The New Zealand LAW JOURNAL

4 JULY 1972 No. 12

POLITICS AND DEFAMATION—A CASE OF KIWI HUMBUG?

The recent furore concerning the Government's announced intention to pay the damages awarded against the Deputy Prime Minister, Mr R. D. Muldoon, in a libel action brought by Mr B. T. Brooks, raises serious issues about the place of libel actions in New Zealand political life. Most of the public discussion on the matter has been directed to the propriety of the Government paying the damages from the proceeds of taxation. That issue now appears to have been rendered moot as Mr Muldoon has said that he will pay the damages out of his own pocket.

Mr Muldoon also said:

> "At the same time I propose to no longer ignore defamatory statements made about me as I have done in the past. There have been at least three of these this year, and I am taking steps to act on the latest, which involves an official of the Labour Party."

Libel actions have long been a feature of New Zealand political life. In 1898 Mr C. H. Mills a member of the House of Representatives for the Wairau District and Government Whip sued the "Otago Daily Times" in respect of an allegation that a police constable had been transferred to another district at Mills' instigation because the constable had voted against him. Mills won even though the head of the Police Department had apparently told the constable he was being removed for political reasons: *Mills* v. *The Otago Daily Times Co.* (1898) 1 G.L.R. 127.

One of the more celebrated of the early cases occurred in 1910, and it eventually went to the Privy Council. The New Zealand Times published a cartoon depicting the then Leader of the Opposition, W. F. Massey. Massey alleged that the cartoon imputed that he was responsible for or had taken part in the distribution of a scurrilous and improper pamphlet reflecting on the then Prime Minister and that he (Massey) was a liar. The cartoon depicted a man in the act of harnessing a donkey "Ananias" to a wagon on which was written "We are the party". The wagon was represented as containing packages labelled "private calumny", "dead men's characters" and other things. The caption under the cartoon was "Hitch your wagon to a star" and "Hitch your wagon to a lie". Massey lost. (*Massey* v. *The New Zealand Times Co.* (1911) 30 N.Z.L.R. 929, affirmed by Privy Council (1912) N.Z.P.C.C. 503.) One can detect in the cases over more recent years a lessening tolerance for strong language.

In 1955 the New Zealand Court of Appeal held that the then Minister of Industries and Commerce, J. T. Watts, was protected by absolute privilege in respect of statements he made concerning a bakery. This was because the publication was one of the steps taken by him in the performance of an act of State in the course of his official duty: *Peerless Bakery Ltd.* v. *Watts* [1955] N.Z.L.R. 339.

In 1960 the Hon. P. N. Holloway was awarded £11,000 against "New Zealand Truth" for defamatory statements made about him: *Truth (N.Z.) Ltd.* v. *Holloway* [1960] N.Z.L.R. 69 (C.A.); [1961] N.Z.L.R. 22 (J.C.). Another Minister of the Crown, the Hon. D. J. Eyre, was awarded damages against the New Zealand Press Association: *Eyre* v. *New Zealand Press Association* [1968] N.Z.L.R. 736. See also *Eyre* v. *Wilson and Horton Ltd.* [1967] N.Z.L.R. 769.

Recently Dr Martyn Finlay successfully sued "New Zealand Truth": *News Media Ownership* v. *Finlay* [1970] N.Z.L.R. 1089. There have been other cases which did not reach the pages of the New Zealand Law Reports. The purpose of this

article is to question the legal principles which so readily allow public figures in New Zealand to sue and be sued for libel.

Let us begin with the idea that individual reputation is an important value. A person's right to be free from false statements to his discredit made by others is prized. The law of defamation protects that interest. The old saw of libel law is that libellous statements expose a person to feelings of hatred, ridicule and contempt and lower him in the estimation of right-thinking members of the community. The law of defamation's articulated concern is with reputation. There are, however, more sophisticated and subtle arguments available in defence of defamation. To libel someone injures him in his relations with other people—it may very well damage his psyche and could in some cases conceivably cause permanent emotional harm. Defamation has traditionally been that part of the common law which holds dear such delicate, fastidious and intangible matters as reputation.

The common law of libel has tended to agree with Shakespeare when he said in "Othello":

> "Reputation, reputation, reputation! O, I have lost my reputation! I have lost the immortal part of myself, and that which remains is bestial."

This attitude is in contrast to the great bulk of the English common law we have inherited which is notable for its rugged material preoccupations, especially with property. On the whole the common law has tended to be rather tough-minded in not allowing claims where the measure of damages was not readily demonstrable. Defamation is an area of the law where damages have always been difficult to compute. It is rather easier to talk to a jury in concrete terms regarding bodily injury than it is concerning honour and reputation. Despite such difficulties there is no doubt the law of defamation can be regarded as a civilising influence, as a force for decency and moderation in language, in circumstances where an individual's reputation is likely to be besmirched. But is there not a countervailing value which is, in many situations, even more important?

The law of defamation has always been an uneasy bedfellow with that much vaunted principle of Western democracies freedom of expression. Part of a standard liberal education in New Zealand consists of an examination of what people such as John Milton and John Stuart Mill have said about freedom of expression. Mill erected an argument based on free trade in ideas: "if all mankind minus one were of one opinion and only one person were of contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind." For Mill, to silence an opinion was to rob something from the whole human race. "If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error." (J. S. Mill, *Essay on Liberty* Chapter 2).

The law of defamation collides with this principle. The collision has resulted in hedging the tort round with all manner of safeguards and defences which has had the effect of making libel one of the most difficult and technical branches of the common law. One English Judge in recent years was prompted to go as far as to say:

> "To the comparative newcomer, the law of libel seems to have characteristics of such complication and subtlety that I wonder whether a jury on retiring can readily distinguish their heads from their heels.":

Broadway Approvals Ltd. v. *Odhams Press Ltd.* (*No.* 2) [1965] 1 W.L.R. 805, 825 per Russell L.J.

The most obvious defence in the law of defamation is truth. If a defendant is able to convince a jury that what he said was true in substance and fact, he wins. Proving truth, in a libel action, however, is no simple task and the price of failure is likely to be increased damages. A number of occasions upon which defamatory statements are published are said to be privileged. Just what occasions are privileged and what are not is not easy to determine as the recent judgment in *Brooks* v. *Muldoon* demonstrates. The Courts must involve themselves in balancing important social interests.

Qualified privilege and fair comment are of course destroyed by the existence of malice. Malice is itself an extremely slippery concept and will not be analysed here. The law takes the position that although the facts are sacred, comment is free. Thus, however extreme an opinion may be, if it is based on accurately stated facts and is the honest opinion of its author who is not acting with malice, the defendant will prevail. Such a defence is of obvious importance to newspapers, editorialising about the performance of politicians.

The law of defamation, then, poses serious problems for the media and others who publish material which may reflect on the reputation of others. In some ways it is more strict than other branches of tort law. Defamation has always smacked of strict liability rather than negligence.

Although bringing a libel action is a risky business for plaintiffs, since they stand to have their dirty linen washed in public, the risks attendant upon publishing material which may be defamatory are grave and weighty. These risks cause the New Zealand media to engage in a good deal of self-censorship.

Having demonstrated what I hope is a due regard for the elegant rigour of the common law of libel the time has perhaps come to let my particular cat out of its bag. The conclusions I have reached are the result of having studied and taught the law of defamation in the United States. It is easy in such a situation to fall prey to the charge that an attempt is being made to impose the precepts of a legal system foreign to that of New Zealand, and from a country whose mores tend to be regarded by New Zealanders with some measure of sanctimonious disdain. Resisting these charges with such fortitude as I can muster, let me pass on saying only to those who enjoy their heritage of free expression filtered through the existing law of defamation New Zealand style, that it is just possible that the Americans might have got something right. And after all, they started off with a common law tradition from England the same as we did.

To the common law grab bag of legal tricks the Americans added that powerful engine, the United States Constitution with the Bill of Rights. The first, and many would say the most important provision, in the Bill of Rights is the First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

From the time of the adoption of the Bill of Rights up until 1964 the American State Courts continued with the common law of defamation substantially intact. Although prior to 1964 there had been cracks appearing on the surface of the common law as administered by the American Courts—there had been a tendency to require proof of special damage in libel as well as slander especially where an innuendo was involved. To require proof of pecuniary loss in this manner had the effect of defeating more plaintiffs than the English common law approach. In 1964 the American law of libel was hit over the head with a constitutional sledge hammer. Whether it will survive the blow is yet in doubt. The case was one with civil rights overtones which came to the United States Supreme Court from Alabama. An Alabama jury had awarded half a million dollars against the "New York Times". The plaintiff in the libel action was an elected city official in Alabama in charge of the Police Department and he sued in respect of an advertisement which appeared in the Times bearing the names of various civil rights leaders which complained about the conduct of police under the plaintiff's control at the time of various civil rights demonstrations and incidents in Montgomery, Alabama. The Supreme Court of the United States does not have jurisdiction to decide matters of state law unless these involve Federal constitutional issues.

So in order for the Supreme Court to find for the newspaper it was necessary to say that the law of Alabama as applied in the case violated the First Amendment of the United States Constitution. In a land mark opinion full of ringing language about free speech the United States Supreme Court held that State law could not, consistent with the First and Fourteenth Amendments of the United States Constitution, award damages to a public official relating to his official conduct unless he could prove that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false: *New York Times* v. *Sullivan* 376 U.S. 254 (1964).

The ultimate policy justification advanced by the Court for this decision was a wide one:

> "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." (376 U.S. at 270.)

The key analogy in *New York Times* was that of seditious libel. The idea of seditious libel is incompatible with democracy because seditious libel punishes those who libel the government. Political freedom is in dire jeopardy when the government can silence its critics. One writer has gone as far as to say that a society which makes seditious libel an offence is not a free society whatever its other characteristics. (Kalven, "A Note on the Central Meaning of the First Amendment" [1964] Sup. Ct. Rev. 191 at 205.) The Supreme Court in *New York Times* seemed to feel that to allow a public official to recover damages for libel was too much like seditious libel and could not be reconciled with First Amendment freedom of expression.

In one way the new constitutional privilege in the United States can be understood as an extension of the common law defence of fair comment. But the comparison is somewhat misleading because the constitutional privilege is so much wider. It extends to false facts. At common law fair comment must be comment on facts

accurately stated. *New York Times* privilege protects false facts so long as the statement was made without knowledge of its falsity or with reckless disregard as to whether it was true or false. Under the new privilege there is no need for a showing that the statement is on a matter of public interest; that is presumed. As was observed in a later case:

> "Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks." (*Monitor Patriot Co.* v. *Roy* 401 U.S. 265, 275 (1971)).

The new constitutional malice which destroys the privilege is much tougher for a plaintiff to prove than common law malice. Under constitutional malice the onus is on the plaintiff to prove malice with convincing clarity. Many of the matters which would establish malice at common law such as spite, hostility or ill-will are irrelevant to the constitutional concept. The defendant's motive is not a consideration—the only test being whether he had actual knowledge of the falsity or published the statement with reckless disregard as to whether it was true or false. Recklessness has nothing to do with what a reasonably prudent man would do. There must be sufficient evidence to permit the conclusion that the defendant entertained serious doubts as to the truth of his publication.

