general charitable intention. It should be remembered that "exclusively charitable" is not the same as "general charitable intention". There can be no general charitable intention unless there is exclusive charitableness, but it does not follow that where there is exclusive charitableness there is also a general charitable intention.

Of course, on the facts of *Pettit*, this course of reasoning was not open, since Chilwell J had already found that the purposes were not exclusively charitable. It appears further that this line of reasoning had not occurred to Chilwell J since in the lengthy passage reproduced above he clearly treated the gift, for the purposes of the prima facie applicability of section 32, as a gift to an institution which had never existed.

5 Applying section 61B to save the gift

Section 61B(1) states:

> **61B Inclusion of non-charitable and invalid purposes not to invalidate a trust** – (1) In this section the term "imperfect trust provision" means any trust under which some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust property or any part thereof is by the trust directed or allowed; and includes any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless (if the law permitted and the property was not used as aforesaid) be used for purposes which are non-charitable and invalid.

The section has been the subject of interpretation in the Court of Appeal on two occasions: in *Re Ashton* [1955] NZLR 192 and in *Canterbury Orchestra Trust v Smitham* [1978] 1 NZLR 787. Chilwell J extracted three principles from Turner J's judgment in *Ashton* (at 543):

1. Before the section can be applied the words of the trust, gift or bequest must be demonstrated to have a substantial charitable content.
2. The section must receive a liberal interpretation.
3. The section will apply not merely to cases where the language used is susceptible of comprehending both charitable and non-charitable purposes but also to cases where the language used does not expressly state purposes charitable and non-charitable, but uses such general language that both purposes charitable and purposes non-charitable may be deemed to have been included.

Section 61B appears on its terms to be limited to gifts for purposes. Clearly Chilwell J saw the section in these terms, and for the purposes of its application he interpreted the gift as one for purposes. He discussed both parts of section 61B (at 454):

> Applying the words of the first part of s 61B, is there here a trust which is an imperfect trust provision? The bequest is a purpose trust in the sense that all charitable trusts are purpose trusts: *Attorney-General for New South Wales v Perpetual Trustee Co Ltd* (1940) 63 CLR 209, per Dixon and Evatt J J at p 222. "Charitable purpose" is defined in the Act to mean "every purpose which in accordance with the law of New Zealand is charitable". Given that there is no institution or fund known as the Doctors Widows Fund, and, given compliance with the threshold test of substantial charitable content, in my judgment it follows that a bequest for doctor's widows could at least be deemed to include some non-charitable and invalid as well as some charitable purpose or purposes to or for which an application of the trust property or any part thereof is by the trust allowed. The answer to the question is that Mrs Pettit's bequest is an imperfect trust provision. Alternatively, does the bequest come within the second part of the subsection? Given again that there is no institution or fund known as the Doctors Widows Fund, and, given compliance with the threshold test, it is my judgment that the bequest is a provision declaring the purposes for which the bequest is to be held and applies; it is to be applied for doctors' widows. It could be used exclusively for charitable purposes for the relief of widows or for purposes which are not charitable such as the provision of comforts additional to the relief of need and therefore invalid. The bequest is an imperfect trust provision under the second part of subs (1).

The result of this characterisation of the residuary bequest as an imperfect trust provision was that it was not to be held invalid (section

61B(2)); that the property could be used exclusively for charitable purposes (for the relief of needy or aged widows) (section 61B(3)(a)); and that no holding or application of the residuary estate to or for any non-charitable and invalid purpose could be allowed (section 61B(3)(b)).

At this stage, if we return to the point made at the end of the previous section, we are in a position to say that section 32(1) can be applied without further enquiry. We have a gift, deemed by statute to be exclusively charitable, impracticable to carry out, and in need of a scheme. However, Chilwell J continued with a full-scale discussion of general charitable intention. To this we shall return.

What would have been the result had Chilwell J been unable to construe the residuary bequest as a purpose trust, thus placing the case in the *Alacoque* mould? It is submitted that section 61B would not be available to save the gift. Only a finding of general charitable intention would suffice for cy-pres to apply. It is of note that in 1979, in their *Report on the Charitable Trusts Act 1957*, the Property Law and Equity Reform Committee recommended the enactment of the following new subsection (at 21):

> (1A) Where any property or income is given to any body (whether incorporated or unincorporated), and by reason of the terms of the gift or the constitution of the body or otherwise the donee is restricted as regards the purposes for which the property or income may be used, if those purposes include some that are non-charitable and invalid as well as some charitable purpose or purposes, the provisions of this section shall apply as if the restriction of the purposes arose by reason of a trust created by an imperfect trust provision.

