

The Notary Public- the third arm of the legal profession

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The notary public is a survival of a civil law notion in the common law. The notary public's duties are primarily involved with authenticating documents. Notaries are appointed under the authority of the Archbishop of Canterbury. Although some consideration was given in New Zealand a decade ago to the introduction of a Notaries Public Bill, no Bill was ever introduced. Though it may seem anomalous to have a type of New Zealand legal practitioner appointed by an ecclesiastical authority, let alone an English one, this is not now the primary factor which should influence any review of the office. Modern commercial practice, and especially electronic commerce, makes it imperative that any change takes into account international usage of the office.

1 Introduction

In civil law systems- those deriving their basic principles predominantly from the laws of ancient Rome- a notary public is a lawyer practising in non-contentious business. More particularly, they are concerned with the authentication of documents. Their duties embrace authentication, protesting bills of exchange, ship protests, and other notarial acts.

Although the civil law never became the basis of the laws of England, and consequently of New Zealand, its influence has always been felt. This is particularly true in commercial law. The international character of this field of law meant that English law had to take account of the civil law practiced more widely on the continent of Europe. One consequence of this was the survival, in England, of the notary public. Appointed by ecclesiastical authorities¹, they nonetheless had primarily secular duties, which were akin to those of notaries in civil law countries.

Notaries were never very numerous, and their relatively responsibilities minimised conflict with the common law practitioners. Partly for these reasons they were never subject to the same sort of pressures that had been brought to bear on the practitioners of the ecclesiastical laws by the common lawyers. They remained as a small but important survival of civil law within the common law legal system. Indeed, they might be regarded as the third arm of the legal profession, alongside solicitors and barristers.

Since 1533 notaries in England, and more recently, in New Zealand, parts of Australia, and a number of other countries, have been appointed by the Master of the Faculties, a judicial officer of the Archbishop of Canterbury.

More than ten years ago the Imperial Laws Application Act ended the application in New Zealand of most imperial legislation. This was regarded as being one of the principal steps on the road to legal independence. Despite the enacting of this legislation, notaries public in New Zealand are still appointed in the name of the Archbishop of Canterbury. Consideration was

¹Some were also appointed by the emperor, though the legal standing of such notaries was never entirely settled in England, as if never acknowledged allegiance to the Holy Roman Empire.

given at the time to enacting the Imperial Laws Application Act to introduce a Notaries Public Bill, in order to make provision for notaries public. In the event nothing was done, and the office remains unreformed. Yet the appointment remains sought after, with over 200 in practice today.

Reforms have now taken place in England and Wales, reforms that affect, to some extent, the position of notaries in the Commonwealth still appointed under the jurisdiction of the Archbishop of Canterbury. With the introduction of mutual recognition legislation for legal practitioners it may now be time to reconsider the position of the notary. Growth in electronic commerce and the resultant need for international harmonisation also suggest that it is time the office was re-examined.

This paper will look first at the nature of notaries. It will then examine their duties. The mechanism of appointment will be reviewed, both in the Commonwealth generally, and in New Zealand specifically. To conclusion it will outline some of the factors which must be considered in any review of the office of notary public in New Zealand.

2 Nature of a notary

An understanding of the office of notary is only possible within its historical framework. Notaries Public² are creatures of the civil law, though they have a long been a feature of the common law world, being mentioned in the Statute of Provisors 1352³. They were always ecclesiastical officers⁴, appointed from 1533⁵ by the Master of the Faculties to the Archbishop of Canterbury⁶, in order to substantiate evidence of human activities⁷. All

²Also called notaries, or public notaries; In Latin, variously *registrarius*, *actuarius*, or *notarius*. The modern notary corresponds rather to the *tabellis* or *tabularius*, rather than to the *notarius*, who was a scribe (and often a slave).

³25 Edw III stat 4 (Eng).

⁴In canon law, a notary is a person legitimately constituted by ecclesiastical authority to authenticate by his or her signature ecclesiastical documents. By the fourth Lateran Council (1215), every ecclesiastical court was required to have a notary. In the Roman Catholic Church, the notary is commonly in holy orders. Lay notaries did not appear until as late as the fourteenth century

⁵By the Ecclesiastical Licences Act 1533 (25 Hen VIII c 21) (Eng). This Act has been repealed so far as New Zealand is concerned, by the Imperial Laws Application Act 1988 (NZ). The relevant section, s 2, was repealed in England and Wales by the Statute Law Repeals Act 1969 (UK). Formerly, all notaries throughout Western Christendom were appointed by, or with the authority of the Pope. In England, some bishops received faculties to appoint notaries, while others were appointed directly by the Pope. There was, however, no general delegation to the Archbishop of Canterbury, or any other bishop. The Clerk of the Crown in Chancery no longer registers notaries public, as formerly- Courts and Legal Services Act 1990 (UK) s 57 (10).

⁶The Commissary or Master of the Faculties is the head of the Court of Faculties, and also, as Dean of the Arches and Auditor, Judge of the Provincial Courts of Canterbury and York. The authority to appoint notaries is found in the Ecclesiastical Licences Act 1533 (25 Hen VIII c 21) (Eng), the Public Notaries Act 1801 (41 Geo III c 79) (UK), the Public Notaries Act 1833 (3 & 4 Will IV c 70) (UK), the Public Notaries Act 1843 (6 & 7 Vict c 90) (UK), and the Courts and Legal Services Act 1990 (UK).

registrars of ecclesiastical courts in the Provinces of Canterbury and York of the Church of England must still be notaries, however, a general notary's duties are primarily secular.

One field in which the influence of the civil was especially influential in England was the Law Merchant, or *lex mercatoria*. The modern commercial law grew out of the custom and usages of the merchants, the Law Merchant. Some of these customs were written down, and became a code of international commercial customs. In the Statute of the Staple 1352-3⁸ this was recognised as part of the law of England, though it is unclear to what extent it was systematised in England. Gerard de Malynes regarded Law Merchant as customary law approved by the authority of all kingdoms and not as law established by the sovereignty of any prince⁹. Like the canon law-based ecclesiastical law, it was the "law of all nations"¹⁰.

⁷The faculty issued by the Office of the Master of the Faculties clearly sets out the responsibilities of a notary. The wording of a modern faculty appointing a notary in England and Wales, and the accompanying Oath of Allegiance and Declaration of Office are as follows-

[...], by Divine Providence, Archbishop of Canterbury, Primate of all England and Metropolitan, by Authority of Parliament lawfully empowered for the Purposes herein written: To Our Beloved in Christ, [...], a literate Person now residing at [...], Health and Grace: We being willing, by reason of your merits to confer on you a suitable Title of Promotion, do create you a Public Notary; previous Examination and all other Requisites to be herein observed having been had: And do out of Our Favour towards you, admit you into the number and Society of other Notaries, to the end that you may henceforward at [...] and all other places in England and Wales whatsoever [clauses of limitation or exception, for instance "except within the jurisdiction of the Incorporated Company of Scriveners of London"] exercise such office of Notary, hereby decreeing that full faith ought to be given, as well in judgement as thereout, to the Instruments to be from this time made by you: the Oath and Declaration hereunder written having been by Us, or our Master of the Faculties first required of you and by you duly taken and subscribed.

