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HOMOSEXUAL ACTS—WHY THE LAW MUST NOT BE CHANGED

In his article in [1972] N.Z.L.J. 1, Mr D. L. Mathieson was confident that lawyers could be expected to weigh the arguments in respect of homosexuality, and he purported to make a brief recapitulation of them. However all of the "arguments" advanced were built on the basic assertion that "the typical homosexual act does not cause any kind of harm to anyone else".

The onus should be upon Mr Mathieson and his supporters to prove this basic premise before proceeding to the other matters which he has so eloquently urged in favour of his proposal.

In my view Mr Mathieson has been myopic in concentrating his attention in the article almost exclusively on the position of the individual homosexual. The same plea could be made on behalf of any other social deviant.

In stating that the typical homosexual act does not cause any kind of harm to "anyone else" I assume it is meant to any "third person". If one closed one's eyes to experience, it would be possible to make a similar statement regarding the behaviour of the chronic secret drinker and regarding acts of bestiality. The Wolfenden Report states at Paragraph 55 ". . . that homosexual behaviour between males has a damaging effect on family life, may well be true. Indeed we have had evidence that it often is; . . ."

In my professional experience great misery has been experienced by the wives and children of persons who have had homosexual episodes in earlier life.

Furthermore, is the law to disregard the protection of homosexuals themselves and the problem of the growth and spread of homosexual practices consequent on law reform? I believe that many an individual homosexual has been assisted and will continue to be assisted by the existence of a penal statute forbidding such behaviour. As this behaviour must always involve two individuals and there will always be variations in the age, education, mentality and background of these people Society has a duty to prevent the spread of homosexual practices to younger and less responsible persons.

Mr Mathieson assumes that about one in twenty adult males may be homosexuals. He does not make it clear but it appears from the terms of his article that such people have been cast in this mould since birth. Some of the experts who appeared before The Wolfenden Committee regarded homosexuality "as a universal potentiality which can develop in response to a variety of factors".

I believe strongly that the question whether a person will tend towards homosexual behaviour depends to a large extent on his environment and associates. If the law is repealed I am not in any doubt that there will be an increase in homosexual behaviour and there will be very strong influences at work to make homosexuality respectable. Mr Mathieson apparently admires the British example. There, a booklet entitled "Scheme of Education in Personal Relationships" was produced for use in Primary Schools. In the booklet homosexual relationships were described as "enriching and lasting experiences" and "slightly illicit homosexual escapades" were made light of. In 1971 a parent was prosecuted in Bedfordshire for refusing to send his daughters (aged 8 and 10 years) to school where the book was being used in classes on personal relationships. There was no provision for the parent to withdraw his children from these classes as was the case with religious instruction. The matter is still under consideration at Ministerial level.

It is always easy to criticise the establishment. This can be done and is being done without any serious study at all. The following is an extract from page 1 of Professor H. L. A. Hart's *Law Liberty and Morality* ". . . the first is a historical and causal question: has the development of the law been influenced by morals? The answer to this question is plainly 'Yes'; although of course this does not mean that an affirmative answer may not also be given to the converse question: Has the development of morality been influenced by law? This latter question has scarcely been adequately investigated yet but there are now many admirable American and English studies of the former question."

I believe that morality is influenced by the law and I am not impressed by the argument that "an enforced morality is an empty morality". Observe how the majority of motorists did not tend the parking meters during the recent 'go slow' by the Traffic Department.

Those in practice know the serious breakdown in family relations in the community at the present time.

There is urgent need for a great deal of improvement in this area but I am sure that this will not be achieved by the type of reform advocated by Mr Mathieson. He has been prompted by an understandable compassion for the individual homosexual but the law should have regard first to the interests of society at large and future generations. At the same time I am not unsympathetic to the individual homosexual.

I shall deal briefly with the specific "arguments" urged in favour of reform but I reiterate that these have little relevance until the original premise has been proved, that these acts do not cause any kind of harm to anyone else.

1. "That change of the law would significantly reduce the sum total of human suffering in our midst." This argument is concerned only with the avoidance of prosecution of an individual and the resultant shame for himself and his family. It takes no regard of the suffering which may already be experienced by the family of the particular individual whether he is prosecuted or not and which in fact some families may be spared if the penal provision is retained. Fear of prosecution may influence many individuals against turning to this way of life.

2. "That the present law discriminates between male homosexual acts which are criminal and lesbian homosexual acts which are not.' Surely this is not an argument at all and the reason for the discrimination has not been studied by Mr Mathieson. The onus is upon those who want change to investigate the matter not upon those who want the law retained.

3. "That the present law is hypocritically and very haphazardly enforced." Surely this is *not* an argument for the repeal of a criminal statute. Repeal of the law would result in a change of attitude towards homosexual acts which would be detrimental to the interests of society.

4. "That the exposure and punishment of the offender is a greater evil than the evil that the law is designed to prevent." Publication of a conviction is one of the most important forms of punishment available to the law and one wonders where we will end if this is to be advanced as an argument for repeal of a criminal statute.

5. "That the the existence of criminal sanctions discourages those who need help from seeking it." I see no reason why the present law should prevent homosexuals from seeking assistance and treatment nor am I convinced at all that the repeal of the law will in some way result in the lonely homosexual seeking assistance and treatment. There is likely to be some incentive to seek treatment as the law stands. Prosecution also leads to treatment. I note with interest that the British experience of counselling may enable the homosexual to come to terms with his own condition and this I fear may not be unconnected with the spreading of homosexual influences in Britain which resulted in the production of the booklet for schools referred to above.

If the law is changed this year it requires little imagination to foresee the flood of undesirable immigrants we will have coming to New Zealand and the effect which they, and the influences which they will generate, will have on our society.

It is all very well for persons who believe themselves to be liberally inclined to campaign for the abolition of restrictions on private behaviour. The effects of such behaviour require to be carefully studied and not dismissed with a bare unsupported assertion as Mr Mathieson has done. I believe the present law gives vital protection to individuals and to society and it definitely should not be changed.

J. S. O'NEILL.

Brief brief—According to the *N.Z. Herald* a man who appeared in the Auckland Magistrate's Court recently pleaded guilty to a charge of being drunk, and a lawyer was appointed to safeguard his interests.

About an hour later, when the case was called, the Magistrate asked the lawyer for the name of his client.

"I've no idea," replied the lawyer. "I've only spoken to him very briefly."

CASE AND COMMENT

New Zealand Cases Contributed by the Faculty of Law, University of Auckland

Crystallising equitable rights

McRae v. *Wheeler* (Court of Appeal, 21 March, 1972) was an appeal from a Supreme Court decision ([1969] N.Z.L.R. 333) in an interesting land law case.

The proceeding in the Supreme Court took the form of an action for trespass brought by the appellant against the respondent. This was answered by the respondent's justifying his use of the appellant's land by reference to a right of way created by a deed registered in the Deeds Registry Office in 1895. The respondent claimed for a declaration that he was entitled to a right of way over the appellant's land.

A certificate of title respecting the land now owned by the appellant was issued a few years after the easement was registered in the Deeds Registry Office, but no reference to it was or has since been contained in the Torrens title.

The Supreme Court found that the appellant had bought the land with full knowledge of the grant in favour of the respondent and held that the right of way was binding on the appellant as the present owner of the servient land. The action for trespass was dismissed and a declaration and certain consequential orders made under s. 127 (3) of the Property Law Act 1952 designed to give the respondent a right of way in a form registrable under the Land Transfer Act 1952.

The appeal was dismissed subject to a variation of the formal judgment of the Supreme Court confirming the declaration to the description of the right of way as defined in the deed. The balance of the judgment in [1969] N.Z.L.R. 333 stands.

This seems to be the first case in which a declaration under s. 127 (3) of the Property Law Act 1952 has been made that a parcel of land is *affected* by a right of way easement and as to the *nature* and *extent* thereof.

The machinery for registering such a declaration appears to be provided in s. 127 (7) of the Property Law Act 1952.

Section 127 gives statutory lineament to the law as enunciated in *Wellington City Corporation* v. *Public Trustee, McDonald and the D.L.R. Wellington* [1921] N.Z.L.R. 1086; [1922] G.L.R. 84 and *Carpet Import Co. Ltd.* v. *Beath & Co. Ltd.* [1927] N.Z.L.R. 37. It is a very useful practical provision for crystallising equitable rights, and, in appropriate cases, perfecting them on the Torrens title.

J.A.B. O'K.

CATCHLINES OF RECENT JUDGMENTS

Building contract—Claim for damages for defective workmanship—Effect of certificate given by owner—Basis for estoppel. *France* v. *Hogan* (Supreme Court, Wellington. 1972. 19 April. Roper J.)

Transport—Case stated—Section 59B Transport Act 1962—Interpretation of "good cause to suspect"—Effect of accident without driving breach. *Boynton* v. *Hartitzch*. (Supreme Court, Napier. 1972. 27 March. Roper J.)

Any practitioner who wishes to obtain a copy of a judgment mentioned above may do so by applying to the Registrar of the appropriate Court.

REGULATIONS

Regulations Gazetted 27 April to 25 May 1972 are as follows:

Civil Aviation Regulations 1953, Amendment No. 16 (S.R. 1972/91)
Customs Tariff Amendment Order (No. 8) 1972 (S.R. 1972/88)
Dental Regulations 1964, Amendment No, 2 (S.R. 1972/102)
Domestic Proceedings (Marriage Guidance Organisations) Order 1969, Amendment No. 2 (S.R. 1972/101)
Electricity Price Stabilisation Regulations 1972 (S.R. 1972/92)
Emergency Forces Rehabilitation Regulations 1953, Amendment No. 5 (S.R. 1972/103)
Fisheries (General) Regulations 1950, Amendment No. 18 (S.R. 1972/104)
Government Railways Amendment Act Commencement Order 1972 (S.R. 1972/98)
Hospitals Medical Information Notice 1972 (S.R. 1972/97)
Motor-Vehicles Insurance (Third-Party Risks) Regulations 1963, Amendment No. 10 (S.R. 1972/93)
Navy Regulations 1958, Amendment No. 5 (S.R. 1972/105)
Periodic Detention Order (No. 2) 1972 (S.R. 1972/89)
Periodic Detention Order (No. 3) 1972 (S.R. 1972/99)
Pharmacy Registration Regulations 1972 (S.R. 1972/94)
Private Broadcasting Stations (Ownership) Regulations 1969, Amendment No. 1 (S.R. 1972/95)
Seat Belts Approval Notice 1972 (S.R. 1972/86)
Seat Belt Exemption Notice 1972 (S.R. 1972/87)
Telex Regulations 1963, Amendment No. 7 (S.R. 1972/106)
Therapeutic Drugs (Permitted Sales) Regulations 1972 (S.R. 1972/96)
Timber Preservation Regulations 1955, Amendment No. 3 (S.R. 1972s90)
Work Centres (Dunedin, Wanganui, and Gisborne) Notice 1972 (S.R. 1972/100)

MATRIMONIAL PROPERTY SYSTEMS

If nothing else, the recent Court of Appeal decision of *E.* v. *E.* [1971] N.Z.L.R. 859 has drawn attention to some of the complications which surround the legislation providing for the judicial resolution of matrimonial property disputes in New Zealand. There is every excuse for practitioners to remain confused over such matters as the interrelationship of the Matrimonial Property Act 1963 and Part VIII of the Matrimonial Proceedings Act 1963, and the effect which that legislation has had on New Zealand's system of matrimonial property. Against such a background, the Published Working Paper of the English Law Commission which was released in October 1971 is of interest (*a*).

