SOME REFLECTIONS ON CORBETT v. SOCIAL SECURITY COMMISSION [1962] N.Z.L.R. 878

I

The importance of *Corbett's* case justifies, it is hoped, the belated appearance of another contribution to the discussion to which it gave rise. [1] The substantive issue, it will be recollected, was whether the objection of a Minister of the Crown, properly taken in point of form, that documents should not be produced in the public interest, was conclusive, or whether the courts had the power to inquire into the nature of the documents and to require some indication of the nature of the injury to the State which would follow their production. According to the Privy Council in *Robinson* v. *State of South Australia* [1931] A.C. 704 a court had "in reserve" the power to inspect the documents and make up its own mind whether the Minister's claim of privilege should be supported. Eleven years later, the House of Lords in *Duncan* v. *Cammell Laird & Co. Ltd.* [1942] A.C. 624 pronounced that the Minister's objection was conclusive. Nowhere in the report of *Corbett* was it disputed that there was a direct conflict between *Robinson* and *Duncan* and a choice between them therefore became inescapable.

While the Court of Appeal did not choose unanimously, all three judges concurred in dismissing the motion that had been removed into the Court. The motion sought an order that the members of the Social Security Commission produce for the inspection of the plaintiff twelve documents for which privilege was claimed by the Minister of Social Security upon the grounds that the plaintiff was entitled to inspect them and that the objection taken to their production was not valid in law. North and Cleary JJ. were for dismissing the motion because, although they were prepared to follow *Robinson* rather than *Duncan* and held that the courts had a power to order inspection of documents in respect of which a claim of Crown privilege was made, the present case was not one where that power should be exercised. Gresson P., on the other hand, was for dismissing the motion because he thought that *Duncan* rather than *Robinson* should be followed and was of opinion that the courts had no power to order inspection. All three learned judges expressed disapproval of the width of the rule enunciated in *Duncan*, but Gresson P., feeling obliged to adopt a "coldly legalistic approach", considered that there were no adequate grounds for exempting the New Zealand Courts from the thraldom that it imposed. [2]

1. See in particular Keith, "Corbett's Case", (1963) 1 N.Z.U.L.R. 124 and Cooke, "The Board or the Lords?", (1962) N.Z.L.J. 463, 534.

2. [1962] N.Z.L.R. 878, 896.

The actual decision is clearly destined to be a leading authority on the scope of "Crown privilege" [3]. but this article is exclusively concerned with some aspects of the precedent problem which loomed so large. Each of the judges suggested that the solution to the problem which arises when decisions of the Privy Council and the House of Lords conflict is to prophesy what the Privy Council would do if confronted with the same conflict. Is this solution satisfactory? The majority of the Court of Appeal considered that it would not be obliged to follow the Privy Council if the House of Lords had subsequently pointed out a definite error in the reasoning of the Board. Is this a principle which is either workable or desirable? Does *Corbett* affect the future status of House of Lords decisions as precedents in New Zealand? What, finally, would be the best principle for resolving Board v. Lords conflicts, and are our courts now precluded from adopting it? We proceed to these questions in turn.

II
THE PROPHETIC FUNCTION

All three judges were prepared to play the prophet. It is true that at one point in his discussion Gresson P., who dissented on the main issue, stated that "It is not the function of this Court to forecast what view might be taken by the Privy Council ....", but he immediately added that it was "difficult to refrain from some estimation of the probable attitude of that body even if it takes one into the realm of conjecture." [4]. The reader now expects an *obiter* estimation of the Privy Council's probable attitude, and that the learned President's actual decision will be uninfluenced by his *excursus*. But, having expressed his opinion that "it is difficult to think that they [sc. their Lordships in the Judicial Committee] would disregard so authoritative a pronouncement [sc. that of the House of Lords in *Duncan* v. *Cammell Laird*] and adopt the highly inconvenient course of allowing one rule to be in force in England, and another in Australia, New Zealand, and other Commonwealth jurisdictions, in which the Judicial Committee is the final Court of Appeal", [5]. Gresson P. allowed his prediction to be decisive. No other interpretation is possible of the passage at the end of his judgment where he said that:

> "...until the Privy Council shall declare otherwise it must be assumed that it would accept and adopt the *Cammell Laird* decision rather than

3. Subject to developments in subsequent English cases: see *Merricks* v. *Nott-Bower* [1964] 2 W.L.R. 702; *In re Grosvenor Hotel, London (No. 2)* [1964] 3 W.L.R. 992; *Wednesbury Corp.* v. *Minister of Housing etc.* [1965] 1 W.L.R. 261.

4. [1962] N.Z.L.R. 878, 896.

5. Ibid.

> allow there to be – in a matter of substantive law, as the House of Lords held it to be – one rule for England and a different rule for Australia and New Zealand.
>
> Accordingly, regretfully I feel bound to hold ...." [6].

Several passages in North J.'s judgment have a prophetic strain. Nor, for North J., was prophecy to be confined to the Privy Council; it might validly extend to the possible second thoughts of the House of Lords:-

> " Now that the rule has been denied in Scotland, it is at least possible that the House might itself on some future occasion find it possible to give the rule a more limited application in view of the enactment of the Crown Proceedings Act 1947, *6 Halsbury's Statutes of England*, 2nd ed. 46. I hope I am not being presumptuous in suggesting that the observations of Lord Radcliffe, which were endorsed by Lord Somervell of Harrow in the *Glasgow Corporation* case[7]. ... would appear to indicate a measure of restlessness at the breadth of the rule laid down in *Duncan* v. *Cammell Laird* ...." [8].

Even if he was wrong in his prediction of the House of Lords' attitude North J. predicted that the Privy Council would not "feel obliged to apply that rule [sc. in *Duncan*] in its entirety to all other parts of the Commonwealth". [9]. This prediction was reinforced, in his opinion, by the undesirability of *Duncan*, especially in view of the State's large-scale entry into commercial and other fields of enterprise. [10].

Cleary J. also predicted that the Privy Council would not feel obliged to depart from *Robinson* because of *Duncan*, and unequivocally adopted the prophetic solution of the conflict:

> " I think the question must always be whether, after a later inconsistent decision of the House of Lords, the Privy Council is likely to adhere to an earlier decision of its own." [11].

The writer has no quarrel with the majority's actual prediction of the Privy Council's probable approach. It is respectfully submitted that it is likely, although

6. [1962] N.Z.L.R. 878, 898.

