BOOK REVIEWS

LOCAL GOVERNMENT LAW IN NEW ZEALAND, by K.A. Palmer. Wellington. Sweet & Maxwell, 1978. 346 pp. including index and appendices. Hardback. New Zealand price $38.50. (Also available in paperback).

At last a book that covers the rather complex and developing area of local government law in New Zealand. In the past, legal practitioners, local authority members, law students and others interested in local government law, had no specific text relating to New Zealand circumstances to which they could turn to find an answer to a problem. The amount of legislation enacted annually in New Zealand has accelerated rapidly and has presented research problems to many, including those engaged in the field of local government. This book is designed to present a consolidated overview of the law as it presently stands in this area. The success of this book is a result of the author's deep knowledge of the subject coupled with the manner in which he shows the development of the law by examining the appropriate New Zealand and overseas statutes and case law. This book covers every conceivable aspect of local government law, with one major exception, that of local authorities' involvement in planning and the related law. However, this subject is included in a companion book by the author entitled *Planning Law in New Zealand* (1977).

Dr. Palmer's work contains the most comprehensive statement of the law relating to local government in New Zealand from its inception to 1 July 1978. In the thirteen chapters one finds a thorough examination of the legal nature of local authorities. Topics covered include the election process, council and committee procedures and duties, employment of officers and staff, contracts and liens claims, financial administration and revenues, land valuation rating, bylaws, working of local bodies including safety, health and development functions. In addition, the functions of various ad hoc bodies such as the Electric Power, Harbour, Education and Hospital Boards are separately considered.

One can select any of these topics and find the necessary case law, the relevant statutory provisions and principles of law expressed

clearly and concisely. For example, the chapter on elections, electors and polls (ch. 2), covers the nature of electoral areas and the establishment of electors' rolls, the procedure and conduct of elections and polls, and the law concerning election petitions. For those concerned with the conduct of elections, the author sets out the relevant sections of the Local Elections and Polls Act 1976 which deal with the nomination of candidates, the voting procedure and the use of special votes, voting dates and the use of alternative voting systems, e.g. postal votes, and finally the procedures for counting the votes, considering recounts and the unfortunate vacancy which could arise through the death or resignation of a candidate, nomination of insufficient candidates or disqualification. This chapter is so detailed that one is also given the relevant sections of the Local Elections and Polls Act 1976 which consider the nature of offences relating to illegal nominations, interfering with votes, influencing voters, bribery and infringements of secrecy. In all, no stone is left unturned. This chapter provides a sample of the quality of research embodied in this book.

All cases cited, including those appearing in the footnotes, have been included in the comprehensive table of cases found at the beginning of the book. The table of statutes has also been compiled with thoroughness. For those faced with frequent problems involving local government legislation they will find the author's tabulation of considerable help.

Those concerned with organizing local body elections, or installing mayors or members into office, or administering the Rating Act 1967, or seeking a loan from the Local Authorities Loan Board will be relieved to find that in the first appendix there are contained all the statutory forms required when engaging in such business. In the second appendix, the author has included a selection of the most important statutory duties and prescribed conditions which must be adhered to by those seeking contracts with local authorities, and by those local authorities which find their day-to-day work falling within the ambit of the Reserves Act 1977. The book also contains a detailed index. These features all combine to make it a most useful reference source.

As noted earlier, this is the first New Zealand text book devoted totally to the area of local government law — an area which is developing most rapidly. It is said that the institutions and systems of local government occupy a continuing role in our society, and a role which is likely to expand in step with population growth and changing expectations. It is the measure of the author's ability that he has succeeded in covering such a vast subject of law so simply and in such great depth. Without a doubt this book has gone a long way towards

eliminating the difficulties of understanding and interpreting local government issues and problems. It is highly recommended reading for all students of local government law and for all interested in this topical area.

MARK N.S. TOLICH

BEYOND REASONABLE DOUBT?, by D.A. Yallop. Auckland. Hodder & Stoughton, 1978. Xii and 363 pp. including appendices. New Zealand price $12.75.

