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LAWYERS IN THE SOUTH PACIFIC

Are lawyers, as a profession, failing to meet the current needs of the smaller States and territories of the South and Central Pacific? Clear indications that this is so became apparent at the First Fiji Law Convention held in Suva early in July.

Two hundred and eighty delegates, many with wives, came to the attractive new Civic Centre from Australia, New Zealand, Gilbert and Ellice Islands, Tonga, New Hebrides, Singapore, Papua-New Guinea, and Canada, and included, of course, were the local Fijian profession. Unfortunately, probably due to lack of financial resources, there were no practitioners from the private sector of any of the smaller communities of the Pacific(*a*). Australians and New Zealanders swamped the Convention numerically (six to one), which may have led to two comments repeated as the days went by—first, made publicly (and just a little sarcastically) by Mr Faiz Sherani, President of the Fiji Law Society, to the effect that at least one benefit to Fiji from the Convention would be the spending of substantial sums in overseas currency; and second, by numerous Australians and New Zealanders, that what began as a tax deductible holiday had developed into an opportunity for them to have their eyes opened to the problems and needs of their host and other island countries. Perhaps the New Zealanders, for each of whom there were three Australians registered, could derive some satisfaction from their proportionately high attendance at the business sessions—while scores of other delegates succumbed to the temptations of beaches, pools and duty-free shops.

Six papers were presented. Despite the difficulty of arranging topics of interest to lawyers of widely differing backgrounds, the discussion and the, at times, lively debate were evidence of the relevance of the issues for those attending the sessions concerned. On the other hand there was disappointment felt by delegates from island States and territories that topics of particular concern to them had not been examined in sufficient depth. Of course, similar complaints are made about most conferences, but there had been expectation that the Fiji Convention might have looked more closely at topics of special island concern. But this is not intended as criticism of the host Convention Committee, who are congratulated for organising efficiently and most hospitably a thoroughly enjoyable programme.

A Court of Appeal for the South Pacific Region—A paper, read for the Hon Martyn Finlay, presumably represents New Zealand Government thinking. The Attorney-General demonstrated why New Zealand should move towards the abolition of appeals to the Privy Council but, in the broad sweep of his argument against the three-tier appeal structure, he expressly poured cold New Zealand water on the entire concept of a regional Court of Appeal. Despite sincere pleas by Mr S M Koya, Leader of the Fiji Opposition, and others for a constructive approach which would seek ways of overcoming the difficulties, Mr Justice R Else-Mitchell added an even icier Australian douche, and pointed to sovereignty and constitutional problems which would require his country to remain firmly outside any regional arrangement.

(*a*) Did the Fijian, NZ and Australian Law Societies miss an opportunity here to assist, say, one private practitioner to attend from each of Western Samoa, Tonga, New Hebrides and the Cook Islands? The smaller communities represented each sent one Government employee only.

Unfortunately, little time was left for the Convention to go on to consider the limited practical alternative (barely hinted at by the Attorney-General) of a permanent Court of appeal for a smaller region of those island States and territories which wish to use it. A requisite of such a Court would be that the Judges should have acquired (or be in the process of acquiring) a knowledge and understanding of the sociolegal systems and special requirements of the members of the region. Naturally, the long-term objective is a permanent Court comprising lawyers from within the region but, in the meantime, the necessary stability and expertise could be built up with assistance from suitably qualified lawyers originating from outside, as from New Zealand and Australia, on a contract basis. The South Pacific Forum and Bureau of Economic Co-operation already have the intergovernmental machinery for planning and establishing a regional Court, which would surely qualify for New Zealand and Australian financial assistance. Until such a Court earned the full confidence of participating members (and perhaps for a very long time) it is likely that issues of special national sensitivity such as land and chiefly titles would be excluded from its jurisdiction. If these criteria are accepted, I believe that the comment expressed by both New Zealand and Australian delegates that independent island States would not accept outsiders on a Court of appeal bench with jurisdiction limited to those States, will prove to be nothing more than an excuse for non-participation by the self-sufficient professional bodies which those delegates represented.

Simplifying the laws of divorce—The reformative views expressed rather dogmatically by the Sydney authority Mr Ray Watson QC, engendered an almost all-Australian moralist debate which was of only passing interest to the rest of the delegates.

Industrial law, Conciliation and Arbitration Courts—Fresh from battle on the home front, Dr Don Mathieson of the Crown Law Office ably reviewed the legislative scene and provided Fijian delegates with the opportunity to debate a subject of increasing importance in their country. On the other hand, the balance of the region has shown little interest, as yet, in legal developments in New Zealand and Australia. As a Canadian lawyer demonstrated to the Convention, each nation has developed an industrial law and practice especially suited to its own background and needs, and comparative studies in the field must be treated with caution.

Insurance law in relation to motor vehicles in the South Pacific—The dissertation by Mr Douglas Newman QC of Adelaide was helpfully comparative of Australian states, New Zealand and Fiji—and prompted Fijian lawyers to use the occasion to press their Attorney-General (who was present) for reform of Fijian legislation.

The national and international protection of human rights—As expected, the paper written by the Hon Lionel Murphy QC, Attorney-General of Australia, was an eloquent affirmation of faith—faith in the "universal values of human dignity, truth and justice", and in the essential need for the "effective *enforcement* of basic rights and freedoms"—which, of course, few question. The problem for those societies where the emphasis is on preserving the family or extended family group as the economic, social and often political unit (as opposed to the individual-orientated basis of Western society) is how to *introduce* belief in and acceptance of these "fundamental rights" without thereby unduly accelerating the breakdown of traditional institutions. In most islands of the Pacific this disintegration is already proceeding at a pace which creates problems for the administration of justice—to the extent that the immediate enforcement of such rights would be self-defeating. It would have been helpful if the Convention could have proceeded to consider the methods, constitutional and otherwise, of gradually reaching an accommodation between Western and Pacific philosophies which would ultimately meet the objectives of the International Covenants.

Law reform in a developing country—Dr Jack Northey of Auckland outlined succinctly both the need for, and the lack of resources for achieving, adequate law reform machinery in Pacific island communities. It is well known that their natural preoccupation with health, living standards and that tyrant economic development has caused many so-called developing countries to neglect the legal rules within which their societies operate. As Dr Northey put it, "The maintenance of out-of-date or unfair laws may be just as conducive to instability and unhappiness as failure to introduce other measures beneficial to the community". Furthermore, "there is an urgent need for fundamental research, which could easily result in legislative action, in the area of customary law". For example, solutions must be found to the problems raised by the human rights paper.

But action in this field requires legally trained people who have *both* the local background experience and the time to give problems the

necessary attention—in research, reflection and discussion. From my own experience, I can confirm that government lawyers and the judiciaries in, for example, Fiji, Tonga, Western and American Samoa, the Cook Islands, New Hebrides and the Gilbert and Ellice Islands, are overworked and with little prospect of relief. Many are worried about preserving respect for the administration of justice and the maintenance of law and order, particularly in the light of exploding populations and increasing breakdown of traditional values and institutions. What contribution can the private sector be expected to make? With the exception of the small Fijian profession (rather preoccupied with the growing demands of commerce and party politics), a tiny handful of hard-pressed solicitors and attorneys in the two Samoan territories, and a unique group of Tongan practitioners learned in tradition but virtually untrained in the conventional sense, the legal profession of the South and Central Pacific generally can hardly be said to exist outside New Zealand and Australia. Put this way, the situation seems to require lawyers in New Zealand to ask whether the profession should be contributing more than the occasional Judge or Magistrate, law draftsman or legally trained volunteer(*b*).

An idea mooted in Suva by some of the delegates takes up Dr Northey's ideal of a separate institute for law reform, legal research and continuing legal education (with an adequate library). Such an institute would be beyond the resources of any one country, but there is no reason why a "Pacific Law Centre" should not become a reality on a regional basis—with a central office (logically in Suva) and with, as its main objective, the provision of a variety of legal services in those countries of the region which make requests. Further thought is being given to the idea and a "blueprint" is under preparation. I take this opportunity of asking readers for suggestions as to the financing and manning of such a project, and for any offers of assistance. Cooperation with the Australian Law Societies is clearly called for, and, of course, governmental approval (and hopefully support) will be sought. Correspondence should be addressed to me (at PO Box 24, Nuku'alofa, Tonga) or to Mr Jeremy Fordham, Senior Magistrate, Tarawa, Gilbert and Ellice Islands. Mr Fordham, although now a British appointee, was a Victoria University law graduate and Wellington practitioner.

C GUY POWLES(*c*)

(*b*) Mr Jamie Scott, LLM, 31, now of Wellington, has completed a year's service as a VSA volunteer assisting in the Attorney-General's office in Western Samoa.

(*c*) Guy Powles, until recently a principal in the Wellington firm of Messrs Macalister Mazengarb Parkin & Rose, has commenced a two-year term of study and research on the legal and customary institutions of South Pacific territories, with special reference to conflicts and accommodations between traditional and imported concepts in Western and American Samoa, Tonga and Fiji. He recently completed a master's thesis on the status of customary law in Western Samoa and has enrolled for a PhD with the Australian National University, Canberra.

SECTION 108 — BACK TO SQUARE ONE?

As if responding to Mr Tony Molloy's challenge in "Fiscal Fantasy" ([1974] NZLJ 297), the Legislature is now tackling s 108 of the Land and Income Tax Act with a formula that at first sight appears to repeal most of the existing case law. To enable readers to mull over the conundrum, while Mr Molloy prepares considered comment, the relevant clause from the Land and Income Tax Amendment Bill (No 2) is set out below.

8. Agreements purporting to alter incidence of taxation to be void—(1) The principal Act is hereby amended by repealing section 108 (as amended by section 16 (1) of the Land and Income Tax Amendment Act (No 2) 1968), and substituting the following section:

"108. (1) Every contract, agreement, or arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void as against the Commissioner for income tax purposes if and to the extent that, directly or indirectly, it has or purports to have the purpose or effect, or purposes or effects which include the purpose or effect (whether or not the principal purpose or effect), of in any way altering the incidence of income tax or relieving any person from his liability to pay income tax (whether or not that person or any other person affected by that contract, agreement, or arrangement is a party to that contract, agreement or arrangement), and where any contract, agreement, or arrangement is void in accordance with the foregoing provisions of this subsection, any person (being a person who, in the opinion of the Commissioner, would have, or might be expected to have, or would in all likelihood have, derived any income but for that contract,

agreement, or arrangement) shall be deemed to have derived such income and shall be assessable and liable for income tax accordingly. Where any income is deemed to have been derived by any person pursuant to the foregoing provisions of this subsection, that income shall be deemed not to have been derived by any other person.

"(2) Without limiting the generality of subsection (1) of this section, it is hereby declared that no contract, agreement, or arrangement, being a contract, agreement, or arrangement made or entered into among, or affecting, any members of any family shall be excluded from the operation of that subsection by reason of the fact that the making or entering into of that contract, agreement, or arrangement was in any way influenced by considerations of ordinary family dealing. The reference in this subsection to any members of any family shall be deemed to include a reference to—

"(a) Any relative of any such member; and

"(b) The trustee of any trust in which any such member or relative has an interest (including a contingent interest); and

"(c) Any partnership or other association of persons in which any such member, relative, or trustee has an interest; and

"(d) Any company of which any such member, relative, trustee, partnership, or association is a shareholder.

"(3) Without limiting the generality of subsection (1) of this section, it is hereby declared that where, in any income year, any person sells or otherwise disposes of any shares in any company under a contract, agreement, or arrangement (being a contract, agreement, or arrangement of the kind referred to in that subsection) under which that person receives, or is credited with, or there is dealt with on his behalf, any consideration (whether in money or money's worth) for that sale or other disposal, being consideration the whole or, as the case may be, a part of which, in the opinion of the Commissioner, represents or is equivalent to, or is in substitution for, any amount which, if that contract, agreement, or arrangement had not been made or entered into, that person would have derived or would derive, or might be expected to have derived or to derive, or in all likelihood would have derived or would derive as income by way of dividends in that income year, or in any subsequent income year or years, whether in one sum in any of those years or otherwise howsoever, an amount equal to the value of that consideration or, as the case may be, of that part of that consideration shall be deemed to be a dividend derived by that person in that first-mentioned income year."

(2) The Land and Income Tax Amendment Act (No 2) 1968 is hereby consequentially amended by repealing section 16.