7. *Glasgow Corporation* v. *Central Land Board* 1956 S.C. (H.L.) 1.

8. [1962] N.Z.L.R. 878, 910. This passage is discussed *infra* at page 6.

9. [1962] N.Z.L.R. 878, 910.

10. Idem, 911. Cf. Cleary J. at 917 and Gresson P., *in arguendo*, at 885.

11. [1962] N.Z.L.R. 878, 915. Cf. the slightly different slant which Cleary J. gave to the question at 916, 11. 40-45.

by no means certain, that the Board would adhere to *Robinson* despite the intervening decision in *Duncan*, and that if the Court of Appeal must prophesy, the prophecies of North and Cleary JJ. are to be preferred to that of Gresson P. But the whole predictive or prophetic approach is objectionable on several grounds: –

(A) It treats all instances of conflict between the Privy Council and the House of Lords on the same footing. In Cleary J.'s words, the question "must *always* be whether ... the Privy Council is likely to adhere to an earlier decision of its own." This approach ignores the real distinction which can and ought to be drawn between (i) cases where the Privy Council's attitude to the conflict can be predicted with near certainty, where there may be what I shall call a "genuine prophecy"; and (ii) cases where its attitude cannot be so predicted, where the court is forced into what I shall label "mere conjecture". The distinction depends on the case material that is available. A Privy Council decision and a later House of Lords decision conflict. *Ex hypothesi* there is no relevant decision of the Privy Council subsequent to that of the contrary House of Lords decision, but the Privy Council may have declared its opinion *obiter*. Better still, there may be a succession of *dicta*. If the *dicta* unequivocally show the Privy Council's inclination to resile, or not to resile, from its own previous decision, then there is material before the New Zealand court on which a genuine prophecy can be based. If no unequivocal *dictum* can be found, it is submitted that, to prophesy means to indulge in mere conjecture, or – more bluntly – to guess. The importance of drawing the distinction is that while something can be said for genuine prophecy, there is little or nothing to be urged in favour of mere conjecture. Genuine prophecy may be thought desirable for two reasons: –

(1) While the Court of Appeal is technically bound only by the *ratio decidendi* of a Privy Council decision, the Board's *dicta* are of the highest persuasive value. Genuine prophecy means that the Court is dutifully conforming to the *dicta* and so to the view that the Privy Council would almost certainly adopt.

(2) It is trite that appeals to the Privy Council involve considerable expense. Is it not preferable that the party whom the conflict-resolving *dicta* of the Privy Council favour should always obtain judgment in the Court of Appeal in accordance with those *dicta*, rather than that he should sometimes be compelled to appeal to the Privy Council? Expressing the argument in another way, it seems a better policy that the onus should always rest upon the party against whom the *dicta* operate. It is better that he should have to decide whether to risk an appeal with, say, a 10% chance of success than that his opponent should be forced to assume the burden of being appellant before the Board, albeit with a 90% chance of success. Where, on the other hand, it is mere conjecture what

the Privy Council would decide, there is no reason why one of the litigants should bear any particular onus other than that created by the state of the litigation or suffer from any consequential presumption operating against him when presenting argument in the Court of Appeal.

The Court of Appeal in *Corbett's* case is to be criticised for failing to see the distinction between genuine prophecy and mere conjecture. It lumped both situations together and sanctioned the prophetic approach to both. It is clear that the prophecy in *Corbett* was mere conjecture rather than genuine prophecy for there were no relevant and unequivocal *dicta* of the Privy Council available on which to assess the probabilities though there was a quantity of case material – voluminous and conflicting – from other sources. The guess of North and Cleary JJ. remained a guess, despite the persuasiveness of much at least of the reasoning which supported it, and despite the probability that many, like the present writer, would have guessed the same way.

(B) There is a real danger that a court will find that probability and desirability become inextricably entangled. If that happens, the court may find itself creating law while purporting to prophesy, in a "coldly legalistic" way, what the Privy Council would do. When courts create law, it is surely right that they should have a clear appreciation of what they are doing. The theory and the reality should coincide. Moreover, the judicial task is likely to be better performed. The theory that the court's sole task is prediction gives no encouragement to an open discussion of policy factors.

(C) The difficulty of guessing what the Privy Council is likely to do may encourage the use of completely artificial assumptions like that of Gresson P. who took the view that "until the Privy Council shall declare otherwise, it must be assumed that it would accept and adopt the *Cammell Laird* decision ...." [12]. With respect, there is no basis for that assumption other than the very existence of *Duncan* v. *Cammell Laird* and it would be equally plausible to use the opposite assumption as a starting point. Both assumptions are equally dogmatic, and neither advances the solution of the problem.

(D) If the dichotomy of "genuine prophecy" and "mere conjecture" is valid, the judge who predicts will, however unconsciously, endeavour to exalt his own reasoning to the higher status. He will be likely to seize on dubious *indicia* of the Privy Council's probable attitude and to draw far-reaching but even more dubious inferences from them. Once again, an example can be taken from Gresson P.'s judgment. [13]. The learned President found support for his view

12. [1962] N.Z.L.R. 878, 898.

13. [1962] N.Z.L.R. 878, 897.

that the Privy Council would, albeit unwillingly, accept and adopt *Duncan* in its decision in *Ioannou* v. *Demetriou* [1952] A.C. 84. The Board was there faced with the question "What is a public document?" for the purposes of the rule which allows these documents to be proved as an exception to the rule against hearsay. In the course of its judgment [14] the Board quoted a passage from the judgment of Lord Goddard C.J. in *Pettit* v. *Lilley* [1946] K.B. 401 wherein the then recent decision in *Duncan* received a passing mention. [15] With respect, the passage that Gresson P. referred to is a totally unreliable guide. Lord Goddard C.J. had referred to the rule in *Duncan* as an additional reason for the requirement that an alleged public document, to be admissible, must be one to which the public has access. *Ioannou* v. *Demetriou* was concerned with *Pettit* v. *Lilley* only because the Divisional Court had there been concerned to interpret Lord Blackburn's speech in the leading case of *Sturla* v. *Freccia* (1880) 5 App. Cas. 623. Neither *Sturla* v. *Freccia*, nor *Pettit* v. *Lilley*, nor *Ioannou* v. *Demtriou* itself was directly concerned with Crown privilege. Of such straw may the pseudo-prophetic brick be constructed.

