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# PROBATE AND ADMINISTRATION—TIME FOR A CHANGE?

Many practitioners would agree that one of the most exasperating steps in the administration of a deceased estate is the obtaining of a Grant of Probate or Administration from the Supreme Court. Each year countless hours must be lost in legal offices throughout the country in complying with the rigid requirements of the Code of Civil Procedure. Registrars are ever alert in enforcing this compliance, and there must be an unduly high proportion of affidavits in support of Motions for Probate or Administration which are requisitioned by the Registrar for some defect or omission often of a formal or trivial nature. This is not said as a criticism of the Registrars and their staff who are usually most helpful, but who have no option but to ensure compliance with the relevant provisions of the Code.

Rule 531x provides that "the use of the forms prescribed by these rules is obligatory". This Rule continues to the effect that the forms shall be varied "only in so far as the exigencies of the particular case may require", and the Judge may, if he thinks fit, allow any document to be read or used which is sufficient in his opinion. Rule 531Y states that strict compliance with the rules may be dispensed with by the Court or a Judge if sufficient reason is shown. However, these discretions are of a limited nature and cannot be freely applied, even to minor variations from the forms.

I question whether insistence on rigid forms and procedures for a normal, uncontested application for a Grant of Probate or Administration can any longer be justified. Later in this article, I propose an alternative method of dealing with these matters. But first, it is an interesting exercise to analyse the common form of affidavit in support of Motion for Probate:

1. The affidavit begins: "That I knew [the deceased]". If the affidavit is being made by a close relation, especially a widow, it is surely unnecessary, and in some cases possibly distressing, for that person to be required to state on affidavit that he or she "knew" the deceased. There is also the opposite situation where the executor may have not really known the deceased or have known him only very slightly. A common arrangement is where a solicitor drawing the Will appoints himself and one of his partners to be the executors. The other partner may have never met the deceased. What degree of "knowledge" is required to make the statement true?

2. Continuing with paragraph 1 of the Affidavit, the deponent is required to say that he knew the deceased "when alive". These words are manifestly superfluous.

3. In paragraph 1 the deponent is further required to state the location of the nearest Registry Office of the Court to the place where the deceased resided or was domiciled. This surely is an irrelevant factor so far as the deponent is concerned. If he is a layman, he has no knowledge of this fact and must rely on what his solicitor tells him. In any event, the distinction between residence and domicile would be confusing to a layman and, in some cases, even to his solicitor.

4. Paragraph 2 commences in quite a sensible manner: "That the said . . . died at . . . on or about the . . . day of . . . 19..". Then, however, the deponent is required to state the evidence supporting these facts. The form in the Code gives as examples: "from having seen him die" or "from having seen his dead body". (Incidentally, could the body of a deceased be other than dead? Also, how does the sight of the

"dead" body establish the place and date of death? The body may quite likely have been removed from the place of death before the deponent saw it.) These are distressing facts to ask a relative to verify. To avoid this embarrassment, the most common reason used is one which is also cited as an example in the Code, namely: "from having been present at his funeral". This seems to be a complete *non sequitur*. How can the deponent be sure that the funeral that he attended was that of the deceased in question? Does he in fact know whether there was a body in the coffin at all? It seems to me that the attending of the funeral no more proves the date and place of death than does the viewing of the body.

For virtually all other purposes a death certificate is regarded as complete evidence of death, but it is not acceptable for the purposes of a Probate application. I would suggest that there is no good reason why a death certificate should not be regarded as ample evidence of death. After all, a death certificate is not issued without proper cause, and, to my mind, a death certificate is more conclusive evidence that a person has died than a statement from someone that he attended that person's funeral. I realise that a death certificate is not always available at the early stage at which a Probate application is made, and that in those cases some other evidence of death would still be required.

5. In paragraph 3 it is usual to refer to a typed Will as "partly typewritten and partly written" on the basis that the written portion comprises the signatures and usually the date. This must mean that every Will is at least partly "written" whether the Will is typed or printed. But whether the Will is partly typed or printed and partly written or completely typed or printed or completely written is, in my view, quite irrelevant. The exhibit note on the Will should be quite sufficient to identify the document. Indeed, I suggest that it would be desirable for the Will itself to be annexed to the affidavit or, if this is inconvenient, for a true copy of the Will to be annexed so that there can then be no doubt that the Will or a copy of it in fact forms part of the affidavit.

6. Paragraph 4 ("That I will faithfully execute . . .") is in very formalised language and is largely meaningless to a layman. Admittedly, if a solicitor is doing his job properly, he should read the affidavit through to the deponent and explain the meaning and effect of it. However, I feel that the wording in this clause could be put into everyday language so as to impress on the deponent more effectively the importance of the duties he is seeking to undertake. Incidentally, I wonder whether the reference to filing accounts is still needed. How often does the Court in fact call on an executor to file accounts? There should of course still be ample remedies available to compel an executor to render full statements if necessary.

I would suggest that in normal circumstances an applicant for a Grant of Probate should be required to prove only:

1. That the applicant is the person named in the Will as executor;

2. The death of the deceased;

3. That the Will is the last Will. (On this point more evidence than is at present required may be justified, e.g. a statement that a search or inquiry as to any later Will has been made without result);

and to give a solemn undertaking to pay all debts of the estate and to carry out in all respects the terms of the Will unless he is legally absolved from doing so.

Similar criticisms to those I have set out in regard to the Probate affidavit could be made of additional clauses which are necessary in affidavits for Grants of Administration in the case of an intestacy etc. I would also query the necessity for a bond. Cases where a bond has had to be enforced are extremely rare. Possibly some form of State-guaranteed bond could be incorporated in every Grant, and an extra small fee levied to cover the premium.

I now venture to make a rather revolutionary proposal, viz. that uncontested applications for grants of Probate and Administration be taken out of the jurisdiction of the Supreme Court and placed in the hands of say a Registrar of Probate and Administration. Historically, of course, the function of granting Probate and Administration belongs to the Supreme Court. However, the granting of uncontested applications for Probate and Administration is largely administrative, as is recognised by the fact that these matters have for many years been delegated to the Court Registrar. The new Registry could still be a division of the Justice Department. This could mean that only a re-arrangement of existing staff would be required. The Registrar could be given more discretion in dealing with straightforward applications than is at present available to the Court. The form of the application could be streamlined and supported simply by a statutory declaration. There should, however, be a right reserved to the Registrar or any interested party to refer any relevant matter to the Court. It should still be possible under this scheme to provide adequate safeguards against fraud and mistake.

Probably objections to at least some of the above proposals can be found. Nevertheless, our Probate and Administration procedures and forms do have an archaic and unrealistic flavour more appropriate to 1873 than 1973. It is to be hoped that in the prevailing atmosphere of law reform, and especially as the Code is at present undergoing revision, any proposals for updating and simplifying these procedures and forms will be sympathetically received.

C. B. BOOCK.

# SUMMARY OF RECENT LAW

## BILLS OF EXCHANGE—ACTIONS IN CONNECTION WITH NEGOTIABLE INSTRUMENTS

*Leave to defend a bill writ and issue counterclaim—Post-dated cheque stopped—Leave granted if argument of substance—Security not ordered where defendant impecunious.* The defendant sought leave to defend a bill writ and to issue a counterclaim. The bill was a post-dated cheque for $10,000 which had been stopped by the defendant. The defendant ran a travel agency and had had business relations with the plaintiff for several years. The defendant was in financial difficulties and in arrears with payments to the plaintiff for bookings. The plaintiff on 28 December 1971 said that it would cancel tickets for a large group departing on 30 December unless the defendant made substantial payments towards the arrears. The defendant gave two cheques for $10,000 each, one being post-dated to 31 December 1971. On 30 December, after the departure of the group, the plaintiff delivered a letter stating that the arrangement between the parties was terminated. The defendant stopped the cheque and sent a letter bearing date 24 December to the plaintiff claiming commission, which was the basis for its counterclaim. The plaintiff alleged that it only paid to the defendant "allowances" for advertising and that the "splitting of commissions" was contrary to the International Air Travel Association regulations. *Held*, 1. Although it is usual to order security, particularly where a defence is doubtful, if the defendant is impecunious such an order practically might take away the right to defend. (*Lloyds Banking Co.* v. *Ogle* (1876) 1 Ex. D. 262, 264, applied. *Fieldrank* v. *Stein* [1961] 1 W.L.R. 1287; [1961] 3 All E.R. 681; *Van Lynn Developments Ltd* v. *Pelias Construction Co Ltd.*, [1969] 1 Q.B. 607; [1968] 3 All E.R. 824; and *Ionian Bank* v. *Couvreur* [1969] 1 W.L.R. 781; [1969] 2 All E.R. 651, referred to.) 2. Only if a defence is transparently a sham leave may well be refused or conditions imposed which cannot be met, but leave will be granted if there is something of substance to be argued. *L. D. Nathan & Co. Ltd.* v. *Vista Travel Ltd.* (Supreme Court, Auckland. 12 July; 17 August 1972. Speight J.).

## BUILDING CONTRACTS—ENGINEERS AND ARCHITECTS

*Duties and liabilities of architects—To contractors—No duty to tell contractor how to carry out remedial work or to discover cause of defect—Creaking floors—No liability for faulty design in manufacture of valves—No liability for defect caused by employers' interference with architect's plan—Breach of contract—Damages default of contractor—Assessment—Cost of reinstatement of defect at time of discovery—Contractor not liable for defect caused by employer's interference with plan.* In this case the defendants were the owners of a property upon which a block of eleven flats was erected by the plaintiff builder pursuant to a contract in accordance with plans and specifications drawn up by the third party architect. The plaintiff claimed that the building had been completed on 22 July 1968 and issued a writ claiming the unpaid balance of the contract price. The ground floor consisted of five flats, one of which was a double flat and there were six flats on the first storey. The floors of the flats on the first storey formed the ceilings of the flats on the ground floor. By arrangement the defendants took possession of some flats before all the flats were completed. The defendants complained that the floors of the top flat creaked continuously when walked upon. In August 1968 the defendants made a serious complaint and a meeting was held between the defendant Mr Olsen, a representative of the plaintiff, and the third party architect. The architect did not issue a final certificate as no agreement was reached at the meeting. The plaintiff issued the writ on 13 September 1968 and on 17 April 1969 the defendants filed a defence and a counterclaim for breach of contract. The plaintiff joined the architect as third party. On 18 April 1972 by agreement the defendants enlarged their claim so as to include allegations of negligence against the architect as well as against the builder. The floor joists on the upper storey were laid at 20 inch centres instead of 18 inches as prescribed in the specifications. The counterclaim consisted (*inter alia*) of three heads: (a) faulty construction of the floors of the upper storey, (b) failure to provide proper draining for shower boxes, (c) repairs to hot water valves which were defective. The Court held that the placing of the floor joists not in accordance with the specifications was not the cause of the creaking floors and that as regards the installation of certain shower boxes not in accordance with the specifications the defendant Olsen had taken upon himself to direct the subcontractor to do work not in accordance with the contract and without the concurrence of the builder. *Held*, 1. There is no obligation imposed on an architect to advise the builder how he should carry out his building obligations. The builder has the right to carry them out as he thinks fit. (*Clayton* v. *Woodman & Sons (Builders) Ltd.* [1962] 1 W.L.R. 585; [1962] 2 All E.R. 33 applied.) 2. In general an architect owes no duty to a builder to tell him promptly during the course of the work when he is going wrong, but may leave that to the final stage, albeit the correction of the fault may be more costly to the builder. (*A.M.F. International Ltd* v. *Magnet Bowling Ltd.* [1968] 1 W.L.R. 1028; [1968] 2 All E.R. 789 applied.) 3. The architect had drawn attention to the creaking floors and required them to be rectified before giving a final certificate and was not in breach of his duty by failing to discover the cause of the creaking as and when the work was done. 4. The

builder was in breach of contract in respect of the floors of the upper storey and the assessment of damages was based on the cost of reinstatement of faulty work at the time when the defect was discovered. (*East Ham Corporation* v. *Bernard Sunley & Sons Ltd.* [1966] A.C. 406; [1965] 3 All E.R. 619, applied.) 5. The defects in the hot water valves were due to faulty design. Neither the builder nor the architect was negligent in not foreseeing that the design would lead to early failure. *Miller Construction Ltd.* v. *Olsen and Another; Netlen (Third Party)* (Supreme Court, Auckland. 29, 30 June; 7, 16, 18 August 1972. Henry J.).

