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TRUST OR PARTNERSHIP

Trust or partnership? That is the question which the Special Committee on Matrimonial Property had to face when it came to reviewing the position created by *Donnolly* v. *Official Assignee* [1967] N.Z.L.R. 83. *Donnolly* decided that the phrase "legal personal representative" in the Matrimonial Property Act does not include an Official Assignee in Bankruptcy, so that a question between one spouse and the Official Assignee is not one which can be dealt with under s. 5 of that Act.

The spouse whose partner has become bankrupt, it was suggested, may be said to enjoy either a beneficial interest under a trust in respect of that spouse's interest in matrimonial property, which should not be permitted to pass into the hands of third parties such as the Official Assignee. Alternatively, on the basis that the couple shared a partnership "for better or for worse, for richer or for poorer," matrimonial property *in toto* could be treated as being available to the creditors of both spouses.

The Committee attempted to steer a middle course, and in its 1972 Report has recommended that the interest of a spouse which exists by virtue of the Act is a right which should not ordinarily pass upon the bankruptcy of the other spouse or be available to the other's creditors. An exception would be made for the case in which a husband and wife were engaged in a joint enterprise with *mutual awareness* of the debts being incurred, or where the debts are incurred in the course of managing the affairs of the household in the common interest.

After a careful assessment of the pros and cons of the analogies, the Committee concluded that on the bankruptcy of one spouse, the assets of that spouse only (defined in terms of matrimonial property law) should be available to the creditors, subject to the power of the Court to order that such part of the assets of the other spouse "as the Court thinks fit" should also be made available. The effect would be to abrogate the rule established in *Re Donnolly*, and allow an application under the Act by one spouse to be brought against the other's Assignee in Bankruptcy.

At first sight this seems a somewhat bewildering suggestion. The wife (as it generally will be the wife) may have the benefit if affairs prosper, and if they prosper for a time and then go under, she may be in the happy position of having the benefit of the period of prosperity without having to bear the penalty of ultimate failure. She would seem to be in a "heads I win, tails you lose" situation as against the creditors. Moreover, there is the possibility that where affairs seem headed for the rocks, there may be an incentive to a person facing bankruptcy to file sooner rather than later, and before realising on any matrimonial assets in an attempt to stave off bankruptcy.

It is interesting that the recommendation of the Committee is not limited to the matrimonial home, for there is certainly more force in the argument in respect of the matrimonial home than there is to the general proposition that the spouse who has not filed in bankruptcy should (in effect) be unaffected by the bankruptcy.

If, as the Committee suggests, allowing the principles of matrimonial property law to be determined by their legal effect on the rights of future creditors is "the tail wagging the dog", then is not the application of the "community of surplus principle" up to the date of bankruptcy so as to increase the deficit to creditors, something of a contradiction in terms?

It may be that in practice the general power that the Court might have to order "such part of the assets of the other spouse as the Court thinks fit" to be made available would overcome objections, but one may question, along with Mr D. F. Dugdale ([1972] N.Z.L.J. 556]) whether the conferment of yet another judicial discretion is a proper way out of the dilemma.

How, for example, is the solicitor advising the failing businessman to be able to properly advise his client as to the consequences of bankruptcy when a judicial discretion hangs like a cloud over an already dismal situation. If the position offered by the present state of the law has any virtue, it is surely that of certainty. If its admitted ills are to be remedied, hopefully, certainty can be retained.

JEREMY POPE.

SUMMARY OF RECENT LAW

ARBITRATION—AWARD

Enforcement of award—Failure to set aside invalid award does not make the award enforceable—Validity of award—Failure to deal with every matter specifically in award does not invalidate award if all matters taken into account. This was an application to enforce an arbitration award. The umpire delivered a written award on 31 May 1971 in which he set out the particular allegations of breaches of a covenant in a lease committed by the respondent. The Umpire then, after referring to the fact of several meetings and considerable investigations on his own part, found that the respondent had neglected certain matters of general maintenance as required by the lease without specifying those matters and awarded to the applicant a lump sum by way of compensation. In addition he found that the respondent had failed to top-dress as set out in the lease to the extent of 30 tons of potassium super and 51 tons of lime plus delivery and spreading costs, those deficiencies to be made good by the respondent. No amount was stated in respect of the latter deficiencies, but was subsequently calculated. On 10 June 1971 the Umpire delivered a supplementary award fixing the payment of costs without being requested so to do. The respondent did not move to have the award set aside. The respondent contended that the award was not enforceable on the grounds that (a) the award was or might be bad on its face, and (b) the fixing of costs on 10 June was in breach of s. 14 (2) of the Arbitration Amendment Act 1938 and invalid. *Held*, 1. Pursuant to s. 13 of the Arbitration Act 1908 and s. 12 of the Arbitration Amendment Act 1938 an order for enforcement of an award as a judgment is only available in reasonably clear cases. (*Re Boks & Co. and Peters, Rushton & Co. Ltd.* [1919] 1 K.B. 491, 497; and *Union Nationale des Cooperatives Agricoles de Cereales* v. *Robert Catterall & Co. Ltd.* [1959] 2 Q.B. 44; 52; [1959] 1 All E.R. 721, 725, applied.) 2. The fact that no action had been taken to set aside an award could not render valid an award which was invalid on its face. 3. The fact that an award does not deal with every matter specifically does not render the award uncertain, if on a fair interpretation of the award, it is to be presumed that the matters have been taken into account. (*Re Brown and Croyden Canal Co* (1839) 9 Ad & E 522; 112 E.R. 1309, applied.) 4. The applicants were under no duty upon an application for enforcement of an award in the absence of any challenge to the validity of the award to apply to the umpire pursuant to s. 14 (2) of the Arbitration Amendment Act 1938 to place evidence before the Court on the question of costs when the umpire was empowered by the submission to deal with costs. Judgment was entered in terms of the award. *Mackintosh* v. *Castle Land Co. Ltd.* (Supreme Court, Wanganui. 23 June; 4 July 1972. Quilliam J.).

COMPANIES—COMPANIES UNDER THE COMPANIES ACT

Regulation and management—Under articles of association—Provision for distribution of surplus assets pro rata *on nominal value of shares—Holders of parcels of shares right to occupy specific parts of the building—Shares purchased above par for certain areas—"Oppression" of minority—Companies Act 1955, s. 209.* The facts of this case are set out in the judgment of Haslam J. reported [1972] N.Z.L.R. 683. The appellants contended that the refusal of the majority of the shareholders to pass a resolution altering the articles of association of the company resulted in the affairs of the company being conducted in a manner oppressive to the appellants who were minority shareholders. *Held*, 1. "Oppression" imports that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor. (*Re Jermyn Street Turkish Baths Ltd.* [1971] 1 W.L.R. 1042, 1060; [1971] 3 All E.R. 184, 199, applied. *Re Associated Tool Industries Ltd.* [1964] A.L.R. 73; *Re B.C. Aircraft Propeller & Engine Co. Ltd.* 66 D.L.R. (2d) 628; *Re British Columbia Electric Co. Ltd.* 47 D.L.R. (2d) 754; *Re Bright Pine Mills Pty. Ltd.* [1969] V.R. 1002; *Re Broadcasting Station 2GB Pty. Ltd.* [1964-65] N.S.W.R. 1648; *Elder* v. *Elder & Watson Ltd.* [1952] S.C. 49; *Re Five-Minute Car Wash Service Ltd.* [1966] 1 W.L.R. 745; [1966] 1 All E.R. 242; *Re H. R. Harmer Ltd.* [1959] 1 W.L.R. 62; [1958] 3 All E.R. 689; *Re Lundie Bros. Ltd.* [1965] 1 W.L.R. 1051; [1965] 2 All E.R. 692; *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer* [1959] A.C. 324; [1958] 3 All E.R. 66, referred to.) 2. The refusal to change the articles thereby maintaining the *status quo* is not conducting the affairs of a company in a manner oppressive to some members. The judgment of Haslam J., affirmed. *Re Empire Building Ltd.* (Court of Appeal, Wellington. 6, 7, 8, 9 June; 21 July 1972. Turner P., Richmond and Perry JJ.).

COMPANIES—POWERS AND LIABILITY OF COMPANY

Company A. taking over company B.—Purchasing all shares in company B. by issue of company A. shares and cash—After takeover dividend declared by company B., and company A. issuing dividend to pay cash to former company B. shareholders—Not financial assistance given

by company B. for purchase of its own shares—Companies Act 1955, s. 62. The Wellington Publishing Company Ltd. made a conditional takeover offer to the shareholders in Blundell Brothers Ltd. to purchase all the 3,060,000 fully paid ordinary shares. Payment was to be made by allocating three shares in the Wellington Company for every five shares in Blundells, together with a cash payment of 95 cents per share payable on or before 1 September 1972 with interest thereon at 7 percent per annum from 1 May 1972. All the shareholders in Blundells accepted the offer and it became unconditional. As a consequence the Wellington Company had to find cash to pay $2,991,788 to the shareholders on 1 September 1972. There was no mention in the takeover offer concerning the method whereby such cash would be found. The Wellington Company, after acquisition of all the shares in Blundells proposed to use the revenue reserves of $3,127,172 in Blundells to pay a dividend totalling $3,000,000 on the Blundell shares, which would be payable to the Wellington Company as the sole shareholder in Blundells. The Wellington Company would then pay the former shareholders in Blundells 95 cents on each share amounting to a total of $2,991,788. A declaration was sought as to whether such method was unlawful, being in breach of the provisions of s. 62 of the Companies Act 1955 as giving directly or indirectly "financial assistance" for the purpose of or in connection with the purchase or subscription made or to be made by any person or for any shares in the company. *Held*, 1. It would seem that the purpose of s. 62 of theCompanies Act 1955 is for the protection of minority shareholders and creditors. 2. The payment of a dividend is not something which will ordinarily be regarded as the giving of financial assistance. 3. There were no minority shareholders and the existing shareholders were amply protected by the substantial excess of assets over liabilities. 4. The declaration of a dividend by Blundells was out of moneys properly available for dividends and the payment by the Wellington Company out of the moneys it had so received to the former shareholders of Blundells was not the giving of "financial assistance" by Blundells for the purchase of its own shares. *Re Wellington Publishing Company Limited* (Supreme Court, Wellington. 30 May; 8, 12 June 1972. Quilliam J.).

EVIDENCE—ADMISSIBILITY

Income Tax—Records of financial transactions—Whether Inland Revenue Department Act 1952, s. 16B is merely enabling as making hearsay evidence or secondary evidence admissible or whether it is also restrictive as to the procedure to be adopted to make any documentary evidence admissible—Whether s. 16B is a complete code on the question of admissibility of documentary evidence in tax prosecutions—Inland Revenue Department Act 1952, s. 16B. Income Tax—Evidence—Whether failure to give notice under s. 16B (11) renders documentary evidence inadmissible—Inland Revenue Department Act 1952, s. 16B. Criminal Law—Practice—Informant's application for leave to withdraw informations during hearing—Principles to be applied. Section 16B of the Inland Revenue Department Act 1952 is a complete code on the subject of the admissibility of documentary evidence in income tax prosecutions. Thus even documents which may be free from taint of hearsay or of being secondary evidence are covered by the section and the procedure laid down by it must be followed. As subs. (11) requires that the defendant be given seven days' notice of the informant's intention to tender any document, failure to give such notice renders the document inadmissible. (*Maxwell* v. *Commissioner of Inland Revenue* [1959] N.Z.L.R. 708 and *Buckley* v. *Macken* [1961] N.Z.L.R. 46, referred to.) An informant's application for leave to withdraw informations during a hearing should not lightly be granted. However, when the defect giving rise to the application is purely a procedural one and not one going to the substance of the alleged offence, the application should be granted. *Commissioner of Inland Revenue* v. *Watkins* (1972. 1, 7 June before Mr J. R. P. Horn S.M. at Palmerston North).

HIRE PURCHASE—NATURE OF TRANSACTION

Contract for lease of car—Residual value fixed—Arrangement to circumvent the provisions of the Hire Purchase and Credit Sales Stabilisation Regulations 1957—Illegality—Lessee an agent for a minor who was not an acceptable lessee to the lessor—Claim by the minor against the lessee for moneys paid to the lessor as moneys had and received—Whether the illegality of the lease bars the action. The plaintiff wished to purchase a car on hire purchase terms but was told that he did not have sufficient money to pay the deposit required by the Hire Purchase and Credit Sales Stabilisation Regulations 1957. The vendor then suggested that the plaintiff lease the vehicle, the lease to fix a residual value at which the vehicle could be purchased at the end of the leasing, this being an arrangement to circumvent the provisions of the Regulations, rendering the contract illegal. Because the plaintiff was an infant his then employer the defendant signed the agreement as lessee, but the plaintiff paid such instalments for the lessor as were paid. The payments fell in arrears and the lessor repossessed. On an action by the plaintiff to recover from the defendant the amount paid as moneys had and received, the plaintiff having met what was on paper the liability of the defendant. *Held*, That the defendant was merely the agent of the plaintiff in signing the lease and in any case the illegality of the lease was a bar to the action. (*Credit Services Investments Ltd.* v. *Quartel* [1970] N.Z.L.R. 933, followed. *North-Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.* [1914] A.C. 461, [1914-15] All E.R. Rep. 752; *Edler* v. *Auerbach* [1950] 1 K.B. 359, [1949] 2 All E.R. 692; *Harry Parker Ltd.* v. *Mason* [1940] 4 All E.R. 199 and *Constable* v. *Rault* [1968] N.Z.L.R. 769, referred to.) *Brown* v. *Shaw* (1971. 21 July; 1972. 16 February, before Mr G. J. Donne S.M. at Tauranga).