The *New York Times* case, in effect, disqualified most public officials from succeeding as plaintiffs in libel actions. It is important to note, though, that in the extreme case a defendant is not protected. In 1969 Senator Barry Goldwater succeeded in an action on a statement made about him at a time when he was a candidate for the office of President of the United States. Some of the more libellous statements made were that Senator Goldwater was suffering from paranoia and was mentally ill. The article concluded a description of Goldwater's personality by comparing the Senator to Hitler. It was held on the facts that there was adequate evidence for a jury to find constitutional malice. The author had conducted a public opinion poll of psychiatrists the results of which he had falsified and had made so little attempt to verify his statements as to have been reckless as to whether what he said was true or false: *Goldwater* v. *Ginzburg* 414 F. 2d 324 (2d Cir., 1969).

Lower Courts in the United States soon got into trouble interpreting the new law and the Supreme Court was called upon to clarify the constitutional test. The main point of doubt was, who is a public official? The Court decided in a later case that the public official test was too narrow and that protection should extend to statements made regarding "public figures": *Curtis Pub. Co.* v. *Butts* and *Associated Press* v. *Walker* 388 U.S. 130 (1967). The Supreme Court developed a rather serious split on the question of the level of protection to be afforded statements regarding public figures. Harlan J. thought that on "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" a libel remedy should be permitted for false statements. (388 U.S. at 155.) Other members of the Court thought that the *New York Times* level of protection should be available for statements concerning public figures as it is for those about public officials—knowledge of falsity or reckless disregard as to whether the statements were false or not.

Two members of the Court, Black and Douglas JJ., have adhered to a strong line throughout the cases that an unconditional right to say what one pleases about public figures is the minimal guarantee of free speech offered by the First Amendment. They seem to suggest that all defamation as it applies to the media is unconstitutional. "It is time for this Court to abandon *New York Times Co.* v. *Sullivan* and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments." (388 U.S. at 172.)

In the latest decision the Supreme Court of the United States has extended constitutional protection to defamatory statements where the plaintiff is involved in an event of public or general interest arising out of which the statement is made: *Rosenbloom* v. *Metro-Media* 403 U.S. 29 (1971). The plaintiff in that case was the distributor of nudist magazines in Philadelphia and he had been arrested on the grounds that the magazines were obscene. A radio station broadcast a news report concerning these events and described the magazines as "obscene". The report left out the word "allegedly". The distributor was eventually acquitted on the criminal charge. In his libel action the defendant broadcaster lost in the State Courts on truth and privilege but he won in the United States Supreme Court on constitutional privilege.

On this occasion, however, the Supreme Court of the United States was badly divided. Only three Justices joined in the plurality opinion. Two others, Harlan and Marshall JJ., found the $725,000 of punitive damages awarded in the case the matter of greatest difficulty and proposed steps to deal with that without extending *New York Times* type protection to statements

made about people in the plaintiff's situation. What will become of this branch of the law in the United States will depend to some extent on the attitude of President Nixon's new appointees to the Court. But the basic decisions are unlikely to be overturned.

Let me try to translate in terms of New Zealand law what the American developments mean. Under the American approach *Truth* v. *Holloway* was clearly decided wrongly and the unsuccessful submission of Mr R. B. Cooke Q.C. to the New Zealand Court of Appeal ought to have been accepted. (see [1960] N.Z.L.R. 69 at 70.)

Reviewing the reported New Zealand libel cases since then we can see that a number of plaintiffs who succeeded would have lost. On the broader approach of the later American cases the plaintiff in *Truth (N.Z.) Ltd.* v. *Bowles* [1966] N.Z.L.R. 303 would have lost her verdict. That case was a plain example of a newspaper mix-up in reporting a trial. Under American standards Mr Eyre would clearly have lost his action against the New Zealand Press Association: *Eyre* v. *N.Z. Press Association* [1968] N.Z.L.R. 736. In all probability neither Mr Gordon, the Minister of Transport, nor News Media Ownership Ltd. would have even been sued in the United States had the facts of *Dunford Publicity* v. *News Media Ownership* [1971] N.Z.L.R. 961 arisen there. Dr Martyn Finlay's action in which he recovered $15,000 concerning some statements made by "New Zealand Truth" replying to his criticisms to that newspaper's campaign to "birch the bashers" would have failed: *News Media Ownership* v. *Finlay* [1970] N.Z.L.R. 1089.

The celebrated case between two public servants *Thompson* v. *Turbott* [1962] N.Z.L.R. 298; [1963] N.Z.L.R. 71, ultimately reached the same result as it would have done under American law. *Greville* v. *Wiseman* [1967] N.Z.L.R. 795 is one case where the defendant may have been so reckless as to whether his allegations were true or false that the question of constitutional malice might have got to the jury.

In his television interview on "Gallery" concerning the libel action against Mr Muldoon, the Prime Minister said:

> "I think it's common knowledge that Ministers of the Crown are subjected to defamatory statements with monotonous regularity but no Minister takes action on statements of that kind. I think in a free community we have to accept this kind of free speech and we do so."

It is plain, however, that politicians and other public figures in New Zealand are not reluctant to sue and they often succeed. A paper like "New Zealand Truth" which conducts vigorous press campaigns and sometimes does not get its facts straight, runs a continual risk in criticising public officials and commenting on issues of public concern. Journalists engaged in investigative reporting will frequently get their facts incorrect.The more sensitive the issue the harder their task. The law of defamation as it is developed in New Zealand serves to dampen down public debate. It tends to keep things quiet, which may be what the politicians want but is not necessarily in the public interest. There is nothing free, uninhibited and robust about freedom of expression in New Zealand.

A necessary extension of my analysis is that when the boot is on the other foot and a private citizen sues a public official in regard to a statement made by him on an issue of public concern which reflects on the private citizen's character no recovery should be had. Mr Brooks was a candidate for a public job. The job was a critical one in the industrial relations sphere. Labour relations is a matter of supreme public importance and interest. Mr Muldoon was a member of the Cabinet responsible for making the appointment. As a member of the public I want to know if Mr Muldoon thinks Mr Brooks has certain political tendencies. If Mr Muldoon is correct I want to know; if he is wrong, I want to know. If he is wrong that may tell me something about Mr Muldoon, something I may not have known before. Fair journalism requires that when Mr Muldoon makes a serious allegation about Mr Brooks, Mr Brooks should be given the opportunity to reply. Let him reply, and let the public be the judge of who was right—but do not use the law to shelter the public from information about decisions of critical public importance. I think as a member of the public I will be better able to make up my mind on issues of public concern if Mr Muldoon can neither sue nor be sued with the ease presently available in New Zealand. We need uninhibited, robust and wide open debate on public issues in New Zealand. We are not getting it and we will not get it unless the libel laws are altered. To this end I propose an amendment to the Defamation Act 1954:

> "No action for defamation shall lie in respect to a statement on an issue of public concern unless the plaintiff can prove that the defendant made the statement with knowledge that it was false or with reckless disregard as to whether it was true or false."

My rough impression from looking at 5 *Abridgement of New Zealand Case Law* is that something like half the reported cases in New

Zealand would be affected by this provision. It is a wide ranging change. But the law of libel is wide ranging in its chilling effect on free expression. For example a financial analyst for the *Sunday Herald* recently complained in connection with the JBL collapse that "a commentator cannot warn the public of serious trouble without laying himself open to a writ. It is too late when the receiver is in office." (*Sunday Herald*, May 28, 1972.) I would leave it to the Courts to develop standards about what amounts to an issue of public concern. There is plenty of common law on privilege and fair comment to assist them in developing standards. It will also be necessary to add a provision in regard to defamatory statements caught by the new section to enable an aggrieved plaintiff to have a statutory right of action to retraction and apology where defamatory facts are falsely published about him.

It is crucial for the carrying on of public debate in a democratic society that we devote close attention to the problem of access to the media. This is a problem which has wider implications than the law of libel but it is important when reforming libel to make sure that the person who is vilified is heard by the public in his own defence.

The position I have taken is a strong one and it would be possible to reform the law without going as far as I suggest. The change could, for example, be restricted to statements about public officials. Or, if it was desired to go further, the new privilege could cover "public figures". The American experience seems to establish reasonably clearly, though, that to develop intermediate stages of protection raises anomalies. The ambit of protection has to be as wide as the political process itself. Unsullied reputation is good, but sometimes free speech is better.

GEOFFREY W. R. PALMER.
VISITING PROFESSOR OF LAW UNIVERSITY OF WELLINGTON

SUMMARY OF RECENT LAW

COMPANIES—COMPANIES UNDER THE COMPANIES ACT 1955

Transfer of shares—Unsuccessful take-over bid—Recovery of expenditure incurred by offeree company from offeror company—Companies Amendment Act 1963, s. 11 (2). This was a claim for the sum of $26,609 by the plaintiff company under s. 11 (2) of the Companies Amendment Act 1963 for expenses incurred by it in connection with an unsuccessful take-over bid by the defendant company. The plaintiff's board advised its shareholders to reject the defendant's offer and sent several circular letters to its shareholders. In addition the plaintiff retained the services of various experts to assist the board in resisting the defendant's take-over bid. *Held*, 1. The expenditure which an offeree can incur under s. 11 (2) of the Companies Amendment Act 1963 includes the following: (a) That incurred in and incidental to the fulfilment of its obligations under ss 5 and 7 (2). (b) That incurred in countering propaganda by the offeror which is calculated to influence the offeree's choice, (c) That incurred otherwise for the purpose of safeguarding the offeree's interests in relation to the scheme, e.g. in keeping them informed of developments which might affect the value of their shares. (d) That incurred in reimbursing directors under s. 11 (1). 2. (1) Before an item can be allowed it must be proved: (a) That it comes under one of the four categories of expenditure (*supra*); (b) That it was reasonable to incur expense by engaging in that kind of activity; (c) That it was reasonable to spend that amount on that kind of activity. (2) The Court will judge the reasonableness of any particular item of expenditure with reference to circumstances obtaining at the time of expenditure and not limit it to that which by hindsight would have been strictly necessary. (3) The Court will allow proper expenses on broad lines. *Canterbury Frozen Meat Company Limited* v. *Waitaki Farmers' Freezing Company Limited* (Supreme Court. Christchurch. 22, 23, 24, 25 November; 16 December 1971. Wilson J.).

ESTATE GIFT AND OTHER DEATH DUTIES—ESTATE DUTY

General—Trustees' commission allowed by Court to trustees after death of one trustee—Trustees not entitled as of right to commission—Deceased trustee's share of executors' commission not part of deceased's dutiable estate—Estate and Gift Duties Act 1955 s. 5 (1) (a). This was a case stated pursuant to s. 69 of the Estate and Gift Duties Act 1955. The deceased J. M. was one of three trustees of the will of P.J.G. who died in 1932. The principal asset in the estate was the Gresham Hotel and the trustees had carried on the hotel business, in which the deceased had taken the leading part. There was no provision in the will of P.J.G. for trustees to charge for their services and from time to time they had applied to the Court for payment of trustees' commission. The deceased J.M. died on 11 November 1968 and on 23 May 1969 an order was made under s. 72 of the Trustee Act 1956 approving payment of executors' commission for the years ending 28 February 1967, 29 February 1968, and on 10 April 1970 a similar order was made for the year ending 28 February 1969. The trustees apportioned the commission for the three years between themselves and the Commissioner in computing the final balance of the deceased J.M's estate included the payment to the objectors of J.M's portion of the commission for the three years. *Held*, 1. The power given to the Court under s. 72 of the Trustee Act 1956 to allow commission to trustees is discretionary. 2. Until application had been made to the Court and considered by it the trustees were not en-

titled to assume that payment of commission would be approved. 3. The payment of trustees' commission being discretionary was analogous to a voluntary payment and accordingly did not form part of the final balance of the deceased's estate (*Perpetual Executors & Trustees Association of Australia Ltd.* v. *F.C.T. (Thomson's case)* (1948) 77 C.L.R. 1, applied. *Re J. Bibby & Sons Ltd. Pensions Trust Deed: Davies* v. *I.R.C.* [1952] 2 All E.R. 483, referred to. *Attorney-General* v. *Quixley* (1929) 98 L.J.K.B. 652 and *Attorney-General* v. *Brunning* (1860) 8 H.L.Cas. 243; 11 E.R. 421, distinguished.) *Re McDonald (deceased), McGrath* v. *Commissioner of Inland Revenue* (Supreme Court. Wellington. 6, 14 March 1972. Quilliam J.).