**BUILDING CONTRACTS ENGINEERS AND ARCHITECTS—THE CONTRACT**

*Implied terms—No implied negative term that owner would not revoke builder's licence to go on the site—Forfeiture—Exercise of right to forfeit—Builder not entitled to injunction preventing owner completing works.* The plaintiff contractor claimed $67,928 damages for breach of a building contract, a declaration that the defendant was not entitled to terminate the contract and an injunction restraining the defendant from entering upon the site in order to remove the plaintiff or its subcontractors from the site. The defendant owner counterclaimed against the contractor for $30,600 damages for breach of contract, liquidated damages at $200 per day for delay, damages for trespass, an order for possession of the site, and an injunction restraining the plaintiff from hindering the defendant from completing the building. The contract was for the erection of a motel complex at a cost of $257,130, the completion date being 19 January 1972. The contractor was not a building contractor itself but under the terms of the contract it was to engage a building firm to do the construction work. The work was not completed by 19 January 1972 and in January the owner questioned the value of the work done and had reason to suspect that the progress payments made exceeded the true value of the work completed up to that date. The owner also alleged faulty workmanship. These claims were contested by the contractor and its subcontractors. The owner on 4 February 1972 made a final payment, but refused to make further payments until the defaults of the subcontractors had been rectified. The contractor pressed for payment of the balance of a sum certified to be due on 20 January 1972. At the end of February 1972 the greater part of the construction work had stopped. Negotiations from early March until the middle of April were fruitless and on 17 April the owner gave notice determining the contract unless sufficient men were on the site by 21 April. The contractor thereupon issued the writ and filed a motion for an interim injunction restraining the owner from entering the site in order to remove the contractor and its subcontractors from the site. The injunction was declined on 21 April 1972 and on the same day the owner served written notice of termination of the contract and dismissal of the contractor from the site. On 24 April new builders engaged by the owner arrived at the site but their access thereto was denied by the subcontractors. After further fruitless negotiations the subcontractors resumed work in June notwithstanding objections by the owner. On 19 July 1972 the owner filed a motion for an interim injunction for possession of the site and restraining the contractor from hindering the owner from completing the works. *Held*, 1. The licence granted by an owner to a builder to go on to the owner's land to erect a building is not a licence coupled with an interest so as to make it irrevocable in the absence of lawful termination of the contract. (*Hurst* v. *Picture Theatres Ltd.* [1915] 1 K.B.1, not followed. *Hounslow London Borough Council* v. *Twickenham Garden Developments Ltd.* [1971] Ch. 233; [1970] 3 All E.R. 326, discussed.) 2. There was no implied negative covenant in the building contract on the part of the owner not to revoke the builder's licence in breach of contract. (*Hounslow London Borough Council* v. *Twickenham Garden Developments Ltd.* (*supra*), not followed.) 3. Even if there could be implied in the contract a negative covenant on the part of the owner not to revoke the licence in breach of the contract, the contractor could not rely upon such covenant as an answer to the owner's application for recovery of the site following revocation of the licence, since if that defence were available the contractor would obtain indirectly specific performance of the building contract whereas the owner could not obtain specific performance of the contract. A decree of specific performance will not be granted in the absence of mutuality of remedy. (*Epstein* v. *Gluckin* (1922) 233 N.Y. 490, and *J. C. Williamson* v. *Luckey and Mulholland* (1931) 45 C.L.R. 282, 298, applied.) 4. Injunction granted ordering the plaintiff contractor to vacate the site and restraining the plaintiff thereafter from hindering the defendant from completing the works. *Mayfield Holdings Ltd.* v. *Moana Reef Ltd.* (Supreme Court, Auckland, 28 July; 25 August 1972. Mahon J.).

**CONTRACT—INTERPRETATION OF CONTRACT**

*Implied terms and warranties—Chattel hired for special purpose implied term as to fitness from danger. Machinery—Liability to guard—Driving belt roller insufficiently guarded. Negligence—Employers—Unfenced and defective machinery—warranty of fitness for purpose including safety. Tort—Liability—Joint tortfeasors—Indemnity—Notwithstanding each liable to plaintiff—One joint tortfeasor entitled to indemnity from another.* These were motions to settle the *quantum* as between three defendants as joint defendants in a case in which the plaintiff obtained a verdict for $33,000 general damages and $4,085.95 special damages against all three defendants. The plaintiff had suffered injuries when his leg was caught in the belt of one of five mechanical meat loaders. The jury had returned a verdict against each defendant on one issue but on the other issues was inconclusive. The shipping company hired the mechanical loaders from the harbour board and then passed the use of them on to the stevedore but did not pass on the hire charge made by the harbour board. Under the contract of hire, the shipping company was responsible for and indemnified the harbour board against damage to persons arising from the working of the plant except due to faulty design defection or wear and tear of the plant or negligence of the harbour board's servants. Each defendant claimed contribution from the other two defendants as joint tortfeasors. In addition the stevedore claimed an indemnity from the shipping company under an implied term of a contract between them; the harbour board claimed an indemnity from the shipping company under the contract of hire; and the shipping company claimed an indemnity from the harbour board under an implied term of the contract of hire. *Held*, 1. The arrangement between the harbour board and the shipping company was a bailment for reward in which a term as to the fitness of the chattel bailed could be implied. (*Francis* v. *Cockrell* (1870) L.R. 5 Q.B. 501, 503, and *Smith* v. *Stockdill* [1960] N.Z.L.R. 53 applied.) 2. The arrangement between the

shipping company and the stevedore was a bailment for reward notwithstanding that the hiring charge was not passed on to the stevedore. 3. A term of fitness is not to be implied in every contract of hire of a chattel. (*Smith* v. *Stockdill* (*supra*) applied. *Hamlyn and Co.* v. *Wood and Co.* [1891] 2 Q.B. 488, 491, referred to.) 4. A warrant of fitness can be implied into a contract for the hire of a specific chattel. *Yeoman Credit Ltd.* v. *Apps* [1962] 2 Q.B. 508; [1961] 2 All E.R. 281 applied. (*Robertson* v. *Amazon Tug and Lighterage Co.* (1881) 7 Q.B.D. 598, distinguished.) 5. Fitness is not limited to fitness to carry out the task for which it is to be used but extends to fitness in terms of safety. (*Smith* v. *Stockdill* (*supra*) and *Derbyshire Building Co. Pty. Ltd.* v. *Becker* (1961-1962) 107 C.L.R. 633, referred to.) 6. The fact that two defendants are in breach of duty to the plaintiff does not prevent one defendant claiming an indemnity from the other. (*Mowbray* v. *Merryweather* [1895] 2 Q.B. 640, 644, 646, applied.) 7. If there has been a breach of warranty a tortfeasor who has been held partially responsible may nevertheless invoke the breach of warranty against another tortfeasor. (*Sims* v. *Foster Wheeler Ltd.* [1966] 1 W.L.R. 769, 777; [1966] 2 All E.R. 313, 319, applied.) 8. The shipping company and the stevedore were each entitled to an indemnity against the harbour board. *Vella* v. *New Zealand Stevedoring and Wharfingering Co. Ltd. and Others* (Supreme Court, Invercargill. 22, 23 July; 13 September 1971. McMullin J.).

**CRIMINAL LAW—TRIAL OF INDICTMENTS**

*Amendment from "attempt to rape" to that of "rape" during course of trial—Crimes Act 1961, s. 335.* The prosecution sought an amendment pursuant to s. 335 of the Crimes Act 1961 of count 1 from "attempt to rape" to that of "rape". The amendment was resisted on the grounds that such an amendment could not be granted during the course of the trial, or if granted would be unduly prejudicial to the accused. *Held*, Section 335 (1) of the Crimes Act 1961 is expressly designed to permit an appropriate variance or amendment during trial. The proposed amendment was not introducing an entirely new and independent count into the indictment after the accused had been arraigned and the jury empanelled. (*Harema* v. *R.* [1971] N.Z.L.R. 147 distinguished.) *R* v. *Durno* (Supreme Court, Auckland. 15 August 1972. Woodhouse J.).

**FISHERIES—OFFENCES**

*Toheroa excessive numbers—Accused sorting pile of toheroa—Accused deemed "in possession" pile "under his control"—No offence of possessing undersized toheroa if "buried immediately"—Toheroa Regulations 1955 (S.R. 1955/206), regs. 2 (2) (Amendment No. 1, S.R. 1962/131), 4A (Amendment No. 2, S.R. 1965/111), 7A (1) (e) (Amendment No. 9, S.R. 1971/168)—Defence of ignorance of offence applies to ignorance of law not mistake of fact—Fisheries Act 1908, s. 2 (2) (Fisheries Amendment Act (No. 2) 1969, s. 2).* The respondent was found by an inspector sorting a pile of toheroa in excess of the prescribed number which he and his family were entitled to take. He informed the inspector that he was intending to return the excess. The respondent was charged with the possession of more than 20 toheroa on an information laid under reg. 7A (1) (e) of the Toheroa Regulations 1955. The Magistrate dismissed the charge. *Held*, 1. Under the provisions of reg. 2 (2) "toheroa . . . shall be deemed to be in the possession of any person when that person has . . . control over the toheroa" and the pile of toheroa was under the control of the respondent. 2. Regulation 4A which places upon an individual the obligation to return an undersized toheroa by "immediately rebury[ing] it" had no relevance. It is only relevant in the case of a prosecution for being in possession of undersized toheroa. 3. The proviso to s. 2 (2) of the Fisheries Act 1908 inserted by s. 2 of the Fisheries Amendment Act (No. 2) 1969 whereby absence of knowledge that possession would constitute an offence is a good defence, is only relevant to ignorance of law and not to a mistake of fact. *Marine Department* v. *Sherman* (Supreme Court, Whangarei. 11, 25 August 1972. Speight J.).

**HIRE PURCHASE—NATURE OF TRANSACTION**

*Contract of lease of motorcar—Monthly payments—Residual value fixed—On termination car to be sold—Lessee to receive or pay difference between sale price and residual value—Lessee no right of purchase—Effect or purpose of contract—Transaction not in breach of regulations—Hire Purchase and Credit Sales Stabilisation Regulations 1957 (Reprint S.R. 1967/172), Reg. 8 (b). Statutes—Interpretation—Construction with reference to other statutes—Caution in reasoning from a revenue statute to a non-fiscal statute and* vice versa. This was an appeal from the judgment of Quilliam J. reported [1972] N.Z.L.R. 460, wherein he held that a leasing agreement entered into between the parties for leasing a motorcar was invalid as contravening reg. 8 (b) of the Hire Purchase and Credit Sales Stabilisation Regulations 1957. The facts are set out in the headnote to the judgment of Quilliam J. The agreement in the present case differed from that in the case of *Credit Services Investments Limited* v. *Quartel* [1970] N.Z.L.R. 933 in that on the repossession of the motorcar by the lessor, the lessor was prohibited from selling it to the lessee or his agent, nominee or trustee or otherwise and the lessee contracted not to purchase it directly or indirectly. *Held*, 1. For the purpose of construing reg. 8 (b) of the Hire Purchase and Credit Sales Stabilisation Regulations 1957 the Court has to concern itself with the purpose (i.e. "end in view") or the effect ("the end in view accomplished") of the transaction, contract or arrangement. 2. If the transaction, contract or arrangement is of a bilateral nature then the "end in view" can only be ascertained by reference to the *common* intention, ascertained by reference to the documents involved and any other relevant extrinsic evidence and also to any overt acts by which the transaction is implemented. (*Newton* v. *Commissioner of Taxation of the Commonwealth of Australia* [1958] A.C. 450; [1958] 2 All E.R. 759, and *Credit Services Investment Ltd.* v. *Quartel* [1970] N.Z.L.R. 933, referred to.) 3. The purpose of a transaction must be what it is intended to effect and that intention must be ascertained from its terms. 4. Extrinsic evidence of the terms of any arrangement between the parties is clearly admissible, if supplementary and not in conflict with the documents involved. 5. It is only if the transaction is in its nature capable of being regarded as having as its purpose or effect, whether directly or indirectly, to defeat, evade, avoid or prevent the operation of the regulations in some respect, that the question arises whether or not that really was the "end in view". 6. Apart from the case of hiring goods included in the Third Schedule the operation of reg. 8 (b) is restricted to transactions embodying the notion of a purchase or a possible purchase. 7. The terms of the leasing agreement prevented the lessee from ever becoming the owner and there was no extrinsic evidence to

establish any mutual arrangement or understanding to the conrary. (*Credit Services Investments Ltd.* v. *Quartel (supra)*, distinguished.) 8. It is always unsafe to reason too closely from one statute to another particularly from a revenue statute to a non-fiscal statute. (*Wisheart, Macnab and Kidd* v. *Commissioner of Inland Revenue* [1972] N.Z.L.R. 319, 328, referred to.) Judgment of Quilliam J. reversed. *Credit Services Investments Limited* v. *Carroll* (Court of Appeal, Wellington. 6, 7 July; 23 August 1972. Turner P., McCarthy and Richmond JJ.).

**HUSBAND AND WIFE—DOMESTIC PROCEEDINGS**

*Separation orders—Orders for maintenance—Parties conduct irrelevant to finding of "serious disharmony" but relevant to exercise of discretion to make separation order —Discretion against making order only in exceptional case—Domestic Proceedings Act 1968, s. 19 (1) (a).* This was an appeal against separation and maintenance orders made against the appellant. The parties aged 19 and 17 years respectively were married in December 1966 and there was one child of the marriage born in 1967. The respondent left the appellant on two occasions due to arguments over money matters, and finally left for the third time in September 1970. The cause of the departure was due to an association with another man which was unknown to the appellant until after her final departure. *Held*, 1. Although the conduct of the parties is irrelevant to the finding of "serious disharmony" under s 19 (1) (a) of the Domestic Proceedings Act 1968, nonetheless it appears as a relevant factor in the exercise of the discretion. 2. The residual discretion as to the making of a separation order could or should be exercised against the application only in exceptional cases. (*Myers* v. *Myers* [1972] N.Z.L.R. 476, 479, applied.) 3. A planned or deliberate manufacture by one spouse of a state of "serious disharmony" should rightly be regarded as an exceptional case. 4. A case where matrimonial infidelity or intransigence or other wrongful conduct on the part of the applicant has been shown to be the overwhelming though not planned cause of the "serious disharmony" should rightly be regarded as an exceptional case. *Mitchell* v. *Mitchell* (Supreme Court, Auckland. 17, 18 July; 21 August 1972. Mahon J.).