The Working Paper does not represent the concluded views of the Law Commission, but has been circulated for comment and criticism. It contains an exhaustive study of England's "family property law," examines comparatively the laws of other jurisdictions, including New Zealand's, and reaches a series of proposals which as yet must be regarded as tentative. The Working Paper is divided into five parts, each dealing with separate but interrelated topics of "family property law" with proposals being made in each part. The parts deal with the matrimonial home, household goods, financial provision for the family, rights of inheritance, and community of property.

The tentative proposals made in the latter section are the most comprehensive, and revolutionary in their concept. The Law Commission envisages the introduction into England of a system of deferred community property. Systems of deferred community operate in various forms in the Scandinavian countries, West Germany, and Holland, and one has been recommended for Ontario (*b*). The concept of a system of deferred community is important to grasp. It combines features of both the systems of community property which operate in Europe and parts of the United States, and of the system of separate property which operates in New Zealand and elsewhere in the common law world. In many respects a system of deferred community is an improvement on both separate and community systems. Under it, both spouses hold their respective property separately for the duration of the marriage, and can acquire and dispose of property in the same way as any other individual. Such is the situation which pertains to systems of separate property. On the dissolution of the marriage, however, whether by divorce or death, each spouse (or his estate) has a defined half share in a specific pool of property. The pool usually comprises all property acquired by the spouses during the course of the marriage.

The deferred community system envisaged by the Law Commission for England closely resembles that which operates in West Germany (*c*). The recommended system is as follows (*d*). During the marriage, each spouse would be free to acquire and dispose of his own property. At the termination of the marriage, there would be a sharing of the spouses' assets. The sharing would operate by an equalisation claim, the spouse with less assets having a monetary claim against the other spouse or his estate for an amount which would equalise the value of the spouses' assets. The property pool to be shared would comprise all property owned by the spouses on the dissolution of the marriage, but would exclude property owned by each spouse at the date of the marriage, property acquired by inheritance or gift from a third party, and property which the spouses agree to exclude from the pool. All property would be presumed to be shareable until the contrary was shown. Spouses would be able to contract out of the system if they so desired, but in the absence of any such express arrangement, the system would apply to all marriages. Detailed provisions are made for pre-marital and current debts for the deliberate wasting of assets.

The possibility of some form of community property for England was examined by the Morton Commission in 1955 (*e*). The majority of the members of the Commission rejected the idea of the introduction of any system of com-

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(*a*) Law Commission, Published Working Paper No. 42, *Family Property Law*. Hereafter cited as *Working Paper*.

(*b*) Ontario Law Reform Commission, Family Law Project, *Property Subjects*, Vol. III.

(*c*) *Working Paper*, para. 5.17.

(*d*) Ibid. para. 5.86.

(*e*) *Royal Commission on Marriage and Divorce* (Cmd. 9678).

munity. The reasons underlying their rejection are of the type one associates with the legal profession. They were (*f*): that its introduction would be too striking a departure from the traditional law, and its unfamiliarity would be a handicap; that a community system leaves out of account the acquisitive instinct of normal people; that greater injustice would result than under a separate system, especially since a lazy spouse could claim a share in the product of the other's thrift; and that a community system would be extremely complicated and difficult to operate. Foreshadowing similar objectives to its Working Paper proposals for a system of deferred community, the Law Commission states (*g*):

> . . . a [deferred community] system is inevitably complex, and many details would remain to be settled or varied in the light of consultation and comment. There are many practical arguments which could be put forward against a system of community. It would, as the Morton Commission pointed out, be an unfamiliar and novel concept in England. . . . On the other hand it could be made to work, and it does work in other countries. In the last resort, the main question to be decided is whether it would lead to a greater measure of justice to give effect to the idea that marriage is a partnership, by sharing the assets acquired during the marriage, regardless of which spouse contributed financially to their acquisition.

The Law Commission examined its proposals for a deferred community system in relation to its proposals in other parts of the Working Paper (*h*). With the exception of the proposals relating to the matrimonial home, these will not be discussed, although it should be noted that the Law Commission was impressed by s. 43 of New Zealand's Domestic Proceedings Act 1968, and recommended similar legislation for England (*i*). Section 43 makes it a criminal offence for a spouse to remove, sell, change or dispose of furniture in the matrimonial home without leave of the Court or the other spouse's written consent when separation order proceedings are pending.

As to its proposals over the matrimonial home, the Law Commission regarded them as being compatible with either a system of separate property or a system of deferred community. The Commission's proposals over occupation rights to the home need not concern us. Its proposal over ownership of the home is of interest, however. The Commission reached the provisional view that a system of co-ownership of the matrimonial home would provide a workable solution (*j*). The Commission saw that the field of choice for the law governing ownership of the matrimonial home comprised three alternatives. First, there was the present system in England, under which the spouses' respective rights would be determined by the normal legal and equitable rules. The spouses' rights would usually depend on their financial contributions to the home, but recently the Courts appear to have been given a broad discretionary power to transfer property rights on divorce (*k*). A second alternative was to introduce a discretionary rule under which the Court had, at any stage, a broad discretion to determine the respective interests of the spouses in the matrimonial home. Such a power would be similar to that exercised by the New Zealand Courts under s. 5 of the Matrimonial Property Act 1963. The third alternative was to introduce a form of co-ownership. Co-ownership could be introduced either by a presumption, or else by operation of law, and it was this latter alternative that the Law Commission favoured. In support of its recommendation the Law Commission stated (*l*):

> The advantages of a system of a co-ownership are that it would recognise the partnership element of marriage by insuring that the spouses had equal interests in the principal family asset; . . . it would no longer be necessary to consider whether either spouse had made a financial contribution.

In the course of its study of the law governing the ownership of the matrimonial home, the Working Paper examined the discretionary powers of the New Zealand Courts under the Matrimonial Property Act 1963 (*m*), New Zealand's Joint Family Homes legislation (*n*), and the presumptions relating to matrimonial homes in Victoria (*o*). The procedure for obtaining joint ownership of the home by registration under the Joint Family Homes Act 1964 is a voluntary one, although not without various

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(*f*) Ibid. para. 651.
(*g*) *Working Paper*, para. 5.84.
(*h*) Ibid. paras. 5. 78-5.83.
(*i*) Ibid., paras. 2. 29, 2.50.
(*j*) Ibid., para. 1.127.
(*k*) See *Pettitt* v. *Pettitt* [1970] A.C. 777; Matrimonial Proceedings and Property Act 1970, s. 4; Kahn-Freund, *Recent Legislation in Matrimonial Property* (1970) 33 Mod. L.R. 601.
(*l*) *Working Paper*, para. 1.127.
(*m*) Ibid., para. 1.53.
(*n*) Ibid., para. 1.58.
(*o*) Ibid., para. 1.55.

fiscal and financial incentives. However, not all homes are so registered, and the provisions of the Joint Family Homes Act have no application to homes not registered under it.

The Victorian presumption is contained in s. 161 of the Marriage Act 1958, as amended by the Marriage (Property) Act 1962. New Zealand's Matrimonial Property Act copies this Victorian legislation, but the presumption was not reduplicated. It provides that in the absence of evidence of a contrary intention, or circumstances which render it unjust so to do, husband and wife are presumed to hold the matrimonial home as joint tenants. However, such a presumption only operates when a dispute arises between husband and wife and proceedings are brought under the Marriage Act. The presumption applies to a dispute over the home, but it does not have the effect of creating a joint tenancy until that time (*p*).

Nor does a judicial discretion such as that conferred by the Matrimonial Property Act result in co-ownership of the matrimonial home. The discretion will not come into play until an application is made under s. 5 of the Matrimonial Property Act or Part VIII of the Matrimonial Proceedings Act. Such applications are unlikely to be made in the context of a harmonious marriage. The judicial discretion is broad enough to alter existing property interests and create new ones. A spouse's rights in a home to which a judicial discretion of the New Zealand variety applies may thus be illusory or inchoate, depending on one's point of view. As the Law Commission observes, a discretionary system might introduce greater justice but it does so at the price of greater uncertainty (*q*).

The tentative proposals of the Law Commission, and in particular the proposal for a system of deferred community, represent an attempt to reform England's matrimonial property law. In many respects the English law is similar to New Zealand's prior to 1965 when the reforming legislation came into operation. The House of Lords decisions in *Pettitt* v. *Pettitt* [1970] A.C. 777 and *Gissing* v. *Gissing* [1971] A.C. 886 make it clear that s. 17 of the Married Women's Property Act 1882 cannot be used to make judicial inroads on the system of separate property. The respective property rights of husband and wife must be decided in accordance with the normal legal and equitable rules. If it is impossible to unscramble the rights of husband and wife with precision, the Court may lean towards an equal division, but there is no broad power to reallocate property rights, or create rights for a spouse who has no legal or equitable claim to the property. Such is now the position in England, subject to the new power to transfer property contained in s. 4 of the Matrimonial Proceedings and Property Act 1970. Such was also the interpretation which the New Zealand Courts had given to the now repealed s. 19 of the Married Women's Property Act 1952 (*r*).

The reasons for the reforms tentatively proposed by the Law Commission are similar to those which prompted the 1963 New Zealand legislation.

> Much of the pressure for reform of English family property law comes from the fact that a wife who has no earnings and no private means cannot acquire any property rights except such as her husband may choose to confer on her (*s*).

An examination of the relevant portions of Hansard reveals that similar reasons lay behind the New Zealand legislation. A wife who fulfilled the traditional roles of a mother and housewife would often be unable to make the financial contributions to property which the bread-winning husband was able to make. Her marital role was just as vital as the husband's, yet it received no recognition in property rights, which were largely dependent on financial contributions. The New Zealand legislation was designed to reform this situation. The Courts were empowered to consider contributions to property of a non-monetary nature (*t*) and an order could be made in favour of a spouse notwithstanding that the spouses' respective rights were defined or the spouse in whose favour an order was made had no legal or equitable interests in the disputed property (*u*). It was felt that the legislation would allow a judicial resolution of matrimonial property disputes on a more equitable basis than solely an assessment of the spouses' legal and equitable interests. The position of non-financially contributing wives would be improved. Such underlying intentions of the legislation were recognised by the Courts (*v*).

The New Zealand solution to the problem of inequities in the system of separate property in the matrimonial field was to introduce a broad

(*p*) On this point see Liddell, "Ownership of the Matrimonial Home in Vicotira" (1967) 6 Melbourne Univ. L.R. 82.

(*q*) *Working Paper*, para. 1.68.

(*r*) See *Barrow* v. *Barrow* [1946] N.Z.L.R. 438; *Masters* v. *Masters* [1954] N.Z.L.R. 82; *Simpson* v. *Simpson* [1952] N.Z.L.R. 278; *Peychers* v. *Peychers* [1955] N.Z.L.R. 564; *Hendry* v. *Hendry* [1960] N.Z.L.R. 48.

(*s*) *Working Paper*, para. 5.28.

(*t*) Matrimonial Property Act 1963, s. 6 (1); Matrimonial Proceedings Act 1963, ss. 58 and 59.

(*u*) Matrimonial Property Act 1963, s. 5 (3).

judicial discretion to alter and create property rights in disputes between husband and wife. The tentative English solution is to introduce a system of deferred community. Commenting on these two alternative solutions, the Law Commission states (*w*):

> It is important not to forget the advantages of security and status which a community system would give to the spouse who, because of marital and family ties, is unable to acquire an interest in the assets by a financial contribution. Instead of being . . . regarded as a dependant, who must apply to the Court, such a spouse would become an equal partner in marriage, entitled at the end . . . to claim an equal share in the net assets acquired during the marriage.

Regardless of the relative advantages and disadvantages of both solutions, it is important to realise that they both meet similar needs.