HUSBAND AND WIFE—MATRIMONIAL PROCEEDINGS (SUPREME COURT)

Institution and defence of proceedings—Supplementary petitions—Leave to file supplemental petition after answer filed—Service of supplemental petition—Method of service—Time for answer to supplemental petition—Cause set down in undefended list—Matrimonial Proceedings Rules 1964, R. 32 (2). On 12 May 1970 the petitioner issued a petition for divorce alleging an oral agreement to separate on or about 27 July 1967. On 27 May 1970 the respondent filed an answer denying both the oral agreement and the New Zealand domicil of the petitioner and asking that the petition be dismissed. On the same day the respondent applied for an order for security for costs which was not proceeded with. On 24 September 1971 the petitioner filed an application for leave to file a supplemental petition. This was opposed but leave was granted to file and serve the supplemental petition within 10 days. It was filed and served by delivery to the addressee for service on 1 November 1971. No time for filing an answer was fixed in the order granting leave but the usual form of notice was annexed to the supplemental petition. About that date the respondent changed her solicitors. Notice of the change dated 19 November 1971 was served on her former solicitors, the petitioner's solicitor and filed on 24 November 1971. On 25 November 1971 the petitioner filed a præcipe to set the cause down, stating that the time for filing an answer expired on 22 November 1970 and that the respondent had filed neither an answer nor an address for service. No notice was given to the respondent or her solicitor and the cause was placed on the list for 3 December 1971 and this was discovered by chance by the respondent's solicitors when they tendered an answer for filing. The respondent immediately filed a motion for leave to defend. *Held*, 1. The service of a supplemental petition follows the practice in relation to amendments to petitions and service was properly effected at the address for service. (*Sherwood* v. *Sherwood* [1939] N.Z.L.R. 159; *Thomas* v. *Thomas* [1955] N.Z.L.R. 216 and *Grey* v. *Grey* [1958] N.Z.L.R. 798, applied.) 2. As the respondent had filed an answer to the original petition, the case came within R. 32 (2) of the Matrimonial Proceedings Rules 1964 which allows 10 days. 3. The supplemental petition could not be set down for hearing as an undefended suit; it was part of the suit commenced by the original petition and must be brought along for hearing with that petition. Leave to file an answer to the supplemental petition was granted, costs of $20 to be paid by the petitioner in any event. *Edge* v. *Edge* (Supreme Court. Christchurch. 3 December 1971; 1 February 1972. Wilson J.).

Separation—Petition for divorce based on oral separation agreement—Respondent wife ordered petitioner out of house—Petitioner went without orally agreeing—No agreement inferred from conduct—Petition dismissed—Matrimonial Proceedings Act 1963 s. 21 (1) (m). This was a petition for divorce founded on s. 21 (1) (m) of the Matrimonial Proceedings Act 1963. The petitioner had left the matrimonial home in February 1969 as the result of a command by the respondent to which he did not reply but which he fulfilled. *Held*, 1. An agreement to separate which is not expressed in words but must be inferred from the conduct of the parties does not comply with s. 21 (1) (m) of the Matrimonial Proceedings Act 1963 as a ground for divorce. 2. An agreement, in order to be made orally in terms of s. 21 (1) (m) requires an oral offer and an oral acceptance. 3. Even if there was an oral offer there was no oral acceptance. *Smalley* v. *Smalley* (Supreme Court. Christchurch. 3, 15 February 1972. Wilson J.).

MORTGAGE—REMEDIES OF MORTGAGEE

Sale of hotel subject to mortgage—Interest in arrear—Sale through Registrar—Provisional hotel premises licence not forming part of security—Mortgagee and purchaser both believed licence sold with the premises—Action by mortgagor for negligent disposal of licence—Mortgagee acted bona fide *and not trustee for mortgagor—Property Law Act 1952, ss. 97, 99. Statutes—Interpretation—Construction with reference to context and subject-matter—Definition of "land" "liberties" does not include hotel premises licence—Land Transfer Act 1952, s. 2.* The defendants in 1960 had purchased the Hotel Marlborough at Blenheim; the price was $56,000. The premises did not comply with the minimum standard required by the Licensing Control Commission and therefore there was only a provisional hotel premises licence issued. Despite numerous requisitions throughout the defendants' ownership the premises remained below the minimum standard. There were four mortgages secured on the property including the plaintiff's mortgage for $7,222. The premises licence was suspended by the Commission under s. 212 of the Sale of Liquor Act 1962 with effect from 8 February 1968. On 17 September 1968 the plaintiff served notice on the defendants under s. 92 of the Property Law Act 1952. On 17 March 1969 the plaintiff applied to the Registrar of the Supreme Court to conduct a sale of the land comprised in the mortgage together with the provisional hotel premises licence (at present suspended). The sale advertisement approved by the Registrar referred only to the land but the auctioneer's note described the property and included the following—"The hotel premises licence is at present suspended". The property was sold on 24 April 1969 for $44,000 to P. the successful bidder who signed the agreement as "agent". The price was insufficient to repay the amount owing to the plaintiff which sued the defendants for the balance of $2,838.18 outstanding. The defendants submitted to judgment but counterclaimed for $9,000 being the loss sustained by them for the plaintiff's alleged failure to sell the suspended provisional hotel premises licence. The plaintiff's mortgage contained two clauses relating to the premises being licensed as an inn or public house. *Held*, 1. The provisional hotel premises licence was not a "liberty" within the meaning of that word contained in the definition of land in s. 2 of the Land Transfer Act 1952. (*Le Strange* v. *Pettefar* (1939) 161 L.T. 309, distinguished.) 2. Having regard to the provisions of s. 97 (1) (a) of the Property Law Act 1952 if the hotel premises licence was the subject of the mortgage then it could have been properly included in the sale by the Registrar. 3. The hotel premises licence could not be regarded as property

subject to the mortgage nor did the terms of the mortgage purport to make it so but the mortgagor under the terms was bound to co-operate in the disposal of the licence. 4. It was not within the competence of the Registrar to include in the sale the defendants' provisional hotel premises licence. 5. The mortgagee is not a trustee for the mortgagor and his duty is only to act *bona fide*. (*Reliance Permanent Building Society* v. *Harwood-Stamper* [1944] Ch. 362; [1944] 2 All E.R. 75, applied.) 6. The mortgagee thought it was selling the licence and the purchaser thought he was purchasing the licence. The plaintiff had acted *bona fide* and the licence had not been assigned without consideration. The counterclaim failed and the plaintiff was entitled to judgment for the amount claimed. *New Zealand Breweries Limited* v. *Alexandre and Others* (Supreme Court. Blenheim. 21, 22 February; 20 March 1972. Quilliam J.).

NEGLIGENCE—ARISING OUT OF SPECIAL RELATIONS

Clubs and members thereof—Gymkhana—Spectator admitted for payment—Implied contract—Reasonable care for safety. Contract—Implied contracts—Spectator injured—Ticket of admission to sports meeting—Duty of organiser to invitee. In this case two actions were combined claiming damages by the plaintiffs who were paying spectators, for injuries occasioned by a runaway horse at a pony club gymkhana on 5 October 1968. The first defendants were sued as representatives of the members of the pony club which controlled the gymkhana, and the second defendant as the person in charge of the horse. The accident had occurred in the public car park. There was no separate enclosure for competing horses and there was an inadequate supply of hitching rails. Two horses which were "paddock mates" were tethered to a branch of a fallen tree. The second defendant was then 13½ years of age and a competent horse woman for her age. Her mother was an experienced horsewoman and before tethering the horse Titch to the branch had tested the branch. The second horse was tethered to the same branch. A third horse was then tethered to the same branch between the other two horses by an unknown person. Being a strange horse it started to kick and the other two horses broke away. Titch took the branch with it which bumped on its heels and banged against motor cars and frightened the two horses. The two horses galloped between parked cars and either Titch or the branch caused the injuries sustained by the plaintiffs. The other horse did not participate in inflicting those injuries. *Held*, 1. The organisers of a sporting competition owe a duty to a paying spectator to take sufficient precautions to make the area and the operation as safe as reasonable care and skill can achieve in the circumstances including the nature of the contest. (*Green v. Perry* (1955) 94 C.L.R. 606, applied.) 2. The organisers are not insurers against accidents which no reasonable diligence could foresee or against perils which the ordinary spectator might be expected to appreciate and take precautions against. (*Moloughney* v. *Wellington Racing Club* [1935] N.Z.L.R. 800, 806, applied.) 3. The duty owed by a competitor to spectators is not to fall into errors of behaviour that a reasonable competitor would not have made. He is not an insurer of the organisers *vis-a-vis* the spectators. (*Wilks* v. *Cheltenham Home Guard Motor Cycle & Light Car Club* [1971] 1 W.L.R. 668; [1971] 2 All E.R. 369, applied.) 4. A competitor, particularly a young person, might expect the organisers to be experienced in the provision and safe conduct of the meeting and if there were an absence of proper facilities the utilisation of such facilities as were provided would not automatically link the competitor with neglect by the organiser. *Evans and Others* v. *Waitemata District Pony Club—East Coast Bays Branch and Others* (Supreme Court. Auckland. 26, 27, 28 October; 19 November 1971. Speight J.).

POLICE—DUTIES POWERS PRIVILEGES AND PROTECTION OF MEMBERS

Entry and search—Search warrant for specific-items—Documents not in warrant unlawfully seized before arrest. Practice—Criminal law—General—Seizure of documents evidencing guilt before arrest. Practice—Extraordinary remedies—Notice of motion and statement of claim—Limits of relief obtainable—Code of Civil Procedure RR. 466, 466A. This was an appeal against the judgment of White J. [1972] N.Z.L.R. 64 wherein the return of documents seized unlawfully under a search warrant issued in respect of other matters was refused. The appellant also appealed against the refusal to order the issue of a writ prohibiting the Magistrate from proceeding with the hearing of a charge of bookmaking founded on the seized documents. In dismissing the appeal the Court dealt with the reliefs to which a person is entitled pursuant to a statement of claim filed pursuant to the procedure authorised by RR. 466 and 466A of the Code of Civil Procedure. *Held*, 1. The documents were seized under a warrant issued for the search of other items prior to the appellant's arrest and the seizure was unlawful. (*Barnett & Grant* v. *Campbell* (1902) 21 N.Z.L.R. 484, applied.) 2. The Court would not overrule its previous long-standing decision in *Barnett & Grant* v. *Campbell (supra).*) *Jones* v. *Secretary of State for Social Services* [1972] 1 All E.R. 145, 149, referred to.) 3. The appellant having not issued a writ but having issued by way of motion a statement of claim pursuant to RR. 466 and 466A of the Code of Civil Procedure could not obtain by means of a prayer for other relief a remedy which he could not ask for expressly in the proceedings he had instituted. (*Kerr* v. *Brown* [1925] G.L.R. 379, referred to.) 4. The appellant was not entitled to a declaration that the material was unlawfully taken under the procedure prescribed by RR. 466 and 466A of the Code of Civil Procedure. (*Armstrong* v. *Kane* [1964] N.Z.L.R. 369, approved.) Judgment of White J. [1972] N.Z.L.R, 64, affirmed. *McFarlane* v. *Sharp* (Court of Appeal· Wellington. 15 February; 9 March 1972. Turner P. Richmond and Macarthur JJ.).