**HUSBAND AND WIFE—MATRIMONIAL PROCEEDINGS (SUPREME COURT)**

*Decree absolute—Opposed on ground respondent's application for ancillary relief pending—Court's discretion to grant or withhold decree—Matrimonial Proceedings Act 1963, ss. 46, 58 (1).* The petitioner's motion for the making of a decree absolute was opposed by the respondent on the ground that ten days prior to the filing of the motion she had filed an ancillary relief application for an order for the sale of the matrimonial home and the division of the proceeds of sale. *Held*, 1. The exercise of the discretion conferred upon the Court by s. 46 of the Matrimonial Proceedings Act 1963 to suspend the making of a decree absolute is not restricted to cases where an order has been made under Part VIII of the Act. 2. The expression "on making a decree of divorce" in s. 58 (1) of the Matrimonial Proceedings Act 1963 means: (a) The making of a decree absolute; (b) On the occasion of the making of a decree of divorce. (*E.* v. *E.* [1971] N.Z.L.R. 859, 874-875, and *Fox* v. *Fox* [1925] P 157, 167, applied.) 3. If the Court can satisfy itself that a wife's claim to a home and for financial protection can be adequately and satisfactorily determined without holding up a decree absolute, the Court may properly grant a decree absolute. *Duncan* v. *Duncan* (Supreme Court, Wanganui. 16 August; 4 September 1972. Quilliam J.).

**INSURANCE—MOTOR VEHICLE INSURANCE**

*Conditions—Action for recovery of money under policy for damages to car—Defence of car driven in unsafe condition—Three tyres not complying with transport regulations tread depth—Car not in unsafe condition at time of accident.* The respondent's car was damaged beyond repair when it veered off the road and hit a pole. The respondent had been about to overtake another car which pulled out to pass another car in front of it. The appellant refused to indemnify the respondent on the ground that the car was being driven in an unsafe condition because three tyres did not comply with reg. 44A of the Traffic Regulations 1956 as regards the minimum depth of the tread pattern. There was no causal connection between the worn tyres and the accident and it was accepted that the tyres would have been effective and safe at the time of the accident. *Held*, 1. There was no onus on the insurer invoking such an exception clause to prove a casual connection between the worn tyres and the accident. (*Public Trustee* v. *NIMU Insurance Co.* [1967] N.Z.L.R. 530 and *Parsons* v. *Farmers Mutual Insurance Assn.* [1972] N.Z.L.R. 966, applied.) 2. The effect of the regulations was merely one factor to be taken into consideration together with all the other evidence relating to the tyres when deciding whether the tyres were "unsafe" in terms of the exception. 3. The motorcar must be unsafe at the time when the accident takes place in order to invoke such an exception clause. (*Bashtannyk* v. *New India Assurance Co. Ltd.* [1968] V.R. 573, 575, applied. *Conn* v. *Westminster Motor Insurance Assn. Ltd.* [1966] 1 Lloyds Rep. 407, distinguished.) *State Insurance General Manager* v. *Harray* (Supreme Court, Dunedin. 16 June; 9 August 1972. Roper J.).

**LAW PRACTITIONERS—RIGHTS AND PRIVILEGES OF**

*Barrister and solicitor acting as barrister not liable for negligence—Law Practitioners Act 1955, s. 13 (2). Negligence—Negligence arising out of special relations—Barristers and solicitors—Barrister and solicitor acting in capacity of barrister not liable.* The plaintiff claimed damages of $8,244.50 against the defendant alleging negligence on the defendant's part when acting as solicitor and counsel for the plaintiff relating to management of litigation between the plaintiff and the former wife. The grounds for the allegation were (a) failing to put forward in affidavit form evidence of wrongful conduct on the part of the wife at the hearing of the application for permanent maintenance, (b) failing to brief evidence and draft affidavits of witnesses in relation to the conduct of the wife, (c) wrong advice as to the challenging of a deed of separation, (d) failing to institute proper inquiries as to the reasons for plaintiff paying maintenance from 1962, for agreeing to maintenance provisions in 1964, and for abandoning his divorce petition when lack of explanation of these matters would create inferences adverse to the plaintiff's case for a variation of the maintenance order, and (e) advising that the question relating to the conduct of the parties was irrelevant within the context of the permanent maintenance proceedings. This case is reported on the legal question of the validity of a claim for negligence or breach of duty in the conduct of litigation on the part of a lawyer retained as a barrister and solicitor. The learned Judge held that in so far as all or any of the allegations were in respect of the defendant's conduct in his capacity as solicitor, the defendant was not negligent. *Held*, 1. Section 13 of the Law Practitioners Act 1955 which confers on barristers of the Supreme Court *inter alia* the privileges

that barristers have in England includes the same immunity from action by his client as a barrister in England has. 2. The immunity of a barrister in England rests upon public policy. (*Rondel* v. *Worsley* [1969] A.C. 191; [1967] 3 All E.R. 993, applied. *Watt and Cohen* v. *Willis* (1909) 29 N.Z.L.R. 58 (S.C.); 615 (C.A.), discussed and not followed.) 3. The immunity of a barrister extends to the necessary pretrial work for which counsel has been retained such as drawing pleadings and advising on evidence. (*Rondel* v. *Worsley* (*supra*), applied.) 4. The immunity arises not from the status of barristers *per se* but from the work they do. The relevant question in New Zealand is whether the barrister and solicitor is doing barrister's work; the solicitor's status has no relevance. 5. Solicitors when acting as advocates in the Courts have the same immunity as barristers. (*Rondel* v. *Worsley* [1967] 1 Q.B. 443; [1966] 3 All E.R. 657, C.A.; [1969] A.C. 191; [1967] 3 All E.R. 993, H.L., referred to.) 6. When a barrister and solicitor is retained in New Zealand a contract of retainer arises embracing all aspects of the work which he is instructed to perform, but an action of negligence will only lie in respect of a specific complaint founded on his conduct in his capacity as solicitor. *Rees* v. *Sinclair* (Supreme Court, Auckland. 10, 11, 12, 13 April; 19 July 1972. Mahon J.).

**LEGAL AID—BOTH PARTIES HAVING LEGAL AID**

*Court may award costs against unsuccessful party—Information as to means and contribution required—Legal Aid Act 1969, ss. 16 (2) (b), 17 (2) (e).* In maintenance proceedings in the Magistrate's Court both parties were legally aided. The Magistrate awarded costs of $120 against the husband who appealed *inter alia* against the order for costs. *Held*, 1. The Court has power to order costs against a legally aided person by virtue of s. 16 (2) (b) of the Legal Aid Act 1969. 2. Section 17 (2) (e) of the Legal Aid Act 1969 imposes two qualifications on the ordinary right of a successful opponent of a legally aided person to recover costs: (a) The Court must have regard *inter alia* to the means of the parties and their conduct in connection with the dispute, and accordingly evidence of the means of the parties must be given, and (b) The Court must be informed as to the amount of the contribution which the unsuccessful legally aided litigant has been required to make to the Crown as a term of obtaining legal aid. 3. The second proviso to s. 17 (2) (e) has no application where the successful party as well as the unsuccessful party is a legally aided person. *Raine* v. *Raine* (Supreme Court. Auckland. 11, 18 July 1972. Mahon J.).

**TORT—UNLAWFUL INTERFERENCE WITH ANOTHER'S BUSINESS**

*Defendant licencee entitled to sell from mobile shop on condition that it complied with Council bylaws—Shop operated in breach of bylaw illegal. Local Government—Municipal Corporations—Bylaws—Offences—Breach of bylaw giving rise to liability for prosecution unlawful act—Municipal Corporations Act 1954, ss. 393, 397. Statutes—Statutory duty—Breach of statutory duty—Right to damages.* The plaintiff appellant held a licence to operate a mobile shop at Okahu Bay and sold ice creams and hot dogs etc. For some years there had been a Mr Whippy van selling ice cream in the Okahu Bay area. The second respondent formed a company the first respondent to purchase the Mr Whippy van business and set up the van on its predecessor's site. The first respondent held a licence from the Auckland City Council under its bylaws to operate a mobile shop for the purpose of selling ice cream in the precincts of the city. The appellant after the respondent had commenced business shifted his mobile shop to the grass verge on Okahu Bay. The appellant complained that the first respondent was continually stopping its van close to the appellant's mobile shop in breach of the City's bylaw which provides that no travelling mobile shop shall be stopped for the purpose of trading within 300 yards of any shop including a mobile shop. The appellant brought an action in the Magistrate's Court alleging unlawful interference by the respondent company with the plaintiff's business and conspiracy between the first and second respondents with intent to injure the appellant's business. The Magistrate dismissed the plaintiff's action and he appealed to the Supreme Court. The allegation of conspiracy was not maintained in the appeal. During the appeal although not pleaded the appellant alleged breach of a statutory duty on the part of the respondent. *Held*, 1. The law recognises the tort of unlawful interference with another's business. (*Sorrell* v. *Smith* [1925] A.C. 700, 719, and *Torquay Hotel Co. Ltd.* v. *Cousins* [1969] 2 Ch. 106, 139; [1969] 1 All E.R. 522, 530, applied.) 2. The effect of a licence is that it makes an action lawful which without it would have been unlawful. (*Thomas* v. *Sorrell* Vaugh 330, 351; *Frank Warr & Co. Ltd.* v. *London County Council* [1904] 1 K.B. 713, 721; *Russell* v. *Ministry of Commerce for Northern Island* [1945] N.I. 184, 188; *Federal Commissioner of Taxation* v. *United Aircraft Corporation* (1943) 68 C.L.R. 525, 533; and *Reid* v. *Moreland Timber Co. Pty. Ltd.* (1946) 73 C.L.R. 1, 5, applied.) 3. The first respondent by opening its shop within 300 yards of the appellant's shop was doing so without any licence which permitted it. 4. The first respondent was liable for the tort of illegally or unlawfully interfering with the appellant's business. 5 In order to maintain an action for breach of statutory duty a mandatory duty must be imposed on the defendant; a directory duty is insufficient. 6. There was no mandatory statutory duty cast on the first respondent. Appeal allowed. *Emms* v. *Brad Lovett Ltd. and Another* (Supreme Court, Auckland. 12, 13 May; 4 July 1971. Perry J.).

**TRANSPORT AND TRANSPORT LICENSING—ROAD TRANSPORT**

*Available route—Two available routes—Shortest distance by road notwithstanding longer distance by rail—Route 2 miles shorter by road involved 25 miles longer by rail—Transport Act 1962, s. 110 (Reprint 1970)—Transport Licensing Regulations 1963 (Reprint S.R. 1971/87), regs. 24, 72.* In this case the appellant, the holder of a goods service licence, was convicted of an offence of carrying on its service in breach of its licence by offending against the "available route" provisions of s. 100 of the Transport Act 1962 and regs. 24 and 72 of the Transport Licensing Regulations 1963. The appellant carried "stationery" by road from Otiria to Kerikeri, a distance of 15 miles 70 chains, in accordance with consignment instructions. Had they travelled a further 25 miles on the railway to Okaihau Station, the distance by road to Kerikeri would have been two miles shorter. The distance by rail from Auckland to the point of destination at Otiria was 170 miles. *Held*, 1. Section 110 (2A) of the Transport Act 1962 only takes out of calculation distance between railway stations which are nearest to the beginning and end of the goods journey; Otiria did not qualify and the 25 miles between Otiria and Okaihau could not be subtracted from the available route under the guise of this sub-

section. 2. If there are two or more available routes including more than 40 miles of railway, reg. 24 requires that the carriage of goods (by road) shall be only so far as is necessary to permit carriage by rail whatever the rail mileage may be. *Transport Ministry* v. *United Carriers Ltd.* (Supreme Court, Whangarei. 4, 25 August 1972. Speight J.).

**WILLS—TESTAMENTARY PROMISES**

*Capacity of promisor—Contractual not testamentary capacity—Proof of testamentary capacity. Contract—Capacity of parties—Onus of proof of lack of capacity of promisor upon the promisor.* The appellant was administrator of the estate of a lady who had died intestate over the age of 80. The respondent, a land agent aged over 70, had successfully made a claim in the Court below under the Law Reform (Testamentary Promises) Act 1949 and had been awarded a residential property which was the main asset of the net estate. The respondent had helped the deceased in two property transactions and subsequently she had become dependent upon the respondent. The respondent's claim was based on a number of statements by the deceased that she would make provision for him because of and in return for the assistance she was demanding of him. The second basis of the respondent's claim was alleged to have taken place in January 1970 during a discussion whether the district nurse could get into the deceased's house when the deceased said to the respondent—"Don't worry, you will get the key and everything that goes with it when I go." *Held*, 1. The estate of a promisor will be bound in a claim under the Law Reform (Testamentary Promises) Act 1949 unless it can be shown at the time when the promise was made the promisor's mental condition was such that he did not know he was doing and that the promisee was aware of the promisor's incapacity. (*Imperial Loan Co Ltd* v. *Stone* [1892] 1 K.B. 599 applied). 2. The principle applicable to the capacity of a promisor in such case is that applied to capacity to contract and not that applied to testamentary capacity. 3. Under the provisions of s. 3 (3) of the Law Reform (Testamentary Promises) Act 1949 the Court has a discretion to vest specific property in the claimant; nevertheless it should exercise that discretion only after a consideration of all the various circumstances set out in s. 3 (1). 4. The Court of Appeal will not substitute its discretion for that of the Court below unless there be made out some reasonably plain ground upon which the order made in the Court below should be varied and "due weight" must be accorded to the opinion of the Court below. The judgment of White J (unreported) varied. *Public Trustee* v. *Bick* (Court of Appeal, Wellington. 14, 29 August 1972. Turner P, McCarthy and Richmond JJ.).