Clearly the enactment of this subsection would save a gift to an existing institution by name, without more, when the institution's purpose or objects comprise both charitable, and non-charitable and invalid purposes. It does not, however, extend to *non-existent* institutions, since the words "the donee" implies the actual existence of the body in question.

6 The second movement: Towards a general charitable intention

It has been suggested that Chilwell J did not need to venture into a discussion of general charitable intention. However, he felt constrained to do so because he was unsure as to which of section 61B or section 32 he ought to apply first, and so devoted much energy to the issue.

The judgment contains an instructive discussion of interpretative approaches to institutional gifts. In the case of gifts to specified charitable institutions which had never existed, "the Court will lean in favour of a general charitable purpose and will accept even a small indication of the testator's intention as sufficient to show a gift for a general charitable purpose and not a particular charitable institution was intended" (at 547). The difficulty in applying the presumption in the instant case was that the Doctors Widows Fund "is not an apparently charitable institution: the implication of exclusive application for charitable purposes is not possible because a fund for the benefit of widows can extend beyond relief from need . . . (at 551-552).

Chilwell J avoided the apparent difficulty by holding that because section 61B had imputed exclusive charitableness to the gift, this also effected "the imputation to Mrs Pettit of a general charitable intent" (at 552), thus avoiding the operation of section 32(3). In reality, of course, this analysis is an example of legal gymnastics at their best. Imagine Mrs Pettit being told the following — your original purposes could clearly be either exclusively charitable or exclusively non-charitable or a mixture of both; so to avoid a problem we decided to interpret them as exclusively charitable; and then to avoid another problem we decided to attribute to you a general charitable intention. All rather odd! Particularly since the first problem was encountered by reading the gift as one for purposes, but the second problem by reading the gift as one for a non-existent institution.

In the end section 32(1) was applied to the $303,000. A scheme was to be prepared and submitted to the Court.

7 Cy-Pres in New Zealand?

After *Pettit* and *Alacoque* we can make the following points.

a It is unclear whether section 32 operates so as to supplant the Court's inherent cy-pres jurisdiction.

b If the inherent jurisdiction no longer exists, then the only situation in which the cy-pres doctrine now applies in New Zealand is where section 32(3) applies to exclude section 32(1) and (2).

c If a gift fails initially because it lacks exclusive charitableness, section 61B may operate to impute exclusive charitableness to it. A gift to which exclusive charitableness is imputed will also, it seems, have a general charitable intention imputed to it to avoid the effect of section 32(3).

In another context, it has recently been suggested that "charity law is riddled with anomalies" (Susan Bright, "Charity and Trusts for the Public Benefit — Time for a Re-think?" [1989] Conv 28). This comment can certainly be applied to the issues with which Chilwell J was forced to grapple in *Pettit*. Time for a re-think? □

Anti-law mentality

To be anti-law is to be anti-social, anti-others. It is, in the truest sense, to be anti-democratic. The anti-law mentality does not favour or defend the freedom of the people. It favours the freedom of the few (the powerful, the clever, the unscrupulous) to exploit the people, who find that as the anti-law mentality grows the strength of the law to protect their rights is gradually eroded. Society needs the strength of law . . . [but not only its coercive power because] law needs to be strong in itself, and this only occurs in virtue of justice. (p 18)

Corman Burke
Authority and Freedom (1988)

Deficiencies in summing up

By John Gibson QC of Wellington

A comment by Richardson J in Tennant's *case has attracted some attention among Counsel who are involved in criminal jury trials. In this article John Gibson QC puts the remarks in context and takes the view that no extra onus is put on counsel than to tactfully draw to the attention of the presiding Judge any perceived deficiency in the summing up at the time. But if it is not perceived until later it can and should be raised on appeal.*

Richardson J in delivering the Court of Appeal's judgment in *R v Tennant* (Richardson, Somers and Casey JJ, [1989] 2 NZLR 271) raised an issue, which was obiter as I read the judgment, as to the duty that counsel has in a criminal trial before a jury to draw to the Judge's attention any deficiencies in the summing up of the Judge. Richardson J put it this way at page 13 of the judgment:

> Before leaving the first point, there is one matter to which we should refer even though it does not directly arise in this case. We were advised at the bar that some defence counsel have taken the view that it is not part of their responsibilities to draw the Judge's attention to any perceived and obvious deficiencies in the directions on the law given to the jury arising from apparent oversight on the Judge's part. That is not a proper position for counsel to take. They are officers of the Court and have a duty to the Court, which in the public interest transcends their other responsibilities, to apprise the Judge of any apparent deficiency in the Judge's directions as to the law. As Viscount Simon, Lord Chancellor observed in *Stirland v Director of Public Prosecutions* [1944] AC 315, 318
>
> > It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal.