HUSBAND AND WIFE—DISPOSITION OF PROPERTY

Matrimonial property—Application by wife for share in matrimonial home—Title in name of husband—Contributions by both parties—Increase in value of property after date of separation—Correct time to value property—Matrimonial Property Act 1963, s. 5. On an application by wife for a share in the matrimonial home solely in the husband's name but purchased with a fund contributed to by both, and, between the date of separation and the date of hearing of the application the property has increased in value (not due to any effort of the husband) the wife is entitled to a share of such increase. (*Edwards* v. *Edwards* [1970] N.Z.L.R. 858, distinguished; *Falconer* v. *Falconer* [1970] 3 All E.R. 449, followed.) *MacFall* v. *MacFall* (1971. 3, 26 February, before Mr P. L. Molineaux S.M. at Christchurch.)

HUSBAND AND WIFE—DOMESTIC PROCEEDINGS

Orders for maintenance—Husband's responsibility to de facto wife where relationship stable—Court's considera-

tion of such responsibility in making order for maintenance of wife—Domestic Proceedings Act 1968, s 27 (2). The appellant and respondent had been living apart for some time, the respondent having custody of the two children. The appellant for about 3 years had been living with a woman who was living apart from her own husband and who had a child of her own marriage and also a child of the appellant. The relationship of the appellant and his *de facto* wife was stable. The appellant's earnings were $66 per week and the Magistrate, relying on the decision in *Lindsay* v. *Lindsay* [1972] N.Z.L.R. 184, had ordered him to pay $31 per week for the maintenance of his wife and his two children, leaving $35 per week which was insufficient to maintain his household consisting of his *de facto* wife and children. *Held*, 1. The decision in *Lindsay* v. *Lindsay* that the duty of a husband to provide for his second wife must not be discharged at the expense of his primary duty to maintain his former spouse does not apply where the first wife is in receipt of a social security benefit and the only effect of the maintenance order is to benefit the general taxpayer at the expense of reducing the husband's second family below a reasonable level of subsistence. (*Comp* v. *Comp* (unreported, Auckland, 16 October 1967, Speight J) and *Gaspar* v. *Gaspar* [1972] N.Z.L.R. 174, followed.) 2. The provisions of s 27 (2) of the Domestic Proceedings Act 1968 enable the Court to take into consideration the responsibility of a husband towards a *de facto* wife subject to the general circumstances and to considerations affecting the public interest. 3. Although the principle in *Comp* v. *Comp* and *Gaspar* v. *Gaspar* would not generally apply in cases where a husband was merely living in a *de facto* relationship, the stability of relationship in the present case was such that the Court exercising its discretion could apply that principle. Appeal allowed to the extent of vacating the order in respect of the respondent's maintenance and substituting therefor the sum of $12 per week. *Newton* v. *Newton* (Supreme Court, Auckland. 12, 18 July 1972. Mahon J).

HUSBAND AND WIFE—MATRIMONIAL PROCEEDINGS (SUPREME COURT)

Maintenance—When granted—No jurisdiction to grant permanent maintenance or capital sum or security before decree absolute—Matrimonial Proceedings Act 1963, ss. 40, 41, 45. The petitioner sought orders for a capital sum under s. 41, for permanent maintenance under s. 40, and for security for such maintenance under s. 45 of the Matrimonial Proceedings Act 1963, immediately after the decree *nisi* but before a decree absolute had been made. *Held*, 1. Sections 40, 41 and 45 of the Matrimonial Proceedings Act 1963 provide for the Court at its discretion to make orders—"on or at any time after the making of any decree of divorce" as distinct from s. 33 of the Divorce and Matrimonial Causes Act 1928 which provided that the Court at its discretion might make an order "on any decree of divorce". 2. An order under the above-mentioned sections cannot be made earlier than the making of the decree absolute. (*Fox* v. *Fox* [1925] P. 157; [1925] All E.R. Rep. 683 and *Leitch* v. *Leitch* [1958] N.Z.L.R. 1123, distinguished. *Pooley* v. *Pooley* [1936] N.Z.L.R. 598; *Thomson* v. *Thomson* [1932] G.L.R. 655 and *Newsome* v. *Newsome* [1947] N.Z.L.R. 525; 1947 G.L.R. 291, referred to.) *Rhodes* v. *Rhodes* (Supreme Court, Christchurch. 20, 27 June 1972. Wilson J.).

INFANTS AND CHILDREN—CARE AND CUSTODY

Grounds for granting refusing or removing—Father brought child to New Zealand—Existing custody order of foreign Court in favour of mother—Weight to be attached to foreign order—Guardianship Act 1968, ss. 5, 23. This case raises the question of what weight should be placed upon the order of a foreign Court granting custody of a child to one of the parents where the marriage has broken up. The Canadian Court had made an order in favour of the mother and the father had brought the child to New Zealand. The father applied to the Supreme Court in New Zealand for an order for custody. *Held*, 1. The existence of an Order of a foreign Court is not irrelevant but first the matter must be considered on its merits. (*Re B. (Infants)* [1971] N.Z.L.R. 143, applied.) 2. Greater or less weight is attributable to an existing order of a foreign Court depending *inter alia* on the status of the Court, the type of hearing, whether it was a full one or a mere formality, and the similarity or otherwise of the laws of the foreign country in question. *C.* v. *C.* (Supreme Court, Auckland. 29 March; 6 April 1972. Speight J.).

INSURANCE—INSURANCE BROKER

Expiry of cover—Whether there is an obligation on a broker to give the insured notice of impending expiry and invite renewal. There is no implied obligation on an insurance broker to give the insured notice of approaching expiry of insurance cover. The normal principles of agency apply. *Aerocraft (N.Z.) Ltd.* v. *Dominion Insurance Brokers Ltd.* (1972. 29 August, 13 September, before Mr J. R. P. Horn S.M. at Palmerston North.).

LAND TRANSFER—EASEMENT

Whether the terms of a registered easement, being a deed, can be varied by subsequent simple agreement not registered. A registered easement, even though deemed to be a deed, can be effectively varied by subsequent simple agreement and the parties are bound by the terms as so varied, even if the variation is not registered. (*Berry* v. *Berry* [1929] 2 K.B. 316, [1929] All E.R. Rep. 281; *Inland Revenue Commissionre* v. *Morris* [1958] N.Z.L.R. 1126; *Spiers* v. *Capewell* [1917] G.L.R. 396; and *Abigail* v. *Lapin* [1934] A.C. 491; [1934] All E.R. Rep. 720 (1934) 103 L.J.P.C. 105, referred to.) *Hammond* v. *Murray* (1971. 5 May; 1972. 9 February, before Mr G. J. Donne S.M. at Tauranga).

MASTER AND SERVANT—INDUSTRIAL INJURIES AND WORKMEN'S COMPENSATION

Industrial accidents—Personal injury by accident arising out of and in the course of employment—Scope of employment—Worker skylarking—Employee running on wet tiled floor contrary to general instruction—Accident not arising out of employment—Workers' Compensation Act 1956 s. 6c. The plaintiff was employed on an 8-hour shift commencing at 4 p.m. and was entitled to a twenty-minute "lunch" break which he decided to take at 8 p.m. He was in the luncheon room with two other employees when his lunch accidentally fell on the floor. The plaintiff as the result of a dare threw his doughnut and a filled roll at another employee who retaliated and started to chase the plaintiff round the room. The plaintiff ran out of the room down a corridor towards a glass door. The plaintiff slipped on the wet tiled floor, which also had iron sand on it, and went through the door severely lacerating his wrist. The plaintiff knew of the general instruction to employees that they were not to run except in an emergency. *Held*, 1. Under the provisions of s. 6 of the Workers' Compensation Act 1956 where an employee

is having a meal on his employer's premises, to which he has a right of access for that purpose, and suffers an accident, it is deemed to have arisen out of and in the course of his employment. (*Bryson* v. *D. A. Lewis and Co. Ltd.* [1965] N.Z.L.R. 370, 372, followed.) 2. Section 6c of the Workers' Compensation Act 1956 affords protection to workers injured at work as a result of another person's negligence or skylarking provided that the injured person himself did not contribute to the accident by any act not incidental to his employment. 3. The effective cause of the accident was directly related to the skylarking begun by the plaintiff and accordingly pursuant to s. 6c the accident did not arise in the course of the plaintiff's employment. *Murphy* v. *New Zealand Steel Limited* (Compensation Court, Auckland, 20 June; 6 July 1972. Blair J.).

MILITARY TRAINING—LIABILITY TO REGISTER

Exemption—"Regular Minister" of a "religious denomination"—National Military Service Act 1961, s. 5 (1) (b). When a defendant claims to be exempt from liability to register for National Military Service because he is a regular member of a religious denomination, the onus of proof of such claim is on him. In determining whether a system of belief, in this case Pantheism, is a religious denomination, essential ingredients are worships and prayer. A claim by the defendant that he has been appointed minister by members of the group must be corroborated. In considering whether he is a "regular" minister, the time he spends on his duties is relevant. *Police* v. *Horton* (1972. 6, 21 March, before Mr H. J. Evans S.M. at Christchurch).

MONEY AND MONEYLENDING—RATE OF INTEREST

Excessive interest—Principles to be applied in cases of small loans for short periods—Moneylenders Amendment Act 1933, s. 14. The proviso to s. 14 of the Moneylenders Amendment Act 1933 recognises that different principles apply between substantial loans over long periods on the one hand and small loans over short periods on the other in determining whether an interest rate is excessive. In this case the loan was $49.50 which together with interest was repayable by twelve weekly instalments. The interest amounted to 160 percent per annum, but this is not necessarily excessive for the purposes of the Act. It would be desirable to make it obligatory to set out the effective interest rate in the memorandum of terms of the contract. (*Birch* v. *Shaw* [1963] N.Z.L.R. 927 and *Balkind* v. *Batchelor* (1923) 42 N.Z.L.R. 1122, referred to.) *Management Aides (N.Z.) Ltd.* v. *Asher* (1972. 8 February, 7 April, before Mr H. J. Evans S.M. at Christchurch).

NEGLIGENCE—GENERAL PRINCIPLES

Effective cause—Foreseeability of type or nature of injury—Of initial injury foreseeable liability for all consequences flowing therefrom—Extent of injury not limited by foreseeability. The appellant, a steeplejack, was engaged in March 1965 in re-setting the wire rope system of a crane which was rusty and frayed. The rope sprang free from a sheave and struck the back of the plaintiff's hand, cutting it. Within a day or two the hand swelled and the appellant became feverish. He was admitted to hospital and developed symptoms of a very serious and debilitating kind which have persisted ever since, causing headaches and loss of balance. The medical evidence given by one specialist was that in his opinion an unknown virus had infected the wound, causing irreversible brain damage and that the appellant would not in the future be able to follow any further gainful occupation. The evidence of a psychiatrist was that although he agreed the appellant had been so infected, he did not agree that the appellant's residual state was caused by brain damage but that he was suffering from traumatic neurosis and that the appellant was the type of person that was vulnerable to neurosis. In his opinion the appellant's symptoms would disappear within six months or so after the litigation was concluded. The jury awarded general damages of $35,000 but found that the appellant was guilty of contributory negligence and apportioned 60 percent of responsibility for the accident to the appellant. The trial Judge subsequently on application ordered a new trial, limited to the *quantum* of damages and foreseeability of the appellant's ultimate disability. The central issue in the appeal was the correct application of the Privy Council's decision in *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co. Ltd. (The Wagon Mound No. 1)* [1961] A.C. 388; [1961] 1 All E.R. 404. *Held*, 1. In cases of damage by physical injury to the person the principles imposing liability for consequences flowing from the pre-existing special susceptibility of the victim and/or from new risk or susceptibility created by the initial injury remain part of New Zealand law. 2. In such cases the question of foreseeability should be limited to the initial injury. The tribunal of fact must decide whether that injury is of a kind, type or character which the defendant ought reasonably to have foreseen as a real risk. 3. If the plaintiff establishes that the initial injury was within a reasonably foreseeable kind, type or character of injury, then the necessary link between the ultimate consequences of the initial injury and the negligence of the defendant can be forged simply as one of cause and effect. 4. The Court of Appeal, in all the circumstances, would not exercise its discretion under s. 87 (1) of the Judicature Act 1908 to award interest on the damages, no application for such interest having been made to the Judge of the Court of first instance. 5. The question as to how far the principles in *Jefford* v. *Gee* [1970] 2 Q.B. 130; [1970] 1 All E.R. 1202 were to be regarded as applicable in New Zealand was reserved for future consideration. (*Tauranga Harbour Board* v. *Clark* [1971] N.Z.L.R. 197, referred to.) Appeal allowed. *Stephenson* v. *Waite Tileman Limited* (Court of Appeal, Wellington. 17, 18 April; 27 June 1972. Turner P., Richmond and Macarthur JJ.).