New Zealand's reformed system of matrimonial property law is now in its eighth year of operation. That it is working is obvious, but it is questionable whether it is working in the intended fashion. One major difficulty is that the Matrimonial Property Act and Part VIII of the Matrimonial Proceedings Act overlap. Both Acts apply to the matrimonial home which is often the principal or only disputed asset. Yet despite this overlap, different principles and jurisdictional requirements apply under both Acts. The powers under Part XIII are limited to seven specified types of order. The power under the Matrimonial Property Act is broad and unlimited by the illustrations given in s. 5 (2). Part VIII orders can generally only be made in conjunction with a divorce decree. Matrimonial Property Act orders can be made before, with, or after a divorce decree, and the Court's powers are not tied to any divorce jurisdiction. The parties to Part VIII actions can only be divorcing spouses, whereas a broader range of parties is permitted under the Matrimonial Property Act. Conduct is a relevant factor in Part VIII matters (*x*) but misconduct is specifically excluded for the purpose of assessing the respective shares of spouses in property disputed under the Matrimonial Property Act (*y*). Contributions *simpliciter* must be considered when the property disputed under the Matrimonial Property Act is a matrimonial home (*z*) but under ss. 58 and 59 of the Matrimonial Proceedings Act, proof of *substantial* contributions by both parties is a jurisdictional requirement (*a*). Finally, the Court's discretion under s. 5 of the Matrimonial Property Act must not be exercised to defeat an expressed common intention of the parties (*b*), which probably extends to property provisions in separation agreements (*c*), but s. 79 of the Matrimonial Proceedings Act enables the Court to vary the terms of any agreement in the exercise of its powers under Part VIII (*d*). Such differences of principle applying to disputes over the matrimonial home are as undesirable as they are unnecessary. A strong case can be made for the repeal *in toto* of Part VIII, since the Court has no powers under that Part which it cannot exercise under the Matrimonial Property Act.

The legislation was designed to achieve greater recognition of the marital role of wives, yet there is doubt whether this objective has been achieved (*e*). The Court is empowered to consider contributions to specific property (*f*), not contributions to the marriage in its entirety. Although the Courts have held that their final order is not bound in any way by their assessment of the spouses' respective contributions (*g*) there is nevertheless a tendency to divide property in the light of that assessment (*h*). The judicial discretion is broad enough to enable the Court to consider contributions to the marriage in its entirety if it were so disposed, but the cases suggest that the Courts instead concentrate on contributions to the disputed property alone. Although non-monetary contributions, including those of a usual and unextraordinary nature (*i*) are considered, the judicial approach resembles that which applied under s. 19 of the Married Women's Property Act 1952. Contributions tend to determine the final order and the scales are still weighted in

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(*v*) *Hofman* v. *Hofman* [1965] N.Z.L.R. 795; *Sutton* v. *Sutton* [1965] N.Z.L.R. 781, *West* v. *West* [1966] N.Z.L.R. 247; *E.* v. *E.* [1971] N.Z.L.R. 859.

(*w*) *Working Paper*, para. 5.85.

(*x*) *Pay* v. *Pay* [1968] N.Z.L.R. 140.

(*y*) Matrimonial Property Act 1963, s. 6A; *E.* v. *E.* [1971] N.Z.L.R. 859.

(*z*) Section 6 (1).

(*a*) *Pay* v. *Pay* [1968] N.Z.L.R. 140.

(*b*) Section 6 (2).

(*c*) *Walker* v. *Walker* [1966] N.Z.L.R. 754; *Gurney* v. *Gurney* [1967] N.Z.L.R. 388; *Gallo* v. *Gallo* [1967] V.R. 190.

(*d*) *L.* v. *L.* [1969] N.Z.L.R. 314.

(*e*) See generally, Mansell, "Whither Matrimonial Property?" (1971) 4 N.Z.U.L.R. 271.

(*f*) Matrimonial Property Act 1963, s. 6 (1); Matrimonial Proceedings Act 1963, ss. 58 and 59.

(*g*) *Pay* v. *Pay* [1968] N.Z.L.R. 140; *Robinson* v. *Public Trustee* [1966] N.Z.L.R. 748, 750; *Keswick* v. *Keswick* [1968] N.Z.L.R. 6, 8.

(*h*) See Mansell, *op. cit.*

(*i*) Matrimonial Property Act 1963, s. 6 (1A).

favour of the financial contributor since there is no indication of how non-monetary contributions are to be quantified.

The relevance of marital misconduct is ambivalent. At the moment it is a relevant factor in Part VIII proceedings, but s. 6A excludes it from consideration when determining shares under the Matrimonial Property Act. This inconsistency was rightly deplored in *E.* v. *E.* [1971] N.Z.L.R. 859 but its removal should be effected, it is submitted, not by the repeal of s. 6A, but by introduction of a similar provision in Part VIII. Section 6A is probably a useful reminder to the judiciary that misconduct is not only unreliable as a pointer to the reasons behind a failed marriage, but has little if any relevance to the spouses' respective claims to the matrimonial property. Although the Courts will not use a property order under Part VIII to punish a "guilty" spouse, they nevertheless hold that the "guilty" spouse should bear the brunt of any hardship occasioned by the breakdown of the marriage (*j*). Hardship may well be punishment by another name.

The history of applications under s. 5 of the Matrimonial Property Act has developed in such a way as to allow applications in respect of completely harmonious marriages dissolved by death (*k*). There are reasons to doubt whether the Matrimonial Property Act procedure was designed to handle matters which are essentially succession disputes, but as the law now stands, such applications are permitted.

There still remain unresolved tensions between contributions to the marriage, conduct, and property rights. Was New Zealand's discretionary system designed as a palliative, whereby a non-financially contributing wife may have a greater property claim than she had under the Married Women's Property Act? Or was the system designed to reflect in a spouse's property rights his contributions to and conduct in the marriage as a whole? If the latter was the object, a system of deferred community might well achieve a similar result with greater certainty.

These observations on the New Zealand system are neither detailed nor comprehensive. They serve merely to point to unresolved problems. Our system was one to which the English Law Commission gave close attention. The fact that other proposals were made is not necessarily an unfavourable reflection on the New Zealand law. However, the tentative proposals of the Working Paper and their subsequent criticism and development will be worth examination since the problems they are designed to solve are problems already tackled by New Zealand legislation. Whether a system of separate property, or a system of deferred community is better suited to adapt to the changes in the economic and social status of women and the institution of marriage which the coming decade will bring, is an open question, and one to which the Law Commission might well give closer attention.

J. M. PRIESTLEY.

(*j*) *Pay* v. *Pay* [1968] N.Z.L.R. 140.
(*k*) *Re Ball, Parr* v. *Ball* [1967] N.Z.L.R. 644; *Wacher* v. *Guardian Trust* [1969] N.Z.L.R. 283; c.f. *re Edkins, Edkins* v. *Public Trustee* [1965] N.Z.L.R. 916.

Apostolic revolution: "The biblical tradition of both Christianity and Judaism sounds at times very much like a criminal record. Moses a 'wanted' man who had to flee from Egypt; David the outlaw, hiding out in the mountains from King Saul; Isaiah and Jeremiah, accused of conspiracy and treason, spending time in jail and in the stocks . . . Jesus arrested, tried and executed as a criminal. The New Testament is so filled with accounts of Christians in trouble with the law and the political structures, that 'the Acts of the Apostles' might well be named 'the Arrests of the Apostles' . . . The law-breaking of the early Christians, and their troubles with the political system, were nearly always over social, rather than theological or doctrinal issues. They were not imprisoned and put to death for preaching a new religion; new religions were tolerated and even welcomed by Rome. They were persecuted and put to death because of the revolutionary implications of their new faith for the power and authority of the Roman State, or of any State for that matter. Citing Jesus' proclamation in Luke 4 : 18. Good news for the poor, release for captives, sight for the blind, liberty, freedom for the wretched of the earth—to those who were not in this company of the downtrodden, this could mean only revolution:" Dr J. BARRIE SHEPHERD.

A Question of Values—The importance of property to the Courts in the 1800's is perhaps exemplified in the story about Lord Eskgrove who rebuked the tailor who'd been brought before him charged with stabbing a soldier to death. Peering at the hapless tailor His Lordship said "Not only did you murder him, whereby he was deprived of his life, but you did thrust, or push, or pierce or propel the lethal weapon through the belly-band of his regimental breeches which were His Majesty's".

MEETINGS, PROCESSIONS, SYMBOLIC SPEECH AND THE LAW—PART II

Symbolic Speech

A typical way to dramatise a protest is by taking action such as burning an effigy, delivering a letter to an Embassy, running on to a rugby field, laying a wreath or sitting-in. In so far as such action is likely to raise the ire of those not sympathetic with the protest there is the possibility of a charge of obstructing a constable in the execution of his duty based on *Burton* v. *Power*. This of course happened in the wreath-laying case, *Wainwright* v. *Police*. If the sergeant had chosen his words more carefully the Chief Justice would probably have sustained the conviction (*j*). But the main problems in connection with symbolic speech arise not from s. 77 of the Police Offences Act but from s. 3D of that Act and s. 3 of the Trespass Act 1968.

Section 3D of the Police Offences Act, as enacted by s. 2 of the Police Offences Act (No. 2) 1960, provides that:

> Every person commits an offence, and is liable to imprisonment for a term not exceeding three months or to a fine not exceeding five hundred dollars, who in or within view of any public place . . . or within the hearing of any person therein, *behaves in a riotous, offensive*, threatening, insulting *or disorderly manner*, or uses any threatening, abusive or insulting words. [Emphasis added].

Little use is made against demonstrators of the offences created by the section other than those emphasised (*k*). "Disorderly behaviour" is today by far the most common offence with which demonstrators are charged and it merits close examination.

To behave in a disorderly manner first became an offence in New Zealand in 1924 when a section similar to 3D replaced earlier legislation going back to 1869 in New Zealand (and beyond in the United Kingdom) which made it an offence to ". . . use any threatening abusive or insulting words or behaviour in any public street thoroughfare or place with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned." The 1924 provision, which was re-enacted when the rag-bag Police Offences Act was consolidated in 1927, added "riotous", "offensive" and "disorderly" to the earlier collection. In order to make conviction more certain it also deleted the requirement that the behaviour be ". . . with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned". Apart from an increase of the fine to a maximum of $500 in 1967 (*l*) s. 3D in its present form is the product of the Labour Government which in 1960 decided that the police needed more power to deal with "hooligans" especially in Christchurch's Cathedral Square and at the Hastings Blossom Festival. In addition to an increase in the maximum penalty, the main innovation in 1960 was the granting of a right of arrest to a constable and to all persons who he calls to his assistance of all persons whom he finds committing or who he has good cause to suspect of having committed an offence against the section. To complete a complicated story, this right of arrest was the following year re-enacted in s. 315 of the Crimes Act. The power of arrest is where the real value of the section lies when the police want to quell "disturbances".

The best way to see how all this applies to a demonstrator engaged in symbolic speech is to look at the leading decision of the Court of Appeal on the section, *Melser* v. *Police* (*m*). Melser and his three companions chained themselves to the stone pillars at the top of the steps at the entrance to Parliament Buildings on the occasion of a visit by Vice-President Humphrey of the United States. At the time there were a large number of people gathered in the grounds in front of Parliament carrying banners and placards protesting about the war in Vietnam.

The first part of this revised address by Mr Roger Clark appeared in [1972] *N.Z.L.J.* 209.

(*j*) Incidentally, in 1970 the P.Y.M. successfully laid a wreath on the same Cenotaph. No charges were brought. Perhaps the moral is that the climate for doing particular actions changes.

(*k*) For a thorough and stimulating analysis of the whole section, see McBride, "The Policeman's Friend. Section 3D of the Police Offences Act", (1971) 6 V.U.W.L.R. 599.