See also Adams, *Criminal Law and Practice in New Zealand* paragraphs 3446 to 3451 and Munday, "The Duties of Defence Counsel" (1983) *Criminal Law Review* 703. In so far as *R v Cocks* (1976) 63 Cr App R 79, 82 might suggest otherwise, we are unable to agree (and compare *R v Edwards* (1983), 77 Cr App R).

The real impact of this passage, in my respectful view, is where Richardson J says that counsel must draw to the Judge's attention to ". . . any perceived and obvious deficiencies in the directions on the law given to the jury. . ." that phrase has in mind, it seems to me, the prerequisite that counsel perceives the deficiency.

Wise and tactful

In my view if counsel in a criminal jury trial perceive a deficiency it is wise to draw it to the Judge's attention, with tact. Some Judges ask counsel if they have any comment they wish to make. Even such request from the Judge may not overcome the situation Richardson J has in mind it seems to me, with respect, as in a very long summing up the deficiency may not be readily perceived. It is only later when the unfavourable jury verdict needs consideration that any relevant issue which seems to have merit on appeal may be brought forward as part of an appeal.

At that point counsel may well seize on a deficiency which, with thought and discussion, has become more apparent than it did at the time of the actual summing up. For example, if more than one counsel appears for an accused one should keep a full note of the summing up – that may lead to discussion and reconsideration of the detail of the summing up. Having said that, in my view counsel should always keep adequate notes of the summing up in case some issue later arises about it.

The long established practice in New Zealand has been, I think, to follow *Stirland's* case. At page 318 of that case Viscount Simon also said:

> The object of British law, whether civil or criminal, is to secure, as far as possible, that justice is done according to law, and, if there is a substantial reason for allowing a criminal appeal, the objection at the point now taken was not taken by counsel at the trial is not necessarily conclusive.

With respect, I agree. There are many examples, some quoted in texts on the criminal law in New Zealand, where the failure to take the point or to inadequately take a point may not help in the argument on appeal. I think it wrong for counsel to try and preserve a point for appeal in the hope that the Appellate Court will upset the jury's decision on appeal. As I say, in my view one should raise the issue with the Judge, with tact, and, if necessary, firmness. If the Judge then elects not to take the point raised, then on appeal it becomes an important issue.

Discussion within profession

Tennant's case has given rise to discussion in the legal profession, and in particular among those who are involved with criminal jury trials, either prosecuting or defending. Does it mean that counsel must raise issues with the Judge that the Judge has not referred to in the summing up. Surely not. That may mean long discussion between counsel and Judge perhaps before the jury as to all sorts of points which the Judge may have considered but considered unnecessary to refer to in summing up in a particular case. For example, an issue as to lies and a summing up as to lies does not occur in every case where there is a conflict of evidence between the prosecution and defence and it is unlikely that in such conflict the Judge would not have considered for the purpose of his summing up whether a direction as to lies was appropriate or not.

I think the views expressed in *Tennant* are no more than a

restatement of the position which in practice has occurred in New Zealand for some years.

As another example of an oversight by counsel as to a summing up point I refer to *The Queen v Brookes and Others* (CA373/88; unreported; judgment 15 February 1989). Again the judgment of the Court was delivered by Richardson J. An issue of self defence and its onus of proof arose in the appeal. At page 6 of the judgment Richardson J said:

> We were advised at the Bar that all counsel referred to the onus of proof in relation to self defence. Regrettably it was not picked up by the Judge when directing the jury and was not noticed by counsel and drawn to the Judge's attention at the end of the summing up.

In *Brookes* a new trial was ordered. If one reads *Tennant* and *Brookes* as to the judgments of Richardson J then I think nothing new has emanated from the Court of Appeal's decision in *Tennant's* case as may have been suggested or some counsel may perceive.