The Oath of Allegiance

I, [...], do swear by Almighty God, That I will be faithful and bear true Allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, according to Law.

The Declaration of Office

I, [...], do solemnly, sincerely, and truly declare and affirm that I will faithfully exercise the office of a Public Notary; I will faithfully make Contracts or Instruments for or between Party or Parties requiring the same and I will not add or diminish anything without the Knowledge and Consent of such Party or Parties that may alter the substance of the Fact; I will not make or attest any Act, Contract or Instrument, in which I shall know that there is violence or fraud; and in all things I will act uprightly and justly in the Business of a Public Notary, according to the best of my Skill and Ability.

Given under the Seal of Our Office of Faculties at Westminster this [...] day of [...] in the year of Our Lord, One Thousand and nine hundred and [...] and in the [...] year of Our Translation.

[signed]

[LS.] Registrar

⁸27 Edw III stat 2 (Eng).

⁹*Consuetudo vel Lex Mercatoria, or the Ancient Law Merchant*, London, 1622.

However, the absence of a reception of Roman civil law, the relative geographical isolation, and the commercial weakness of England before the sixteenth century all contributed to the law merchant developing differently in England to on the continent¹¹. For similar reasons the notary public has been left as something of a hybrid, a civil law creature in a common law environment.

The appointment of notaries passed to the Archbishop of Canterbury with the passage of the Ecclesiastical Licences Act 1533-34¹², also known as the Peter Pence Act. This conferred the power, formerly vested in the pope, to grant licences, dispensations and faculties¹³ upon the Archbishop of Canterbury.

The notary is a civil lawyer practising in non-contentious matters, but does not have the same relationship with his or her clients, as does a solicitor. The notary's responsibility is to the transaction itself, rather than to the client¹⁴. The notary is at once the holder of a public office and a member of a distinct branch of the legal profession¹⁵. Their office is of relatively slight importance, except in relation to foreign transactions and, in England, certain ecclesiastical matters¹⁶. The notary is an officer of the law whose public office and duty it is to draw, attest or certify under his or her official seal, for use anywhere in the world, deeds and other documents.

In foreign countries generally, that is those not part of the Commonwealth, notaries are governed by special legislation¹⁷. In the United States of America they are usually appointed by the Governors of the states (and, for the District of Columbia, by the President of the

¹⁰*Luke v Lyde* (1759) 2 Burr 882; 97 ER 614, per Lord Mansfield, CJ.

¹¹Leon Trakman, *The Law Merchant- The Evolution of Commercial Law*, Littleton, FB Rothman, 1983, p 23-26.

¹²25 Hen VIII c 21 (Eng).

¹³The Faculty is, in ecclesiastical law, a privilege or special dispensation, granted to a person by favour and indulgence to do that which by the common law he or she could not do. This includes marrying without banns, or erecting a monument in a church. These are granted in the court of faculties, by the master of the faculties (*Magister ad Facultates*), under the Ecclesiastical Licences Act 1533-34 (25 Hen VIII c 21) (Eng). Mocket's *Politia Ecclesiae Anglicanae*, London, 1617 places the appointment of notaries public first among the archbishop's power to dispense. In limited causes Consistory Courts may also grant faculties.

¹⁴Continental notaries tended to assume more the position of a public official before whom wills were proved and probate granted and by whom official records were maintained. None of these functions applied under the common law.

¹⁵One of the oldest officers of the law, the notary first developed in response to the need for reliable authentication of documents executed in one jurisdiction for use in another.

¹⁶Mediæval notaries public were akin to modern conveyancing solicitors, and present day notaries are far more limited and specialised in their functions, a fact testified by the paucity of their numbers. For briefs accounts of the earlier history of notaries see Wilfrid Hooper, "The Court of Faculties" (1910) 25 *English Historical Review* 670; and CR Cheney, *Notaries Public in England in the Thirteenth and Fourteenth Centuries*, Oxford, Clarendon Press, 1972.

¹⁷In many cases a notary may not practise in any other profession, but there are some important exceptions. Thus, in certain of the German länder, the notaries, called *Anwaltsnotare*, may also practice as legal counsel, or *Rechtsanwälte*.

United States), and are often accused being of a low standards¹⁸. However, they are not empowered to act outside their own state, and often not beyond their own county¹⁹.

There has been no attempt in the common law world to codify the precise nature of the office of notary public as has been done in continental Europe, Latin America, and other parts of the world whose legal systems are based on principles derived from Roman law. The functions of notaries may however be gleaned from a number of sources. The chief of these is custom, principally the law merchant. To a limited extent case law provides guidance, and some statutes deal with specific aspects of their work.

3 Duties of Notaries

The act of certifying or authenticating is called the "notarial act", which may be either in a private or public form. Private notarial acts are when the notary certifies or attests a private document. The public form, which is less common, are those bills of exchange, ship protests, notarial certificates, affidavits, statutory declarations, or powers of attorney, which are, written by the notary himself.

By virtue of his or her office, the notary's signature²⁰ and seal²¹ is recognised as being evidence of a responsible officer in most countries of the world²². However, the common law

¹⁸See also Gerald Haberkorn & Julie Z Wulf, "The legal standard of care for notaries and their employers" (1998) 31 *John Marshall Law Review* pp 735-748; Peter J van Alstyne, "The notary's duty to meticulously maintain a notary journal" (1998) 31 *John Marshall Law Review* 777-802; Michael J Osty, "Notary bonds and insurance: increasing the protection for consumers and notaries" (1998) 31 *John Marshall Law Review* 839-858; Nancy Perkins Spyke, "Promoting the intermediate benefits of strict notary regulation" (1998) 31 *John Marshall Law Review* 819-838; John T Henderson & Peter D Kovach, "Administrative agency oversight of notarial practice" (1998) 31 *John Marshall Law Review* 857-878; William P Barrett, "Robber Stamps" (1987) 140 *Forbes* 144-145; R Jason Richards, "Stop! ... go directly to jail, do not pass go and do not ask for a notary" (1998) 31 *John Marshall Law Review* 879-902.