CATCHLINES OF RECENT JUDGMENTS

Transport Act 1962—Section 58A (6) (a) and (b)—Transport (Breath Tests) Notice 1971—Held to be validly enacted. *Beattie* v. *Brian* (Supreme Court, Wellington. 1972. 24 May. Full Court—Haslam J., Roper J., Beattie 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.

Bumper Sticker—"See Next Bumper Sticker".

BILLS BEFORE PARLIAMENT

Carter Observatory Amendment
Children's Health Camps
Coal Mines Amendment
Customs Amendment
Fire Services
Fire Services Amendment
Hydatids Amendment (No. 2)
Mental Health Amendment
Minister of Local Government
Ministry of Energy Resources
National Art Gallery, Museum, and War Memorial
Occupational Therapy Amendment
Tobacco Growing Industry Amendment

REGULATIONS

Regulations Gazetted 1 to 8 June 1972 are as follows

Alcoholism and Drug Addiction Institutions Order 1972 (S.R. 1972/107)

Artificial Insemination of Animals Regulations 1972 (S.R. 1972/113)

Child Care Centre Regulations 1960, Amendment No. 3 (S.R. 1972/114)

Companies (Limitation of Distributions) Regulations 1972 (S.R. 1972/115)

Companies Special Investigations Order 1972 (S.R. 1972/111)

Companies Special Investigations Order 1972, Amendment No. 1 (S.R. 1972/112)

Customs Tariff Amendment Order (No. 7) 1972 (S.R. 1972/116)

Defence Regulations 1972 (S.R. 1972/117)

Hydatids Regulations 1970, Amendment No. 1 (S.R. 1972/118)

Infectious Diseases Order 1972 (S.R. 1972/108)

Law Practitioners Fees Regulations 1972 (S.R. 1972/109)

Motor Spirits Prices Regulations 1970, Amendment No. 3 (S.R. 1972/121)

New Zealand-Australia Free Trade Agreement Order (No. 2) 1972 (S.R. 1972/119)

Pharmacy Bursaries Regulations 1972 (S.R. 1972/120)

Secondary School Grants Regulations 1967, Amendment No. 3 (S.R. 1972/110)

CASE AND COMMENT

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

Trade names and sale of goods

In his judgment in *Robert Holt & Sons Ltd.* v. *Lay* (Napier, 20 April 1972), Roper J. illustrated what constitutes a breach of a contract for the sale of goods, and what ought to be the proper measure of damages for such breach.

To cut a long story short, a buyer had purchased timber-framed sliding doors for a beach-front property of his. These doors later became hard to open, also admitting leaks and draughts. The reason for this, Roper J. concluded, was that the doors could not withstand exposure to sea, sun and wind.

It was contended for the buyer that here was a breach of s. 16 (a) of the Sale of Goods Act 1908, in that the buyer had relied on the seller's skill and judgment, yet had still not been supplied with goods which the Act required to be fit for their particular purpose.

On the evidence, there was no question but that the buyer had relied on the seller's skill and judgment in choosing the doors. The sellers also knew of the climatic conditions to which the doors would be exposed. Here, then, would seem to be a plain breach of s. 16 (a).

But the proviso to that subsection excludes liability where goods are sold under a trade name, it being uncontested that the doors were sold under the name "Timberline". Roper J., however, pointed to Farwell L.J.'s well-known observation that "a trade name has to be acquired by user" before it comes within the proviso to s. 16 (a): *Bristol Tramways* v. *Fiat Motors* [1910] 2 K.B. 831, 839. In the present case, the doors had first been sold in 1967 (the present contract having been entered into in 1969), and no evidence was forthcoming that "Timberline" had acquired the status of a trade name by user.

His Honour could have supported his conclusion that the proviso did not apply by recognising that the purchase under the designation "Timberline" had not been such "as to indicate that the [buyer] is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying on the skill or judgment of the seller": *Baldry* v. *Marshall* [1925] 1 K.B. 260, 267 per Bankes L.J. (see too *McCosh* v. *Baylis* (1968) 12 M.C.D. 189).

As for the correct measure of damages, Roper J. agreed that the buyer could claim all the costs and expenses contingent upon replacing the "Timberline" doors with doors which were more suitable. His Honour, however, was disinclined to allow the *quantum* to be assessed on current prices. The buyer knew by late 1970 of the inadequacy of the doors, and so should, as Roper J. observed "have taken the initiative sooner". The buyer, in other words, had failed in his duty to mitigate his loss. As a result, and recognising the difficulty of making a correct assessment of the damages, his Honour gave a sum slightly less than one based on current rates for the job.

R.G.L.

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 proceedings 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; 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 crystalling equitable rights, and, in appropriate cases, perfecting them on the Torrens title.

J.A.B. O'K.

English Cases Contributed by the Faculty of Law, University of Canterbury

The Enforcement of Contracts of Employment

Two recent English cases may have upset the rather simple statements found in textbooks that contracts of employment being contracts for personal services are not specifically enforceable. The cases are *C. H. Giles & Co.* v. *Morris* [1972] 1 All E.R. 960 and *Hill* v. *C. A. Parsons & Co. Ltd.* [1971] 3 All E.R. 1345. The rule that contracts of employment are not specifically enforceable means that the Courts will not force an employer to commence or continue to employ an employee or force an employee to commence or continue to work for an employer. The accepted exception to this rule, if it is really an exception, is the doctrine propounded in a line of cases headed by *Lumley* v. *Wagner* (1852) 1 De G.M. & G. 604 which sometimes allows the remedy of injunction to restrain a breach of a negative stipulation of a contract for personal services. Without going into the subtleties of this exception it typically restrains an employee from undertaking other work of a similar nature,

to that which he should be supplying to his original employer, in breach of his original contract. In *C. H. Giles & Co. Ltd.* v. *Morris*, Megarry J. made some interesting comments on the enforcement of contracts with elements of personal service. The contract of employment is a common and important example of this sort of contract. In *Hill* v. *C. A. Parsons & Co. Ltd.*, a decision of the English Court of Appeal, an injunction was issued which had the effect of maintaining a contract of employment for at least six months.

The facts of *C. H. Giles & Co. Ltd.* v. *Morris* were rather complex and raised issues which were not directly related to the specific enforcement of obligations arising from contracts of employment. However, in the course of his judgment Megarry J. gave his opinion that the "so-called" rule against the enforcement of contracts for personal services was not absolute. He said (at page 970), "In general, no doubt, the inconvenience and mischief of decreeing specific performance of most of such contracts will greatly outweigh the advantages, and specific performance will be refused. But I do not think that it should be assumed that as soon as any element of personal service or continuous service can be discerned in a contract, the Court will, without more, refuse specific performance . . . . As is so often the case in equity, the matter is one of the balance of advantage and disadvantage in relation to the particular obligations in question; and the fact that the balance will usually be on one side does not turn this probability into a rule."

In the context of this quote Megarry J. expressed the opinion that the difficulties of constant superintendence by the Court can be overstressed. He thought that the reasons why the Court is reluctant to decree specific performance included the problem of ensuring the proper quality of performance by the employee. However he thought that not all contracts of employment were dependent on this problem or involved a frequent 'impact of person on person' between the employer and the employee.

Unknown, it seems to Megarry J. the Court of Appeal had to some extent enforced a contract of employment, a few weeks prior to Megarry J's judgment. This was the case of *Hill* v. *C. A. Parsons & Co. Ltd.* The Court consisted of Lord Denning M.R., Sachs and Stamp L.JJ. Mr Hill and a number of other employees of C. A. Parsons & Co. Ltd. were given a month's notice of termination of their employment as a result of their refusal to join a union called D.A.T.A. DATA had forced on C. A. Parsons & Co. Ltd. an agreement that all the employees would have to belong to the union. The reason for the purported dismissals of Mr Hill and his colleagues was stated to be solely due to the requirement that all employees be members of DATA. Mr Hill's action was an action to test the position of the employees as a result of these notices. Mr Hill was aged sixty three. He had been employed by the defendant employer for thirty-five years and was two years short of retirement when he received the one months' notice. His salary was £3,000 a year and as a member of the defendant's pension scheme, the amount of his retirement pension would depend on his average salary during the last three years of his employment. It was therefore important for him to serve until the end of his time. Mr Hill issued a writ against the defendant for wrongful dismissal and asked for an interim injunction restraining his employers from treating the notice as having determined his employment. The case reached the Court of Appeal as an interlocutory appeal against an order of Brightman J. refusing the injunction. In the meanwhile all the employees remained at work pending the outcome of this hearing.

As an employer can always, subject to express terms in the contract, dismiss an employee for reasonable notice, it was argued that the dismissal was wrongful because one month was not reasonable notice. All the members of the Court agreed that the dismissal was wrongful, because the notice should have been at least six months (Lord Denning thought twelve) for a man in the position of Mr Hill.

The question then arose as to whether the dismissal although wrongful nevertheless terminated the contract and thus precluded the possibility of injunction. The defendants argued that a wrongful repudiation of a contract of employment terminates the contract irrespective of whether or not the other party elects to accept it. They argued that in this respect contracts of employment are an exception to the general contract principle that repudiation must be accepted to terminate the contract. Lord Denning did not take this approach. He said (at page 1349) that he recognised that "In the ordinary course of things, the relationship of master and servant [employer and employee] comes to an end; for it is inconsistent with the confidential nature of the relationship that it should continue contrary to the will of one of the parties thereto." However, he thought it was open to the Courts in a "proper" case to grant a declaration that the relationship subsists and an injunction to stop the master [employer] treating it as at an end. This approach of Lord Denning is rather difficult to understand. He

does not seem to separate clearly the continued existence of a contract, and the specific enforcement of the contract; yet these two problems seem to be conceptually separate. Sachs L.J. takes a similar approach to Lord Denning but one which is analytically more satisfying. Sachs L.J. settled on a view he had favoured in *Decro-Wall International S.A.* v. *Practitioners in Marketing Ltd.* [1971] 2 All E.R. 216. Sachs L.J. argues (at pages 228-9) in this latter case that contracts of personal service (contracts of employment) form a prime example of the type of case in which in the overwhelming majority of instances the innocent party must in practice accept the repudiation because there is no room for a change of mind by the other side nor, if he is the employee, can he either sue for services he does not render, or seek any other remedy except damages. Stamp L.J. assumed without expressing an opinion that the plaintiff's contract still subsisted.