(3) This section shall apply with respect to the tax on income derived in the income year commencing on the 1st day of April 1975 (whether the contract, agreement, or arrangement was made or entered into on, before, or after that date) and in every subsequent year.

SUMMARY OF RECENT LAW

ARBITRATION

Assent by inaction to Court's jurisdiction—Steps required by contract for the resolution of disputes by arbitration not carried out—In allowing 2½ years to elapse between the date of issue of the writ and the application for a stay of execution the defendant has assented to the Court's jurisdiction and agreed by his inaction and silence to a variation of the agreement to submit the matter to arbitration—Allegations of unreasonable conduct against the person to whom the dispute would be first submitted under the arbitration provisions unsatisfactory—Discretion exercised against defendant. *W M Angus Ltd v Attorney-General* (Supreme Court, Wellington. 1 August 1974 (A 389/70). O'Regan J).

BAILMENT

Undivided half share in livestock—Whether undivided half share in livestock can be the subject of bailment, quaere—Personalty cannot be held under leasehold tenure and in relation to chattels the expressions "hire", "let" and "lease" usually have the same meaning—Land and Income Tax Act 1954, s 106—In reallocating partnership income it may be a relevant matter that in truth the assets which are its source have all been provided by one partner. *Harding and Ors v Commissioner of Inland Revenue* (Supreme Court, Hamilton. 26 July 1974 (GR 229/73). Cooke J).

BANKRUPTCY

"Concern in the management"—Companies Act 1955, s 188 (1)—"Concerned in the management" prohibits an undischarged bankrupt from taking any hand directly or indirectly in the real business affairs of a company—The purpose of the provision is the protection of the business community and it is irrelevant whether or not what the bankrupt did had to be referred to someone else for approval. *R v Newth (Myers)* (Supreme Court, Rotorua. 25 July 1974 (T 13/74). Quilliam J).

CARRIAGE OF GOODS

Clean receipt given—A clean receipt given on accepting cargo is prima facie evidence of delivery in the sense that delivery in good order and condition is deemed proved in the absence of further evidence—Fortnight had elapsed before complaint made that goods were damaged—No evidence from driver who took delivery—Exterior of cartons noticeably damaged—Goods handled and stacked on several occasions after discharge from ship—Clean receipt raised a strong presumption—Goods held not to have been damaged on the ship. *Seatrans Consolidated (New Zealand) Ltd v Musical Import Co Ltd* (Supreme Court, Wellington. 1 August 1974 (M 279/72). White J).

CONTRACT

"First option"—Clause in agreement giving plaintiff "first option" to participate in a joint venture if in-

dustry established—Defendant had not rebutted presumption of intention to create legal relations—"Option" used in colloquial sense of 'choice"—Wording of clause conferred on plaintiff a right of pre-emption—Clause varied by subsequent agreement leaving plaintiff with only a promise of being considered—Evidence of events preceeding execution of the contract admissible to show consideration for the agreement of variation—No ambiguity in the words of the clause—Rule of contemporanea expositio could not be invoked—*New Zealand Equipment Ltd v Canterbury Pipe Lines Ltd* [1967] NZLR 961 applied—Plaintiff estopped from denying the defendant the right to embark on a joint venture with another company. *Adaras Developments Ltd v Marcona Corporation* (Supreme Court, Hamilton. 24 July 1974 (A 314/71). O'Regan J).

Rescission—Whether justified—Sale of Goods Act 1908, ss 13 and 32—Consideration of tests as to whether a breach serious enough to justify rescission—Disease of 13 out of 85 cows found to be sufficiently serious to justify rescission by buyer. *Russell v Merritt Smith* (Supreme Court, Hamilton. 16 July 1974 (GR 255/73). Cooke J).

COMMERCIAL LAW

Recovery of moneys paid under illegal arrangement—Lease of a motor vehicle by finance company—Respondent believed that he was purchasing the car—Held extrinsic evidence could be given of a collateral understanding which was directly in conflict with the terms of the written agreement—"Arrangement" in reg 8 (b) of the Hire Purchase and Credit Sales Stabilisation Regulations 1957 includes understandings between the parties not enforceable under the general law of contract—Authority delegated to the motor dealer to explain the leasing transaction to customers—Motor dealer acting in the course of the business of Credit Services when he gave the assurance that the car was being purchased—Respondent not able to recover the moneys paid under the lease—"Agreement" in the proviso to reg 10 refers only to a hire purchase or a credit sales agreement. *Credit Services Investment Ltd v Evans* (Court of Appeal, Wellington. 8 July 1974 (CA 7/74). McCarthy P, Richmond and Haslam JJ).

COMPANY

Priority of debentures—Notice which a current account debenture holder is entitled to receive before the rules in *Clayton's case* (1816) 1 Mer 529 and in *Hopkinson v Rolt* (1861) 9 HLC 514 apply does not need to be written notice—The test is whether there was distinct notice, either actual or constructive, sufficient to inform the second debenture holder of the third debenture—Companies Act 1955, s 298. *Re Morgan's Foodcentre Ltd (In Liquidation)* (Supreme Court, Wanganui. 17 July 1974 (M 3/74). Quilliam J).

COPYRIGHT

Generally—Principles discussed relating to breach of copyright under the Copyright Act 1962—Work in which copyright can subsist—Ownership of copyright—Infringement of copyright—Right of Judge to bring non-expert eye to bear on the question of reproduction. *P S Johnson Associates v Bucko Enterprises Ltd* (Supreme Court, Auckland. 16 July 1974 (A 1622/71). Chilwell J).

Photocopying machines in library—Use of machines by library users to photocopy copyright material—Breach of copyright by library users—Adequacy of system adopted by corporation to prevent—Circumstances in which inadequate precautions can amount to "authorisation"—Inactivity—Whether can amount to "authorisation". The University of New South Wales (UNSW) maintained a library which possessed one copy of a book of short stories, *The Americans, Baby,* of which Moorhouse was the author. Angus & Robertson (Publishers) Pty Ltd was licensed to publish the work. *The Americans, Baby* was prescribed reading for one of UNSW's courses and recommended for another. Included in the library building was a room containing eight token operated photocopying machines. One, Brennan, a graduate of the University, deliberately and at the behest of the Australian Copyright Council (ACC), used one of the machines to make two copies of one of the stories from *The Americans, Baby,* his purpose being to test whether NUSW's supervision of the machines was adequate for preventing breaches of copyright by users. *Held,* (i) "Authorisation" for the purposes of the Copyright Act 1968 (Com) is to be understood in its ordinary dictionary sense of sanction, approve, or countenance, being alternative and not cumulative descriptions. (ii) "Countenance", being the widest term and the most appropriate to describe any liability of the defendant can occur by reason of inactivity. (iii) Authorisation of breach of copyright does not have to be express. (iv) Where a person who has created a facility liable to be used by his licensees to breach copyright and at the same time attempts to exclude representatives of the owners of such copyright for the purpose of preventing detection of breaches of copyright he authorises such breaches. (v) In order to determine whether a corporation has authorised a breach of copyright it is necessary to look not only at the actions of its controlling bodies but also how it, through its organs, acted towards the persons whose actions it is said to have authorised. *Moorhouse v University of New South Wales and Anor* (1974) 3 ALR 1.

CRIMINAL LAW

Alibi—The 1973 Amendment to the Crimes Act (SR 1973/118)—Purpose of the amendment is to enable the authorities to have reasonable opportunity to check and disprove fabricated evidence—If accused intends to rely on corroborative evidence of alibi, notice must be given so that the matter may be investigated — Where, however, the accused cannot tender independent evidence of alibi, then a Judge has a discretion to allow the defence of alibi to be raised notwithstanding failure to give notice to the prosecution. *R v French* (Supreme Court, Auckland. 27 June 1974 (T 88/74). Speight J).

Amendment of indictment at close of Crown case—Indictment amended in Supreme Court by adding a separate and distinct charge of indecent assault at conclusion of Crown's case—Authorities against an amendment by the addition of a cumulative count—Issue of prejudice crucial as it is not often that the addition of a cumulative count would not prejudice the accused, especially when the new count relates to a separate incident — Doubt expressed as to whether the Court had jurisdiction to add an extra count, per Richmond J—New trial ordered on a new indictment—Crimes Act 1961, s 335 (1). *R v Johnston* (Court of Appeal, Wellington. 18 July 1974 (CA 43/74). McCarthy P, Richmond and Woodhouse JJ).

Offence committed on parole—Parolee given suspended sentence—Whether suspended sentence is "a sentence of imprisonment" causing parole to be revoked. Whilst on parole, the defendant committed larceny and was sentenced to one month's imprisonment but the Court directed that he be released pursuant to the Criminal Law (Conditional Release of Offenders) Ordinance 1971 upon his giving security by his own recognisance in the sum of $100 with one surety in the same sum to be of good behaviour for a period of 12 months. The question for the Court to determine was whether or not the sentence of imprisonment for one month followed by the direction to release was a sentence of "a term of imprisonment" within the provisions of s 5 (8) of the Parole of Prisoners Ordinance 1971. *Held,* The defendant *was* sentenced to a term of imprisonment. *Meehan v Lawrence* (1974) 3 ALR 44.

Police interviews—There is no rule that the police must follow stereotyped methods of investigation—Judges' Rules are guidelines to the police—Overriding rule is fairness—*R v Convery* [1968] NZLR 426 (CA) applied—Evidence of interviews admissible—No unfair conduct on part of police—Accused could not on reasonable grounds believe they were in custody—Repetitious, persistent even pressing questioning is not the same as cross-examination—Questions not unfair in the particular circumstances. *R v Anderson and Ors* (Supreme Court, Dunedin. 4 July 1974 (T 6-40/74). White J).

"Possession"—Meaning of possession—Servant having custody or control of goods belonging to master—Evidence from which it could be inferred that servant knew goods were dangerous drug—Whether servant in "possession" of dangerous drug—Dangerous Drugs Law (Jamaica), s 7 (c). *Held,* (i) A person had possession of a dangerous drug, within s 7 (c), if, to his knowledge, he had the drug in his physical custody or under his physical control, and (ii) on the evidence the respondent had in his physical custody and control the 19 sacks of ganja and from the evidence it could be inferred that he knew what he was carrying in the van. *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840 (PC).

Presentation of indictment—In determining whether an indictment should be presented it is proper to take into account only the evidence appearing on the depositions—Crimes Act 1961, s 347. *Hart v The Queen* (Supreme Court, Wellington. 8 July 1974 (T 47/74). Quilliam J).

Recall of witness—Excess blood-alcohol—Magistrate called traffic officer after close of prosecution's case and after hearing submissions on behalf of the defendant—Purpose was to clarify the mode of taking the blood sample—Argument as to whether the Magistrate should have recalled the witness. *Held,* The Magistrate would have been free to call the evidence if required to repair a mere formal or trivial slip and if the course of the hearing had not been materially affected by that slip; but that this was a defect in substance and not procedure. The judgment of Cooke J in *Emmerson v Brien* (Wellington. 27 September 1973 (M 287/73)); *Price v Humphries* [1958] 2 QB 353 followed. *Judah v Auckland City Council* (Supreme Court, Auckland. July 1974 (M 489/74). Mahon J).

Self-defence—A theory of self-defence advanced on appeal founded solely on speculation is insufficient to show that the evidence required the Judge to put that defence to the jury of his own accord—Appeal against conviction for murder dismissed. *R v Hauiti* (Court of Appeal, Wellington. 18 July 1974 (CA 15/74). Reasons for the judgment of the Court (McCarthy P, Richmond and Woodhouse JJ) delivered by McCarthy P).

Self-induced intoxication — Mens rea — Causing death by unlawful act—Accused incapable of forming intent to cause harm to victim—Whether defence to charge of manslaughter. *Held,* Intoxication in relation to manslaughter stood on its own and it was not right to introduce into cases of intoxication those concepts of intention or realisation of harm that were necessary in other forms of manslaughter. Self-induced intoxication resulting from drink or drugs or both was no defence to manslaughter however great the degree of intoxication. (*Director of Public Prosecutions v Beard* [1920] All ER Rep 21, *Bratty v Attorney-General for Northern Ireland* [1961] 3 All ER 523, *Attorney-General for Northern Ireland v Gallagher* [1961] 3 All ER 523 and *R v Lipman* [1969] 3 All ER 410 applied. *Gray v Barr* [1971] 2 All ER 949 distinguished.) *R v Howell* [1974] 2 All ER 806 (Crown Court, Wien J).