**WORK AND LABOUR—INDUSTRIAL DISPUTES**

*Strike—Stop work meeting by engineers in support of stop-work meeting by storeman—Engineers went home—Industrial Conciliation and Arbitration Act 1954, s. 189. Lockout—Prior industrial unrest—Employers refused work to engineers on return—No sufficient reasons for assurance that workers would return to normal work—No lockout.* This was an industrial dispute involving a claim by engineers that the Shortland Freezing Co. Ltd. was liable to pay them wages from Friday 25 February 1972 until Thursday 2 March 1972. There had been prior industrial unrest and work stoppages. On 24 February at 7 a.m. the storemen held a stop-work meeting and decided to go home. The engineers after abortive negotiation went home after clearing two mutton chains but refusing to allow an engineer to remain to cope with any future breakdown. They indicated that they would return when the storemen returned. On Friday the engineers were told there would be no work for them until further notice. On Wednesday 1 March 1972 an agreement submitted by the management on the Friday was amended and signed by the secretaries and ratified by a special meeting of workers and the works re-opened on Thursday 2 March. Two questions arose: (a) whether the action of the engineers constituted a strike within the provisions of s 189 (1) of the Industrial Conciliation and Arbitration Act 1954, and (b) whether the action of the management constituted a "lockout". *Held*, 1. The presumption of intention within the provision of s. 189 (1) is not a proposition of law, but a proposition of ordinary good sense, namely, that as a man is usually able to foresee the natural consequences of his act so it is as a rule reasonable to infer that he did foresee and intend them. (*Hosegood* v. *Hosegood* (1950) 66 T.L.R. 735, 738, and *R* v. *Noel* [1960] N.Z.L.R. 212, 216, applied. 2. It was reasonable to infer that the engineers intended to cause loss and inconvenience to their employers and their action constituted a strike. 3. If the employers had refused to allow the engineers to work on Friday, 25 February, with the knowledge that they would be willing to return to work that day and carry out their working obligations, then the employer's action might have constituted a "lockout". 4. The management did not have sufficient reasons to assume that the men would return to normal work on that Friday and there was no "lockout". 5. In contracts of service, as in other contracts, a breach of an essential term of the contract enables the other party to terminate the contract summarily. (*Laws* v. *London Chronicle (Indicator Newspapers) Ltd.* [1959] 1 W.L.R. 698; [1959] 2 All E.R. 285, applied.) 6. Workers cannot base a claim for wages for loss of working time when the facts establish that the loss of time arose directly from the state of affairs which they themselves had created. (*Inspector of Awards* v. *New Zealand Refrigeration Co. Ltd.* (1960) 60 Book of Awards 1980, and *Thomas Borthwick and Sons (Australasia) Ltd.* v. *Haeata* [1965] N.Z.L.R. 957, referred to.) 7. A party to a contract who has himself repudiated such contract cannot claim under the contract for an injury resulting from the repudiation. The claim for wages did not succeed. *Re New Zealand Engineering, etc., Industrial Union of Workers and Shortland Freezing Co. Ltd.* (Court of Arbitration, Auckland. 13 July; 17 August 1972. Blair J., Messrs W. N. Hewitt and W. C. McDonnell).

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**The Law's Delays**—"The writ in these proceedings was issued on 15 May 1972, and an application by the plaintiffs for an *ex parte* injunction, with the defendants present in order to assist the Court, was heard and refused by me on 18 May. Such are the Law's delays in these days that it was not until the afternoon of the same day that the Court of Appeal by a majority, reversed my decision and granted an interlocutory injunction restraining the defendants from distributing gramophone records under the name 'Pick of the Pops':" per Megarry J. in *Pickwick Inc. Ltd.* v. *Multiple Sound Ltd.* [1972] 1 W.L.R. 1213, 1214 C-D.

## BILLS BEFORE PARLIAMENT

Companies Amendment
Crimes Amendment
Department of Social Welfare Amendment
Domestic Purposes Benefit
Explosives Amendment
Maori Purposes
Marine Pollution
Ministry of Transport Amendment
Moneylenders Amendment
Municipal Corporations Amendment
New Zealand Export-Import Corporation
Niue Amendment
Post Office Amendment
Rates Rebate
Trade and Industry Amendment
Trustee Savings Banks Amendment
Wool Marketing Corporation Amendment

## REGULATIONS

Regulations Gazetted 1 to 9 March 1973 are as follows:

Abrasive Blasting Regulations 1958, Amendment No. 1 (S.R. 1973/44)
Customs Export Prohibition Order 1973 (S.R. 1973/34)
Customs Export Prohibition Order (No. 2) 1973 (S.R. 1973/42)
Drug Tariff 1970, Amendment No. 9 (S.R. 1973/41)
Evidence (Photographic Copies) Order 1973 (S.R. 1973/45)
Exchange Control Suspension Regulations (No. 2) 1973 (S.R. 1973/43)
Fisheries (General) Regulations 1950 (Reprint) (S.R. 1973/52)
Fishing Boat Radio Rules 1971, Amendment No. 1 (S.R. 1973/46)
Health (Bursaries) Regulations 1965, Amendment No. 2 (S.R. 1973/35)
Judicature Amendment Act Commencement Order 1973 (S.R. 1973/36)
Medical and Dental Auxiliaries Act Commencement Order 1973 (S.R. 1973/37)
Medical Technologists Regulations 1973 (S.R. 1973/38)
Price Freeze Regulations 1973 (S.R. 1973/53)
Radiation Protection Act Commencement Order 1973 (S.R. 1973/47)
Radiation Protection Regulations 1973 (S.R. 1973/48)
Sales Tax Exemption Order 1967, Amendment No. 11 (S.R. 1973/49)
Sanitary Plumbing (Counties) Notice 1973 (S.R. 1973/54)
Shipping Radio Rules 1967, Amendment No. 1 (S.R. 1973/50)
Supreme Court Amendment Rules 1973 (S.R. 1973/39)
Transport of Radioactive Materials Regulations 1973 (S.R. 1973/51)
Weights and Measures Regulations 1926-1951, Amendment No. 10 (S.R. 1973/40)

**Welcome Woodhouse**—Said the successful plaintiff to his successful counsel on viewing the costs shrunken damages cheque in his hand: "Sometimes I wonder who it was who was hit by the car—you or me."

## CATCHLINES OF RECENT JUDGMENTS

**Municipal Corporations**—Notice to take down dilapidated building—Powers of Council under s. 300 (3) of Municipal Corporations Act 1954. *Robinson* v. *Blenheim* (Supreme Court. Blenheim. November 1972. Quilliam J.).

**Police Offences**—Offensive behaviour—Conduct towards police sergeant not in sight or hearing of public. *Hurst* v. *Police* (Supreme Court, Nelson. 16 November 1972. Quilliam J.).

**Practice**—Late service of duplicate of notice of appeal—No discretion to extend time beyond prescribed period—Magistrates' Courts Act 1947, ss. 72 and 73. *Clouston* v. *Motor Sales (Dunedin) Ltd.* (Supreme Court, Dunedin, 1972, October. Quilliam J.).

**Road traffic**—Excessive blood alcohol—Blood specimen given on request by defendant taken by ambulance to hospital without "requirement" to accompany constable—"Reasonable compliance". *Twidle* v. *Police*. (Court of Appeal, Wellington. 29 September 1972. Wild C.J., Turner P., Richmond J.).

**Transport**—Driving while disqualified—Sitting next to person in driver's seat and steering—Whether "driving". *Ministry of Transport* v. *Rangi* (Supreme Court, Wellington. 15 November 1972. Quilliam J.).

## TREASURY SOLICITOR RETIRES

Mr J. S. Clendon, the Treasury Solicitor since 1964, retired on Friday (February 23) after 40 years in the Public Service. Born in Lower Hutt, where he still lives, Mr Clendon was educated at Wellington College and Victoria University, graduating LL.B. in 1935. He joined the Lands and Survey Department in 1933. He was five years (1941-45) overseas with the 6th Field Ambulance, 2nd N.Z.E.F., and spent six months in Britain after the war on repatriation work. He resumed with the Lands and Survey Department in 1946, and acted as Crown representative in the Lands Sales Court. That year he went to the Department of Internal Affairs as legal officer and was counsel assisting the Local Government Commission. In 1952, he was appointed officer-in-charge of the department's local government branch and in 1960 senior group executive officer. In that position he was Chairman of the Cinematograph Films Licensing Authority and responsible for the administration of the wildlife branch, gaming branch, explosives branch and cinematograph films. He was appointed Treasury Solicitor in 1964. Married, with a family of four, Mr Clendon has no retirement plans other than the pursuit of his hobbies—bowls and trout fishing.

# CASE AND COMMENT

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

### Town Planning Practice and Procedure

In *Smeaton and Others* v. *Queenstown Borough* (Supreme Court, Wellington, 8 November 1972) a number of questions of law were before Beattie J. pursuant to s. 42A of the Town and Country Planning Act 1953, arising out of an application by the second respondent, Southern Lakes Hotel Ltd., to erect a high-rise hotel of height 110 feet. The Council had granted the application initially subject to a height limitation but this limitation had been removed by the Appeal Board. The site for the hotel was in a special "licensed hotel zone" under the operative scheme. This zone provided for no predominant uses and a single conditional use, namely "licensed hotels." The ordinance further provided bulk and location provisions including the provision—"maximum height 35 feet (increased height may be authorised by a resolution of the Council)." At the time of the original application the discretion given to the Council to increase the height by resolution was subject to a resolution that it be removed as part of a change to the scheme. This deletion was ob viously correct to meet the criticisms of discretionary powers unrelated to any planning criteria, as condemned in *Attorney-General* v. *Mount Roskill Borough* [1971] N.Z.L.R. 1030. Also the discretion would be contrary to the tenor of s. 21 (1A) of the Act (1971 amendment No. 2) and accordingly invalid. The applicant applied under s. 28C of the Act for conditional use approval of the site for the hotel and three ancillary ships. Application was also made for a specified departure under s. 35 of the Act to authorise the building height of 110 feet and finally application was made under s. 30B to authorise the height as the decision involved a consideration of the proposed change at that time under way.

The first two questions asked were whether on the proven facts and the provisions of the scheme the applicant was entitled to conditional use consent, and whether the standards as to bulk and location set down in the ordinance were determinative of the relevant conditions under which the conditional use consent could proceed. On the initial aspect Beattie J. found that the conditional use consent could properly have been given, but in respect of the height restriction of 35 feet contained in the bulk and location provisions of the ordinance, his Honour stated:

> "The Board was plainly right in finding the standards in the ordinance were not determinative because the very concept of conditional use zoning is that there is no development as of right and the matter ultimately becomes discretionary under s. 28C (3). The standards and the particular ordinance are a general guide to be taken into account when that discretion comes to be exercised under an application for conditional use consent. At that time, certainly more stringent standards could be laid down or less stringent standards also."

The finding that the Council, in exercising its discretion to impose such conditions as it thinks fit under s. 28C (3) of the Act, could impose a condition less stringent than a restriction laid down in the district scheme is a novel and disturbing conclusion. It is a basic principle that a discretion to impose conditions, must be exercised to further the objects of the empowering legislation and that conditions should not be imposed which are contrary to or in conflict with the legislation or statutory provisions authorised thereunder: *Fawcett Properties Ltd.* v. *Buckingham County* [1961] A.C. 636. The provisions of a district scheme are open to public objection when the scheme is prepared and at this stage an objector would either accept or reject proposed bulk and location provisions. In the Queenstown scheme it could be reasonably assumed that many potential objectors did not challenge the special "licensed hotel zone" upon the basis that where an hotel was agreed to, it would at least be limited to 35 feet in height. The bulk and location provisions form an integral part of a district scheme and under s. 33 (1), the provisions have the force and effect of a Regulation made under the Act. The finding, therefore, of Beattie J. is that the Council in exercising its discretion may override and modify a provision which has the force and effect of a Regulation. This new found power which the Councils may now have makes a dramatic hole in the Town Planning legislation in that a Council may now perhaps ignore completely bulk and location provisions which are specifically said to apply to conditional use activities. In the writer's respectful conclusion, his Honour has seriously erred in coming to this conclusion

and the decision on this point must be regarded as made *per incuriam*.

