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DO WE NEED A NADER?

Does New Zealand need a Nader?

Ralph Nader has been described as "the U.S.'s toughest customer." In earning this reputation he has shown the way in which the consumer can obtain vast improvements in a large range of popular goods. In 1955 Nader graduated from Princeton, and entered Harvard Law School and it was there that he first became involved in the question of car safety. In 1965 he published *Unsafe at any Speed* which became a best-seller and made new car safety a public issue. General Motors then hired private detectives led by a former F.B.I. agent to investigate Nader's background. The agents kept him under surveillance. Under Senate cross-examination the then president of General Motors made a public apology to Nader. The result of these hearings was the Traffic Safety Act, requiring Federal safety standards for new cars. In 1970 he obtained 425,000 dollars in an out-of-court settlement from General Motors for invasion of privacy. Nader's campaign against the General Motors' Corvair led the company to abandon that car in 1969 after sales had dropped by 93 percent. In the past five years more than 8,000,000 cars have been recalled by four large United States manufacturers alone.

Nader's campaigns against new car defects have not stopped. In 1971 he published *What to do with your bad car— An Action Manual for Lemon Owners*, and in 1972 a Nader study group published *Small-on Safety*, a detailed criticism of what were alleged to be "the designed-in dangers of the Volkswagen". This attack was, in part, countered by a report published in "Road and Track" in April 1972. In the present context it is only possible to briefly outline Nader's impact in one field of consumer interest.

Is there any need for similar concern in New Zealand? The available evidence indicates that New Zealand has serious problems of new car defects and safety problems. In 1967 the Consumers' Institute prepared a report based on material submitted by 200 members who had bought New Zealand assembled new cars. The Institute concluded that people had to accept vehicles that were sometimes poorly assembled and contained "such defects that they should never have been allowed out of the factory door." *Auto Age*, the Automobile Association magazine, obtained replies from 1,511 members to a 1972 questionnaire, and has just published the results. To the question whether there had been problems with new car defects, 495 answered yes, 683, no. The magazine commented that "although outnumbered, the Yes tally was still uncomfortably large, and was frequently accompanied by lengthy descriptions of new car teething troubles." A car correspondent recently tested a car costing over $10,000. Here are some of the comments of the owner:

> "The (car) is a fitting symbol for industrial England in 1972. It doesn't work. Whenever tested, it fails. . . . The car is inferior in its functioning in most regards. The engine . . . has never failed, but in 18 months of owner ship, the car has averaged a fortnightly breakdown."

What are the remedies available to the owner of a new car? Firstly, he can attempt to get the vendor or manufacturer to remedy the defect. Methods for doing this are detailed in Nader's *Action Manual for Lemon Owners*. Among the more extreme measures are the "lemon sign." For this Nader suggests he attach large signs to his car reading:

"THIS FIRE-EATER IS A $5,500 LEMON BOUGHT FROM SHADYDEAL MOTORS. MANUFACTURER'S DEALER CAN'T FIX."

And then park the car conspicuously near the dealer's showroom. However, such measures can hardly be regarded as a satisfactory solution by either party.

There are legal remedies available, but these are considerably complicated by the cost of bringing legal proceedings, the difficulty of proving mechanical defects in all but the most extreme case, and the limitations imposed by new car warranties. This writer has been unable to find any reported case in New Zealand, or the United Kingdom, in which the purchaser of a new car has sued for defects. (Although there are at least two New Zealand cases on alleged defects in aeroplanes.) This is surprising because there are numerous complaints of serious defects. However, there have been such suits in Canada. Examples are *Lightburn* v. *Belmont Sales Ltd.* (1969) concerning a new 1968 Cortina, and *Gibbons* v. *Trapp Motors Ltd.* (1970) concerning a new 1969 Pontiac Firebird convertible. In both cases the purchaser succeeded. There does not appear to be any reason why similar suits should not succeed in this country.

But no one wants to buy a law suit. There are a number of other institutions which are concerned with new car defects of which one is the Consumer Council. The Council has wide functions "to protect and promote the interests of consumers of goods and services by whatever lawful means appear to it expedient . . ." (s. 16, Consumer Council Act 1966). But the Council's total income in 1971 was $364,000, and was mostly spent on salaries and publication costs. A full scale new car defect investigation would demand most if not all of this budget. The Council is an educational body and has no coercive powers; it can be ignored, and indeed has been. The Automobile Association has the resources, in the form of cash and technical facilities, to undertake a new car defect investigation on a wide scale, but so far has not done so. It does not appear that any government department has taken available action, or conducted large-scale studies in this field, although there are considerable questions of vehicle safety involved.

It is suggested that the consumer problems, of which the new car question is only a single instance, can only be properly and effectively dealt with by an independent and fully funded government agency having enforcement powers which would, unlike existing consumer legislation, actually be put to some use. It is not intended to denigrate the work of the Consumer Council. It is the Council's work which has helped to indicate the dimensions of the problem. But unless an independent and fully funded agency is set up New Zealand will need a Nader.

F. M. AUBURN.

BILLS BEFORE PARLIAMENT

Domestic Purposes Benefit
Explosives Amendment
Municipal Corporations Amendment
New Zealand Export-Import Corporation
Niue Amendment
Rates Rebate

REGULATIONS

Regulations Gazetted 22 February 1973 are as follows:

Customs Tariff Amendment Order (No. 5) 1973 (S.R. 1973/27)
Education Boards' Employment Regulations 1958, Amendment No. 14 (S.R. 1973/28)
Education (Salaries and Staffing) Regulations 1957, Amendment No. 12 (S.R. 1973/29)
Judicial and Other Statutory Salaries Order 1973 (S.R. 1973/30)
Land Settlement Promotion and Land Acquisition Regulations 1968, Amendment No. 3 (S.R. 1973/31)
Private School Grants Regulations 1973 (S.R. 1973/32)
Radio Regulations 1970, Amendment No. 3 (S.R. 1973/33)

CATCHLINES OF RECENT JUDGMENTS

Hire Purchase and Credit Sales Stabilisation Regulations—Whether lessee of car to whom oral promise made of purchase in name of wife is a "prospective purchaser"; *Drewery* v. *Ware-Lane* [1960] 3 All E.R. 529 distinguished—Whether transaction to be explained as ordinary business transaction. *Associated Group Securities* v. *Marsanyi*—(Supreme Court, Auckland. 6 February 1973. McMullin J.).

Income tax—Accountant with small farm—Consistent losses from farm set off against professional income—Farm no longer a "business"—Land and Income Tax Act 1954, ss. 88 (1) (a) and 111. *Prosser* v. *Commissioner of Inland Revenue* (Supreme Court, Nelson. 21 November 1972. Quilliam J.).

Income tax—Purchase of United Kingdom stock with sterling funds with view to subsequent sale in New Zealand—Profit held taxable under s. 88 (1) (c)—Examination of *ratio decidendi* in *C.I.R.* v. *Hunter* [1970] N.Z.L.R. 116—Judgment of North P. preferred. *Holden and Menneer* v. *C.I.R.* (Court of Appeal, Wellington. 29 September 1972. Wild C.J. and Richmond J; Turner P. dissenting).

"SERIOUS DISHARMONY", AND THE DISCRETION TO REFUSE A SEPARATION ORDER

For those who believed that inquiries into matrimonial fault should be banished from the Courts, s. 19 (1) (a) of the Domestic Proceedings Act 1968 was a welcome innovation. It will be recalled that in its original form the section provided that the Court "may, in its discretion", make a separation order on the ground that

> "there is a serious state of disharmony between the parties to the marriage of such a nature that it is unreasonable to require the applicant to continue or, as the case may be, to resume, cohabitation with the defendant, and that the parties are unlikely to be reconciled".

However, as the section stood, there was room for argument that an applicant who had originated the state of "serious disharmony" might be precluded from establishing this ground for a separation order, simply because, as the originator of the state of affairs of which he complained, he might find it difficult to say that that state of affairs was "of such a nature that it is unreasonable to require the *applicant* to continue or, as the case may be, to resume, cohabitation with the defendant".

It was no doubt with this possible argument in mind that the section was amended in 1971 so that the ground for separation became:

> "That there is a state of serious disharmony between the parties to the marriage of such a nature that it is unreasonable to require the *parties* to continue, or, as the case may be, to resume, cohabitation with each other, and that the parties are unlikely to be reconciled."

This amendment was passed on 19 November 1971, five days after *Myers* v. *Myers* [1972] N.Z.L.R. 476 had been argued in the Court of Appeal and seven days before judgment was delivered in that case. It became widely believed that *Myers* v. *Myers* had entirely disposed of any basis for the introduction of matrimonial fault into the issue whether there was "serious disharmony", and that a separation order must therefore follow as a matter of course on proof of the existence of "serious disharmony" within the meaning of the section, whatever might have caused it.

Certainly one might gather this impression from reading the judgment in *Myers* v. *Myers*. Woodhouse J. said, delivering the judgment of the Court:

> "In the past the concentration has been substantially on proof of fault; and the Court process has been marked by endless mutual recriminations and its order by an inevitable stigma. It has been an adversary process, peering at symptoms and causes and less interested in the condition which the causes had produced. The new Act takes the accent off that sort of confrontation into what, one hopes, can become a more detached and dignified inquiry. Its object is to define existing situations and so the issue is not the isolation of responsibility for the causes of domestic trouble but an estimation of their effects.Thus the separation order which can be made in terms of s. 19 has been preceded by efforts at reconciliation which have failed; neither party can be regarded as successful where both so obviously are losing; it carries with it no penal sanctions; and it is to be regarded as the formal recognition of an existing and peculiarly personal state of affairs."

The judgment then proceeded to analyse what might be involved in the phrase "may, in its discretion" in the context of an application under s. 19 (1) (a), pointed out that each element in s. 19 (1) (a) necessarily involved some initial exercise of discretion, and then went on:

> "But once an affirmative assessment has been made concerning each of those criteria and the jurisdiction to make an order has thereby been established then the area left within which the residual discretion might operate will have largely disappeared and the cases where it could or should be exercised against the application will be exceptional."

With these strong expressions of opinion it was not at all surprising that many should have thought that the "serious disharmony" ground made it unnecessary for too much to be made of such matters as adultery or cruelty or desertion. But was that the real effect of *Myers* v. *Myers*?

It has to be remembered that *Myers* v. *Myers* was founded upon a situation where no real criticism could be made of the conduct of either party. They had both made an effort in seeking guidance from counsellors, but finally the wife had decided that nothing further could be done to save the marriage and had left home. The Magistrate had held that she had not made

sufficient effort to save the marriage, but he had also held that there was in fact a state of serious disharmony, that it was in fact unreasonable to require the wife to resume cohabitation with the husband, and that there was in fact no likelihood of reconciliation. It was in this context that the Court of Appeal held that "as a matter of public policy it might be thought that marriage as an institution is hardly likely to be threatened by giving formal recognition to the plight of incompatible spouses", and that the Magistrate had "failed to recognise the importance of the concept of marital breakdown as the new basis for an order . . ."

Myers v. *Myers* was therefore not a case where the Court was faced with a state of disharmony engineered by the applicant, and one can only speculate on how the judgment might have read had that been the case. It is perhaps unfortunate that there is no report of the sometimes lively interchanges which took place in the course of argument in *Myers'* case: there was, needless to say, some discussion of how the section might relate to a plainly guilty party endeavouring to mpose a separation order on an unwilling and innocent spouse.