CUSTOMS

"Importer"—Whisky landed at Auckland—Twenty-five cases delivered to Freightways to be forwarded by rail to Wellington — Stolen in transit — Held Freightways bailee for reward—"Importer" within the meaning of s 2 of the Customs Act 1966—Liable to Collector of Customs for unpaid duty—Judgment of White J [1973] 2 NZLR 434 affirmed. *Daily Freightways Ltd v Coad* (Court of Appeal. 12 July 1974 (CA 65/73). McCarthy P, Richmond and Haslam JJ).

DAMAGES

Assault and provocation—History of bad feeling and potential violence between the parties—Appellant assaulted the respondent, causing injury—Respondent had prior to the assault insulted the appellant—Argument as to whether (i) the provocation of the respondent should be considered in mitigation of damages, and (ii) whether the circumstances were such that the person assaulted was guilty of contributory "fault" within the meaning of the Contributory Negligence Act 1947. *Held,* (i) The provocation of the respondent was not a factor which could mitiagte or reduce damages. (*Fontin v Katapodis* (1962) 108 CLR 177 and *Lane v Holloway* [1968] 1 QB 372 followed. *Green v Costello* [1961] NZLR 1010 considered.) (ii) It was open to the appellant in an action based on assault to call in aid the provisions of the Contributory Negligence Act. *Hoebergen v Koppens* (Supreme Court, Hamilton. 25 July 1974 (GR 175/73). Moller J).

Deceit and loss of profits—Fraudulent representation inducing purchase of tractor—Damages for deceit as distinct from breach of contract do not normally include profits lost by the purchaser. *Foster v Public Trustee* (Supreme Court, Wellington. 23 July 1974 (A 12/67). Cooke J).

DEFAMATION

Qualified privilege—False statement published in newspaper—Defamatory—No malice—Apology published—Statement initially made by plaintiff's publisher to reporter—No relationship of principal and agent

between plaintiff and publisher—No acquiescence or consent by plaintiff to the statement made by the publisher—Occasion on which statement made one of qualified privilege—Damages of $5,000 awarded by jury excessive—New trial ordered limited to the question of damages. *Mihaka v Wellington Publishing Co (1972) Ltd and Alister Taylor Publishing Ltd* (Supreme Court, Wellington. 19 July 1974 (A 30/73). Haslam J).

DOMESTIC PROCEEDINGS

Corroboration by association—Domestic Proceedings Act, s 49 (2)—Whether evidence of association over a long period of time (in this case two years) without the intervention of any other boyfriend and without specific evidence of acts of familiarity between complainant and defendant can amount to corroboration. *Held,* Such evidence, where independently given, could amount to corroboration. (*Moore v Hewitt* [1947] KB 381 followed. Further, obiter, *Jefferey v Johnson* [1952] 2 QB 8, on the question of corroboration doubted.) *Lewell v Wright* (Supreme Court, Hamilton. 26 June 1974 (GR 67/74). Mahon J).

Corroboration where complainant identifies handwriting—Domestic Proceedings Act, s 49 (2)—Complainant identifies defendant's handwriting—Whether a letter forwarded by the defendant to the complainant could constitute corroborative evidence—Complainant identifies defendant's handwriting and produces letter. *Held, Jefferey v Johnson* [1952] 2 QB 8 should not be followed in New Zealand. A complainant cannot identify the defendant's handwriting—No corroboration. *Saka v Taiese Faalava'Augalu* (Supreme Court, Auckland. 8 July 1974 (M 272/74). Chilwell J).

LANDLORD AND TENANT

Rent review—Notice—Failure to comply with time limits—Clause providing machinery for determination of rent for specified period of term—No other provision in lease for rent during that period—Notice to operate clause to be given by landlord within specified time limits before termination of preceding period of term—Landlord failing to give notice within time limits—Notice given reasonable time before expiry of preceding period—Whether notice valid. *Held,* The clause (cl 5) provided machinery for the determination of the rent under the lease and imposed an obligation on the landlord to set that machinery in motion by giving notice; the clause was not one which conferred on the landlord an option to require the review of an agreed rent. Accordingly the requirement of strict compliance with conditions precedent in the case of the privilege conferred by an option did not apply to cl 5. Furthermore the proviso to cl 5 confirmed that the obligation imposed on the landlord to comply with the time limits was not mandatory but merely directory, and failure to comply did not therefore render a notice by the landlord void. Accordingly there was no necessary repugnancy between the proviso and cl 5. Since the notice had been given on 10 October, ie a reasonable time before the first five-year period had expired, it operated as a valid notice under cl 5 to agree the rent for the second five years. (*Finch v Underwood* (1876) 2 ChD 310 and *Samuel Properties (Development) Ltd v Hayek* [1972] 3 All ER 473 distinguished.) *Kenilworth Industrial Sites Ltd v E C Little & Co Ltd* [1974] 2 All ER 815 (Megarry J).

LEGAL AID

Typing charges—In bills of costs presented for taxation under the Legal Aid Act, a typing charge under Item 4 (b) of Schedule I of Law Society Scale of Charges is not a proper charge. *Re Arvidson* (Supreme Court, Auckland. 12 June 1974 (A 219/74). Mahon J).

LIFE INSURANCE

Suicide—Mortgage indemnity plan contained exclusion clause in event of suicide—Co-mortgagor died from self-administered overdose of tranquilising pills—Onus of proof on defendant to prove suicide on a preponderance of probability—Although no longer a crime, high standard of proof required to rebut presumption of innocence—Adopted test currently used in allegations of adultery—Defendant entitled to rely on the presumption that a person intends the natural consequences of his act—Suicide established. *Ross v Western Co-operative Building Society* (Supreme Court, Christchurch. 5 July 1974 (A 72/73). Casey J).

LOCAL GOVERNMENT

Annual fee for refuse removal a "rate"—A uniform annual fee for the removal of refuse is a rate recoverable under the Rating Act 1967—Municipal Corporations Act 1954, s 102 (2), does not empower the Council to levy a uniform annual fee on units within a motel complex as if they were separate premises for the purpose of the refuse fee. *Picton Borough v Marlin Motels (1971) Ltd* (Supreme Court, Blenheim. August 1974 (A 19/73). Beattie J).

MATRIMONIAL PROPERTY

Res judicata—Whether wife entitled to bring application for an order determining her interest in a beach property which had been mentioned by her in her defence of a previous application brought by her husband in relation to other items of real and personal property—Husband sought to have the wife's application struck out as being vexatious. *Held,* The wife was entitled to bring the application because the husband's prior application had been made in relation to different items of property. For a Court to invoke its jurisdiction to strike out, something more than a passing reference to the property must be made in the prior application. The matter must have been raised as a real issue and have been the subject of the litigation. *Miller v Miller* (Supreme Court, Auckland. 11 July 1974 (M 89/73). McMullin J).

Jurisdiction to vary order for possession—On an application brought by the husband to order his wife to vacate possession of the matrimonial home, which had been granted to her in the Magistrate's Court, the wife claimed that the Supreme Court had no jurisdiction to vary the Magistrate's order. *Held,* The existence of an order made in the Magistrate's Court giving the wife the right to occupy the matrimonial home until further order of the Court is not a bar to the making in the Supreme Court of an order under s 5 of the Matrimonial Property Act for possession of the property to be given to the husband. *Miller v Miller* (supra).

PRACTICE AND PROCEDURE

Application for leave to appeal out of time—An appeal from an order or decision made in the Magistrate's Court under the Guardianship Act 1968 is subject to the provisions of Part V of the Magistrates' Courts Act 1947 and not the Summary Proceedings Act 1957, s 115 and following sections—An order as

to custody is a "final determination of the Magistrate's Court" within the meaning of s 71 of the Magistrates' Courts Act 1947—Application for leave made after the time prescribed in s 73 (1) had expired—No jurisdiction to extend time—Appeal dismissed. *Pilgrim v Pilgrim* (Supreme Court, Wellington. 22 July 1974 (M 173/74). O'Regan J).

Crown privilege on discovery—Extent of privilege—Power of Court—Examination by Court of documents in respect to which Crown privilege claimed. The plaintiff submitted to the Minister for the Interior a plan for subdivision and a request for approval. The Minister replied that the Government had decided that the Commonwealth should acquire the land under the Lands Acquisition Act and forwarded a "Notice to Treat". The plaintiff sought production of the documents which came into existence in the course of consideration of its request, including minutes of Cabinet, its Committees and Sub-committees, directing subpoenas to the Minister of State for the Capital Territory, the Secretary of Cabinet and to the National Capital Development Commission, for which the Minister of State for Urban and Regional Development was the responsible Minister. Each claimed Crown privilege, swearing an affidavit that in his opinion the documents ought not to be produced on grounds of public policy. *Held,* per Menzies J, upholding the claim for privilege without examination of the documents referred to in the subpoenas, The governmental process directed to obtaining a Cabinet decision upon a matter of policy and Cabinet's decision upon that matter should not, in the public interest, be disclosed by the production of Cabinet papers including papers which have been brought into existence within the governmental organisation for the purpose of preparing a submission to Cabinet and recording the decision of Cabinet, its Committees or Sub-committees thereon. Such papers belong to a class of documents that ought not to be examined by the Court, except, it may be, in very special circumstances. *Lanyon Pty Ltd v Commonwealth of Australia* (1974) 3 ALR 58.

New trial—Application by the defendant for a third trial on the grounds that the damages awarded by the jury were excessive—Two juries had returned verdicts for substantially the same amount as damages for personal injuries—Principles in *Watson v Burley* 108 CLR 635 applied—Application dismissed. *Welsh v General Motors New Zealand Ltd* (Supreme Court, Wellington. 25 July 1974 (A 76/72). O'Regan J).

Preservation of subject-matter—Code of Civil Procedure, R 476—Order for preservation or interim custody of subject-matter—Rule not applicable where defendant contends that the contract was entered into with another party—Rule applies where a prima facie case of liability under a contract has been established, and the defence is that for some reason such as recission of the contract or breach by the other party, the defendant is entitled to be relieved wholly of the contract. *Kenderdine v Robert Raymond Associates Ltd* (Supreme Court, Auckland. 21 June 1974 (A 669/73). Chilwell J).

Trial by Judge alone—Trial by Judge alone ordered on application of defendants—Claim for damages against solicitor for alleged negligence—Examination of essentially professional matters involved—Jury would have difficulty in appreciating the application of the law to the changing circumstances arising during negotiations—Matters of fact and law would tend to merge, making the formulation of issues for the jury difficult—Judicature Amendment Act (No 2) 1955, s 2 (5). *Gee v Major and Ors* (Supreme Court, Masterton. 31 July 1974 (A 40/71). O'Regan J).

REAL PROPERTY

Encroachment—"Spite fence"—Property Law Act 1952, s 129—Jurisdiction to make vesting or possession order limited to specific piece of land covered by encroachment—Difficulty where irregular boundary would result—"Spite fence" cannot be controlled under section. *In re Chandar* (Supreme Court, Hamilton. 15 July 1974 (GR 25/74). Cooke J).

Privately-owned footpath—Plaintiff the registered proprietor of land subject to a building line restriction—Building erected set back leaving a strip of land used by the public as a footpath—Plaintiff held to be the owner of the strip of land—Onus on defendant who was asserting an interest against the plaintiff's guaranteed title—Presumption of proof from user rebutted—No implied or express dedication—Plaintiff not estopped from asserting his rights. (*Mawley v Masterton Road Board* (1889) 7 NZLR 649 not followed.) *Webb v Blenheim Borough* (Supreme Court, Blenheim. 31 July 1974 (A 1218). Beattie J).

SALE OF LAND

Contract "subject to solicitor's approval"—Mistake—Offer and acceptance signed subject to solicitor's approval within seven days—Held intention of parties was to sign a binding transaction subject to a condition precedent—Condition not void for uncertainty—Confusion existed over identity of property when offer and acceptance signed—Mistake discovered—Land agent represented that the signed document which at that time contained no legal description or address would be treated as applying to the vendor's land—Vendor estopped from denying that the contract applied to his land—Specific performance granted—Land agent in breach of duty in failing to answer vendor's inquiry by informing him that the buyer's solicitor had approved the contract—Agent liable to indemnify vendor for any loss resulting from him entering into a second contract. *Robin v R T Shields & Co Ltd and Boote* (Supreme Court, Christchurch. 5 July 1974 (A 265/73). Casey J).