There is another aspect of *Tennant's* case which may have had a greater effect if the issue had been taken at trial. It seems that the trial Judge asked Tennant at the conclusion of his evidence some questions. Amongst other questions these were asked:

Q. What about Smiler, when did you last speak to him?
A. Um, I've seen him at the visiting room at Mt Crawford.
Q. I just said when did you last speak to him, how long ago?
A. January or some time.
Q. This year?
A. Mm.

Submissions were developed by counsel for the appellant that the first answer was damaging to Tennant and that the jury may have inferred Tennant was putting pressure on the witness not to give evidence. Richardson J as to the questions said:

> As asked, the question did not invite the answer that was given and which indeed could hardly have been expected, and given the robust common sense of jurors we are satisfied that the submission read far too much into the question and answer and that there was no risk of unfairness arising from this evidence. (page 8)

I may not disagree with Richardson J as to the point on appeal, but the questions raise an even more important issue. The answer to the question suggests that there was a meeting between the accused and another at Mt Crawford. The robust common sense of jurors in Wellington would suggest to the majority that the meeting took place at a venue at Mt Crawford. It is well known in the greater Wellington area that there is a jail at Mt Crawford. The robust juror may therefore decide using his or her common sense that these two men met at a jail at Mt Crawford. That could mean:

(a) That Tennant was in custody there, or,
(b) Smiler, the witness, was in custody there, or,
(c) they were both in custody there, or,
(d) that both were there visiting some other inmate who was in custody, or
(e) that there is some other explanation, which I find hard to conceive.

However the alternatives are looked at they suggest communication at a prison. Generally it would be wrong to say in the course of a trial that an accused has been in prison for some offence.

Discharge of jury

The trial Judge did not intend to elicit the answer given. There is precedent, however, where such an answer is given, inadvertently, for the jury to be discharged because of the obvious prejudice to an accused. In *R v Schipper and Fieret* [1961] NZLR 852, a judgment of McGregor J, an application was made to discharge a jury. A police constable, when being examined by the Crown Prosecutor in regard to taking the prisoner to a police car, to a quite innocuous question inadvertently answered something to the effect that he had met the accused on previous occasions and while not a reference by the Constable to any previous conviction as McGregor J put it ". . . it might be difficult to know in what way the jury would construe the remark, and it might be prejudicial to the accused". (Page 853). McGregor J said at page 854:

> In the present case, as I see it, the remark made by the constable does not refer in itself to the prisoner's previous record, but it does seem to me to be a remark of that kind inadvertently made from the witness box, and it seems to me impossible to decide the effect that that piece of evidence may have had on the minds of the collection of jurors. The learned Crown Prosecutor is not in any way to blame in the matter, because he asked a question that was obviously directed to another answer which had been given in the depositions, and this answer on the part of the police constable was entirely unanticipated, and it would seem to me could not have been anticipated. But the fact that it was made by a constable in his capacity as constable, and that he, a constable, had met the accused on previous occasions, is, it seems to me, open to the interpretation by the jury that he had met the accused in the course of his duties, and that might well be a reference to something in the accused's previous record, or that at least the accused had been the subject of police investigation on a previous occasion, and that that might well be prejudicial to the accused.

McGregor J discharged the jury, correctly in my view with respect. It is not the only occasion where such an incident has arisen and *Schipper and Fieret* has been authority for the discharge of the jury.

However robust and well intentioned and laden with common sense a juror may be, reference to previous involvement with the Police or a prison setting in my view generally must be prejudicial to an accused and, if prejudicial, in my submission it may be unfair to an accused. One could not lead evidence of previous convictions. In my view there should be no evidence before a jury, however inadvertently it is advanced, which has an equal or similarly prejudicial effect. □

Wills — ensuring liabilities are paid out of the right assets

By R T Fenton, of Auckland

Debt liability within an estate affecting assets in varying ways, can have consequences when the separate assets are bequeathed to different individuals. Consequently, this article points out, drafting a will needs to take account of a testator's liabilities as well as the assets.