On this latter question the Act itself supplies no guidance, nor does the decision in *Myers'* case. What, then, is the position in a case where it is clear that the applicant has been overwhelmingly responsible for the creation of a state of "serious disharmony", or has manufactured that state of affairs for the purpose of obtaining a separation order? What of the type of case—by no means unusual—where a spouse has seriously misconducted himself, knowing that he was thereby destroying the marriage, and offers no sort of convincing excuse or explanation for his conduct? Is he to be granted a separation order, essentially on the ground that the parties—both of them—are "incompatible", so that after a two-year waiting period he can perhaps remarry and acquire further legal responsibilities, almost inevitably to the prejudice of the innocent party? There is of course no difficulty if it is the innocent party who wants a separation order, but where a plainly guilty party is the applicant the question is whether *Myers* v. *Myers* leaves the Court with any room to manoeuvre.

This was the very problem which confronted Mahon J. in *Mitchell* v. *Mitchell* (unreported, Auckland, August 1972). There was a history of some turbulence in the parties' marriage, but it appeared plain that the final break came because of the wife's infatuation with another man. She left the home and applied for a separation order. The Magistrate held that all the necessary ingredients of s. 19 (1) (a) were established, and exercised his discretion in favour of the wife. He must have done so without knowledge of *Myers'* case, which was decided shortly afterwards. Since all the jurisdictional elements of s. 19 (1) (a) were established on the facts, it followed that the only question on appeal was whether the Magistrate had rightly exercised whatever discretion he might have had in making the separation order.

Putting the matter in this way of course makes it clear that this question really involves two separate issues: first, in considering an application under s. 19 (1) (a), is there a "residual" discretion at all (bearing in mind that the three elements of s. 19 (1) (a) themselves involve a decision of a discretionary character); and secondly, if there is a "residual" discretion, how it is to be exercised. The first issue involves purely an exercise in statutory interpretation; the second involves the process of extracting principles for the exercise of the discretion.

Mahon J. dealt with the first issue in this way: "If the statutory discretion is to be exercised on any rational basis", he said, "it must involve, perhaps in most cases, a review of the acts and conduct of the parties and the circumstances which led to the state of serious disharmony already established." If this were not so, the Judge continued, "the discretion seems reduced to vanishing point, and the section would require to be interpreted, in effect, as if the exercise of a judicial discretion had not been reserved. This is not what the section says."

The difficulty in this view is of course that to introduce any question of matrimonial misconduct at the discretionary stage is to resile from the premise that matrimonial fault is displaced as the necessary foundation for a separation order. Mahon J. sought to overcome this difficulty by saying that:

> "One is therefore driven . . . to the conclusion that considerations of conduct will only have a real bearing on the exercise of the discretion when there is an allegation that the state of serious disharmony has in substance been engendered by the wrongful acts or attitudes of the applicant alone."

He held that this type of situation must be included in the "limited area" of residual discretion recognised by the Court of Appeal in *Myers'* case as available in "exceptional" circumstances.

So far it is difficult to escape the compelling logic of this conclusion. The section itself expressly gives the Court a discretion, and it

would make nonsense of the legislation to say that simply because the factual basis of the ground in s. 19 (1) (a) had been established there was no discretion left to exercise. Whether the Court of Appeal was right to give the appearance of limiting the discretion to "exceptional" cases may be a matter for debate, but the fact remains that in *Myers'* case the Court was dealing with a situation of plain unvarnished incompatibility: even the defendant husband, while he opposed a separation order in that case, admitted in evidence that the gap between him and his wife was too big to bridge and that he must "face reality", and that he did not want her back.

The next issue facing Mahon J. in *Mitchell's* case was, on what principles is the residual discretion to be exercised? Naturally at this point the real question was concerned with the discretion to *refuse* an order, and, following *Myers'* case, the Judge made it clear that the refusal of an order once the ground in s. 19 (1) (a) had been made out would have to be justified by "exceptional" circumstances. Unlike the Court of Appeal in *Myers'* case, however, the Judge went on to describe what he meant by the elastic term "exceptional", and he dealt with this point as follows:

> "In taking the view that it will be a special reason for exercising the discretion against the application that the applicant is overwhelmingly responsible for the creation of a state of 'serious disharmony' or has, in effect, manufactured that state of affairs for the purpose of obtaining a separation and related orders, I think I should repeat that I am not to be taken as intending to re-introduce 'matrimonial fault' in an area from which it has by statute been excluded. . . . The requirement of commission of a matrimonial offence has gone, and with it the concept of 'matrimonial fault' in that context, but even if deliberate instigation of 'serious disharmony' against an innocent or uncomprehending partner be regarded as 'matrimonial fault' then in my opinion it is still relevant to the exercise of the statutory discretion."

On this basis the Judge held that the Magistrate had not exercised his discretion on proper principles, and on the facts held that the separation order had been wrongly made.

Mitchell v. *Mitchell* therefore makes it perfectly clear that a separation order under s. 19 (1) (a) will not necessarily be available to an applicant who pleads serious disharmony for which he is himself "overwhelmingly responsible" or which he has himself manufactured. In view of this lucid statement of principle little additional commentary is required, but perhaps some further points need to be made.

First, and most important, the decision in *Mitchell's* case, and the principle which it enunciates, coincides with most people's view of justice. So much is said today on social issues that we are often tempted to fall over backwards trying to help people who have made a mess of their lives. This is very worthy, but there is such a thing as over-reaction, and many may doubt whether it really helps anyone in the end to try to sweep under the carpet attributes which are often described as "incompatibility" but which are in reality selfishness, greed, and a fixed determination to get one's own way regardless of the rights or interests of others. It is time that it was clearly recognised that nothing rankles more in a matrimonial dispute than any suggestion that the Court has reached an unfair result: that a plainly guilty spouse has been allowed to "get away with it", and to profit from his or her own wrongdoing. It is true that what the Legislature has done in s. 19 (1) (a) is to recognise the reality which lies behind a good many matrimonial difficulties. But a "clean hands" doctrine still has its place even in this difficult field.

Secondly, it may be suggested that no public good is served by refusing a separation order in any case where the spouses are obviously hopelessly irreconcilable, whatever may have brought about that state of affairs. This way of approaching the problem, superficially reasonable though it may be, nevertheless places a premium on the interests of the (sometimes guilty) applicant, and ignores the interests of the (sometimes innocent) defendant. It is all too seldom recognised that a blameless defendant may well be the best judge of what is in his or her own interests, and that there is little justification for allowing these to be overridden by assisting an applicant who does not in reality deserve to be assisted.

The third and final point is an essentially practical one. Ever since s. 19 (1) (a) was enacted there has been a pressing need for guidance on the principles to be applied in administering it. *Myers* v. *Myers* met part of that need. But even after *Myers'* case there was still uncertainty about the ambit of what the Court of Appeal called the "residual discretion". It is with some surprise we learn, from reading Mahon J.'s judgment in *Mitchell* v. *Mitchell*, that there have been at least two unreported Supreme Court judgments on very similar lines: *Courtenay* v. *Courtenay* (Speight J., 1972) and *Eland* v. *Eland* (Quilliam J., 1971). While the latter of these has been written up in 1971 *Recent Law* 307, it is

astonishing that neither has been reported. At the present rate of reporting we may expect to see Mahon J.'s important judgment in *Mitchell's* case appear somewhere round mid-1973. The profession should surely be better informed than this on appellate decisions in a rapidly developing field.

B. D. INGLIS.

LAWSON ON EUROBRITAIN

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It will not have gone unnoticed in New Zealand that Britain, on January 1 1973, became a fully paid-up member of the E.E.C.

Indeed, it did not escape attention in this country either. What was surprising, however, was the overwhelming apathy of the people towards this epoch-making event.

The media did, and is doing, its best. News bulletins tell us of European weather and European road conditions. A "Fanfare for Europe" was organised across the country, featuring all that is best in the culture of her new trading partners.

But it passed everybody by. England looked pretty much the same on New Year's Day as it had done the day before. As one newspaper said, with accuracy if not originality, the great event had passed "not with a bang, but a whimper". One was left agreeing with Dr Mansholt that the very notion of the community has failed to make much impact. if any, on the ordinary working population of the member countries.

But in partial derogation of what has been said above, one event connected with British entry did stir the people from the Christmas torpor.

This was a competition held to name the first baby born into the new European Britain. My own favourite was "Eurosprog" with "Eurobrat" and "Brussel Sprout" coming close behind. The wretched parents chose, in fact, the hideously trendy "Pace", being Italian for "peace".

The uncharitable supposed that one of the first benefits of the Common Market was the rocketing price of beef. Best Scotch fillet, just after January 1, approached £1.50 (over $3) per pound.

The Government appointed a committee to investigate the position, and the report, quite incredibly, came back in three days. Such an inquiry cannot, of course, really do its work properly in such a time. What happened was that the Government became alarmed at the rising prices and appointed a committee as a matter of political cosmetics. Mr Heath has now seemed to have fallen for the political gimmickry he so despised in Mr Wilson.

For what it is worth, the Committee found no profiteering, just a shortage of beef. The housewife was advised to boycott the meat until the price came down. No one bothered to say that, if she did this, the price would shoot up again when she resumed her pursuit of the Roast Beef of Olde England.

What made this all peculiarly depressing was the fact that this all occurred while Britain, supposedly, was in the throes of a price freeze under the terms of the Counter-Inflation Act 1972. During the 90 days of the freeze, food prices rose by 7 percent. In the same period prior to the freeze, the rise was just on 2 percent. There is a message here for someone.

Meanwhile, the Government is engaged on working out the terms of the next phase of the statutory incomes policy. What is interesting in all this is that the principle architect of the policy is Mr Heath, a man who just 18 months ago "utterly rejected" a statutory incomes policy as unworkable. But then, as Emerson once said: "Consistency is the hobgoblin of the small mind".

Hot Shot—Lord Goodman recently accused lawyers as having a "coy terror of the human race". He could not have had in mind Christchurch practitioner Mr D. H. Stringer, who, according to the Christchurch *Star*, supervises the training of about 90 bank officers and security men in Christchurch in the use of firearms, wearing his hat as director of coaching for the New Zealand Pistol Association. It seems he not only prepares securities. but ensures that the securities themselves are secure.

UNIT PARTNERSHIPS, TAXATION AND FAMILY BUSINESS VENTURES

In a previous article ([1973] N.Z.L.J. 43) it was suggested that the unit partnership combines many of the attractive features of partnerships and companies, while it avoids many of the disadvantages of the latter. It is not a legal entity, and its name merely is a convenient description for an association, each member of which holds shares or units.

As many unincorporated joint stock companies were, a unit partnership may be found to be more convenient if the partnership property is held by a trustee. The necessity of obtaining the signatures of all members to, for example, mortgages and transfers, would be avoided thereby. So, also, would any difficulties raised over the capacity of infant partners. It is submitted that this arrangement would not come within the wide definition of a "unit trust" in the Land and Income Tax Act 1954, s. 153B (1), namely an

> "arrangement . . . that is made for the purpose or has the effect of providing facilities for the participation, as beneficiaries under a trust, by subscribers or purchasers, in income and gains (whether in the nature of capital or income) arising from the . . . property . . . for the time being subject to the trust . . .."