(*l*) The typical penalty for a first offender is $25-$50.

(*m*) [1967] N.Z.L.R. 437.

The four claimed to be an independent group making their own silent protest. They stood by the pillars for some hours, and although they could move slightly by reason of the slackness of the chains, they had arranged to stay in position until after the departure of the Vice-President when they were to be released by another person who had the key to the padlocks holding the chains. They were not carrying any banners or making any vocal demonstration and it was not contended that they had any intention of trying to prevent the Vice-President from entering or leaving Parliament. Asked by the police to leave, they refused. Some hours later they were again asked and on again refusing they were arrested on a charge of disorderly behaviour. After the arrest the police used bolt cutters to cut the chains and release them. One walked to the police van but the other three had to be carried although there was no violence or physical resistance on their part.

The four duly appeared before Mr J. A. Wicks S.M., charged with behaving in a disorderly manner. Apart from an unsuccessful technical argument that it had not been proved that Parliament Grounds was a "public place" within the meaning of the Police Offences Act, the main defence argument was that whatever else might be said about the behaviour it was not disorderly. Mr Wicks was therefore faced squarely with defining the term. The plight of a Magistrate of Judge faced with such an ill-defined creation of the legislature is a difficult one. The dictionary seldom provides the whole solution. "Disorderly" is in fact defined in the *Concise Oxford* as "untidy, confused, irregular, unruly, riotous". Fairly obviously if the legislature intended to punish people who in the opinion of a Magistrate or the police are "untidy" or "confused" or "irregular" there is not much scope for the active dissenter. On the other hand if a meaning nearer to "unruly" or "riotous" be adopted (words which carry a connotation of violence) a greater range of activity would be permissible. It also seems clear that, since the removal from the legislation of the words ". . . with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned", it is not necessary that the conduct should be intended or likely to cause violence to others for it to be within the section. Further, if the term "disorderly" is to be regarded as adding something which is not already dealt with by the other words in the section, it cannot be treated as completely synonymous with "riotous" since behaviour of that kind is also specifically dealt with. Finally, once a definition is settled upon, the question remains: disorderly (or untidy, or confused, or irregular, or unruly, or riotous) by whose standards? those of the police? the Magistrate? the most puritan and conforming member of society?

With these difficulties in mind one can sympathise with Mr Wicks in his search for a meaning. He referred to authority (*n*) for the proposition that "To behave in a disorderly manner is . . . to act in a manner which contravenes good conduct or proper conduct" and adopted the standard of the "right-thinking man":

> It is quite clear that to be "disorderly" the conduct need not provoke a breach of the peace or be likely to create a breach of the peace, but in my view it would be disorderly conduct for anyone to chain himself to the gate post of a private dwelling and then refuse to leave, and similarly it is disorderly to chain oneself to the pillars of Parliament House. It is not conduct which is in accordance with the ordinary rules of decorum. It is not good conduct or proper conduct. I feel that the action . . . went beyond the standards of conduct generally accepted by right-thinking people and that the defendants were thereby behaving in a disorderly manner.

Convictions were accordingly entered, although only a nominal fine or five pounds and costs was imposed.

The test or whether the conduct was "good" and "proper" and "in accordance with the ordinary rules of decorum" comes close to the *Concise Oxford's* "irregular". Punishing people who are improper or irregular hardly leaves much scope for the right to dissent. Nor is the position made better by adopting the standards of that legal fiction, the right-thinking man. No doubt he is a close relative of some other nonentities who play a leading role in the law of negligence —the "reasonable man" and the "man on the Wadestown bus". He is not to be confused with the "thinking man"—and he is unlikely to be a political demonstrator.

The correctness of the Magistrate's reasoning was argued before the Supreme Court and the Court of Appeal. In the Supreme Court, Tompkins J. agreed substantially with the Magistrate. The Court of Appeal, while affirming the convictions, adopted a definition which appears to allow a little more scope to the demonstrator. Sir Alfred North, the President of the Court, put it this way:

> . . . a person may be guilty of disorderly conduct which does not reach the stage that

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(*n*) *Police* v. *Christie* [1962] N.Z.L.R. 1109, 1131. The Magistrate's written judgment, quoted in the text, is not reported.

it is calculated to provoke a breach of the peace, but I am of opinion that not only must the behaviour seriously offend against those values of orderly conduct which are recognised by right-thinking members of the public but it must at least be of a character which is likely to cause annoyance to others who are present (*o*).

This goes beyond Mr Wick's opinion in two ways. First, a test of "seriousness" is added—it is not enough that the right-thinking man should be *offended*, he must be *outraged*. Second there must be a likelihood of annoyance to viewers—apparently the actual ones, who may or may not be right-thinking. The other two members of the Court, Turner and McCarthy JJ., agreed with North P. although they seemed to regard the question of seriousness as one which went to the quality of the annoyance suffered by those who observe the conduct. Thus Turner J. said:

> . . . it is conduct which, while sufficiently ill-mannered, or in bad taste, to meet with the disapproval of well conducted and reasonable men and women, is also something more—it must, in my opinion, tend to annoy or insult such persons who are faced with it—and sufficiently deeply or seriously to warrant the interference of the criminal law (*p*).

Even in this light the Court considered the conduct to be disorderly. Who then was annoyed? Certainly not the other demonstrators who were the main people faced by it! The police? Perhaps. The Court took the view that the important thing was the potential annoyance to Members of Parliament and their guests. McCarthy J. expressed this most clearly:

> . . . the Speaker and the Members of the House of Representatives had a right to freedom from interference at the doorway of their House and the right freely to entertain their visitors within the House unembarrassed by unseemly behaviour on the part of intruders. Should the appellants then be entitled to exercise their freedom to protest in a way which seriously interfered with these freedoms of Members of the House. I think not (*q*).

Implicit in the Court of Appeal's right-thinking man opproach is some sort of notion of degree and context. Thus, in upholding the conviction for disorderly behaviour in the wreath-laying case (*r*), the Chief Justice remarked that "Conduct that is acceptable at a football match or boxing match may well be disorderly at a musical or dramatic performance. Behaviour that is permissible at a political meeting may deeply offend at a religious gathering." Unfortunately the New Zealand Courts have shown little inclination to regard as a highly relevant part of the context the fact that the defendant was obviously and sincerely making a political point (*s*).

The meaning of "offensive" in s. 3D has not yet been determined by the Court of Appeal but a charge of offensive behaviour is sometimes made against demonstrators. In one such case, dealing with the burning of a Union Jack on the occasion of a visit of the Governor-General to Canterbury University, the test applied was that of "a course of action calculated to cause resentment or revulsion in right-thinking people." (*t*) This comes very close to the Court of Appeal's test for what is disorderly and is equally limiting in its scope for the demonstrator.

The threat posed by s. 3D to the demonstrator is a large one indeed and it should be amended. For the whole point of symbolic speech, as of protest in general, is to shake up the right-thinking man. Yet it is just at the point when the protest begins to be effective that the law steps in.

The major problem after s. 3D is s. 3 of the Trespass Act 1968 which can be used to deal with the sit-in. With a few exceptions, such as the tarmac and other non-public parts of an airport (*u*), it is not a criminal offence merely to trespass. Section 3 of the Trespass Act, reproducing an earlier provision in the Police Offences Act, makes it an offence to trespass *and to continue to do so after being warned to leave*:

> Every person commits an offence against this Act and is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding two hundred dollars who wilfully trespasses on any place and neglects or refuses to leave that place after being warned to do so by the owner or any person in lawful occupation of

(*o*) [1967] N.Z.L.R. at 443.

(*p*) Ibid., at 444.

(*q*) Ibid., at 446.

(*r*) *Wainwright* v. *Police* [1968] N.Z.L.R. 101, 103, discussed above. See also Turner J. in *Melser* at 444-445.

(*s*) Cf. the words of Kerr J. in an Australian case: ". . . in this day in Australia we are mature enough to tolerate spontaneous political protests of this kind . . . without having our feelings wounded or anger, resentment, disgust or outrage aroused to any significant extent." *Ball* v. *McIntyre* (1966) 9 F.L.R. 237, 245. The reasonable Australian appears to be more understanding than his Kiwi counterpart.

(*t*) Wilson J. in *Derbyshire* v. *Police* [1967] N.Z.L.R. 391-92 adopting the words of Haslam J. in *Price* v. *Police* [1965] N.Z.L.R. 1086, 1088.

(*u*) Civil Aviation Regulations 1956, reg. 15 (S.R. 1962/13).

the place, or any person acting under the express or implied authority of the owner or person in lawful occupation.

If you deliberately jump over the fence into someone's property you are a trespasser within the meaning of the section (and indeed a "wilful" one because "wilful" in this context has been held to mean deliberate rather than accidental and does not carry with it the lawyer's meaning of a "guilty mind" (*v*) which it has in some other contexts). But before you can be caught by the section you must be given a warning to leave after you begin to trespass and allowed a reasonable time to do so. (*w*) In respect of the type of situations demonstrators are likely to get into, the section creates all sorts of difficulties for the prosecution both as to who is a trespasser and how the warning is to be made effective.

The difficulty with insuring that the defendant is a trespasser at the relevant time arises because the venue of a sit-in is often a place to which the public have access in the ordinary course of business—a Government office or a police station for example—or on payment of a fee such as a rugby ground. It is normally possible for those in control of a particular spot to "revoke" your "licence" to be present, upon repayment of the entry fee if any (*x*). A licence to be present is probably *impliedly revoked* once you sit down or act in some other way for a purpose other than that for which people are normally there (*y*). The point of time at which this implied revocation occurs is usually quite unclear. In this type of situation, if the prosecution is to be sure of success, it is thus desirable that the owner or occupier of the place or his agents state unequivocally that those present are no longer welcome. This gets over the first limb of the section and makes clear that they are wilful trespassers. They must then be given some more advice—a warning to leave. In a sense, two warnings are required, the first to revoke any express, or implied licence to be present and the second to comply with the warning provision of the section. It was probably difficulties such as these that led to the demonstrators who moved onto the field at Athletic Park during a rugby match in 1970 being charged with disorderly behaviour rather than wilful trespass.

So far as the warning required by the section is concerned, it seems to be the law that the only effective kind is an oral one to the trespasser while he is actually trespassing. A sign such as "Trespassers will be prosecuted" or "No canvassers allowed" placed near the fence does not seem to be much use: it is not a warning to an actual trespasser to leave, but a warning to a potential one not to come in; arguably it is not even a warning by the owner or his agent—it is a warning by a notice. At the very least, the prosecution shoulders the difficult task of proving that the notice was seen by the defendant (*z*). There is also some doubt about how far the police may be clothed with the "implied authority" of the owner or occupier so far as giving the warning is concerned. For example, did the policeman who told Melser and his friends to leave Parliament steps have the authority of the Speaker to do so? Or would he or his superiors have needed precise instructions in order to succeed on a charge of wilful trespass? The point is certainly open to debate.

Notwithstanding these difficulties with the section so far as the prosecution is concerned, I should add that the wilful trespasser who declines to go runs the risk of being convicted both for wilful trespass and for obstructing a constable in the execution of his duty. A constable has the power to arrest anyone whom he finds committing the offence created by s. 3 of the Trespass Act (*a*). He may also assist the owner or occupier of the place to use reasonable force to eject the trespasser without arresting him (*b*). In *Allen* v. *Police* (*c*), the defendant stayed in a coffee bar after he had been asked to leave and his money had been refunded. He was charged with wilful trespass and with obstructing the constable who ejected him. It was argued that when a constable carries out such an ejection he is "not doing so in pursuance of any duty but merely as agent of the proprietress" although the law protected him from proceedings for assault in such circumstances. Leicester J. held that this argument was ill-founded but he appeared to lay great emphasis on the fact that the constable reasonably feared a breach of the

(*v*) *Ryan* v. *Stanford* (1897) 15 N.Z.L.R. 390.