The explanation of Sachs L.J. seems to be more satisfying that the "proper case" explanation of Lord Denning, though both explanations leave unsolved when any other remedy other than damages will lie. By Sachs L.J.'s approach, contracts of employment do not in law form an exception to the general rule that a repudiation must be accepted before the contract is terminated. There are *dicta* in other cases that do suggest that contracts of employment are an exception to the general rule. It might be argued that the case of *Denmark Productions Ltd.* v. *Boscobel Productions Ltd.* [1968] 3 All E.R. 513 C.A. was decided on the ground that the contract comes to an end on repudiation. In this case the majority held that the plaintiff could not enforce a term of remuneration in a contract, analogous to a contract of employment, after repudiation. However of the majority Judges, Harman L.J.'s reasoning is consistent with Sachs L.J.'s explanation, and Salmon L.J. gave as his reason that the servant (employee) could not render the services for which remuneration was payable. On the other hand there are cases where the ordinary rule of repudiation and acceptance has been treated as applicable to contracts of employment, e.g. *General Billposting Co.* v. *Atkinson* [1909] A.C. 119.

The important issue now emerged clearly, could the Court and should the Court grant the injunction asked for in order to maintain the continuance of the contract? The injunction was being sought to maintain the contract of employment for a further six months to April 1972 at which point in time the position of Mr Hill would probably be protected by the Industrial Relations Act 1971 (U.K.). It would not be possible to give valid (i.e. reasonable) notice terminating before this time. It was thought by all the Judges that to grant the injunction involved meeting the challenge that a contract of employment was never specially enforced. It should be remembered, however, that the injunction did not seem to necessarily involve the employer being bound to accept the presence of the plaintiff at the company's offices. To this extent the injunction sought was not a direct challenge to the commonly understood rule.

The Judges saw the issue as whether the general rule or practice that contracts for personal services would not be specifically enforced admitted of any exception apart from the *Lumley* v. *Wagner* doctrine. Both Lord Denning and Sachs L.J. did not think the rule was inflexible. Unfortunately neither of these Judges made a detailed review of the early equity cases. They both to some extent relied on *dicta* of Lord Morris of Borth-y-Guest in *Francis* v. *Municipal Council for Kuala Lumpur* [1962] 3 All E.R. 633, 637, who expressed the approach of the Courts in a qualified manner, leaving room for the possibility that a contract of employment might be enforced. Stamp L.J. dissented strongly on this point arguing that the present state of the law admitted only the *Lumley* v. *Wagner* exception. He relied on the judgment of Lindley L.J. in *Whitwood Chemical Co.* v. *Hardman* [1891] 2 Ch. 416, 427, 428.

Stamp L.J.'s reliance on Lindley L.J. is not convincing. Lindley L.J. was primarily concerned with the need for negative stipulations in the contract before the *Lumley* v. *Wagner* doctrine would apply. Then there are other *dicta* in that judgment (at pages 426, 427) which suggests that Lindley L.J. saw the rule against specific enforcement as a general rule. Spry, at page 499 of his book *Equitable Remedies* (1971), criticises Lindley L.J. for being too concerned with the "form" of contract. Spry prefers the approach of Lord Selbourne in *Wolverhampton & Walsall Ry. Co.* v. *London & N.W. Ry. Co.* (1873) L.R. 16 Eq. 433, 440. Finally Megarry J.'s approach in *C. H. Giles & Co. Ltd.* v. *Morris* is consistent with Lord Selbourne and Spry, and inconsistent with Stamp and Lindley L.JJ. It is unfortunate that Lord Denning and Sachs L.J. did not comment more fully on the authorities.

The next question was whether the injunction should issue. Both Lord Denning and Sachs L.J. concluded that in this case damages were not an adequate remedy. This conclusion was rather easy to arrive at for under the present law an employee can only recover damages representing a loss of income to the limit of his lawful period

of notice. The strong traditional consideration against the injunction issuing is that the contract of employment is a contract for personal services. There are a number of subsidiary considerations given by the cases for denying enforcement to this sort of contract. The first consideration is the difficulty of deciding what is a proper performance of the obligations of service. This consideration was discussed by Megarry J. in *C. H. Giles & Co. Ltd.* v. *Morris* but was not in question here. The second consideration goes to the heart of the personal quality of the relationship involved in these contracts and is the general undesirability to force persons to maintain personal relationships. In this case both Lord Denning and Sachs L.J. seemed to see this problem in terms of the need for mutual confidence. Although Lord Denning does not expressly rely on mutual confidence it seems clear that he places much weight on the fact that Mr Hill was given notice only because of the union pressure. Sachs L.J. however raised the notion of confidence expressly (at page 1355) and found that mutual confidence existed on the facts and was a justifying consideration. There was no evidence that personal relationships between the employers and Mr Hill were strained. Stamp L.J. refused to look at the personal relationship problem in terms of confidence, but did so in terms of willingness to employ (at page 1357). He regarded the true position to be that the employers would be willing to maintain the contract but for the argument of DATA. He regarded their unwillingness on this ground to be a strong consideration against the issue of the injunction.

Sachs L.J. expressly (at page 1355) and Lord Denning at least impliedly regarded as an additional factor in favour of granting the injunction that at the end of six months the Industrial Relations Act 1971 (U.K.) would probably provide for the stability of Mr Hill's job. In this respect they thought the case became an exceptional one. Sachs L.J. added the interesting argument that he could take into account, as a ground for changing previous practice, a recent climate of general opinion, apparent from recent legislation and judicial decisions, towards shielding an employee from the hardships he might suffer from employers and unions. Both Judges concluded that the injunction restraining the company from treating the notice as determining the employment should be allowed.

In his dissent Stamp L.J. also referred to the difficulty of foreseeing the consequences of ordering an employer or employee to perform the contract. However in this case Mr Hill was still at work and there had never been any quarrel as to the quality of his work. Any interference to the performance would be because of third parties such as the union DATA, who could if necessary be restrained.

Has *Hill* v. *C. A. Parsons Ltd.* significance beyond its exceptional facts? The case can be appreciated as a recognition by the Courts that the traditional rationale against enforcement of contracts for personal services may not be persuasive when applied to modern contract of employment problems. In this case the Court recognised that a contract of employment could be maintained by the authority of the Court without undue fear of forcing the parties into an invidious relationship. The case may signal a more realistic approach to modern contracts of employment. Under modern conditions an employee may have no real personal relationship with his employer, because it is a legal personality, a company. Secondly the employee may be dismissed for reasons which have nothing to do with the quality of his work, or his relationships with other employees. The dismissal may be a result of "restructuring" the company for economic advantages. In these sorts of situations why should employers be able to "pay-off" employees in breach of contract to suit their own convenience? Perhaps Lord Denning (at page 1351) should have the last word. "It is quite plain that the employers have done wrong. I know that the employers have been under pressure from a powerful trade union. That may explain their conduct, but it does not excuse it. They have purported to terminate Mr Hill's employment by a notice which is too short by far. They seek to take advantage of their own wrong by asserting that his services were terminated by their own 'say-so' at the date selected by them—to the grave prejudice of Mr Hill. They cannot be allowed to break the law in this way. It is, to my mind, a clear case for an injunction."

J.G.F.

Looking at our brethren—To mark the centenary of the birth of Herbert Lincoln Harley, an eminent American law reformer, *Judicature* (the journal of the American Judicature Society), has reprinted an article written by him in 1928 after a brief visit to Britain. In the article he notes that in Magistrates' Courts, defendants were seldom represented by lawyers "because guilty persons assume that lawyers cannot save them from conviction. . . . The customary absence of solicitors and barristers is off-set by the high character of the Magistrates"

SWEARING-IN OF MR JUSTICE MAHON

Mr P. T. Mahon, a Queen's Counsel, of Christchurch, was sworn in as a Judge of the Supreme Court at a ceremony in the Supreme Court at Christchurch in January. The new Judge was sworn in by Mr Justice Macarthur, on a bench which included Mr Justice Wilson and both Sir Kenneth Gresson and Sir Francis Adams. A large number of members of the profession were in attendance and the five Christchurch Magistrates were also present.

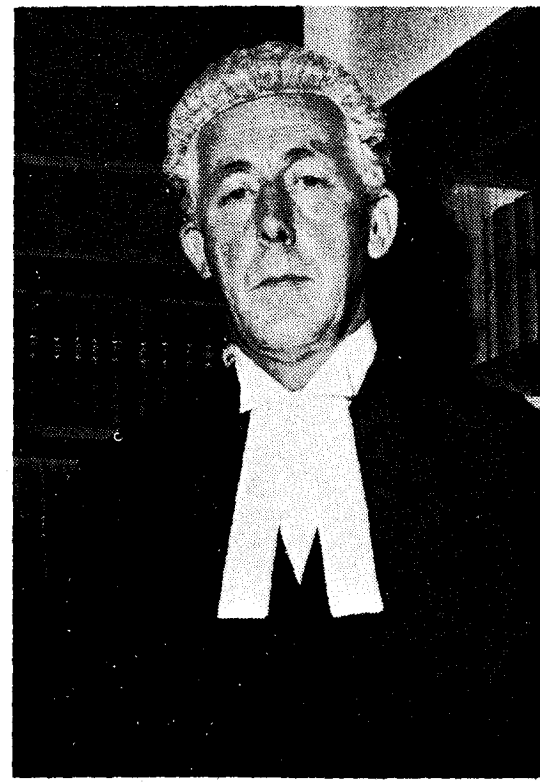
The Hon. D. J. Riddiford, as Attorney-General conveyed the congratulations of the Government and of the profession as a whole to the new Judge and wished him well in his high office.

"Your Honour's appointment to the Supreme Court bench, sealed as it is today by your taking the Oath of Allegiance and the Judicial Oath, is the culminating step in a professional career of distinction. You have earned the respect and confidence of your fellow practitioners as a lawyer and, I add, as a man," said Mr Riddiford.

"I know that the President of the Canterbury District Law Society will be following me in addressing your Honour and so I will not say more of your Honour's professional career other than to make mention of your service to the country as a one-time Crown Solicitor of Christchurch. Your Honour had been a partner of a former Crown Solicitor and in due course became the Crown Solicitor yourself, which appointment you held until you resigned in order to practise as a barrister alone. This unusual course, which need not and I hope will not be imitated in all parts of New Zealand, added greatly to the high reputation you already enjoyed among your professional colleagues.

"I mentioned earlier that I spoke as Attorney-General and as such for the Government and the profession. The role of the Attorney-General may sometimes be misunderstood but it can plainly be said that though a member of the Government he is nevertheless when discharging the duties of a law officer in duty bound to act, and does so act, independently of political ties and unaffected by purely political considerations. Ample precedents prescribe the course which Attorneys-General in New Zealand have invariably followed.

"If it be that there is sometimes confusion in some people's minds about these different roles of an Attorney-General, and there must be those two roles, no such doubt fortunately exists about the independence of a Judge from the Government. We all rightly take the independence and integrity of the Judiciary for granted because it has been part of our system of justice for



Mr. Justice Mahon

nearly three centuries but it is good that this ceremony gives us an opportunity of reminding ourselves publicly of it. The rights, duties and freedoms of the citizen are given and prescribed by our law which is partly inherited from the common law of England and partly enacted by our Parliament. They are, however, expressed and in large measure secured to us by our Judiciary. I regard the independence and integrity of the Judges as of the greatest importance to us all and one of our most valuable possessions as a people. It is something appreciated and highly valued throughout the world but only in fact existing in the full sense of the term in a limited number of countries.

"I extend to your Honour the warmest good wishes for a long, happy and as we confidently believe, a successful term of office," he concluded.

The President of the Canterbury District Law Society, Mr B. L. Stanley, expressed the pleasure of the profession in Canterbury at the new appointment.

"Our pleasure derives partly from the fact that your Honour is a local man who attended school here, graduated from Canterbury University College (as it then was) and achieved eminence as a barrister whilst practising in our midst," he said.