Service of notice to rescind—Token mortgage to test validity of caveat—Purchaser in possession under long-term agreement for sale and purchase—Default in payment of rates—Vendor sought to rescind—Forwarded notice under s 118 of the Property Law Act—Argument as to whether service of notice under s 152 (1) of the Property Law Act was validly effected where service had been made on the wife, who was a party to the agreement, but not on the husband. *Held,* (i) Under s 152 it is provided that notice must be delivered personally, but even if there was room to apply the more liberal approach adopted in *Goldman v Mackay* (1912) 31 NZLR 859, it was nothing more than speculation that such notice had been given to the husband by the wife, for the affidavit of service spoke only of secondhand process by some unknown person, and since there was a denial of service, the Court was not satisfied that s 152 had been complied with. (ii) Further, even if a mortgage be token, provided it is in registrable form, there is no call on the Court in the absence of fraud to question its antecedents. Such a mortgage is a valid instrument

HOHEPA HOMES

FOR THOSE IN NEED OF SPECIAL CARE

The Hohepa Homes and Schools are administered by the N.Z. TRUST BOARD FOR HOME SCHOOLS FOR CURATIVE EDUCATION (a Charitable Trust registered under The Charitable Trusts Act).

The aim of this Trust is to establish and maintain homes, schools and employment centres where INTELLECTUALLY HANDICAPPED children and adults reside to receive training, schooling and occupation so they may develop to their full potential.

The first Hohepa Home School was opened in May 1957 for fifteen children at the Whare-rangi Hills, Napier. Today this school looks after thirty children, with the nearby Girls' Home and Farm School accommodating over forty young men and women, whilst the Hohepa Grace and Shirley Home and Willow Cottage in Christchurch are responsible for another twenty-four children.

Solicitors will appreciate that gifts by their clients to this charity or to a private trust for this charity will be exempt from gift duties.

For further information, application should be made to any of the undermentioned Trustees.

Mr L. E. Harris, O.B.E., Brooklands Station, Napier, R.D. 2 (Chairman)
Mrs N. M. Harris, Brooklands Station, Napier
Mr N. R. Cunningham, Renall St., Masterton
Mr E. H. Bell, Belvedere, Carterton
Mrs C. E. van Asch, 4 Sherwood Lane, Christchurch
Mr B. H. Kivell, 31 Duart Rd., Havelock North
Rev J. Barker, 36 Howe St., Christchurch
Mr F. H. Goodenough, 72 Marine Parade, Mt. Maunganui
Mr H. J. Hornblow, 87 Lytton St., Rotorua
Mr H. E. Perrett, 10 Penrose St., Lower Hutt
Mr P. A. Scales, 17 Chislehurst Pl., Christchurch
Mr F. W. Westrupp, 21 Ngatimama St., Nelson
Secretary, Hohepa Homes, R.D. 2, Napier

NEW ZEALAND LAW SOCIETY

CENTENNIAL SCHOLARSHIP

APPLICATIONS are invited for a grant or grants up to a total of $500 from the Centennial Scholarship Fund of the New Zealand Law Society for the year 1974.

The objects of the Scholarship are:

(a) To assist already enrolled law students in case of need during their qualifying years;
(b) To assist groups of students or law faculties—eg, in the holding of debates or moots;
(c) To encourage law reform and research by assisting qualified lawyers, whether in private practice or not, to undertake courses—research, reform or refresher—whether in New Zealand or overseas.

Applications close on 30 September 1974, and should be submitted to—

The Secretary, New Zealand Law Society, P.O. Box 5041, Wellington.

MAORI SCHOLARSHIP

Applications are invited from any person of Maori ancestry, either a student or a practitioner, for the 1974 award of $500.

Applications close on 30 September 1974 and should be addressed to—

The Secretary, Maori Education Foundation, P.O. Box 8006, Wellington .

NOTE: Those who have already made application or who are now receiving assistance from the Maori Education Foundation will automatically be considered.

to test the validity of caveats registered against title. Burden of proof always remains on caveator to justify caveat. *Re Moon* (Supreme Court, Auckland. 12 July 1974 (M 574/74). Speight J).

TRANSPORT

"Forthwith"—Meaning of—Transport Act 1962, s 58B (6)—"Forthwith" embodies an element of practicability—"Forthwith" when used in the section is therefore to be construed against the background of the means authorised for the delivery to the analyst and their availability. *Sameen v Abeyewickrema* [1963] AC 597 (PC) referred to.) *Greene v. Ministry of Transport* (Supreme Court, Hamilton. 19 July 1974 (GR 79/74). McMullin J).

Request for private analysis—Transport Act 1962, s 58 (8)—Argument as to whether an analyst's certificate was admissible under s 58 (9)—No evidence adduced by prosecution that request for example to be forwarded to independent analyst had been complied with—Magistrate had ruled that defendant must first prove in evidence that he had made the request. *Held,* Since the defendant had sent a letter to the informant traffic officer requesting a sample to be sent for private analysis, there was no need for the appellant to give evidence as to the making of the request. Where prosecution is taken by surprise at the hearing by a request for proof that a sample has been forwarded for private analysis, the correct procedure is to apply for an adjournment. (*White v Auckland City Council* [1973] 2 NZLR 27 followed.) *Scott v Ministry of Transport* (Supreme Court, Hamilton. July 1974 (GR 99/74). McMullin J).

CASE AND COMMENT

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

Maintenance on divorce—husband having de facto wife

In *Roberts v Roberts* (the judgment of Speight J was delivered on 15 July last) the parties were married in 1961 and they parted in August 1968. In February 1969 a consent order for maintenance in favour of the wife was made in a Magistrate's Court at the rate of $15 per week. There were no children. A decree nisi on the grounds of four years apart was granted to the husband in October 1973 and it now fell to Speight J to fix the wife's maintenance. The husband had been badly in arrears—over $1,000—in meeting the required payments under the order and the wife was in receipt of a domestic purposes benefit at the rate of $28.20 per week. The wife was 38 and suffered from muscular dystrophy of such severity that she could not earn a living. Indeed, counsel for the husband did not submit that she could support herself.

Since the separation the husband had taken up with a woman and had been living with her for the last two and a half years. She was separated from her husband and had no maintenance order in respect of herself but received $20 per week from him in respect of four children of her marriage. The husband in the present case said he would marry this woman as soon as he was able, but it is to be noted that he had, as yet, taken no step to procure his final decree. It was not stated whether there was any hindrance to the woman's obtaining a divorce. The husband deposed that he had "accepted responsibility for maintaining her four children in respect of the money needed for that purpose in excess of the maintenance she received from her husband". In addition, as a result of their association, the husband and his de facto wife had a child born in 1973. It will thus be seen that the present case concerned the question of what order would be made, if any, against a separated (or divorced) man who is living with another woman (or who has remarried) and who is supporting that woman (or second wife) and possibly children, "particularly where such order, no matter how severe, could not be expected to exceed the amount of money being paid by the Social Welfare Department to the first wife—or as in this case, the only wife. The benefit of any order, of course, goes to the relief of the taxpayer".

His Honour considered his own unreported decision in *Comp v Comp* (1967); *Lyne v Lyne* [1951] NZLR 281; *Gaspar v Gaspar* [1972] NZLR 174, 178; *Lindsay v Lindsay* [1972] NZLR 184 (CA); *Newton v Newton* [1973] 1 NZLR 225, 229; and *Matangi v Matangi* [1974] 1 NZLR 55 and *Clark v Clark* (unreported, Auckland, 25 July 1973). He observed: "In view of the development of social attitudes as progressively reflected in 1963 and 1968, I am prepared to hold that the *Newton v Newton* and *Matangi v Matangi* decisions are equally applicable to s 43 (b) of the Matrimonial Property Act 1963. If it were not so, a husband who lost his Domestic Proceedings status on divorce would be more adversely placed as a result of severing the matrimonial bond than if he allowed the married status to remain—which seems contrary to the legislative intention of facilitating divorce."

His Honour did not doubt that the husband had a responsibility towards the child of himself and his de facto wife and that this factor could be taken into account in assessing his obligations to his wife. He added, however, that "he has no such obligation in law or morally in respect of the four children despite the quotation in his affidavit that he has 'accepted responsibility for maintaining them'. That rests upon their father, and if he is unable to meet this obligation, then upon the State".

His Honour turned to the situation of the de facto wife and said: "There is nothing to show that she is dependent upon the [husband] for her maintenance in the way in which Mahon J was required to deal with the matter in *Newton* and *Matangi*. The two of them are in business together, earning a joint income so that considerations concerning her inability to work because of caring for young infants do not arise. I do not think there is such demonstrated responsibility as in the *Newton* case which requires me also to take into account the needs of [the de facto wife]. If she is unable to support herself or her children by her marriage, then she will have to turn to her husband, or in case of his default, apply as for a deserted wife's benefit." The learned Judge, in awarding $20 per week to the wife, concluded as follows: "It is perhaps a quaint twist that the result of the legislative convolutions relating to domestic and matrimonial proceedings enacted by the reforms of the 1960s, now brings us to the point where the consideration given by the Courts to determining these questions largely results in determining under which letter of the alphabet the Department of Social Welfare will classify its payments."

PRHW

Companies—calls by instalments

In deciding that a Court has no power to order that calls be made by instalments under s 254 of the Companies Act 1955 (*Re Canaan Enterprises (NZ) Ltd*, judgment 7 June 1974) O'Regan J thought that "those presently concerned with the revision of the law as to companies" might review that section; those concerned with such revision might also find that *Re Canaan Enterprises (NZ) Ltd* raises problems of greater significance in Company Law than the ambit of a Court's discretion under s 254.

The company was incorporated with a nominal capital of $3,000, none of which was paid up by the three subscribers and sole shareholders; and in time the company was ordered to be wound up by the Court, and the Official Liquidator thought that a sum in excess of $25,000 would be required to satisfy the liabilities of the company. Of the three shareholders, one was "in dire financial straits", so that it was clear that he did not have "the means to meet any call either in a lump sum or by instalments"; the other two shareholders' financial position was such that they required time to pay. The Official Liquidator sought an order under s 254 that a call be made by the Court for the full amount (ie $1,000 on the unpaid shares of each of the three shareholders); the shareholders, relying on *Re R J Allen Contract Co* [1962] NZLR 736 and *Re Law Guarantee Trust and Accident Society* (1910) 26 TLR 565, argued that a Court had a discretionary power under s 254 to order that calls be paid by instalments. Section 254 is in these terms:

"(1) The Court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, and make an order for payment of any calls so made.

"(2) In making a call the Court may take into consideration the possibility that some of the contributories may partly or wholly fail to pay the call."

His Honour thought that the power conferred on the Court was clearly discretionary, but that the discretion was limited merely to the making or not making of calls "of such amount as the Court deems necessary for those purposes". *Re Allen Contract Co Ltd* and *Re Law Guarantee Trust and Accident Society* were both distinguished as turning on the wider discretionary powers conferred under s 298 (2) of the Companies Act 1955 (or its equivalent, s 193 of the Companies (Consolidation) Act 1908), which empower a Court to make calls "on such terms and conditions as it thinks fit" and to take consideration of what is "just and beneficial". In the absence of such words, his Honour held that he had no discretion to order that calls be made by instalments; but he considered it "odd" that a Court's powers were different under s 254 and under s 298, and "odd" that a liquidator has power with the sanction of the Court under s 240 (1) (f) to

compromise all calls on such terms as may be agreed, but that the Court is without power to do likewise when it becomes itself seized of such matters under s 254.

The more important general point that *Re Canaan Enterprises (NZ) Ltd* raises is the futility of having a rule that all the shares in a private company be fully subscribed (s 356 (2), thereby theoretically providing a minimum guarantee fund for the creditors) without having a corresponding rule that the company shall only begin trading operations if it has an actual guarantee fund for its creditors.