Murder is a strange thing. It is the crime for which the community has exacted the most severe retribution. The killing of another in other than those situations not proscribed by the community — war and the defence of one's life — is abhorred, denounced and punished. The measure of punishment is severe. Life imprisonment is mandatory on conviction in our own system while in other jurisdictions the debate still actively rages over capital punishment as the "ultimate deterrent". The demand for communal retribution has necessitated a complex and costly process of discovery, prosecution and conviction of the criminal. Yet paradoxically underlying this system there remains a clear almost simple belief that the person so charged must be proved to be guilty of that act, "beyond all reasonable doubt". He must be guilty — not merely possibly or probably, but "actually" guilty.

Thus, when David Yallop, in *Beyond Reasonable Doubt,* after twelve months research and over 350 pages claims that "Arthur Thomas did not murder Harvey and Jeanette Crew" (p.314) against the evidence of two jury trials, three appeals and a judicial inquiry, most people will conclude either that the man is a sensationalist attempting to revive the public interest in a controversial case and profit from that revival, or that he has produced startling new evidence that proves what he claims. The cynics amongst us will claim he has successfully done both.

The book attacks from the outset, claiming the police were not only inefficient to the point of "bungling" in their investigation but that as the "investigation" developed into a prosecution and trials they blatantly suppressed and changed evidence. Yallop's view is clear: "I believe there was perjury in this case, that there was suppression of evidence". (Ann Lloyd talking to David Yallop — *N.Z. Listener,* 2 December 1978, 18.)

The police, however, are not the only recipients of Yallop's serious

and often aggressively ironic criticism. Of David Baragwanath, (assisting Crown Prosecutor David Morris) he said ". . . a clever young man of whom it has been said 'He won every prize at university except the one for knitting' " (p.114).

The two trial judges, the Court of Appeal, the final trial jury — in essence, the whole system of criminal justice — receives censure that is more than a backhand swipe. Yallop states (at p.114) that "[I]t [the judicial system] is a game. Tactics is the name of this particular game. Evidence is put in and taken out depending on how the game is going".

The Crown argued successfully that Thomas, inflamed by life-long passion for Jeanette Crewe, shot both Crewes then dumped the bodies in the Waikato River, weighting Harvey Crewe's body with an axle taken from his farm. Yallop sets out to prove and proves adequately that the Police evidence simply could not substantiate the Crown's claims. That is not to say Thomas may not have committed the murders, rather that on the evidence discovered and produced by the Police he could not reasonably be said to be guilty.

The Crown contended that Thomas had a "passion" for Jeanette Crew that resulted in pestering and rebuffed advances to Jeanette. Yet the Crown produced only one witness who actually swore that Thomas pestered Jeanette at the local dances in 1956 and 1957. Yallop claims that the people he has located who were at those dances are all "prepared to swear on oath that Arthur Thomas did not attend those dances" (p.99).

The Crown also maintained that Thomas shot both the Crewes on their farm. The only evidence which actually put Thomas on the Crewe farm was a cartridge case found by Detective Sergeant Charles in a flower bed near the Crewe house. There was no other visual means of identification, such as fingerprints. Test firings with other .22 bullet cases from the Thomas farm produced the same markings as on the "Charles" case. During the second jury trial it was discovered that the markings on the bases of the cartridge cases were different. One of these categories of markings never carried a pattern 8 bullet (the bullet recovered from Jeanette Crewe's body).

The evidence was rebutted in the second jury trial and, although the bullet manufacturers (I.C.I. Company) later produced evidence that the pattern on the "Charles" case was different and could not have been loaded with a pattern 8 bullet, that rebuttal was upheld by the Court of Appeal.

The only other solid piece of evidence that linked Thomas with the murders was the axle from an old trailer owned by Thomas and used to weight Harvey Crewe's body. Yallop makes two points very clear

on this evidence. First, that the Police failed to recover the axle and Harvey Crewe's body together. Secondly, that the axle presented to Justice of the Peace, Mr. Garratt, after the discovery of Harvey's body was, on Mr. Garratt's evidence, not the same axle produced as evidence in court.