"When one considers the length and depth of your professional experience: as an extremely able Crown Prosecutor fulfilling that office according to its highest tradition, as counsel with a reputation extending beyond the local bar, as an advocate whose work took you frequently to our highest Courts and administrative tribunals and as a lawyer learned in so many branches of our law, it is with surprise that one recalls, if I may say so with respect, your Honour's comparative youth.

"Your Honour's call to the Inner Bar last year was warmly applauded by all your professional brethren and your elevation to the Bench of this Honourable Court to many of us would seem to take on the character of the inevitable—a word which I use in no way to imply a lack of desserts on the part of your Honour but rather as a somewhat left handed yet sincere compliment to those whom my learned friend the Attorney-General represents. Our profession by nature is critical of decisions from above but in today's appointment we respectfully concur.

"We are all conscious that to grace the Bench a Judge must have much more than learning in the law and great professional attainments. Your Honour brings also experience in the Army on active service, as a part time lecturer, as one with wide interests not the least of which is Man himself. Your friendship for practitioners in both branches of the profession has endeared you to us all and whilst wishing you together with Mrs Mahon and family the best of fortune for the future may I also hope that your paths will frequently reach Christchurch where a warm welcome will always await them.

"May I take this chance of expressing the pleasure that we all feel at seeing Sir Kenneth Gresson and Sir Francis Adams join your Honours upon the Bench and at the appearance of the Attorney-General and the Solicitor-General.

"In addition Judge Archer, our local Magistrates and a retired Magistrate Mr E. H. Lee S.M. are present. They have all graced the occasion and their presence reminds us of its importance.

"Finally may I make brief reference to the fact that many members of the public are present. That is proper. We in the profession might just tend to regard this a domestic matter and forget that the public have and should have a vital interest in appointments to this Honourable Court. Today, I suggest that they may share our gratification," he concluded.

Misuse of Judges?—The time has come to protest at the somewhat cavalier way in which recent governments of both parties use Judges to assist them in cooling political hot potatoes, if not in removing them altogether from the fires of pent-up passion. Lord Pearce in Rhodesia, the Lord Chief Justice in Coleraine on a visit in duration, we hope, of only a fraction of the greater part of over two years spent by Mr Justice Scarman on his Northern Ireland riots investigation (which must have been to the detriment of the effective working of the Law Commission), and Lord Wilberforce's inquiry into the miners' pay dispute are all only too recent examples. With reference to the last instance, it is absurd to suppose that any person, not even a Lord of Appeal in Ordinary, can do himself or the subject of inquiry justice when he has to rush out a report in a matter of hours in the knowledge that the country's industry is grinding to a halt and that lasting damage to its economy will be done should the strike continue. The politicians are overdrawing on the capital of the Judges' high reputation for competence and impartiality in reaching conclusions by the judicial process of reasoning. Each time a Judge is misused by being put up as a face-saver behind whose report a government can hide in carrying out a policy which they shirked adopting directly, a little of the long-standing esteem in which Judges are held is lost and some of their authority undermined. We all know that over recent years our currency has diminished in value. Let us avoid also reducing the standing of our judiciary. *The Solicitors' Journal.*

Obscenity—You may have a shrewd idea of what is lewd, but can you tell what the Courts mean by being "obscene?" J.P.C. in the *Justice of the Peace.*

THE NEW ZEALAND SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS

An article written for the JOURNAL *by Mr G. E. Bisson of Napier, Chairman of the New Zealand Section.*

The first object of the International Commission of Jurists as stated in its Rules is "to keep under review, expound, develop, strengthen and protect the principles of the Rule of Law in New Zealand." In the past there has been limited opportunity to be active in this field as fortunately we have enjoyed a society in which citizens rarely took the law into their own hands, finding the democratic process and legal remedies, criminal and civil adequate to meet their needs. Likewise we have been in the main free from arbitrary government so that one could fairly say there have been few inroads on the dignity of man, which the rule of law protects.

There are signs that our tranquility may be a thing of the past and we are about to enter into a period marked by violent conflicts of opinion expressed in new ways threatening to the rule of law. The urgency of the situation was graphically stated by Mr P. Temm Q.C. in a recent radio talk, *Looking at Ourselves*, in which he said the rising protests for and against next year's Springbok rugby tour of New Zealand were reaching a pitch where threats of violence on the home front dwarfed into insignificance for us, the South African policy of apartheid and the question of sporting contacts with South Africa. Lawful dissent is recognised as one of the foundations of our liberty but we have heard publicly stated intentions to persist in demonstrations which may well breach the law. Such actions do violence to the law and order of our land and as such are recourse to violence whether or not injury to life or property results.

In "Lord Denning on Dissent and Secrecy" [1971] N.Z.L.J. 24 there are quotations from Lord Denning's speech at the Law Society's Conference in Bristol. Those who had the pleasure and privilege of meeting Lord Denning at the Dominion Law Conference at Dunedin in 1966 found this great Judge who is so well known for his liberal views, quietly spoken and with a mild endearing manner. But he has no hesitation or qualms in his approach to unlawful and violent demonstrations. He simply says "they cannot be tolerated and must be put down." Freedom of speech meant "not only freedom to voice something you believe in, but also freedom for a voice you most heartily detest." Referring to a university gathering at which a visiting speaker was continuously howled down, Lord Denning said of those responsible that "they had not learnt that elementary lesson of free society." People "cannot be allowed to trample underneath the views of others." Isn't that exactly what happened recently at a New Zealand University? Speakers who had been invited to express their opposing views on the Springbok Rugby Tour were given a mixed reception, one being listened to in silence, no doubt from a sympathetic audience, while another was not listened to but howled down and verbally abused.

This threatening situation is a challenge to lawyers and an opportunity for them to act to prevent society rattling to pieces. The important role of the lawyer in his own society is evident in the following Editorial Note in The Review of the International Commission of Jurists No. 7 of December 1971 at p. 22,

> "The International Commission of Jurists welcomes the call to the legal profession in South Africa made on September 7, 1971, by Mr T. Vorster, President of the South African Association of Law Societies. He proposed a campaign to end the continual erosion by the Government of the basic principles of Criminal Law, and appealed to the profession to eradicate 'the evil whereby authorities were trying to break down, or disregard, the principle that the State had to prove beyond reasonable doubt the guilt of the accused.' He also complained that the Association felt it was 'banging its head against a bureaucratic wall' when making representations to the State.
>
> We share the hope of Professor Barend van Niekirk of the Univeristy of Natal that Mr Vorster's appeal will herald a new approach on the part of the legal profession concerning matters previously labelled 'contentious'. 'I have no doubt', said the professor, 'that the present situation as regards the erosion of liberty and of the rule of law would never

have come about if the lawyers of this country had been more vigilant and more outspoken in the defence of the values on which our law is supposed to be based. If no leadership emanates from them, from whom can it emanate?' It is to be hoped that Mr Vorster's call to the profession will be taken up and answered not once but repeatedly whenever the opportunity occurs, so that no one may be led to think that the erosion of the rule of law in South Africa has the approval of lawyers."

At an International Conference of Lawyers from 25 countries convened by the International Commission of Jurists from 8 to 12 September 1971 as guests of the Aspen Institute for Humanistic Studies, Aspen, Colorado, it was resolved, *inter alia*, that all lawyers have a special responsibility, which they have not as yet sufficiently discharged, to stimulate a greater awareness of the international obligations in respect of human rights now protected by international customary and treaty law and to encourage their application.

Civil disobedience, that is, dissent expressed through deliberate violation of the law has reached New Zealand. The present climate is such that forcible assaults on public order to protest points of view often by minority groups are likely to increase. The New Zealand Section of the International Commission of Jurists would welcome new members, and offers to New Zealand lawyers an avenue in which to act so that their special skills and knowledge of the problem can be used to "strengthen and protect the principles of the Rule of Law in New Zealand."

DUTCH MARRIAGE CONTRACTS—A TRAP FOR NEW ZEALAND PRACTITIONERS

During every year we see the arrival of several thousands of immigrants into this country. They come from many, mainly European, countries. They may ask questions as to the applicability of New Zealand law. Generally speaking the *lex loci* applies and there is no doubt about their being subject to New Zealand law. There is, however, one notable exception.

Most countries have provisions for matrimonial property applicable to married couples within their jurisdiction. In some countries the woman, when she marries, becomes entirely dependent on her husband: she cannot own any property, she cannot sign documents. In other countries the marriage has no such effect. But in all countries (except for some Oriental ones) marriage is a kind of contract between two parties.

Contracts are governed by the law of the country where they are made and recognised as such in other countries. This is the basic principle; there are many exceptions but, at this time, I am not concerned about the further technicalities thereof. Marriage is a contract whereby two partners of the opposite sex (generally speaking!) enter into a personal relationship but, depending on the country in which the ceremony takes place, this contract might have further implications. In most European Continental countries the marriage contract brings with it a special regime as to matrimonial property. Does this have consequences in New Zealand?

There are no explicit New Zealand decisions on this topic but the principle seems to be governed by a decision of the House of Lords in *De Nicols* v. *Curlier* (1900) 69 L.J. 109.

In this decision the Lords held that "where a marriage is celebrated in a foreign country and the spouses subsequently become naturalised British subjects, the rights, whether constituted by the law of the land or by convention between the parties, vested in them respectively at the marriage in regard to movable property remain unaffected by the change of domicil."

In other words, the matrimonial property situation is governed by the law of the domicil of the husband at the moment of the wedding. If this were not so a husband could take some of the property of his wife merely by moving to another country with a more "favourable" regime (or vice versa if they moved to a more matriarchal society). To quote further:

> "But if by marriage the wife acquires as part of that contract relation a real proprietary right, it would be quite unintelligible that the husband's act (i.e. moving to another country) should dispose of what was not his" (*ibid.*, at p. 112).

The New Zealand decision of *Hofman* v. *Hofman* [1965] N.Z.L.R. 795 seems not to have investigated the question of applicability of Dutch law as to the matrimonial property rights of the spouses; the question was not raised. The Court in that case was mainly concerned with the interpretation of the Matri

monial Propetry Act 1963. But if we look at some relevant literature it is obvious that the principle accepted in *De Nicols* v. *Curlier* governs this question (see for example Webb and Luxford, *Domestic Proceedings* 2nd ed. p. 347 and E. C. Adams, *The Law of Estate and Gift Duties in New Zealand*, 3rd ed., p. 3).

It seems clear that the rights as acquired by marriage cannot be changed otherwise than as provided for by the legal system of the country of domicil of the husband at the moment of the wedding.

One European system is of particular importance to New Zealand. Two and a half percent of the New Zealand population are of Dutch descent.

In the Netherlands, in 1970, an entirely revised first book of the Code of Civil Law was introduced. In this book one finds all the rules related to marriage, matrimonial property. Marriage, under Dutch law, is a legal contract between two partners having equal rights "like two captains on one ship". Then, Article 93 of the Code provides that from the moment of marriage there exists by law between the spouses a full community of interest to the extent that they have not made any "marriage conditions" to the contrary. This, in other words, is a Statutory Marriage contract, applicable if not otherwise agreed.