The further questions of law related to whether the Board was correct in holding in respect of the application under s. 35, that the question of justice or injustice to the applicant was a matter of public interest, and whether in considering this question, the Board was entitled to take into account observations made by other Boards in previous proceedings relating to the zoning of the particular site. On these matters his Honour rightly concluded that under s. 35 where a specified departure was in issue, the public interest did include the justice or injustice generally of the application in the widest sense and it was relevant for the Board to take into consideration statements made in previous proceedings relating to the same site. His Honour made the observation that the s. 35 application covered again the question of the height of the building and clearly the consent under s. 35 would authorise the height at 110 feet notwithstanding the limitation of 35 feet (which in the writer's submission was a mandatory maximum limit under the conditional use application). Accordingly the consent obtained by the applicants was valid at least where viewed as a consent under s. 35 of the Act. The consent under s. 30B was made in identical terms and would also have been valid as a consent for the limited purposes of that section. Section 30B is designed to focus upon the proposed change and to judge whether the proposals should proceed in the light of the change. Accordingly a final observation by Beattie J. that "It is of course possible that the s. 30B consent might even suffice on its own" is difficult to understand. Clearly a consent under s. 30B could not in the particular case have authorised the use of land and construction of a building which was not a predominant use in the zone, regardless as to whether the change was approved or not. This confusion in respect of s. 30B is understandable as in re-enacting the section in 1971, the opportunity to clarify its relation to ss. 35 and 28C was not taken.

K.A.P.

# EXCHANGE OF MEDICAL REPORTS

Most personal injury claims are settled by negotiation and compromise. Where legal liability is not in issue only a tiny minority of settlement discussions founder, even though they may falter awhile, upon a disagreement as to *quantum* of damages. A divergence of views upon *quantum* can often be reconciled by exchange between counsel of the medical reports obtained on behalf of plaintiff and defendant. If the medical reports themselves are greatly at variance the reports can be referred back to the medical examiners for resolution or explanation. Sometimes the differences in medical assessment of the degree of hurt or permanent disability will be found to have occurred because of the widely differing dates of the respective medical examinations. The more recent report is probably the more reliable. My own view is that nothing but good can come from a free exchange of medical reports between legal advisers. It is the truth of the plaintiff's condition which is being sought. In a relevant case, referred to later in this article, Barrowclough C.J. had this to say ". . . the plaintiff invokes the aid of the Court to recover damages. It is the Court's plain duty to see that he gets fair and just compensation—no more and no less."

It should equally be the duty of both counsel, that is for plaintiff and defendant, albeit under the adversary system, once they have resolved the question of liability and agreed to enter upon settlement negotiations to insure that the plaintiff receives the fair and just compensation to which his injuries entitle him.

One request to an eminent counsel acting for the defendant for a copy of the medical report obtained by him at his request drew in 1973 the following reply which is quoted verbatim:

"I have been acting as counsel for the defendant in connection with this claim. I understand from my instructing solicitors that you have asked for a copy of the report recently received from Dr —.

"I do not normally favour the exchange of medical reports but in this case I would be prepared to make a copy of the report available to you, provided:

(a) You undertook that the report was without prejudice to any subsequent litigation and in particular the report would not be used as evidence on behalf of the plaintiff nor for the purposes of cross-examination of the defendant's witnesses.

(b) You make available to me copies of the medical reports that are in your possession.

Upon receipt of your confirmation that these terms are acceptable, I will send you a copy of Dr — report."

It must be stated at once that the question at issue in the instance above was liability under the Workers' Compensation Act 1956 and the determination of such issue was totally dependent upon medical evidence as to whether the injury was caused by the work performed. My own view again is that the principle, namely that of eliciting the truth of the medical condition of the claimant with a view to settlement, would be assisted by a free and unfettered exchange of the respective medical reports.

The position in England is clear. In *Worrall* v. *Reich* [1955] 1 All E.R. 363, Morris L.J. notes that ". . . in cases of personal injuries it is proper and desirable that medical reports should be exchanged to the greatest extent possible". At p. 366 he gives as reasons that it was helpful to the parties, saved calling medical men to spend time in Court when their views did not differ from the other medical men involved, and that it was just, expeditious and economical to the parties in the preparation of a case.

This case was cited with approval in *Clarke* v. *Martlew & Anor* [1972] 3 All E.R. 764 of which the headnote reads:

> "Held—In seeking to have the plaintiff medically examined the defendant was seeking a privilege; he ought not to be accorded that privilege unless he was prepared to act fairly by it and fairness required that he should show the medical reports to the plaintiff. Accordingly, if the defendant sought to have the action stayed for the purpose of having the plaintiff medically examined, it was reasonable and just that as a condition of the stay he should give an undertaking to make the medical reports available to the plaintiff."

Lord Denning M.R. used strong words at p. 766:

> "This is the first case in which a defendant, who seeks a medical examination of the plaintiff, has claimed to keep the medical report secret, or, at any rate, to have it in his option whether to show it to the plaintiff, or not. He says it is like the proof of a witness. It is privileged from disclosure unless the privilege is waived. I think this argument is unsound. It is the second defendant who seeks a privilege—he seeks to have a medical examination of the plaintiff—and I do not think he should have this privilege unless he is prepared to act fairly by it. Fairness requires that he should show it to the plaintiff. In all the cases where the Courts have allowed the defendant to have a medical examination of the plaintiff —and ordered a stay until it is given—it has been assumed that the defendant will show the report to the plaintiff. In *Lane* v. *Willis* the defendant undertook to do it. Sachs L.J. put it very emphatically: 'There is far too much reluctance in this matter of exchanging —far too much manoeuvring behind the scenes—far too much (especially on the part of defendants) trying to hold back a report until the moment of trial'."

And at p. 767 the Master of the Rolls concluded:

> "I know that, as a result of our decision today, it will mean that in practice medical reports will have to be exchanged with a view to agreement. That seems to me altogether desirable in the search for justice and the saving of expense."

In New Zealand there are statutory provisions relating to taking of medical examinations.

Section 100 of the Judicature Act 1908 provides (*inter alia*):

> "(1) Where any person injured or alleged to have been injured by an accident, through the wrongful act, neglect, or default of any other person, claims compensation or damages on account of the injury, any Judge of the Court in which proceedings to recover such compensation or damages are taken may order that the person injured be examined by one or more duly qualified medical practitioners named in the order, and not being witnesses on either side, and may make such order with respect to the costs of such examination as he thinks fit.
>
> "(2) If the person injured refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation or damages under any act or law shall be suspended, and all proceedings brought by him in respect of such compensation or damages shall be stayed, while such refusal continues."

It is to be noted that the preamble to the section refers to an *independent* medical examination and though there are no decided cases reported construing the section, the section reads as if designed to enable the Court, rather than either party to the action, to obtain its own independent medical report.

Section 28 of the Workers' Compensation Act 1956 (of which subsections 1 and 2 only are reproduced here) provides:

> "28. (1) Where a worker has given notice of an accident or claims compensation or is entitled to weekly payments under this Act, he shall if and as often as so required by the employer or by any person by whom the em-

ployer is entitled to be indemnified, whether by way of insurance or otherwise, in respect of any liability under this Act, or by any other person liable to pay compensation under this Act, submit himself, at the expense (if any) of the employer or of that other person (whether for medical expenses, transport, or loss of wages or earnings), for examination by any registered medical practitioner nominated and to be paid by the employer or by that other person.

"(2) If the worker at any time without sufficient justification refuses or neglects to submit himself to any such examination or in any way obstructs or delays the same, his rights under this Act in respect of the accident to which the examination relates shall be suspended until the examination takes place, and shall absolutely cease if he fails without sufficient justification to submit himself for examination within one month after being required so to do."

This section is reviewed on pp. 467 and 468 of *MacDonald's Workers' Compensation* (4th ed.). Neither of the above statutory provisions says anything about the injured person or worker receiving or not receiving a copy of the medical report. Under the Judicature Act section I submit it is most unlikely that the Court would not reveal the contents of the report to the injured person and to both counsel for perusal and comment. Under the Workers' Compensation Act section the worker should not be held guilty of refusal or neglect without sufficient justification if he required as a condition of examination that he receive a copy of any report.

There is one orphan case reported which is the decision of the late Chief Justice, Sir Harold Barrowclough, earlier referred to, namely *Bird* v. *Hammond & Attorney-General* [1960] N.Z.L.R. 466. A husband plaintiff suing on his own and his infant children's behalf for damages for the death of his wife refused to be medically examined on behalf of the defendant. Section 100 of the Judicature Act 1908 had no application as the husband plaintiff was not a person injured in the accident which was the foundation of the action. On a motion for stay of proceedings the headnote reads:

"Where the plaintiff in an action under the Deaths by Accident Compensation Act 1952 suffers from a disability which may affect the length of his expectation of working life and that is a factor relevant to the assessment of damages, no order can be made for his medical examination under s. 100 of the Judicature Act 1908 since he is not a person injured, or alleged to have been injured, by the accident which is the foundation of the action.

"The Court has, however, inherent jurisdiction to stay the proceedings until the plaintiff has submitted himself to medical examination since to allow the plaintiff to proceed with his action without placing before the Court relevant evidence bearing upon his expectation of working life would be an abuse of the processes of the Court, as it may result in an award of a greater sum for damages than that to which the plaintiff is justly entitled."

It is to be noted that the Court in that case had evidence before it from the defendant that the plaintiff had a defective heart condition which might affect his life expectancy.

No mention is made anywhere in the judgment of a copy of such medical report as might eventually be given consequent upon an examination being made available to the plaintiff. It is submitted by me, however, that this was taken for granted because in his judgment the learned Chief Justice refers to the need for evidence as to the heart condition and as to the need for contra-evidence if the allegations be untrue.

The learned author of *Mazengarb's Negligence on the Highway* (4th ed.) refers to the reprehensible practice of a defendant's medical adviser questioning the claimant about circumstances of the accident and other extraneous matters. I suspect that some defendants arrange for the examining doctor to put questions to claimants concerning wearing or non-wearing of seat belts, jobs and reasons for changes, work ability and so forth on matters ranging far beyond a physical medical examination. On a free exchange of medical reports both sides would at least have equal access to the data so obtained.

In summary therefore I suggest that in practice medical reports be exchanged freely and without tags. In future all claimants' legal advisers should reply to letters from defendants notifying arranged medical appointments in the following form:

"We have duly received your letter advising us of the medical appointment arranged by you for our client Mr Broback. Upon receipt of your undertaking that a copy of the report rendered to you by Dr Lessenclaim will be supplied to us, we will notify Mr Broback and arrange for him to keep the appointment. If you are in any doubt as to the propriety of our request for this undertaking from you please refer to *Clarke* v. *Martlew* [1972] 3 All E.R. 764."

R. A. HOUSTON.

# THE OVERWRITTEN JUDGMENT—ITS DIAGNOSIS AND CURE

A friend and I were having morning tea in a coffee bar near the Courts. He had just picked up a reserved judgment, delivered in favour of his client. He had no quarrel with the quality of the legal reasoning it displayed, but complained that it was full of literary allusions and was written in a rather mannered style. This set me to thinking, an unfamiliar though not uncongenial experience. Ought not, I thought, judgments which aspire to literary status to be judged by literary standards, and disregarded if they fall short of them? Ought one not to be able to address the Court of Appeal thus: "Your Honours, the judgment of this Court in the case of *Biltong* v. *Tussock* [1925] N.Z.L.R. 2123, while impeccable as a statement of the law, is badly overwritten and should therefore not be followed"?

One would then proceed to develop this submission and establish to the Court's satisfaction that the judgment fell within one of the clearly established categories of overwriting, so as to deprive it of authority. For the Courts would doubtless establish such categories in the process of developing this new ground of appeal. One envisages, for example, the ground of *equitable overwriting*. This ground would apply to judgments written in superb Augustan prose, but which had no soul. Conversely, there would be the ground of *overwriting sans law*, where the judgment was written in a style of hazy Romanticism, containing little in the way of decipherable legal principle. Some judgments would fail because, like Lord Atkin's judgment in *Liversidge* v. *Anderson* [1942] A.C. 206, they were written in a mood of eloquent anger. This would be known by the Norman-French title of *overwriting de coeur*. Others, redolent of Gothic horror, like the opening passage of Lord Denning's judgment in *Hinz* v. *Berry* [1970] 1 All E.R. 1074, would be categorised as *overwriting on the facts* and dismissed accordingly. Splendidly funny judgments, such as Megarry J.'s, in the case *Re Flynn* [1968] 1 All E.R. 49, would fail through being examples of *overwriting pour faire rire*. In addition, there would be a general category of *overwriting on the case*, into which would fall judgments clearly overwritten, but for reasons which nobody could put their finger on.

Where overwriting of one sort or another was advanced as a ground of appeal, it would be necessary for the appellate tribunal to allow counsel advancing the ground to call expert evidence in support of his submission. This necessity would arise out of the fact that not every Judge, appellate or otherwise, would be capable of distinguishing overwriting, or for that matter, writing, when he saw it. The fine line between fine writing, which added to the merits of a judgment, and overwriting, which negated them, would often be difficult to draw. Professors of literature, professional writers, professional critics and others would be called to assist the tribunal in its deliberations. Notice would have to be given to the other parties to the appeal that it was intended to advance overwriting as a ground, and they would be entitled to call their experts in rebuttal. The Courts are traditionally suspicious of experts, and that suspicion might well be intensified by the procedure envisaged. As with psychiatrists, it would not be difficult to find any professor of literature willing to disagree with any other professor of literature. On the other hand, our Judges, forced to become Judges of literature as well as of law, might well find the process of sifting through the evidence presented to them, broadening and educational—unless on the other hand (if I may be permitted three hands for the moment) it inhibited them from putting pen to judgment altogether.