The technical rules for the payment of estate debts out of particular assets can sometimes have unexpected practical consequences for the beneficiaries involved. Take the not uncommon example where the testator leaves a trading entity, such as a sports shop, to a son, and leaves his house to his daughter. A term loan which funded the shop is secured on the testator's house: it is to be paid out of proceeds from the realisation of the house, or is it to follow the business so that it becomes the responsibility of the son receiving the shop? This type of problem emphasises how the incidence of debt liability, within the estate, may have a dramatic effect on the general scheme of the will. Most wills contain the time honoured direction to pay the testator's "just debts, funeral and testamentary expenses", but this useful clause will not invariably express the testator's wishes. This note is intended to provide a very brief outline of the rules applicable, to emphasise certain drafting pitfalls, it does not extend to a discussion of the order of assets to be sold to satisfy pecuniary legacies (including rights as to marshalling between beneficiaries) but attempts to set out the general order of assets to be applied to pay debts and, in a broad way, answers the question as to when debt X is to follow asset Y upon distribution.

Order of application of assets

For hundreds of years testators, or their legal advisers, have failed to make express provision for debts, and arbitrary rules have developed as to the order of application of assets. The rules which had evolved by the late eighteenth centry (*Donne v Lewis* (1787) 2 Bro CC 257 at 263; 29 ER 142 at 144 per Lord Thurlow LC; *Manning v Spooner* (1796) 3 Ves Jun 115 at 118; 30 ER 923 at 924 per Sir Pepper Arden MR; *Harmood v Oglander* (1803) 8 Ves Jun 106 at 124, 125; 32 ER 293 at 300 per Lord Eldon LC) remain generally applicable in New Zealand. Assets fall into four fundamental categories and are applied to pay debts in the following order:

(a) Generally personalty not bequeathed (unless exonerated expressly or by plain implication);
(b) Realty specifically devised or ordered to be sold for the purposes of paying debts (but where the personalty has not been exonerated);
(c) Real property "descended" (ie, not devised in New Zealand, generally property subject to intestacy).
(d) Property devised, bequeathed or otherwise subject to testamentary disposition (this includes residuary devises and personalty).

Thus, personalty not bequeathed comes first, unless exonerated; property devised or bequeathed comes last and, in between, comes property devised for the purpose of paying debts and realty not devised. Subtle refinements to this basic structure have developed; for example, personalty specifically charged with the payment of debts is to be applied before realty so charged; the assets comprising a "mixed fund" created for the purpose of paying debts will be applied rateably whether the assets are personalty or realty. The order of application of property devised, bequeathed or otherwise subject to testamentary disposition (category (d) above) is as follows: real estate devised but charged with the payment of debts (as to the distinction between a "mere" charge and a specific gift for the purpose of paying debts, see *Donne v Lewis, Manning v Spooner and Harmood v Oglander*, supra); general pecuniary legacies; specific and residuary devises and specified bequests not charged with payment of debts (which on a deficiency abate rateably; s 37 of the Administration Act 1969) and appointments by will pursuant to general powers of appointment of real or personal property (for detail

see Garrow and Alston, *Law of Wills and Administration* (1984 5 ed pp 587-604). Finally, as a gift taking effect upon death, comes property subject to a donatio mortis causa. This scheme has been replaced in England by the statutory order imposed under the Administration of Estates Act 1925 (UK) but, in general, survives in New Zealand. In particular, in New Zealand the personal estate remains primarily liable for payment of debts (*Public Trustee v Weir* [1929] NZLR 800 at 804 per Smith J; *Re Winters Dcd* [1930] GLR 23; *Re Rowling Dcd* [1942] NZLR 88 at 102 per Myers CJ; *Official Assignee v Crooks* [1986] 2 NZLR 322 per Henry J).

Varying the order

This structure poses difficulties for the New Zealand draftsman. For example, the testator may wish to charge a liability, such as an unsecured trading account, upon specific realty, such as a farm. The will must displace the established order which would otherwise apply, ie that realty follows residual personalty. This leads to a further refinement which, without careful drafting, may frustrate the testator's design. According to a long line of authority it seems the will must not only charge the asset involved but, either expressly or by implication, exonerate the residual personalty (*Watson v Brickwood* (1804) 9 Ves June 447; 32 ER 675; *Tower v Rous* (1811) 18 Ves Jun 132; 34 ER 267; *Kilford v Blarney* (1886) 31 Ch D 56; *Re Smith, Smith v Smith* [1913] 2 Ch 216; *Official Assignee v Crooks,* supra, at 324-325 per Henry J). The words "I direct my debts to be paid exclusively out of real estate" are sufficient exoneration of the personal estate; *Forrest v Prescott* (1870) 10 LR Eq. 545 at 549 per Sir Richard Malins VC. The rule does not apply where specific personalty is charged with debts, in such a case the specific personal estate will, without more, become the primary fund (*Trott v Buchanan* (1884) 28 Ch D 446). Essentially, the existence of a charge (ie, the allocation of liability for the payment of a debt) upon realty without exoneration of residual personalty merely places the property charged in first place in category (d) above, ie, in the absence of property coming within categories (b) and (c) it establishes an auxiliary fund should the residual personalty prove insufficient (*Donne v Lewis*, supra). While this rule has been criticised by Lord Halsbury LC in *Kilford v Blarney* (1886) 31 Ch D 56 at 61, before the enactment of the English statutory rules, the New Zealand draftsman should frame specific provisions as to debts not only to charge the asset involved but to fix its precise order of priority ie, generally, to exonerate preceding classes particularly the residual personalty.