¹⁹In the common law, though not Commonwealth jurisdiction of the Republic of Ireland, the Chief Justice appoints notaries. Any person of integrity and good standing may apply for appointment, but must demonstrate knowledge of a relevant branch of law. This is shown either by possessing a professional qualification, or by having relevant experience. There must also be evidence of a need for notarial services in the county where the applicant seeks to practice. The professional body is the Faculty of Notaries Public in Ireland; s 10 Courts (Supplemental Provisions) Act 1961 (Ireland).

²⁰The attestation and signature should be in ink rather than written with a ballpoint pen, which is liable to fading.

²¹A notarial seal is not strictly necessary, but is invariably used. If the notary is armigerous, he or she may use their own arms on the seal. Seals are usually embossed, with an intaglio of case hardened steel and a relieve of copper. This may be used with or without a wafer.

²²A court will take judicial notice of Commonwealth notary's seal and signature; *Brooke v Brooke* (1881) 17 ChD 833. However, judicial notice will only be taken of a local notary's protest of a foreign bill as a result of s 51 (2) and s 95 (1) and the Second Schedule of the Bill of Exchange Act 1908 (UK); *Poole v Dicus* (1835) 1 Bing NC 649; 131 ER 1267 [though this was questioned in *Brain v Preece* (1843) 11 M & W 773, 775; 152 ER 1016 per Lord Abinger].

courts will take judicial notice of the seal of a notary²³, but not that the facts that he or she has certified are true²⁴, except in the case of a bill of exchange protested abroad²⁵.

Most New Zealand notaries have lodged specimens of their signatures and seals with the Ministry of Foreign Affairs and with the principal foreign missions so that if further consular verification of any document is required in that country the details are already on record²⁶.

Depending upon the nature of the document and the place where it is to be used, the formalities of authentication will include attestation, notarial authentication, or authentication in special form, such as for ship protests. Governmental or consular officials require further authentication²⁷.

The notary is required to keep a file of a year's documents, which records all notarial acts, and is often termed the protocol. It contains originals of all instruments that he or she makes in the public form²⁸. A notary should also have a supply of suitable tape and adhesive seals²⁹.

The notary's evidential function is to attest the execution and signature of documents. This includes receiving all acts and contracts that must or are wished to be clothed with an authentic form³⁰. He or she authenticates the execution of documents, and issues authentic

²³*Cole v Sherard* (1855) 11 Exch 482; 156 ER 920.

²⁴*Appleton v Braybrook (Lord)* (1816) 6 M & S 34; 105 ER 1155.

²⁵The common law will take judicial note of a foreign notary's protest abroad of a foreign bill, but not of the seals and signatures of foreign notaries when authorised merely by foreign law; *Chesmer v Noyes* (1815) 4 Camp 129; 171 ER 42; *Re Earl's Trusts* (1858) 4 K & J 300; 70 ER 126. It is not necessary in New Zealand to protest an inland bill of exchange. However, foreign bills must be noted by a notary public, or, if no notary is available, by a "householder or substantial resident of the place"- Bill of Exchange Act 1908 (NZ) s 51 (2) and s 95 (1) and Second Schedule.

²⁶Bill Laxon, "The Notary Public" [1997] NZLJ 65.

²⁷In 1961 the 9th Session of the Hague Convention on Private International Law included a convention on legalisation. This provides that for countries that are parties to the Convention, a special procedure, called the apostille, merely requires authentication by diplomatic body. As throughout the Commonwealth, and in former Commonwealth countries sharing the common law, the signature and seal of a notary proves itself, the apostille procedure is only required for foreign countries; 9th Session of the Hague Convention on Private International Law (1961) cmnd 1582.

²⁸The duty to maintain a proper record of his or her notarial acts public and private is now enshrined, in respect of notaries appointed by the master of the faculties, in the Notaries (Records) Rules 1991 (UK).

²⁹A notary is not legally required to initial every sheet of a document; *Hamel v Panet* (1876) 2 App Cas 121; 46 LJPC 5. They will generally bind notarial acts and their attachments securely together with ribbon or tape, the notary's wafer seal being impressed over the ends of the ribbon or tape.

³⁰Mauritius requires legalisation by an independent authoritative source. Statutory declarations made before a notary are acceptable in judicial proceedings in Commonwealth countries unless the local law has excluded the provisions of s 15 of the Statutory Declarations Act 1835 (5 & 6 Will IV c 62) (UK). The Oaths and Declarations Act 1957 (NZ) s 31 (1) declares certain English or United Kingdom Acts to have ceased to have effect in New Zealand. These include the Witnesses Oaths Act 1702 (1 Anne stat 2 c 9) (Eng), the Statutory Declarations Act 1835 (5 & 6 Will IV c 62) (UK), the Oaths Act 1838 (1 & 2 Vict c 105) (UK), the (Colonies) Evidence Act 1843 (6 & 7 Vict c 22) (UK), and the Colonial Affidavits Act 1859 (22 & 23 Vict c 12) (UK).

copies of documents, establishing their dates, and contents³¹. He or she preserves originals or minutes of such documents which, when prepared in the style and with the seal of the notary, obtain the name of original acts. The notary is also required to authenticate, and certify transactions relating to negotiable instruments in general³².

The notary is required to administer oaths and declarations for use in legal proceedings, and, in England and Wales, to take evidence as a commissioner for foreign courts. He or she also swears affidavits³³. It is the function of a notary to draw up (or note) and extend protests or other formal papers relating to occurrences on the voyages of ships, and happenings to their crews and cargo³⁴. The notary may also make and verify the making of translations from foreign languages into English and vice versa.

The notary presents foreign bills of exchange for acceptance and payment in case of non-acceptance or non-payment³⁵. This must be done by a notary, at the request of the holder of the bill, in order to recover the sum owed³⁶. The notary may also note or certify transactions relating to negotiable instruments.

In addition to the principal and quasi-public functions, notaries may draw, attest or certify mercantile documents, deeds, contracts and agreements and other documents. This includes

³¹*Geralopulo v Wieler* (1851) 10 CB 690; 138 ER 272; But only admissible as primary evidence if it is a duplicate made at any time from the original or protocol in the notarial book- *Permanent Trustee Co v Fels* [1918] AC 879.

³²The Bills of Exchange Act 1882 (45 & 46 Vict c 61) (UK), and Bills of Exchange Act 1908 (NZ) the are two of the few statutes in which a notary is mentioned as such, and given a specific duty.

³³Including those sworn for use abroad- *Re Davis' Trusts* (1869) LR 8 Eq 98; *Re Lambert* (1866) LR 1 P & D 138.