Accordingly, the provisions of subs. (2), deeming such arrangements to be companies, for the purposes of income tax, would not apply.

The members of a unit partnership, whose property was held by a trustee, would not be participating in any gains from the property as subscribers to, and beneficiaries under, a trust, but as members of the partnership. Any profits come from the business of the partnership, and the trustee would have no business of his own, would make no money, and would keep no accounts. The only right of any member stemming from his fiduciary relationship with the trustee, is the beneficial ownership of the property in common with the other members. The property is held on trust, not as a business, but merely as a convenience for the members of the partnership.

Although the unit partnership is not a legal entity, continuity is attainable by drafting the Articles of Partnership to include an agreement abrogating the rules, in the Partnership Act 1908, ss. 35 and 36, that it is dissolved, for example, by the termination of any adventure or undertaking, by the giving of notice by any partner, or by the death or bankruptcy of any partner.

Transferability of the units can be improved by a provision in the Articles abrogating the Partnership Act 1908, s. 34, which provides that the assignee of an interest in a partnership is not entitled to be treated as a member of the firm, but merely is entitled to receive the profits to which the assignor otherwise would be entitled.

As in many companies, the Articles of a unit partnership could create two classes of shares. One, relatively small, with voting power, and the other, relatively large, without it. In this way control can be vested in the holder of a small stake only in the business. The voting units could have attached to them the right also to a preferential payment out of profits. Possibly this may be calculated as a certain percentage by way of interest on capital, with or without the right of participation in any surplus. Again, the voting units could carry rights on dissolution restricted to a return of capital, preferential or otherwise, but nothing more (*a*). Any remaining annual profits, and any excess over and above a return of capital on dissolution, would be distributable between the holders of the non-voting units only. Whatever income was required by the controlling partner could be secured by way of a salary, payable pursuant to a service contract written into the Articles of Partnership, by which he agreed to manage the partnership (*b*).

As a further refinement, the voting units may have attached to them the right to acquire non-voting units from any other person who has become entitled at law or in equity: such as on death or bankruptcy. Also, transfer of the non-voting units may be restricted in much the same manner as shares in a private company, so that

(*a*) Although very careful regard would have to be paid to the Estate and Gift Duties Act 1968, s. 24 That enactment enables the Commissioner to disregard any such provision which is unreasonable.

(*b*) Estate and Gift Duties Act 1968, s. 12 (1) (b) warrants great care being given to a service contract It brings into the notional estate any property comprised in a disposition accompanied by a contract for any benefit to the disponer for any period calculated by reference to the life span of any person.

no units can be disposed of without the consent of the holder of the voting shares.

The result is that the senior partner, during his lifetime, can have superior voting power, and, therefore, retain the direction and management of the business, and the control of the membership of the partnership. On his death, subject to considerations raised by the Estate and Gift Duties Act 1968, s. 24, his capital interest in the enterprise, for purposes of estate duty, could be small. Moreover, by transfer of the voting units, he is in a position to pass all of his management rights to the successor of his choice, either during his lifetime or by his will.

Effectiveness for tax purposes—The Land and Income Tax Act 1954, s. 106 (1) (c) provides that where, in relation to what can be called a family partnership, of which the taxpayer is a member, the Commissioner is of the opinion that any income payable to or for the benefit of a relative, in terms of the partnership agreement, exceeds what is reasonable in all the circumstances, he may, *for tax purposes*, re-allocate the profits and make assessments accordingly. This power of re-allocation is not one of those exempted, by s. 35, from objection and review. If, and only if (c), the partnership bears the five marks of s. 106 (6), it is deemed to be a *bona fide* contract of partnership, and is exempt from this power of re-allocation.

The first of these five marks is that the partnership agreement is written, and, where a husband and wife both are members of the partnership, s. 10 (2) requires that it be enshrined in a deed.

Minors as partners—Next, all members must have attained their twentieth birthdays at the date the agreement is executed.

There is, apart from s. 106, no objection to an infant being a member of a pertnership. The effect of the Minors' Contracts Act 1970 (*d*), is that, generally, contracts, which neither are unconscionable nor oppressive, with minors over eighteen, are as effective as if the minor was of full age, and contracts with minors under eighteen are equally effective except that they are unenforceable against the minor (*e*). Consequently, the doubt that was expressed (*f*), before the Act, whether infants of 9, 7, and 5 years were capable of giving the consent necessary to the formation of the contract of partnership appears to have been resolved affirmatively. Where a minor is married or divorced, or the contract is approved by a Magistrate's Court, the partnership agreement will have effect as if he were of full age (*g*).

Even if, through his infancy, a minor is able to escape liability in respect of partnership debts, he cannot prevent their being discharged out of the partnership assets, for these are available for payment of all partnership liabilities (*h*).

One of the major attractions of the unit partnership lies in the opportunity to introduce minors progressively into a business. Accordingly, the advantage of exemption, by being deemed a *bona fide* partnership within s. 106 (6), must be lost if this is done. Care is necessary, therefore, to ensure that the income payable to any partner is reasonable in all the circumstances, otherwise it will be subject to re-allocation by the Commissioner.

Term of the partnership—The third of the five indicia of *bona fides* enacted by s. 106 (6) is that the partnership agreement must bind the parties for three years, except in the cases specified in the Partnership Act 1908, ss. 36 and 38. These are the death, bankruptcy, suffering of his share of the property to be charged for his separate debt, lunacy, permanent incapacity, or conduct prejudicial to the carrying on of the business or making it impracticable to carry on the business with him, of any partner, or where the business can be carried on only at a loss, or where circumstances have arisen making dissolution just and equitable.

Since one of the reasons for adopting the unit partnership form probably would be that, while its existence will continue for some considerable time, members may enter and leave it relatively freely, it is unlikely that this condition will be satisfied.

"Real and effective control"—"Real and effective" control by each party of his share of income is the fourth mark of *bona fides*. Circumstances excluding this requirement were held to exist in *Robert Coldstream Partnership* v. *F.C.I.* (*i*). The partnership was between the taxpayer, his wife, and their two daughters.

(*c*) *C.I.R.* v. *Lilburn* [1960] N.Z.L.R. 1169.

(*d*) Which, by s. 15, replaces all former rules of law and equity on the subject.

(*e*) Minors' Contracts Act 1970, ss. 5, 6.

(*f*) *Moore* v. *C.I.R.* [1959] N.Z.L.R. 1046, 1050 line 53-1051 line 1, per McCarthy J.

(*g*) Minors' Contracts Act 1970, ss. 4, 9.

(*h*) *Lovell & Christmas* v. *Beauchamp* [1894] A.C. 607, 611; [1891-4] All E.R. Rep. 1184, 1186B, per Lord Herschell.

(*i*) (1943) 68 C.L.R. 391.

However, sole management and control was conferred on the taxpayer. Moreover, it was provided in the partnership deed that, although each member was entitled to an equal share of the annual profit, the wife and daughters were required to permit 70 percent of their respective shares to be credited irrevocably to their capital accounts, and they were not entitled to call on their drawing accounts without the consent of the taxpayer. Finally, the taxpayer, at any time, was entitled to sell or dispose of the partnership business, on any terms, and was required to hold the proceeds on certain trusts.

Referring to the provision granting the taxpayer the sole management and control of the partnership, the Court observed that it did not

> "enable the managing partner to alter the rights of the other partners under the deed in respect of a share of net income or anything else. This clause enables the managing partner to determine how the moneys available for expenditure in the business are to be spent. He can conduct the business of the partnership in relation to all persons with whom the partnership deals without interference by other partners. The power to place restrictions or conditions upon the powers of the other partners relates only to the conduct of the business and does not allow the managing partner to restrict or alter their rights under the deed. In my opinion [this] clause . . . does not allow the managing partner the control of net income of any other partner. If under the deed the partners are either entitled or required to deal with profits in a partiuclar manner, [this] clause . . . does not affect such provisions of the deed in any respect" (*j*).

The learned Judge held that the power of the taxpayer to dissolve the business was irrelevant. It did not deal with the income of the partnership, but with its assets.

But the requirements that 70 percent of their income be deposited irrevocably in their capital accounts, it was held, prevented

> "the female partners having real and effective control and disposal of their share. They are bound by reason of these provisions to allow their shares to be dealt with in this particular way and are not in a position at their own will to deal with them in any other way" (*k*).

In practice it may be difficult for a unit partnership to exhibit this fourth mark of *bona fides*. While, in an ordinary business partnership between strangers, equality of rights and obligations must be the guiding principles, they often are the last thing required in a family partnership.

It has been observed (*l*) that vesting merely the management of the business in one or more members, to the exclusion of the others, will not give rise to a construction that those others lack "real and effective control" of their respective shares of the income. Neither will the vesting of one or more of the partners, to the exclusion of others, with the right to dispose of the partnership business on any terms (*m*). Such a right has no effect on the *income* of the partnership, but on its *assets* only. Nor, for the same reason, should an option to acquire for value, the shares of other members of the partnership. Nor, again, it is submitted, should a provision restricting operation of the partnership bank account to certain partners: for this seems to be a function of the management of the business.

However, as the judgment of Latham C.J. (*m*) shows, s. 106 (6) (d) will be infringed by provisions restricting drawings from, or requiring capitalisation of, the shares of some partners in the income. The learned Judge did not give explicitly the former provision as a basis for his decision, but it is clear that, had the compulsory capitalisation requirement been absent, the restriction on drawing from profits without permission from the taxpayer would have led to the same result. The position would be different, it is submitted, if partners, not being required by the agreement to leave their shares of income in the business, allowed them to remain there nonetheless. Accordingly, if the senior partner is sure that the others would accept his "suggestion" that this be done, there would be no need for a provision infringing s. 106 (6) (d). Although it would be otherwise if the "suggestion" was, in reality, a threat, or some form of pressure.

Distributive share must not be a "gift"—The final statutory indication of *bona fides* is that no part of the income paid to a "relative" (*n*) is a gift for the purposes of the Estate and Gift Duties Act 1968. Subsection 2 (2) of that statute defines "gift" as

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(*j*) Ibid. 395-396 per Latham C.J. Also 399-400.
(*k*) Ibid. 398 per Latham C.J.
(*l*) Ibid. 395-396, 399-400 per Latham C.J.
(*m*) Ibid. 398 per Latham C.J. However, such a right could infringe the Land and Income Tax Act 1954, s. 106 (6) (c).
(*n*) The Land and Income Tax Act 1954, s. 2 defines "relative" as a person connected with another by ties of blood, marriage, or adoption. A trustee for a relative is included expressly in the definition.

". . . any disposition of property, wherever and howsoever made, otherwise than by will, without fully adequate consideration in money or money's worth passing to the person making the disposition:

"Provided that where the consideration in money or money's worth is inadequate the disposition shall be deemed to be a gift to the extent of that inadequacy only."

So, any remuneration paid, other than in respect of fully adequate consideration, rendered in services or capital, or in some other way, will preclude the partnership being deemed *bona fide* for tax purposes. This, despite the fact that the Third Schedule to the Estate and Gift Duties Act 1968 allows gifts of up to $4,000 to be made in each year without attracting gift duty. For, "gift", for the purposes of the Land and Income Tax Act 1954, s. 106 (6) (e), means *any* gift, and not merely a gift in excess of $4,000: *Robertson* v. *C.I.R.* [1964] N.Z.L.R. 484.