PRACTICE—CHARGING ORDER

Judgment debtor contracted to sell land to third party—Prior to contract creditor obtained judgment against debtor but charging order issued subsequent to contract and registered against land—Charging order cancelled. This was an application to have the registration of a charging order registered against land cancelled. The applicant on 25 November 1970 entered into an agreement for sale and purchase of land owned by D. the judgment debtor, and paid a deposit. The balance of the purchase price was due on 31 March 1971. The judgment creditor obtained judgment against D. on 30 July 1970 and a charging order was issued on 11 March 1971 and registered against the title to the land on 22 March 1971. The title to the land had been searched on 30 November 1970. The applicant paid the balance of the purchase money on 9 June 1971 and the certificate of title to the land and a memorandum of transfer were forwarded on 25 June 1971 to the applicant's solicitor, who lodged them for registration on 15 July 1971. On 19 August 1971 the applicant's solicitor learned of the

charging order when a requisition was received from the District Land Registrar. The charging order was renewed by order of the Supreme Court on 6 September 1971 and 10 March 1972. *Held*, 1. A charging order against land is subject to all the liens and equities created over the land prior to its date of registration. (*Re Beattie* (1887) N.Z.L.R. 5 S.C. 342; *Re Mutual Benefit Building and Investment Society; ex p Baynes* (1887) N.Z.L.R. 5 S.C. 293; *Messent* v. *New Zealand Farmers' Co-operative Assn. of Canterbury Ltd.* [1925] N.Z.L.R. 564; [1925] G.L.R. 368; *Nicol* v. *Raven* [1925] N.Z.L.R. 155; [1924] G.L.R. 186, followed.) 2. The interest of the judgment debtor in the land must be determined as at the date of the registration of the charging order. (*Nicholl* v. *Official Assignee* [1966] N.Z.L.R. 779, 781, followed.) 3. At the date of registration of the charging order the judgment debtor while remaining the registered proprietor of the land, had no equitable interest in it but an interest in personalty, viz a lien for the unpaid purchase money. (*Hillingdon Estates Co.* v. *Stonefield Estates Ltd.* [1952] Ch. 627, 631-632; [1952] 1 All E.R. 853, 856, referred to.) 4. The Courts have shown themselves to be ready to protect equitable interests without reference to the kind of instrument under which the equity may have arisen. (*Re Elliott* (1886) 7 L.R. (N.S.W.) 271; *Rowe* v. *Equity Trustees Executors and Agency Co. Ltd.* (1895) 21 V.L.R. 762; *Beavan* v. *The Earl of Oxford* (1856) 6 De G.M. & G. 507; 43 E.R. 1331, referred to.) 5. On 22 March 1971 the purchaser's equity was in existence when the charging order was registered and the judgment debtor had no equity in the land at that date. 6. The registration of the charging order was ordered to be cancelled. *Firth Concrete Industries Ltd.* v. *Duncan* (Supreme Court, Hamilton. 23 May; 6 July 1972. McMullin J.).

SHIPPING AND NAVIGATION—CARRIAGE OF GOODS

The contract of carriage—Bill of lading condition limiting liability of agents and servants and independent contractors employed by the carrier—Himalaya clause—Negligence of stevedore. This was an appeal from the judgment of Beattie J reported [1971] N.Z.L.R. 385, where the facts are set out. The appellant (plaintiff) was the holder of (but not an original party to) a bill of lading in respect of a piece of machinery which was damaged by the negligence of the respondent. The respondent by an existing arrangement carried out all the stevedoring work in New Zealand for the carrier. The respondent was not a party to the bill of lading, but pleaded that it was an independent contractor employed by the carrier and that its liability was limited by clause 1 of the bill of lading. The decision turned upon the fourth requirement which Lord Reid in *Scruttons Ltd* v. *Midland Silicones Ltd.* [1962] A.C. 446, 474; [1962] 1 All E.R. 1, 10, stated was necessary for a stevedore to obtain limitation of liability, namely ". . . that any difficulties about consideration moving from the stevedore were overcome." *Held*, 1. At the time when the bill of lading was signed and delivered the stevedore had not given any undertaking either *per se* or through its agent by which it was bound contractually to to do anything. 2. Having regard to the generality of the clause it was not intended to make the operation of clause 1 in any way dependent on any undertaking given by employees of the carrier in favour of the shipper. 3. An offer to the world must contain a promise by the person making the offer, and make known to the offeree the particular method of acceptance sufficient to make the bargain binding. Clause 1 did not come within this category. *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256, referred to. Judgment of Beattie J. reversed. *A. M. Satterthwaite & Co. Ltd.* v. *The New Zealand Shipping Co. Ltd.* (Court of Appeal, Wellington. 8, 9 May; 29 June 1972. Turner P., Richmond and Perry JJ.).

TRANSPORT AND TRANSPORT LICENSING—AIR TRANSPORT

Hiring of aircraft to individual farmers—Aircraft flown by pilot engaged by each farmer and not employed by the owner—Aircraft used for topdressing—Not carrying on an "air service"—Air Services Licensing Act 1951, ss. 2, 13 (1). The three relators, which were all commercial aerial topdressing companies, held appropriate licences pursuant to the Air Services Licensing Act 1951. They sought an injunction against the first defendant restraining it from leasing or hiring to farmers a topdressing aircraft for the purpose of spreading fertiliser, and an injunction against the second defendant restraining him from making his services available to farmers to fly a topdressing aircraft hired or leased from the first defendant for spreading fertiliser on their farms. The first defendant, a co-operative society, all of whose members were farmers, had acquired an aircraft under a hire purchase agreement which was capable of being used for aerial topdressing. The first defendant hired its aircraft to its members only, but it was not a term of the hiring that it must be used for topdressing and the member paid the first defendant by the "productive flying-hour". The second defendant was not an employee of the first defendant and when he flew the aircraft the member paid him per hour and also insured him. The first defendant also possessed a loader which could also be hired by a member. The loader was operated by D., who was not an employee of the first defendant and who was paid and insured by the member. The relators contended that it was necessary (a) for the first defendant to hold a licence under s. 13 (1) of the Air Services Licensing Act 1951 because it was carrying on an "aerial work service", or alternatively an "air transport service", and (b) for the second defendant to hold a licence because he was carrying on an "aerial work service". *Held.* A licence must be obtained if, and only if, a person is providing a *complete* air service, in the sense that there must come from the same source an aircraft and a pilot both ultimately engaged in a "flight" or a "journey" for "hire or reward". The action was dismissed. *Attorney-General ex rel James Aviation Ltd. and Others* v *Makarau Co-operative Lime Society Ltd. and Another* (Supreme Court, Auckland 27, 28, 29 March; 13 July 1972 Moller J.).

TRANSPORT AND TRANSPORT LICENSING—OFFENCES

Driving while under the influence of drink or drug—Driver not in vehicle charged with driving or attempting to drive vehicle while under the influence of drink—Transport Act 1962, s. 58 (1) (a) The appellant appealed against conviction on a charge of the offence of driving or attempting to drive a motor vehicle with an excess proportion of alcohol in his blood pursuant to s. 58 (1) (a) of the Transport Act 1962. A traffic officer saw the appellant's truck parked about six feet from the kerb on its incorrect side. The door of the truck was open and the appellant was wandering round the truck. The appellant told the officer that he had swung to the right to avoid a parked vehicle. The appellant was looking for the driver of the parked vehicle. There was

no one else in the vicinity. As the appellant smelt of alcohol breath tests were duly administered and the blood test revealed 242 milligrammes of alcohol per 100 millilitres of blood. The defence was that it had not been proved that the appellant was driving the truck. *Held*, 1. Notwithstanding that ss. 1 and 2 of the Road Safety Act 1967 (U.K.) was expressed in different language from that in ss. 58 and 58A of the Transport Act 1962, the decisions on the English statute were of assistance. 2. A person may still be said to be driving a vehicle when he leaves the vehicle for a purpose connected with the driving of the vehicle, but he may also be said to be driving if he leaves the vehicle for a purpose unconnected with driving it. (*Pinner* v. *Everett* [1969] 1 W.L.R. 1266, 1273-1274, 1279; [1969] 3 All E.R. 257, 259, 264, applied. *Sasson* v. *Taverner* [1970] 1 W.L.R. 338; [1970] 1 All E.R. 215; *R.* v. *Bove* [1970] 1 W.L.R. 949; [1970] 2 All E.R. 20; *R.* v. *Kelly* [1970] 1 W.L.R. 1051; [1970] 2 All E.R. 198; *Stevens* v. *Thornborrow* [1970] 1 W.L.R. 23; [1969] 3 All E.R. 1487, referred to.) 3. Although the appellant had left the driving seat there was no fresh event unconnected with driving. *Wilson* v. *Ministry of Transport* (Supreme Court, Wanganui. 28 June; 6 July 1972. Quilliam J.).

REGULATIONS

Regulations Gazetted 18 January to 15 February 1973 are as follows:

Customs Tariff Amendment Order 1973 (S.R. 1973/4)
Customs Tariff Amendment Order (No. 2) 1973 (S.R. 1973/13)
Customs Tariff Amendment Order (No. 4) 1973 (S.R. 1973/14)
Education Board Grants Regulations 1973 (S.R. 1973/5)
Education (Secondary Instruction) Regulations 1968, Amendment No. 7 (S.R. 1973/6)
Exchange Control Suspension Regulations 1973 (S.R. 1973/25)
Excise Duty (Cigars and Snuff) Order 1973 (S.R. 1973/1)
Factories Consolidating Regulations 1937, Amendment No. 4 (S.R. 1973/10)
Fisheries (General) Regulations 1950, Amendment No. 20 (S.R. 1973/11)
Hospital Employment (Grading Committees) Regulations 1973 (S.R. 1973/15)
Kindergarten Regulations 1959, Amendment No. 6 (S.R. 1973/16)
Milk Producer and Other Prices Notice 1968, Amendment No. 12 (S.R. 1973/12)
Racing (Totalisator) Order 1973 (S.R. 1973/17)
Revocation of Exchange Control Suspension Regulations 1973 (S.R. 1973/26)
Rotorua Trout Fishing Regulations 1971, Amendment No. 2 (S.R. 1973/18)
Sales Tax Exemption Order 1967, Amendment No. 10 (S.R. 1973/19)
Secondary School Grants Regulations 1967, Amendment No. 4 (S.R. 1973/7)
Southern Lakes Fishing Regulations 1971, Amendment No. 1 (S.R. 1973/20)
State Services Salary Order 1973 (S.R. 1973/8)
State Services Salary Order (No. 2) 1973 (S.R. 1973/9)
Taupo Trout Fishing Regulations 1971, Amendment No. 1 (S.R. 1973/21)
Technical Institute Bursaries Regulations 1966, Amendment No. 3 (S.R. 1973/22)
Technical Teachers Certificate Regulations 1973 (S.R. 1973/23)
Weights and Measures Metric Packages Notice 1973 (S.R. 1973/24)
Wildlife (Canada Goose) Order 1973 (S.R. 1973/2)
Wildlife Regulations 1955, Amendment No. 7 (S.R. 1973/3)

CATCHLINES OF RECENT JUDGMENTS

Town and Country Planning—Right of appeal from Board—"Property affected"—*Evans* v. *Town & Country Planning Appeal Board* [1963] N.Z.L.R. 244 approved. *Rogers & Ors.* v. *Stephens & Ors.* (Court of Appeal, Wellington. 1972. 9 November. Wild C.J., Turner P., Richmond J.).

Transport, Goods Service Licence—Driver's unauthorised admissions to Traffic Officer not admissible to prove breach. *Kenneally & Sons Ltd.* v. *Fincham* (Supreme Court, Invercargill. 1972. 14 November. Wild C.J.).

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

Understand your Witness—Barristers may goad patients into a highly dangerous and homicidal frame of mind, a Melbourne psychiatrist told the ninth annual congress of the Australian and New Zealand College of Psychiatrists in Hobart.

Dr David Barnes said: "There is, of course, no simple relationship, and never will be between psychic trauma and its effects."

Doctors, he said, were all familiar with paranoid reactions occurring in these instances.

These reactions, as past bitter and bloody experience had shown, he said, could be both highly destructive and dangerous.

"It is important that we cannot have too much awareness and understanding of the existence of such potentially dangerous paranoid individuals," he said.

"It is both socially and personally alarming how lightheartedly and insightlessly solicitors and barristers will appear to treat these litigants, in the situation both in and out of Court, and in particular in the context of cross-examination.

"A psychologically unsophisticated barrister may goad a patient into a highly dangerous and homicidal frame of mind," he said.

"The ineptness of a number of members of the bar is in this regard surprising," he said.

CASE AND COMMENT

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

Defensive weapons are offensive

From time to time one reads stories of how some people in the United States are wont to go about their daily lives armed with pistols or cans of mace and the like, their object being to have a defensive capability should they be attacked in the street. The recent decision of the Queen's Bench Division in *Evans* v. *Hughes* [1972] 3 All E.R. 412 indicates that anyone who adopts a similar practice in England or New Zealand will himself be guilty of an offence. In this case the defendant had been arrested by the police when he had been found in a public place in possession of a metal bar about six inches long. The defendant's story (which the justices accepted as true) was that one week previously he had been subjected to an unprovoked attack by three youths; he had fought them off but they had said they would get him some other time, and since then he had carried the bar to protect himself. The defendant was charged with having an offensive weapon in a public place, contrary to s. 1 (1) of the Prevention of Crime Act 1953; in New Zealand this offence is found in s. 53A of the Police Offences Act 1927, the provisions of which are in all material respects identical to the English Act. Section 53A (1) provides that: "Every person commits an offence who, without lawful authority or reasonable excuse, the proof of which shall be on him, has with him in any public place any offensive weapon." "Offensive weapon" means "any article made or altered for use for causing bodily injury, or intended by the person having it with him for such use" (s. 53A (7)). In *Evans* v. *Hughes* there were two issues: (1) was the metal bar an "offensive weapon", and (2) even if it was, had the defendant established a reasonable excuse for having it? The justices answered both these questions in favour of the defendant; the prosecutor appealed, but although the Queen's Bench Division held that the metal bar was, in fact, an "offensive weapon" it was not prepared to disturb the justices' finding on the second question, with the result that the defendant's acquittal stood.