This last danger, however, need not concern us too greatly. As I said at the outset, only judgments which plainly aspired to the status of literature would be open to attack. The vast majority of judgments would be immune from such criticism. Some might fall into another category, that of *boring judgments*, which is a theme I shall develop in a moment, but reverting to literary judgments, I should make it clear at this point that I am entirely in favour of them and believe we should have more of them. I should like to see literary ability added to the other criteria, such as legal erudition and forensic success, by which potential Judges are measured. What I am saying is that a Judge who possesses literary ability, and who exhibits it in his judgments, should expect to be judged by the same standards as those literary colleagues whose efforts are submitted to the public and the press, rather than to a respectful Bar and to awed litigants.

I thought at one stage of urging that plain bad writing should be created as an additional

ground to overwriting, but a moment's reflection convinced me that this would result in the extinction of a substantial portion of the common law, and I now seek leave to withdraw this submission.

However, I urge in its place that *boring judgments* should be overruled as ruthlessly as possible. I should like to hear counsel submitting to our Court of Appeal that the judgment of the Privy Council in *Myopic Oil Company* v. *McMurky's Agglomerated Paddock and Family Trusts und Gesellschaft* should not be followed because it was excruciatingly dull and even the headnote was four pages long. Any case in which the golden thread of the common law is wound through wad after wad of cotton wool should be unhesitatingly declared bad law. There would be no need for expert evidence in support of this ground. The production of affidavits from three lawyers of more than seven years' standing that they had read the judgment and been bored by it would be sufficient to remove it from the Court's consideration.

It may be that some sort of legislative enactment would be required to bring about the changes I propose. Roll up your sleeves, Dr Finlay! The two chief glories of the English race are its literature and its common law. My proposals would result in the fusion of the two.

A. K. GRANT.

# UNLIMITED COMPANIES AND LIMITED PARTNERSHIPS IN THE FAMILY TAX PLAN

## The unlimited company

The element of double taxation of distributed company income has been referred to in an earlier article ([1973] N.Z.L.J. 43), and, generally, it robs the company of much of its attractiveness for tax and estate planning. Another point which tells against the company is that it is difficult to change its capital. Effecting an increase is not so difficult, for, provided the Articles permit (*a*), a general meeting of the company can alter the Memorandum and increase the share capital by any amount considered to be expedient (*b*). But, generally, a reduction in capital requires the consent of the Court (*c*), for persons trusting the company

> "have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished . . . by the return of any part of it to the shareholders."(*d*)

The company is restricted further by the *ultra vires* rule, by having to meet filing requirements, in respect of certain resolutions (*e*) and an annual return (*f*), and by statutory requirements as to auditors (*g*).

The partnership form avoids all of these drawbacks, and, if it is a unit partnership, does so while retaining many of the attractive features of the company form. However, cases may arise when, despite its drawbacks, the company form has to be used. In that event, subject to the availability of adequate insurance cover against tort liability, careful consideration could be given to an unlimited company. The reasons in favour are that, while most of the restrictions and drawbacks, just noted, will remain, the requirement of an application to the Court for approval of a reduction in capital does not. Moreover, while the element of double taxation cannot be eliminated, it is possible that it may be reduced significantly.

## Specific provisions

An unlimited company must be a public company (*h*), and, accordingly, it requires to be formed by at least seven persons (*i*). It may be formed either with, or without, a share capital. If it has a share capital, the amount of it must be stated in the Articles (*j*), and not in the Mem-

(*a*) *Cf* Companies Act 1955, Third Schedule, Table A, Article 44.

(*b*) Ibid., s. 70.

(*c*) Sought pursuant to Companies Act 1955, ss. 75-80. See *Re E. W. Mills & Co. Ltd.* [1925] N.Z.L.R. 227, 228; [1924] G.L.R. 618, 619 per Stout C.J.

(*d*) *Trevor* v. *Whitworth* (1887) 12 App. Cas. 409, 415 per Lord Herschell.

(*e*) Companies Act 1955, s. 130.

(*f*) Ibid., s. 147.

(*g*) Ibid., s. 163, modified, in respect of private companies by s. 354 (3).

(*h*) Ibid., s. 353 provides that a private company may be formed "having the liability of its members limited by shares, or by shares and by guarantee". No other case is provided for. One consequence of this is that an unlimited company is not bound by s. 356 (2), and, accordingly, may have unsubscribed share capital. Another is that it may not make loans to its directors: s. 190. However, it may deduct up to $1,000 of charitable donations annually: *Financial Statement* 1972.

orandum (*k*). If it has not, the number of members with which it proposes to be formed must be stated instead (*i*), and any subsequent increases in that number must be notified to the Registrar within fifteen days, and recorded by him (*m*). The purpose of this requirement for notice appears to be to enable the Registrar to calculate the fees payable in terms of the First Schedule. The requirement that there must be stated in the Memorandum the name of the company, followed by the expression "limited", does not apply (*n*). The form of the Memorandum and Articles must be as close as possible to those set out in Table E of the Third Schedule to the Act (*o*). The prescribed form of Memorandum is similar to that set out in Table B of that Schedule for an ordinary limited company, except that the statements that the liability of the members is limited, and that the share capital is a certain amount, are omitted. The incidental and ancillary objects and powers set out in the Second Schedule, to the extent that they are not modified or excluded expressly, are applicable (*p*).

A statement of share capital does appear, however, in the model Articles. These incorporate also a statement of the number of members with which the company proposes to be registered, with power in the directors to register an increase from time to time (*q*). With the exception of Articles 40 to 47 (*r*) Table A is deemed to be incorporated. Then, there is an express provision that, by special resolution, the company may reduce its share capital in any way. Finally, the names of the initial members, although not the number of shares for which each has subscribed, is included in the way it normally is appended to the Memorandum. While Articles are optional in the case of a company limited by shares, they are compulsory for an unlimited company. They must be registered with the Memorandum and signed by the subscribers to the Memorandum (*s*).

## Nature of members' liability

Although any shareholder is said to be liable to the full extent of his assets, the nature of his liability differs from that of a member of a partnership. As a partner, he would be liable direct to the creditors of the partnership (*t*). On the other hand, as a member of an unlimited company, still in business, his only liability is to the company. He must pay calls to the full nominal amount (*u*) of any shares he has in it, but he is not liable to creditors in respect of the debts of the company. The only way in which his liability can arise is by demand of the liquidator after the company has been ordered to be wound up (*v*).

> "Calls must be made on members for the capital unpaid on their shares (if any) in the first place, and if this yields insufficient to discharge the company's liabilities further calls must be made in proportion to the nominal value of each contributory's shares, or if the company has no share capital, equally upon all the contributories." (*v*)

If, in such an event, the existing members are unable to meet the debts (*w*), any person who had been a member within the previous year (*x*) is liable to contribute, except to the extent that the debts were contracted after he ceased to be a member (*y*).

The directors and even members, of a small company, so often are required to give personal guarantees in respect of its contractual engagements, that limited liability often could be something of an illusory, rather than real, sacrifice. Tort liability will remain, and must be insured against. In some lines of business the premiums may be so high as to make the use of an unlimited company impracticable. In others, the investment field, for example, this should not be such a discouraging factor. In all cases, it will be something to be weighed against the advantages now discussed.

## Reduction of Capital

It was observed earlier that the share capital, if any, of an unlimited company may be reduced without resort to the Court. This is possible

(*i*) Ibid., s. 13.
(*j*) Ibid., s. 21 (1).
(*k*) Ibid., s. 14 (4) (a).
(*l*) Ibid., s. 21 (2).
(*m*) Ibid., s. 21 (3).
(*n*) Ibid., s. 14 (1) (a) requires this only of company limited by shares or by guarantee.
(*o*) Ibid., s. 25 (d).
(*p*) Ibid., s. 16, which applies to "every" company.
(*q*) Any such increase must be notified to the Registrar within fifteen days, and recorded by him: ibid., s. 21 (3).
(*r*) Dealing with the conversion of shares into stock, and with alteration of capital.
(*s*) Companies Act 1955, s. 20.
(*t*) Partnership Act 1908, s. 12.
(*u*) *Re Mayfair Property Company* [1898] 2 Ch. 28, 35 per Lindley M.R.
(*v*) Pennington *Company Law* (2nd ed.) 623. There is a limited right of set-off provided by the Companies Act 1955, s. 253 (2) (a).
(*w*) Companies Act 1955, s. 211 (1) (c).
(*x*) Ibid., s. 211 (1) (a).
(*y*) Ibid., s. 211 (1) (b).
(*z*) Ibid, s. 21 (1).

since, if there is a share capital, it is required to be stated in the Articles (*z*), and not the Memorandum (*a*). Unlike the Memorandum (*b*), the Articles require only a special resolution (*c*) to amend them. Moreover, the enactment requiring the sanction of the Court to any reduction (*d*), is, in its express terms, confined to companies limited by shares or by guarantee, and having a share capital (*e*).

Notice of any special resolution must be given to the Registrar within fifteen days (*f*).

Thus, in this respect, the unlimited form confers the freedom of a partnership on the taxpayer who requires a company.

**Tax advantages**

Moreover, if he must have a company, the taxpayer may find that he and his family can enjoy a greater share of the profits of their business in the form of disposable income if an unlimited form is chosen, than if a limited company was formed. Being a separate entity, like any other company formed under the Companies Act 1955, the unlimited company may be used for spreading income over the company itself, and, in the form of salaries, over the individuals working for it. Their salaries will be assessed in the normal way to those who derive them, and the balance, after any other allowable deductions or exemptions, will be assessed to the company. After it has paid tax on it, the rest will be credited to the profit and loss appropriation account.

Unless the company is a "privately controlled investment company", this credit will not be diminished by any further (that is, double) tax until either it is distributed as a dividend (*g*), or capitalised and made the subject of a bonus issue of shares. In the former instance the measure of the element of double taxation is the rate appropriate to the individual recipient. In the latter, it is the 17.5 cents in the dollar bonus issue tax payable by the company itself (*h*).

This latter figure is lower than any of the basic rates for each dollar of taxable income, except the rate for the first $650 (*i*). Taken with the power, mentioned already, to reduce capital so simply, this gives rise to the possibility of a better income tax result from an unlimited company.

As the first step in the procedure (*j*) the company will capitalise the balance standing in the profit and loss appropriation account, and make a bonus issue (*k*). The company thereby becomes assessable (*l*) with the bonus issue tax of 17.5 cents in the dollar.

Something which may militate against the use of an unlimited company, in particular circumstances, is that there must be a three-year delay before it is possible to implement the second step: distribution of the capitalised profits (*m*).

Subject to that consideration, the company may proceed to make use of its power to reduce its capital by special resolution. Then, provided a power for the purpose has been included in the Articles, the capital may be returned to the members entitled to it, with no further liability for income tax (*n*).

Any tax advantage is diminished where the company is liable to excess retention tax as being

(*a*) Ibid, s. 14 (4) (a).

(*b*) Which can be altered only to the extent the Act permits: ibid, s. 17. So far as reduction of capital is concerned, s. 75 does not permit it without confirmation by the Court.

(*c*) This must be passed at a general meeting convened pursuant to s. 145. Since the company is not private, s. 362, permitting resolutions to be passed by entry in the minute book, is inapplicable.

(*d*) Companies Act 1955, s. 75.

(*e*) In *Re Borough Commercial and Building Society* [1893] 2 Ch. 242, 253-254, Vaughan Williams J. said that there was nothing to prevent an unlimited company from providing, by its Memorandum and Articles, for a return of capital.

(*f*) s. 147 (4) (a).

(*g*) Until they expire on March 27 1973, the Limitation of Dividends Regulations 1972 prohibit, without the consent of the Minister of Finance, the declaration or payment by a newly incorporated company of dividends exceeding a total of 5 percent for the period ending March 27: Reg. 7. Existing companies may not exceed the rate paid in the previous year, or the average of the rates paid in the preceding three years: Reg. 5.

(*h*) Land and Income Tax Act 1954, Part VI B and First Schedule, Part A, para. 8.

(*i*) Ibid, First Schedule, Part D. The rate in respect of the first $650 is 7.85 cents, and the next step, between $651 and $1,700 advances it to 21.00 cents.

(*j*) The following procedure is an application of an idea of Mr P. S. Lewis, Solicitor, of Cambridge, and I am grateful for his permission to follow it up here.

(*k*) The unlimited company is permitted to have unsubscribed share capital, since, being a public company, it is not bound by s. 356 (2). If, at the time the profits are capitalised, the shares created thereby will exceed any unsubscribed capital, a resolution authorising an increase of capital will be required first. Notice of the resolution must be given to the Registrar within fifteen days, and he must record the increase: Companies Act 1955, s. 72.

(*l*) Land and Income Tax Act 1954, s. 172Q. Payment of the tax is due on February 7 of the relevant year: ibid, s. 172s.

(*m*) Ibid, s. 172T provides that where, within three years of the making of a bonus issue, there is such a distribution, it is deemed to be a further bonus issue. An additional 17.5 cents in the dollar would become payable as a result.