³⁴A ship protest is where a master of a vessel records that damage has occurred to ship or cargo owing to bad weather or some accident at sea. This record may be used as evidence against the master or shipowner, but not in their favour; *Christian v Coombe* (1796) 2 Esp 489; 170 ER 430; *Senat v Porter* (1797) TR 158; 101 ER 908; *The "Betsey Caines"* (1826) 2 Hagg 28; 166 ER 154; *The "Hedwig"* (1853) 1 Spinks E & Ad 19; 164 ER 11.

³⁵The notary or his or her clerk makes a formal demand upon the drawee or acceptor for acceptance or payment, as the case may be. Upon refusal, the notary notes the bill, by writing a minute on the face of the bill- his or her initials, the date, the noting charge, and a reference to the notary's register. A ticket or label is also attached to the bill, on which is written the answer given to the notary's clerk who makes the presentment. An example might be "No orders" or "No effects".

Before sending out the bill, the notary makes a full copy of it in his or her register and subsequently adds the answer, if any. The noting of a dishonoured instrument may take place on the day of its dishonour. It must take place not later than the next succeeding business day. When it has been duly noted, the protest may subsequently be extended as of the date of the noting. A protest is a formal declaration by the holder of a bill of exchange, or by a notary public at his or her request, that the bill of exchange has been refused acceptance or payment, and that the holder intends to recover all the expenses to which he or she may be put in consequence thereof. In the case of a foreign bill, such a protest is essential to the right of the holder to recover from the drawer or indorser; *Geralopulo v Wieler* (1851) 10 CB 690; 138 ER 272.

³⁶The requirement that a notary public be a witness is believed to be a survival of the law merchant, or a concession to Continental practice, itself derived from the *lex mercatoria*.

conveyances of real and personal property, and powers of attorney³⁷, in English and in foreign languages, for use in the United Kingdom, the Commonwealth and foreign countries.

The drawing of wills and other testamentary documents is part of his or her work, as may be probate business. Miscellaneous duties, which class is open ended, include certifying that a foreign official is duly qualified³⁸; and, in England and Wales, attend upon the drawing of bonds³⁹. Most of these functions are however either obsolete or very rare outside England and Wales.

Although disparate duties fall to the notary public, they have as a common element the ancient function to substantiate evidence of human activities. This is clear in the wording of a modern Declaration of Office of a notary public appointed by the Master of the Faculties:

I will faithfully make Contracts or Instruments for or between Party or Parties requiring the same and I will not add or diminish anything without the Knowledge and Consent of such Party or Parties that may alter the substance of the Fact; I will not make or attest any Act, Contract or Instrument, in which I shall know that there is violence or fraud; and in all things I will act uprightly and justly in the Business of a Public Notary, according to the best of my Skill and Ability.

Various officers are empowered to witness the taking of a declaration, statutory declaration, and similar evidentiary instruments⁴⁰. Some of these, such as Justices of the Peace, and solicitors, are numerous. While there are in New Zealand some 7,000 solicitors⁴¹, and 6,000 Justices of the Peace, there are only 200 notaries public. Their role however is more restricted, being concerned with commercial transactions. More importantly, the notary is recognised by private international law in a way that the other officers are not. By the law of nations, the acts of a notary have credit everywhere⁴².

³⁷*Armstrong v Stockham* (1855) 24 LJ Ch 176; *Hayward v Stephens* (1867) 36 LJ Ch (NS) 135; *Re Eastern United Assurance Corporation* (1928) 72 SJ 353.

³⁸*Ex p Worsley* (1793) 2 H Bl 275; 126 ER 548; *Omealy v Newall* (1807) 8 East 364; 103 ER 382; *Cole v Sherard* (1855) 11 Ex 482; 156 ER 920; *Abbott v Abbott* (1860) 29 LJ P & M 57; *Re Magee* (1885) 15 QBD 332.

³⁹The drawing of bonds is unlikely to form part of the responsibilities of a notary in Australasia.

⁴⁰s 9 of the Oaths and Declarations Act 1957 (NZ) confers upon notaries the authority to administer oaths and statutory declarations. Similar authority is conferred upon Justices of the Peace, solicitors, Registrars or Deputy Registrars of the High Court or of any District Court, or "any other person by law authorised to administer an oath", any employee of New Zealand Post Limited or Post Office Bank Limited, officer in the service of the Crown, or of a local authority from time to time authorised for that purpose by the Minister of Justice or any member of Parliament.

⁴¹Including those qualified to practise as barristers, but excluding barristers sole, who cannot act as notaries public; *Code of Ethics* (1980) rule 5.14 [though the equivalent rule is absent from the *Rules of Professional Conduct for Barristers and Solicitors* (5th ed 1998), the Master of the Faculties does not appoint barristers sole to the office of notary, and its nature is quite distinct from the day-to-day function of counsel].

⁴²*Hutcheon v Mannington* (1802) 6 Ves 823, 824 per Lord Eldon, LC; 31 ER 1327.

In many Commonwealth countries other officials can conduct the functions of a notary. Commonwealth countries generally have Commissioners for Oaths, and similar officials⁴³. In New Zealand, the Oaths and Declarations Act 1957 (NZ) provides that declarations made outside New Zealand, but within the Commonwealth, may be taken before a Commissioner of Oaths or a Solicitor of the High Court of New Zealand⁴⁴. It is however in their role of authenticator of documents for non-Commonwealth legal processes that the notary is most important.

In England, special Commissioners for Oaths are not now appointed⁴⁵. Now, every authorised person has the powers of a commissioner for oaths, as does every general notary⁴⁶. These authorised persons include any authorised advocate or authorised litigator, other than one who is a solicitor, in relation to whom similar provision was made by s 81 of the Solicitors Act 1974⁴⁷. They also include any person who is a member of a professional or other body prescribed by the Lord Chancellor⁴⁸.

Every solicitor who holds a practising certificate, authorised person, general notary, and member of the Incorporated Company of Scriveners admitted to practise as a public notary within the jurisdiction of the Company shall have the right to use the title "Commissioner for Oaths"⁴⁹. Similar legislation applies in the Canadian provinces and elsewhere.

The Commissioners of Oaths exist primarily for Commonwealth countries. Outside the Commonwealth a notary replaces the Commissioner of Oaths. The great majority of civil law countries require documents to be authenticated by a notary public, and cannot be unilaterally abandoned by any single country⁵⁰.

4 Appointment of Notaries

Under his inherent jurisdiction and later statutory authority, the Master of the Faculties makes rules governing the admission of notaries in England⁵¹, and elsewhere where his

⁴³In New Zealand these are appointed, under s 47 of the Judicature Act 1908 (NZ), by individual High Court judges, by commission under the Seal of the High Court, to act in any country or place beyond the jurisdiction of the Court, for administering and taking oaths, affidavits or affirmations. Appointments are published in the *New Zealand Gazette*, as are revocations for sufficient cause (s 49).