In respect of the first question, the Court accepted that the first two classes of "offensive weapons" were inapplicable here in that the bar was not "made or altered for use for causing bodily injury", but it was nevertheless within the statutory definition because the defendant had intended to use it to cause such injury. The justices had found that he intended it for such use "if and only if such use was necessary for the purpose of defending himself", but Lord Widgery C.J. thought it was clear that the fact that the defendant only intended to use it defensively "does not prevent it from being an offensive weapon within the meaning of the definition" ([1972] 3 All E.R. at 415). This means that there is a sufficient intention to injure even though the intention is only to injure *lawfully*, but given the statutory defence of lawful authority or reasonable excuse this conclusion seems unobjectionable. It also provides a neat example of a statutory requirement of intention being held to be satisfied by a conditional intention: the defendant only intended to cause injury *if* it was necessary (for discussions of "conditional intention", see *Glanville Williams on Criminal Law, The General Part* (2nd) para. 23, and *Mental Element in Crime*, 51-54; and for another recent example, see *R.* v. *Bentham* [1972] 3 All E.R. 271).

The question whether the defendant had had a "reasonable excuse" for having the offensive weapon was rather more difficult. It was established by *Evans* v. *Wright* [1964] Crim. L.R. 466, that the reasonable excuse had to exist at the particular time the weapon was carried, so even if there was a reasonable excese for carrying it at one point of time that was no defence if the defendant continued to carry it when such excuse had ceased to exist (the Court there held that although a wages clerk might have a reasonable excuse for carrying weapons while transferring large sums of money, yet he was guilty of the offence if he continued to carry them at other times). Thus, in considering the reasonableness of an excuse the Court must have regard to "the immediately prevailing circumstances". As far as the particular defence in *Evans* v. *Hughes* was concerned, Lord Widgery's conclusion was that "it may be a reasonable excuse for the carrying of an offensive weapon that the carrier is in anticipation of imminent attack and is carrying it for his own personal defence", but this is so only if there is an "imminent particular threat". This does not protect a person who regularly arms himself because he thinks there is always some risk of attack: "this Act", his Lordship said, "never

intended to sanction the permanent or constant carriage of an offensive weapon merely because of some constant or enduring supposed or actual threat or danger to the carrier. People who are under that kind of continuing threat must protect themselves by other means, notably by enlisting the protection of the police. . . ." ([1972] 3 All E.R. at 415; it may be noted that in *R.* v. *Hudson* [1971] 2 All E.R. 244, 247, in considering the effect of duress on a defendant, Lord Widgery took a rather less sanguine view of the ability of the police to protect people who are subjected to continuing threats). In this case the defendant had been subjected to a "particular" threat, but the Court thought his case was a borderline one: it was thought he would have little difficulty in establishing a reasonable excuse for arming himself for a day or two but the question was much more doubtful when seven days had elapsed since the attack. Nevertheless, the Court was not prepared to hold that it was not open to the justices to find a reasonable excuse on these facts, so the prosecutor's appeal was dismissed.

The Court's emphasis on the time lapse in this case suggests that even where there has been an actual threat to a person yet it will usually not be reasonable for him to carry a weapon indefinitely merely because he fears he may be attacked at any time. Although what is reasonable must depend on all the circumstances of any particular case, the Court presumably takes the view that as more time passes it will usually become less reasonable to anticipate imminent attack, and perhaps an additional factor is that as more time passes a person will usually have more opportunity to enlist the help of the police. Where there has been no actual threat the position is a little more clear-cut: in such a case a person generally has no excuse for carrying an offensive weapon merely because he fears attack. Thus in *Evans* v. *Hughes* the Court accepted as correct the Scottish decision of *Grieve* v. *McLeod* 1967 S.C. (J) 32. There a taxi driver carried a two-foot loaded rubber cosh in his cab and the defence of reasonable excuse was held not to be established in, spite of an argument to the effect that he carried it only for the purpose of self-defence against attacks which taxi drivers are sometimes subjected to. The Scottish Court took the view that one of the objects of the Act was to dissuade citizens from taking the law into their own hands. On the other hand, in *Evans* v. *Wright* it was recognised that a person may have a reasonable excuse if he is performing a task, such as carrying wages, which carries with it a peculiarly high risk of attack, so presumably the defence failed in *Grieve* v. *McLeod* because the risk to taxi drivers was not shown to be sufficiently greater than the risk to ordinary citizens. Professor J. C. Smith has also noted that the nature of the weapon may be crucial in such cases, and he suggests that "the practical answer for the taxi driver may be to keep his starting handle in a convenient place". ([1967] Crim. L.R. 424). There is authority which suggests that even if a person has a reasonable excuse for having an article with him, yet he becomes guilty of this offence as soon as he intentionally uses it, without reasonable excuse, to cause bodily injury (see *Powell* [1963] Crim. L.R. 511, contra *Jura* [1954] 1 All E.R. 696). This has been persuasively criticised (*Smith and Hogan, Criminal Law* (2nd), 283-285) but even if it is correct the taxi driver with the starting handle would seem to be protected: it is an offensive weapon if he has a conditional intention to use it to cause bodily injury, but it seems he has a reasonable excuse for carrying it in that he also has it for a quite different, lawful purpose, and even if he does use it to injure he will retain a reasonable excuse for having it if he only uses it in reasonable self-defence.

The crucial question apparently being whether a person's excuse for being armed is reasonable, it may be that whether this defence is established may also depend on the seriousness of the injury likely to be inflicted by the type of weapon carried, and the seriousness of the attack which the person anticipates. If this is so, a female hitch-hiker could have a reasonable excuse for carrying a drum of pepper with the view to warding off attacks, but would probably not be justified in carrying a knife or pistol for the same purpose.

Finally, it may be noted that in New Zealand, s. 16 (1) of the Arms Act 1958, makes it an offence to carry any "firearm, ammunition, explosive, or dangerous weapon except for some lawful, proper, and sufficient purpose". Presumably anyone who has a "reasonable excuse" within s. 53A of the Police Offences Act 1927 will also have a defence under the Arms Act, and similarly such an excuse will presumably support a defence to any charge under s. 51 or s. 52 (1) (g) of the Police Offences Act in that it is a "valid and satisfactory reason" for being armed, and it negatives any "felonious intent".

G.F.O.

The Case of the Absent-minded Shoplifter

In *Cottle* [1958] N.Z.L.R. 999, 1010 Gresson P. noted that New Zealand's statutory version of the *McNaghten* rules, which is now found in s. 23 of the Crimes Act 1961, merely requires

that a defendant must have acted while "labouring under natural imbecility or disease of the mind" and unlike the common law formula there is no explicit requirement that any such disorder must have given rise to a "defect of reason": all that is required is that the mental disease caused a cognitive failing within s. 23 (2) (a) or (b). Gresson P. raised the question whether the absence of any reference to a "defect of reason" might be material "in a particular case", but he did not further explore this possibility.

With these remarks in mind it is of some interest to consider the recent case of *Clarke* [1972] 1 All E.R. 219 (C.A.). A 58-year-old lady was charged with theft as a result of her walking out of a supermarket with three articles, which had not been paid for, concealed in her shopping bag. In essence her defence was a simple denial of *mens rea*: she said she had no intention to steal these articles, that she had no recollection of putting them into her bag and that she must have done this in a "moment of absent-mindedness". This was supported by evidence that she had been unwell for some time and as a result of this and other matters she had become depressed and forgetful. Evidence was given by a general practitioner and a consultant psychiatrist to the effect that the defendant was suffering from "depression". One of these witnesses was prepared to describe this as a "minor mental illness" and the psychiatrist said it could produce states of absent-mindedness: "the consciousness, if you like, goes off at times and comes on again"; he also described these as periods of "confusion and memory lapses", during which a person would "do things he would not normally do".

The assistant Recorder before whom the defendant was being tried took the view that on this evidence the defence amounted to one of insanity and, in order to avoid the consequences of this defence, counsel was forced to advise his client to change her plea of not guilty to one of guilty.

If the evidence really amounted to evidence of insanity the assistant Recorder would have been right in treating the defence as one of insanity for it now seems quite clear that in both England and New Zealand when a defence is based on the disordered state of the defendant's mind the Court should leave the question of insanity to the jury if there is evidence of it, even though the defendant denies he is relying on that defence (see, generally, *Cottle*, *supra*).

In Clarke, however, the Court of Appeal held that the *Mc Naghten* rules have no application to a case such as this, and so the defendant's conviction was quashed. The Court thought it possible that the defendant was suffering from a "disease of the mind" (although it expressed no concluded view on that) but it held that the evidence did not show she suffered from "a defect of reason" or that she was "unable" to know the nature and quality of her acts. It followed from this that the evidence did not disclose insanity: "The *McNaghten* rules relate to accused persons who by reason of a disease of the mind are deprived of the power of reasoning. They do not apply and never have applied to those who retain the power of reasoning but who, in moments of confusion or absent-mindedness, fail to use their powers to the full" (*per* Ackner J. at 221).

How should such a case be dealt with in New Zealand? The English Court was able to hold that the defence did not amount to insanity by enunciating a previosuly unarticulated limit on the *Mc Naghten* rules: for there to be a "defect of reason" there must be impairment of the powers of reason and a mere failure to reason is not enough. In New Zealand the Court would have to decide whether, as a matter of statutory interpretation, such a case fell within s. 23 of the Crimes Act 1961. Although it seems likely that the insanity rules were never intended to apply to such a case as *Clarke* a Court here might experience more difficulty than the English Court in excluding such a case from their ambit.

One argument which might be raised is that s. 23 (2) in terms requires that a defendant be "incapable" of understanding the nature and quality of his act, or of knowing that it was wrong: it might be argued that a person in Mrs Clarke's condition would be capable of such awareness although she might in fact act without it. The *Mc Naghten* rules themselves do not, in terms, require incapacity and in the past New Zealand Courts have assumed that notwithstanding the wording of s. 23 it suffices that a defendant in fact lacked the relevant knowledge as a result of a "disease of the mind" (e.g. *Macmillan* [1966] N.Z.L.R. 616, 621). Although Ackner J. does seem to suggest that a defendant must be "unable" to have the relevant knowledge it is submitted that the better view is that it is enough if such awareness is in fact absent: "it is unthinkable that a jury should be told to distinguish between proved absence of knowledge and a theoretical capacity to know". (Adams, *Criminal Law and Practice in New Zealand* (2nd ed.) para 423). It might also be emphasised that a person such as Mrs Clarke is not in a state of "total lack of consciousness", but once it is accepted that absolute incapacity

to know is not needed there is nothing in s. 23 (2) (a) which suggests that total "unconsciousness" is required. By analogy with the rules relating to automatism it appears to be at least sufficient if a defendant is "unconscious of *what he is doing*", or if "the deliberative functions of the mind" are absent so that he "acts automatically" (*Burr* [1969] N.Z.L.R. 736, 744, 745, *per* North J; emphasis added). In *Clarke* there seems to have been at least evidence that the defendant was in such a condition.

If the above reasoning is correct it appears that in order to reach the same conclusion as the Court in *Clarke* a New Zealand Court would have to interpret the term "disease of the mind" in such a way that it excluded a condition such as the defendant in that case suffered from. This phrase is probably the most obscure aspect of the insanity rules. It is not a medical or scientific expression and it has been said that it is a term which "defies precise definition and which can comprehend mental derangement in the widest sense" (*Cottle*, *supra*, at 1011 *per* Gresson P.). Attempts at positive definition have tended to end in the use of rather unhelpful and vague expressions such as "disorder", "derangement", "defect" or "disturbance", which are to be contrasted with the "mere excitability of a normal man, passion, even stupidity, obtuseness, lack of self-control, and impulsiveness", none of which suffice (*Porter* (1933) 55 C.L.R. 182, 188, *per* Dixon J.). But some things are clear: for there to be a "disease of the mind" it is enough if the functions of the mind have been thrown into "derangement or disorder" and it is not necessary for there to have been any deterioration of the brain cells or any other physical organ; also, the disorder may be temporary or permanent, curable or incurable (see *Porter*, *supra*; *Kemp* [1957] 1 Q.B. 399). On the other hand, the Courts have held that transitory disorders caused by such external factors as a blow on the head, hypnotism, or the absorption of alcohol or narcotics, are not diseases of the mind (*Cottle* [1958] N.Z.L.R. 999, 1007, 1026, 1032-1033), although Lord Denning has said that the concept will include any mental disorder which manifests itself in violence (or, presumably, other anti-social behaviour) if it is "prone to recur" (*Bratty* v. *A.G. for Northern Ireland* [1961] 3 All E.R. 523, 534).