Bearing in mind that the Commissioner, by s. 106 (1), is empowered to re-allocate an unreasonable disposition of profits among members of a partnership, this requirement appears to impose nothing on the unit partnership with which it does not have to comply anyway.

A. P. MOLLOY.

HOW TO USE THE PRESS COUNCIL

The New Zealand Press Council was formed in September 1972, on the initiative of the Newspaper Publishers' Association of New Zealand and the New Zealand Journalists' Association.

Its principal object are:

(a) To preserve the established freedom of the New Zealand Press.
(b) To maintain the character of the New Zealand Press in accordance with the highest professional standards.
(c) To consider complaints about the conduct of the Press or the conduct of persons and organisations toward the Press; to deal with these complaints in whatever manner might seem practical and appropriate and to record resultant action.
(d) To keep under review developments likely to restrict the supply of information of public interest and importance.

Representations may be made to the Council under any of the above headings, but this article is intended primarily for the information of persons wishing to complain of breaches of good Press practice, whether they relate to the publication (or non-publication) of material or to the conduct of Press representatives.

As an ethical body, the Press Council does not recover debts or seek monetary recompense for complainants. There is no charge for the Council's services.

Initially, a person with a complaint or grievance must complain by letter to the editor of the newspaper concerned. This rule is necessary because it acquaints the editor with the nature and the details of the complaint and allows him an opportunity to deal with the matter at first hand. It is not necessary that a complainant should be personally involved in the matter about which he has a grievance.

If the complainant is not satisfied with the response to his representations, his second step is to send to the Secretary of the Press Council:

(a) A statement of complaint in general terms;
(b) Copies of the correspondence with the editor;
(c) The page of the newspaper containing the matter complained of;
(d) Names and addresses of other persons involved, if this is applicable, and any evidence or statements which may support the complaint.

From this point, the Press Council pursues its own investigations. The Council may invite a complainant or others involved to give oral evidence. Proceedings before the Council are informal. They will not be open to the public and in accordance with English practice counsel will not be heard.

The Council's adjudication is communicated in due course to the parties, and in all but exceptional cases the Council issues to the Press for publication a statement of the facts of the complaint together with the adjudication.

It must be remembered that the Press Council is an ethical body and does not seek to supersede or supplement the administration of legal justice. In circumstances where a legally actionable issue may be involved, the complainant will be required to give a written undertaking that, having referred the matter to the Press Council, he will not take or continue legal proceedings against the newspaper or journalist concerned.

This is to avoid any possibility of a Press Council inquiry being used as a "trial run" for litigation.

All documents submitted in presentation of a case will be retained by the Council in its Case Records and submission will be accounted evidence of acceptance of this rule.

English experience has shown that delays in the presentation of complaints sometimes seriously interfere with investigation by the Press Council and make unreasonable demands upon editors and journalists. The Council ,therefore, is concerned to seek the co-operation of the public in the prompt presentation of complaints and has decided that where there is unreasonable delay in submission it may decline to entertain complaints.

Similarly, the Council seeks to minimise delays in the response of newspapers' editors and has authorised its Secretary, in appropriate cases, to fix time-limits for production of replies, in default of which the Council may proceed to deal with the complaints.

The Council, under its constitution, exercises jurisdiction only in respect of publications which are published by members of the Newspaper Publishers' Association of New Zealand. In particular it has no jurisdiction over radio or television, either publicly or privately operated, and cannot consider cases in those fields.

Further details are available from the Secretary, K. M. Poulton Esq., c/- P.O. Box 1066, Wellington.

ABORTION, PHILOSOPHY AND NATURAL LAW

Mr Coen van Tricht's article on abortion ([1972] N.Z.L.J. 188) has had two commentators (Mr Mooney at p. 296 and Fr Duggan at p. 324).

Both Mr Mooney and Fr Duggan point out absurdities in van Tricht's article. They criticise for example his use of the physiological/morphological distinction, and show that this distinction is not at all the same as that between foetus and person. Messrs Mooney and Duggan further agree, *contra* Mr van Tricht, that though appearance (i.e. shape) alone may not distinguish, at one stage, a human foetus from a tadpole, there there are differences other than mere shape. Mr Mooney points e.g. to genetic features, which are of course not apparent to unaided observation, but which are none the less objective for that.

But now both commentators, having agreed that there are genetic differences between, say, a human and an ape foetus, wish to add something to this undoubted difference. Mr Mooney declines to beg the question by appealing to the Christian concept of soul; instead he speaks of a "psyche, anima, or life-force", or "the vital spark of life". Is it really necessary to point out that an appeal to a "life-force" begs the question just as much as does appeal to a soul? The notions purportedly named are all equally obscure. Mr Mooney does recognise that there are obscurities surrounding his life-forces; he worries: "At the present time it is not possible to determine scientifically at what stage the embryo receives the vital spark of life". Mr Mooney might well be concerned, for it is obviously not possible to determine such a question scientifically at the present time, or at any other time. It is simply not a scientific question, but, as Fr Duggan notes (p. 325) a philosophical/theological one.

What possible scientific way could there be to say when "the embryo receives the vital spark of life"? Let us imagine this *elan vital* waiting, as it were, in the wings, for the suitable moment to be received by the embryo. On what grounds should we say that *now* the embryo has its vital spark? If at all, then by some objective organic features of the embryo-quickening for example. But if quickening were our sole criterion for saying that the vital spark has now "been received", if there are no independent tests for its existence, then there are no grounds for postulating that there *is* a vital spark. What there is is quickening (or whatever mark you will). This can be adequately explained in scientific terms, and the additional explanation supposedly provided by vital sparks and their like is empty.

In short, either "vital spark" is misleading terminology, being simply shorthand for some organic behaviour, or it is used for something else. If the latter, then the discussion begs the question against those who believe that there *is* nothing else.

Fr Duggan is more sophisticated than Mr Mooney; in his world-view the "vital spark" gives way to the "entelechy". Now this could be meant in various ways. It could be yet another name for whatever is supposed to be named by

"soul" or "life-force". If so the same objections apply: it is either meaningless, or question-begging. "Entelechy" could on the other hand be being used to mean something like "purposiveness". But either the purposiveness in question is a feature so general that it is shared with animals, and even plants, or else it is something stronger, like conscious purposive pursuit of a goal. If the latter it is stronger than Fr Duggan would wish; while a human being has this feature, a foetus lacks it.

I do not want to join the argument as to the existence of some metaphysical entity, soul-vital-spark-entelechy. I merely wish to point out that it *is* a philosophical and not a scientific question; we cannot therefore expect general agreement. And where views can be expected to differ so radically, we cannot rest an argument for a practical decision on any one view. But then, Mr Mooney indicates that he is aware of all this when he says that any appeal to the Christian "soul" would beg the question. Nevertheless he goes on, undaunted, to beg the question.

Natural law

More important than these hoary points are the two genuine legal questions which are raised, one by each commentator. The first is the assumption by Fr Duggan of a theory of "natural moral law—that which obliges a man by the fact that he is a human being" (p. 325). Let us note firstly, that the doctrine of natural law is not established, and positivism is not refuted, by Fr Duggan's quoting of authorities, Cicero and Kaufmann.

Let us grant to Fr Duggan however, his natural law doctrine, insisting nonetheless that no particular law is thereby established as valid. The substantive work for a natural law theorist lies in attempting to establish of *particular* laws that they are in accordance with nature (or with true nature perhaps? or ideal nature? or God's plan?). If there *are* exhibited in nature any "true laws", they are certainly not unambiguously displayed. A general precept: "follow nature", like the precept "follow God", is simply not a helpful guide in any particular situation. I myself would argue that any doctrine of natural rights would, unhappily, need to allow that there are conflicting rights. Abortion is an obvious case. The man who weighs the rights of a microscopic zygote, is in my opinion, a man totally lacking in human compassion and understanding. For let us not pretend that being forced to give birth is nothing more than a few months inconvenience and discomfort. The experience of having a child is not something which most women can take, so lightly; and to have to give a born child away for adoption could be unimaginably cruel.

Weigh the right of a human being not to be forced to suffer these profound experiences, against the right of a foetus to *become* a human being. It is a question of the respective rights of actual and merely potential human beings. Potential human beings are not human beings, any more than eggs are chickens; to compare their rights with those of presently living people is to lose sight of what ought to be our concern —a full and satisfactory life for (actual) people.

Here, however, we must consider Mr Mooney's arguments to the conclusion that the foetus *is* a human person.

He says:

> "American Courts have recognised a born child's right to compensation for injuries received *en ventre sa mere* but under our Anglo-American system of law, legal rights cannot devolve on anything less than a human being.
>
> Does this not confirm that to the civil as to the criminal lawyer as well as to the anthropologist the unborn child is a human person?"

His argument in this passage is of this form: A born child has been held to have rights regarding injuries received as a foetus. Only human beings have legal rights, therefore the foetus is, in civil law, a human being.

To see the invalidity of this argument, consider a parallel argument: I would like to see control of mercury in the oceans, in order to protect my (yet unborn) grandchildren from poisoning. Certainly my grandchildren, when born, would be right to censure the present generation for mercury contamination. So there seem to be rights belonging to my future possible grandchildren, rights which impose constraints on my behaviour now. Yet my (merely possible) grandchildren are not human beings. They are not anything; there may in fact never be any grandchildren of mine.

The point is that once there exists an actual born child it has rights, and these may extend backwards in time to influences before its birth. But this alone cannot show that a possible, embryonic child is at the present time a human being, any more than my future grandchildren are human beings now. The undeniable rights of a born child to a healthy pre- and post-natal environment cannot show that an embryo has the right to *develop into* a baby.

To sum up my dispute with Mr Mooney: a foetus is not a human being, and nothing he cites shows that a foetus has been held to have the rights of a person.

To sum up my dispute with Fr Duggan: the natural law v. positivism debate cannot be taken as being settled in favour of the former, *pace Kaufmann*. So an anti-abortion argument resting on natural law rests on doubtful grounds. Even if, however, the debate is conducted in the terms acceptable to Fr Duggan and other theologians, their desired conclusion (the absolute right of a foetus to develop into a baby) does not follow.

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THE I.C.J. IN NEW ZEALAND

The New Zealand Section of the International Commission of Jurists is one of about 50 national sections of the parent Commission. The latter was formed in 1952 out of a group of Judges, practising lawyers and law teachers who had escaped from East Germany. Since then the Commission incorporated as a non-profit making non-political entity with a permanent Secretariat in Geneva.

The aims and objects of the Commission focus on the recognition of human rights and fundamental freedoms through the rule of law which is defined broadly as those principles, institutions and procedures which the traditions and experience of lawyers generally have shown to be important to protect and advance the civil and political rights of individuals and to promote the social economic and cultural conditions which ensure those rights.

The New Zealand Section which last year held its tenth Annual General Meeting supports the same aims and objects as they relate to New Zealand society. As Mr Justice Woodhouse indicated to an Annual General Meeting of the Section, it is not with the clear cut usurpation of power or the spectacular or shameful injustice, which are happily nonexistent in New Zealand, which this Section has to deal with but with those matters which, while they remain latent and accepted, require investigation and possible reform to achieve the aims of the Commission in a stable common law jurisdiction.

There is nothing spectacularly wrong in New Zealand to be put right but there are and always will be areas where the individual's rights can be improved and advanced.