⁴⁴s 11.

⁴⁵Courts and Legal Services Act 1990 (UK) s 113 (2). Formerly, Commissioners for Oaths were solicitors appointed by the Lord Chancellor.

⁴⁶s 113 (1).

⁴⁷This confers upon those solicitors with practising certificates, the powers of the Commissioners for Oaths Act 1889, 1891, and s 24 of the Stamp Duty Management Act 1891.

⁴⁸Courts and Legal Services Act 1990 (UK) s 113 (2).

⁴⁹Courts and Legal Services Act 1990 (UK) s 113 (10). Ecclesiastical notaries are excluded from the provision.

⁵⁰In the Commonwealth (excepting Mauritius- a civil law jurisdiction), the signature and seal of a notary public proves itself; *Brooke v Brooke* (1881) 17 ChD 833.

⁵¹Courts and Legal Services Act 1990 (UK) s 57 (4).

jurisdiction survives. Applicants, excepting those appointed for ecclesiastical purposes only, are now required to pass examinations in notarial practice⁵².

General Notaries have been appointed in England and Wales under statute since 1801⁵³. Depending upon the terms of their Faculty⁵⁴, they may practise either in all places in England and Wales, including the area under the jurisdiction of the Scriveners' Company⁵⁵, or in all places in England and Wales outside that area. They will normally be solicitors of the Supreme Court of England and Wales. The previous requirement to serve a five-year apprenticeship was ended in 1990⁵⁶.

District Notaries were appointed and regulated by statute from 1833⁵⁷. They were appointed by Faculty of the Master of the Faculties, for a specific geographical area⁵⁸. They need not have served an apprenticeship. Their appointment had to be supported by bankers, merchants, and similar people in business in that area. They also had to pass an examination in notarial practice. Normally, only solicitors were appointed district notaries. Since 1991 the distinction between general and district notaries has ended, and they may now practice, as general notaries, in all parts of England and Wales outside the jurisdiction of the Scriveners' Company⁵⁹.

All applicants for appointment as notaries public in England and Wales must be aged twenty-one or over, and have satisfied the requirements of one of four rules, as being qualified for appointment as an Ecclesiastical Notary, Scrivener Notary, Solicitor Notary, or other Notary. Before commencing practice a notary must also be duly sworn, admitted and enrolled in the Court of Faculties⁶⁰.

⁵²Order of Court 83 LS Gaz 670; General Notaries could take the examinations in land Law and Trusts and Succession any time after completing two years articles, and the Conveyancing and Notarial Practice examinations after four years. All had to be passed before an applicant could be appointed a notary.

⁵³Public Notaries Act 1801 (41 Geo III c 79) (UK).

⁵⁴The Faculty is, in ecclesiastical law, a privilege or special dispensation, granted to a person by favour and indulgence to do that which by the common law he or she could not do. This includes marrying without banns, or erecting a monument in a church. Faculties are issued by the Master of the Faculties as officer responsible for exercising the special jurisdiction of the Archbishop of Canterbury, as well as by the ordinary Consistory Courts in England.

⁵⁵Public Notaries Act 1801 (41 Geo III c 79) (UK) s 13. Notaries must have the freedom of the Scriveners' Company to practise within the area covered by the jurisdiction of that company.

⁵⁶Courts and Legal Services Act 1990 (UK) s 57 (2). An alternative, for those not solicitors, was a seven year apprenticeship for those within the jurisdiction of the incorporated Company of Scriveners of London.

⁵⁷Public Notaries Act 1833 (3 & 4 Will IV c 70) (UK).

⁵⁸From 1920 to 1990 the Lord Chancellor appointed those in Wales.

⁵⁹Public Notaries (Qualifications) Rules 1991 (UK).

⁶⁰Since the passage of the Courts and Legal Services Act 1990 (UK) applications have been made in accordance with the Public Notaries (Qualifications) Rules 1991 (UK). Rule 4 states that no person shall be admitted as a Notary to practise within England and Wales unless they have taken the oath of allegiance, and the oath under s 7 of the Public Notaries Act 1843 (6 & 7 Vict c 90) (UK). The applicant must undertake to maintain adequate indemnity insurance.

If an application is approved, the notarial Faculty is forwarded to New Zealand, and a commission is issued to a Judge or other person to administer the oath of admission and the oath of allegiance. The commissioner is authorised to then issue the Faculty. A notary must

The Master of the Faculties appoints ecclesiastical Notaries for the ecclesiastical purposes of the Church of England within England. There are few besides the diocesan registrars and legal secretaries of Bishops⁶¹. They are not now appointed in Wales, nor are they required to serve apprenticeships. Appointments are made as a matter of course if the applicant is personally suitable⁶².

Scrivener notaries are subject to the independent jurisdiction of the incorporated Company of Scriveners of London⁶³. By charter, freemen of the company have the exclusive right to practise within the City of London, the liberties of Westminster, the borough of Southwark, or "within the circuit of three miles of the said City"- three miles from the Royal Exchange⁶⁴.

Any solicitor of the Supreme Court of England and Wales, who, in addition to his or her own professional qualifications, has passed the examination in Notarial Practice, may apply for admission by Faculty to practise as a notary public anywhere in England and Wales outside the Scriveners' jurisdiction⁶⁵.

The other notaries, those not freemen of the Scriveners' Company, practising English or Welsh solicitors, nor appointed for ecclesiastical purposes only, must have passed examinations in Land Law, Conveyancing, and Trust and Succession, in addition to the examination in Notarial Practice⁶⁶.

In order to qualify for appointment as a notary, a non-solicitor applicant must have, within the last five years, spent three years in full-time study of law in England and Wales. Alternatively, they must have spent full-time study in preparation for such other English and Welsh legal qualifications as approved by the Master of the Faculties⁶⁷.

be duly sworn, admitted and enrolled in the Court where notaries are customarily sworn, admitted and enrolled- the Court of Faculties. The commission is necessary to dispense with this requirement.

⁶¹The following may apply to be appointed notaries for ecclesiastical purposes only- the Registrars of Provincial Courts of Canterbury and York, the Registrar to the Archbishop of Wales, the Legal Adviser to General Synod of the Church of England, the Legal Secretary to the Governing Body of the Church of Wales, the Registrar of any Diocese in England and Wales, and officers of the Ecclesiastical Court in Jersey or Guernsey. If a solicitor, the following are eligible for appointment- the chapter clerk of any Cathedral Church in England or Wales, or deputy thereof; Public Notaries (Qualifications) Rules 1991 (UK).