(*w*) *Loughlin* v. *Guiness* (1904) 23 N.Z.L.R. 748; *In re Glegg* (1908) 27 N.Z.L.R. 740.

(*x*) *Wood* v. *Leadbitter* (1845) 13 M. & W. 838 (theatre); *Walden* v. *Collins* (1910) 30 N.Z.L.R. 282 (racecourse); *Allen* v. *Police* [1961] N.Z.L.R. 732 (coffee bar).

(*y*) E.g. by unfurling a banner on a golf green: *Duffield* v. *Police* [1971] N.Z.L.R. 381. Whether a paying entrant whose licence is impliedly revoked may get his money back is shrouded in mystery.

(*z*) *Marshall* v. *Cattley* (1937) 32 M.C.R. 129.

(*a*) Crimes Act 1961, s. 315 (2) (a) (offence punishable by imprisonment).

(*b*) Crimes Act 1961, s. 52. The property owner may himself use reasonable force or employ security guards or bouncers to use it for him.

(*c*) Above note (*x*).

peace. My feeling is that, even if it is necessary to establish a reasonable fear of a breach of the peace to obtain a conviction of a trespasser for obstructing a constable in the execution of his duty, it is so easy to establish a fear of such a breach that even a passive demonstrator who sits quietly and is carried out is likely to be convicted.

Conclusion

Throughout this discussion I have stressed both the breadth and the vagueness of the legal restrictions against meetings, processions and symbolic speech. Undoubtedly these provisions have what American commentators are fond of calling a "chilling effect" on public debate. I have stressed also that many of these restrictions, if not all, are seldom enforced to their full limits. That this wide degree of discretion should need to be exercised in order to make the law bearable is, in my opinion, deplorable. The need for reform is well enough known (*d*). There are too many examples in the statute books in these and other areas of legislative overkill mitigated by administrative decision not to prosecute. The necessity to exercise this discretion has forced the police into some difficult positions. They have learnt a lot from the mistakes of the Agnew and Anti-All Black Tour demonstrations in 1970 and are now emphasising a low-key, unobtrusive approach which will undoubtedly help their public relations (*e*). Protestors still have something to learn about co-operating with the police. They are just as entitled to protection and assistance from the police as any other citizens. Baiting the police is no way to get it. Nor is it an effective way to put across a point of view.

(*d*) See e.g. McBride, above note (*k*); Palmer, "Freedom of Peaceful Assembly and Association", [1969] *Recent Law* 113, 118; Justice Department, *Crime in New Zealand* (1968) 49; Keith; "The Right to Protest" in K. J. Keith ed., *Essays on Human Rights* (1968) 49.

(*e*) Note in particular their new instructions for the handling of demonstrations as reported in the *Evening Post*, 19 August 1970. This article was written prior to the recent statement of the Minister of Police regarding the use of dogs in demonstrations. To what extent the Minister's views are accepted and in fact reflect those of the police themselves is at the moment open to question.

ORAL AGREEMENTS FOR SALE OF LAND

Scott v. *Bradley* [1971] 2 W.L.R. 731; [1971] 1 All E.R. 583, is of general interest to solicitors, inasmuch as Plowman J. had to resolve a difference of opinion between two well recognised text books, *Williams on Vendor and Purchaser* and *Fry on Specific Performance*.

The headnote in *Scott* v. *Bradley* reads as follows:

> "By an oral agreement made in March 1969, the vendor agreed to sell and the purchaser to buy a freehold property for the sum of £5,000. The purchaser paid a deposit of £500 and completion was due to take place in July 1969. The receipt of the deposit, duly signed by the vendor, contained the names of the parties, a description of the property and the consideration, but omitted a term of the oral agreement whereby the purchaser had *agreed to pay half the vendor's legal costs of the sale*. The vendor refused to complete, denied that there was a concluded oral agreement, and pleaded section 40 (1) of the Law of Property Act 1925, alleging that the omission of the oral term as to the payment by the purchaser of half the legal costs from the receipt, rendered it insufficient as evidence of a 'note or memorandum in writing.' The purchaser, by a writ dated 22 May 1969 sought an order of specific performance.
>
> *Held*, that as the vendor had signed a written document which was evidence of an oral contract for the sale of land and, since the purchaser had consented to be bound by the omitted material term that he pay half the vendor's legal costs incurred in the sale, the vendor was bound by the agreement and the purchaser was entitled to an order for specific performance of the contract."

Section 40 of the Law of Property Act 1925, has its counterpart in New Zealand, s. 2 of Contracts Enforcement Act 1956 (formerly s. 4 of the Statute of Frauds 1677). The missing part of the contract was a material term in the sense that the vendor was unwilling to sell the property to the purchaser for the £5,000 which he had offered, and it was his offer to pay half the vendor's legal costs in addition, which tipped the scales and induced the vendor to accept.

The difference of opinion between *Williams* and *Fry* may be explained by taking a passage

from *Williams on Vendor and Purchaser* as follows:

"It is essential, however, whether the writing given in evidence is of a formal or an informal nature, that the terms of the agreement sought to be proved thereby shall be sufficiently ascertained therein. The parties to the contract and the property to be sold must therefore be sufficiently described, and the price, or the means of ascertaining it, be stated; and any other terms of the bargain (except, of course, such as are implied by law, as that a good title shall be shown) must be defined. It appears, however, that if a stipulation, which is to the detriment or for the benefit of any one of the parties exclusively, is omitted from the memorandum, that party may submit to perform it or waive the benefit of it (as the case may require), and may with such submission or waiver specifically enforce the contract as stated in the memorandum."

This passage from *Williams* may be contrasted with one in *Fry on Specific Performance*:

"It would seem, however, that where a stipulation *is of no great importance* and solely benefiting the plaintiff is omitted from the memorandum, the defendant will not, in action for specific performance, in which the stipulation is not asserted against him, be allowed to set up that the memorandum is insufficient by reason of such omission to satisfy the statute, if the plaintiff chooses to waive the stipulation." (emphasis supplied).

In the course of his judgment in *Scott* v. *Bradley* Plowman J. examined many of the English cases but in the main he relied on a decision of the Court of Appeal in Chancery, *Martin* v. *Pycroft* (1852) 2 De G.M. & G. 785 (C.A.). This important case had not been cited in many of the English cases and this fact appears to have led to many inconsistent judgments.

In *Martin* v. *Pyecroft* a tenant sued for specific performance of a written agreement for a lease. The written agreement omitted a term that the tenant would pay a premium of £200, but by his claim he offered to pay it. The lessor pleaded s. 4 of the Statute of Frauds 1677 but the Court of Appeal in Chancery held that the statute was no bar to the action.

In conclusion I shall cite *mutatis mutandis* from a note in the Law Quarterly Review, Vol. 67 (1951), p. 300 under the initials of Megarry J. who of course was speaking with the freedom allowed to a commentator: "Despite cogent transatlantic attacks, in England the doctrine of mutuality still broods heavy over specific performance; yet it is not easy to see how even lip-service is paid to that doctrine by holding that the omission of stipulation from the memorandum makes the contract unenforceable by the party bound by the stipulation (even though he offers to perform it), although it remains enforceable by the party who benefits by it, provided he renounces the benefit. Thus on this point neither on principle nor on authority does *Burgess* v. *Cox* [1951] Ch. 383, appear to promise great longevity; so difficult a branch of the law as this might well have been spared the shadow of this further refinement."

E. C. ADAMS.

WELLINGTON DISTRICT OFFICERS BEARERS

At the Wellington District Law Society's General Meeting held on 8 March 1972, the following officers were elected to the Council:

President:	Mr J. F. Jeffries
Vice-President:	Mr R. B. Cooke, Q.C.
Treasurer:	Mr R. C. Savage, Q.C.
Council: Messrs	J. T. Eichelbaum
	I. L. McKay
	M. J. O'Brien, Q.C.
	F. D. O'Flynn, Q.C.
	L. M. Papps
	R. D. Richmond
	P. T. Young
	J. K. Cullinane (Wairarapa)
Professor	I. L. M. Richardson

Camp Site for Sale?

According to the N.Z.B.C.'s house magazine the advertising manager of Station 2ZN Nelson was delighted when he signed up a local real estate firm. However it was not long before an irate Real Estate Agent was on the telephone to him complaining bitterly about the peculiar replies he was receiving to his advertisement. It transpired that the racy disc jockey was so garbling the message, "If you want a home or section contact . . ." that listeners were construing it as "If you want a homosexual contact . . ."

What's in a name?—The young couple sat in silence in the Marriage Guidance Counsellor's office. "Why don't you begin?" the Counsellor said, turning to the husband. "What seems to be the trouble?"

"I don't have any complaints", the man responded, "but what's-her-name here seems to think I haven't been paying her enough attention lately."

A MAGNETIC MEMORY FOR THE LAW OFFICE

An article by Eugene Kush that originally appeared in the JOURNAL *of the Canadian Bar Association.*

Twentieth century electronic wizards have produced a Magnetic Memory Typewriter. Very few of these machines have found their way into the average law office. Most lawyers have a natural reluctance to adopt any modern gadgets; yet, if Law Offices are to survive, they must modernise.

I remember quite vividly the confusion that surrounded the purchase of a copying machine. This was further confounded by the development of the electric typewriter, and I know of several law offices that won't even hear of having an electric adding machine!

If we are to survive in the modern business world, we must be among the first to accept and adopt modern business technique.

The Electronic Memory Typewriter consists of two basic units, a standard electric typewriter married to a tape-reading unit. The tape-reading unit is very similar to a tape reader. A standard electric typewriter keyboard has been expanded to give certain control functions to the operator which enable her to control the tape reader.

The tape reader is a very simple computer. It is able to read magnetic impressions deposited on a card. These magnetic impressions represent characters or control functions originated by the typewriter. Each time that a character is struck at the keyboard a corresponding magnetic character is produced on a memory card. The memory card is made out of the same material which you find in the common tape recorder, except that a card takes the place of a long tape.

As the operator of the typewriter types, she causes an impression to be made on the paper in her machine and at the same time creates a magnetic record of the character on the card. In addition to typing characters there are control functions for the machine. These control functions allow the machine to backspace, underline, margin control, line feed and capitalise. The combination of functional control and character control gives an ability to the tape reader to repeat precisely that information which was originally fed into the machine.

The first generation of this type of equipment used magnetic tape similar to that which is used in the ordinary computer. They had two tape reading heads making it possible to transfer information from one set of tapes to another.

These machines were marketed to various law firms throughout Canada. The first-generation machine had a number of problems involving information retrieval. It took a very carefully trained operator to make effective use of the machine and in most cases she received very little encouragement from her lawyer boss.

A second-generation machine has now reached the market. The roll of magnetic tape was replaced with a system of magnetic cards. Each card represents a page of complete typing. Each card has a number on it and it is possible to index the information contained on the card so that you can have immediate recall. This system of information storage is very useful to a modern and busy office.

The main use for this type of equipment is to speed the production of typed material. Although you may hire a stenographer who is capable of typing 60 to 70 words a minute, the actual production received from the stenographer is closer to 10 or 15 words per minute of finished work. It seems that as they get down to the bottom of a Will or to the bottom of a difficult pleading they go slower and slower and slower. There is no consistent, high output of work and there is no standard of uniformity from stenographer to stenographer. With a Magnetic Memory Typewriter the stenographer uses cheap newsprint in the machine in order to prepare the record. She types at full rough draft speed, and if an error is made she backspaces and retypes. When she completes a "rough" page she then does a "printout." The printout is a play back from the magnetic card. She then proofs the page for errors or, if the lawyer can proof read and make changes, on the rough draft. When the rough draft is returned to the stenographer she can put the machine into an "adjust" function, make the necessary change and return a new proof or she can do a final printout.

