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KEEPING UP TO DATE

Amid the multifarious claims for the attention of the overtaxed practitioner is the need for him to keep abreast of the law. This has become increasingly more difficult, not simply because of the growing tide of legislation which perennially sweeps over increasingly wider areas of human activity, but also because of the unavoidable timelag between delivery of judgments and their being reported—not to mention the demands of space which mean that cases marginally of interest tend to be excluded.

In the Supreme Court at Wellington in July, senior counsel was heard to address the Judge and say that he had been unaware of the text of the judgment in *Dreadon v Fletcher Development Co Ltd* (since reported at [1974] 2 NZLR 11), even though that judgment was delivered as long ago as October 1973.

As publishers, Butterworths have become increasingly aware of the gap that exists between developments in the law occurring, and their coming to the attention of those most affected by them—the legal practitioner.

In an effort to bridge that gap, *Summary of Recent Law* was revamped in August to provide pithy catchlines of recent cases and not full headnotes of much older ones.

This has met with such an enthusiastic response that we have decided to take the next logical step. On 19 November the JOURNAL will introduce a new feature as a supplement to the JOURNAL entitled CURRENT LAW. It will come to subscribers automatically, together with each issue of the JOURNAL, and by first-class mail (to overcome present delays in the post).

Each subscriber will, in due course, be sent a binder, and twice a month parts will be sent to be inserted with up-to-date information on bills, acts, regulations, case law and articles in periodicals. A special "stop press" section will bring the service even further up-to-the-minute.

At the end of each year, beginning with the end of 1975, each subscriber will be sent a transfer binder, suitably embossed and lettered, into which CURRENT LAW can be permanently filed.

Response from the profession to this innovation has been such that we are confident of its success. We will, as always, welcome suggestions as to how the service may be further expanded and improved so as to ensure that the mythical practitioner need no longer frame on his wall the disclaimer: "The law as stated in this office is at 31 December 1933".

D. R. CHRISTIE
Managing Director
Butterworths of New Zealand Limited

SUMMARY OF RECENT LAW

This is the last issue in which Summary of Recent Law, Bills Before Parliament, Statutes Enacted and Regulations will appear in this format. In future issues they will appear in an expanded form, together with notes as to their effect, in a separate Law Journal supplement entitled "CURRENT LAW". This will automatically be sent to all subscribers to the Journal.

ADMINISTRATIVE LAW

Milk Board—Town milk supply—Claim for increased quota—Held that there was no duty on the Milk Board to appoint a committee under s 9 of the Milk Act 1967 or recommend regulations pursuant to s 53 when asked to do so—Supply Associations, not the Board, being responsible for investigating farmer's claims—Section 11 (1) conferred an unrestricted discretion on the Board—*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 distinguished—Board may have a duty to conduct an inquiry under s 57—If duty existed it had been discharged by the establishment of an Appeal Committee—Three members—President of the Town Milk Producers' Federation not disqualified from being a member on the ground of bias—*Brigham's Creek Farms Ltd v New Zealand Milk Board* (Court of Appeal, Wellington. 25 September 1974 (CA 70/73). McCarthy P, Richmond and Woodhouse JJ).

ADOPTION

Ward of Court—An adoption order may be made in respect of a ward of Court without terminating the wardship, but the consent or leave of the Supreme Court should be obtained before or after filing the application in a Magistrate's Court. *Re Spiros Combs* (Supreme Court, Wellington. 20 September 1974 (M 391/73). Cooke J).

COMPANY

Restoring company to register—Name of company ordered to be restored to the Register—When struck off the company had already ceased business and was not operating—"Or otherwise . . . just" in s 336 (7) of the Companies Act 1955 enables the Court to take into account the personal circumstances of the shareholders—Observation that in an application under s 336 (7) either a member of the company or a creditor should be joined as a party so as to be responsible for any costs awarded to the Registrar. *Re L Carroll Ltd* (Supreme Court, Wellington. 19 August 1974 (M 199/74). O'Regan J).