⁶²They are appointed under the general authority of s 3 of the Ecclesiastical Licences Act 1533 (25 Hen VIII c 21) (Eng).

⁶³A London notary must be proficient in one or more foreign languages, and familiar with the principles and practice of foreign law; Scriveners' (Qualifications) Rules 1991, made by the Court of the Scriveners' Company under powers preserved to it by s 57 of the Courts and Legal Services Act 1990 (UK).

⁶⁴The scrivener notaries are members of the Society of Public Notaries of London, 10 Philpot Lane, London EC3M 8AA, NP Ready, Honorary Secretary. This society, established 1823, has only 28 members, indicating the relative rarity of the appointment in England.

⁶⁵Public Notaries (Qualification) Rules 1991 (UK) rule 7. The fee for admission is £200; Notarial Faculties (Fees) Order 1982 Schedule (UK).

⁶⁶Each examination, which may be partly written and partly viva voce, or wholly written, is conducted in January and July each year, and each paper is of a duration of three hours. The Notarial Practice examination is in two parts, covering evidence and authentication, and Bills of Exchange, each of which lasts 90 minutes.

⁶⁷Alternatively, they must have been under an apprenticeship pursuant to s 2 of the Public Notaries Act 1801 (41 Geo III c 79) (UK), or have had service under articles of clerkship with

Once appointed, all notaries admitted to practise in England and Wales, except ecclesiastical notaries, must undertake a period of supervised training⁶⁸. This is generally for two years, less any time spent in an apprenticeship under the Public Notaries Act 1801 (UK)⁶⁹ or time spent as a notary by a district notary appointed under the Public Notaries Act 1833 (UK)⁷⁰. Supervision must normally be by a notary holding a current practising certificate, with five years experience⁷¹.

Notaries must have a practising certificate as a solicitor, or from the Court of Faculties, as a notary⁷². Solicitor notaries send their practising certificates to the Registrar for endorsement, and other notaries apply for separate practising certificates, with evidence of adequate professional indemnity insurance⁷³.

The Courts and Legal Services Act 1990 (UK) saw the emergence of the notarial profession in England and Wales from a long period of legislative neglect. This was caused in part at least by the entry of the United Kingdom into the European Community. The growing international contacts of the legal profession, which had led to an appreciation of the importance of the role played by notaries in the civil law jurisdictions of continental Europe.

The demand for notarial services had also revealed an unequal geographical distribution (there were shortages in the London suburban area in particular). There was an apparent need to bring the profession within a tighter regulatory framework analogous to that existing in the other branches of the legal profession.

Solicitors are seeking appointment in England and Wales as notary public in increasing numbers, and the profession there appears in good shape⁷⁴.

a solicitor in England and Wales, or been in practice or pupillage at the Bar in England and Wales. Lastly, the applicant must have been in practice as a licensed conveyancer or as an Associate or Fellow of the Institute of Legal Executives, or have had such other employment in the business of a notary, solicitor or licensed conveyancer as the Master may approve; rule 8 Public Notaries (Qualification) Rules 1991 (UK).

⁶⁸Notaries (Post-Admission) Rules 1991 (UK).

⁶⁹41 Geo III c 79 (UK).

⁷⁰3 & 4 Will IV c 70 (UK).

⁷¹Supervision may be dispensed with. However, a newly appointed notary must also attend one full day course or seminar approved by the Master, on Bills of Exchange, Notarial Practice and Professional Conduct. If the notary proposes to practise in conveyancing, they must also attend one full day course or seminar in Conveyancing, approved by the Master, and there is an equivalent requirement for those practising in probate.

⁷²This is applied for annually to the Faculty Office, in accordance with the Public Notaries (Practising Certificate) Rules 1982 and 1991 (UK). The current fee for a certificate for a (English) solicitor notary and for other notaries is £40. There is also a £4 donation to the Notarial Contingency Fund; Public Notaries (Practising Certificates) Rules 1982 (UK) rule 5.

⁷³Solicitors, Notary Public etc Act 1949 (12, 13 & 14 Geo VI c 21) (UK) s 1 (3), since repealed by the Solicitors Act 1974 (UK) s 89 (2) and Schedule 4; Public Notaries (Practising Certificates) Rules 1982, 1991 (UK).

⁷⁴In 1884, when a Bill which would have absorbed the notarial profession into that of the solicitors was debated, there were said to be only 48 notaries public in England, and of these, 33 were in the Scriveners' Company area; HL Debates vol 287, series 3, columns 139-145. By the mid-1920s there were 500 in all. By 1987 there were 739 general and some 400 district notaries, as well as some fifty ecclesiastical notaries. NP Ready, *Brookes' Notary*, 11th ed, London, Stevens, 1992, p 19.

5 Notaries in the Commonwealth

Unless excluded under dominion or colonial law, the Master of the Faculties formerly had authority to appoint notaries public in a dominion or colony⁷⁵. The admission of notaries in the Commonwealth was governed specifically by the Public Notaries Act 1833 (UK)⁷⁶. The provisions of the Public Notaries Act 1801-43 requiring a notary to be a solicitor did not apply overseas⁷⁷, nor need a notary have a practising certificate as a solicitor, or from the Court of Faculties⁷⁸.

The usual procedure followed is that the applicant lodges with the Court of Faculties a memorial counter-signed by local merchants, shipping companies, bankers and other persons of substance, which show the local need of a notary and the fitness of the applicant. They also lodge their certificate of admission as a solicitor. A fee accompanies the application⁷⁹. The applicant, with the support of two other notaries public⁸⁰, who vouch that the applicant is well skilled in the affairs of notarial concern⁸¹, petitions the Master of the Faculties⁸².

The chief consideration for the approval of an application is whether there is sufficient need in the district, regarding the convenience of bankers, ship-owners and merchants. The local society of notaries must be satisfied that a need exists for an additional notary in the area served by the applicant⁸³. Priority is given, as a matter of practice, to an applicant within the same firm, as a replacement in the case of the death of a notary, or where a practising notary is reducing his or her workload because of age or infirmity.

The Master of the Faculties continues to appoint notaries overseas in the exercise of the general authorities granted by s 3 of the Ecclesiastical Licences Act 1533 (Eng)⁸⁴. In these

⁷⁵Ecclesiastical Licences Act 1533 (25 Hen VIII c 21) (Eng); the Public Notaries Act 1801 (41 Geo III c 79) (UK), and the Public Notaries Act 1843 (6 & 7 Vict c 90) (UK). Section 4 of the last Act empowers the Master to make rules for the admission and regulation of Public Notaries to practise "either in England or in any of Her Majesty's foreign territories, colonies, settlements, dominions, forts, factories, or possessions".

⁷⁶3 & 4 Will IV c 70 (UK).