Many people in the Netherlands, however, agree to make a further contract ("conditions") and in the majority of cases they agree to a so-called Community of Loss and Profit. This Community entails all assets and liabilities acquired by the Community from the date of the wedding onward. All assets owned by either of the parties before that date—often described in long schedules attached to the marriage contract—belong to each of the parties separately. The Community of Interests ("Algehele Gemeenschap van Goederen") as described by the Code provides for a full partnership. Both spouses bind each other in all their actions and approval by the other partner is generally taken for granted until evidence to the contrary has been provided. Thus, everything "owned" by a married person under Dutch law is, in fact, only his property to the extent of 50 percent unless his Marriage Contract provides differently.

This may, of course, have interesting repercussions in New Zealand.

As described above, a Marriage Contract made under the law of domicil of the husband at the moment of the wedding has the same validity in this country.

Now, if somebody dies who has been married subject to a Community of Interests, his estate consists of 50 percent of the combined assets of the deceased and the survivor (the situation may be more complicated, depending on the Marriage Contract *in casu*). As the foreign law only applies to the distribution of the property within the Community, New Zealand law applies thereafter.

See for example Adams: "Where the doctrine of Community of goods is held to apply, estate duty is usually levied as if deceased had been a tenant in common in equal shares with his spouse of the common interest" (Adams, *supra*, at p. 3).

Another interesting question is the ability under Dutch law to change the Marriage Contract after the wedding, subject to approval of the Court (in The Hague for non-residents). A clause which might be introduced provides for the fiction upon the death of one of the spouses that the Community had always been vested in the surviving spouse. This is to postpone payment of estate duties until the death of the survivor.

Will this later change in the position be accepted by the New Zealand Courts also, after the couple has become domiciled in this country?

Under Dutch law gifts from one spouse to the other are forbidden. If the Community of Interests applies they have no effect whatsoever. If another contract has been made they might be useful in case of bankruptcies or other contingencies. Dutch law prohibits this. Does this also apply within New Zealand?

Another problem is that of taxation. In the Netherlands, for taxation purposes one accepts the legal fiction that income is taxed before distribution to the Community, otherwise the income becomes immediately part of its property. To my knowledge there is no such provision in New Zealand.

New Zealand taxation laws give no explicit provisions in this matter.

As I see it, a consistent interpretation of the marriage contract in New Zealand, leads to taxation of both husband and wife. Each of them has to pay income tax on 50 percent of the earnings of the Community. It seems that legislation is needed to prevent anomalies because of the progressive system of taxation.

Whatever the answers to these questions, it is essential that practitioners in this country, with so many European immigrants living here, need to look into this problem and to enquire where the clients were married and whether marriage contracts are applicable.

N. J. C. FRANCKEN.

THE SELECT FEW

Woman's Liberation implies that women must accept the responsibilities and duties of equality of rights along with any extension of personal freedom. Paternalistic protection of New Zealand women from the underside of social reality and the exhibition of insulting if jocular disbelief in their powers of judgment perpetuates the subjugation of women as much as a denial of fundamental liberty. Full participation by women in the public sphere would seem to require women to be both legally and psychologically equal to men if they are properly to share in community decision making.

Since women achieved the vote in New Zealand in 1893 other legal rights have not followed as rapidly as perhaps the early feminists believed they might. The initial vote was won without too much struggle probably owing to the early pioneering equalitarian ethos but other legislative inequalities have been overlooked or incompletely reviewed in the light of recent social development.

An example is the present position of women in relation to jury service. Until 1942 women had no right to serve on a jury. Only European males over twenty one and some selected Maori males of "good fame and character" were liable and qualified to serve as jurors. In 1942 the Women Jurors Act was passed, s. 2 of which provided as follows:

> "Any woman between the ages of twenty-five and sixty years who passes the qualifications for service as a juror required by the principal Act in the case of a man, and is not exempted or disqualified by that Act, and who notifies the sheriff in writing that she desires to serve as a juror, shall be qualified and liable to serve on juries in the same manner in all respects as if she were a man."

It is noticeable that at this time males assumed liability automatically from the age of twenty-one, while women were granted only limited rights with the additional proviso that they were to notify the sheriff in writing if desiring to serve. The 1942 Bill moved by Mrs Dreaver (Govt. Waitemata) was presented with a curious mixture of sentiment. The Victorian myth of women's inherent purity being sullied by involvement with evil and crime is tempered with the suggestion that a woman's hand in judicial affairs would help to reform and purify the nation:

> ". . . in the past, women have been kept from a knowledge of the sins and sufferings of their own world, the consequence being that they have held themselves aloof from doing remedial work that would be done to prevent suffering and crime that involves such an enormous expense to all governments in the upkeep of prisons, homes, hospitals etc. . . . that if women took part in the proceedings in Court, that need not make them any less pure in thought, word, or deed. It would, on the contrary, show the unthinking the sordidness and the horrors of crime, and make them eager to see that in their own circles such things were not likely to happen. . . . The knowledge of evil need not make anyone perverse in character or ideals but rather would inspire one with a longing to help the fallen and to protect the innocent."—1942 Hansard p. 307.

One of the prime objectives of the legislation as stated was to release a corresponding number of men to attend uninterrupted to their normal business and augment manpower for the war effort. The Act remained in force until 1963 when the 1908 Juries Act was amended and the present qualifications set down. In all, twenty-one classes of persons are exempt by profession or status ranging from Members of Parliament to Nurse Aids. Under s. 2 (a) a woman is liable for jury service but is exempt if she notifies the jury officer or the sheriff that she does *not* wish to serve as a juror (the reverse of the 1942 Act).

Mr Hanan, the then Minister of Justice in 1962 when the Bill went before the Petitions Committee expressed some doubts about a blanket provision and considered a narrower field of objections should apply, but evidently it was considered by the majority that women were not yet qualified for equal responsibility.

Despite the change in legislation, statistics would suggest that New Zealand women are first electing in large numbers not to serve on jury panels and secondly are being challenged by counsel at a higher proportional rate than men. Figures supplied by the Justice Department for the period 1 January 1968-30 June 1968 show as follows:

	Jurors Summoned		*Remaining*	
	M	*F*	*M*	*F*
Auckland ..	1,855	771	1,010	267
Invercargill ..	330	101	222	32
Christchurch ..	686	346	431	139
Dunedin ..	191	59	121	17
Hamilton ..	778	62	387	22
Wellington ..	949	370	503	165
Palmerston Nth.	401	122	250	70
	5,190	1,831	2,924	712
Combined Total	7,021		3,636	

This means that overall the percentage of women jurors summonsed comprised approximately thirty-five percent (35%) of the total while those remaining after challenge comprises approximately twenty-four percent (24%) of jurors. The usual reason given by lawyers for the greater percentage of women challenged is the undesirability of women jurors in sex cases but while statistics show a slightly larger number of female challenges in these types of cases there is still an overall bias against selection of women jurors.

It is interesting to look in greater depth into how Jury panels are selected. Palmerston North Supreme Court has been selected for the course of this study. Four electoral rolls are used to select jurors for the forthcoming three years, all of these to be resident within fifteen miles of the Supreme Court centre. Nineteen numbers are selected by ballot and applied to each page of the Electoral Rolls. The following are the results set down at the Supreme Court at Palmerston North on the 9th day of October 1970:

Number Selected by Ballot ..	9,806
Undelivered	416
Number Excused by Registrar	599

Number Claiming Exemption:

	Allowed	*Disallowed*
Men	1,187	27
Women ..	3,461	
Final Total No. of Jury Roll	4,705	

Included in the number excused by the Registrar are those persons entered on the roll who are now dead, have left New Zealand, are over the age of sixty-five or who are absolutely exempted from service by law or by Order of a Judge (s. 26, Juries Act 1908).

Women are exempting themselves from jury service at a ratio to men of approximately 3 : 1 (men's exemption generally relying on occupation).

A random sampling indicated that women exceeded men in the number selected by ballot by over ten percent (10%). Of this population an estimate of seventy-two percent (72%) of women are either being exempted or exempting themselves as against thirty-two percent (32%) of men. This leaves a roll ratio of roughly two males to one female, a figure borne out by the ultimate sex composition of the jury panels.

Eighty jurors are balloted for each week that the Supreme Court sits. Of these eighty there is expected to be a panel of about forty after further exemptions have been granted. Palmerston North figures for 1971 reveal the following:

JURY PANEL 1971
PALMERSTON NORTH SUPREME COURT

Week	*Female*	*Male*	*Total*
1/2/71	16	31	47
8/2/71	11	30	41
29/3/71	15	32	47
26/4/71	14	36	50
21/6/71	15	33	48
28/6/71	14	38	52
12/7/71	17	30	47
6/9/71	12	35	47
13/9/71	9	39	48
28/9/71	8	32	40
4/10/71	14	31	45
22/11/71	11	29	40
29/11/71	22	25	47
TOTAL	178	421	599

Surprisingly on the basis of Palmerston North figures proportionately less women serve on civil than on criminal juries. Also it will be seen that there is not a great deal of difference in the ultimate composition of criminal juries between cases involving sexual offences and those concerning other charges.

Although the totals are small in civil cases and the male jurors called numbered ninety-two as opposed to thirty-one females (66 percent males cf. 34 percent females) the resultant juries consisted of sixty-one (61) males to eleven (11) females (82 percent males cf. 18 percent females). There is a strong suggestion that the disproportionate number of challenges against women implies a lack of faith in women's capacity to make judgments in matters relating to assessment of civil claims.

In the criminal cases recorded the final jury numbers come close to expectancy with only a slight prejudice against women (expectancy 101 males to 55 females. Actual figure 105 males to 51 females). but this can *not* be said of challenges. The male jurors called numbered 148 as opposed to 82 females (64 percent males cf. 36 percent females). The challenges by both counsel should

CIVIL CASES
PALMERSTON NORTH SUPREME COURT 1971

	Jury		Challenged Plaintiff		Challenged Defendant	
	M	F	M	F	M	F
Damages Motor Accident Injuries 9/2/71	12	—	—	5	5	1
Damages Motor Accident Death 30/3/71	9	3	1	5	4	1
Damages Motor Accident Injuries 6/9/71	10	2	1	—	2	3
Damages Motor Accident Injuries 29/9/71 ..	12	—	6	—	4	—
Damages Motor Accident Injuries 4/10/71 ..	11	1	4	1	2	2
Damages Motor Accident Injuries 2/12/71 ..	7	5	2	1	—	2
Total	61	11	14	11	17	9

CRIMINAL CASES
PALMERSTON NORTH SUPREME COURT 1971

	Jury		Challenged Accused		Stood Aside Crown	
	M	F	M	F	M	F
1/2/71. Rape	8	4	2	4	1	5
2/2/71. Incest..	8	4	5	1	2	—
29/3/71. Theft as a servant	8	4	—	1	—	—
21/6/71. Burglary	8	4	2	3	1	—
22/6/71. Burglary	9	3	1	—	1	—
23/6/71. Theft	5	7	3	—	3	—
28/6/71. Burglary	6	6	2	—	3	2
12/7/71. Indecent Assault	9	3	4	2	—	—
28/9/71. Receiving	10	2	5	—	2	—
22/11/71. Rape	10	2	2	3	—	1
24/11/71. Murder	9	3	—	3	1	—
29/11/71. Rape	7	5	1	3	—	—
30/11/71. Theft	8	4	1	3	1	—
TOTAL ..	105	51	28	23	15	8

correspond to these proportions. However in the challenges by the accused where the proportional expectation would be that of 51 challenges, 33 against men and 18 against women in fact the figures read 28 males and 23 females, a significant trend against women.

Despite the common practice of scrutineering of jurors' names by the Crown, the jurors stood down by the Crown are considerably fewer and more consistent with the sex ratio of the jury panel.