Such a rule might be that before the certificate of incorporation is granted a company should have received cash assets of a minimum prescribed amount from the subscribers to the memorandum. Were this proposition to become law, it would necessitate a fundamental re-appraisal of a number of rules in company law (*Spargo's Case* (1873) LR 8 Ch 407, and the power of a company to accept payment in consideration other than cash from the subscribers to its memorandum, are areas which immediately spring to mind); but any attempt to prevent the abuse of limited liability by companies which are, from their very inception, hopelessly underfinanced, must ensure that initially, at any rate, an actual minimum guarantee fund does exist.

FD

BILLS BEFORE PARLIAMENT

Agricultural Workers Amendment
Antiquities
Appropriation
Arms Amendment
Broadcasting Amendment
Building Societies Amendment
Cinematograph Films Amendment
Commerce
Crimes Amendment
Drugs (Prevention of Misuse)
Education Amendment (No 2)
Farm Ownership Savings
Finance (No 2)
Hire Purchase Amendment
Home Ownership Savings
Insurance Companies' Deposits Amendment
Investment Bonds
Joint Consultation in Industry
Joint Family Homes Amendment
Joint Family Homes Amendment No 2
Judicature Amendment
Land and Income Tax Amendment (No 2)
Land and Income Tax (Annual)
Legal Aid Amendment
Life Insurance Amendment
Magistrates' Courts Amendment
Maori Affairs Amendment
Marine and Power Engineers' Institute Industrial Disputes
Moneylenders Amendment
Municipal Corporations Amendment No 2
National Parks Amendment
Neighbourhood Noise Control
New Zealand Superannuation (Corporation)
Ngarimu V.C. and 28th (Maori) Battalion Memorial Scholarship Fund Amendment
Niue Amendment
Niue Constitution
Post Office Amendment
Private Investigators and Security Guards
Public Works Amendment (No 2)
Queen Elizabeth The Second Arts Council of New Zealand
Social Security Amendment
Soil Conservation and Rivers Control Amendment
Tobacco Industry
Transport Amendment
Trustee Savings Banks Amendment
Waitaki Lakes Recreation Area
War Pensions Amendment
Women's Rights of Employment

STATUTES ENACTED

Animals Amendment
Commonwealth Games Symbol Protection
Cornish Companies Management
Counties Amendment
Customs Acts Amendment
Dangerous Goods
Defence Amendment
Education Amendment
Estate and Gift Duties Amendment
Estate and Gift Duties Amendment (No. 2)
Fire Services Amendment
Harbour Pilotage Emergency
Harbours Amendment
Housing Corporation
Imprest Supply
Land and Income Tax Amendment
Licensing Amendment
Licensing Trusts Amendment
Local Elections and Polls Amendment
Marine Pollution
Municipal Corporations Amendment
New Zealand Export-Import Corporation
Perpetuities Amendment
Physiotherapy Amendment
Public Works Amendment
Rates Rebate Amendment
Royal Titles
Rural Banking and Finance Corporation
Sale of Liquor Amendment
Sales Tax
Sales Tax Amendment
Scientific and Industrial Research
Stamp and Cheque Duties Amendment
Time
Trustee Amendment
Unit Trusts Amendment
Wheat Research Levy

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TRIBUTES TO THE LATE SIR ROBERT KENNEDY

Sir Robert Kennedy, for 21 years a Judge of the Supreme Court, died recently at Wellington. Born in 1887, he was educated at Southland Boys' High School and Victoria University College.

His academic career was outstanding. Dux of Southland Boys' High School, a winner of a junior university scholarship and later a senior university scholarship, he became a Master of Arts with First Class Honours and a Master of Laws with First Class Honours in a period of five university years. In two consecutive years he won the Jacob Joseph Scholarship at Victoria University; he topped the New Zealand Junior and Senior Civil Service Examinations and passed the Senior Examination with distinction; he also studied for accountancy, but did not take the final examinations as they clashed with his law exams. He was admitted to the Bar in Dunedin but he practised his profession largely, if not wholly, in Wellington and was for 15 years a partner in the well-known firm of Luke and Kennedy, as it was then called. During that period he was elected a member of the Council of the Wellington District Law Society and later its President. He served, too, as a representative of his society on the New Zealand body.

In 1929 he was appointed to the Supreme Court Bench. He was then only 41 years old. He served for 21 years before retiring in 1950, all of that time being the resident Judge in Dunedin. He had been made a Knight Bachelor in the New Year's Honours of 1949.

At a special sitting of the Supreme Court at Wellington, Sir Thaddeus McCarthy, President of the Court of Appeal, said that the Court met to show respect for the late Judge and to remember again his services to the law, particularly those which he rendered over a period of 21 years as a Judge of the Supreme Court.

"The Chief Justice is unable to be present, but he has asked to be associated with these tributes, as do Mr Justice Richmond, Mr Justice Cooke and Sir Douglas Hutchison, who also are prevented by circumstances from being here," he said.

"Sir Robert was far from being a flambuoyant man," Sir Thaddeus continued. "Intellectual, precise, reserved, he was not given to facile relationships, but those who shared his friendship treasured it highly. As a lawyer he was in the very top class. Erudite, fastidious, disciplined, his judgments, when he became a Judge, reflected all these qualities. They were models of precision, exhibiting in much-honed language a deep understanding of legal principle and consummate skill in applying principle to complex situations. He administered his Court with dignity and manifest impartiality. I have said that he was reserved, but the large number of leading Dunedin citizens who attended his farewell in the Supreme Court in August 1950 and the words of the then President of the New Zealand Law Society, Mr Cunningham, and of the Presidents of the Otago and the Southland District Law Societies, leave no doubt concerning the warmth and respect with which the Judge was regarded in the district where he had presided for so long. Mr Cunningham said that he had given to the profession an outstanding example of what could be achieved by hard work, unflagging industry, and devotion and scrupulous care in the performance of judicial duties," he said.

"As will be seen, it is now nearly 24 years since Sir Robert retired. Over this period a new generation of lawyers who did not know him personally has arrived in the Courts. But they have come to know of him by his judgments which have even ripened with time and have bred in these younger men a great respect for his qualities as lawyer and Judge.

"Since his retirement Sir Robert lived in Waikanae. He is survived by Lady Kennedy. We hope that your attendance today to mark the gratitude of us all for his life of service to the profession and the judiciary, will to some extent soften the loss which she has sustained. We extend our sincere sympathy to her," the President concluded.

Addressing the Court, the Attorney-General, the Hon. A M Finlay QC, said that he had a special interest in this memorial because he had had the honour of being admitted to the Bar by Sir Robert. Before Kennedy J this was a ceremony and occasion not to be taken lightly by anyone, least of all by him," he continued. "It was not to be confused with so mundane an event as joining a gentlemen's club or regimental mess, much less becoming one of a group of individuals banded together for occupational advantage of a material nature.

"It was more like being accorded the privilege of entry to a dedicated monastic order, over which he presided in a manner that was both aloof and austere, yet reverential and benevolent. He was the bane of Dunedin law clerks, both for his insistence on meticulous observance of the rules relating to the form and preparation of documents as well as his habit of stopping in the street any he could recognise as being of such lowly domain and inquiring why they had not doffed their hats to him. He was also prone to direct the Court crier to approach and quietly remonstrate any spectator in his Court who had offended its dignity by crossing his legs," he said.

"Such incidents depict him as remote and detached, and that was the way he interpreted his high office as a Judge of the Supreme Court of New Zealand. I thing he read it correctly and he was at pains—perhaps more ostentatiously and emphatically than is currently fashionable—to ensure that society accorded him the respect that was his due.

"He was a scholar of distinction with a record of prizes and honours that would gratify the most eager seeker of trophies, and it is typical of his academic eminence that he graduated simultaneously Master of Arts and Master of Laws, with first class honours in both. His pursuit, however, was not of public acclaim but truth itself, and he applied his learning with care and precision.

"Others may particularise Sir Robert's career at the Bar or on the Bench, but it may be appropriate if I say a word about his ventures into the semi-political world, which no Judge relishes. He presided over three Royal Commissions, two operating in areas of great political sensitivity — the Waterfront Industry and Police Conduct. The third, Orakei Native Lands, could in less accomplished hands, readily have become so. He acquitted himself with skill, tact and diplomacy which was much appreciated by the Government of the time.

"In the office of resident Judge in Dunedin—one which my southern brethren frequently remind me no longer exists, or at any rate is not currently occupied—Sir Robert had many distinguished predecessors. He lived to rank no less than equal with any of them, and when he retired in 1950 he had accumulated an impressive store not only of admiration but also of affection in that cautious, critical and canny city," the Attorney-General concluded.

Addressing the Court on behalf of the New Zealand Law Society, Mr Guy Smith said that members of the profession throughout New Zealand joined in paying their respectful tribute to the life and work of Sir Robert Kennedy and in expressing their sympathy to Lady Kennedy and those relatives who mourn him.

"The great majority of our members did not hold practising certificates when Sir Robert stood down from the Supreme Court Bench 24 years ago," he said.

"Indeed, there are now half of the Supreme Court Bench who had not made their first Court appearance in July 1950. Despite this lapse of time, the profession remains fully aware of Sir Robert's outstanding contribution to the law. Sir Robert will always remain identified with the notable generation of lawyers who, with what now seems an almost excessive single-mindedness, established themselves in the 1920s not only as leaders in the law, but as considerable public figures.

"Certainly those were days when Court proceedings were given much more publicity than now," he continued, "but we in the profession are fortunate in that the contribution of Sir David Smith, happily here with us today, in *Portrait of a Profession* and the memoirs of Sir Hubert Ostler (published in that same New Zealand Law Society Centennial publication) tell much of the giants of that era, and they did indeed number Sir Robert Kennedy.

"From the records of the Wellington District Law Society and the New Zealand Law Society we are reminded that Sir Robert was President of the Wellington Society at the age of 39. He followed Sir Michael Myers in that office. And that one of his great contributions during the five years that he was a councillor of the New Zealand Law Society was his membership of a committee which made representations on university education for lawyers. The chairman on that committee was Sir Charles Skerrett, and in this distinguished company it is quite apparent that for academic achievement and industry Sir Robert Kennedy more than held his own—though much the younger man.

"On the quality of his work as a Judge, those who knew him well had no doubt. The President of the Court of Appeal has already referred to the words of Sir William Cunningham on the occasion of his retirement; and Sir William on that occasion added his own assessment that Sir Robert would go down in the legal history of the Dominion as one of our great Judges. A Bar dinner was held to mark his retirement, and there were present those who had not only appeared before the retiring Judge but also before both Judges who had sat as resident Judges in Dunedin for such long periods before

him. They had no hesitation in putting Sir Joshua Williams, Sir William Sim and Sir Robert Kennedy together in the same rank.

"Sufficient time has now elapsed to test contemporary opinion by reference to the respect and weight given to his reported decisions. By this exacting test the assessment of his contemporaries would appear to be well founded.

"In many ways Sir Robert's career paralleled that of Sir David Smith. Both were appointed to the Bench at an early age; both brought to the Bench an unusual (certainly for these days) professional skill in commercial matters. Sir Robert's reputation in Wellington as a draughtsman of commercial documents still survives. It is not very long since my tentative opinions to the wording of an arbitration clause were quickly overcome when it was established that the clause in question had been drafted by Sir Robert—and had been in constant, unaltered and unquestioned use for the last 50 years.

"Frequent reference has been made to the long service of Sir Robert as resident Judge in Dunedin. I am specially asked by the Presidents of the Otago and Southland District Law Societies to associate their Councils and their members with this tribute, and to convey a special message of sympathy from them to Lady Kennedy—who is well and affectionately remembered by many in those two provinces.

"Sir Robert has, to use one of his own carefully honed phrases, been 'overtaken by the noiseless foot of time'. We, the present-day practitioners, are the beneficiaries of his outstanding contribution to the quality of legal life in New Zealand," Mr Smith concluded. "We are grateful."

PROMISES, PROMISES

Though there has been much discussion about the rights of the New Zealand citizen over the last 15 years, and though both major political parties continue to make promises about the definition of these rights, nothing significant has been done.

The matter was raised again recently, at this year's annual general meeting of the New Zealand section of the International Commission of Jurists. On the motion of Mr A C Brassington, of Christchurch, it was decided unanimously to instruct the incoming council to examine the present constitutional structure (see [1974] NZLJ 373).

Mr Brassington said that what passed for a New Zealand Constitution was largely unwritten. It was based on an Imperial Statute designed for colonial government—but power today was vested in a way that was not the case even 30 or 40 years ago. The only constitutional safeguard left was the independence of the judiciary, and this could be affected by a vote in Parliament, by the creation of new tribunals, and by other means.