Assets already subject to liabilities

Where an asset is subject to an existing mortgage or charge then, by the operation of statutory rules, the liability follows the asset on which it is charged. First enacted in England by the Real Estate Charges Act of 1854 (Locke King's Acts), the rule is that the asset so charged is primarily liable unless "contrary intention" is established (for the history of the early legislation see *Official Assignee v Crooks,* supra, 324-325 per Henry J). Originally applicable in New Zealand only to mortgages over real property (s 149 of the Property Law Act 1952), since 1 January 1971 this rule applies to "interest[s] in property . . . charged with the payment of money, whether by way of mortgage, charge, or otherwise . . ." (s 34 of the Administration Act 1969). Section 149 of the Property Law Act 1952 continues to govern wills made before 1 January 1971, s 34 of the Administration Act 1969 applies to all wills made after that date. Section 34 does not apply to personal chattels passing to the testator's spouse, and in *Official Assignee v Crooks*, supra, Henry J expressed doubt as to whether it applies to intestate estates.

If the testator wishes to vary the rule that the asset charged is primarily liable then "contrary or other intention" must be expressed by "will, deed or other document" (s 34(1)). Nor is a "contrary intention" deemed to be signified by a general direction (ie, to pay "just debts, funeral and testamentary expenses") to pay debts out of the testator's personal or residuary estate (s 34(2)(a)). "Contrary intention" is not established by proof that the testator has earmarked certain monies for payments of this debts during his life, there must be an intention as to how the charge is *to be borne as between the parties entitled under the will after his death* (*Re Horton* [1969] NZLR 598 at 601 per Richmond J). For instance, a letter enclosing a cheque giving instructions to solicitors that the cheque was to be applied in payment of a certain debt, was held not to constitute "contrary intention" since the instructions were revocable and the letter was not written in contemplation of death; *Re Wakefield, Gordon v Wakefield* [1943] 2 All ER 29. One question is whether the documents relied upon to establish "contrary intention" were intended to rearrange the incidence of debt liability between beneficiaries, nor between creditors and the estate: as put by Richmond J in *Re Horton*, supra, 602 whether ". . . the testator is dealing with the incidence of his debts from the point of view of the internal administration of his estate, rather than merely making provision for payment, as between himself (or his trustee) and his creditors".

These sections become particularly important when the asset has been used as security for a debt arising from a quite separate undertaking; for example, the term loan on the sports shop left to the son but secured on the house property left to the daughter. Once again, the burden rests on the draftsman to ensure that, if necessary, the testator's "contrary intention" is sufficiently declared to prevent the otherwise inexorable application of the statutory provisions.

Life/Endowment policies

Problems sometimes arise as to the treatment of the proceeds of life policies collaterally secured over assets subject to a charge. Are the proceeds to be applied in payment of the mortgage over the asset collaterally secured by the policy? The normal course of events is for the proceeds to be paid to the executor for payment of the testator's liabilities in general, but the mortgage or collateral deed may contain a clause requiring or empowering the mortgagee to apply the moneys in payment of the mortgage. In *Re Murray* [1964] NZLR 627 McGregor J held that