⁷⁷"No person in England shall be created to act as a publick notary ... ". The power of the Master of the Faculties to appoint notaries is discretionary. However, in order to qualify for appointment under the 1991 rules, an overseas applicant will generally have to satisfy the Master that they have had three years suitable employment in the business of a notary, solicitor or licensed conveyancer within the preceding five years. Only in exceptional cases will the Master appoint as a notary someone who is not in practice as a solicitor; *Bailleau v Victorian Society of Notaries* [1904] P180, 185 (Court of Faculties).

⁷⁸Public Notaries (Practising Certificates) Rules 1982, 1991 (UK).

⁷⁹Public Notaries (Qualification) Rules 1991 (UK) rule 9 (5).

⁸⁰In 1931 the requirement was for only one.

⁸¹They must vouch for the applicant, that he or she is well known to them, is a loyal subject of Her Majesty, of sober life and conversation, known probity, learned in affairs of notarial concern.

⁸²Public Notaries (Qualification) Rules 1991 (UK) rule 9 (2).

⁸³The local societies maintain a caveat with the Court of Faculties which ensures that no application will be granted without reference to the society.

⁸⁴25 Hen VIII c 21 (Eng).

cases he is guided by local considerations of public convenience⁸⁵. The Master continues to appoint notaries in the Channel Islands, Gibraltar, New Zealand, and Papua New Guinea⁸⁶. In Australia, the Master continues to appoint notaries in the states of Tasmania, Victoria and Queensland, the other states having passed legislation to enable appointment to be made in those states⁸⁷.

The Master of the Faculties also appointed notaries public in Hong Kong until 30 June 1997, though they were also registered with the Supreme Court.

6 Notaries Public in New Zealand

Notaries in New Zealand continue to be appointed by the Master of the Faculties⁸⁸. There is, however, some uncertainty as to the source of the authority for this⁸⁹. The authority which is apparently relied upon is the Ecclesiastical Licences Act 1533 (Eng)⁹⁰, rather than the Public Notaries Act 1833 (UK)⁹¹. Consideration was however given more than a decade ago to enacting a Notaries Public Bill in New Zealand, in order to make provision for a code for this country in relation to notaries public.

The Report of the Law Reform Committee on the proposed Imperial Laws Application Bill, issued in 1988, noted that consideration was being given to enacting a Notaries Public Bill in New Zealand in order to make provision for a code for New Zealand in relation to

⁸⁵*Bailleau v Victorian Society of Notaries* [1904] P180 (Court of Faculties); *Fay v Society of Notaries for the State of Victoria* [1904] P15 (Court of Faculties).

⁸⁶Where Australian-admitted notaries may also practise.

⁸⁷As for example, New South Wales, where the Public Notaries Act 1985 (NSW) replaces notaries appointed by the Master of the Faculties with those appointed by the Supreme Court (ss 4, 5). The Act is however careful to stress continuity (s 12).

⁸⁸He sets the criteria for appointment, although an indication of suitability of applicants, and of the need for appointment of further notaries is always sought from the local Societies of Notaries. The requirements are, inter alia, that an applicant must be a solicitor in current practice with at least ten years' post-admission experience, a significant portion of which must have been as a partner or sole practitioner.

Current legal experience is considered essential to deal with legal issues that are often involved in matters with which notaries must deal. A course of study prior to admission is also conducted by a senior Notary in Auckland. To the best of the knowledge of the President of the Auckland District Society of Notaries, no persons other than practising solicitors are appointed in New Zealand; Letter from Robert Narev, President, Auckland District Society of Notaries, c/- Glaister Ennor, Norfolk House, 18 High Street, PO Box 63, Auckland, dated 13 March 1996.

⁸⁹It must also be remembered that the notary was a product of the civil and canon law, and has never enjoyed the recognition of the common law.

⁹⁰25 Hen VIII c 21 (Eng). Section 3 of the Ecclesiastical Licences Act 1533 can be taken to be applicable in New Zealand, in so far as it allows appointments to be made by the Archbishop of Canterbury by Faculty, by reference to the Public Notaries Act 1843, although the ecclesiastical law has no application even in settled colonies- *In re Natal (Lord Bishop of)* (1864) 3 Moo PCC NS 115 at 148, 152; 16 ER 43, 57; approved in *Baldwin v Pascoe* (1889) 7 NZLR 759, 769-70.

⁹¹3 & 4 Will IV c 70 (UK).

notaries public. It was anticipated that this code would not be in place in New Zealand soon enough to fit in with the timetable for the Imperial Laws Application Bill⁹².

The Report therefore provided in the Imperial Laws Application Bill for the pre-existing Bill for the position to be covered in the meantime by the savings provision in clause 10 (10) (f) of the Bill⁹³.

However, when enacted, the Imperial Laws Application Act 1988 did not contain any savings clause. As a consequence, the Ecclesiastical Licences Act 1533 (Eng)⁹⁴, the Public Notaries Act 1801 (UK)⁹⁵, the Public Notaries Act 1833 (UK)⁹⁶, and the Public Notaries Act 1843 (UK)⁹⁷ have all ceased to have effect as part of the laws of New Zealand⁹⁸. None of these Acts, nor the newer Courts and Legal Services Act 1990 (UK)⁹⁹ are in force in New Zealand, which leaves the authority of the Master to appoint notaries for New Zealand rather uncertain¹⁰⁰. Nor has the proposed Bill been introduced.

However, under whatever authority they may be appointed, notaries are not unknown to the statute law of this country¹⁰¹, or of other common law countries. The common law has always been ambivalent. The notary is essentially a creature of the civil and canon laws¹⁰². The notary public is relatively rare, and often ill-defined, in common law jurisdictions¹⁰³.

⁹²*Report of the Law Reform Committee on the Imperial Laws Application* (1988) Appendix I, 18.

⁹³*Report of the Law Reform Committee on the Imperial Laws Application* (1988) Appendix I, 18.

⁹⁴25 Hen VIII c 21 (Eng).

⁹⁵41 Geo III c 79 (UK).

⁹⁶3 & 4 Will IV c 70 (UK).

⁹⁷6 & 7 Vict c 90 (UK).

⁹⁸No indication was given in parliamentary debates on the various readings of the Bill as to why this savings clause was dropped. In fact, the Bill as enacted was shorn of almost all its savings clauses, and makes a clean sweep of a number of enactments, which, like the legislation governing notaries, were still applicable.

⁹⁹During the considerable consultation process leading up to the Courts and Legal Services Act 1990, the British Government, and specifically the Lord Chancellor's Department, took the view that the notarial profession in New Zealand was well served by the Faculty Office, and indeed the 1990 Act gave the Master specific powers to continue to make rules and orders for the governance of the profession. The views received consistently over a number of years by Registrar of the Faculty Office are that the connection with the Court of Faculties are is much valued and that the guaranteed independence of notarial appointments in New Zealand is much appreciated- PFB Beesley to author, 6 May 1997.