None of the established limits on the concept appear to apply to a condition of "depression" such as that in *Clarke* and thus it appears to be quite possible that the assistant Recorder was correct when he classified it as a "disease of the mind". If this is so it seems that it could be strongly argued that in New Zealand the defence would be properly classified as one of insanity. Such a defence does not necessarily entail "disastrous consequences" to the accused in that a New Zealand Court now has power (which will be exercised only in exceptional cases) to order the immediate release of a person acquitted on the ground of insanity if, after hearing medical evidence, it is satisfied that this "would be safe in the interests of the public" (s. 39G of the Criminal Justice Act 1954, inserted by the Criminal Justice Amendment Act 1969). However, in *Clarke* the medical evidence was to the effect that "it would be absurd to call anyone in the appellant's condition insane" ([1972] 1 All E.R. 221) and in view of this it is thought that a New Zealand Court would properly resist the conclusion that s. 23 extended to such a case (c.f. *Macmillan* [1966] N.Z.L.R. 616, where one of the factors which induced the Court of Appeal to accept the "subjective" interpretation of s. 23 (2) (b) was that an "objective" test would have the effect of removing the defence from a large class of persons "clinically demonstrable as persons of unsound mind". Presumably the Court will also want to exclude people who are demonstrably "sane".) In order to arrive at this conclusion it appears that it may be necessary for the Court to hold that the absence of explicit reference to a "defect of reason" in the Crimes Act was not intended to alter the common law. If this is so, the Court could then interpret "disease of the mind" in s. 23 as meaning a disease of the mind which gives rise to a "defect of reason", and once this step is taken the decision in *Clarke* could be applied here with the result that the insanity rules would not apply to a person who retained his powers of reason but who in a moment of "confusion or absent-mindedness" failed to use those powers to the full.

The above suggestion might be thought to involve a rather loose approach to s. 23 but it is submitted that it is consistent with the approach of New Zealand Courts in the past to the interpretation of the codified versions of this defence (see, in particular, *Murdoch* v. *British Israel World Federation (N.Z.) Inc.* [1942] N.Z.L.R. 600; *Macmillan* [1966] N.Z.L.R. 616).

G.F.O.

"Person" means "Penis"

Section 47 of the Police Offences Act 1927 (as amended by the First Schedule of the Police Offences Amendment Act 1967) provides for the offence commonly known as "indecent exposure" in the following terms: "Every person commits an offence, and is liable to imprisonment for a term not exceeding one year or to a

fine not exceeding four hundred dollars, who wilfully and obscenely exposes his person in any public place or within the view thereof." The equivalent statutory offence in England is found in s. 4 of the Vagrancy Act 1824; this is in similar terms to the above New Zealand provision, and in particular both sections proscribe the exposure of one's "person". In *Evans* v. *Ewels* [1972] 2 All E.R. 22, the Queen's Bench Division had to consider the precise meaning of this rather coy expression. The defendant had exposed himself to a female complainant in so far as he had walked past her in the street while his trousers were "unfastened at the front, exposing a patch of bare skin low down on his stomach in a 'V' shape". This apparently upset the complainant, as it was intended to do, and in view of this the justices convicted the defendant of the above statutory offence. This conviction was quashed on appeal because the Court took the view that in this context the word "person" has a special meaning and is merely a synonym for "penis". The defendant had exposed part of his flesh which was "close to the private parts", but that was not enough. The Court thought that even by 1824 the word "person" probably had this special meaning ("It may be . . . that it was the forerunner of Victorian gentility which prevented people calling a penis a penis. . . ." *ibid* at 24, *per* Ashworth J.), but in any case it was quite satisfied that this had become established in the intervening 150 years. It also thought that this narrow interpretation of the offence was supported by the fact that in enacting s. 4 of the Vagrancy Act 1824 Parliament had apparently merely had the object of dealing efficiently with a number of prevalent nuisances by making them summary offences.

In reaching the above conclusion the Court disapproved the contrary decision of the Devonshire Quarter Sessions in *Norton* v. *Rylands* [1971] 3 C.L. para. 61, and approved a passage in Smith and Hogan, *Criminal Law* (2nd ed.) 319 where the authors had noted the suggestion that "person" means "genital organ", so that "the exposure of the backside is not within the section" (quoting *Sexual Offences*, ed. Radzinowicz, 427).

It is possible that the word "person" in s. 47 of the Police Offences Act 1927 will be held to have a rather wider meaning than in the English Act, for the New Zealand provision is distinguishable from the English one in at least two respects. Firstly, unlike the Vagrancy Act 1824, s. 47 does not contain a "catalogue" of various different kinds of "public nuisance", and it is possible that this would encourage the Court to resist the idea that the section is aimed at one very particular class of act. Secondly, and more importantly, the English provision (but not the New Zealand one) requires that a defendant act "with intent to insult [a] female", and it is perhaps because of this specific reference to females hat the offence is regarded as being limited to exposure by a male (*cf* Smith and Hogan, *op. cit*, 319). Apart from the meaning of "person" there is nothing in the wording of s. 47 to rebut the presumption that "words importing the masculine gender include females" (s. 4 of the Acts interpretation Act 1924), so it appears that the New Zealand offence can be committed by females, unless the New Zealand Courts follow *Evans* v. *Ewels* in holding that "person" means nothing more nor less than "penis". Even if s. 47 extends to females the Court could still take a narrow view and hold that "person" merely means "genital organ", but it would also be open to the Court to adopt a wider view. If this latter approach is adopted the limits of the New Zealand offence will probably be the same as those contemplated by the Court in the South African case of *S.* v. *B.* 1968 (2) 649. There the statute made it an offence for anyone to wilfully exhibit "himself or herself" indecently within view of a public place. The facts were that a youth and his girlfriend were having sexual intercourse in a field about 40 yards from a public road when they were observed by two passers-by, who thereupon crossed the field and hauled the youth away from the girl. The amorous pair had, however, kept their clothes on so that the only parts of their bodies which could in fact be seen from any public place were their faces and their hands. Notwithstanding the public fornication, Colman J. was inclined to think that the *actus reus* of the above offence had not been committed for he was of the opinion that for this offence there had to be exposure of "some part of the body which it is not decent to expose in public" (*ibid*, 650).

It is submitted that even on a wide view of s. 47 such a case should be decided in the same way in New Zealand. It can hardly be doubted that a part of the body can only be said to be "exposed" if it is so revealed that it could be seen by another, and furthermore, it probably cannot be said to be "obscene" if it cannot be seen by anyone (*cf Walker* v. *Crawshaw* [1924] N.Z.L.R. 93.) Also, even if s. 47 is not limited to the exposure of genital organs, it does seem necessary that it be limited to the exposure of parts of the body which can be said to be "obscene" in some circumstances: the Court could not hold, by analogy with the law relating

to indecent assault, that it suffices if there is exposure of any part of the body "accompanied with circumstances of indecency" on the part of the defendant, for the practical consequence of such an approach would be to render every case of public "obscenity" a case of "obscene exposure", which is absurd.

It may be added that in *S.* v. *B.* the actual ground for the decision was that the couple had not acted "wilfully" in that they believed they could not be seen; in New Zealand it seems that an exposure will only be "wilful" if the defendant realises there is a "reasonable probability" that it can be seen in or from a public place (*cf. Walker* v. *Crawshaw*, *ibid*).

Of course, if it is held that s. 47 is not confined to genital organs then it becomes necessary to consider what other parts of a body might be "obscene" if exposed in public. In this context the concepts of "obscenity" and "indecency" appear to have much the same meaning, and although obscenity is perhaps the stronger of the two it does not here appear to mean that any tendency to deprave and corrupt need be proved. Whether conduct is obscene or indecent may doubtless depend on all the circumstances, so that quite mild abuse may be "indecent" if it occurs in a church (*Abrahams* v. *Carey* [1967] 3 All E.R. 179) while acts of prostitution may not be indecent if they take place in private (*Ex parte Fergusson*; *Re Premises No.* 13 *Charlotte Lane, East Sydney* [1967] 1 N.S.W.R., 185, affirmed at 791). It appears to be impossible to provide any satisfactory general description of these concepts, although it has been said that mere "immodesty" is not enough (*McGowan* v. *Langmuir* 1931 S.C. (J) 10, 13) and that what is required is conduct which is "offensive to common propriety" (*Purves* v. *Inglis* (1915) 34 N.Z.L.R. 1051, 1053; *Stanley* [1965] 1 All E.R. 1035, 1038.)

In view of all this it would seem that if a wide view of s. 47 is adopted then it seems probable that the exposure of a posterior would be caught, as well as the exposure of genital organs, but it may be doubted whether the section will extend to other parts of the body. In 1733, it may be noted, a woman was indicted for "running in the Common Way naked down to the Waist", but the indictment was quashed "for nothing appears immodest or unlawful". (*Gallard* (1733) W. Kel. 163; 25 E.R. 547). Possibly this would offend "common propriety" today, or it may be that it depends on the nature of the public place: what is acceptable on the beach may be unacceptable downtown. The actual situation in *Evans* v. *Ewels* seems to be open to similar doubts.

As far as s. 47 of the Police Offences Act is concerned, these doubts will not arise if the English view of "person" is accepted, but such cases might still be punishable pursuant to ss. 125 and 126 of the Crimes Act 1961. These sections render everyone liable to up to two years' imprisonment who "wilfully" does an indecent act in or within view of a public place, or who does any indecent act in any place with intent to insult or offend any person. These offences are triable in the Magistrate's Court and, indeed, they seem to render the particular offence of "indecent exposure" unnecessary, particularly as they merely require that a defendant act "indecently" whereas s. 47 requires that the exposure be "obscene". The Crimes Act provisions appear to cover all cases that fall within s. 47 and they will also clearly reach public copulation (*cf. Walker* v. *Crawshaw*, *supra*), but the inherent uncertainty of the concept of indecency means that their outer limits must remain doubtful. But even if certain conduct which some might find insulting or annoying is held not to be indecent there remains the possibili y that it will be caught by the equally eluisve proscription of "offensive . . . insulting or disorderly" behaviour in s. 3D of the Police Offences Act 1927 where the question appears to be whether the likely annoyance or insult is sufficiently deep or serious "to warrant the interference of the criminal law" (*Melser* v. *Police* [1967] N.Z.L.R. 437, 444, *per* Turner J.) The lower Court in *Evans* v. *Ewels* would apparently have answered such a question in the affirmative in that case.

G.F.O.

The House of Lords and the Doctrine of Precedent

In 1972 the House of Lords has four times had to consider whether it should exercise the power given it by the famous Practice Statement [1966] 3 All E.R. 77, to refuse to follow its own decisions. Briefly summarised, the cases, and the conclusions reached in them, are as follows:

In *Jones* v. *Secretary of State for Social Services* [1972] 1 All E.R. 145, the House refused to depart from *Re Dowling* [1967] 1 All E.R. 210, and held that, on the proper construction of the National Insurance Act 1965, a determination by an insurance tribunal as to the cause of an injury was "final" and could not be questioned by a medical tribunal in later proceedings.

In *Cassell & Co. Ltd.* v. *Broome* [1972] 1 All E.R. 801, the House followed *Rookes* v. *Barnard* [1964] 1 All E.R. 367 which had severely limited the occasions on which exemplary damages could be awarded. In fact, the majority of their Lordships were pleased to reach this

decision, for they agreed with the law in *Rookes*.

In *Knuller (Publishing, Printing and Promotions) Ltd.* v. *D.P.P.* [1972] 2 All E.R. 898 the House refused to overrule *Shaw* v. *D.P.P.* [1961] 2 All E.R. 446 and reaffirmed that there was a common law offence of conspiracy to currupt the public morals.

The final case, *British Railways Board* v. *Herrington* [1972] 1 All E.R. 749, is in many ways the most interesting, for there the House did depart from its earlier decision in *Addie* v. *Dumbreck* [1929] A.C. 358, which had held that an occupier of land owes no duty to look to the safety of potential trespassers on his property. *Herrington* substitutes a new principle that the occupier who knows that trespassers are likely to come on his land and who knows of facts which could constitute a serious danger to such trespassers must take such steps as are required by common humanity to avoid the danger. Yet only two members of the House, Lords Reid and Pearson, unequivocally used their power under the Practice Statement to dispose of *Addie*. Lords Wilberforce and Diplock were able, by looking at the cases coming after *Addie*, to find that the law as stated in that case had been "developed", and could now be stated in a way which would be satisfactory in a modern age. Their approach is not entirely easy to reconcile with a doctrine of binding precedent, for it does seem to imply that the later Courts had *changed* the rule in *Addie*. The fifth lord, Lord Morris, was somewhat equivocal, but he did say at one point that "on its facts, the decision in *Addie's* case should in my view have been the other way"; he can thus probably be counted amongst those who thought the case should be overruled.

It is very clear that the House of Lords is not ready to use its new-found power to reconsider its own decisions. This will only be done if some compelling reason exists. There are constant expressions to this effect in the judgments. It is of particular interest that several of the Judges found themselves obliged to say that even if they disagreed with the earlier case in the sense that they would not have reached the same decision themselves, yet this alone was not sufficient reason for departing from it. Most emphatic in this regard is Lord Reid's judgment in *Knuller*. Lord Reid had. of course, dissented in *Shaw's* case; he made it clear in *Knuller* that he still adhered to the view he had there expressed, but felt that the interests of certainty of the law prevailed over all other considerations. Certainty of the law indeed weighed heavily with the members of the House in all the cases, presumably for two reasons, first that citizens should be able to plan their conduct in reliance on the law, and second that vacillation by the highest Court of appeal can only lead to increased litigation in that more parties will be tempted to try to persuade the House to change its mind.