It is the doubts that Yallop raises about these three specific pieces of crucial evidence that are the strength of this book. It "demonstrate[s] convincingly that the Crewes were not murdered and disposed of in the manner claimed by the Crown" (Former Attorney-General Martyn Finlay, "Finlay: The Thomas Judgments Were Wrong", *N.Z. Listener,* November 1978).

What of Yallop's other criticisms that the Thomas verdict is a damning indictment of New Zealand's judicial system?

There is a belief and a justifiable belief that those the Police prosecute are guilty. It has however created not only among Police and prosecutors but also among the representatives of the community at large, the juries, a prosecuting complex — we cannot believe the accused did not commit the crime alleged.

Perhaps this explains the third Court of Appeal finding that the case for Arthur Thomas had not established beyond reasonable doubt that the "Charles" case could not have contained a pattern 8 bullet — an explanation not an excuse. An error of law in requiring that the defence meet a criminal standard of proof almost certainly, but an indictment of the system? The reader must decide.

JOHN BIERRE

THE DISCIPLINE OF LAW, by the Rt. Hon. Lord Denning M.R. London. Butterworths, 1979. 331 pp. including index. New Zealand price $19.50; paperback $12.00.

Inevitably, a reviewer's expectations of a book from a judge of Lord Denning's stature must be high. The Master of the Rolls has a natural literary facility honed by many years in high judicial office. He revels in an iconoclast's scorn for uncritical adherence to established doctrines which, though providing some abstract certainty, can work injustice to individuals. There are few areas of the law where he has failed to rouse apoplexy amongst academic lawyers and played fox in the conservative judges' hen-house.

Fairness however requires that the limited purpose and scope of this book be recognized. It was written during the English summer legal vacation of 1978. During the legal terms Lord Denning sits in court

daily. At the weekends he writes his reserved judgments. The publishers wished to have a book available to mark the author's eightieth birthday in January 1979. Lord Denning describes the task as having been undertaken in lieu of an overseas holiday. This is not therefore the work of a retired judge with the leisure and resources to write the extended analytical essays which others have done. Nor is this an autobiography, though it is punctuated with anecdotes and personal details.

What the reader does get are reprinted messages from a selection of Lord Denning's judgments with comments; indications of where the law might have, and in his view, ought to have gone.

One theme runs throughout this book: the law must be vigilant to prevent the abuse of power. This concern is explicit in the sections dealing with public law and the law of private associations. It is implicit in the presentation of the *High Trees* principle. It is found also in the opening chapters where Lord Denning discusses the power of the judges to select rules of statutory and documentary construction. By the exercise of this power, substantial justice may be done or it may be deferred in favour of a narrower literalism or punctiliousness of doctrine.

It is Lord Denning's avowed purpose in this book to encourage discussion in the law schools. The particular occasion for this will come from readers' assessment of the results in the cases presented, the personal and social problems they raise, and acceptance or rejection of the reasoning in support.

In a style familiar to all law students, Lord Denning leaves an unmistakable impression of presenting a challenge to anyone who would dispute the results arrived at. He emphasizes the duty of lawyers and judges to strive to achieve justice through reason, and is restless in his reproaches to those timorous souls who would obstruct that goal.

Supremely self-confident that his views will eventually prevail, Lord Denning sees himself preparing the way for the consolidation of advances he has made. While openly sceptical of the capacity of the judges to fashion a common law suitable for the late twentieth century, Lord Denning reposes his hopes in the Law Commission (some of whose reports he has treated as authorities in deciding cases), and new generations of students. This book is intended to proselytize amongst the latter.

The material in the book is organized into seven main parts. These deal with the construction of documents (statutes and contracts, wills and trust deeds); misuse of ministerial powers; *locus standi*; abuse of "group" powers; *High Trees*; negligence; and the doctrine of precedent.

The "abuse of power" theme is one Lord Denning pursued in his 1949 Hamlyn Lectures. These were published under the title *Freedom Under The Law.* The concern then was with the growth of executive and other governmental powers. Now the concern is much more general.

Misuse of the freedom of contract remains a problem. Lord Denning will use any means available to ensure that the just result is not obscured or obstructed by plain words or by silence. It is the author's apparent but unstated moral approach to his cases that is most striking.