CRIMINAL LAW

"Intent" where possession of offensive weapon—Offensive weapon in a public place—Intent under s 53A (7) of Police Offences Act 1927 must have been formed at time person charged "goes out" to the public place—Onus of proof on a charge brought under s 53A discussed—*Smith v Police* [1974] 2 NZLR 32 and *R v Dayle* [1973] 3 All ER 1151 (CA) followed. *Nadin v Police* (Supreme Court, Auckland. 10 September 1974 (M 737/74). Quilliam J).

Plea of autrefois convict—Acceptance by the Court of a plea of "guilty" amounts to a conviction—Plea of previous conviction successful notwithstanding the absence from the Criminal Record Sheet of any record of conviction—Crimes Act 1961, ss 357, 359 (1). *R v Baker* (Supreme Court, Palmerston North. 13 September 1974 (T 6/74). Quilliam J).

"False document"—Forgery—Held that in deciding whether a material part of a document purports to be made by a person who did not make it, the Court may look beyond the document itself and take into account the surrounding circumstances—*Reardon* [1965] NZLR 473 (CA) referred to—Crimes Act 1961, ss 263 (1) (a), 264 (1). *R v Calder* (Court of Appeal, Wellington (CA 50/74) and *R v Haskett* (CA 52/74; 27 September 1974). Judgment of the Court (McCarthy P, Richmond and Woodhouse JJ) delivered by Richmond J).

Issue estoppel and possible perjury—Perjury—Issue estoppel, if applicable to criminal proceedings in New Zealand, held not to be available to inhibit an inquiry into possible perjury. *R v Morrison* (Supreme Court, Christchurch. 13 September 1974 (T 47/74). Roper J).

HIRE PURCHASE

"Signing" of agreement—Hire Purchase and Credit Sales Stabilisation Regulations 1957—Requirements in the First Schedule as to "the signing" of the agreement refer to the signing by the purchaser—Judgment of Wild CJ in *Alliance Finance Corporation (NZ) Ltd v Hurley* (Invercargill, 17 September 1971) followed—Requirement that the agreement be in writing means inter alia that the writing must sufficiently identify both parties—Purchaser's claim for recovery of his money upheld when vendor's name not shown in agreement at time of signing by purchaser—*Cotton v Central District Finance Corporation* [1965] NZLR 992 and cases on Statute of Frauds, s 4 applied. *Quality Auto Car Sales Ltd v Singsam* (Supreme Court, Auckland. 20 September 1974 (M 531/73). Cooke J).

INCOME TAX

"Intention" and "Purpose"—"Intention" and "purpose" in s 88 (1) (c) of the Land and Income Tax Act 1954 discussed—Purchase of property for sale conditional on lease-back finance held to fall within the middle limb of s 88 (1) (c)—*UEB In-*

dustries Ltd v Commissioner of Inland Revenue (Supreme Court, Wellington. 26 September 1974 (M 407/73). Beattie J).

INTOXICATING LIQUORS

"Allowing consumption of liquor"—No liquor sold after 10 pm but people in the bar drinking at 10.20 pm—Manager on premises but took no steps to clear bar—Manager's inaction held to be more than mere carelessness—Carelessness "so great as to be itself evidence of connivance": *Bailey v Pratt* (1920) 20 NZLR 758, 765—Sale of Liquor Act 1962, s 249 (2). *Goodlass v Police* (Supreme Court, Wellington. 20 September 1974 (M 191/74). O'Regan J).

LANDLORD AND TENANT

Intoxicating liquors—Interpretation of documents—Supply of word "or" evidently accidentally omitted in current renewal of perpetually renewable lease—Meaning in New Zealand usage of "hotel" and "public house"—Interchangeable in ordinary usage in past, "hotel" now distinguishable in trade usage—Consideration of alleged rule that a covenant is to be construed against the covenantor. *Midland Hotel (Wellington) Ltd v Wellington City Corporation* (Supreme Court, Wellington. 16 September 1974 (A 90/74). Cooke J).

PRACTICE AND PROCEDURE

Application for review—In an application for review it is essential that the applicant states with particularly the grounds upon which he seeks relief—*Pagliara v Attorney-General* [1974] 1 NZLR 86, 88-9 referred to—Judicature Amendment Act 1972, Part I. *Thomson v Post Office Appeal Board and Anor* (Supreme Court, Wellington. 19 September 1974 (M 96/74). Wild CJ).