It was noted that the New Zealand Constitution Act of 1852 had come under scrutiny last year, and that the Government intended to repeal it. The Chief Justice (Sir Richard Wild) commented that if the council intended to study the situation, much material produced in the last 10 or 12 years would be found.

The repeal of the 1852 legislation would certainly free the way for a more modern Constitution, in which the rights of the individual New Zealand citizen might be defined. It is possible that this is one of the measures contemplated by the Minister of Justice (Dr Finlay) as defining and protecting the privacy of the individual.

But Mr Brassington seemed to go deeper when he mentioned the ways in which Parliament, or the Government caucus, could erode the present powers of the Judiciary. Only a stiffening of our present constitutional structure could protect us from this sort of attack.

Both major parties have made specific promises in this region. Labour's promises, as expressed in the recent party publication "Labour Achieves", are expressed in general terms: "Labour has taken action to strengthen the principles of democracy and open government, encourage greater participation and interest in national and local decision-making, strengthen national pride, and safeguard individual rights."

But none of the moves enumerated under this heading offers much protection, either to the individual or to the rule of law as it is established at present. The only measure aimed at strengthening privacy has been the Private Investigators and Security Guards Bill, which now awaits a second reading.

The record of the National Government is scarcely more reassuring. During the three years of the second Labour Government, the National Opposition expressed considerable interest in the rights of the individual. Promises of a Bill of Rights, to be linked (if feasible) with a written Constitution, were made in the National Party manifesto.

Offering its wares again for the 1963 General Election, the National Party claimed that all of its 1960 promises were either implemented or were on the way to being so. One of the latter was for the introduction and passing of a Bill of Rights, defining and preserving the "fundamental human rights and freedoms" of private citizens in New Zealand.

There was no doubt about National Government intentions. The imminence of a New Zealand Bill of Rights was mentioned by the Governor-General in the Speech from the Throne at the opening of the 1961, 1962 and 1963 sessions of Parliament but no bill appeared.

On 13 November 1962 the then Leader of the Opposition (Mr Kirk) asked after the promised bill, and was told by the then Minister of Justice (the late Mr J R Hanan) that for various reasons it would not be brought down that session. But the next year, which happened to be election year, all doubt was swept aside.

In the Governor-General's Speech from the Throne on 20 June 1963, occurred the passage: "Since its assumption of office, my Government has been at all times conscious of the need to remove unnecessary restrictions on the freedom of the individual citizen, and to expand the scope for him to enjoy his fundamental rights. . . ."

The New Zealand Bill of Rights arrived in the House on 15 August 1963. It had only four clauses, with a preamble full of warm and sonorous phrases. It did not attempt close definition. The operative section, clause II, referred to the existence of fundamental human rights, and laid down that there should be no discrimination by reason of race, national origin, colour, religion, opinion, belief or sex.

A subclause mentioned the validity of Article 29 of the Universal Declaration of Human Rights, and made the point: "Everyone has duties to others, and is therefore subject to the limitations imposed by law for protecting the rights and freedoms of others, or in the interests of public safety, order or morals, the general welfare, or the security of New Zealand."

In the definition section there were phrases like the well-remembered fragrance of other people's flowers: "The right to life, liberty and the security of the person, and the right not to be deprived of these except in accordance with law."

For such as it was, the bill was in the House. In that it provided for freedom of speech and expression, peaceful discussion and assembly, it was proof that the Government had fulfilled at least part of its pledge. And that was just over 11 years ago.

It was greeted with quite a fanfare. Members spoke warmly of its future. Mr Hanan's words, if transplanted forward, would have possibly even more force today: "The balance between the citizen and the State over a long period has moved in the direction of the State, and many people believe the time has come for a reassessment of the liberties of the individual."

Mr Hanan cast an eye into the future when, outlining possible objections, he spoke of fears that "it would import a catastrophic uncertainty into the law", and that any assertion of a right would also bring the necessary qualification of an obligation.

Opposition members' questions were answered. The bill was read a first time, given a pro forma second reading, and referred to a Select Committee entitled the Constitutional Reform Committee, which had been set up earlier to consider petitions asking for a written Constitution for New Zealand.

It was a fine beginning but it was really the end.

The New Zealand Bill of Rights was never reported back to the House. It was mentioned daily in the order paper as being before the committee. Being technically "under action" it could not be discussed by candidates in the general election only three months later.

Opposition members would have known what happened to it, but the public did not. There was, and is, no obligation on the part of a Select Committee to report a measure back to the House—a fault in our Parliamentary procedure which could well be remedied by the committee now looking into procedural reforms.

And in the 1964 Appendix to the Session it is listed under "measures lapsed or otherwise disposed of"—surely a sad end for any measure, or any pre-election promise.

—CEDRIC MENTIPLAY in the Christchurch *Press*.

RECENT ADMISSION

Mr Neville Bolsover has been admitted as a barrister and solicitor in the Supreme Court at Christchurch before the Hon Mr Justice Macarthur.

"SUBJECT TO FINANCE" — AGAIN

PROFESSOR BRIAN COOTE *of the Auckland Law School ponders on* Gardner v Gould *[1974] 1 NZLR 426.*

If those who are concerned with contracts for the buying and selling of real property are worried by the range of effects which conditions can have upon such contracts, they are unlikely to find much reassurance in the recent decision of the Court of Appeal in *Gardner v Gould* [1974] 1 NZLR 426.

In that case the parties had entered into two agreements for sale and purchase, the combined effect of which was that a property in Howick priced at $16,500 was to be taken in part exchange for a property in Pt Chevalier priced at $46,500. Each contract was expressed to be conditional on the completion of the other. In addition, each contained a "subject to finance" clause which made "this agreement and completion hereof" conditional upon the "Purchaser, Vendor or Vendor's agent" being able to arrange mortgage finance, of $10,000 in the case of the cheaper Howick property and $30,000 in the case of the more expensive Pt Chevalier one.

Initially, Gardner, the buyer of the Howick property, had difficulty in raising a $10,000 mortgage and sought, and obtained, a one-month extension of time in which to do so. On the day before the extended time limit expired, he was able to inform the other side that the mortgage finance had been raised. In the meantime the solicitor for Gould, the buyer of the Pt Chevalier property, uncertain whether the other side's efforts to raise finance would succeed (though told that no assistance from him was required), and confident that he could raise the $30,000 required by his own client at relatively short notice, waited to hear that Gardner's mortgage had been raised before taking any steps himself. The upshot of all this was that, on the day the extended time limit expired, Gardner had raised his $10,000 mortgage but Gould had not raised his. Moreover, he would have required several more days in which to do so.

At this point Gardner insisted that the contract for the sale by him of the Pt Chevalier property had become unconditional. Gould's solicitor replied with the claim that both contracts were now cancelled. The present action was a claim by Gardner, as plaintiff, for damages for losses alleged to have been incurred through the failure of Gould to complete. At first instance ([1972] NZLR 943) Henry J dismissed the action. The subsequent appeal was also dismissed. The substantial ground in both Courts was that the contracts had terminated at the expiration of the extended time limit. The sale of the Pt Chevalier property had terminated by operation of the "subject to finance" clause and the sale of the Howick property had in turn come to an end because it was expressed to be conditional on the completion of the other contract.

Apparent arbitrariness

As the New Zealand cases over the past 20 years or so have demonstrated, conditions appearing in agreements for sale and purchase can have a wide range of effects. At the one extreme, they can prevent a form of agreement from operating even as an offer (*Buhrer v Tweedie* [1973] 1 NZLR 517). They can prevent a contract ever taking effect as such (*Scott v Rania* [1966] NZLR 527) or they can terminate a contract which has come into effect (*Barber v Crickett* [1958] NZLR 1057). Termination sometimes requires notice (*Barber v Crickett* (supra)) and sometimes does not (*Scott v Rania* (supra)). Conditions can sometimes be waived unilaterally (*Donaldson v Tracy* [1951] NZLR 684) and sometimes can not (*Daubney v Kerr* [1962] NZLR 319). However, one feature which did appear to be constant amongst all these difficulties was that a party could not rely on the failure of a condition where that failure had been the result of his own default, even though there was some doubt as to the reason for the rule (*Scott v Rania* (supra)). It was on this principle that the plaintiff relied in *Gardner v Gould* when he claimed that the contracts of sale had become absolute. Gould, he alleged, had failed, within the time limited, to make reasonable efforts to obtain a $30,000 mortgage.

Arbitrary though the differences in the effects of conditions might appear to non-lawyers, the reported cases all consistently turn upon the construction of the particular contracts involved and on the interpretation of the conditional

clauses themselves. The differences in result go back to differences in the contracts under consideration. Accordingly, in *Gardner v Gould,* the first concern of Henry J and of the Court of Appeal was to construe the two agreements for sale and purchase.

Construction of the conditions

The "subject to finance" clauses employed in the two agreements differed from those considered in previous decided cases, in that they made the agreements conditional, not merely upon the purchaser's being able to arrange finance, but upon the purchaser, vendor, or vendor's agent being able to do so. In the view both of Henry J and of Beattie J in the Court of Appeal, what this form of words did was to place an equal obligation to find finance on both the vendor and the purchaser in each transaction. It followed that the plaintiff, not having himself attempted to find finance for Gould, could not, by pointing to Gould's failure to do so, prevent Gould's relying on the condition and determining the contract.

McCarthy P read the condition differently, though with the same eventual result. For him, the fact that each agreement was conditional upon the purchaser, vendor or the vendor's agent finding finance made it impossible to say that any of those persons was under any duty to make reasonable efforts to obtain finance. The vendor's agent was no party to the contracts, so there was no question of his having to make any efforts. There was nothing in the wording of the clause to distinguish the vendor's or the purchaser's case from that of the agent. This view of McCarthy P was the direct opposite of that of Richmond J. The latter saw the inclusion of the vendor and the vendor's agent as a facilitating device and as leaving unaffected the normal duty of the purchaser to use reasonable efforts to obtain finance. On the other hand, he concluded by saying that he would have found for the respondent on an alternative point. Accordingly, he was able to agree in the final result of the appeal.

The reason for the rule

For a contract lawyer, the most interesting feature of *Gardner v Gould* is the discussion it contains of the rationale for holding that a purchaser under a "subject to finance" contract is ordinarily bound to take reasonable steps to satisfy the condition. In *Mulvena v Kelman* [1965] NZLR 656, Henry J had said that the requirement resulted from an implied term. On the other hand, in *Scott v Rania* (supra), 534, McCarthy J (as he then was) preferred to rest the requirement on the principle that no person can take advantage of a state of things occasioned by his own default. Subsequently, in *Gardner v Gould,* Henry J once again expressed a preference for the implied-term view, on the ground that the default required by the rival principle must in any event be a failure in performance of the contract. That, in turn, required the implication of a term. On appeal, McCarthy P accepted this view, and expressly resiled from his earlier position. The particular significance of this for McCarthy P, so far as the facts of *Gardner v Gould* were concerned, was that terms are not lightly to be implied into contracts, as the House of Lords had re-emphasised only recently in *Trollop and Colls Ltd v NW Metrpolitan Regional Hospital Board* [1973] 2 All ER 260. Given the unusual wording of the condition in the contract before him, in his view no implication could be made.

Some difficulties

McCarthy P's conversion to the "implied term" theory, then, significantly affected his approach to the particular "subject to finance" clause which was before him. Conceivably, that theory could similarly affect the approach to at least some other, differently worded, clauses. But the significance of the theory does not stop there. According to Henry J, a purchaser must make reasonable efforts to find finance because the implied term places him under an *obligation* to do so (*Mulvena v Kelman* [1965] NZLR 656, 660). This raises at least two difficulties. In the first place, it would have the result that, if the purchaser failed to make reasonable efforts, he would be in breach of contract and hence, presumably, liable in damages to the vendor for that breach. This would mean that in a case where a vendor had found finance for the purchaser, the latter, if his efforts had been less than reasonable, would be in breach and therefore liable to the vendor for any loss, such as procuration and legal expenses, which he could establish. That result is not itself unreasonable, but one wonders whether it corresponds with what the legal profession as a whole sees as the true position.