(E) The prophetic solution of Board – Lords conflicts does not achieve the measure of certainty in application which should be the raison d' etre of any rule of precedent developed by the courts. This criticism has already been admirably developed by Mr Keith. [16]

(F) Last, but perhaps most important, to prophesy the Board's resolution of a Board – Lords conflict is an arduous assignment and peculiarly likely to be later proved wrong. The very division of opinion in the Court of Appeal in *Corbett* itself illustrates the inherent difficulty of the procedure. Who among those who sympathize with the majority view will start to read some future examination of the nature of Crown privilege by the Privy Council without trepidation?

North J., it will be remembered, was of opinion that the House of Lords might on a future occasion find it possible to give the rule in *Duncan* a "more limited application". This part of his judgment may serve to illustrate the difficulty of all prediction and the danger of erroneous prediction. Recent English cases suggest that his prediction may ultimately be proved correct for reasons other than those on which it was based. In *Merricks* v. *Nott-Bower* [17] and *In re Grosvenor Hotel, London*

14. [1952] A.C. 84, 93-94.
15. [1946] K.B. 401, 406.
16. Keith, "Corbett's Case", (1963) 1 N.Z.U.L.R. 124, 128-130.
17. [1964] 2 W.L.R. 702 (C.A.).

(No. 2) [18]. the English Court of Appeal has *(inter alia)* paved the way for a ruling by by the House of Lords that *Duncan* is limited to matters of national security and that a Minister's certificate is not conclusive when a litigant seeks production of, for instance, Departmental files in no way related to national security. The Court of Appeal, in undermining *Duncan* and reversing the practice which had developed of making claims of Crown privilege in reliance on Lord Simon's far-reaching remarks, placed no weight on the enactment of the Crown Proceedings Act 1947 and little on Lord Somervell's "restlessness" in the *Glasgow Corporation* case. Instead, the main line of attack consisted of treating *Duncan* as authority only for its own special facts, and Lord Simon's inclusion of the category of documents "necessary for the proper functioning of the public service" [19]. as unnecessary to the decision, *obiter*, and, although concurred in by each member of the House, not binding on the Court of Appeal. [20].

No one will complain that *Robinson* has been preferred to the much criticized judgment in *Duncan*. But the desirability of the decision in *Corbett* should not blind us to the undesirability of the technique by which it was reached. It is not surprising that a Full Court of the Supreme Court of Victoria, when confronted with the same *Duncan – Robinson* conflict after the judgments in *Corbett's* case had been delivered, held itself bound by *Robinson*, but expressly eschewed the prophetic technique. [21]. That their Honours did not entirely rid themselves of it is shown by the fact that Lowe, Smith, and Gowans JJ. in their joint judgment made an enumeration of all the factors which might be thought to render it likely that the Privy Council would adhere to its own decision, "except perhaps in relation to matters involving national security"?[22].

Counsel for the plaintiff in *Corbett* mentioned that the prediction or prophecy theory "has been applied on a number of occasions and has the stamp of approval of Lord Wright in the House of Lords: *Noble* v. *Southern Railway Co.* [1940] A.C. 583, 598". [23].

18. [1964] 3 W.L.R. 992 (C.A.).

19. [1942] A.C. 624, 642.

20. *Merricks* v. *Nott-Bower, supra*, at 709 (Denning M.R.), and 714 (Salmon L.J.); *In re Grosvenor Hotel, London (No. 2), supra*, at 1000 (Ungoed-Thomas J.), 1014 (Denning M.R.), 1024-1025 (Salmon L.J.), 1019 (Harman L.J., more faintly). In the *Grosvenor* case the House of Lords refused leave to appeal.

21. *Bruce* v. *Waldron* [1963] V.R. 3, 8-9. The prophetic test was, they considered, "an extremely difficult test to apply, and one which would produce conflicting answers from time to time by reason of changes in the climate of professional and academic opinion in England and other transitory circumstances". (id. 9).

22. Idem, 9-10.

In *Noble's* case Lord Wright said:

> " What a court should do when faced with a decision of the Court of Appeal manifestly inconsistent with the decisions of this House is a problem of some difficulty in the doctrine of precedent. I incline to think it should apply the law laid down by this House and refuse to follow the erroneous decision. "

In other words, an English judge sitting at first instance is entitled and obliged to prophesy because, although he is bound by the Court of Appeal, he is also bound by the House of Lords whose authority is greater. Further, the material is available for genuine prophecy: it is provided by the earlier decision of the House and the knowledge that the House holds itself bound by its own decisions. Lord Wright's remarks are relevant in New Zealand to the relationship between the Supreme Court, the Court of Appeal and the Privy Council, the example aptly used by counsel for the plaintiff in *Corbett*. But they can have no relevance to the relationship between Court of Appeal, House of Lords and Privy Council. In the second trio, but not in the first, there is an odd man out, for the House of Lords is not technically part of the same hierarchy as the other two courts. Lord Wright was clearly not addressing himself to a problem in any way germane to that which arises when Board and Lords conflict. There is in fact no precedent for the unsatisfactory rule of precedent enunciated in *Corbett*.

III
DEMONSTRABLE ERROR

It was North J.'s opinion in *Corbett* that:

> " ... in very exceptional circumstances, this Court would be justified in following a later decision of the House of Lords in preference to an earlier conflicting decision of the Privy Council, and particularly so if the House had discussed the Privy Council decision and had pointed out in what respect it was of opinion that the Board had erred. But even so, that course would only be justified if, as Sir John Latham C.J. put it in *Piro's* case [24]. ... the case involved only principles of English law which admittedly are part of the law of New Zealand and there are no relevant differentiating local circumstances." [25].

23. [1962] N.Z.L.R. 878, 883. Cf. 884, 11. 47-55 (argument on behalf of the Commission) and North J. at 911, 11. 42-48. Counsel for the plaintiff, it should be stressed, was directing his argument *against* a prophetic solution: see page 883, 11. 22-39.

24. *Piro* v. *W. Foster & Co. Ltd.* (1943) 68. C.L.R. 313, 320.

25. [1962] N.Z.L.R. 878, 901-2.