such a clause in a collateral deed constituted a "contrary intention" for the purpose of s 149 of the Property Law Act 1952 so that the proceeds of life policies were properly applied in payment of mortgages secured on land devised to a beneficiary who was accordingly held to be entitled to take the property free of the mortgage debt. In *Official Assignee v Crooks* Henry J found that a clause in a mortgage over a house and collaterally secured over a life policy empowering the mortgagee/insurance company to apply the proceeds of the policy in payment of the mortgage signified a "contrary intention" for the purposes of s 34 of the Administration Act 1969, although the decision was based on other grounds as well. In contrast in *Re Horton*, supra, Richmond J held that a direction in the policy itself to apply the proceeds of an endowment policy, which was to fall due in 1976, in payment of two mortgages did not amount to "contrary intention" for the purposes of s 149 of the Property Law Act 1952. Richmond J was unable to find any intention by the testator as to how the mortgage debt should be borne as between the beneficiaries under the will. The line is a fine one, but, while each case depends, as the judges are at pains to point out (*Re Murray*, supra, at 635 per McGregor J), upon its individual circumstances, it seems that directions relating to endowment policies tend to fall on one side while those relating to life policies, which inevitably contemplate disposition upon death, fall on the other. The safe course is to include a clear expression of contrary intention in the will itself although the draftsman should be aware of any direction contained in another document so as to ensure that the two do not conflict.

Unsecured trade debts

Unsecured trade liabilities present a difficulty if it is the testator's wish that the beneficiary of a business assume responsibility for its debts. Care must be taken to ensure that the liabilities are not trapped by the general direction to the trustees to pay "just debts, funeral and testamentary expenses". There is authority that the bequest of a business includes trade liabilities where it is apparent from the will that the bequest is of the business "lock, stock and barrel" ie, of the business as a trading entity complete with liabilities (eg, *Re White, McCann v Hull* [1958] Ch 762 at 773; [1958] 1 All ER 379 at 385 per Wynn-Parry J; *Re Rhagg* [1938] Ch 828; Williams, *Law Relating to Wills* (1980 5 ed) vol 1 at 513; cf *Re Jacobson Dcd* [1970] VLR 180). But the position cannot be regarded as wholly settled (see *Re White, McCann v Hull*, supra, 384 per Wynn-Parry J) and, in any event, involves a question of construction of the individual will involved (Halsbury's *Laws of England* (1984 4 ed) vol 50 at 287). The will should leave the position indisputably clear.

Example

To develop the sports shop analogy, let it be assumed that in addition to the shop, and his house, the testator leaves a residuary personal estate (ie, not specifically bequeathed) totalling $100,000.00. The shop is to be left to his son, the house to his daughter and the balance of his estate divided among his grandchildren. If the will contains nothing more than a general direction to pay testator's "just debts, funeral and testamentary expenses", and the debts are not secured on any particular asset, the unsecured debts, subject to the question of trade debts, will be paid pursuant to this direction. If secured however, the debts will follow the security: this means that responsibility for the term loan secured on the house, even if raised to finance the shop will, in the absence of "contrary intention", pass to the daughter (not the son) pursuant to s 34 of the Administration Act 1969. If the testator wishes the obligation to repay certain unsecured debts to pass to the daughter as devisee of the house, it is not enough for the will to simply charge the house: it must contain a declaration of intention to exonerate the personalty. Absence of exoneration will simply leave the house next in line in case the residual personal estate is insufficient. If the testator wishes the unsecured trade liabilities of the shop to pass to the son, then, given the state of the authorities, the testator's direction should be expressed in clear terms. If the house for some reason does not pass under the will, for example, it is subject to intestacy so that it "descends", then it may be resorted to before any other land devised unless the will contains a direction appropriately worded (*Re Starr* [1926] GLR 465). Finally, if the testator wishes to leave specific personal property, such as a boat, to a son, then this ranks almost last (equally with real property not charged with debts) subject only to general appointments by will and property given by way of donatio mortis causa. If the assets coming within the previous categories are insufficient, property specifically devised or bequeathed abates proportionately (s 37 of the Administration Act 1969).

Conclusion

The rules set out do not, of course, affect the liability of the estate of creditors, and relate only to the distribution of liability within the estate, ie between beneficiaries. A will should be drafted not only with regard to the testator's assets but also his liabilities. In many wills the normal direction to pay "just debts, funeral and testamentary expenses" will give effect to the testator's intent; but this is not true in every instance. At all points the arbitrary rules may be altered by adequate direction in the will: express words, or a plain implication of that intention (*Watson v Brickwood*, supra, 453, 677 per Sir William Grant MR), will secure the testator's intention. □

Obituary

D A S Ward, CMG
1909-1989

Mr Denzil Anthony Seaver Ward, a former Chief Parliamentary Counsel, died in Wellington Hospital on 17 September after a short illness. He was 80.