In its ten years, membership of the New Zealand Section has remained relatively small but it has and will continue to support reforms and changes in the law.

Among the numerous matters which it has considered are the extension of the jurisdiction of the Ombudsman, the enlargement of the jurisdiction of the Administrative Division of the Supreme Court, and the procedures under which land is compulsorily taken. It has exercised an effective influence in the area of administrative law. Proposals put forward by the Section to simplify the procedures of the extraordinary remedies can be claimed to have resulted in the recent Judicature Amendment Act.

The Section has spent a great deal of energy in the area of privacy and its protection and has put forward two separate suggestions in draft Bill form first for the control of the use of listening and other devices and second for the creation of a test of interference with privacy with criminal and civil liability. The Section has submitted these proposals to Government and will renew its support of them with the new Government. While the Section accepts that questions of computer control in the area of privacy are also important and is working on this it believes that the general questions raised in its earlier proposals are equally important and should not be forgotten because of the immediate impact of increasing use of centralised storage of information in computers.

Although numerically small the Section has had an influence beyond its numbers. It has attracted distinguished jurists throughout New Zealand including Chief Justices, Judges, Magistrates, Members of Parliament, practising lawyers and law teachers. It is not, however, an "establishment" organisation. It has always welcomed and obtained its strength from younger men, whether in years or in outlook. It has remained true to its non-political foundations and has exerted its influence with deliberation.

Those who wish to have details of membership should write to the Secretary, New Zealand Section of the International Commission of Jurists, P.O. Box 1291, Wellington.

THE BORDERLAND OF THEFT REVISITED

Pursuant to s. 220 of the Crimes Act 1961, the offence of theft can be committed by "taking" or "converting" property; it is not essential that there be a trespassory taking accompanied by the requisite intent and a person is guilty of theft if, with *mens rea*, he converts property of which he is already in lawful possession. This simple extension to the old concept of larceny has meant that many cases which used to cause difficulty, because it was at least arguable that the defendant was already in possession of the property with the consent of the owner before he dishonestly appropriated it, are now clearly covered as soon as the defendant dishonestly converts the property (*a*). Nevertheless, doubtful cases can still arise when a person obtains property from another with that other's consent. The reason for this is that, although s. 220 does explicitly require that the thing stolen be "property belonging to another" (*b*), yet there can be no simple theft if the transferor of property passes full title (as opposed to mere possession) to the transferee before he takes or converts it. Section 220 (2) makes this explicit, at least where the consent of the transferor to the passing of the property has been obtained by a false pretence: the subsection provides that the term "taking" in s. 220 (1) "does not include obtaining property in or possession of anything with the consent of the person from whom it is obtained, although that consent may be induced by a false pretence; but a subsequent conversion of anything of which *possession only* is so obtained may be theft." The new provision could possibly be interpreted as being limited to cases where a false pretence has been employed, so that in other cases a defendant could be held to "take" property when he receives possession of it even though he does this with the consent of the transferor. But even if s. 220 (2) might thus be of limited scope the New Zealand Courts do not appear to have ever departed from the view that simple theft cannot be committed when the transferor intentionally passes full title to the person who then appropriates the property (*c*). This was, of course, the rule at common law; there is nothing inconsistent with it in the Crimes Act and, moreover, it seems to be implicit in s. 220 that the rule is retained in so far as a person can only have the intention described in s. 220 (1) (a) if, at the time he takes or converts the property, there is someone else who is either the "owner" of it or who has a "special property or interest" in it.

There are also a number of New Zealand decisions where the continued operation of this rule has been recognised. Thus, in *McDuff* v. *Hammond* (1911) 30 N.Z.L.R. 444, it was held that the welshing bookmaker was not guilty of theft because in laying his bet the punter passed title in the stake money to the bookmaker: that particular money—the actual one pound note allegedly stolen—"disappeared in the bargain and the depositor never expected to see it again" (*d*). Similarly, where the defendant had employed some fraudulent device to induce another to hand over his property the defendant's liability to be convicted of theft depended on whether the victim had merely passed possession or whether he had intentionally passed full title as well (*e*). Again, when the owner of a car fraudulently induced a garage proprietor to return it to him, thus surrendering his lien, he was guilty of obtaining by false pretences but not theft: the victim "actually intended to surrender the lien over the car, and did in law surrender it accordingly when he consented to the removal of the car. . . . When, therefore, the accused took away the car there was no longer any lien over it: he was himself the absolute owner of it; therefore he could not steal it. The fact that the absolute ownership so acquired by him had been acquired by fraud would have been wholly irrelevant on a charge of theft." (*R.* v. *Cox* [1923] N.Z.L.R. 596 per Salmond J. at p. 605).

Thus, it is tolerably clear that it is still the law in New Zealand that a person cannot be guilty of common theft pursuant to s. 220 if, at the time he takes or converts the property, he has

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(*a*) E.g. *R.* v. *Ashwell* (1885) 16 Q.B.D. 190; *R.* v. *Hudson* [1943] 1 K.B. 458; *Russell* v. *Smith* [1958] 1 Q.B. 27.

(*b*) *Cp* Theft Act, 1968 (U.K.), section 1 (1).

(*c*) *Cf* Adams, Criminal Law and Practice in New Zealand (2nd) paras 1742-1744.

(*d*) At p. 447, per Chapman J; the contrary decision in *R.* v. *Buckmaster* (1887) 20 Q.B.D. 182 seems to be unsupportable; *cf* Smith ,*The Law of Theft* (2nd ed.) para. 35.

(*e*) *R.* v. *Muir* (1910) 29 N.Z.L.R. 1049; *R.* v. *Brownrigg* [1933] N.Z.L.R. 1248; *cf R.* v. *Rattray* (1896) 15 N.Z.L.R. 259.

acquired full title to it. It may be added that some English authority supported the view that there could be no larceny if the victim intended to part with full title to the defendant, even though that intention was for one reason or another frustrated (*f*). In New Zealand there seems to be no reason why there could not be theft by conversion in any such case, although the original acquisition by the defendant will not amount to "taking", at least if he employs a false pretence; whether or not there may be a "taking" when no false pretence is employed will depend upon whether s. 220 (2) extends to such cases.

The rule which excludes the possibility of theft when title has been successfully passed to a defendant is easy enough to state, but it may be difficult to apply because in some cases it may be doubtful whether property in goods has passed or not. If the defendant has employed a false pretence to induce the victim to hand over the property then such problems can and should be avoided by charging the defendant with obtaining by a false pretence, for which offence it suffices that either possession or title has been so obtained (*g*), but in some cases there has been dishonesty but no deception and so this solution is unavailable; in such cases it is necessary to decide whether property has in fact passed. This problem has been recently considered by the English Court of Appeal. *R.* v. *Gilks* [1972] 3 All E.R. 280.

The defendant went to collect his winnings from a betting shop and was overpaid by £106.63 as a result of a mistaken belief on the part of the manager of the shop that the defendant had backed the winning horse in a race (the race had been won by "Fighting Taffy" whereas the defendant had backed "Fighting Scot" which had been unplaced.). At the time he was paid the defendant realised that a mistake had been made and that he was being paid more than was due to him, but he nevertheless refused to repay the money, "his attitude being that it was Ladbrokes' hard lines." (at p. 281 per Cairns L.J.) The Court of Appeal held that the defendant had been properly convicted of theft of the amount by which he had been overpaid. Under the new definition of theft in England the *actus reus* of the offence comprises the appropriation of "property belonging to another" (Theft Act 1968, s. 1 (1)) and the main issue in *Gilks* was whether ownership in the money passed to the defendant when it was paid to him, so that when he appropriated it it was not "property belonging to another." In affirming the defendant's conviction the Court of Appeal did not examine this issue in any great detail, being content to hold that it had been established by the famous case of *R.* v. *Middleton* (1873) L.R. 2 C.C.R. 38, that in cases such as the present, property in the money paid by mistake does not pass.

The decision in *Gilks* on this point has been forcefully criticised by Professor J. C. Smith in [1972] Crim. L.R. 586 who notes that although there is little directly relevant authority the uncritical application of *Middleton* is less than convincing in that it is one of the most disputable decisions on the old law of larceny, and it is distinguishable anyway. Underlying the doubts about *Gilks* is the assumption that whether property passes or not depends primarily on the intention of the transferor: title will generally pass if he intends it to (*h*), although there are exceptions, as where the transferor lacks the necessary authority to pass title, or where he is labouring under certain kinds of fundamental mistake. In *Gilks* the bookmaker's manager doubtless intended that title should pass and it may be disputed whether his mistake was such as to vitiate this intention.

Three sources of authority on this question may now be considered: academic opinion, *Middleton*, and other apparently relevant cases which were not considered by the Court of Appeal.

Academic opinion

The weight of academic opinion favours the view that when a transferor intends title to pass, a mistake on his part will only prevent ownership passing if it is a mistake as to the identity of the transferee, or as to the identity of the thing delivered, or as to the quantity of the thing delivered; in the case of other kinds of mistake it is at least extremely doubtful whether the intention to pass title is vitiated (*i*). That the above kinds of mistake will prevent property passing may be explained on the basis that in

(*f*) This appears to have been unequivocally rejected in *R.* v. *Middleton* (1873) L.R. 2 C.C.R. 38, 45; Smith and Hogan, *Criminal Law* (1st ed.), 414-415; but it seems to have been accepted as good law in *Lacis* v. *Cashmarts* [1961] 2 Q.B. 400.

(*g*) Crimes Act 1969, s. 246; *cf* the advice to English prosecutors in Smith, *The Law of Theft* (2nd ed.) para. 30.

(*h*) *Cf Fawcett* v. *Star Car Sales* [1960] N.Z.L.R. 406.

(*i*) Glanville Williams [1958] Crim. L.R. 221; J. W. C. Turner, Modern Approach to Criminal Law, 356, 359; *Russell on Crimes* (12th ed.) 970 *et seq*; J. C. Smith [1972] Crim. L.R. 586, 588; *cf* Goff and Jones, *The Law of Restitution*, 91.

every such case the transferor has done something he never really intended to do, although where an excessive quantity of goods is delivered by mistake in execution of a contract to sell a lesser amount it is possible that s. 32 (2) of the Sale of Goods Act 1908 might operate to enable property to pass (*j*).

If the view of mistake favoured by the academics is correct it would seem that *Gilks* is wrong, for the bookmaker's manager made no mistake as to the identity of the defendant, nor as to the identity or the amount of the money he paid.

R. v. *Middleton* (1873) L.R. 2 C.C.R. 38

The facts of this case are well known. The defendant had 11s. in a Post Office savings account and he sought to withdraw 10s. The Postmaster General sent the necessary letter of advice to the post office and the appropriate warrant to the defendant, but when he presented this the post office clerk consulted the wrong letter of advice by mistake and consequently paid the defendant £8 16s. 10d. The defendant immediately realised that a mistake had been made but nevertheless appropriated the whole sum. He was convicted of larceny and the case was then considered by a full Court of fifteen Judges who upheld the conviction by a majority of 11 to 4 (*k*). Of the majority, one Judge decided the case on a rather special view of the facts and law, and three others held the clerk acted without authority; these will be returned to below. The remaining seven Judges in the majority held that the clerk's mistake nullified his intention to pass ownership: "It was simply a handing it over by a pure mistake, and no property passed" (at p. 44). The mistake was also held to be such that the defendant could be regarded as having taken the money without the consent of the owner.