The cases illustrate that there are at least three classes of case where the House will be particularly reluctant to overturn an earlier decision, and the first two relate directly to the certainty argument.

First, the House has shown that it will not readily depart from a former decision involving a question of statutory interpretation. This was expressly stated by the majority of their Lordships in *Jones*. The reason appears to be that there are often several viable interpretations of a statutory provision, and different Judges may well arrive at different interpretations depending on whether they take a literalist or purposive approach. This being so, it is often difficult to say that a particular interpretation is clearly wrong, and if the present Court were to overrule readily this would often amount merely to substituting its own view. And, of course, if the present Court could do this, so could a future Court revert to the original position. Certainty would thus never be attained. (It may be noted at this point that the House accorded a mixed reception to the argument that Parliament, by amending the relevant statute subsequently to the earlier decision without altering the effect of that decision, was thereby tacitly approving it. The more convincing view would seem to be that of Lords Reid and Diplock in *Knuller* that parliamentary inaction may have several causes, and tacit approval of the law as it stands is merely one possibility, and not always the likely one).

Second, the Practice Statement itself indicates that there is an "especial need for certainty as to the crimina law". This was echoed by most of their Lordships in *Knuller* as a reason for not overturning *Shaw*. This is a somewhat elusive argument, and has not always been consistently applied by the English Courts themselves. For instance, it is established practice that the Criminal Division of the Court of Appeal has greater latitude to depart from precedent than its civil counterpart. In fact, the argument has differing strength according to whether it is applied against or in favour of the accused. While there is undoubted justice in not convicting an accused who has relied on a former case declaring his conduct to be non-criminal, it is not really possible to maintain such a stand when the shoe is on the other foot and the effect of overriding the earlier decision would be to acquit the accused. One cannot help wondering

if another consideration lay at back of the Court's attitude in *Knuller*: if *Shaw's* case had been declared to be wrong, the thirty or so people who had been convicted in accordance with it in the decade since it was decided would have had legitimate cause for wrath.

Third, there are some cases where any reform that is necessary should be left to Parliament. This is a line one has found taken increasingly frequently in recent years, particularly in the English Courts but also occasionally in New Zealand (an example is *Ross* v. *McCarthy* [1970] N.Z.L.R. 449). No one has as yet clearly defined the respective spheres of competence of the Parliament and the Courts in relation to changing the law, but one can see merit in the argument that there are some "hot" political issues in respect of which the Court should be reluctant to embark on legislative activity. For one thing, the Courts must appear unbiased and apolitical, and this image could be tarnished if they were to take sides in matters of public debate; for another, the Courts are not in the best position to be the arbiters of such issues when they, unlike a parliamentary select committee, cannot hear representations from interested groups. In *Knuller*, at least two of the Lords—Reid and Simon—concluded that the degree to which the law should be concerned with morality was a matter best left to Parliament. It may be surmised that this type of reasoning has special force in Britain where a Law Commission is actually working towards large-scale statutory amendment of the law, and there is a reasonable prospect that many unsatisfactory areas will be thus dealt with.

The House was thus very ready to explain the kinds of case in which it will not overrule its own decisions; it was not so explicit about the kinds of case in which it will. Perhaps it is not desirable that the grounds for overruling should be stated in advance; obviously each case must be dealt with on its merits. All their Lordships were prepared to say was that they might be persuaded to overrule if the earlier decision had caused clear injustice or serious administrative inconvenience, or was contrary to public policy. Similarly, a case might be disposed of if it were shown to be "impeding the proper development of the law" (although if it is, that will probably be for one of the reasons just stated anyway). This was the situation which faced the Lords in *Herrington*, for *Addie* v. *Dumbreck* had been distinguished by lower Courts for years on the most tenuous and artificial grounds. Fine distinctions such as those it had caused to be made do a legal system no good. Also in *Herrington* Lord Pearson made it plain that one of the grounds which influenced him was that times had so changed since *Addie* that the rule it laid down was no longer appropriate to modern conditions. "It seems to me" he said, "that the rule in *Addie* v. *Dumbreck* has been rendered obsolete by changes in physical and social conditions. . . . It has become an anomaly and should be discarded."

J.F.B.

"Policy" and Economic Loss

With the passing of the Accidents Compensation Act 1972, the tort of negligence has all but expired so far as damages for personal injury are concerned. The main sphere of operation of that tort from now on will be in relation to property damage and economic loss. So far as property damage is concerned, there are few problems: the broad principle of *Donoghue* v. *Stevenson* is readily applicable, and in recent years more and more kinds of property damage have been dealt with by applying it (e.g. *Bognuda* v. *Upton & Shearer* [1972] N.Z.L.R. 741; *Dorset Yacht Co.* v. *Home Office* [1970] 2 All E.R. 989). But economic loss raises far more thorny problems.

The recent case of *Spartan Steel & Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.* [1972] 3 All E.R. 557 is a useful illustration of some of the problems, and it is in several ways a most significant case. This note will not attempt to be exhaustive of them. The facts fall into a familiar pattern. The defendant firm of contractors negligently damaged an electric cable while digging up the road. As a consequence the plaintiffs were without electricity for a time, and had to pour molten metal out of their furnace to prevent it solidifying. The metal depreciated in value by £368, and the plaintiffs lost a profit of £400 on that "melt". They also estimated that the power cut lost them a further four possible melts, which would have netted them a further £1,767. They sued the defendants in negligence for £2,535, the total of the above amounts. A majority of the Court of Appeal (Lord Denning M.R. and Lawton L.J.) held that the plaintiffs were entitled to the £368 and to the profit of £400 on the wasted melt, this latter sum being a foreseeable financial consequence of the physical damage. But the projected profits on the four further melts were disallowed. Edmund Davies L.J. dissented; he would have allowed the plaintiffs the whole amount.

The decision of the majority is in full accord with a long line of previous cases: the one principally relied on was *Cattle* v. *Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453. As a rule pure economic loss is not recoverable in a

negligence action, although there are a number of apparently anomalous exceptions, one of them being that applied in *Spartan* itself, namely that such loss may be recoverable if it is consequential on physical or proprietary damage; the *Hedley Byrne* rule, whatever its scope, provides another. It is not easy to discover a clear rationale underlying this part of the law, and some of the exceptions have the appearance of arbitrariness. Those who attempt to apply rigorous logic are bound to get into trouble. Edmund Davies relied mainly on logic in his dissenting judgment:

"For my part, I cannot see why the £400 loss of profit here sustained should be recoverable and not the £1,767. It is common ground that both types of loss were equally foreseeable and equally direct consequences of the defendants' admitted negligence, and the only distinction drawn is that the former figure represents the profit lost as a result of the physical damage done to the material in the furnace at the time when power was cut off. But what has that purely fortuitous fact to do with legal principle?" (at page 566 e.-f.)

His Lordship thus held that economic loss should be recoverable provided that it is foreseeable and the direct consequence of failure in a duty of care. Yet even Edmund Davies L.J. acknowledged that his approach did not readily accord with the decided cases, and that it could "understandably give rise to difficulties in certain sets of circumstances."

The main cause of the difficulty has been the appreciation by the Courts over the years that there must be limits beyond that of foreseeability placed on a man's liability for economic loss. The economic loss foreseeably resultant on a single careless act can be quite open-ended. Even on facts like those of the *Spartan* case, what if a dozen other manufacturers had been affected similarly to the plaintiffs? What if electric trains had ceased to run with the result that hundreds of employees were late to work? Were the unfortunate defendant or his insurers to be liable for all this financial loss the burden would be quite ruinous, and firms providing an essential public service could be driven out of business. With this thought uppermost in their minds the majority of the Court of Appeal thus preferred to hold that pure economic loss is seldom recoverable in a negligence action, although they admitted that there can be exceptions to this general rule.

It is here that the principal interest of the case lies. In the past when the Courts have had to determine whether or not economic loss is recoverable in a particular case they have employed the traditional "tests" of duty and remoteness. Lord Denning was not happy with this.

"At bottom I think the question of recovering economic loss is one of policy. Whenever the Courts draw a line to mark out the bounds of *duty*, they do it as matter of policy so as to limit the responsibility of the defendant. Whenever the Courts set bounds to the *damages* recoverable —saying that they are, or are not, too remote— they do it as matter of policy so as to limit the liability of the defendant. . . ." (at page 561 h-j)

"The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: 'There was no duty.' In others I say: 'The damage was too remote.' So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable. . . ." (at page 562 g-h).

Lawton L.J. was not so forthright, but he did offer his partial support to Lord Denning, saying that the differences which exist between different types of cases are to be explained "because of the policy of the law".

Academic writers have been saying for years that the elements of duty and remoteness involve a degree of circularity, and in reality conceal policy choices. No doubt if this is so it is better that the fictions should be seen for what they are, and that the policy considerations, the real basis of decision, should come out into the open and receive full discussion. It has often been said that better justice is done by a Judge who is not required to suppress his real reasons behind an "acceptable" legal barrier. Probably the very reason that the decisions on economic loss are so hard to reconcile, and that the exceptions seem so anomalous, is that the policies underlying the decisions were but imperfectly appreciated by the Courts themselves.

Yet, despite this, Lord Denning's forthrightness gives rise to a good deal of uneasiness. What, precisely, is comprehended by the term "policy"? And even if one concludes that it really just means factors of justice, and social and economic expediency, exactly how does a Judge assess the weight of such factors? It is interesting to note the considerations which Lord Denning took into account in determining the *Spartan* case. There were five of them. First, he referred to the fact that statutory suppliers of electricity, gas and the like have been steadfastly held not liable for breach of statutory duty for failing to supply the commodity. "If such be the policy of the Legislature in regard

to electricity boards, it would seem right for the common law to adopt a similar policy in regard to contractors." Yet, with respect, while this is a perfectly valid analogy, it does not tell one very much. Even if the Legislature has an intention that people should not sue electricity boards (and this is very much to be doubted—rather do the Courts themselves read such an intention into the various statutes) one is still no nearer discovering the policy reasons for this intention. Second, he referred to the fact that power cuts are the type of hazard that can occur without anyone's negligence, and that people must learn to cope with them, and to make up the time lost by them, without resorting to the Courts. (Could this not be at least substantially true also of accidents causing property damage?) Third, he voiced the fear that if such a claim were to be allowed there would be no end of claims, and some of them would be inflated, even false. "It would be well-nigh impossible to check the claims. If there was economic loss on one day, did the claimant do his best to mitigate it by working harder next day? And so forth." This argument loses some of its force by virtue of the fact that something rather like it has been put forward many times in the past when a novel claim has been presented: for instance, it was heard when claims were first made in respect of nervous shock, and when in the nineteenth century an employee first dared to sue his employer for injuries suffered as the result of carelessness by a fellow-worker. In both these contexts the fears have proved largely groundless. Fourth, Lord Denning re-iterated what, as pointed out, has been the dominant consideration in the economic loss cases: that the community should shoulder heavy losses rather than one contractor. Fifth, Lord Denning said that "the law provides for deserving cases": for instance, he said, economic loss truly consequential on material damage is recoverable. With respect, that is to restate the problem without solving it.

One cannot but feel that these "policy factors" by no means exhaust those which could be relevant in cases of this kind. For one thing, Lord Denning has omitted reference to what surely in some cases could be the most crucial consideration of all: the impact of insurance, and the question how far the advantages of loss insurance outweigh those of liability insurance. For another, if one is to talk, as Lord Denning did, about the community bearing losses, surely the economics of loss absorption should be carefully investigated? And here one faces the paradox. It is no doubt true that legal fictions should have no place in a modern legal system. But when one discards them and asks the Judges to grapple with policy considerations, one sometimes finds that the Courts are simply not equipped to do so adequately; and one should not be satisfied with half measures. How is a Court to inform itself on the intricacies of insurance practice, or on the economic aspects of the topic, or on the long-term social consequences of what it is doing? Obviously such things are not a matter of judicial notice, for Judges can claim no expertise in such matters. Yet if one calls an expert economist or insurance assessor one is converting the trial into a commission of inquiry; one cannot conceivably do this and ask the parties to pay the costs. One can sympathise with the Courts' past anxiety to hide behind quasi-logical, purely "legal" premises.

Economic negligence is by no means the only field where "policy considerations" have been rising to the surface in recent years. In fact, in a number of other negligence cases policy aspects have been openly discussed (e.g. *Dorset Yacht Co.* v. *Home Office* [1970] 2 All E.R. 294 and *Dutton* v. *Bognor Regis U.D.C.* [1972] 1 All E.R. 462) and in restraint of trade cases there has lately been greater emphasis on the public interest rather than resorting, as was so often done in the past, to the question of reasonableness *inter partes*. This is perhaps an inevitable result of the growing realisation that the Judge's task is more than purely mechanical: it is to create as well as apply law. But it is of considerable significance that in some of these other areas the Judges are openly admitting that they do not feel confident in some realms of policy. For instance, in *Blackler* v. *New Zealand Rugby Football League* [1968] N.Z.L.R. 547 McCarthy J. said at 572:

"No doubt . . . we must be careful not too readily to believe ourselves competent to determine where the interests of the state do lie. Judges have no special training or expertise in those fields."