TOWN PLANNING

Motel—Practice generally—Appeal Boards should follow the practice of submitting as part of the case stated a complete copy of their decision, which may if circumstances require be supplemented by other material—Time limits in s 42A should be observed—In the absence of specific requirements the Board was entitled to apply the "minimum habitable room count" to a motel as a guide to the number of persons who should use the proposed building—In refusing consent the Board was competent to take into account the possibility that the building might be used as an apartment if the motel failed—Board not wrong in applying Practice Note 4 in 4 NZTPA 165—Town and Country Planning Act 1953. *Barry v Auckland City Corporation and Ors* (Supreme Court (Administrative Division), Wellington. 30 September 1974 (M 118/74). Wild CJ).

TRADE NAMES AND TRADE MARKS—INTERIM INJUNCTION

Passing off — Interim injunction — Common law trade mark—Passing off—Interlocutory injunction refused on the ground that there was no direct evidence before the Court of a public reputation of the name as being distinctive of the plaintiffs' product—*T Oertli AG v E J Bowman (London) Ltd* (1958) 76 RPC 1, *Roche Products Ltd v Berk Pharmaceuticals Ltd* [1973] RPC 473 (CA), and *Amway Corporation v Eurway International Ltd* [1974] RPC 82 referred to. *Customglass Boats Ltd and Anor v Salthouse Brothers Ltd and Anor* (Supreme Court, Auckland. 24 September 1974 (A 1020/74). Cooke J).

TRANSPORT

"Half distance rule" inapplicable — Half distance rule in reg 26 (2) of the Traffic Regulations 1956 held not to apply to the situation where a vehicle enters a roadway from a drive or an intersection—*Johnston v Griffin* [1942] NZLR 554 and *Ritchie v Dunedin City Corporation* [1953] NZLR 899, referred to. *Ashmore v Drain* (Supreme Court, Invercargill. 16 September 1974 (M 24/74). O'Regan J).

THANKS TO YOU

The Minister of Justice, the Hon Dr A M Finlay, has said that the duty solicitor scheme to assist defendants in criminal cases is now operating in virtually all Courts in New Zealand. "There has been close co-operation among those mainly involved—the Law Societies, the Courts and the Social Welfare Departments", said Dr Finlay. "In a number of places representatives of the community have also participated. There was a clear determination that the scheme should work and this has overcome the numerous practical problems that a new scheme such as this faces. The result is that the duty solicitor scheme has been able to begin even sooner than I had expected." The Minister considers it too early to say dogmatically that the duty solicitor scheme is a success, but it has certainly begun well. Doubtless there will be difficulties from time to time, but given the good will that has so far been evident, there is no reason to suppose that these will not be met.

"Many people", said Dr Finlay, "had contributed to this successful outcome but special thanks were due to the members of the legal profession. Without their ready co-operation the scheme would have been doomed to failure and I want to acknowledge my indebtedness to them and to the Law Societies for the ready and willing assistance they have given."

Advertising Pays—To the American Bar Association Bob Hope described his own lawyers' firm as one of the most ethical in Los Angeles. "They have the smallest neon sign on Sunset Boulevard."

BILLS BEFORE PARLIAMENT

Accident Compensation Amendment
Accident Compensation Amendment (No 2)
Agricultural Pests Destruction Amendment
Agricultural Workers Amendment
Agriculture (Emergency) Regulations Confirmation
Annual Holidays Amendment
Antiquities
Appropriation
Arms Amendment
Broadcasting Amendment
Chattels Transfer Amendment
Children and Young Persons
Cinematograph Films Amendment
Commerce
Crimes Amendment
Criminal Justice Amendment (No 2)
Drugs (Prevention of Misuse)
Education Amendment (No 2)
Education Amendment (No 3)
Education Amendment (No 4)
Finance (No 2)
Government Railways Amendment
Historic Places Amendment
Hospitals Amendment
Inland Revenue Department
Insurance Companies' Deposits Amendment
Investment Bonds
Joint Consultation in Industry
Joint Family Homes Amendment
Joint Family Homes Amendment No 2
Joint Family Homes Amendment (No 3)
Judicature Amendment
Land and Income Tax Amendment (No 2)
Land and Income Tax (Annual)
Legal Aid Amendment
Life Insurance Amendment
Local Government
Local Legislation
Magistrates' Courts Amendment
Maori Affairs Amendment
Maori Purposes
Marine and Power Engineers' Institute Industrial Disputes
Moneylenders Amendment
Municipal Corporations Amendment No 2
National Parks Amendment
Neighbourhood Noise Control
Penal Institutions Amendment
Petroleum Amendment
Pork Industry
Post Office Amendment
Primary Products Marketing Regulations Confirmation
Property Law Amendment
Public Works Amendment (No 2)
Queen Elizabeth The Second Arts Council of New Zealand
Reserves and Other Lands Disposal
Right to Confidentiality
Soil Conservation and Rivers Control Amendment
Statutes Amendment
Superannuation Amendment
Tourist Hotel Corporation
Transport Amendment
Trustee Savings Banks Amendment
Waitaki Lakes Recreation Area
Water and Soil Conservation Amendment
Women's Rights of Employment