The precise limits of this judgment are by no means clear, and, indeed, as recently as 1969 Lord Parker C.J. supposed that it would be "for all time debated until that case is no longer cited what is really the true effect of *R.* v. *Middleton*" (*l*). But the Court in *Gilks* had no such doubts: *Middleton*, it said, established that "where a person was paid by mistake . . . a sum in excess of that properly payable, the person who accepted the overpayment with knowledge of the excess was guilty of theft" and the bookmaker in this case, who would not have paid but for his mistake, "is paying by mistake just as much as the Post Office clerk in *R.* v. *Middleton* (*m*)."

The first thing to be noted about this is that when *Middleton* was decided it was necessary that the defendant knew of the mistake at the time of payment because it was essential that he had the *animus furandi* at the time he took the money. This is no longer necessary in either England or New Zealand: provided the defendant has acquired mere possession and not title he will be guilty of theft if at any time he converts the property with the necessary *mens rea*. In view of this it seems clear that it is no longer essential that the defendant be aware of the mistake when he first receives the property for the question now is simply whether title passes or not and that depends on the intention of the transferor, not on the presence or absence of a fraudulent intention on the part of the recipient.

Of more importance is the fact that the reasoning in *Gilks* is apparently defective in that it uncritically equates the mistake in this case with the mistake which was made in *Middleton*. The most satisfactory explanation of *Middleton* would seem to be that it was a case where the clerk mistook the identity of the defendant (although it has been disputed whether the facts of the case supported a finding of such a mistake (*n*)). Thus, at one point in the majority judgment the clerk's mistake is expressly described as a mistake as to the defendant's identity (*o*), and at another point the mistake was equated with one where a deliverer mistakes the identity of the goods he delivers, as where he delivers coffee when he intends to deliver beans (*p*). Most commentators have been prepared to accept this explanation of the case (*q*), as did the Appeals Committee of Quarter Sessions in *Moynes* v. *Coopper* [1956] 1 Q.B. 439 (*r*). If this is the true explanation of *Middleton* it is clear that the case does not govern *Gilks* in that there there was no mistake as to the identity of the defendant, or as to the identity or the amount of money paid: the betting shop manager really intended to pay those notes and coins and that amount of money to the person he in fact paid it to, although his motive or

(*j*) Glanville Williams, ibid. 229-232.

(*k*) It is noteworthy that no counsel was heard on behalf of the defendant.

(*l*) *Lacis* v. *Cashmarts* [1969] 2 W.L.R. 329, 336.

(*m*) [1972] 3 All E.R. 280, 282-283, per Cairns L.J.

(*n*) J. W. C. Turner, *Modern Approach to the Criminal Law*, 356, 359.

(*o*) (1873) L.R. 2 C.C.R. 38, 41-42.

(*p*) Ibid., 44-45.

(*q*) E.g. Smith and Hogan, *Criminal Law* (1st ed.) 354; Glanville Williams, [1958] Crim. L.R. 307, 308.

(*r*) See J. C. Smith, "Larceny by Finding Out" [1956] Crim. L.R. 516.

reason for doing so arose only because of a mistaken belief that the defendant had backed the winning horse. It is, to say the least, doubtful whether such a mistake prevents property passing; certainly *Middleton* does not require such a conclusion and it is not enough to say that the victim would never have paid had he known the truth for "this is true of all payments under a mistake of fact and it would be going much too far to say that the payer remains the owner in all such cases." (*s*)

At this point it is convenient to note the opinion adopted by Pigott B. in *Middleton* (1873) L.R. 2 C.C.R. 38, 51-52: that learned Baron took the view that the defendant was guilty of larceny because the clerk merely put the money onto the counter, rather than actually into the defendant's hand, with the result that possession did not pass until the defendant took it up, at which moment of time he was guilty of larceny. This approach was not adopted by any of the other Judges but in any event, as with the majority judgment, the correctness of Pigott B.'s conclusion depends on the view that the mistake was such as to negative the victim's consent to the defendant's acquisition of possession, and also the victim's intention to pass title. If in any case the mistake does not negative such consent then D. does not commit theft in taking possession of the property and if he also acquires full title to it there can be no theft by subsequent conversion (*t*). Furthermore, it may be noted that there is authority for the view that when there is no mistake which negatives an intention to pass title then in cases such as this, title passes when the money is laid on the counter, even before the payer takes it up (*u*).

Other relevant authorities

If the question whether property passes is treated as analogous to the question whether a person may be contractually bound as a result of an offer he made by mistake, then it would seem that property does pass in a case such as *Gilks*. An offeror will not be bound when he expresses himself in terms which the offeree must realise do not express his "real intention", (*v*) but he will be bound if the terms of his offer accurately reflect his intention even though the offeree realises that he would never have made that offer but for some antecedent mistake. Thus, in one Canadian case a manufacturer offered to sell a quantity of glass at a price which was ridiculously low, the offeror having used the wrong figures in computing the price, but although the offeree knew a mistake had been made it was held that he was entitled to hold the manufacturer to his offer for there had merely been a mistake "in the motive or reason for making the offer", not in the offer itself (*w*). The mistake in *Gilks* seems to have been of the same nature.

The view that property passes in such a case is also supported by a number of decisions on the old law of larceny. The best known of these is *Moynes* v. *Coopper* [1956] 1 Q.B. 439. It will be remembered that there the defendant had received an advance on his week's wages but the wages clerk had not been told this and so on pay-day he handed the defendant a packet containing a full week's wages, instead of the mere 3s. 9½d. he was really entitled to. The defendant did not discover the error until some time later, when he appropriated the money, and the Divisional Court held there had been no larceny because the *animus furandi* did not accompany the original taking. Of course, this reasoning will not prevent a conviction in New Zealand if mere possession was acquired, followed by a conversion, but the Appeals Committee of Quarter Sessions in *Moynes* v. *Coopper* had held there was no larceny for the more fundamental reason that the defendant had acquired title to the whole contents of the paypacket when the clerk gave it to him: this was because the clerk intended to pass such title and made no mistake as to identity or the amount of money, but at most there was a mistake going to the motive or reason for making the payment. The Divisional Court found it unnecessary to decide this question and this aspect of the case does not appear to have been considered in later cases, although academic commentators have accepted it as correct (*x*). If the view of the Appeals Committee was right it is difficult to see how *Gilks* can be supported.

There are also cases where the victim has been led to hand over property by some false representation which has induced in the victim a mistaken belief which appears to be strictly analogous to the mistake in *Gilks*, but it has been held that title nevertheless passes. Thus, this has been held to be the case where the victim

(*s*) J. C. Smith [1972] Crim. L.R. 586, 588.
(*t*) Section 220 (2) if the Crimes Act 1961.
(*u*) *Chambers* v. *Miller* (1862) 32 L.J.C.P. 30, 33, per Byles J.
(*v*) *Hartog* v. *Colin and Shields* [1939] 3 All E.R. 566.
(*w*) *Imperial Glass Ltd.* v. *Consolidated Supplies Ltd.* (1960) 22 D.L.R. (2nd) 759.
(*x*) J. C. Smith [1956] Crim. L.R. 516; Glanville Williams [1958] Crim. L.R. 307, 310; Rupert Cross [1958] Crim. L.R. 529, 530.

has handed the defendant a sum of money after the defendant has fraudulently led him to believe that he has handed him an equivalent sum (*y*). Of course, these cases differ from *Gilks* in so far as in them the defendant employed some false representation. This meant that although there was no larceny the defendant was nevertheless within the reach of the criminal law, but it is submitted with some confidence that the presence or absence of any false pretence is irrelevant to the question whether property passes: it can hardly be the law that a mistake induced by a false pretence will not vitiate the intention to pass title but the same mistake will have that effect if it is not induced by the defendant's fraud.

Perhaps the most important of the cases where a false pretence was employed is *R.* v. *Prince* (1868) L.R. 1 C.C.R. 150. In that case a bank cashier paid out on a forged cheque in the belief that it was genuine. The Court for Crown Cases Reserved held that the defendant was guilty of obtaining money by a false pretence but could not be guilty of larceny because the cashier had intended to pass property in the bank notes and had done so. The cashier in this case acted under a mistake which was quite as fundamental as that of the betting shop manager in *Gilks*, but notwithstanding this mistake, and the defendant's fraud, the intention to pass title was not frustrated.

In *Middleton* (*supra*, at p. 44) the majority purported to distinguish *Prince* but the precise nature of the distinction drawn is anything but clear, and it provoked a scornful reaction from Martin B., one of the dissenting Judges, who observed: "the act of the accused in *R.* v. *Prince* was a grosser act and more akin to larceny than that of the prisoner in this case; yet it was held not larceny. I defy any man to explain to anyone not a lawyer the difference between the two cases. The distinction seems to me to be worthy

Lord Parker C.J. concluded that the distinction drawn was to the effect that in *Prince* the money was handed over pursuant to a contract, albeit one the defendant had induced by fraud, whereas in *Middleton* there was no contract to render the money his which required to be rescinded (*z*). Although it may be respectfully doubted whether the holder of a forged cheque really enters into any contractual relationship when he presents it at the bank to be cashed, yet there are passages in *Middleton* (*supra*; pp. 43-44) which support the above distinction; but even if there was a contract in *Prince* it seems that the only reason there was no similar contract in *Middleton* was the nature of the mistake made by the clerk, and it has already been suggested that this was treated as a mistake of identity. Moreover, it has been argued that the reference to contracts was irrelevant in that the essential question was whether property passed and that did not depend on whether there was a contract, or consideration for the payment, but rather on whether there was anything to frustrate the conveyance which the payer intended (*a*). In any case, it is submitted that the only intelligible distinction between the two cases is that in *Middleton* there was a mistake as to identity but in *Prince* there was no such mistake.

At this point it may be noted that in *Gilks* the overpayment was made in execution of a "contract" which was void pursuant to the Gaming Act 1845, but the Court did not treat this as material.

The above authorities appear at least to render it doubtful whether the mistake in *Gilks* sufficed to prevent property passing and it seems fair to say that the question deserved a rather closer examination than the Court saw fit to attempt.

Authority and identification

These are two other matters which might appear to cause difficulty in a case such as *Gilks*.

The doubts which have so far been raised about the decision in *Gilks* have all been concerned with the decision that the mistake was such as to prevent property passing, but it might also be argued that property did not pass because the manager was merely an agent for the owner of the money and did not have any authority to pay the amount he actually paid to the defendant. Unfortunately, this question was not discussed in *Gilks*. As a general rule, it appears that a servant's or agent's intention to pass title in another's goods will be effective if the former has a "general authority" to conduct the business of the latter, or to deal with the latter's goods, as opposed to a limited authority which merely empowers the servant or agent to transfer possession (*b*). The manager of the bookmaker's shop no doubt had a general

(*y*) E.g. *R.* v. *Williams* (1857) 7 Cox C.C. 355; *R.* v. *Gallagher* (1929) 21 Cr. App. R. 172; *R.* v. *Mark* (1910) 28 W.L.R. 610; Howard, *Australian Criminal Law* (2nd ed.) 197-200; *cf R.* v. *Jackson* (1826) 1 Mood. 119; 168 E.R. 1209.