Secondly, the imposition of an obligation to make reasonable efforts to find finance creates no obvious difficulty in cases like *Mulvena v Kelman* (supra), and *Gardner v Gould* itself, where the "subject to finance" clause operates as a condition subsequent. But in those cases, such as *Scott v Rania* (supra), where the clause is characterised as a condition precedent, it is

much less easy to see how the purchaser can be under a present obligation implied under a contract which (because of the condition precedent) has not yet come into force. No doubt, it would be possible to resort to the device of a present collateral contract. The difficulty then would be that performance of the collateral contract, though doubtless sounding in damages, could not affect the operation of the condition precedent in the head contract.

An alternative view

With the greatest respect, and some hesitation, it is submitted that McCarthy P's first thoughts in this matter were the best ones. The argument for the implied term theory which appealed to Henry J, and eventually persuaded McCarthy P, was that, if disqualification were for fault, the fault had to be a breach of contract. But this is to put too narrow a limit on the disqualification principle, as is shown in the locus classicus on the point, *NZ Shipping Co v Société des Ateliers et Chantiers de France* [1919] AC 1. There, Lord Shaw of Dunfermline said at p 12:

> ". . . the conduct or situation of the party treating the contract as void shall not have been the same means whereby the event which gives rise to the condition has been brought about. What I have ventured last to express appears to me to be sound in principle and to be a better and broader expression of the principle than a reference to either a party's own wrong or a party's own default, for without either a definite wrong or default the action, or even the situation, of one of the parties may be sufficient to produce the condition. I prefer more than any other as an expression of the principle that which occurs in Coke upon Lyttleton 206 b . . . 'for that he himself is the mean that the condition should never be performed'."

It is not suggested for a moment that Lord Shaw's dictum is to be applied literally to a "subject to finance clause", in the sense that *any* failure by the purchaser to find finance would disqualify him from relying on the condition. That would be to defeat the intention of the parties. But the dictum does make it clear that the sorts of "default" which will disqualify a party are not confined to breaches of contract. A finding by the Courts that a failure to take reasonable steps to find finance, even though not a breach of contract, is enough to disentitle a purchaser from relying on a "subject to finance" clause, would appear to fall well within the limits set by Lord Shaw.

If this view of the law is accepted, all the above-mentioned difficulties relating to obligation, damages, collateral contracts, and distinctions between conditions subsequent and conditions precedent, disappear. So, too, it is submitted, do any problems arising from the reluctance of the Courts to imply terms into a contract.

It would also follow that, on the view now put forward, the effect given to the "subject to finance" clause in *Gardner v Gould* might well have been different. It would no longer have been necessary to consider whether an *obligation* to find finance had been placed on the vendor and the vendor's agent, as well as on the purchaser. Further, no difficulties of implication would have arisen. With these considerations absent, it could have been rather easier for McCarthy P and Beattie J to conclude, as Richmond J did, that the disqualification rule applied only to the purchaser, and that the reference to the vendor and the agent was no more than a facilitating one, merely giving them a right or standing to fulfil the condition, particularly if the purchaser failed to do so.

It is to be remembered that, had there been no "subject to finance" clause, the purchaser would have been under an absolute obligation to find the purchase price, while the vendor would have been under no obligation to find finance whatever. If that is accepted as a ground for differentiating between the purchaser and vendor respectively, it is submitted with respect that there is something to be said for preferring the conclusion reached by Richmond J.

A final point

It has been suggested above that the wide variation in the effects of conditions attaching to contracts for the sale and purchase of land goes back to the construction of the particular contracts involved and to the interpretation of the conditional clauses themselves. If this is so, it follows that the law places a heavy onus on a draftsman to spell out, both accurately and fully, the precise effects intended to be achieved. It is self-evident that such a task should not be undertaken by someone not qualified to practise law.

There would seem to be good sense in local law societies agreeing with estate agents on standard formulations of the more usual conditions (as has been done in Auckland) and on estate agents referring to the solicitors for the parties the drafting of conditions which involve any departure from the agreed standard forms.

GISBORNE AND WAIRAKEI SEMINARS

Members of the Gisborne and Hawke's Bay District Law Societies recently spent what was described to their wives as a hard-working weekend at Gisborne, grappling with such diverse topics as matrimonial property, property speculation tax, negligence insurance, and the public image and future of their profession. The only official diversion was a dinner, and even there an insight was given into possible developments in the field of law reform.

For those taking part from Wellington (Dr Ivor Richardson, Mr F D O'Flynn QC, MP, and the anonymous editor of the Journal) the weekend provided two fine days to lighten the gloom of a Wellington winter; for Mr Stuart Ennor it was in all senses a flying visit; and for those participating from the various Bays, it was an opportunity to renew kinship alliances needed to stir into action those in the remote and unworldly capital and to deprecate the wheeler-dealers of the north who after a brief venture into wonderland, thought the trip would last for ever. Despite numerous plugs, it is not yet known whether sales of the *Mobil North Island Travel Guide* were appreciably increased.

A handful of protagonists tapped reserves of energy sufficient for them to venture into the hinterland, to Wairakei, a fortnight later—there to participate in the Hamilton District Law Society's well-attended weekend seminar. They studied the field of securities as mined by such Acts as the Moneylenders, Hire Purchase, Chattels Securities and the Companies; they heard Mr H Y Gilliand SM espouse the cause of advocacy as the Bench bit back; Mr A R Turner SM paddle the murky streams of water and soil conservation (to the vocal consternation of at least one tax farmer who found himself to be more in breach than in compliance); Jeremy Pope (again) indulging in some crystal-ball gazing; and Tony Molloy on the infamous s 88AA and the *James* case.

The weekend was capped by a dinner at which the excellence of the food was surpassed only by the eloquence of Roy Stacey, who welcomed Tony's paper, "How to Live with the *James* Case". "Personally, I've found it *very* easy to live with," he assured his audience. "Until I arrived here I never knew it even existed." Roy's belated arrival (from Wellington by way of Rotorua and a hastily rented car) was caused by his being so engrossed in conversation with a police superintendent at Wellington Airport as to miss his flight call—and of all people, *he* should have known that those who talk to policemen only get themselves into trouble.

As at Gisborne, the seminar coincided with a Lions-Springbok clash, but in an impressive display of stamina a full house assembled to face the boring (for water) problems of Sunday morning. (Note: The organisers have asked that the winner of the world nude snooker championship return to claim his trophy.)

TRIAL AS THEATRE

Our reporter at the trial of Othello staged in the Supreme Court at Wellington recently by the Victoria University Law Faculty emerged unscathed but incoherent. According to his indecipherable notes:

— Mr Justice Cooke observed that owing to a typing error the trial seemed to involve one "O T Hello and his wife, Desdemona Hello".

— His Honour warned the jury that counsel would be tedious and repetitious, "but you can find comfort in that you need only endure it this evening—I have to every day".

— "Moro" muncher - actor - toxicologist Ray Henwood, as witness for the prosecution, gave his occupation: "I study the character of men." "Not of women?" asked counsel. Replied Ray coldly: "You asked my *professional* occupation . . ."

— The delightful Miss Goldblatt was cross-examined by the prosecution:

Counsel: As an expert, do you agree that the themes of this play are hate, love and revenge?

Witness: Yes.

Counsel: Very well, are you an expert on hate?

Witness: Yes.

Cooke J: Next question overruled.

— The jury of 17 returned their verdict of not guilty of murder but guilty of manslaughter.

Clerk: Are you unanimous?

Foreman (emphatically): We *are* unanimous—except for six or seven dissenters.

THE LAWYER AND THE COMMUNITY

Part II — To what extent are community needs not being met by the private law firm?

Recently there has been a growing consciousness of the larger reservoir of legal needs in the community that is not being met by lawyers in private practice. Studies in Canada and the United States have shown that up to one-half of persons with personal accident claims never take legal advice and as a result forfeit the damages to which they are legally entitled. No such survey has been carried out in New Zealand but experience at Citizens' Advice Bureaux confirms that a number of people seen at the bureaux might otherwise have allowed valuable rights or claims to go by default.

Recent research in England described in *Legal Problems and the Citizen,* by Brian Abel Smith, Michael Zander and Rosalind Brooke has thrown up some interesting data.

The authors carried out a comprehensive survey in three working-class London suburbs and reached the conclusion that a substantial number of people in need of legal advice failed to take it. A significant number of people allowed their legal rights to go by default. The Milner Holland Report had earlier shown that in two-thirds of cases of illegal eviction in England, no legal advice was sought by the tenant.

Lawyers have traditionally acted on the assumption that anyone who genuinely needs legal help will seek out a lawyer. In a country district or small town, the lawyer is likely to be a well-known figure but in the huge anonymous city, an attempt to find a lawyer can be fraught with difficulty. An ordinary working man may not find it easy to take time off work to see a lawyer. He is likely to feel most uncomfortable in the surroundings of a lawyer's office even if he is able to penetrate the screen of secretaries and receptionists that protect the lawyer from the real world outside. He will find, too, that lawyers speak a different language from the man in the street.

Some people steer clear of lawyers for fear of the expense. Because of the esteem, even awe, in which lawyers as a group are held, people are frightened to raise the question of cost. Lawyers are often insensitive to their clients' feelings and do not raise this important point themselves.

The ethical rules which prevent lawyers from advertising or actively soliciting business were formulated to save lawyers from the undignified spectacle of open competition but they have in some ways enured to the disadvantage of the public. They have discouraged lawyers from specialising and from giving notice to the public of the area or areas in which they possess specialised knowledge. It would be quite possible for a client with a matrimonial problem to approach 10 different firms in Auckland and be told by each that it did not deal with that type of work. Law Society staff and Court officials —to whom people naturally turn to find a good lawyer—cannot recommend a particular lawyer. Until recently they could do no more than refer an enquirer to the yellow pages in the phone book—a particularly unhelpful exercise because the list contains the names of Queen's Counsel, barristers, retired solicitors and a number of lawyers who never appear in Court. What has been accepted by the legal profession as a sensible ethical ruling from the layman's point of view must look very much like a conspiracy to prevent a person from finding a suitable and competent lawyer. Little wonder that to the poor and disadvantaged, the law is often seen as incomprehensible and generally hostile.

It is interesting to note that of the 1,650 people in the London Boroughs of Islington, Southwark and Tower Hamlets who were asked, "Where is the best place for the ordinary citizen to go for legal advice?" only 14 percent gave a solicitor as their first preference; 43 percent opted for their local Citizens' Advice Bureau or Legal Advice Centre.

Other surveys in Canada, United States and Australia demonstrate beyond doubt that the private law firm is not meeting the needs of the community. Lawyers should be giving serious thought to finding ways and means of making legal services more accessible.

Access to the Public

The problem which we are now facing in our larger cities is by no means peculiar to New Zealand. We are an egalitarian society and many of the class differences which create a social barrier between the lawyer and the man in the street do not operate here. We do not have a society stratified on class lines as in the United Kingdom nor the pockets of grinding poverty, the prejudice and discrimination that prevail in parts of the United States. But we do

share with England and the United States a significant racial minority whose members are disadvantaged in their dealings with our judicial system.

The Maoris are doubly disadvantaged—not only are they judged according to the moral and legal standards of an alien culture but they are also deprived of the safeguards that that alien culture provides. Recent surveys have demonstrated beyond all doubt the fact that Maori people get a poor deal from our legal system—not because of racial prejudice but because they find the system puzzling and confusing and only rarely have a lawyer to protect their interests.

Immigrants to New Zealand from the Pacific Islands are disadvantaged too. They come from a simple agricultural community and are unfamiliar with city ways and with our formalised legal system. They have a greater need for skilled legal help and yet are less often getting it.

The problem is seldom one of lack of money to pay for a lawyer. It is in part lack of appreciation of the benefits of legal representation but chiefly a question of access. Legal firms tend to be clustered in the centre of our cities. Lawyers need to be handy to the Courts, government departments and other facilities with which they are in day-to-day contact. They like to keep office hours—convenient for them and their staff but less convenient for the working man who will often take a whole day off work to get in to see his lawyer. These days there is the additional difficulty that lawyers are so busy with their existing clients that they are often reluctant to take on new clients—particularly where these present a crisis problem. A lawyer who drops everything else and rushes to Court to get an injunction or a non-molestation order is likely to return to find his office in disarray and his other clients angry at having been kept waiting.

What can be done to make the lawyer's skills more accessible to the public?