STATUTES ENACTED

Animals Amendment
Building Societies Amendment
Commonwealth Games Symbol Protection
Cornish Companies Management
Counties Amendment
Customs Acts Amendment
Customs Orders Confirmation
Dangerous Goods
Defence Amendment
Education Amendment
Electoral Amendment
Estate and Gift Duties Amendment
Estate and Gift Duties Amendment (No. 2)
Farm Ownership Savings
Fire Services Amendment
Government Railways Amendment
Harbour Pilotage Emergency
Harbours Amendment
Hire Purchase Amendment
Home Ownership Savings
Housing Corporation
Imprest Supply
Imprest Supply (No 2)
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
New Zealand Superannuation
Ngarimu V.C. and 28th (Maori) Battalion Memorial Scholarship Fund Amendment
Niue Amendment
Niue Constitution
Perpetuities Amendment
Physiotherapy Amendment
Private Investigators and Security Guards
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
Social Security Amendment
Stamp and Cheque Duties Amendment
Time
Tobacco Growing Industry
Trustee Amendment
Unit Trusts Amendment
War Pensions Amendment
Wheat Research Levy

REGULATIONS

Regulations Gazetted from 1 August to 17 October 1974 are as follows:

Canterbury Raspberry Marketing Regulations 1950, Amendment No 4 (SR 1974/250)
Hire Purchase and Credit Sales Stabilisation Regulations 1957 (Reprint) (SR 1974/246)

(Continued on page 499)

CASE AND COMMENT

Australian Cases Contributed by the Faculty of Law, University of Otago

Infringement of copyright in university libraries —Copyright Act 1962, ss 19 (1), 21

In *Moorhouse and Angus & Robertson v University of New South Wales* (1974) 3 ALR 1, the Supreme Court of New South Wales (Equity Division in the exercise of federal jurisdiction, Hutley JA) declared the practice of operating coin-controlled photocopying machines in university libraries (and in the libraries of other teaching institutions) for the convenience of students was not only a breach of copyright by the actual users, but an authorisation of such a breach by the university. A short story entitled, *The Americans, Baby,* written by the first plaintiff and published together with other stories of the same writer by the second plaintiff under the same title, was prescribed reading for certain courses in political science. Acting on the instructions of the plaintiffs and the Australian Copyright Council, a graduate of the university made two copies of the story with a coin machine using the library's only copy, which was not held in the restricted "open reserve" section.

The basis of liability pressed against the university was that it authorised such breaches of copyright. The Court found that the library guides issued by the university were misleading as according to the information they gave, students could take photostat copies "for the purpose of research or private study", but reference to "fair dealing" was omitted; likewise, notices attached to the machines were not calculated to draw attention to the possibility that their use might involve students in breach of copyright; furthermore, although there were library supervisors, supervising, in fact, did not exist. As a result the Court held that the university had authorised breaches of copyright, and much material photocopied by students with the coin machines was not for the purposes of fair dealing within the meaning of s 40 of the Copyright Act 1968 (Commonwealth of Australia). "Authorisation" includes "countenance" which can occur by reason of inactivity. The learned Judge based this view on the judgments of Gavan Duffy and Starke JJ of the High Court of Australia in *Adelaide Corporation v Australasian Performing Right Association* (1928) 40 CLR 481, 504 who, quoting Bankes LJ in *Performing Right Society v Ciryl Theatrical Syndicate* [1924] 1 KB 9, said that "inactivity or 'indifference, exhibited by acts of commission or omission, may reach a degree from which an authorisation or permission may be inferred'." Although Higgins J took a narrower view, as the two dissenting Judges, Knox CJ and Isaacs J, formulated the law in the same terms, Hutley JA felt his duty to follow the reasoning of the majority.