(*z*) *Lacis* v. *Cashmarts supra*.

(*a*) *Russell on Crimes* (12th ed.), 972.

(*b*) *R.* v. *Sutton* [1966] 1 W.L.R. 236; *cf Lacis* v. *Cashmarts supra*

authority to conduct his employer's business but nevertheless it might have been argued that he was only authorised to pay out winnings which were actually due, or which at least reasonably appeared due, in which case it would seem that the payment in *Gilks* was unauthorised. This argument is suggested by the reasoning of three (*c*) of the Judges in *Middleton* who took the view that the cashier's intention to pass property was of no effect because he had no authority to pay money except on the actual authority of the Postmaster-General. However, this view was not adopted by a majority of the the Court and in any event it seems to have turned on a particular interpretation of the statute which then governed Post Office Savings Banks.

The view that the payment in *Gilks* was authorised may be thought to be supported by *Prince* where is was held that the bank clerk had authority to pay on an order which he *believed* to be genuine. These cases, however, are distinguishable in that in *Prince* the order was apparently genuine and thus the clerk had reasonable cause to believe it to be a proper case for payment; for the payment in *Gilks* to be held authorised it seems to be necessary to hold that the manager's authority extended to include a decision that payment was due even though there was in fact no reasonable cause to believe this. Such a view would appear to be supported by the dissenting judgment of Bramwell B. in *Middleton* (*supra*; at p. 57) and it could find favour with the Courts for where the possibility of theft arises as a result of a mistaken payment there seems to be no substantial difference between a case where the mistake has been made by the actual owner of the money and one where it has been made by his agent who is attempting to act within the scope of his authority. However, the authority on this issue is slight and it is difficult to predict with any confidence the approach which is likely to be favoured by the Courts.

Another aspect of *Gilks* which may be thought to cause difficulty involves what can conveniently be termed the problem of identification. The bookmaker in fact owed the defendant £10.62 although the mistake led him to part with £117.25. The report does not disclose the actual terms of the indictment but the defendant was in fact only convicted of theft of the amount overpaid, i.e. £106.63. Although the question was not discussed by the Court it may be presumed that the manager's mistake did not prevent property passing in money up to the value of £10.62. It is true that in *Middleton* the defendant was convicted of theft of the entire amount taken, even though he had been entitled to be paid 10s., but even if the decision is correct on this point (*d*) on the basis that a mistake of identity negatives the payer's intention as to the whole sum, yet *Gilks* is readily distinguishable in that the mistake was only as to the amount owing. In any event, the defendant could doubtless raise a claim of right to £10.62 of the money paid (the possibility of a claim of right to some of the money was not discussed in *Middleton*). But if the defendant did not steal all the money it may be objected that it is impossible to say what money he did steal; while it may be true that there were notes and coins to the value of £10.62 which he did not steal yet it is logically quite impossible to identify which particular notes and coins he was entitled to (unless there was only one combination of notes and coins which made up £10.62.) There have been suggestions that such a state of affairs meant that there could be no conviction of larceny (*e*), but against this there was at least one case where the Court (without discussing the question) upheld a conviction for larceny of an unascertained and unidentifiable part of an ascertained whole (*f*). *Gilks* appears to be clear support for this: the Court appears to take the view that the defendant's conviction for theft can be upheld provided it can be said that of the £117.25 actually paid out there were notes and coins to the value of £106.63 to which he was not entitled, even though there is no way of distinguishing those notes and coins from the ones to which he was entitled.

S. 222 of the Crimes Act

Thus far the decision in *Gilks* has been considered only in terms of theft under s. 220, the offence which is the equivalent of the old crime of larceny and which is now commonly referred to as "common theft". If the above arguments were to be accepted, so that the defendant could not be guilty of this offence because property in the money passed to him, it could still be argued that the defendant would be guilty of theft under s. 222, which creates an offence

(*c*) Bovill C.J., Keating J. and Kelly C.B.

(*d*) For criticism of this aspect of *Middleton*, see Glanville Williams [1958] Crim. L.R. 221, 226, 308.

(*e*) Glanville Williams [1958] Crim. L.R. 221, 207; *Lacis* v. *Cashmarts supra*, at p. 336-337.

(*f*) *R.* v. *Tideswell* [1905] 2 K.B. 273; Rupert Cross [1958] Crim. L.R. 529; J. C. Smith, The Law of Theft (2nd), paras. 107-108.

(*g*) Adams, *Criminal Law and Practice in New Zealand* (2nd ed.) para. 1791.

which is equivalent to the former English offence of "fraudulent conversion". However, Adams (*g*) has fairly described s. 222 as "perhaps the most difficult section of the Act", and the precise limits of the offence which it creates are far from clear; in particular it is a matter for conjecture whether a case such as *Gilks* would fall within its ambit. For this offence to apply the Court would have to hold that the defendant received the money "on terms requiring him to account for or pay it, or the proceeds of it" to another. It seems that such terms will exist only where equity would hold that the other is the beneficial owner of the property or its proceeds (*h*) but whether such a constructive trust would be recognised in such cases of mistaken payment is doubtful; indeed it appears to be a quite novel question which has yet to be considered by the Courts.

Conclusion

The above discussion of *Gilks* has been largely concerned with the question whether the *actus reus* of common theft was really committed in that case. The defendant had also argued that he had not acted "dishonestly" (as is required by the Theft Act 1968) but the jury rejected this. The Court of Appeal declined to intervene on this issue, finding that the jury had been adequately directed to the effect that the defendant would not be guilty of theft if he believed he had "some right in law to take the property". There can be little doubt that the defendant's denial of dishonesty was weakened by his admission that he would think it dishonest if one knowingly accepted an excessive amount of change mistakenly paid over by a grocer, although he claimed it was different when it was a bookmaker who made the mistake.

In view of the fact that the defendant was apparently quite properly found to have acted dishonestly it may well be that some will take the view that the objections advanced above to *Gilks* are merely academic and tendentious quibbles which are calculated to unnecessarily complicate a basically simple offence. It is submitted, however, that more substantial issues are involved, as indeed is suggested by the fact that controversy has surrounded this type of case for more than a century. The basic issue in a case such as *Gilks* is whether the defendant is to be regarded as a thief or as a mere debtor who can be regarded as "dishonest" in that he refused to perform a legal obligation to repay, conduct which has never been regarded as criminal. In considering such a case the Court is concerned to determine the outer limits of the offence of theft and in doing this the Court necessarily has to consider rather obscure questions of civil law concerning the passing of property (*i*); in this case it is submitted that these questions were dealt with in an inadequate and unconvincing manner. It may be added that the view that the defendant's conduct was just as bad as that of an ordinary thief may be seriously disputed: the defendant employed no fraudulent device but merely succumbed to a sudden temptation of getting something for nothing, and moreover the opportunity for such a windfall would never have arisen but for the victim's own carelessness (*j*). In 1703 Holt C.J. justified the refusal of the common law to punish a simple obtaining by false pretences by asking rhetorically: "Shall we indict one man for making a fool of another? Let him bring his action" (*k*). It is not suggested that a return to this attitude is to be encouraged but at the same time one may question whether decisions such as *Gilks* do not go too far in the opposite direction. Holt would, no doubt, take the view that we now live in a fool's paradise where one man can be indicted because another has made a fool of himself.

G. F. ORCHARD.

(*h*) Adams, ibid., paras. 1798-1805.

(*i*) *Cf* J. C. Smith, Civil Law Concepts in the Criminal Law [1972B] C.L.J. 197.

(*j*) *Cf Middleton* (1873) L.R. 2 C.C.R. 38, 56 57, *per* Bramwell B. dissenting; J. W. C. Turner, Modern Approach to the Criminal Law, 357, 360.

(*k*) *R.* v. *Jones* (1703) 1 Salk. 379; 91 E.R. 330.

Evolution Revolution—A correspondent suggests we might profitably quote from *Private Eye*, the London satirical magazine, as has been successfully done by *The Review* of the International Commission of Jurists:

" 'The Africans just SAVAGES' South African Leader Lashes Out. 'If proof were needed of the necessity for separate development of the races in Africa, we certainly had it this week' said African leader Mandela Telegraph, 49, yesterday. The scenes outside the University of Cape Town have demonstrated once and for all that these white South Africans are little better than wild animals. We black South Africans come from a civilised tradition several thousand years old. It is hard for us to understand how human beings can behave like these policemen. 'To look at them', concluded Mr Mandela Telegraph, 'You would think they had only just come down from the trees.' "

LANGUAGE AND THE LAW

The question of what constitutes obscene or indecent language has recently received public attention because of a series of Court decisions.

The "Greer" (*Greer* v. *Police*, 15.5.72), "Hair" (*R.* v. *Harry M. Miller Attractions Ltd.*, 23.3.72) and "Shadbolt" (*Shadbolt* v. *Police* 26.8.71) cases, involving the use of the words "fuck" and "bullshit", are familiar to most.

Under the heading "Using foul language in a public place", s. 48 of the Police Offences Act 1927 provides: "Any person who uses profane, indecent or obscene language in any public place or within the hearing of any person in such a place is liable to imprisonment. . . ." Specific words, deemed to be "indecent" "obscene" or "profane" are not mentioned.

What are these "foul" words and in what circumstances should their use lead to prosecution?

In her appeal against conviction for using obscene language, Germaine Greer acknowledged using the word "fuck" in a public place but claimed she did not misuse it. She contended that the word was a more appropriate expression in the context in which used, than "sexual intercourse," "coitus" and so on.

The point taken on appeal was whether the word was obscene. In an oral judgment, Mr Justice McMullin (Supreme Court, Auckland, 15 May 1972) referred to the Shorter Oxford Dictionary definition of the word "obscene": "offensive to modesty or decency; offensive to the senses or the mind, disgusting, filthy."

The learned Judge noted that whether or not a word is obscene is to be determined by the time, place and circumstances in which it is used. He considered that whereas the word "fuck" may have been in good standing until the year 1690, this did not mean it was necessarily accepted in 1972 because words may fall in and out of favour. He said, "I have not myself been able to find the word in any standard dictionary for the reason, I believe, that it is recognised by the compilers of dictionaries as being still covered with a measure of taboo."

In the Judge's opinion, little profit was to be gained by invoking either the "Hair" or "Little Red School Book" (Indecent Publications Act 1972) cases as precedents, or as reflective of public acceptance. Each case was brought under separate acts which lay down different criteria for judging offensiveness.

Mr Justice McMullin further noted that: "While some few persons may believe that the word is acceptable in any circumstances and some may find it to be at best a grubby term, I believe that in 1972, while the word may have lost much of its taboo, or at least some of it, its use at a public meeting at which members of the public were free to be present would be and is offensive to modesty and decency." The appeal was dismissed.

There is frequent reference in law to the "right-thinking man" criterion for judging matters of public taste, decency, acceptance, etc. However, legislators rarely have access to tools of social science to discover what "right-thinking" men consider to be in good or poor taste, decent or indecent and so on. In fact, where surveys have been taken, public and private morality and behaviour are often shown to be discrepant (e.g. Kinsey et. al., *Sexual Behaviour in the Human Male*. Philadelphia: Saunders, 1949).