In the United States, England and Australia a number of schemes have been introduced to bring the lawyer closer to the community and to make his skills more accessible to people from all walks of life. In succeeding articles I will look at some of these.

ROBERT LUDBROOK

ACCIDENT COMPENSATION COMMISSION APPOINTS SPECIAL ASSISTANT

Mr Henry Lynch, LLB, newly appointed Special Assistant to the Director of Compensation at the Accident Compensation Commission, has gained extensive experience in the insurance industry. He will be responsible in particular for the assessment of compensation for permanent disabilities.

Born in Dublin in 1923, he took an LLB course at University College, Dublin, in 1940. He qualified as a solicitor through the Incorporated Law Society of Ireland in 1945 and was admitted to practice as solicitor of the Supreme Court of Ireland in October of that year. He was in private practice as a lawyer until 1953 when he came to settle in New Zealand.

In 1954 Mr Lynch joined the Hartford Fire Insurance Co, then the General Accident, Fire and Life Assurance Corporation Ltd, and in 1958 took up a post with the NIMU Insurance Company (now the AA Mutual Insurance Company). He acceded to the post of claims manager early in 1970.

PHOTOCOPY PIRATES

A committee has been appointed in Australia to examine photocopying practices and to consider whether legislative changes should be made to maintain a proper balance between owners of copyright and the users of copyright material. The extent to which photocopying free of copyright fees should be permitted on the grounds of "fair dealing" for educational purposes is one of the most important questions the committee has to consider.

Day of the Wilsons—A traffic case was heard by Mr D B Wilson SM, in the Waihi Magistrate's Court recently. Trevor Allen Wilson was charged with inconsiderate use of a motorcar. Sergeant C Wilson appeared for the police. Miss Sherie Lea Wilson was the driver of the second car involved in the accident, from which the charge arose.

Sergeant Wilson remarked that there seemed to be a surfeit of Wilsons in the case—the accident happened in Wilson Road, Waihi Beach. Trevor Wilson pleaded not guilty, and after the evidence had been heard the charge was dismissed.

ANZALS CONFERENCE 1974

The 1974 conference of the Australian and New Zealand Association of Law Students was held in Hobart at the University of Tasmania Law School. The conference lasted nine days and was attended by approximately 100 delegates representing 12 Australasian universities.

There were three basic areas of activity within the conference—seminars, mooting, and a social programme. All three aspects attracted much interest and a result of the almost equal emphasis given all areas was the "total" and integrated feeling of the conference. An extremely good community spirit existed at the conference with a great deal of useful interaction between delegates. It would seem that one of the reasons behind the existence of such a conference is the opportunity it supplies for the communication of ideas concerning both substantive law and legal education. We felt that this communication did indeed take place at the conference this year, that worthwhile information was exchanged and we are optimistic about the benefits to the faculties represented.

These benefits depend to a large extent on the enthusiasm and effort of the delegates after the conference. However, the conference was such this year that most delegates (ourselves included) were very keen to continue the exchange of information and to work more actively within our faculties. Much of this eagerness came from the widened perspective that the conference offered—that we, as law students, are not in a static situation but a dynamic one. We realised to what degree law and legal education are on the move—and that we have a responsibility to think about the direction of this movement and an opportunity to help direct it.

An interesting development in ANZALS came this year with the institution of a committee to co-ordinate legal aid and referral schemes. This committee will function throughout this year until the next conference (when it will be evaluated) thus providing a continuing interaction within ANZALS. The duty of this committee is to stimulate research and collect information on legal aid and in particular university legal aid and referral schemes for dissemination among members of ANZALS. It is hoped that this will encourage and assist such schemes by providing a wide base of information in this area.

Much of the impetus for the institution of this committee arose from the workshops on legal aid and an address by Professor Allan (Monash University) on Clinical Legal Education. Professor Allan told of the institution of a legal advice centre by students in an area called Springvale and outlined the subsequent steps which have resulted in Monash University taking definite steps towards introducing a course in which students work in such a centre for a semester (as an integral and valid part of their education). It should be noted that the main aim of such a move is *not* seen as the provision of a legal advice centre for the community but as a form of legal education.

The seminar programme was guided by daily themes with three seminars each day. Themes were: "The Law and Society", "Industrial and Labour Law", "Consumer Rights" and "Privacy and the Individual". Because of time limits no exhaustive studies could be made at the conference, but the series provided an excellent base for further comparative work in each area. One area in which we have made definite moves to obtain more information is that of the South Australian Consumer Protection Legislation, which appears to be particularly worth while examining. We presented a paper to the conference on "The Mechanics of Consumer Protection" in which we attempted to examine some of the basic problems in our present system.

The mooting competition was keenly contested with much midnight oil burnt by the competitors in order to achieve the high standard obtained generally. The mooting cup returned to New Zealand for the sixth consecutive year, this time in the hands of Auckland mooters Rob Chambers and Peter Weir. Both Rob and Peter are extremely good mooters with a notably lucid presentation of their arguments. It was generally felt that much was learnt by both spectators and mooters alike in the four rounds of the competition.

The social side of the conference was excellently organised and of good content. It was a very great pleasure to meet and mix with so many interesting people and it would be fairly accurate to say that we learnt as much about Australian legal education informally as we did formally.

All in all it was an extremely good conference which we were very grateful to be able to attend and we hope that we shall be able to benefit our faculty and others around us accordingly.

EVAN WILLIAMS
JOHN MCLINDEN

CONFERENCE '75

New Zealand's Sixteenth Law Conference looks set to establish an attendance record—when enrolments have not yet even been called for.

The timing: the weekend after Easter (4-7 April 1975); and the location: in Wellington, centrally located and with some 700 local practitioners should ensure more enrol than ever before.

In addition the Conference organisation is planning a conference structure which will encourage all practitioners to attend. Speakers will concentrate, as in the past, on current legal issues, but discussion in business sessions will centre on participation from the audience. Although a chairman and two assistants will control the discussion of papers, there will be no formal commentaries as such.

On three occasions also there will be a choice of sessions offered to delegates. Though the exact match of topics is yet to be settled, delegates will be able to choose between such current issues as "Law and Polynesians", "Inflation", and "Profits on Land Transactions".

Monday 7 April is a full day of business and the organisers stress that those attending should not plan to return home till the Tuesday.

To those who have experienced Wellington's accommodation problems it may come as a surprise to learn that high standard accommodation for everyone has been found within two city blocks of the conference's main venues, the Town Hall and the Majestic Theatre/Cabaret complex.

Less success has been found in accommodating the dinner, which it was at first thought might include practitioners' spouses. There is simply not enough space in the Wellington Town Hall for more than practitioners themselves—and the tables of New Zealand food and wine.

Decisions on many matters are continuing, including the final selection of a visiting speaker sponsored by Messrs Chapman Tripp and Co to mark that firm's centenary. But the conference joint secretaries expect a large attendance—and a rush on enrolments when they are called for in October.

The Conference organisation is directed by Mr M O'Brien QC, and the joint secretaries are Messrs F M Shanahan and J J McGrath. The address is PO Box 3643, Wellington.

H B RENNIE

LEGAL LITERATURE

Latey on Divorce, 15th edition (Longman Group Ltd) cxxiv + 2,114 pp. £19.50.

One of the oldest legal textbooks (its parentage extends back to 1864, when George Browne wrote on divorce not long after the Legislature had introduced the concept of forensic dissolution of marriage), the latest edition of *Latey* ranks also as one of the largest to be produced in a single volume.

Much has happened to divorce in Britain at the hands of the Legislature since the last edition appeared in 1952—the Divorce Reform Act 1969, the Matrimonial Proceedings and Property Act 1970, the Family Provision Act 1966 and the Civil Evidence Acts of 1968 and 1972 among them. The Acts of 1973 were presumably excluded by reason of the time such a massive work takes to pass through production stages—law stated as at September 1972, a 1973 imprint and a publication date of February 1974.

The relevance of the work to New Zealand practitioners is not as diminished as might appear by reason of "irretrievable breakdown" now being the sole ground for divorce in Britain. For "guidelines" have been written into the Act, in effect providing that what were previously matrimonial offences must still be proved. Only the name has changed.—JDP.

CORRESPONDENCE

Land Distraction Office

Sir,

I have just received my initiation into the new system of land transfer registration and I reel from the body blows dealt to me by a bureaucracy gone mad. Were I to state my feelings explicitly, even you, sir, with all your worldly experience, could scarce forebear to blush.

So far as my firm was concerned, the dealing consisted of a transfer followed by a first and second mortgage, but there were other sundry items such as withdrawal of caveat, discharges and partial discharges of mortgages, a total of eight dealings. This involved two sets of Form L & D 78 (six in each) plus 10 carbon papers to be used once and discarded. But the headings at the top of the columns are misleading. It appears that for "All C/T's" we should read "Each C/T", and for "Total Area" read "Area of each C/T". Twelve C/Ts in all were affected, and it was impossible to supply all the information in the space provided for each item on the form. Therefore, a schedule must be provided. This schedule consisted of four foolscap pages, each page being produced in sextuple. It took me two hours to prepare the forms and schedule and my secretary two and a half hours of typing. Photocopying of the schedule cost $2, or a total cost to my firm of something like $31.

Let me make it clear my grouse is not with the Land Transfer Office. Their work has speeded up, and so it should. We are now doing their donkey work for them. But the Valuation and Statistics Departments are leaning very heavily on us.

Incidentally, can we now cease the practice of sending Notices of Sale to the Valuation Department?(*a*).

Not all dealings would require as much work and paper as the case I have described, but the overall cost to the practitioner, multiplied by the number of practitioners, is very substantial. I suggest that one search clerk with several sheets of plain paper, a pencil and one sheet of carbon in each centre, could provide all the information required by the two departments at a much lower cost.

In the particular case mentioned, the salt was rubbed into my wounds in that under the old system there would have been a joint registration with the vendor's solicitor. But because joint registration is not now permitted, out of courtesy to the other solicitor we presented five items for him and only three referred to our client. Further, we were acting as agent and our total fee was $9.

As a method of showing my displeasure, I was proposing that all practitioners should work to rule and carry out all their settlements at the Land Transfer Office after making an up-to-date search of the register and all documents not entered on the register. All that deters me from this is the fact that our DLRs and their staffs (innocent victims all) would be sent round the bend.

As for the other two departments, I will chuckle with satanic glee when they flounder in an ever deepening sea of paper, wallow in a mire of facts and figures, and what is more, smudge their shirt fronts with the Stygian gloom of carbon.

Yours faithfully,

D E AMES
Christchurch

[(*a*) The Valuation Department advises that there is no prospect of the requirement being relaxed in any way. It appreciates that paper is a plague in life, but the Land Transfer advice is incomplete (ie does not cover all the dealings covered by the requirement in the Rating Act), is delayed (believe it or not, your Sale Notices get to the Department first) and not all local authorities are supplied with valuation rolls by the Department. It concedes the need for a complete and prompt supply of information from a single source, but says that source is not the LTO.—Ed]

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REGULATIONS

Regulations Gazetted 22 July to 8 August 1974 are as follows:

Air Services Licensing Regulations 1952, Amendment No 6 (SR 1974/196)
Customs Tariff (Rivets) Amendment Order 1974 (SR 1974/197)
Dairy Produce Regulations 1938, Amendment No 30 (SR 1974/198)
Electricity Control Order 1948, Amendment No 8 (SR 1974/209)
Farm-Dairy Instruction Regulations 1949, Amendment No 8 (SR 1974/199)
Income Tax (Cook Islands Development Projects) Order 1968, Amendment No 3 (SR 1974/200)
Income Tax (Income Equalisation Reserves) Order 1974 (SR 1974/201)
Magistrates' Courts Rules 1948 (Reprint) (SR 1974/204)
Milk Producer and Other Prices Notice 1968, Amendment No 18 (SR 1974/206)
Motor Vehicle Taxation Regulations 1966 (Reprint) (SR 1974/205)
New Zealand-Australia Free Trade Agreement Order (No 4) 1974 (SR 1974/202)
Penal Institutions Notice 1974 (SR 1974/207)
Post Office (Money Order) Regulations 1974 (SR 1974/203)
Rock Lobster Regulations 1969 (Reprint) (SR 1974/195)
Whitebait Fishing Regulations 1964 (Reprint) (SR 1974/194)
Wool Marketing Corporation Regulations 1974 (SR 1974/208)