¹⁰⁰There need not be legal authority for the appointment of notaries for the notaries to have legal standing. Public authorities and officials must act *intra vires*. They can only do what the law permits the to do, they cannot do what the law forbids them to do. However, they do not necessarily require legislative authority to make appointments, unless the appointment *in rem* affects the law. This is not the case with notaries. It is sufficient that there are notaries, the means of appointing them is of secondary importance.

¹⁰¹They are referred to in s 51 (2) and s 95 (1) and the Second Schedule of the Bills of Exchange Act 1908 (NZ), s 242 of the Land Transfer Act 1952 (NZ), and s 9 of the Oaths and Declarations Act 1957 (NZ) (as amended).

¹⁰²In the strongly civil law-influenced Scots legal system, every solicitor may apply to be appointed a notary, and most do so. No one else can apply. The position of Clerk to the Admission of Notaries Public in Scotland is now held by the Secretary of the Law Society of

7 Conclusion

At present the notary public in New Zealand is an officer assigned by history the function of authenticating and protesting certain instruments. His or her responsibility is to the transaction itself, rather than to the client. Although New Zealand shares with a considerable number of countries a common law system, originally developed in the courts at Westminster, this is but one of the two great legal systems of the world.

The other is that of the civil law, developed from the Roman civil law, and influenced especially by the Codes Napoleon. This system has also greatly influenced the common law, though the extent to which Roman law was received in England has been disputed.

As one empire, that of the pope, was abruptly ended in England in 1534, so another, that of Great Britain, has now all but ended. But whereas in the first case the appointment of notaries was regularised immediately- by being transferred to the Archbishop of Canterbury, there has been no comparable change in the appointment of notaries public after the decline of the British Empire.

Largely this is because of the different nature of the political evolution that led to the independence of the dominions. But it also reflects an added difficulty, one that was not considered in 1534. The process of changing the process of authentication in New Zealand would require an approach to every independent country, to ensure that notarial acts receive due recognition¹⁰⁴. For this reason, it seems likely that no such move to nationalise the office is imminent¹⁰⁵.

In many civil law countries the notary is, as he was in England in the past, a distinct official, unable to practise as a solicitor, or in any profession but notary. But these officials generally have a wider function than the notary does in the common law world today¹⁰⁶.

Scotland; Part IV of the Solicitors (Scotland) Act 1980 as amended by the Solicitors (Scotland) Act 1988 and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (UK).

In South Africa, an attorney, having passed the requisite professional examination, is eligible to be enrolled as a conveyancer and as a notary. They can continue as a notary so long as they are enrolled on Roll of Notaries maintained by Provincial Division of Supreme Court in which he or she or she practises. The profession, of Dutch origins, was first consolidated by the Attorneys Notaries and Conveyancers Admission Act 1934; *Bowler v Registrar of Deeds* 1939 AD 401.

¹⁰³In Northern Ireland, notaries are appointed by the Lord Chief Justice of Northern Ireland; s 112 Judicature (Northern Ireland) Act 1978 (UK). They are not required to be legally trained, although solicitors may be appointed but must show need. In Bermuda the Supreme Court appoints them. In the Canadian provinces every Barrister and Solicitor is ex officio a notary public and Commissioner for Oaths, though not all notaries are legally trained. In St Lucia barristers and solicitors may practise as Notaries Royal. The Lieutenant-Governor appoints Manx notaries.

¹⁰⁴The process of whereby a notary's signature and seal is certified to be genuine is known as legalisation.

¹⁰⁵Bill Laxon, "The Notary Public" [1997] NZLJ 65.

¹⁰⁶See, for example, Henry Dyson & Stephen Smith, "What does a "notaire" do?" (1998) 142 *Solicitors Journal* 332; Pedro A Malavet, "The foreign notarial legal services monopoly why should we care?" (1998) 31 *John Marshall Law Review* 945-970.

The rapid growth of electronic commerce raises questions about the future of the notarial profession world-wide¹⁰⁷. One response, seen so far only in civil law countries, is the "cybernotary". These authenticate documents by electronic means through the internet, which can reproduce such documents almost instantaneously anywhere in the world¹⁰⁸. The future direction of this type of electronic media is uncertain, but the notarial profession must be prepared to meet the demands that it brings¹⁰⁹. And it is important to remember that the notary's responsibility is to the transaction itself, rather than to the client.

With the introduction of the Trans-Tasman Mutual Recognition Act 1997 (NZ), which came into force in New Zealand on 1 May 1998, it should be possible to accord mutual recognition to notaries appointed in each jurisdiction. Since the methods of appointment in New Zealand and the Australian jurisdictions are approximately evenly divided between the Master of the Faculties and local appointments, there should be little difficulty in according them mutual recognition.

With increasing globalisation, there is a need to maintain, if not increase, the standardisation of the notarial profession. The number of countries which have notaries appointed by the Master of the Faculties is not great, but they have commercial significance out of proportion to their populations. This common appointment should not be abandoned lightly. Most importantly, no change should be made without considering the international implications, and the effects of electronic commerce.

As officers appointed by the Master of the Court of Faculties of the Archbishop of Canterbury, notaries public are a significant survival of imperial unity. But they are also an important relic of the former universal papal authority. While the present situation should be allowed to continue unless a better could be devised, it would be necessary, were Australia or New Zealand to become republics, for statutory provision to be made for their appointment, and for the regulation of their professional activity¹¹⁰.

¹⁰⁷Paul M Hummer, "Legal issues in electronic commerce in the insurance and reinsurance industry" (1997) 64 *Defense Counsel Journal* 246-259; Mary F Theofanos & John T Phillips, "Digital signatures: Signing and notarizing electronic forms" (1994) 28 *Records Management Quarterly* 18-24.

¹⁰⁸Bill Laxon, "The Notary Public" [1997] NZLJ 65.

¹⁰⁹Vincent Gnoffo, "Notary law and practise for the 21st century: suggested modifications for the Model Notary Act" (1997) 30 *John Marshall Law Review* 1063-1097; Karla J Elliot, "The notarial seal: the last vestige of notaries past" (1998) 31 *John Marshall Law Review* 903-910; Peter Ahlers, "The impact of technology on the notary process" (1998) 31 *John Marshall Law Review* 911-926.

¹¹⁰If only because they must at present be "a loyal subject of Her Majesty", and take the oath of allegiance; Public Notaries (Qualifications) Rules 1991 (UK) rule 9 (2).