This ability to dispense with the eraser and switch the average stenographer from low gear into high gear will result in an increase in the productive output from the stenographer but the question is, how much of an increase?

Each one of us hates to do repeat work, every office has its favourite and most often used forms

as, for example, the standard 30-day-survivor type of will or the standard foreclosure action.

It is not sensible to pay a stenographer three or four dollars an hour to do repetitious work. It is possible to program any legal document so that it is broken down into two parts—"stationary data" and "variable data." The machine can be taught to type the stationary data and stop to wait for the insertion or the variable data. It also has the ability to rearrange line endings so that, if the variable data is long, it will look as if the document were originally typed with that information therein contained. If, on the other hand, the variable information is short the machine will rearrange the line endings accordingly.

It is possible to do a Divorce pleading without making it appear as if printed forms were used and, at the same time, have the benefit of mass production. In my office we have gone through the most repetitious work and have put it on a standard programme. The standard programme can be recalled at an instant and the variable information can be inserted by the operator at the request of the lawyer.

Where it once took two or three hours to do a Divorce Petition it is now possible to have that work completed in about 15 or 20 minutes.

There are other uses for the equipment, some of which have not yet been discovered and as time passes we will find that the third- and fourth-generation devices will be even more adaptable to everyday work in a law office.

I have not made an exhaustive cost study. The increase in the production from the stenographer should pay the rental. A saving of two hours per day of the practitioner's time will be sufficient to justify the rental for the machine.

The manufacturer of the equipment leases the device for several hundred dollars per month. I suppose you could buy it but the capital cost can not be justified, taking into consideration the technical changes that are likely to occur within the next five years.

Acquisition of a machine will not be the complete answer to all of the stenographic problems of the office. We will have to rearrange our work patterns in order to get the most benefit out of the device. In a small one-man operation the changes can be easily and quicklv made but some of the larger offices will experience considerable difficulty in making adaptations.

Before you acquire the use of a machine of this sort it is essential that preparation for its installation should be made well in advance of the delivery date. The office precedent book should be gone over and the material rearranged in order of frequency of repetition. If your practice is generally a company practice, then your favourite and most often used precedents should be the ones that will have to go into the memory unit at the very beginning. I would suggest that a three-ring looseleaf type of precedent book be established. Mylar sheets are available from most stationary supply houses and each page of the precedent should be placed into the mylar carrier sheet. Keywords should be written on a top right hand corner of each different precedent with a suffix letter A, B, C, etc., to indicate the pages involved in the precedent.

The importance of keyword indexing cannot be overstressed. These keywords will form the basis of your indexing system. A standard indexing device similar to that marketed by Acme-Sealy should be used and the keywords with the appropriate precedent number should be inserted in each individual card line. You should adopt a numbering code for the precedents that is not confusing with your existing file numbers, and use existing file numbers to identify cards with work in process.

The memory cards already bear the serial number imposed on them by the manufacturer. Care must be taken to properly identify each magnetic card, otherwise you will soon have a mess on your hands.

These cards and the Acme-Sealy type of index should be available at the operating position, close to the Magnetic Typewriter installation. The Magnetic Memory Typewriter installation requires almost the same room as a standard electric typewriter, except that it will require a little more floor area for the tape reader.

The index of precedents, the book actually containing the precedents and the box of magnetic memory cards should be placed very close to the operator of the machine; in fact, one set of indexes can serve two positions.

The machines are notorious for making a large noise and some attempt should be made to put them in a comparatively out-of-the-way part of the office so that the noise from their operation will not disturb the remaining office staff.

The manufacturer provides a short, three-day training course for a staff member at no charge, provided that it is taken at a central training depot. Once you have established a library of precedents, the stenographer taking the course could be given a dozen or so precedents to programme while she is on the course.

When she returns she should be instructed to take on normal office routine making the best use of the Magnetic Memory repetitious characteristics of the device. You will find that the machine causes the stenographer to work harder and eventually you will have to pay her more

because her output will increase. Use above-average staff, otherwise you will create more problems than you solve.

From thereon an attempt should be made to programme as the work is being done. The operator must use the index system to find the precedent and thereby to locate the magnetic memory card. At the beginning her library of records will be very small but it will soon expand as she makes active use of the new facilities. She should programme at least five or six pages per week in addition to being able to carry on with normal stenographic duties. A conscientious employee and an interested employer, together with a planned system, will make this machine productive. Don't expect the stenographer to adapt to magnetic memory typewriting without a considerable amount of prodding and planning by her employer.

Once the initial staff operator has been trained, it is essential that the other members of the team should take identical training, either at the depot provided by the manufacturer or on their own time when the machine is not being used. It is possible to operate the machines on a 24-hour basis if you could find the staff members to operate it. The time will come when stenographic staff will work in 24-hour shifts, keeping the machines humming at all times, provided of course that her employer hasn't come down with a nervous breakdown in trying to keep her busy.

Ordinary office dictation and routine letters can be done on the machine at a far greater speed and with greater accuracy than can be done by an operator without this device. You no longer need to have an eraser and you can turn out as many "originals" as you desire.

Keep in mind that the Magnetic Typewriter cannot think, it must be taught everything that it knows. Once having learned its lesson, it knows its lesson well. It types at approximately 135 to 175 words per minute, depending upon the number of control functions that are being used. Its average output is about 125 words per minute, which means that a page of typing will be completed in about two minutes.

You will have to acquire from your printer a supply of very cheap newsprint, cut to standard letter size. This newsparint will be used as the proof or printout paper and it will be used in large quantities.

Some experimenting should be done on 10 in. by 11 in. newsprint to see if line ends can be more easily identified.

The final printout is done on the ordinary office letterhead or business paper and you will find a dramatic increase in use of ribbons for the machine.

It does not adapt itself too well to the standard printed form, as for example, agreements for sale. However, the memory function can be used to store complicated legal descriptions especially if they have to be repeated three or four times during the course of the life of the file. You might also put into the memory unit the complicated styles of cause that sometimes are prevalent in pleadings. I would suggest that any items in the memory card relating to a client's affairs be indexed in the normal numerical file number and stored with the remaining cards. A printout of the card should be placed into the file. You will also have to acquire from your stamp maker, a stamp which will indicate the card number, the margin settings and other bits of technical data that the operator requires in order to set up the machine for a printout function.

Although we have not had long use of the second-generation machine, we already find that it is making itself most useful. There is no objection at all; it costs money but I hope that the cost is justified by the increased productivity.

You will find that the general intelligence level and standard of training of the operator have to improve because a poor operator cannot make the best use of the memory feature. The lawyer responsible for the machine must continually keep his mind open to making further and better use of the device; otherwise you will become saddled with a white elephant that gobbles up several hundreds of dollars of overhead without a corresponding increase in productivity. So far as future uses for this type of equipment, some book company will probably engage my services for the purpose of advice on how to use these magnetic memory cards in substitution for the ordinary precedent book. Instead of buying a new book on forms, you will buy a book containing the magnetic memory card which will give you the standard format and save the expense of programming. However, I haven't been able to talk any book company into seeing me yet, so I had better go back to the practice and worry how to pay the bills for "Maggie," the electronic typist!

Porn-o-phone—A Chicago newspaper recently carried this "personal" advertisement: "GIRLS, do you feel neglected? Do you not receive obscene telephone calls? Old practitioner will take on several more clients. $37.50 per week. 22 obscene calls between 12.30 and 6 a.m. guaranteed each night. Heavy breathing $15 extra. Box 477."

THE "UNDER-PRIVILEGED NEIGHBOUR"

The intention in *Robert Addie and Sons (Collieries) Ltd.* v. *Dumbreck* [1929] A.C. 358, was to establish clearly the principle that a trespasser takes premises as he finds them. The House of Lords saw no reason to require an occupier to take *positive* steps to protect the trespasser, and as far as those frequently sued defendants, railway operators, were concerned there were, and still are, no statutory duties which might benefit the trespasser (see Vincent Powell-Smith, *N.L.J.*, March 25, 1971, p. 240). *Addie* was an attempt to clarify the law, but was by the same token "a step back in the direction of categorisation from an earlier more general attitude to the duty of care" (*per* Lord Wilberforce in *British Railways Board* v. *Herrington*, *N.L.J.*, February 24, 1972, p. 166) and Viscount Dunedin particularly wished to emphasise "that there are three different classes invitees, licensees, trespassers. . . . The line that separates each of these three classes is an absolutely rigid line". This was a plea for a mechanical jurisprudence; classify your plaintiff and the question is decided automatically. The failure of the 1957 Act to deal at all with the trespasser-plaintiff perhaps provides modern Judges with some reason for such an approach but it was by no means forced on their Lordships in 1929.

In *Lynch* v. *Nurdin* (1841) 1 Q.B. 29, the Court rejected counsel's argument that because the seven-year-old plaintiff "had by his own act of trespass consciously or unconsciously occasioned the misfortune, he could not sue for the consequent injury". The reasons exemplify an approach, not uncommon in the nineteenth century cases (see e.g. *Sarch* v. *Blackburn* (1830) 172 E.R. 712 at 714), to argue not in terms of duty or immunity but interms of cause. "The most blameable carelessness . . . having tempted the child, [the defendant] ought not to reproach the child with yielding to that temptation. [The defendant] has been the real and only *cause* of the mischief". By this technique the case of the adult trespasser was easily distinguished (see e.g. *Lygo* v. *Newbold* (1843-60) All E.R. Rep. 422) and the conduct of the occupier had to be justified if it caused the trespsaser harm. The occupier would be liable even to an adult if he went beyond legitimate defence of his property and created "retributive" risks (see *Illot* v. *Wilkes* (1820) 106 E.R. 674). This principle, which survives *Addie* and the recent decision of the House of Lords in *Herrington* (*supra*), indicates merely for what kind of *positive* acts an occupier will be liable, but, by its very existence, has encouraged the growth of the idea that there is no duty on an occupier to take positive precautions for the trespasser.

Since *Blithe* v. *Topham* (1607) 79 E.R. 139, the cases have contained the occasional *Addie*-style statement, but in 1859 (in *Hardcastle* v. *South Yorks Railway Co.* 158 E.R. 761 at 764) Pollock C.B. thought it possible to leave to a jury questions of liability for negligence towards unintentional trespassers. In *Cooke* [1909] A.C. 229 at 239, Lord Atkinson thought the question of liability to trespassers to be an open one. There was still no "absolutely rigid line", but the desire for more mechanical rules seems to gain ground in Lord Halsbury's judgment in *Lowery* v. *Walker* [1911] A.C. 10, in *Grand Trunk Railway of Canada* v. *Barnett* [1911] A.C. 361, and in Hamilton L.J.'s judgment in *Latham* v. *R. Johnson & Nephew Ltd.* [1913] 1 K.B. 398 at p. 410. This judicial abdication is hardly surprising as Lord Halsbury's judgment in *London Street Tramways* v. *L.C.C.* ([1898] A.C. 375) clearly reflected a widespread judicial preference not to recognise the possibility of judicial legislation.