And in a number of recent cases where appeal Courts have been asked to make a change in a common law rule they have refused to do so on the ground that no change should be made without full consideration of the implications of the new rule, something which the Courts are not equipped to undertake. A typical statement is that of Lord Salmon in *Morgans* v. *Launchbury* [1972] 2 All E.R. 606, 622, a case in which the House of Lords refused to hold that the owner of a car should be vicariously liable for damage done when a member of his family was driving it:

"It seems to me that before any change resembling that proposed . . . is made in our law it is most important that full and careful investigations into all aspects of the question should be carried out, and perhaps the arrangements with the Motor Insurers' Bureau considered. . . . This is a task which can hardly be undertaken by your Lordships' House sitting in its judicial capacity."

This then, is the impasse at which we have arrived, and which the *Spartan* case illustrates well. It appears that in a modern complex society the common law, and common law methods, are simply not going to work satisfactorily any more in some of their traditional preserves. One of the most important passages in the *Spartan* case is in the judgment of Lawton L.J. Having agreed with Lord Denning that the differences already existing between different cases involving economic loss have arisen "because of the policy of the law", he went on to say:

"Maybe there should be one policy for all cases; the enunciation of such a policy is not, in my judgment, a task for this Court." (at page 573 b-c).

J.F.B.

Bail—Deposit of money before allowed

With one statutory exception, bail provisions in New Zealand run parallel to those in England, so the recent decision of the Queen's Bench Divisional Court in *R.* v. *Harrow Justices, ex parte Morris* [1972] 3 All E.R. 494 is of some interest.

The applicant sought an order of *certiorari* to quash an order of the Harrow Justices that he should not be admitted to bail unless and until each of the two sureties for £2,000 had deposited £500 with the Court. Two points were considered —(i) was there any express authority for the Justices to do so; (ii) if not, was any such power to be implied? In a short judgment Lord Widgery C.J. answered both questions in the negative.

On the first question, Lord Widgery made clear that the nature of the bail bond, both under the relevant statutes and at common law, is that it is a future liability to pay, only to be activated if the accused does not comply with the terms. As Lord Widgery says (at p. 495 f), "There is nothing in the language of the section in my view which authorises justices to require any sureties to put up money as a condition of granting bail. The essence of a recognisance I would have thought, in its ordinary sense and in the sense in which the draftsmen of the Act and the draftsmen of the rules contemplated, is that it is a promise to pay, an obligation to pay, arising potentially in the future if certain conditions are not satisfied." There is a qualification to this idea as applicable to New Zealand, as under the Summary Proceedings Act 1957, s. 52 (2), when a constable admits a person to bail under s. 51 (i.e. where the latter has been arrested without warrant for a summary offence and cannot practicably be brought immediately before a Court) the constable may require that person to deposit a sum of money equal to the sum acknowledged by him; note, however, that s. 52 (2) does not say that such a power extends to sureties, though these may be required under s. 51 (2). Subject to this qualification (which may only apply to a deposit by the arrested person himself), the above remarks of the Lord Chief Justice should apply to bail bonds in New Zealand.

The second question is of equal interest, as powers are given to attach to the bail bond such conditions as may be necessary—could these conditions extend to requiring the deposit of money? This question was also answered in the negative, thus presumably laying down the principle that conditions of bail cannot be such that they alter the very nature of bail itself. Again, to quote the Lord Chief Justice (at p. 495 j), "In my opinion that subsection (s. 21 (1) of the Criminal Justice Act 1967, which authorises the attachment of conditions) does not in any way touch the essential character of the recognisance which can be required in the event of a grant of bail. . . . I see nothing in s. 21 (1) to alter the character of the recognisance or to alter the feature of it which causes it to be the undertaking of a potential future liability, rather than an obligation to put money down at the time when the grant of bail is made." As pointed out at the end of the judgment, if the Justices are not satisfied that a surety could in the event pay the sum acknowledged by him, the proper course for them to take is to reject him as a surety, and if no other surety can be found, refuse to grant bail.

I.T.S.

What constitutes taxable income—the godfather principle

Two recent English cases at first instance add to the already considerable material on the liability to income tax of lump sums. Neither attempts to further rationalise existing principles, but they are of some interest on their facts, and also as a possible indication of an undesirable way in which this branch of the law could develop.

In *Holland* v. *Geoghegan* [1972] 3 All E.R. 333 the taxpayer was a refuse collector who shared with his fellows a right of salvage of items retrieved from the refuse collected. The employer, the local council, wished to containerise collection, and so had to terminate this right of salvage (valuable to the employees as an integral part of their living). The employees went on strike, which ended when the employer agreed to pay to each man £450 for loss of salvage rights. The tax payer was assessed to income tax on this amount. Foster J. held that, although this payment was not made in respect of current or past services, and the taxpayer could have left the employment at any time with a week's notice, this amount was an emolument of the taxpayer's employment, and liable to income tax, being a form of substitute remuneration.

In *Moore* v. *Griffiths* [1972] 3 All E.R. 399, the taxpayer was the England football captain Bobby Moore. After the victory in the 1966 World Cup, the taxpayer was given three lump sums—£1,000 from the Football Association, £500 from a private firm for being the best player in the competition, and £250 from the same firm for being the best English player in the competition. He was assessed to income tax on all three amounts. Although under contract to West Ham football club, the taxpayer was in effect employed by the Association for the duration of the competition; he did not know until after the competition that either the Association or the firm would be making these payments. Brightman J. held that income tax was not payable on any of the payments, the £1,000 being in the nature of a testimonial from his employers, not as a reward for his services, and the £500 and £250 being a publicity stunt by a firm with which he had never had any dealings. Important, though not conclusive, points favouring this decision on the £1,000 were that the taxpayer was no longer "employed" by the Association; he had no prior knowledge of the payment; the payment was not linked to the *quantum* of service (all 22 players in the squad received the same amount) and there was no element of recurrence; the letter accompanying the payment spoke of it in terms of a testimonial to mark an occasion, and the status and function of the Association itself also pointed to that conclusion.

It is not submitted that either of the learned Judges erred in deciding on which side of the difficult line these cases should fall especially in the second (more arguable) case, in the light of the two cricket collection cases of *Seymour* v. *Reed* [1927] A.C. 554 and *Moorhouse* v. *Dooland* [1955] Ch. 284, and *dicta* in the important case of *Hochstrasser* v. *Mayes* [1960] A.C. 376. However, certain points might be noticed.

First, Brightman J. in *Moore's* case reiterates *dicta* of Megarry J. in *Pritchard* v. *Arundale* [1971] 3 All E.R. 1011 on the burden of proof in such a case, i.e., that the question is whether the Crown can properly show that the payment is a taxable emolument, not whether the taxpayer can show that it falls into any possible category of exceptions to liability.

Second, considerable emphasis was placed, in both cases, on the wording of documents relating to the payouts. Where this establishes liability in a dispassionate way, as in the first case, there can be little objection to it, but where it is used to avoid liability, as in the second case, it is submitted that the Court should approach it with care and not place too much reliance upon it, for it is always open for employer and employee to co-operate in an effort to clothe as a testimonial a payment that is really only an extra remuneration.

The third point is somewhat more elusive, for though these two decisions are not queried on their facts, it does seem somehow unfair when they are contrasted—to put it at its most basic, no doubt the refuse collector needed the money taken as tax, more than the professional footballer whose earnings for the year totalled £11,491. It need hardly be said that such a consideration cannot rank as a legal argument, but these two cases do suggest that, if this exemption for a testimonial of sorts is carried too far, the only lucky taxpayer will be the one with a fairy godmother, or, to be more topical, a Godfather. If payments can be channelled through such a person, they may well escape tax. This in itself may not be too undesirable, but the unfairness would be this—that only those in relatively high positions in society will tend to receive such payments, and so qualify for tax exemptions on part of their earnings. This would not be an invariable rule, but professional footballers would probably tend to have more Godfathers than dustmen. This would be especially so in the case of private firms giving lump sums to obtain publicity—naturally the objects of their bounty would be well-known (and presumably well-remunerated) persons rather than those in the obscurity of ordinary employments or professions. To take another example, the director of a company is more likely to receive a testimonial (real or faked—see the second point) from the company (and so possibly evade tax on it) than is the ordinary employee who will have to continue to press hard for all he gets and pay the full amount of tax on it.

In short, this exemption from tax for the testimonial must be strictly limited, and one would hope that the *Moore* case would be that limit. If construed too generously it may well develop into support for the old adage, "Unto those that have, it shall be given".

I.T.S.

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

Tort—Deceit—Abuse of Legal Process

The judgment of Mahon J. in the action between *D.* v. *R.* (judgment was delivered on 6 September 1972) will be of considerable interest since it contains an exhaustive historical review of the development of the privileges and immunities which attach to witnesses and other persons involved in judicial proceedings.

The action arose out of a motion by the defendant asking the Court to exercise its inherent jurisdiction and strike out all or part of the statement of claim, which the defendant said, showed no cause of action. In their statement of claim the plaintiffs alleged that, in various earlier proceedings for divorce and custody, the defendant had made false statements on oath, which had resulted in misrepresentations disadvantageous and damaging o the plaintiffs, and that these misrepresentations amounted to the tort of deceit. After lengthy consideration Mahon J. held that the tort of deceit could not lie when the basis for the tort was in effect an allegation that perjury had been committed. The learned Judge showed that if false evidence amounting to perjury had been given, the proper, and only, remedy for an aggrieved party is to lay an information for a criminal prosecution, and that the false evidence cannot form the basis for the tort of deceit.

The learned Judge then turned to consider whether the plaintiffs in their statement of claim were in fact using the tort of deceit to found an action under a less well-known head of tortious liability, namely the tort of abuse of legal process. This tort, which in some ways resembles malicious prosecution, was recently considered by the House of Lords in *Roy* v. *Prior* [1970] 3 W.L.R. 202. In that case the plaintiff, who was required as a witness at a trial, was arrested at the instigation of the accused's counsel. The plaintiff, on the other hand, alleged that the summons never had been served upon him. The House of Lords held that if the plaintiff could prove that the defendant had acted maliciously and without reasonable and probable cause, then an action for abuse of legal process might lie.

In this case the learned Judge had to consider whether the possibility that false evidence had been given in the earlier divorce and custody hearings would be sufficient to found an action for abuse of legal process. Mahon J. decided that it could not. In reaching this conclusion the learned Judge had to consider another aspect of the law with important constitutional as well as tortious implications, namely the extent of those privileges or immunities which attach to statements made by witnesses and others involved in judicial proceedings. These immunities are well "entrenched" in the common law and can be traced back for several centuries, and through many precedents, and have been held to include Judges, parties, advocates and jurors as well as witnesses.

As Mahon J. said:

> "The basis of the rule . . . rests on practical considerations. A witness must be entitled to give evidence in judicial proceedings fearlessly and without risk of reprisal by civil proceedings at the suit of someone connected with the litigation. Were this not so then every witness would be exposed to a subsequent action by a party or witness discontented with what was said. Such a second action, especially if successful, might then be followed by a third action raising once more the issue of truth or falsehood in the second action. . . . The immunity which the law confers does not by any means overlook the possibility that an injustice may sometimes be done under the cloak of that immunity but the paramount policy which underlies the immunity requires that the occasional injustice which may be suffered by an individual must yield to the constitutional necessity of the unfettered proof of relevant facts in judicial proceedings."

For these reasons the learned Judge did not think, since any action between the parties alleging either deceit or abuse of legal process must essentially be based on the allegation that the defendant had committed perjury, that the statement of claim for damages disclosed any cause of action, and he accordingly struck that part of the statement of claim out.

Mahon J. also had to consider an application to set aside an order for custody of the children, but as the learned Judge, after due consideration, was able to show that the Guardianship Act 1968, under which the custody order had

been made, was a code, he concluded that the means whereby such an order might be varied or otherwise discharged are available under that Act, and that the Supreme Court has no jurisdiction to entertain an action by writ of summons to set aside a custody order.

The case is also of importance because, since there are no statutory rules of Court in New Zealand governing an application by way of motion to strike out an action on the ground that no reasonable cause of action is disclosed in the statement of claim, the learned Judge found it necessary to consider the extent of the inherent jurisdiction which lies with the Court to strike out pleadings and if necessary to stay or dismiss actions. In considering this matter he had to decide in what circumstances the Court must judge the matter on the pleadings alone, and/or under what circumstances affidavit evidence should be received. The main importance of the judgment lies, however, in the consideration it gives to obscure and uncertain areas in relation to tortious liability.

M.A.V.

Vicarious Immunity by an Alternative route—Stage II

The decisions of Beattie J. in *A. M. Satterthwaite & Co. Ltd.* v. *New Zealand Shipping Co. Ltd.* [1972] N.Z.L.R. 385; [1971] 2 Lloyd's Rep. 399 (noted by F. M. B. Reynolds (1972) 88 L.Q.R. 179, P. S. Atiyah (1972) 46 A.L.J. 212 and Brian Coote (1972) 35 M.L.R. 177) has now been reversed by the Court of Appeal (Turner P., Richmond and Perry JJ; judgment 29 June 1972) but on grounds which leave unanswered the more interesting questions raised in the lower Court.