The last sentence of that quotation is considered in the next section of this article. Even without it, the passage cited is difficult enough. North J. was apparently implying that there could be circumstances in which the House of Lords should, exceptionally, be preferred, even although the House had not discussed the Privy Council decision, or if it had discussed it, had not pointed out in what respects the Board had erred. If this is not a misreading of the passage lawyers would be grateful for some indication of what other circumstances are sufficiently "exceptional" to rebut what is, apparently, a presumption in favour of the Privy Council when it has diverged from the House of Lords. (It is tolerably clear that North J., though sanctioning the prophetic test, did start with a presumption in favour of the Privy Council: he had previously emphasized that "the Privy Council, not the House of Lords, is the supreme and ultimate appellate authority for New Zealand".) [26].

Cleary J. dealt with the same point as an element to be taken into account when applying the prophetic test:–

> " Where the House of Lords has made it plain how and in what respects error arose in the earlier case, so that it would seem wholly unlikely that there could be any reversion to the earlier decision, then I think that a New Zealand Court should follow the decision of the House of Lords. That would no doubt be the position if a New Zealand Court, like the Supreme Court of Alberta in *Will* v. *Bank of Montreal* [27]. ... had to choose between the decisions in *Colonial Bank of Australasia, Ltd.* v. *Marshall* [28]. ... and *London Joint Stock Bank, Ltd.* v. *Macmillan* [29]. ... because the exposition of the error upon which the earlier case proceeded appears to be incontrovertible. But I do not feel persuaded that the judgment in *Cammell Laird's* case ... has in any similar manner shown that *Robinson's* case ... proceeded on such erroneous grounds that the Privy Council might not, despite *Cammell Laird's* case, re-assert what it said in *Robinson's* case. " [30].

A little later, Cleary J., having discussed the treatment that *Robinson* received in *Duncan* v. *Cammell Laird*, said:

> " In the result, it seems to me, the disapproval of *Robinson's* case ... in the *Cammell Laird* judgment cannot be based on any suggestion

26. Idem, 900.

27. [1931] 3 D.L.R. 526.

28. [1906] A.C. 559, (P.C.).

29. [1918] A.C. 777, (H.L.).

30. [1962] N.Z.L.R. 878, 915.

> of failure or oversight on the part of the Privy Council to have regard to some previously existing authority, nor is it the consequence of showing that the Privy Council arrived at its conclusion through some misapprehension of principle that is now exposed and shown to have led to an erroneous decision. In truth the conflict between the two decisions has arisen from a difference in valuing and assessing the two aspects of the public interest which come into conflict ...." [31.]

With that view of the conflict the writer is, with respect, in whole-hearted accord. Lord Simon's consideration of *Robinson* was surprisingly perfunctory. He failed to point to a definite error of any variety. A brief discussion is however required of what may be called the "definite error doctrine" itself. It is submitted that this doctrine was regarded by the Court of Appeal in *Corbett* as an integral part of the prophetic solution of Board – Lords conflict but that it may be divorced from that solution; and that it is likely to be most difficult to apply, but has great value in one situation.

Difficulty is likely to arise because the definite error doctrine implies that a firm distinction can be drawn between *mere disapproval* of a Privy Council decision and *the pointing out of a definite error in that decision.* As the House of Lords is not obliged to follow earlier decisions of the Privy Council, [32.] it is not obliged to point out a definite error in such a decision when it decides not to follow it. On the other hand it may, out of judicial comity towards its *alter ego*, [33.] offer elaborate reasons for dissenting from the Privy Council. The effect of the combined judgments of North J. (subject to the ambiguity in that learned judge's formulation already discussed) and of Cleary J. is that it is only (1) where the House has chosen to discuss the Board's decision, *and* (2) where that discussion clearly demonstrates the Board's error, that the "definite error" rule comes into play. Two possible types of conflict are therefore excluded from its scope. The first is where the House, possibly through ignorance, makes no reference at all to the Board's earlier decision, perhaps a very old one. The second is where the House is confronted with a difficult problem which it considers *de novo* and the true explanation of its dissent is that it considers the Board's solution undesirable for some reason of policy, without however being able to put its finger on any demonstrable error in the Board's reasoning. Possibly the Privy Council decision was the only authority upon the point. On that hypothesis there would be no "previously existing authority" with which it could be incompatible.

31. Idem, 916.

32. *Ridge* v. *Baldwin* [1964] A.C. 40, 77; *pace* Viscount Maugham in *Dover Navigation Co. Ltd.* v. *Isabella Craig* [1940] A.C. 190, 193, (H.L.).

33. This epithet has sometimes been overworked in discussions such as the present. It is apt only when no large interval of time separates the two decisions.

Having excluded these two situations accordingly, we are still left with the problem of distinguishing mere disapproval and the demonstration of a definite error, and here we are up against the fact that judicial technique in the higher courts is generally averse to pointing out definite errors in the previous decisions of other courts. It is apt to employ more subtle means of evading unwelcome precedents. Consider, for instance, the manner in which the decision of the House of Lords in *Liversidge* v. *Anderson* [1942] A.C. 206 was handled by the Privy Council in *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66. [34] There are some interesting recent examples. [35] The House may be of the firm opinion that error there was but unless it overcomes its reluctance and expresses that opinion, the "definite error" doctrine sponsored by North and Cleary JJ. can have no application. Seen in this light, Lord Simon's laconic reference to *Robinson* is typical of normal judicial technique, whereas the exposition of the Privy Council's error in the Colonial Bank case by the House of Lords in the *London Joint Stock Bank* case, (Cleary J.'s example in *Corbett*) is rather exceptional. The difficulty created by the doctrine as stated in *Corbett* lies in deciding whether individual members of the House have expressed disapproval or whether the House *as a whole* has exposed a definite error. Has, for instance, a definite error been found when one Law Lord says: "The Privy Council in *P.* v. *Q.* decided so-and-so but it might have reached the opposite conclusion had its attention been drawn to *R.* v. *S.*"? This will be one of the problems facing New Zealand courts when the conflict between *Nakkuda Ali* v. *Jayaratne (supra)* and *Ridge* v. *Baldwin* [1964] A.C. 40 falls to be resolved. For in *Ridge* v. *Baldwin* only Lord Reid effectively grappled with *Nakkuda Ali.* He held that part of the Privy Council's judgment "was given under a serious misapprehension of the effect of the older authorities and therefore cannot be regarded as authoritative". [36] Of the other majority Lords, Lord Hodson apparently considered that the language of the sections under consideration in *Nakkuda Ali* and in the instant case justified the different conclusions reached. [37] Lord Morris and Lord Devlin ignored *Nakkuda Ali.* Lord Evershed, who dissented, was not prepared to dissent from that case. [38]

34. Referred to by Gresson P. in *Corbett's* case at 897.

35. See e.g. the dexterous side-stepping of the High Court of Australia decisions on an occupier's liability to trespassers in *Commissioner for Railways* v. *Quinlan* [1964] A.C. 1054 (P.C.); and the kid-gloved overruling of *R.* v. *Zielinski* (1950) 34 Cr. App. R. 193, a previous decision of its own, by the Court of Criminal Appeal in *R.* v. *Goddard* (1962) 46 Cr. App. R. 456.