The merit of particular plaintiff's claims soon produced techniques for the evasion of the *Addie* rule. The allured child trespasser would readily be given a licence (see e.g. *Gough* v. *N.C.B.* [1954] 1 Q.B. 191), a practice the prevention of which was their Lordships' main purpose in *Addie*, and which "fiction", Lord Diplock said in *Herrington*, "has served its purpose and is ripe for discard". There were successive attempts to distinguish "occupancy" and "activity" duties, confirming the immunity to the former; a notion clearly rejected by both Court of Appeal and House of Lords in *Herrington*. In *Buckland* v. *Guildford, etc., Co.* [1948] 2 All E.R. 1086, the occupiers' independent contractor was denied the benefit of the immunity. In *Excelsior Wire Rope Co.* v. *Callan* [1930] A.C. 404, the idea of "recklessness" was generously interpreted to give the child plaintiff a remedy, a technique which commended itself to the Court of Appeal in *Herrington*, but which Lord Diplock described as "unduly censorious of the station master as an individual".

Despite such amelioration of the draconian *Addie* principle—or perhaps because the techniques strained the legal imagination greatly—the rule has undergone several frontal attacks. In Australia, Dixon C.J. refused to continue to explain the law "in terms which can no longer command an intellectual consent". Instead, he referred it "directly to basal principles" (see *Commissioner for Railways (N.S.W.)* v. *Cardy* (1960) 104 C.L.R. 274). Lord Denning M.R. adopted a similar approach in *Videan* v. *B.T.C.* [1963] 2 All E.R. 860 at p. 864 G.

"This rule seems fair enough if you put all trespassers in the same bag as burglars or poachers and treat them alike. But as soon as you realise that a trespasser may be innocent of any wicked intent . . . you find that the rule works most unfairly."

This then was the problem in *Herrington*: a six-year-old child had strayed onto the defendant's electrified line, and it seems that if the defendants had taken care to repair their fence, i.e., acted positively, the accident would not have occurred. As Lord Diplock put it, "all nine Judges who have been concerned with the case . . . are convinced that the claim ought to succeed and if I may be permitted to be candid, are determined that it shall. The problem of judicial technique is how best to surmount or to circumvent the obstacles presented by [the *Addie* rule]".

All their Lordships were troubled by the fact that the 1957 Act had left the *Addie* rule untouched whereas the Occupiers' Liability (Scotland) Act 1960 had imposed a general duty of care without there being any change in the English legislation. Lord Morris thought "it would not be fitting to make fundamental changes in the law, according to our view as to what its terms and policy should be, when Parliament, apparently deliberately has refrained from making such changes". In Lord Wilberforce's opinion "the law as stated in *Addie's* case is developed but not denied". So long as we have to work within "our outdated law of fault liability" we should remember that the rigid categorisation in *Addie* does not provide "an all embracing code. . . . We may, indeed must, adjust it by reason and experience".

Lords Reid and Pearson were more direct in their approach. Lord Pearson said *Addie* was an anomaly and should be disregarded. Lord Reid disliked "usurping the functions of Parliament" but could not adopt the Wilberforce formula. "It can properly be said that one is developing the law laid down in a leading case so long, but only so long, as the 'development' does not require us to say that the original case was wrongly decided". It appeared to him "that any acceptable 'development', of *Addie's* case must mean that *Addie's* case if it arose today would be decided the other way".

Lord Diplock thought there was no reason after the 1966 Practice Direction [1966] 3 All E.R. 77, to discuss whether or not *Addie* was actually overruled, but joined his brethren in thinking it would be decided differently today. *Herrington* thus provides the first instance of the actual exercise of the 1966 discretion, and that with only five Law Lords, as opposed to the seven recruited for *Jones* v. *Secretary of State for Social Services* [1972] 1 All E.R. 145 and *Cassell & Co. Ltd.* v. *Broome*, *N.L.J.*, March 2, 1972, pp. 185 and 195).

With such diverse approaches it is not surprising that their Lordships lay down the test of liability to a trespasser in differing terms. They are unanimous only in deciding that *Donoghue* v. *Stevenson* [1932] A.C. 562, has nothing to do with the case. "A test more specific than that of 'foresight of likelihood of trespass' and a definition of duty more limited than that of 'the common duty of care' is required". Whilst recognising the danger of falling into another *Addie*-style over-rigid classification trap, Lord Wilberforce went on to reject "the expedient of recoiling upon the comfortable concept of the reasonable man", as "it evades the problem by throwing it in the lap of the Judge". It is hard to see how the test of "common humanity" is any less "throwing it in the lap of the Judge". Admittedly the neighbour principle is a vague abstraction which only gains sufficient precision to be useful because Judges fix particular standards in particular cases, but the same can be said of any "common humanity" test. The detailed variations in the formulation of either test are hence unimportant. Surely, as Lord Denning M.R. said in *Videan*, "The true principle is this: In the ordinary way the duty to use reasonable care extends to all persons lawfully on the land, but it does not extend to trespassers for the simple reason that he cannot ordinarily be expected to foresee the presence of a trespasser. But the circumstances may be such that he ought to forsee even the presence of a trespasser; and then the duty of care extends to the trespasser also".

It is somewhat remarkable, in view of this desire for "boundary marks", that Lords Reid and Wilberforce should have encouraged uncertainty further by introducing what Megaw L.J. called in *Nettelship* v. *Weston* "the doctrine of varying standards" [1971] 3 All E.R. 581 at p. 592 h (see also the writer's previous article

N.L.J., July 22, 1971 p. 634). In *Goldman* v. *Hargreave* ([1967] A.C. 695, at p. 663) it was said that "the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances". This "individuation" is quite satisfactory when it operates to aid the plaintiff against the large corporation or to defeat the plaintiff who could reasonably be expected to have insured himself. It is altogether less acceptable when it operates to defeat a deserving plaintiff who has the misfortune to be injured by "an impecunious occupier with little assistance at hand". In effect this is to "punish" the trespasser by depriving him of his damages on an entirely capricious basis. The solution seems to be to require even the impecunious to insure. Lord Wilberforce thought cases such as this "would be more satisfactorily dealt with by a modern system of public enterprise liability devised by Parliament". Why confine reform to cases against public enterprises? At any rate it seems that such a policy will be adopted by the judiciary only where Parliament has given a lead by making insurance compulsory (e.g., *Launchbury* v. *Morgans* [1971] 1 All E.R. 642).

The common situation where an occupier employs an independent contractor is also unclear. The *Buckland* principle suggests that the occupier's immunity should be confined to the occupier and that the contractor is liable to the trespasser on ordinary negligence principles. Here a precise rule might be useful; or some concept of the primary liability of the occupier, similar to that of employers under the Employer's Liability (Defective Equipment) Act 1969 might be adopted. If the position was clear the necessary insurance arrangements could be made, but there is little guidance. Lord Pearson re-rejected the *Buckland* principle, Lord Wilberforce doubted its validity and Lord Diplock thought it inappropriate to deal with the point. He made it clear however, that in his view, no occupier could be liable to a trespasser without actual knowledge of the facts making his injury likely.

Only Lord Diplock provides any practical guide lines on the effect of warning notices, which is at present far from clear (see e.g. *Birch* v. *Thomas*, *The Times* December 10, 1971). It seems that where a child is too young to read a notice, common humanity may demand that the occupier fences, not to keep the trespasser out, but "to make it clear to the youngest unaccompanied child that beyond the obstacle is forbidden territory"; very young children remain the parents' responsibility, presumably. It is perhaps worth pointing out that this may effectively deprive a child of compensation (e.g., *O'Connor* v. *British Transport Commission* [1958] 1 All E.R. 358, 3½-year-old) which is a result that a later House of Lords might wish to avoid. One can only speculate on the word play that will be used to circumvent *Herrington*; or perhaps a more insurance orientated House will "develop" it further.

MAX WEAVER in the *New Law Journal.*

EUROPEAN COURT OF HUMAN RIGHTS—ITS ITS ORGANISATION AND OPERATION

With the object of making its work more widely known, the registrar of the European Court of Human Rights has produced the following account of its organisation and operation since it was first set up in 1959 under the Convention for the Protection of Human Rights and Fundamental Freedoms to insure the observance of the engagements undertaken by contracting States under the Convention.

The Court consists of Judges equal in number to that of member States of the Council of Europe. No two Judges may be nationals of the same State. Judges are elected by the Consultative Assembly, for a period of nine years, from a list of persons nominated by member states. They may be re-elected. They sit on the Court in their individual capacity and they enjoy full independence in the discharge of their duties.

The jurisdiction of the Court in contentious matters extends to all cases concerning the interpretation and application of the Convention. It can, however, be exercised only with regard to States which have either declared that they recognise it as compulsory *ipso facto* or have given their consent to a particular case being referred to the Court. To date, eleven states have accepted the Court's compulsory jurisdiction, namely Austria, Belgium, Denmark, the Federal Republic of Germany, Iceland, Ireland, Luxem-

bourg, the Netherlands, Norway, Sweden and the United Kingdom.

In the event of dispute as to whether the Court has jurisdiction, the matter is settled by the decision of the Court.

According to the Convention, any case submitted to the Court necessarily originates in an application lodged by a state or by a private individual with another body, the European Commission of Human Rights. The Commission deals first with the admissibility of the application. If it finds the application to be admissible, it ascertains the facts and tries to reach a friendly settlement. If this attempt fails, the Commission draws up a report containing both a statement of the facts and an opinion as to whether the facts found diselose a breach by the respondent state of its obligations under the Convention. The report is transmitted to the Committee of Ministers of the Council of Europe, whereupon the case may be brought before the Court, within three months, by the Commission and/or by the counteracting state concerned. If this does not occur, the Committee of Ministers decides whether or not there has been a violation of the Convention.

For the consideration of each case brought before it, the Court sits as a panel of seven Judges including, as an *ex officio* member, the Judge who is a national of any state party concerned or, if there is none, a person of its choice sitting in the capacity of Judge; the names of the other Judges are chosen by lot by the president before the opening of the case. However, the chamber called upon to deal with the case may, or must, under certain conditions, decide to relinquish jurisdiction in favour of the plenary Court. So far, this has happened in four of the 10 cases in which the substantive issues have been finally disposed of.

The first stage of the procedure is, as a general rule, written; memorials and other documents are filed with the Court's registry in the order and time-limits laid down by the president. When the case is ready for hearing, the president fixes the date of the opening of the oral proceedings. As a rule oral hearings are public.

The state or states concerned are parties to the case. The European Commission of Human Rights also takes part in the proceedings and appoints one or more of its members as delegates for this purpose: but it does not appear as a party. Once a case has been brought before the Court—by a state or by the Commission—the Commission's main function is to assist the Court; as "defender of the public interest" it is associated with the proceedings in order to enlighten the Court.

The Convention does not give individual applicants a right to refer a case to the Court or to appear before it as parties. According to the case law of the Court, it is, however, open to the Commission to "take into account" on its own authority any "views" the applicant may make known to it on the Commission's report or on any other matter arising in the course of the proceedings. It is not at all necessary for the purpose that the Commission should adopt as its own the applicant's arguments; it is enough that these arguments appear to the Commission as likely to enlighten the Court.

According to one of the Rules of Court, the delegates of the Commission may, if they so desire, have the assistance of any person of their choice. The Court held in 1970 that this provision did not preclude the delegates from having the assistance, subject to certain conditions, of the lawyer or former lawyer of an individual applicant.

The Court, by majority vote, gives final judgments which are binding on the states concerned and whose execution is supervised by the Committee of Ministers of the Council of Europe. The Court may, in certain circumstances, afford "just satisfaction" to the victim of an act done in violation of the Convention.

If a judgment does not represent in whole or in part the unanimous opinion of the Judges who heard the case, any Judge may deliver a separate opinion, concurring or dissenting.

Since it was originally created in 1959, the proceedings in ten cases before the Court have been concluded, either wholly or in relation to at least one of the issues involved (*a*).

(*a*) By a protocol to the Convention which entered into force on 21 September 1970, the Court has jurisdiction to give advisory opinions in certain circumstances.