Incidental to the main theme of this examination is the observation that the present list of exemptions means that often a person, particularly a professional, is unlikely to be tried by his or her peers. (60 percent of those initially balloted are exempted.) If service on the jury is to be regarded as a serious civic duty and not a trivial inconvenience, it is surely time the list of possible jurors was widened to include all but the barest minimum of exceptions. For example, school teachers can now secure temporary relievers and other privileged persons such as Dentists and even Members of Parliament (who have a pairing system for absences) should have to expect to undertake similar responsibilities to the rest of the community.

On the issue of women having an option *not* open to men to decline service on the grounds of being female, a legislative change is required to bring equality of responsibility. This could be achieved by repealing s. 2 (a) of the Juries Act 1908 and replacing it with a qualified exemption on application for women having sale care of children under the age of six years or incapacitated dependants.

Should there be no strong move to bring such a change the only alternative open is the educative one of impressing upon all women that their inferiority in human judgments has nowhere been shown and that the purchase price of equal respect in other fields is an equal share

in the more onerous aspects of civic justice and concord.

At present, it would seem on these facts that it takes fortuitous selection and strong will for a woman to be on a jury at all. That she should serve willingly deserves consideration rather than prejudice behind whatever whim barristers exercise when making challenges.

JAN WALKER.

CORRESPONDENCE

Britain and the European Community

Sir:

The JOURNAL of 7 March contains two articles and a letter dealing with some aspects of the process of European integration. All are rather critical and express some fears as to the safeguarding of the British institutions. Many books and articles have been written on each of the topics dealt with and it would take too much time and energy to summarise those at this place. Two points however emerge as a major fear from all three writers: Britain would lose her sovereignty and its glorious legal system would be finally taken over by the continental foreigners. For an admirer of the British way of life, a student of both the "continental" (whatever that may be) and the anglo-saxon legal systems and also a staunch supporter of the ideals of European integration, their arguments sound rather futile. Besides, they have been repudiated by the facts as they concern all other European countries. Britain might be different, but not at its own expense, I hope. I will clarify this last remark.

To start with the legal system. One of the three above-mentioned writers tells us a very funny story about poultry and the trade in that commodity; he concludes that the very fact that the European Court of Justice has been asked to give a decision on the relevant Regulations is a threat to the Monarchy! Of course it can not be as simple at that.

If we look at the position from the other side, we can see that none of the Belgian, German, Italian, French or Dutch legal systems has been changed by the application of European Law. They merely have benefited of the experiences of the others. The European Court takes advantage of all legal traditions in the explanation of the European law. It guards the equal treatment of all Europeans under the same set of rules. It has no say whatsoever in the application of the law emanating from the national institutions. The fact that the rule of precedent is not part of the European law, possibly makes it a bit more flexible. Apart from that I can assure the worried readers that no European will be tried for using certain words where others have been acquitted. Besides, nobody will be held guilty before this has been proved in Court! Many people often complain that European law would take precedent over British law. This, however, is beside the point. European law is national law; but the old saying applies in this respect as well: *Lex posterior derogat legi anteriori*. The only difference is that some rules of law do not come from the national parliament but from the institutions it has delegated its powers to. Yet, even the members of the E.E.C. Council of Ministers are responsible to their own parliaments for all their actions.

Finally, I can assure those who fear that European law will be conducted in French, that all languages have exactly the same influence within the Community. Each rule of European law will be explained with reference to all official texts. The English language will obtain this status as soon as Britain is a member.

The other topic I would like to say something about is the expected "loss of sovereignty". It would pay to look at the problem from the other side. What are the advantages of sovereignty? To defend one's frontiers, to keep competitive products out at the expense of the consumers, to limit one's nationals in their freedom to travel, to withhold them information and the possibility to compare, to prohibit them to do the kind of work they want to do? In Europe the option is to keep one's full sovereignty and to be left (and in the cold) or to join the larger community. The answer is quite obvious.

Many people argue that joining the E.E.C. would be the end of the British Monarchy. But has the Belgian King or the Dutch Queen less influence than they had before? They still represent the unity of their people (although their position is being threatened by the national soccer teams). The motto of Europe is "Unity in Diversity." Only the weaker parts will lose their identity in Europe.

This, I think is the sad side of all those arguments against the E.E.C. Is the British legal

system or the Monarchy that much weaker than their other European counterparts that they would lose their identity by joining? Only weak peoples stress their own importance or greatness in words, the stronger ones prefer the facts. Self-satisfaction is not the way to face the future!

Our western philosophy is based on pluralistic thinking. Britain can learn from its future partners, and they can learn from Britain.

It is ridiculous that, for the sake of legal fictions (sovereignty, fountain of justice etc.) progress should be halted.

The British deserve a better lot.

NICO FRANCKEN.

What the School Children saw on their Day at Court

We have received a set of "thank-you" letters from children who recently attended the Magistrate's Court at Auckland where Mr H. Y. Gilliland S.M. was presiding. They write:

"Thank you very much for letting us come into the Courtroom on Friday the 26th November 1971. I felt quite happy when you only fined the man $6.00 when he only had $6.00. I think it was really all interesting and hope to go another day."

"Thank you very much for letting listen to your court. I was particularly interested in the way that the accused stood in the stand."

"Our class is very grateful to you for letting us attend a court case this morning. I noticed that a real court case is different to the court cases on television. I was particularly interested in the way you entered the courtroom."

"Thank you for allowing us to see most of the cases. What I found most interesting was that there were a lot of short cases and whenever someone went out of the courtroom they bowed to you."

"Thank you very much for letting me visit your court. I was particularly interested in the different punishments you gave to the defendants found guilty. I noticed that nearly all the defendants who had a choice chose to be heard at your court. I found that a few of the defendants were quite happy with their punishments."

"I would like to take this opportunity to thank you very much for our visit to your court. I found it interesting and would like to come back during the school holidays. I was amazed how light you were on most of the offenders and very tough on others."

"Thank you very much for allowing us to attend your court on Friday. I couldn't understand why there wasn't two (were not) shouting at each other and the Judge wasn't telling them to approach the Bench. But now I know I was watching too much T.V. I felt sorry for the man who was brought in on a drunken charge, and who only had $6.00 in his pocket. I like the way you handled him by taking away $2.00."

"Thank you very much for having us in your court today. I was very interested in most of the cases. I think you handled those cases very well. I noticed you showed mercy to the man who stole two cars. I really enjoyed myself this morning."

"I am grateful to you for allowing our class to visit your court. I was interested in mainly how you over talked the defending barristers as they asked for bail and how your attitude changed from sympathy to strictness from one offender to the other."

The letters come from the Pasadena Intermediate School at Point Chevalier.

OBITUARY

Mr E. C. Adams

The recent death of Ernest Claude Adams is a loss for every member of the Profession in New Zealand. The books and articles and precedents published by Mr Adams over the years have been a valuable source of information and legal guidance to the whole profession. Because of the emphasis in Mr Adams' writing on matters of land tenure and estate and stamp duties, it is the conveyancer who has the greatest cause to honour him, but it is also probably true that the vast majority of practitioners in New Zealand today—even those whose practice is mainly in the criminal and domestic Courts—have used his books as texts at least during the course of their University study.

Mr Adams was born at Thames in 1894. He was educated at Parawai Primary School and at Thames High School. He studied subsequently at Auckland University. He was admitted as a Barrister and Solicitor in 1920. Some years later he completed his LL.M. degree.

Mr Adams' earliest inclination was to journalism. When he first started work, however, he was unable to find an opening in that field and he went instead to work as a civil servant in the

Land and Deeds Department. He remained a civil servant in that Department, with a brief period in the Stamp Duties Department, until his retirement from the Public Service in 1954 at which time he had been Registrar General of Land for a period of six years.

Mr Adams had a brief period as Registrar of Land at Apia in Western Samoa. This was in 1921. On his return to New Zealand he was appointed District Land Registrar and Deputy Commissioner of Stamp Duties at Hokitika. Over the years he held similar offices in Nelson, Napier and eventually in Wellington. After his retirement from the Department in 1954, Mr Adams worked in the offices of Messrs. Phillips, Shayle-George & Co., with the right of private practice as a Barrister. In this latter capacity his advice was sought by solicitors from every part of New Zealand. He continued this work as a Barrister after his retirement from the firm in 1966. On the day of his death he was actually completing a half-finished opinion.

Mr Adams had a distinguished career in the Civil Service and on his retirement in 1954 he was awarded the Imperial Service Order. One of his other responsibilities was as a member of the Co-operative Dairy Companies Tribunal and he was also a member of the Dairy Legislation Committee. Mr Adams took an interest in bowls and throughout his life showed an alert interest in current affairs.

Because of his very great knowledge of the law and because of his considerable practical experience in the administration of the Land Transfer system, the New Zealand Law Society on a number of occasions in his later years referred to him for opinion difficult questions that came before it relating to the law of real property. One such occasion was after the decision of the Privy Council in the case of *Frazer* v. *Walker*.

It is, of course, as a writer on legal subjects that Mr Adams was most widely known. There were his numerous contributions to the New Zealand Law Journal over the years. He wrote the standard textbook on the Land Transfer Act, and his re-editing of *Garrows Real Property in New Zealand* in effect amounted to a re-writing of the book. The standard textbooks on estate and gift duties and on stamp duties were also written by Mr Adams himself as author. The most substantial text now bearing his name is, of course, the *New Zealand Encyclopaedia of Forms and Precedents* which is a tremendous expansion on *Goodalls Conveyancing in New Zealand*, of which Mr Adams was also the most recent editor.

Those who knew Mr Adams personally will remember him with affection. He was a man of quiet manner and great industry. His interest in all matters relating to property law was real and intense but did not give the impression of being in any way an obsession. Practitioners who dealt with him during the years when he was Registrar General of Land, or a Land Registrar in one of the district offices, found him to be clear and precise in his understanding and expression of the legal principles that would be applicable. But they also found him ready and willing to listen and prepared to discuss any difficult problem that had arisen with a view to finding a solution. Most of all, young solicitors and law clerks would approach him without diffidence, with the certain assurance that his vast knowledge would be generously available to help in the more unusual aspects of the subjects in which he was pre-eminent. He truly deserved to be considered a servant of the public in the widest and best sense of that term; and a man who fulfilled all that is meant in the classic phrase, learned in the law.

G.C.P.

A Prayer for Relief—Swift may have hoped for 'pleaders honest and modest', but even he could hardly have recommended diffidence as a forensic virtue, or a frank disclosure of the weakest part of one's case as being a laudable ploy in litigation. As far as immodesty goes, nobody could hold a candle to Cicero who, while prosecuting ex-governor Verres for extortion, addressed the Court in astonishing terms. "My conduct of the prosecution," he said, "will at least demonstrate that no one in human memory can ever have come to Court better equipped, more thoroughly prepared, and more vigilantly watchful." Yet even such extreme conceit is surely preferable to the feignedly humility of those divorce petitioners whose pleadings finish with their 'humbly praying' for relief; they sound such a sneaky, sanctimonious lot. There are few of them these days; modern petitioners seem to demand decrees of divorce as their inalienable right. As far as pleadings go, it is not common sense which is violated, so much as the English language. Consider a simple traffic accident in which a pedestrian is knocked down by a bus. There is no suggestion that he was flattened by a fleet of buses, and yet most pleadings refer throughout to "the said bus," for fear it should escape down a side road. You might as well refer to "the said plaintiff"; there are plenty of plaintiffs about.