Born in Nelson, the youngest son of Mr Louis E Ward (a former Secretary of the Geographic Board and author of *Early Wellington*), Denzil Ward was educated at Christs College and the Cathedral Grammar School, and at Victoria University of Wellington. He graduated BA in 1928.

A rugby enthusiast from his grammar school days, a leg injury suffered while playing for the University Club early in his law studies put him in hospital for four years. He persevered as an extramural student until his discharge, finally graduating in 1938 and being admitted as a barrister and solicitor the same year. Having had some office experience with the Wellington firm of Findlay & Moir from 1926 to 1931, in 1937 he joined the staff of Izard Weston Stevenson & Castle, on the conveyancing side, and quickly made his mark as a competent draftsman. His contemporaries in the firm then included the late W J Kemp, J H von Dadelszen and R W Baird.

In 1942 he joined the Law Drafting Office, as it was then called, and embarked with characteristic drive and responsibility upon an exacting career under the friendly eye of that master, the late Mr James Christie. In 1953 Mr Ward spent several months in the Parliamentary Counsel Office, Whitehall, studying the English approach to a legislative programme for the House of Commons. Some Wellington practitioners may remember Mr Terence Skemp, CB, QC who spent a corresponding period with the Law Drafting Office upon an exchange basis. Denzil Ward became Chief Parliamentary Counsel in 1958.

The clarity of statutory language was always his touchstone. That allied with the professional preparation of Parliamentary bills were goals the need for which Denzil Ward sought always to emphasise to the profession at large. They were the topics which he stressed in articles he contributed to volumes 1 and 3 of the *Otago Law Review* (1 *Otago Law Review* 294 [1968], 3 *Otago Law Review* 529 [1976]). He stimulated debate also on the judicial interpretation of statutes in a paper he delivered at the 12th New Zealand Law Conference of 1963 [1963] NZLJ 293; and the interpretation of statutes was amongst the subjects he taught at Victoria University – between 1944 and 1955. His name is particularly associated with the drafting (and the professional debate over two years before its passing) of the Crimes Act 1961 – the first comprehensive consolidation of the Criminal Code since 1893; and with the metamorphosis of the bill that became the Parliamentary Commissioner (Ombudsman) Act 1962.

Collaterally with his parliamentary duties Denzil Ward served on the former Law Reform Commission, the Public and Administrative Law Reform Committee, and the Criminal Law Reform Committee – But outside these professional interests he found time to serve on (and to become chairman of) two Maori Educational Trusts: The Otaki and Porirua Trusts Board and the Papawai and Kaikokirikiri Trusts Board. And he was vice-patron of the Legal Research Foundation from 1965 to 1968.

Made CMG in 1967 he retired the following year as head of the drafting staff and became counsel to the Law Drafting Office and compiler of statutes until his final retirement in 1974, when he practised privately as parliamentary counsel for a few years.

A talent for singing which appeared in early boyhood when he sang in the choir of St John's Cathedral, Napier, developed while he was at the Cathedral Grammar School where he became the leading boy soprano in the Anglican Cathedral Choir at Christchurch. His love of music, especially of choral singing, remained with him to the very last. It led to a close association with the Royal Wellington Choral Union and the Wellington Schola Cantorum; and he was an original member of the Alex Lindsay String Orchestra Foundation. He seldom missed a New Zealand Symphony concert until a few years ago.

He is survived by his wife and three daughters. An elder brother, the late Basil Ward, became a well known architect in England, and Professor of Architecture at the Royal College of Art.

P A C

Correspondence

Sir

When recently reading Anthony Hartley's "A 19th-century Thatcherite" in the October issue of the *New Zealand Law Journal* I noted an error on page 354. The article examines aspects of the political and social philosophy of James Fitzjames Stephen. In referring to J F Stephen's puritanical temperament the article cites an incident in which Stephen is supposed to have ". . . once smoked a cigar and found it so delicious that he never smoked again". My quote from Hartley's article is itself a quote from Leslie Stephen's, *The Life of James Fitzjames Stephen* (Smith, Elder & Co, London 1895, p 61). However, the person to whom Leslie Stephen is referring is Sir James Stephen, the father of Fitzjames, who was a member of the evangelical group known as the "Clapham sect", and not James Fitzjames Stephen himself.

In case you are wondering how I came by this knowledge, my LLM thesis was entitled "Law, Power, and Morality: Roots of the Debate over the Legal Enforcement of Morality with particular reference to the Influence of Hobbes on the Ideas of James Fitzjames Stephen".

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