36. [1964] A.C. 40, 79.

37. Idem, 133.

38. Idem, 94.

A slightly different example may reinforce the submission that the technique of decision in the superior courts renders the task of steering between Board and Lords a delicate business. How can it be established whether the House has *distinguished* a decision of the Board or *disapproved* it? (It will be appreciated that this is not the same distinction as that between disapproving a decision and demonstrating its error). In *Macintosh* v. *Dun* [1908] A.C. 390 the Privy Council decided that a trade protection society whose business it was to supply information about the credit of traders could not claim privilege in a suit for defamation brought in respect of statements contained in the information. There was, it was said, no social or moral duty to supply such information. In *London Association for Protection of Trade* v. *Greenlands, Ltd.* [1916] 2 A.C. 15, the House of Lords held that similar activities conducted by persons who were themselves interested in trade and maintained a trade protection organization for their own common advantage were protected by the shield of qualified privilege. *Macintosh* v. *Dun* was naturally canvassed in argument and in the judgments. The puzzle is to know whether the Lords distinguished that decision or disapproved it. A distinction can be drawn because in the *Greenlands* case the association was not created or worked solely from motives of pecuniary gain, whereas this was the position in *Macintosh* v. *Dun*. That, indeed, was the main distinction taken by Lord Atkinson. [39] Lord Buckmaster L.C., on the other hand, considered that the essential difference between the two cases was that in *Macintosh* v. *Dun* no inquirer about a trader's solvency could influence the conduct of the inquiries that were conducted, whereas in *Greenlands* the inquirer could influence them through the association's committee. [40] Earl Loreburn considered that *Macintosh* v. *Dun* was "of equal authority with our own" but he did not show how it could be distinguished. [41] Nor did Lord Parker of Waddington, who left it open whether *Macintosh* v. *Dun* was to be considered good law. [42] Did the House as a whole distinguish *Macintosh* v. *Dun* and, if so, on what grounds? Most probably we would say, without more, that it distinguished it on the two grounds stated by Lord Atkinson and Lord Buckmaster respectively. But then we are confronted with this statement of Scrutton L.J. in *Watt* v. *Longsdon* [1930] 1 K.B. 130, 148:–

> " If *Macintosh* v. *Dun* is rightly decided the duty to communicate does not arise where the communication is made in pursuance of a contract made for the private gain of the speaker. But after the decision of the House of Lords in *London Association for Protection of*

39. [1916] 2 A.C. 15, 37. Cf. Lord Buckmaster, 26.

40. Idem, 26-7. Cf. Lord Atkinson, 37.

41. Idem, 28.

42. Idem, 42.

> *Trade* v. *Greenlands Ltd., Macintosh* v. *Dun* must not be relied on too strongly."

Fleming reconciles the two decisions, but concedes there is "some uncertainty". [43] The latest edition of *Clerk and Lindsell on Torts* distinguishes the fact situations but is cautious: "there is said to be no privilege" writes Armitage of the *Macintosh* v. *Dun* situation. [44] Salmond considers that it is impossible to reconcile the two cases. [45]

Assume that a situation indistinguishable from *Macintosh* v. *Dun* arises in New Zealand. Where will our Court of Appeal take its stand?

But the definite error doctrine involves little difficulty and has great value in one class of case. That is where the Privy Council has ignored or misinterpreted a previous relevant House of Lords decision, or an applicable statute, and a subsequent House of Lords decision exposes the error. Such an error vitiated the Privy Council's decision in *Colonial Bank of Australasia* v. *Marshall* [46] where it was assumed that the duty which subsists between customer and bank in respect of the filling out of cheques was substantially the same as that between the acceptor and the holder of a bill of exchange. But Lords Watson and Macnaghten in *Scholfield* v. *Earl of Londesborough* [1896] A.C. 514 had authoritatively distinguished the two situations. *The Colonial Bank* case therefore conflicted with *Scholfield,* as was pointed out in *London Joint Stock Bank Ltd.* v. *Macmillan.* [47]

In a situation similar to that just mentioned, to apply the Privy Council's decision would be absurd: it would be *stare decisis* without common sense. To such a situation the "definite error" doctrine of North and Cleary JJ. is apt, and its application is to be welcomed. But in non-analogous situations it may create more difficulties than it solves.

IV
THE "SUPREME TRIBUNAL" – LESS SUPREME?

Does *Corbett* affect the status of House of Lords decisions as precedents in New Zealand? Previous commentators on the case have not dealt with this question. It must be emphasised that we are not here concerned with the problem that arises

43. Fleming, *The Law of Torts* (2nd ed.) 533.
44. *Clerk and Lindsell on Torts* (12th ed) para. 1565.
45. *Salmond on Torts* (13th ed.) 368, n.17.
46. [1906] A.C. 559.
47. [1918] A.C. 777. See especially Lord Finlay L.C., 809; Lord Shaw of Dunfermline, 829.

when a decision of the New Zealand Court of Appeal cannot be reconciled with a decision of the House of Lords. That problem can now be resolved by reference to authority. [48.] Nor does the present question involve further discussion of the rare Board – Lords conflict. Our present concern is with a simpler question which is suggested almost incidentally by *Corbett*. And to that question *prima facie* an equally simple answer can be given, viz. if decisions of the House of Lords are not distinguishable they are binding.

But is the simple answer sufficient after *Corbett?* It is submitted not. The authority of the House of Lords was, in the opinion of North J., [49.] put in true perspective by Sir John Latham C.J. in *Piro* v. *W. Foster & Co. Ltd.* (1943) 68 C.L.R. 313, 320 where he had said:

> " This Court is not technically bound by a decision of the House of Lords, but there are in my opinion convincing reasons which lead to the conclusion that this Court and other Courts in Australia should as a general rule follow decisions of the House of Lords. The House of Lords is the final authority for declaring English law, and where a case involves only principles of English law which admittedly are part of the law of Australia, and there are no relevant differentiating local circumstances, the House of Lords should be regarded as finally declaring the law .... [T]his Court, and other Courts in Australia, should follow a decision of the House of Lords upon matters of general legal principle. "

And later, when discussing the "definite error" doctrine, North J. limited its application to the House of Lords decision which "involved only principles of English law which admittedly are part of the law of New Zealand and there are no relevant differentiating local circumstances". [50.]