The present study was undertaken to explore swearing behaviour amongst a sample of New Zealanders who, by some definitions, could be regarded as "right-thinking." The aim was to:

1. Ascertain the degree to which common "swear" words were seen to be "offensive" (in relation to each other).

2. Measure the extent to which "swear" words are used by men and women (in different situations).

For want of a better term, our stimulus words are hereafter referred to as "swear" or "offensive" words.

Casual observation suggested "fuck" and "cunt" were likely to be the most offensive words. It was hypothesised that swear words are used by most people at least once a month, that men swear more frequently than women, that people adjust language to fit situations and that the least offensive words are used most. (A further aim was to ascertain from respondents the words they considered should be the subject of criminal proceedings if used in a public place.)

Procedure

Twenty words (*a*), arbitrarily selected, were printed in red on white cards measuring $8\frac{1}{2}$ x $2\frac{1}{2}$ins The words were arranged in alphabetical order

(*a*) The full list of words and other stimulus materials are available from the authors.

except that the card with "hell" printed on it was placed first to begin the experiment on a neutral note. Words such as "Christ", "God" and "Jesus" were excluded as it was considered their inclusion would introduce new and confounding variables.

The first sample comprised six men and six women, randomly selected, of varying ages and occupation. Each was asked: "With no one else present, arrange these words in the order you find them to be offensive. Put the most "offensive" word at the far end of this table (floor, bench, etc.) and the least offensive at the near end. Re-arrange the order until you are satisfied that the words are in the order of their offensiveness to you."

The most "offensive" word was scored 20, the next most "offensive" 19, the next 18, and so on, until the least "offensive" word was scored 1. The maximum possible "offensiveness" score for any one word was 240 and the least possible 12.

The second sample consisted of 14 men and 74 women aged between 18 and 65 years, (mean age, men: 41.64 years (S.D.—11.79); women: 36.81 years (S.D.—10.35) attending a continuing education class at Auckland University in August 1972.

Research into the clientele of adult education agencies reveals adult education participants to be well-educated and primarily employed in professional/technical and managerial occupations. On measures of conservatism they have been found to be more "right-thinking" than respondents in other social and occupational groups. Whilst it is not contended that our respondents are a representative sample of New Zealanders, any bias would be in a conservative direction. Furthermore, it is often contended that persons in the lower socio-economic groups swear more than upper socio-economic group members. On all data available we estimate that our respondents would swear less than the "typical" New Zealander.

For use with this sample stimulus words were printed on cards measuring 12″ x 8″. Respondents were told: "Twenty words, some of which are "swear" words, will be shown to you one at a time. Six questions are to be answered as each word is displayed. Indicate your answers by circling either the "yes" or "no" printed on the form provided.

Prior to holding up the first stimulus word, the experimenter said that data was to be collected in order to answer the following questions:

1. Have you used this word during the past month while alone? (e.g. in your car, office, kitchen, etc.).

2. Have you used this word during the past month at home in front of members of your own family? (e.g. wife, husband, children).

3. Have you used this word during the past month on a social occasion where you are *amongst strangers*?

4. Have you used this word during the past month on a social occasion when you were *with friends*?

5. Have you used this word during the past month in a public place? (e.g. a street, cinema, park, etc.).

6. Do you consider it should be a criminal offence to use this word in a public place?

These questions were summarised across the top of the answer sheet thus:

Alone; Home (with family); with Strangers; with Friends; Public Place; Criminal Offence.

The numbers 1 to 20 were printed down the margin. The first word shown, "blast", was simply referred to as word 1, and so on. The printed word was displayed by the experimenter but not spoken.

"Offensivness" Rankings

There was little difference between "fuck" and "cunt". Both rated highly. It is significant, that the four words considered most offensive are concerned with the sex act. Several pairs show significant association. "Bullshit" was ranked equally with "bitch" at 13th position. No one, as we shall see later, considered "bullshit" should be the subject of a criminal charge. So far as can be established, the word "bitch" has never been the subject of a criminal charge in this country.

In order of offensiveness and their frequency of use, "bum" and "bastard" show the greatest variation. "Bum" was considered to be relatively inoffensive, and is used infrequently. Conversely, "bastard" was considered to be fairly offensive, but is used quite frequently. While "fuck" was judged slightly more offensive than "cunt", it is used much more frequently. In fact half the men and a quarter of women acknowledged using "fuck" while alone. Apart from these cases, the most offensive words are used least and vice versa.

The word most frequently used by men was "hell" whilst for women it was "damn". Overall, in this order, "damn", "blast", "hell" and "bloody" were the four most frequently used words.

It will be recalled that there were twenty stimulus words. Respondents were asked to indicate whether these words had been used in five situations. Thus if a respondent acknow-

ledged using each stimulus word in every situation, the maximum possible use would score 100. No respondent used all twenty words at least once in each of the situations during the previous month, although one admitted to using "offensive" words 95 times, whilst another respondent used "offensive" words only 3 times. Across the five situations 50 percent of men used the word "bullshit" whilst 25.5 percent used "fuck." "Bullshit" was used by men about as often as the apparently 'legal' words "bitch" and "bugger".

To test the notion that men use "offensive" words more than women mean "useage" scores were calculated for men and women.

This demonstrated that men are significantly more inclined than women to use the stimulus words. Fifty percent of men said they used "bastard" in public and 36 percent acknowledged using "bullshit" in a situation where they could have been charged with a criminal offence. Women tend to use the least offensive words more frequently than men, especially while "alone" and at "home" nearly all women acknowledged using "damn" at home and alone and 66 percent used it in public. Men swore more often amongst friends than at home. Women did the opposite. Respondents were more likely to swear in a social situation with strangers than in public. They swore most frequently when alone. These data suggest people use language to suit situations.

Criminal Charge

Men were unanimous concerning whether or not use of the words in a public place should be illegal. Not one man considered any of the words should be the subject of prosecution.

Just over 13 percent of women respondents considered the use of "fuck" in public should be proscribed. Recalling the "offensiveness" rankings of the stimulus words, it is interesting to note that "prick", "piss", "balls", "fanny" and "crap", all of which were considered more offensive than "shit" and "bullshit", were not considered by any woman respondent to warrant legal proscription. Although no woman respondent admitted using either "fuck", "cunt" or "cock" in a public place, the percentage of women respondents who considered these words should be legally proscribed was minute. In other words, whilst our women respondents did not use these words in public themselves, most did not consider it necessary to prosecute people who use them in public. Not one respondent (man or woman) considered uttering "bullshit" to be an appropriate subject of prosecution.

Conclusions

These data strongly suggest that recent decisions concerning "offensive" language do not reflect the views of "right-thinking" people but the opinions of presiding Judges, Magistrates and complainants. If our sample is typical it would appear that law concerning "offensive" language bears little relation to the attitudes, but more particularly the language behaviour of New Zealanders especially concerning the word "bullshit".

A parallel situation existed before the advent of 10 o'clcok closing when after hours drinking in some New Zealand districts was rife. Our data suggests that present interpretations of laws governing "offensive" language and actual "swearing" behaviour are in some ways discrepant. Laws which do not reflect contemporary behaviour, are only perfunctorily enforced, and not based on any empirical investigation of public taste and behaviour are bad laws and lead to societal dislocation.

The difficulty confronting Magistrates concerning language behaviour is whether words used in specific situations are "offensive" to "most of the people of the community". The University of Auckland quadrangle wherein Germaine Greer used the word "fuck" was considered a public place but as no attempt was made to canvass opinion concerning whether or not students listening to the Greer address found the word "offensive" the Court had to adopt the usual "right-thinking" criteria and assume the word would be "offensive to modesty and decency."

Our data demonstrates that people tailor their language to suit situations. If Germaine Greer's language did not "offend" the (approximately) one thousand students but was "offensive" to the few non-student complainants produced by the police should the "right-thinking" criteria apply?

We conclude that legislators should use social science techniques when formulating laws concerning matters of public taste, decency, acceptance and so on. Judges and Magistrates should not be expected to merely rely on their own "right-thinking" views or hazard guesses concerning the views of the hypothetical "right-thinking" man. The dominant ethos prevailing in situations where "offensive" words are used should also be considered.

The social, psychological functions benefits and/or harm derived from swearing behaviour remain unexplored. Many people undoubtedly consider it a non-issue.

Persons recently jailed as a consequence of verbally labelling political statements as "bullshit" might not agree.

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R. BOSHIER (b) and R. GOODALL (c).

ADMIRALTY JURISDICTION IN NEED OF REVISION

New Zealand Courts will be able to hear a wider range of shipping claims if the Government adopts the recommendations of the Law Reform Committee on Admiralty Jurisdiction, which recently presented its report to the Minister of Justice.

The Committee's terms of reference were to examine the desirability of enacting local legislation to redefine the extent of Admiralty Jurisdiction in New Zealand Courts and the classes of vessels which should be affected. The work of the Committee had entailed extensive research into recondite areas of English maritime law and the Admiralty practice of other seafaring nations.

An important feature of the report was the recommendation to confer jurisdiction on Magistrates' Courts. The question whether those Courts had any jurisdiction under the present law had given rise to considerable confusion. The Committee thought that Magistrates' Courts should be entrusted with as many cases as possible involving pleasure craft and small marine cargo claims which fall within the monetary limits of their civil jurisdiction.

The enacting of local legislation conferring plenary jurisdiction on the Supreme Court would also pave the way for a revision of the relevant Rules of Court, which have not been revised since they were made in 1884 under an English statute of 1863. The result would be a modern statement of the substantive law and a code of practice that would be clear and readily available to New Zealand lawyers.

Generally speaking the Admiralty jurisdiction of the Superior Courts in the former Dominions have not been revised since 1890 when they were given the Admiralty jurisdiction that the High Court in England then had. Since then the English jurisdiction had been enlarged from time to time but apart from an adjustment made by Canada in 1934, no changes have been made in the Admiralty Jurisdiction of the self-governing Commonwealth countries. The Statute of Westminister of 1931, by abolishing the supremacy of imperial legislation, opened the way to independent action by these countries. Recently it has become apparent in Canada and also in Australia that they are ready to reform the Admiralty jurisdiction of their Courts and the time is ripe for New Zealand to do the same.

The report represents the results of more than two years' work. The Committee, under the chairmanship of Mr Justice Beattie, comprised Messrs A. C. Brassington (Christchurch), R. J. Campbell, P. A. Cornford, I. M. Mackay and J. B. Stevenson (all of Wellington).

"**A Privileged Profession**"—Australian lawyers, because of their high income level and their capacity to determine their own fees and codes of ethics, are the "most privileged profession" in Australia, according to the president of the Australian Council of Trade Unions, Mr Robert Hawke.

Mr Hawke, addressing a large group of lawyers at a luncheon in Sydney, said: "The Australian professions, especially the legal profession, are not only privileged but in my opinion in an inordinately privileged position."

Mr Hawke then quoted the latest available figures showing that lawyers had the highest taxable incomes in Australia—an average of $11,312 a year.

He also attacked the lawyers, saying that they were too conservative.

"Members of the legal profession do not bring to bear the capacities they hold to improve society."

Despite his criticism, Mr Hawke received enthusiastic applause from the audience of 517.

Law Draftsman's Material?—A recent advertisement, from an "investment advice company", offers a list of what it calls "10 typical investments". It then lists 9 specific categories of investment and concludes "10. All other kinds of investment".

A reader suggests that a place might well be found for this company in the law draftsman's department, perhaps specialising in the framing of taxing legislation?