It offended Lord Denning's sense of the reasonable tenant's expectations that the landlord in *Liverpool City Council* v. *Irwin* [1976] 1 Q.B. 319, should not be found liable for failing to maintain the common parts of a multistorey apartment building. Similarly, the reasonable factory owner would not expect to have his premises burned down by a security guard and not be able to recover from the guard's employer (see *Photo Electric Productions Ltd.* v. *Securicor* [1978] 1 W.L.R. 856). Nor should the water supply company which failed in 1929 to anticipate the effects of inflation in 1977, be tied to a fixed price contract merely for a lack of prescience as to the declining value of money (see *Staffordshire Area Health Authority* v. *South Staffordshire Waterworks Company* [1978] 1 W.L.R. 1387).

The device Lord Denning has crafted to achieve the desired result is the doctrine of "presumed intent". The chapters in which he develops this deserve careful reading. He is aware that such a doctrine requires a very broad judicial discretion. He knows that this is akin to a legislative power but feels that it is the judge's first duty to do justice and if that requires a more active role then so be it. In this, Lord Denning may very well be closer to the pulse of society than many commentators, lawyers and judges, who prefer a more clear cut conceptual separation of powers.

There seem to be two main objections to Lord Denning's cavalier approach to the vaunted symmetry and coherence of the common law. These objections are also applicable beyond the confines of the law of contract. The first is that the Master of the Rolls fails to adhere to the doctrine of precedent and has even been known to overlook the authority of the House of Lords. One proclaimed virtue of *stare decisis* is that it produces certainty. Another, that it provides a body of law which can resolve legal issues without constant reference to the courts. The problem is that the law found in the books may, when applied to the matter in dispute, produce an undesirable result. Unless the courts are to abdicate all creative responsibility and wait for Parliament to act, then something must be done when the case comes

to be decided. Certainly this creative power is limited. But where it does exist ought it not to be used? Perhaps the argument is really only over those limits. Lord Denning obviously finds them to be fairly wide. The second objection arises out of the view that common law principles are both settled and sacrosanct. Some would doubt the correctness of this view. What Lord Denning sees as fundamental are not the principles or rules in themselves but the principles or values they are designed to achieve. Thus, he will return to the policy of the rule and, if necessary,reformulate it to take account of new factors, for example, inflation, fluctuating exchange rates, new concentrations of economic power and greater government involvement in previously unregulated aspects of social and personal life.

One field where Lord Denning identifies novel problems is that where collective power is arrayed against the individual. He describes these as "group" powers. The concern is with the activities of trade unions, sports bodies and professional associations, amongst others. He divides the discussion into two parts: powers against members, and powers against other persons. In the case of power exercised against their own members, Lord Denning recognizes the reality behind the artifice of the membership contract. These bodies are really exercising a kind of legislative power. Perceiving this, the courts are able to employ public law concepts in a notionally private law field. The exercise of power against non-members can be controlled through a creative use of established common law doctrines like restraint of trade. The author expresses the hope that a doctrine of unfair competition, or abuse of bargaining power can be developed. In respect of this latter idea it is perhaps surprising that one case not mentioned in the book is *Lloyds Bank* v. *Bundy* [1975] Q.B. 326.

That Lord Denning will not be slow to create precedents where necessary is borne out by his discussion of *Central London Property Trust* v. *High Trees House Ltd.* [1947] 1 K.B. 130. He acknowledges having prepared his principle before the case came before him, waiting only for the appropriate occasion to unveil it.

The element of chance in the development of the law is evidenced by Lord Denning's remark concerning *High Trees,* and his wish to get the principle accepted, that an appeal would have ruined everything.

It has not been possible in a review of this nature to do more than sketch the scope of this book. Its particular value lies in showing one judge quite self-consciously shaping the law in many areas. Its deficiencies — condensed argument and limited exposition — arise out of the prior claims on the author's time. To Lord Denning, making the law has priority over merely writing about it. His closing words are, "I must get on with the next case. Nothing must be left undone."

The book itself is well printed and solidly bound. Bearing in mind the author's limited objects, the book is highly recommended.

BRIAN COONEY