Cleary J., the other majority judge, was prepared, for his part, to regard the differences between the English social context of 1942 and the New Zealand social context of 1962 as relevant. It was "not to be over-looked that in this country the commercial operations of the Crown are very widespread indeed, and the inflexible application of the *Cammell Laird* doctrine could, perhaps more readily than in many other countries, result in the undue curtailment of the subject's rights". [51.]

48. See *In re Rayner (Deceased), Daniell* v. *Rayner* [1948] N.Z.L.R. 455 and *Smith* v. *Wellington Woollen Manufacturing Co. Ltd.* [1956] N.Z.L.R. 491.

49. [1962] N.Z.L.R. 878, 901.

50. Idem, 902.

51. Idem, 917.

Further:

> " In my opinion it should not be assumed that a decision intended to settle the law as to Crown privilege in England should necessarily apply in New Zealand, without consideration being given to the question of possible differences between the activities of the Crown in the two countries. " 52.

He might well have referred also to another point relied on by the Full Court of the Supreme Court of Victoria in *Bruce* v. *Waldron* [1963] V.R.3, namely that the *Cammell Laird* case, "like its contemporary, *Liversidge* v. *Anderson* [1942] A.C. 206; [1941] 3 All E.R. 338, was decided in times of extreme national danger when it was much more difficult than in normal times to withstand claims made by the Executive Government that in the interests of national security its decisions should not be open to challenge in the courts". 53.

Gresson P. referred to the same passage from *Piro* v. *W. Foster & Co. Ltd.* as North J. had done and although he felt constrained to follow *Duncan* v. *Cammell Laird*, said:

> " That the rule [there enunciated] may on occasions result in a miscarriage of justice is more likely to result in New Zealand having regard to the wide sphere of activities, commercial and trading, in which the state in New Zealand engages .... " 54.

The significance of all these quotations is that our Court of Appeal has for the first time recognised that there is a limit to the binding force of House of Lords decisions in New Zealand courts. The qualification expressed by Sir John Latham C.J. in reference to Australia has, it seems, been adopted. More accurately perhaps, it has been expressly adopted by North J. and Gresson P. Cleary J. made only passing reference to *Piro* v. *W. Foster & Co. Ltd.*, 55. but there is nothing to indicate that his general position differed from that of North J.

If a House of Lords decision need now be regarded as binding only where it deals with "matters of general legal principle" or with "principles of English law which admittedly are part of the law of New Zealand and there are no relevant differentiating local circumstances" an intriguing field of enquiry is opened up. Two things are clear. The courts will have to scrutinize decisions of the House more

52. Idem, 918.

53. [1963] V.R. 3, 9. See also the recent English cases referred to in n.3 *ante*.

54. [1962] N.Z.L.R. 868, 897.

55. Idem, 914.

closely and critically than they have done in the past; and counsel's submissions will no longer be automatically checkmated when his opponent demonstrates that they are inconsistent with a judgment of the House. But what is a "matter of general legal principle"? And, granted that in many fields of application of the common law, there will be *some* "differentiating local circumstances", what kind of circumstances will be held to be "relevant" for the purpose of denying the application of a House of Lords decision? And how are the *differentia specifica* to be proved? By evidence of the differences or by asking the Court to take judicial notice of them as matters of notoriety? Recourse to judicial notice seems the more sensible approach, as evidence of, for instance, the comparative extent and nature of the Crown's activities in the United Kingdom and New Zealand would be difficult to obtain, expensive, and irrelevant to the substantive issue before the Court. Nor could courts be reasonably expected to receive such evidence with much patience. For when the evidence is called the initial relevance of the decision may not be beyond question: the jury's or the trial judge's finding of fact may indeed make it quite irrelevant. Moreover, it is difficult to conceive so important a step as declining to apply a House of Lords decision as practical policy in any Court other than the Court of Appeal, and if that Court decided that it could take it only after being satisfied by evidence of the special New Zealand circumstances, the necessary evidence would be unlikely to be before it.

But recourse to judicial notice of a fact of a complex socio-economic nature may result in suspect conclusions. In *Corbett*, for example, Cleary J. implied that the commercial operations of the Crown in New Zealand were more widely spread than in other countries. But can that simply be assumed? Granted that the Crown's activities were more widespread in New Zealand in 1962 than they were in the United Kingdom in 1942, were they more widespread than in the United Kingdom in 1962, at which date *Duncan* still held the field, or in other Commonwealth common law jurisdictions at either date?

Only a considerable volume of future litigation will show whether what was said in *Corbett* heralds a revolutionary approach towards House of Lords decisions or recognizes a theoretical qualification of no practical importance. If one can judge by the practice of the High Court of Australia since Sir John Latham's remarks in *Piro* v. *Foster*, the second possibility is more likely. The High Court has not, as far as the writer is aware, even once pointed to "local differentiating circumstances" in order to escape the binding effect of a House of Lords decision. It is noteworthy that when in *Parker* v. *The Queen* [56]. Dixon C.J. with the concurrence of the other members of the High Court, refused to follow the decision of the House in *Director of Public*

56. (1963) 37 A.L.J.R. 3. The Privy Council allowed an appeal, but was not concerned with this point: [1964] 3 W.L.R. 70.