Beattie J. had held that stevedores were protected by limitations of liability contained in a bill of lading and expressed to be intended for the benefit of the servants or agents of the carrier. His ground for so holding was that the limitation provisions were an offer which had resulted in a unilateral contract between the stevedores and the consignees when the former, knowing the terms of the bill of lading, had unloaded the goods. Relying on the *Scotson* v. *Pegg* (1861) 6 H. & N. 295 line of cases, he found consideration in the stevedores' act of unloading.

The Court of Appeal unanimously allowed the consignees' appeal upon the short ground that it was impossible, on their wording, to construe the limitation clauses as an offer. The decision, therefore, still leaves open the possibility that a third party in the position of the stevedores in this case could be protected by appropriately worded clauses.

For his part, Turner P. was prepared to go as far as saying:

> "I do not say that a more limited clause, restricted, say to exempting a named stevedore, and him only, for liability, in terms similar to those of the clause now under consideration, might not be devised so as to meet not only Lord Reid's first three requirements, but his fourth also."

The reference here is to Lord Reid's judgment in *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1962] A.C. 446 (H.L.) at 474.

Turner P. did not explain why he would limit such clauses to named third-party beneficiaries, but it seems probable he had in mind certain passages from the judgments of Richmond and Perry JJ. So far as Turner P. was thinking of a contract between the goods owner and the third party, entered into *at the same time as* the bill of lading contract (and it was this sort of contract that Lord Reid himself seems to have envisaged), he was probably referring to a requirement stated by Perry J. According to that learned Judge, to conclude a contract at that stage between a third party and the goods owner, the carrier, as agent for the third party to be benefited, would have to undertake contractual obligations to the goods owner on the third party's behalf.

But the difficulties in establishing such a contract at that point would in any event be vast. The important question raised by the *Satterthwaite* case is whether the idea of a *subsequent* unilateral contract is sustainable.

On this question, one of the principal reasons given by Richmond J. for refusing to construe the limitation provisions of the bill of lading as an offer was that it was general in its terms, was intended to apply to all employees and agents of the carrier indiscriminately, and did not prescribe any particular mode of acceptance by performance. These requirements would explain the reservations stated by Turner P. but it is submitted, with respect, that they may be too severe. On the evidence of the "reward" cases, offerees do not have to be identified specifically, as distinct from generically. And surely the mode of acceptance could be sufficiently prescribed by reference to performance by the servants, agents and subcontractors of the carrier respectively, of such of the obligations imposed on the carrier by the bill of lading contract as they might perform.

It is submitted, in other words, that (the consideration point apart) unilateral contracts between the *consignor* and the servants or agents of the carrier could result from an offer of immunity in the bill of lading addressed to them

as servants or agents and calling for performance of such of the carrier's obligations under the bill of lading as they might be engaged to perform. It would, of course, be necessary for the servants or agents to know of the existence of the offers before they performed, but such knowledge could possibly be based on their employer's invariable practice to require such offers.

Whether a *consignee* would succeed to such an offer or offers under s. 1 of the Bills of Lading Act 1855, or its New Zealand equivalent, is a point which the Court of Appeal was not called upon to consider, though Perry J. expressed doubts. Independently of that Act, it seems at least conceivable that an endorsement on the bill of lading which recited that the consignee, by his acceptance of the bill, had adopted as his own any offers of immunity contained therein, would be sufficient.

On the *Scotson* v. *Pegg* (1861) 6 H. & N. 295 point, none of the Judges felt called upon to offer any comment, one way or the other.

In the Supreme Court, it apparently was indicated that the present is regarded as a test case, so that an appeal to the Privy Council may well follow. In view of the Court of Appeal's decision, however, those sympathetic to the concept of vicarious immunity might well feel that the better test would be of a redrafted clause on some later occasion.

B.C.

SUPREME COURT DISTRICTS

For several years the Government has discussed with the New Zealand Law Society a proposal to abolish Supreme Court districts or "judicial districts" as they are generally called. A number of practitioners in the northern Bay of Plenty region have opposed this because over the years they have established a connection with the Auckland Bar which they are loath to relinquish. Some of the opposition has disappeared with the recent proposal to make Rotorua one of the circuit towns of the Supreme Court.

The demise of the districts under s. 18 of the Judicature Amendment Act 1972 is now in the offing (*a*). It will probably be timed to take effect shortly before the first sittings of the Supreme Court at Rotorua. Most practitioners acknowledge that judicial districts—that is to say, the districts formerly assigned to the Judges when they received their appointments—are anachronisms. This is the more apparent, not because nowadays Judges exercise their jurisdiction throughout the country, but because the boundaries of the districts were decided before the present railway systems were opened and when access to many circuit towns was mainly by sea. This is well illustrated in the case of the Auckland Supreme Court District. The districts inhibit flexibility in the civil trial process. Abolition has been anticipated in the new draft Code.

Another and minor revolution which it is hoped to accomplish bloodlessly under last year's Judicature Amendment Act is the abolition of sheriffs' districts. The ancient word "sheriff", by derivation, connotes a territorial appointment, and this attribute has been preserved by the Judicature Act 1908 and its forerunners. When sheriffs' districts accompany judicial districts into the limbo of New Zealand legal history the length of a sheriff's arm will be indicated by the nature of each process which he is called upon to execute—for example, the place where a debtor resides or where his property may be seized.

When the Order in Council dispensing with judicial districts is made, amended Rules of Court will come into force. Practitioners should note particularly the alterations made to RR. 4, 6, 8, 9, 10, 249, 51L, 51N, 517 and 607 of the Code of Civil Procedure. These amendments will be found in the Supreme Court Amendment Rules 1973.

So far as actions are concerned broadly the effect of the amendments is that the place for filing the statement of defence will be the Court nearest by the most practicable route to the place where the defendant resides. As before this is subject to the special provisions of R. 9. Adoption of the test "nearest by the most practicable route" means that in this respect the Supreme Court and the Magistrates' Courts Rules will be the same. It should be noted that in the case of applications for probate or administration the qualification "by the most practicable route" will not apply; in this case convenience is subordinated to the consideration that the Registry in which a will may be searched or a *caveat* lodged may be ascertained with certainty.

(*a*) Since this article was written the Judicature Amendment Act Commencement Order 1973 has been gazetted (S.R. 1973/36). This fixes 1 April as the commencement of s. 18.

The Rules Committee has resisted the temptation to introduce the procedure contemplated by the new draft Code. It has decided instead that at the present time as few changes should be made as possible. Its purpose has been to modify the present rules only to the extent that the abolition of the districts as reference points requires. Accordingly, RR. 4, 6, 8, 9 and 10 have been amended with that purpose only in view. To impart more flexibility to the choice of the place for the trial of an action R. 249 has been rewritten. In the past that rule has been resorted to in order to obtain a change of venue where such a course appeared to be the only way to ensure a fair trial. The rule speaks of both fairness and convenience; but the idea of fairness has in the past been the dominant one. In the new rule the intention is to balance that element more evenly with the element of convenience. In future the rule will enable the parties to consent to a place of trial subject to the control of the Court, or a Judge at Chambers.

Small amendments have been made to RR. 51L and 51N which relate to the service of foreign process in New Zealand and a further change has been made to the second paragraph of R. 517 which relates to the filing of an application for administration where the deceased was not resident or domiciled in New Zealand.

Other minor amendments have been made to rules in force under such enactments as the Companies Act 1955 and the Insolvency Act 1967. The practitioner is referred to the Fourth Schedule of the Supreme Court Amendment Rules 1973 for particulars of these changes.

P. A. CORNFORD.

CORRESPONDENCE

Sir,

Conversion to Metric System in Land Transfer Offices

I have your letter of 21 November 1972 asking for information on the above subject for publication in the New Zealand Law Journal. This I am only too pleased to do and I set out hereunder the changes that will occur in Land Transfer Offices once the metric system is introduced and how these will affect practitioners in their dealings with the Office.

The metric system for land measurement is being introduced in New Zealand this year. The Survey Regulations 1972 made 1 January 1973 the effective date and any plan lodged on or after that date must be in the new black and white form and show dimensions and areas in metric terms.

Allowance will, however, be made for those cases where survey work and preparation of plans commenced prior to 1 January 1973. The resultant plans may therefore be accepted by Land Registry Offices after that date on present 20″ x 20″ or 30″ x 30″ forms which must be in colour with areas and measurements expressed in imperial units. Should in such cases Surveyors prefer to use the new black and white plan form this must be to metric specifications.

As from 1 January 1973 every new certificate of title diagram drawn has to be expressed in metric terms irrespective of whether the base plan is in imperial or metric terms and the notation "measurements are metric" will be endorsed on the title. In those cases where land is taken from a title with imperial measurements, where say, there has been a subdivision, or proclamation action has taken place, the balance area remaining, where it is possible, will be converted to metric and the title noted "Metric area. . . ." It is not proposed, however, at this stage to convert the existing certificate of title records to metric.

All Land Transfer instruments lodged for registration after 1 January 1973 should be prepared in accordance with the areas shown on the existing relevant titles, except where the instrument affects part of the land in a title which is expressed in imperial units and the part affected is expressed in metric in terms of a new plan. In those cases where an instrument will affect several titles, with some in metric and others in imperial terms the same rule will apply.

In the metric system of land measurement to be adopted in New Zealand the hectare will be used as the measure of the area of larger lots and the square metre for small areas in all land surveys and on certificates of title.

The square metre, the basic unit of area in the metric system, will be used for areas smaller than one hectare. The hectare, which is 10,000 square metres, or nearly 2½ acres, will be used for areas of one hectare or larger, and where appropriate on maps and titles, such areas will be expressed to an accuracy of four decimal places, i.e., to the nearest square metre. For example, if a piece of land has an area of one

square metre less than one hectare it will be shown on the survey plan and title as 9999 square metres. If it is one square metre more than one hectare it will be shown as 1.0001 hectares. Distances and heights will be measured in metres; the metric symbols for all these units and examples of expression are:

hectare ..	ha	1.0001ha
metre ..	m	6.25m
square metre	m^2	$9999m^2$

These symbols are both singular and plural. They are not followed by a full stop unless at the end of a sentence; commas must not be used nor should there be spaces between numbers (e.g. $9999m^2$).

Boundary distances on plans and titles will be expressed in metres but no symbol will be shown after the distance. In most surveys, both urban and rural, measurements will be to two decimal places. There is, however, provision in the Survey Regulations for the distance to be extended to three decimal places where in the opinion of the Surveyor a higher degree of precision is required; this will apply where land of high value is involved. Conversely the Regulations make provision for some rural surveys to show measurements to one decimal place only.

Tables for the conversion of imperial units to metric units have been prepared under the title of "Metric Conversion Tables for Land Surveyors" and copies are available from the Government Printer's Bookshop throughout the Country at a cost of $1.50 a copy.

For those who do not have such a Bookshop in their area and require a copy they may write to:

Mail Order Service,
Government Bookshop,
Government Printing Office,
Private Bag,
Wellington.

naming the publication as above and enclosing the correct purchase price.

I trust the foregoing information will be of some assistance to Practitioners in adapting to the new system.

Yours faithfully,
L. H. McCLELLAND.
Registrar-General of Land.

Sir,

Bonus Bonds and Estates

I am writing to seek your assistance in bringing to the notice of readers the following items concerning Post Office Bonus Bonds.

1. When the registered holder of Bonus Bonds dies, requests are frequently made for the bonds to be transferred and registered in the name of a beneficiary in the estate of the bond holder. In accordance with the restrictions set out in s. 129A of the Post Office Act 1959, Bonus Bonds may not, however, be assigned to another person and where a bond holder dies it is the duty of his personal representative to redeem the bonds forthwith. This should be done as soon as Probate or Letters of Administration have been obtained. Alternatively, payment may be obtained in terms of s. 65 of the Administration Act 1969.

2. Details of the last known address of a deceased bond holder and serial numbers of bonds must be entered on the form IR 607C, Post Office Bonus Bonds certificate to accompany the Inland Revenue Department Estate Duty Form 7. If the bonds cannot be located it would be of assistance in tracing the holdings if a certified specimen signature of the bond holder were supplied with the form IR 607C.

3. Some personal representatives are not seeking repayment of Bonus Bonds because of the small denomination value involved. If such bonds are successful in a prize draw difficulties could arise if a major prize is involved.

4. Although repayment of Bonus Bonds is arranged through the Bonus Bonds Centre, Dunedin, Probate or Letters of Administration may be produced at any office of the Post Office Savings Bank for noting.

I would be grateful if you could give publicity to the above matters through the LAW JOURNAL.

Yours faithfully,
C. A. HUDSON.
Director of Savings.

Sir,

Oxbridge Law Graduates

I am in the process of preparing a Register of graduates of the Oxford University and Cambridge University law schools by name, College, year of graduation, address and name of firm in which presently practising.

I read law at Cambridge myself and have not had too much difficulty in tracing the whereabouts of graduates who have remained in the United Kingdom, but I am experiencing considerable difficulty in locating Commonwealth graduates who left England and returned home.

Yours sincerely,
DAVID M. WRIGHT.
Glovsky & Glovsky
Attorneys at Law
Beverly, Mass.
U.S.A.

[Oxbridge law graduates are asked to contact Mr D. R. Bradshaw at Messrs Bell, Gully & Co. who is compiling a master list for Mr Wright—Ed.]