This section referred to, s 40, provides that "a fair dealing with a literary . . . work . . . for the purpose of research or private study does not constitute an infringement of the copyright in the work". "Fair dealing" has not been defined by the statute, but in Professor Sawer's view "the general principle is to permit quotation and summary which is genuinely relevant to the legitimate purposes of the 'borrower' ", and the actual amount of the material copied coupled with the possible effect on the sales of the original are the most important criteria in deciding fairness. (*A Guide to Australian Law for Journalists, Authors, Printers and Publishers,* Melb Univ Press, 27-28.) The learned author emphasises that the making of copies for other persons cannot be justified, even if those others use them for private study and research only, and "the student or research worker must make his own copies" (ibid). The meaning of "private study" again lacks any statutory or judicial certainty. If a person makes one photocopy only of a literary work for the purpose of writing a critical essay on it, that copy certainly would be covered by the expression, If, however, the essay is prepared for a course requirement, so that a number of students do research on the same literary work, and finally the work will be discussed in class under the guidance of the teacher, does the study still retain its private character? A university, teachers' training college or polytechnic is certainly a public educational institute, but its classes are open to enrolled students only, and the aim of their studies is private: to acquire a degree, a qualification,

or merely knowledge for knowledge's sake. Any institutional teaching by its very nature through the media of lectures, tutorials and seminars consists of participation in group-learning supplemented by a considerable amount of individual study. Thus, research and study carried out by participants in an educational course cannot be other than private.

Section 49 (1) and (2) of the Commonwealth Act exempt the making of a copy of an article in a periodical and that of a published literary work, or part of them, by or on behalf of a librarian of a library not established or conducted for profit. Subsection (3) restricts the librarian's freedom in supplying such a copy to a person only who satisfies him that it is needed for research and private study, and will not be used for any other purpose.

In the Court's view s 49 had only a peripheral relevance in the case, and as the copies made with the self-service machines were not supplied by the librarian, such photocopying was not a fair dealing exempted by the Act. The University, therefore, by failure of proper supervision, not being an owner of the copyright, or having the licence of the owner in terms of s 36 (1) of the Act, authorised the infringement of that copyright.

How are educational libraries in New Zealand affected by this Australian decision? Although the Copyright Act 1962 in many respects differs from the Australian one, the parts relating to fair dealing, research and private study show a remarkable resemblance. The New Zealand statute expressly provides in s 19 (1) that "no fair dealing with a literary . . . work for the purposes of research or private study shall constitute an infringement of the copyright in the work". Further, s 21 (1) is even more relevant as it specially exempts, among other things, the making or supplying of a copy in a published literary work by or on behalf of a teacher or librarian of any university or school if the following conditions exist: (a) the copies are supplied only to persons satisfying the teacher or librarian that they will be used for research or private study only; (b) no copy shall extend to more than a reasonable part of work, or to more than one article in a periodical, unless two or more articles in it relate to one subject matter; (c) a person is supplied with one copy only; (d) persons receiving copies will be required to pay the actual cost of production only.

Teachers of educational institutes in New Zealand frequently distribute photostat copies of certain literary work (this expression includes any written table or compilation: s 2 (1)) prescribed for study to their students, but in general they strictly observe the conditions as laid down by the Act. By the use of coin-operated self-help copy machines, however, students, notwithstanding that they act in good faith, can unwittingly commit breaches of copyright. Through their action educational institutes may be found, in view of s 6 (2) of the Act, to have infringed copyright by authorising other persons to do so.