Prosecutions v. *Smith* [1961] A.C. 290, it was not on the ground that the House had not there been concerned with matters of "general legal principle", for clearly the correct method of formulating the "presumption" that a man intends the natural and probable consequences of his acts is such a matter. Nor, of course, was it on the ground that there were any differentiating social or economic circumstances in Australia which rendered what had been said in *Smith* inapplicable on the other side of of the world; it was on the simple ground that "[t]here are propositions laid down in the judgment which I believe to be misconceived and wrong". [57]

If Latham C.J.'s apparently important qualification in *Piro* v. *Foster* has been of little weight in practice in Australia, much the same pattern may be expected here after the adoption of the remarks in *Piro* v. *Foster* by the Court of Appeal in *Corbett.* But even so, the express recognition by the Court (even if it was *obiter)* of some limitation on the authority of the House is an event worth noting. For there may conceivably be cases in which it is clear that the Lords' rule is explicable only against the background of a social pattern which is not reflected in New Zealand. Two hypothetical illustrations may serve to make the point. If the House should pronounce upon the rights and duties flowing from a contract of employment, making explicit reference *en passant* to the English system of collective bargaining agreements on wages and conditions of work, its pronouncement may have to be viewed with suspicion in New Zealand where these matters are regulated quite differently under our system of compulsory industrial arbitration. Or if the House should reformulate the law of nuisance "having regard to the needs of our industrial towns", the law as so stated need not be automatically applied to regulate the conflict of interests between smoke-producer and resident in a country like New Zealand where heavy industry is much less prominent. But it will be difficult to contend that a different established legal practice amounts to a "differentiating local circumstance"; for whereas Fair J. in *In re Rayner* [58] based his dissent on the general acceptance for at least thirty-five years by the Courts, the profession, and executors and administrators, of a certain conveyancing practice relating to the draftsmanship of the executors' clause in wills, which in his view rendered the *ratio* of the House's decision in *O'Grady* v. *Wilmot* [1916] 2 A.C. 231 inapplicable, the majority of the Court of Appeal did not regard that fact as sufficient justification for refusing to be bound by the *O'Grady* case. Nor is it likely that the settled practice of a Government Department would preclude the application of a House of Lords decision with which it was in-

57. (1963) 37 A.L.J.R. 3, 11.

58. *In re Rayner (Deceased), Daniell* v. *Rayner* [1948] N.Z.L.R. 455, 478-9, already referred to, n. 48 *ante.* Further discussion of this case, from another point of view, is offered in Mathieson, "Australian Precedents in New Zealand Courts" (1963) 1 N.Z.U.L.R. 77, 108-111.

consistent, even if the practice has been approved by the New Zealand Courts and accepted without question by the profession over a long period. Gresson P. in *Corbett* referred [59] to *Gale* v. *Federal Commissioner of Taxation* [1960] 102 C.L.R. 1, 17, where the High Court of Australia applied a decision of the House of Lords, *Sneddon* v. *Lord Advocate* [1954] A.C. 257, which meant disapproving three previous decisions of the Court upon which no doubt the Federal Commissioner had confidently based his Departmental practice. It is scarcely necessary to add that the existence of a relevant New Zealand statute with no English parallel is always a "local differentiating circumstance". [60]

V

A BETTER SOLUTION ?

When Board and Lords conflict the Court of Appeal has held that resolution of the conflict should depend on what the Privy Council would probably decide. This solution has already been sufficiently criticised. What, however, *should* the solution be, and are our courts precluded by *Corbett* from adopting it?

The best solution, it is submitted, is that if Privy Council and House of Lords cannot be reconciled the Privy Council should (with one exception) always be preferred. In support, it may first be asked what the alternatives are. Apart from the solution offered by *Corbett* there would appear to be two: a rule that the House of Lords should always be preferred, and a rule that the New Zealand court has a free choice on the merits. A rule that the House of Lords should always be preferred would at least have the merit of promoting that degree of certainty which is a principle aim of the doctrine of precedent, [61] but it is obviously incompatible with the position of the Privy Council as the ultimate appeal tribunal of New Zealand. When it is recollected that the House sits to declare and apply English law only, whereas the Privy Council applies the law of the country from which appeal is brought to it, and sits notionally, as a court of that country, it is clear that an automatic rule preferring the House of Lords would mean that effective divergence from English doctrine by courts in Commonwealth countries would become impossible. That would be intolerable. Moreover, where the Privy Council had "interpreted" or "explained" a decision of the House, it would always be arguable that the House's decision had been misunderstood or otherwise mistreated by the Board. It may be here that the shoe would

59. [1962] N.Z.L.R. 878, 896.

60. Cf. the discussion of the applicability of Australian cases interpreting similar but not identical statutes in Mathieson, loc. cit., 92-95.

61. See discussion by K.J. Keith, "Corbett's Case" (1963) 1 N.Z.U.L.R. 124, 126-8.

pinch most. In *Holmes* v. *Director of Public Prosecutions* [1946] A.C. 588, for example, Viscount Simon, speaking of provocation, said that "where the provocation inspires an actual intention to kill ... or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter very seldom applies". [62] That remark caused difficulty in later cases, [63] and in *Lee Chun – Chuen* v. *R.* [1963] A.C. 220 the Privy Council explained, or explained away, Viscount Simon's remark in these words:

> " It is plain that Viscount Simon must have meant the word 'actual' to have a limiting effect and that he had in mind some particular category of intention. He cannot have meant that any sort of intention to kill or cause grievous bodily harm was generally incompatible with manslaughter because that would eliminate provocation as a line of defence." [64]

If the House of Lords were accorded primacy over the Privy Council this would, apart from any other objectionable consequences, seem to open the door to a literal reading of *Holmes* and disparagement of *Lee Chun – Chuen* and, whatever our Court of Appeal would make of that argument, certainty would certainly have gone.

The second possible alternative is the merits approach favoured by Mr Keith. [65] He suggests that the New Zealand courts should have a free choice. With his reasons for preferring the merits approach to the prophetic test [66] the present writer is in respectful agreement. But I cannot agree with the reasons set out for preferring the merits approach to the "automatic test" here favoured. According to Mr Keith, the "only merit of the Victorian test [sc. in *Bruce* v. *Waldron*] [67] is that it is certain (its formal merit – that it recognizes the Privy Council as the supreme tribunal of the Australian system and the House of Lords as entirely outside that system – has no inherent value)". [68] But this scarcely does justice to the point that the certainty of application of an automatic test is its supreme merit. If it had been accepted by the Court of Appeal in *Corbett* the judgments would have been very much shorter.

62. [1946] A.C. 588, 598.

63. See e.g. *Attorney-General for Ceylon* v. *Perera* [1953] A.C. 200, 205-6 (P.C.).

64. [1963] A.C. 220, 227. The explanation has since been adopted by the High Court of Australia: *Parker* v. *R.* (1963) 37 A.L.J.R. 3, 10, 16, 22. *Lee Chun - Chuen* is not referred to in the joint judgment of Taylor and Owen JJ.

65. Keith, *loc. cit.*, 130 ff. Cf. counsel for the plaintiff's suggested *via media* in *Corbett's* case at 883, 11. 43-49.