(*n*) *Cf. Re Borough Commercial and Building Society* [1893] 2 Ch. 242, 253-254 per Vaughan Williams J. to the effect that there is "nothing to prevent" such a distribution.

a "privately controlled investment company". A company will be a "privately controlled investment company" if it has a share capital (*o*) and is a "proprietary" company—that is, if it is under the control of no more than four persons (*p*)—engaged (*q*), in the opinion of the Commissioner, principally in investment activities (*r*). Any company of this description must distribute, as dividends, that proportion of its income remaining after deduction of income tax, bonus issue tax, any excess retention tax payable in respect of the preceding year, and a "retention allowance" of 60 percent of the excess of its assessable and non-assessable income over its income tax for that year (*s*). To the extent that the company fails to distribute any of that remaining portion, it makes an "insufficient distribution" (*t*). An impost, called excess retention tax, is exigible on the amount of that insufficiency at the rate of 35 cents in the dollar (*u*).

For the purposes of this tax a bonus issue is not a "dividend" (*v*), although the amount of the bonus issue tax is allowed to be taken into account in calculating the amount that has to be distributed (*w*). Accordingly, where the company is liable for excess retention tax, account must be taken of it in determining whether the unlimited form is to be used. If it is liable, the revenue disadvantages of the unlimited company, by comparison with a partnership, are increased. However, even if excess retention tax is payable, the unlimited form will continue to offer revenue advantages over the limited company.

(*o*) Land and Income Tax Act 1954, s. 172c (h).
(*p*) Ibid, s. 138 (1) (a).
(*q*) That is, it is submitted, "actively engaged in", not merely "formed for the purpose of".
(*r*) Land and Income Tax Act 1954, s. 172BB.
(*s*) Ibid, ss. 172BB, 172D, 172E.
(*t*) Ibid, s. 172E.
(*u*) Ibid, First Schedule, Part A, para. 7.
(*v*) Ibid., s. 4 (1).
(*w*) Ibid, s. 172B. Paragraph (e) of the definition of "distributable portion".
(*x*) Ibid, s. 137 (2).
(*y*) Ibid, s. 137 (3).
(*z*) Partnership Act 1908, s. 49.
(*a*) This is the view expressed, perfectly correctly, it is submitted, by Webb & Webb in *Principles of the Law of Partnership* (1972) 206-207.
(*b*) Partnership Act 1908, s. 52.
(*c*) Ibid, s. 49.
(*d*) Ibid, s. 50.
(*e*) Ibid, s. 51.
(*f*) Ibid, s. 54.
(*g*) Ibid, s. 58.
(*h*) Webb & Webb *Principles of the Law of Partnership* (1972) 203 (i) state that only ten were registered at the Auckland Registry of the Supreme Court as at 24 September 1972.

**Loss companies**

Additional tax benefits may accrue, in a few cases, from a choice of the unlimited form of company, by virtue of the restrictions on "loss companies". The rule that deductible losses may be carried forward to future years, until used up (*x*), is not applicable where less than 40 percent both of the nominal value of the allotted shares and of the paid-up capital are held by the same persons in the year the deduction is claimed, as were the holders at the end of the year when the loss was made (*y*). However, the only companies thus disqualified are *limited* companies (*y*).

The seldom-used unlimited company may be the only answer for the taxpayer who, while wishing to pay the lowest tax, *must* have a company. For the taxpayer who, while wishing to have limited liability, *must* have a partnership, the only answer may be the equally unusual special partnership.

**Special partnerships**

Where a general partnership, rather than a company, is chosen as the family business vehicle, one of the consequences will be the loss of limited liability in contract and in tort. While the latter can be covered by insurance, the former may be considered a problem in some circumstances. It is possible to overcome this problem, to some extent, by forming a special partnership pursuant to Part II of the Partnership Act 1908. This will be applicable particularly in respect of members whose role is to be, merely, providers of capital rather than decision-makers.

A special partnership may be formed by any number of persons (*z*). Only the general partners, who should not exceed 25 in number (*a*), are permitted to transact the business of the partnership (*b*). There is no limitation on their liability. On the other hand, there may be any number of special partners (*c*), and it is provided (*d*) that they must "contribute specific sums to the capital *beyond which they shall not be responsible for any debt of the partnership* except in respect of any of them who makes any contract for the partnership, or permits his name to be used in connection with the partnership business, or unless any false statement is made in the partnership certificate."

This certificate is required to be signed by all partners before business is commenced, and the partnership

> "shall not be deemed formed until such certificate as aforesaid is acknowledged by each partner before some Justice, and registered in the office of the Supreme Court in a

book to be kept for that purpose by the Registrar of such Court open to public inspection." (*f*)

A copy of the certificate must be published in specified newspapers (*g*).

The maximum duration for a special partnership is seven years, but it may be renewed by all the partners signing, acknowledging, registering, and publishing a further certificate (*g*).

Although special partnerships are not used widely (*h*), they could merit consideration, in some circumstances, as being useful arrangements for spreading business income over various members of the family, while keeping them out of the management of the business, and not placing at risk any other assets they may have.

A. P. MOLLOY.

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# LEGAL LITERATURE

**Natural Justice** by D. J. HEWITT, O.B.E., LL.M., pp. xxxv + 374. Butterworths, 1972. Price $18.

We have gone a long way since 1940 when the Chief Justice of the day, Sir Michael Myers, found great difficulty in accepting the term, Administrative Law (*a*). Such a difficulty has not beset the author of this book and as made plain in the Preface his objective is to present an important branch of Administrative Law, namely Natural Justice, in the form of a textbook. Administrative and Domestic Tribunals are covered. There is a detailed examination of the nature and scope of the rules as to bias and also of the right to a hearing. The book discusses the law in Great Britain, Canada, Ceylon, Australia and New Zealand.

There is a satisfying introduction to the book as a whole. Then follow three chapters on the subject of bias. The next chapter deals comprehensively with the right to a hearing. One chapter deals with the Housing Acts and another with Town and Country Planning. Then follow chapters dealing with the relevant situation in Canada, Ceylon, Australia and New Zealand.

In his penultimate chapter, the author sets out his conclusions. He points out that much confusion has been caused through trying to base rights and remedies on technical distinctions. The reported cases reveal in his view an indiscriminate use of the word quasi. Furthermore, there is inconsistency, uncertainty and obscurity.

The last chapter, Reform of the Law, gives the substance of the Franks Report and of the legislation which flowed from it. The various reports of the New Zealand Public and Administrative Law Reform Committee are traversed. There is reference to the recently created Canadian Federal Court which exercises general supervisory jurisdiction over the affairs of Federal administrative agencies. Reference is also made to the appointment of an Ombudsman in English-speaking countries including New Zealand. Valuable papers by the author dealing with the New Zealand Ombudsman are contained in an appendix.

During the sixties New Zealand saw a growing emphasis placed upon the rights of the individual as against the State. Various steps were taken by the late National Government to strengthen the rights of the ordinary citizen and not least, of course, was the adoption of the Ombudsman as an institution. As a result it can be said that the rule of law has permeated most of the central administration to a much greater degree. There seems nothing in the policy of the present Labour Government to suggest that they will want to reverse the trend—indeed there are positive signs that they are in sympathy with the trend.

Now we have an Administrative Division of the Supreme Court which is hearing appeals from a number of areas within the Administration. It seems inevitable that Parliament will continue to add to the jurisdiction of the Division. In the course of time the Division will, doubtless, be handling highly controversial questions of crucial importance to the country.

It would seem that the seventies will be favourable for the Judges in the Administrative Division to build up a more satisfactory body of law. The author expresses one of the challenges in these words:

> "The question as to when an administrative body is under a duty to act judicially in the course of arriving at an administrative decision is very often a complex one. The difficulty has been in finding some basis for the distinction between the judicial, quasi-judicial

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(*a*) See address delivered before the Institute of Public Administration, "The Law and the Administration", *N.Z. Journal of Public Administration;* Vol. 3, No. 2 Dec. 1940, p. 38 *et seq.*

and administrative functions, and an examination of the decided cases will reveal no more baffling and elusive problem in administrative law." (Page 285)

Plainly there is scope for judicial creativeness in the years immediately ahead.

Not all change can or should be left to the Judges and there is an important place for legislation. The Judicature Amendment Act 1972 was passed after the book had gone to press. There is now provided an alternative single procedure, by way of application to the Supreme Court by motion, on which the Court may grant any relief to which the applicant is entitled in proceedings for *mandamus*, prohibition, *certiorari*, declaration, or injunction. This provision goes some of the way to meet the author's criticism. However, there is scope for further legislation and one illustration is the author's submission (at page 342) that it would be of great benefit to all subjects living in British countries, if legislation were enacted which made the *audi alteram partem* rule applicable to all administrative and domestic tribunals of whatsoever nature; any rule of law notwithstanding.

This book has come at the right time—it will nourish the process both of judicial creativeness and of legislation. It has been planned with care and although it covers a wide area there is judgment in the choice of material. The author has used the comparative method to great advantage. His book is a scholarly and constructive one.

J. L. ROBSON.

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# NATURAL LAW AND NATURAL HISTORY

The expression *jus gentium*—"the law of nations"—was so called by the Romans, and originally used by them to mean the system of justice applied, in the provinces, between local citizens in their own courts; later it came to mean the law administered by the Roman governor to decide actions between provincials among themselves or against Roman citizens. It was codified *inter alia* by Justinian (*c.* 530 A.D.) in the *Corpus Juris Civilis*. In this sense, as a kind of private international law, it was based upon the system of Aristotle (384-322 B.C.), divided between "natural" law, common to all mankind, and man-made laws, applicable by different states.

In another sense *jus gentium* has been used, in modern times, to signify "public international law". The first authoritative attempt to formulate its rules, intended to bind all nations, was made by the Dutch jurist Grotius (1583-1645). *De Jure Belli et Pacis* (1625) arose out of the new claims of sovereignty by independent states; he showed that the absence of a common imperial Power did not involve international anarchy, but that the concept of natural law was binding on dealings between individual nations. Unfortunately this conception has never been recognised by all independent states. Might is right in matters of war or peace; on the rock of armed might foundered the League of Nations, the Kellogg Pact (1928)—by which the fifteen signatories purported to renounce war as an instrument of policy—and the United Nations, with its veto for the five permanent Council members, in matters affecting their sovereignty Decisions of the Court of International Justice are abortive whenever armed power confronts rights based on pacts and treaties, despite their proliferation in the past twenty years. The precarious stalemate in nuclear deterrence is based on the doctrine of "balance of terror" —*si vis pacem, para bellum*, i.e., "if you want peace, prepare for war". However, there is progress here and there.

Most independent nations condemn piracy *jure gentium*, defined in *A.G. for Hongkong* v. *Kwok-a-Sing* (1873) L.R. 5 P.C. 179, as:

> "destroying, attacking or taking a ship or any part of its tackle or cargo from the owners on the high seas . . . by acts of violence or by putting in fear, and by a body of men acting without the authority of any state [or politically organised society]."

The four final words were added to meet the case of a body of men acting in what they believed to be the public interest of their community for public ends and not for greed—i.e., no *animus furandi* (see *Hall on International Law* (*8th Edn.*); *Bolivia Republic* v. *Indemnity Mutual Marine Assurance Co.* [1909] 1 K.B. 785, C.A.) Similar cases arose during the United States civil war (1861-5), when the Confederates arrogated to themselves the rights of a belligerent state (*The Alabama* Arbitration, 1871). The Declaration of Paris (1856) abolished the practice of some states' granting "letters of marque" to private shipowners ("privateers") authorising them to carry on warlike operations

(ratified by Britain in the Foreign Enlistment Act, 1870). But lack of unanimity has now weakened measures against a new threat.

That threat is called the "hijacking" of civil aircraft by individuals often acting, or purporting to act, on behalf of oppressed communities or seeking asylum in politically sympathetic states, without the motive of monetary gain (which is different in principle, though not in risk). If such a case ever reaches the Hague Court, we may expect much legal controversy; argument will depend on the nature of the regime on the one side and political or libertarian aspirations on the other. It is obvious that "hijacking" of aircraft is both more difficult to prevent and likely to be far more catastrophic, in case of resistance, than analogous acts at sea. Despite searches of passengers' baggage and persons, more or less rigorous according to the embarking point, such acts are becoming more frequent; the failure, in many international treaties, to provide extradition of those responsible, and the helplessness of an aircraft crew in charge of the safety of (perhaps) 150 travellers, render it impossible to find an effective remedy. Nothing can more clearly indicate the failure of rules of "public international law" not based on sanctions.

However, even this grave subject has its lighter side. At Istanbul Airport (*The Times*, 23 June), when ground staff opened the baggage compartment of a Pan-American jet-plane, they were confronted by a 5 ft. crocodile, which proceeded to run loose amid the electronic equipment. The pilot (not unnaturally) refused to proceed until the intruder was captured and removed. The creature was unable to produce a passport or other travel document; as a stowaway it had to be caught and taken to the local Zoo—an operation which took two hours. There is no evidence how it came to be on board; nor are such creatures addicted to flying.

Among the ancient Egyptians Sebek, the tutelary deity of the Fayum Oasis, on the west bank of the Nile, opposite Cairo, was represented as crocodile-headed. The beetle (*Kheper*) appeared winged in the coronation head-dress of many Pharaohs, and was often incorporated in their ceremonial names; the word means "generation" or "resurrection", because its eggs were autogenous, from the heat of the sun. (It may be noted that the Greek form of its name, *Karabos*—Latin *Scarabaeus*—is the origin of our word "crab"). In the British Museum two man headed bulls stand guard at the Department of Assyrian Antiquities; they are winged. The Greek legend tells of Pegasus, the winged horse, symbol of poetic genius. The Aztects of Mexico represented the deity Quetzalcoatl as a plumed serpent, which is the meaning of his name (cf. the novel of D. H. Lawrence). But we have searched in vain for any precedent of a flying crocodile.