Section 21 (1) of the statute, it may be asserted, establishes a complete exception for educational courses conducted by a teacher, as any copies taken can be for the purposes of research and private study only. "Fair dealing" is not mentioned in this context at all, and its relevance may be questioned. If the literary work copied and distributed will merely be discussed in class, the assertion has some validity, but if the preparation of an essay is required, the issue of fair dealing assumes some importance, though the essay will normally be read by the teacher only. The penalty for indiscricriminate copying in such circumstances would be reflected through heavy loss of marks. When an exceptionally good essay is published in a school journal or a periodical, then, of course, whether the quotation or reference has been made "for the purpose of criticism or review" within the meaning of s 19 (2) will be a relevant criteria in deciding whether it constitutes an infringement, or otherwise, of the copyright. The better view is that s 19 (1) should be read together with s 21 (1), always bearing in mind that the authorised copying under the latter section must necessarily constitute fair dealing.

It appears to be clear, in any case, that self-made copies are not covered by the exception in s 21 (1), and it is questionable whether even accurate library guides would negative the assertion of "authorising" breach of copyright through the use of coin-operated copying machines, unless the machines are constantly and closely supervised. In such a case, however, as a member of the library staff must always be present when any copying is done, the raison d'etre for maintaining coin-machines in the library would be completely nullified.

The decision of the New South Wales Supreme Court does not, of course, bind New Zealand Courts, but as a persuasive authority it certainly would be considered should any similar case arise.

A S.

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

Separation Agreements and Registration

Cameron v Cameron (the judgment of Cooke J was delivered on 15 August last) is an important case for practitioners in the domestic proceedings field. A separation agreement dated 18 November 1971 between the parties provided in cl 4 that

> "the husband will during the joint lives of himself and the wife so long as they shall live separate from each other pay to the wife for the maintenance of herself the weekly sum of $26.00 and for the maintenance of the children the weekly sum of $6.00 each until such children respectively attain the age of 16 years or later leave school and also whilst any such child continues to attend any other educational establishment such payments to be made monthly and the first payment on the 22nd day of November 1971."

On 4 December 1972 the marriage was dissolved by decree absolute of divorce. On 8 May 1973, on the former wife's application, the agreement was registered in the Auckland Magistrate's Court in the prescribed manner in purported pursuance of s 55 (1) of the Domestic Proceedings Act 1968. On or about 15 May 1974 the former husband sought to have the registration set aside on the ground that it was invalid by reason of the decree absolute. The learned Magistrate refused to set it aside and the husband appealed. It was accepted for the husband that the agreement was a maintenance agreement within s 54 (1) (a) and (c) of the 1968 Act. It was conceded for the husband that the agreement was registrable under s 55 of the Act as to the children and that contractually it was still in force as to the maintenance of the former wife. What was argued, however, was that because at the date of the registration the former wife would have had no standing to apply for a maintenance order for herself under Part IV of the 1968 Act, the agreement was not registrable as to her maintenance. His Honour considered s 55 (1), which reads as follows:

> "Either party to a maintenance agreement, whether it was made before or after the commencement of this Act, may register the agreement in the prescribed manner in the office of any Magistrate's Court."

He observed that the former wife at the date of registration was a party to a maintenance agreement, adding that there was nothing in the subsection requiring her to satisfy any other qualification. His Honour then read s 55 (2) which enacts that:

> "Subject to this Act, a registered maintenance agreement shall, while it continues in force, have the same force and effect as if it were a maintenance order made under this Act on the date of registration in the Court in the office of which it is registered, and the provisions of this Act relating to maintenance orders shall apply accordingly with the necessary modifications."

As his Honour said, the contention for the husband was "that as a maintenance order could not have been made for the former wife under the Act at the date of registration, s 55 cannot apply to the present case". "In the course of the argument," continued his Honour, "counsel for [the husband] accepted that his contention would require the notional reading into s 55 (2) of some such words as 'provided that on the date of registration the Court would have had jurisdiction under this Act to make such an order'. I can see no justification for inferring any such limitation on the scope of s 55 or for reading in any such requirement. Section 55 (2) is a provision designed to bring about the result that once a maintenance agreement has been registered, it shall be enforceable in the same manner as a maintenance order. It is a provision as to the consequences of registration, not as to the conditions precedent to registration. Moreover, it contains, as did its predecessor in the Destitute Persons Act 1910, the words 'with the necessary modifications'. In my view they tell further against the argument advanced for the appellant. If attention be not confined to the language of the statute but be extended to its apparent policy, one notes that under s 26 (1) (a) a wife may obtain against a husband an order directing him to pay periodical sums for her future support for such period not exceeding their joint lives as the Court thinks fit. An order under that paragraph may continue in force after the parties have by reason of divorce ceased to be husband and wife. In the light of that consideration there appears no obvious reason why the legislature would have wished to deny the benefit of registration to a former wife who in the past had relied on a contractual obligation by the husband rather than upon a statutory

obligation imposed by order of the Court under the Act. Nor was counsel for the appellant able to suggest any such reason. Indeed he frankly said that his argument did not advert to considerations of policy underlying the Act."