66. Summarized, *loc. cit.*, 135-136.

67. *Supra*, n. 21.

68. Keith, *loc. cit.*, 136.

Once it had been decided that there was a direct conflict between *Robinson* and *Duncan* discussion would have been limited to the interpretation of *Robinson*, the effect of any subsequent developments or refinements not incompatible with the main *ratio* derivable from *Robinson*, and the application of the law to the facts of the case in hand, viz. should the power to order "inspection" – whatever that means [69] – be exercised? From the standpoint of the legal adviser, it is submitted that the automatic rule would enable much more confident advice to be given to a client when the adviser had satisfied himself – in itself, let it be granted, not necessarily a simple matter – that Board and Lords indeed conflicted. Predictability, after all, is what we have in mind when we praise the certainty achieved by a rule of precedent. As for "formal merit", let not this be undervalued either. Is there not more "inherent value" in a rule of precedent which is compatible with the traditional relationship of *stare decisis* to the positions which the precedent-giving and the precedent-accepting court occupy in a particular hierarchy, than a rule such as "choose on the merits", which cannot be regarded other than as exception to the normal basis upon which rules of precedent depend?

Next, Mr Keith argues that there are few cases of conflict between House of Lords and Privy Council so that instances of uncertainty would be few. This is, however, not much of an argument in support of a rule of precedent when a better rule is at hand which removes the uncertainty in those few instances. Moreover, a few instances of conflict may cause very considerable uncertainty in the Supreme Court and in lawyers' offices over a period of time, if the subject matter is of a frequently recurring nature, such as Crown privilege.

The next argument is taken from North P.'s judgment in *Corbett* [70] and is reinforced by the views expressed in *In re Rhodes*, [71] that common sense requires that litigants should be spared the expense of proceeding to England where the Privy Council has taken an erroneous view of the law. This objection is, however, fully recognized and accommodated by the gloss to the automatic rule which is discussed in the next paragraph. Next, the quotation of Isaacs J.'s celebrated assertion that it is better for the court to be "ultimately right" rather than "persistently wrong" is really irrelevant except when discussing a quite different question: should the House of Lords (or High Court of Australia, or the New Zealand Court of Appeal) be absolutely bound by its *own* previous decisions? Finally, and perhaps most important, the merits approach, though not without considerable attraction as the most rational solution, is equally as impossible to reconcile with the constitutional position of the Judicial Committee as a rule that the House of Lords should always be preferred.

69. See e.g. Coote, "Investigate or Override?" (1963) 1 N.Z.U.L.R. 137.

70. [1962] N.Z.L.R. 878, 902.

71. *In re Rhodes (Deceased), Barton* v. *Moorhouse* [1933] N.Z.L.R. 1348.

If the simple rule that the Privy Council must be preferred were to gain acceptance, there would be considerable certainty combined with proper recognition of the place of the Privy Council as the highest court in the New Zealand hierarchy. The consequences of that recognition can be pushed nearly, but not quite as far, as logic would dictate. Logically, the consequence is that a Privy Council decision should be followed, however undesirable the effect of so doing might be, whatever its age, whatever criticisms had been levelled at it, and whatever the House of Lords may have laid down to the contrary. But that would indeed be "too facile". The doctrine, in order to avoid absurdity, must be glossed with a doctrine of demonstrable error, narrowly defined to apply to the situation discussed in *London Joint Stock Bank Ltd.* v. *Macmillian* [1918] A.C. 777 where alone, it is submitted, it is valuable. This is not the recommendation of a rule achieving certainty with an exception reintroducing uncertainty. For if the "definite error" doctrine is restricted as I have suggested.[72] it would, it is submitted, be highly predictable in advance whether it was applicable or not. And common sense would support the conclusion that would be necessitated. Error by the Privy Council in non-application or misinterpretation of an earlier House of Lords decision must not and need not be perpetuated.

Finally, there is considerable authority in favour of the simple rule that is here submitted as most preferable. In *Bruce* v. *Waldron* [73] itself the Full Court of the Victorian Supreme Court regarded it as its "simple duty" to follow the Privy Council. Professor Davis [74] has drawn attention to early instances of New Zealand judges preferring Privy Council to House of Lords. Their preference may have to be implied from what they actually said [75] or may have been mere *obiter*, [76] but may it not have resulted from an instinctive preference for a simple rule without any obvious adverse consequences? Gavan Duffy J., in the Supreme Court of Victoria, has recently, and apparently equally instinctively, preferred Board to Lords. In *Victoria Insurance Co. Ltd.* v. *Junction North Broken Hill Mine* [1925] A.C. 354 the Privy Council placed a certain construction upon words in s. 12(1)(a) of the Workmen's Compensation Act 1916 (N.S.W.). Two years later, in *Blatchford* v. *Staddon and Founds* [1927] A.C. 461, the House of Lords, without even referring to the *Victoria Insurance Co.* case, adopted a contrary construction of s. 8(a) of the Workmen's Compensation Act 1906, which was couched in identical language to the New South Wales provision. Gavan Duffy J. in

72. See discussion, pp. 10-11 *supra.*

73. [1963] V.R. 3, 8. But the rejection by the same court of any doctrine of definite error is, with the greatest respect, unacceptable.

74. A. G. Davis, "Judicial Precedent in New Zealand", (1955) 31 N.Z.L.J. 42, 43.

75. E.g. Stout C.J. in *Stewart* v. *Taylor* (1905) 24 N.Z.L.R. 785, 789.

76. E.g. Herdman J. in *Stevenson* v. *Basham* [1922] N.Z.L.R. 225, 231.

Minerals (Vic.) Pty. Ltd. v. *Insurance Commissioner of the State Accident Insurance Office* [1961] V.R. 340 was confronted with a strong argument from counsel that the *Blatchford* case governed the interpretation of the Victorian provision, also identical. His Honour rejected this contention and unhesitatingly applied the reasoning in the *Victoria Insurance Co.* case.

Whether our Court of Appeal has precluded itself by its decision in *Corbett's* case from adopting the simple solution advocated in the present article is debatable. But I venture to suggest that it has not. The doctrine of precedent in the Court of Appeal is surely not so rigid as to prevent the reconsideration of a precedent rule to which there are many objections and to which a simpler and preferable alternative lies ready to hand. [77.]

D. L. MATHIESON.

77. I gratefully acknowledge the helpful criticisms of Dr G.P. Barton, who is not, however, to be thought responsible for the opinions expressed in this article.