The Common Law Diet?—Wellington solicitors who recently sent papers away for filing in a foreign Court received from their agents notification that they had duly filed the application for a "change of menu".

On legal institutions: "How curious to hear the pillars of the profession, oddly garbed in their wigs and curls and gowns, admonish a young man with long golden locks of hair to get it shorn. So many lawyers appear to be so much a part of a status oriented society. They make the practice of law the most conservative of all the professions." E. E. ISBEY M.P. AT WAITANGI.

ASSIGNMENTS OF FREEHOLD REVERSION

It had been held in England that by virtue of s. 141 of the Law of Property Act 1952 (U.K.) an assignee of the freehold reversion could sue and re-enter for rent in arrear at the date of the assignment when the right of re-entry had arisen before the assignment: *London and County (A. & D.) Ltd.* v. *Wilfred Sportsman Ltd.* [1970] 3 W.L.R. 418; [1970] 2 All E.R. 600 (C.A.). The New Zealand counterpart of said s. 141 is s. 112 of the Property Law Act 1952. For the purposes of this article nothing turns on any difference that there may be between the two jurisdictions in this respect. But it may be stated that s. 112 of the Property Law Act 1952 resembles more s. 10 of the Conveyancing Act, 1881 which was the predecessor of s. 141 of the Law of Property Act 1952 (U.K.).

Russell L.J. put the position plainly in the *London and County (A. & D.) Ltd.* case, when he said: "The language of section 141 (substantially re-enacting the earlier legislation from 1881 onwards) is such as, in my judgment, to indicate plainly that the assignee of the reversion may sue and re-enter for rent in arrear at the date of the assignment when the right of re-entry has arisen before the assignment."

In the still more recent case of *Arlesford Trading Co. Ltd.* v. *Servansingh* [1971] 1 W.L.R. 1081 (C.A.), it was sought by the appellant, who appeared in person to argue his own case, to distinguish the *London and County (A. & D.) Ltd.* The judgment of the Court was read by Russell L.J: "It has been established in this Court that an assignee of the reversion can claim, against the lessee, arrears of rent accrued prior to the assignment and to re-enter on the ground of the failure to have paid such arrears by force of section 141 of the Law of Property Act 1925: see *London and County (A. & D.) Ltd.* v. *Wilfred Sportsman Ltd.* In that case, however, the claim to re-enter and forfeit the lease was against the original lessee (and his chargee). It is pointed out that in the present case the defendant assigned his lease before the reversion was assigned to the plaintiffs and that there has never been privity of estate between the plaintiffs and the defendant contrary to what appears, from the note of the judgment, to have been the Judge's view. But it is argued for the plaintiffs that an original lessee remains at all times liable under the lessee's covenants throughout the lease, and that assignment of the reversion does not automatically release him from that liability. The argument is in our judgment correct; so that, if there is no special feature in this case the plaintiffs undoubtedly have a right as assignee of the reversion, and with it of the benefit of the lessee's covenants for rent, etc., etc., to sue for arrears of rent."

The Court then considered whether there was any such special feature, and held that there was not. "The obligation on the defendant remained on him in his capacity as lessee under the lease, and the ability to enforce against him passed with the reversion to the plaintiffs."

It remains to me to add that nothing in the foregoing article applies to lessees or licensees of Crown land issued under the Land Act 1948 and its amendments. Section 89 (4) of that Act, as substituted by s. 2 of the Land Amendment Act 1958 reads as follows: "(4) Where any lessee or licensee has transferred all his interest in his lease or licence by a legal transfer with the consent of the Board, the person to whom the lease or licence has been so transferred shall have all the rights and privileges of and be subject to the same obligations as the original lessee or licensee, and the former lessee or licensee shall thereupon cease to be liable for any subsequent breach of any covenant, condition, or obligation (express or implied) in the lease or licence." These provisions of the Land Act have proved in practice most convenient.

E. C. ADAMS.

Contempt of Court: "A Judge who is accused of dishonesty or unfairness by reason of partiality in carrying out his judicial duties can scarcely sue for libel without running the grave risk of being publicly attacked, and, as has recently been said by the English Court of Appeal, Judges cannot enter public controversies." From "Censorship", by R. C. Savage, in *Essays on Human Rights*, p. 97.

Notes in Court—The Chief Justice, Rt Hon. Sir Richard Wild, has advised that at their Conference on Saturday, 20 November 1971, the Judges resolved that there is no general objection to the taking of notes in Court. A Judge is, however, master of his Court and as a matter of courtesy his permission should be sought by persons other than Counsel and accredited news reporters.

LEGAL LITERATURE

Legislative Drafting by G. C. Thornton (London. Butterworths. $20.50).

As far as the reviewer is aware, this book is the first substantial work on legislative drafting published in the Commonwealth for very many years and should be of particular interest to New Zealand lawyers. Firstly the author, a former Chief Parliamentary Draftsman of Tanzania, is a New Zealander and member of the New Zealand legal profession, although he has practised abroad for some years. Secondly a great many of the very modern legislative precedents used in the book are drawn from New Zealand statutes.

The aim of the book is to provide an introduction and a practical guide for the use of legislative draftsmen. In the book the author lays particular emphasis on the need for the draftsman to develop an obsession to be readily understood. He points out that in the main good draftsmanship demands experience in and knowledge of the law, maturity of judgment, and interest in and feeling for language, practice in drafting, and the experience that comes from continual criticism. While these qualities and attributes cannot be learnt or acquired from a book, a book of this nature can nevertheless be of considerable assistance to both the novice and the experienced draftsman.

Although this book may be thought to be of interest only to legislative draftsman, this is not so. The early chapters particularly will be of tremendous value to practitioners engaged in drafting every kind of legal document. Indeed the reviewer would respectfully venture to suggest that these chapters should be regarded as compulsory reading for the editors of books of legal forms and precedents since it might persuade them to abandon some of the archaic legal jargon that pervades so many of their precedents.

The first four chapters are concerned with words, syntax, style, and miscellaneous words and expressions. The author deals with these topics in a particularly helpful and lucid manner and his points are illustrated with well chosen examples. Moreover, in dealing with these topics, which some readers might think rather dry, he helps to retain interest with his often wry wit. In the opinion of the reviewer these chapters are probably the best part of the book, the discussion of syntactical ambiguity in Chapter 2 being particularly valuable.

In discussing drafting style, Mr Thornton makes the point that the draftsman should have an ardent desire to the intelligible. Intelligibility is, he says, the product of simplicity plus precision. One device, commented on by Mr Thornton, that could be adopted far more often by conveyancing draftsmen is that of dividing lengthy clauses into subclauses, paragraphs, and subparagraphs on similar lines to our statutes. Reading through some legal documents is, to borrow one of Mr Thornton's colourful similes, often like trying to wade through a trough of rapidly drying concrete.

There is an interesting discussion of the proviso. The use of the proviso has been roundly criticised in the past but its use in legislation and legal documents remains prevalent to this day notwithstanding. The author reiterates this criticism and doubts whether the use of "this all purpose conjunction invented by lawyers but not known to or even understood by grammarians is ever really necessary. In passing, it is interesting to note that Australian Commonwealth parliamentary counsel manage to draft legislation without resorting to this device. As Mr Thornton reminds us, the draftsman's job is to communicate, and not only to lawyers; a draftsman therefore should not depart from common usage unless absolutely necessary.

Conveyancing practitioners might usefully take note of chapter 4 which deals with the use of a variety of words and expressions. Such words as aforesaid, said, preceding, following, herein, hereinafter, hereinbefore, hereby, wheresoever, and whatsoever are often misused or used unnecessarily. The usage is criticised mainly on the ground that it is imprecise, inefficient, archaic, or amounts to lawyer's jargon. The discussion of various words to use carefully is valuable. Experienced draftsmen should hardly need reminding of the dangers that can arise in connection with the use of the conjunctions "and", "nor", and "or". One has only to recall the vast expense that was incurred in deciding *Re Diplock* [1948] Ch. 465, which it will be remembered arose out of a will draftsman's careless use of the word "or". Mr Thornton criticises the excessive use of the "any", and rightly, it is submitted, points out that "a" or "an" should be preferred where appropriate. The unnecessary use of "all" in such expressions so beloved of conveyancers as "all and singular" and "all that

parcel of land" is also roundly attacked, as is the use of such expressions as "each and every". Why use three words where one would do! The overuse of "shall" is also criticised. The reviewer finds it difficult to understand why conveyancing practitioners should have such a penchant for the use of this word when "is" is not only more appropriate but grammatically correct. One abortion that is found far too frequently in legal documents is "such" when it is used as a substitute for "the" or "that".

The New Zealand practice of setting the "marginal" note to a section of an Act in the first line of the section is commented on in this chapter too. The reviewer is inclined to agree with the author's view that the practice of setting the notes in the margin is more desirable because, set there, a note is more conspicuous, easier to comprehend, not likely to be confused with a heading, and enables other notes to be placed in the margin opposite to the relevant text.

The New Zealand practice of tabulating "marginal" notes in the form of an analysis or arrangement of sections is favourably commented upon by the author. This practice is not followed in many other jurisdictions, e.g. Australia.

The book continues with chapters on substantive and administrative provisions. In those chapters the author deals with some of the more common legislative topics, including statutory corporations and other similar bodies, government finance, taxation, validation of illegal or unauthorised acts, obligations under international conventions, powers and duties, and tribunals. The discussion of these topics is carried out in a logical manner and all relevant aspects are discussed. All of these chapters are profusely illustrated with precedents from throughout the Commonwealth. The reviewer does have one criticism to make however. Some of the precedents selected contain examples of bad drafting practices which the author criticises elsewhere in his book.

In discussing penal provisions the author castigates, and rightly so, the use of omnibus penalty clauses. Unfortunately this sort of clause is particularly prevalent in New Zealand legislation. The author points out that those provisions are open to objection on two counts:

(a) it may produce uncertainty as to which conduct constitutes an offence; and

(b) unintended offences may be created.

The author's discussion of *mens rea* and strict liability, thorny topics for the legislative draftsman, is slightly disappointing. No mention is made of *Metropolitan Police Commissioner* v. *Warner* [1969] 2 A.C. 256, nor is there any discussion of the English Law Commission's most valuable working paper on the mental element in crime, which must have been available before the book went into print. Another minor criticism of this chapter is the omission of any reference to the drafting of fixed penalty legislation which is becoming prevalent in New Zealand and other parts of the Commonwealth.

A matter that should have been dealt with, in chapter 13 for want of a better place, was the question of civil liability for breach of statutory duty. The Courts have consistently criticised the legislative draftsman over the years for his failure to state whether breach of a statutory duty gives rise to damages as well as to a penalty. The English Law Commission in its report on "Interpretation of Statutes" included a draft provision which, it is submitted, should be incorporated into the Acts Interpretation Act 1924.

It is rather a pity that the book has no bibliography or tables of cited cases and statutes. Moreover the index might have been more comprehensive. Nor is there any comment on such ancillary matters as explanatory notes and comparative tables of enactments repealed which are common in consolidating Bills. However it would be churlish to criticise over much this excellent book which ought to be of value not only to legislative draftsmen but also to the conveyancing practitioner. In any event the book is certainly a "must" for the libraries of parliamentary drafting offices throughout the Commonwealth.

D.E.B.

"Britain expels Russian 'diplomats' "
. . . news item

Russia has made a Moon landing—
Her technology must be immense.
She can launch an atomic offensive
That allows no effective defence.

So what do her spies think they're doing?
What knowledge from us can they steal?
I'm sure they've already invented
Both the safety match and the wheel.

J.B.J. in the *Justice of the Peace*.

Restaurant sign—OUR FOOD CONTAINS ONLY THE PUREST ARTIFICIAL PRESERVATIVES.