Herodotus of Caria (early 5th century B.C.), with his usual perspicacity, observed its habits on his travels in Egypt (Histories, Bk. II). Its name is the ordinary Greek word for "lizard" from *crocus*, "saffron-coloured"—the lizard's common colour:

> "During the winter months it take no food. It is an amphibious quadruped, laying and hatching its eggs on land, but staying all night in the river, which is warmer. Its egg is hardly bigger than that of a goose; its young is small, but it grows to a length of 23 ft. or more. It has great fangs; it is the only creature to have no tongue and a stationary lower jaw; when it eats, it is the upper jaw that moves. Because it spends so long in the water the inside of its mouth gets full of leeches. No animal or bird lives in friendship with it, except the plover, for when it comes to land and lies with open mouth, the bird hops in and picks out the leeches. The crocodile is so pleased (*sic*) with this service that it does the bird no harm. Some natives regard the crocodile as sacred; when it dies they embalm and bury it."

The picture of this fearsome reptile "welcoming in" the plover "with gently smiling jaws" is quite endearing. The Istanbul specimen, if accused of would-be hijacking, might reply "I deny the allegation and repudiate the *alligator* who makes it". Perhaps it intended openly to shed tears to demonstrate the hypocrisy of those who deplore the hijackings but refuse to take steps to bring perpetrators to justice. A.L.P. in the *Justice of the Peace*.

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**Secret Decrees**—The modern world has become accustomed to secret arrests, secret trials and even to secret executions.

The latest development in this Kafka-like concept of the Rule of Law is a new decree signed by President Medici of Brazil in November 1971, which authorises him to make secret decrees relating to national security.

As the opposition leader Pedroso Horta said in the Congress: "Decree No. 69534 is, in my opinion, a unique case in Brazilian law. How can a law, a decree, or a regulation be obeyed if it is to remain unknown? I do not even know if, by making these comments, I may be violating the law". *The Review* of the I.C.J.

# CORRESPONDENCE

Sir,

**Cost of Litigation—Conciliation an Answer?**

There has been considerable discussion about Small Claims Courts to settle disputes up to say $300 in amount without litigants going to the expense of engaging lawyers. I would urge that it would be better for the Department of Justice and the Courts, without denying any litigant so desiring the present appropriate legal procedures, nevertheless to recommend and offer conciliation, somewhat similar to conciliation in matrimonial disputes but nevertheless with the advantages of conciliation by a trained judicial officer. It is not only in matrimonial disputes that the need for conciliation is felt.

There is widely expressed anxiety that in a changing world the judicial officers and the legal profession should make the greatest possible contribution to social progress. There is a great need for a drastic change of outlook with regard to litigation—a change from the belief that litigation after the established pattern will bring peace through the rule of law. There must be a new and compelling emphasis on the need for disputants to settle their problems but at the same time a recognition that, as in so many social problems, there is room for and great need of the expert.

To a considerable extent a court of law is a battlefield. It is true that weapons of physical violence are prohibited but in so many other ways the elements of confrontation and strife are paramount. True, the object of passing laws is to do justice but it is also true that laws, necessarily so general in application, often fail to provide justice and so frequently the outcome of litigation provides dissatisfaction to one or both parties. The fruit of conciliation, leading to agreement, so often provides results fraught with much less bitterness than the ultimate outcome of litigation fought to a finish.

It is urged therefore that, whilst preserving and defending the rights to litigate for all who insist, it is desirable that the judicial system should recommend conciliation with counsel only if desired by the parties, firstly in all civil cases and secondly in the lesser criminal matters. If the offer of conciliation first became established procedure and we had generally, in first instance, one conciliator trying to settle a matter instead of a judicial officer and two counsel engaged, the drain on manpower could be greatly reduced. In science and so many fields mankind has made such progress that a great future is assured if social co-operation can be achieved locally, nationally and internationally.

F. C. JORDAN.

Sir,

**Anzacs on the Privy Council**

I was interested to read your editorial "Justice on the Cheap—Part Two" [1972] N.Z.L.J. 433. I hope you will not mind my making one small point. You state that the term in which Sir Richard Wild sat on the Judicial Committee of the Privy Council represented the first in which Australian and New Zealand Judges had sat together on the Committee. In fact this is not quite so: there is at least one case in which the Board included both Sir Douglas Menzies and Sir Alfred North.

As I have said, this is a small point. The real reason I make it is that the case to which I have referred was *Kariapper* v. *Wijesinha* [1967] 3 All E.R. 485. As Sir Alfred North also sat on the appeal in *R.* v. *Fineberg* [1968] N.Z.L.R. 443 it becomes even more tantalising to speculate what might have been the outcome if Counsel for Fineberg had pressed an argument based on s. 53 of the Constitution Act 1852 even after *Kariapper* v. *Wijesinha*.

Yours faithfully,

P. B. KAVANAGH.

Christchurch.

Sir,

**On Violence**

Mr Hillyer at [1973] N.Z.L.J. 25 raises some interesting pointers for discussion in his article on violence but ultimately illustrates that lawyers have little to add to a problem which has baffled the pyschologists, sociologists, biologists and philosophers. Mr Hillyer distinguishes between various forms of violence—revolution for good ends on the one hand and gangs and street corner violence on the other but ultimately it seems to me applies the test laid down by Lord Denning to bring both forms under the same mantle. In my view it is not legitimate to classify these different forms of violence under the one head. There is no politics in beer bottle bashing, gang warfare and street-corner scuffling and the sociologists have done some useful work in

isolating some of the manifestations of behaviour which man in society exhibits, under conditions of stress and deprivation. The famous study by Thrasher of gangs is a case in point. But can whatever conclusions may be arrived at as a result of sociological studies be legitimately extended to the issues of student unrest and political demonstrations? In my view they cannot.

Mr Hillyer's implication of the hypocrisy of "war disapprovers" who resort to violence reveals an unwillingness to place the respective elements under discussion (war and protest about war) in any meaningful scale of values. Has the world-wide protest over many years about American involvement in Vietnam resulted in untold carnage? The answer must be no, but the war itself has resulted in the deaths of probably a million and a half Asians, over 45,000 Americans and 35 New Zealanders. The extent of American devastation has been adequately documented.

Keith Buchanan, Professor of Geography at Victoria University, has written that "on Indo-China as a whole according to Pentagon sources a total of 5 and three-quarter million tons of bombs was dropped from 1965 to March 1971." In other words how can Mr Hillyer really talk about war and protest about war in the same breath? Surely his description of the pattern of events in Germany and America is nothing less than an explanation of the possibility of violent protest against acquiescence by whole communities in unspeakable atrocities?

The legal profession has a tendency to talk of "anarchy" and of society "rattling to pieces" which in itself must assist the process whereby "the nation as a whole will accept the idea of violence". The problem needs to be seen on a political level to give it any meaningful depth. As A. J. P. Taylor has said "Sanity is rare in the political world and the political psychologist should busy himself explaining why most of the world is mad, not why the few are sane". He had probably seen the recent United Nations study which estimated that 54 million persons died in military service in the wars between the year 1600 and the end of World War II. Violence on that scale cannot be understood by reference to what happens on street corners.

Yours faithfully,

K. J. OSBORN.

Christchurch.

Sir,

## More on abortion

The arguments advanced by Mrs J. M. Armstrong [1972] N.Z.L.J. 448 for opposing abortion are inadequate. The claim that "human life begins at conception" is arbitrary since human ova and sperm are living cells and could thus be described as "human life."

In her attack on the suggestion that a foetus is a potential human being Mrs Armstrong fails to make an adequate distinction between potentiality and actuality. She reads as though she believes that if something is potentially there, it actually exists. If we begin with a human zygote we expect it to develop in certain ways but we have no guarantee that our expectations can be realised, that is, we talk of a human zygote as having certain potentialities but we have no way of finding out in each individual case whether we are justified in making such claims. Some human zygotes are potential hydatidiform moles and there is a 50/50 chance that a conceptus will spontaneously abort, mainly as a result of genetic abnormality (according to Kerr in "Prenatal Mortality and Genetic Wastage in Man" (1971) J. Biosoc. Sci. 3, 223).

We are told that "modern scientific evidence supporting the conclusion that a unique human being exists from conception is overwhelming." This assertion must be rejected for the following reasons:

(a) A unique conceptus does not guarantee a unique human being as two or more fertilised eggs can be fused to make one individual and one fertilised egg divided to make several. Twinning occurs 14 days after fertilisation.

(b) The conceptus may become a hydatidiform mole (a cluster of cells which fail to develop into an embryo) or it may become a teratoma (a monster—a mass of tissue often containing hair, skin, nervous system and teeth). Such entities are removed surgically like any other tumour.

(c) Scientists disagree with the conclusion that a conceptus is a human being. For example, Dr George Corner (1970), one of the first embryological researchers, has stated that "after more than a half century trying to separate facts from speculation, I find it impossible to answer categorically the question we have been discussing: When does the developing organism become a human being?" (in *Abortion in a Changing World*). Dr V. Elving Anderson (1969) Professor of Human Genetics at the University of Minnesota, states: "I would conclude that it is more accurate to say that the zygote is potentially human than it is fully human. As development proceeds, the foetus becomes increasingly more different from (and independent of) the mother. Our knowledge of DNA has greatly improved our understanding of the *mechanism* involved, but it does not resolve finally the question as to

the *value* of the zygote or the foetus." (in *Birth Control and the Christian*).

And in the view of Dr Garrett Hardin, Professor of Biology at the University of California in "Blueprints, DNA and Abortion: A Scientific and Ethical Analysis," (1967) *Med. Opin. & Rev*: 3, 74-85) "The zygote which contains the complete specification of a valuable human being, is not a human being and is almost valueless."

Even Professor A. W. Liley, leader of the New Zealand anti-abortion reform movement, has denied the suggestion that he is competent as a medical scientist to say the "foetus has a human personality." When it was alleged that Professor Liley had claimed that the foetus was a person Professor Liley replied: "Personalities are not a commodity with which I am professionally competent to deal and therefore I avoid them." ((1970) *Craccum* vol. 44, No. 15).

The persuasive argument that science shows a conceptus is a human being fails for two main reasons: the proponents of this argument include abnormal tumours within their term "human being" (a point they ignore) which illustrates the inadequacy of using a single criteria to determine what is a human being; and scientists do not "prove" what is a human being for this is a term with both moral and empirical components and hence not open to purely scientific definition. Further, as with any term the principles of classification are a matter for decision. And when classificatory principles are settled there will still always be marginal cases. With a marginal case all the scientific facts may be in and yet they do not "prove" whether some given entity is a certain thing; it is a marginal case and it must be decided whether it is to be included in the class or not. A foetus is certainly not a central paradigm case of a human being, the decision whether it is a human being or not does not depend on having more scientific knowledge. It depends on how we decide to classify it. One factor affecting our decision will be our attitudes, e.g. "sanctity". But this is not a factual matter, but a moral issue.

The unsourced quote by a Catholic doctor that "no one can be permitted to take the life of any innocent human being" is irrelevant to abortion discussions. If the author means a conceptus is "innocent" (ignoring the unproven assertion that it is a human being) then he is contradictory. We can only ascribe innocence where we could ascribe guilt, that is we are dealing with a responsible moral agent. The conceptus is not a responsible moral agent so the use of terms such as guilt or innocence are improper.

The arguments used by Mrs Armstrong are rationalisations to justify a total ban on all induced abortions. If they were reflected in the criminal law they would require an amendment to current legislation, so that the existing grounds for therapeutic abortion were removed and all induced abortions were penalised as homicide. This would amount to a tyrannical use of the law by the theological few on the untheological many.

Yours faithfully,

W. A. P. FACER.

## NEW MAGISTRATES APPOINTED

Recent appointments as Stipendiary Magistrates include:

Mr Trevor Robert Gillies Esq., S.M. appointed a Stipendiary Magistrate to exercise civil and criminal jurisdiction within New Zealand and to exercise jurisdiction in the Children's Court at Otahuhu as from 16 November 1972.

Eric Bernard Anderson Esq., S.M. appointed to exercise civil and criminal jurisdiction within New Zealand, to exercise the domestic jurisdiction of the Magistrate's Court and to exercise jurisdiction in the Children's Court established at Invercargill on and from 20 October 1972.

Fergus Gordon Paterson Esq., S.M. has been appointed a Stipendiary Magistrate to exercise the domestic jurisdiction of the Magistrate's Court.

Gerard Putnam Monaghan Esq., S.M. appointed to exercise civil and criminal jurisdiction within New Zealand, to exercise the domestic jurisdiction of the Magistrate's Court, to exercise jurisdiction in the Children's Court established in Wellington, and to be a Justice of the Peace.

**Res Ipsa Loquitur**—Three professionals sat down to lunch together and began to question whose was the oldest profession, taking into account the fact that there were no ladies present. The doctor claimed precedence, pointing to the bone transplant which made the creation of Eve possible. "Plainly medicine had reached an advanced stage at this point in time".

"Not so," claimed the engineer. "For prior to the creation of Adam, God had created order out of chaos and this was plainly a considerable feat of civil engineering".

At this the lawyer, who had hitherto remained silent, was heard to murmur: "Ah yes—but who created the chaos?"