His Honour then proceeded to deal with *Hendry v Hendry* (1963) 10 MCD 422, which the learned Magistrate had distinguished. That case was concerned with s 47B of the former Destitute Persons Act 1910 and it was held that a maintenance agreement made between spouses and providing for the maintenance of the wife and the children of the marriage could not be registered under that section, so far as it concerned the wife's maintenance, once the marriage had been finally dissolved. His Honour went on to state that "One of the grounds of that decision was that in s 47B (1) the phrase 'to whom Part 3 . . . of this Act is applicable' applied to the words 'the other party'. If so, there is a material distinction between s 47B (1) and the legislation giving rise to the present case. With respect to the learned Magistrate who decided *Hendry v Hendry,* I am not sure that the phrase quoted did apply to the words quoted. Grammatically such an interpretation does not seem natural. The more natural reading of s 47B (1) may have been that the expression 'to whom Part 3 or Part 4 of this Act is applicable' qualified the immediately preceding words 'or of any child'. Such a provision would have been understandable because both Part 3 (see s 18A) and Part 4 of that Act contained provisions applicable to children. However, it is not necessary to express any final opinion about *Hendry v Hendry,* for the Destitute Persons Act 1910 is a thing of the past. It is enough to say that I am not satisfied that as to the issue raised by the present appeal the 1968 Act made the 'revolutionary changes' suggested by the Magistrate from whose decision the appeal is brought."

It is satisfactory to have this matter set at rest and to know that the recent decision in *White v White* (1973) 14 MCD 95 appears to be correct.

PRHW

ABORTION IN PERSPECTIVE—I

The term "abortion" is not defined by statute. In *Dorland's Medical Dictionary* (23rd ed 1957), it is defined as the premature expulsion from the uterus of the products of conception—of the embryo, or of a non-viable foetus. The same work defines the developing individual as an embryo from one month after conception to the end of the second month, and as a foetus from the end of the second month until birth. The *Encyclopaedia of Social Sciences* refers to abortion as "giving birth to the foetus before it becomes a viable human being, which is 26 weeks after conception". "Miscarriage" is the term used in the text of New Zealand statutes from 1866 onwards, but "abortion" appears in the marginal notes or subheadings; this interchangeability accords with *Gradwohl's Legal Medicine* (2nd ed, 1968), in which the two terms are used synonymously to describe the interruption of pregnancy at any stage in its development. *Stedman's Medical Dictionary* (19th ed., 1957) makes a distinction between abortion and miscarriage, the former signifying the emptying of the uterus prior to the fourth month of pregnancy, the latter during the fourth, fifth or sixth month (after which "premature delivery" is the appropriate term). This distinction, however, has not been followed by other medical writers, nor by the Legislature, nor does it seem to be established in common usage. Many abortions (miscarriages) occur spontaneouesly, especially within the first few weeks.

There is nothing new about abortion. It by no means shocked the conscience of the Athenians of the classical era; Plato discussed it not so much from a moral standpoint but eugenically, and proposed in a rather uncontroversial way that the offspring of parents past their prime, whom he defined as mothers over 40 and fathers over 55, be disposed of as creatures that must not be reared; he did not pause to discuss whether abortion or infanticide was the appropriate technique. The only significant condemnation of abortion among the ancient Greeks is that contained in the Hippocratic Oath, but the authenticity of the anti-abortion section has been questioned by modern critics. (Lawrence Lader, *Abortion,* Beacon Press, Boston 1967, p 76.)

In Roman times, even during the Christian era, abortion was regarded rather as an offence against the parents than against the unborn life and apparently it was no offence if it was

done with their consent. (*Modern Law Review*, Vol 2, p 131; Garraud, *Droit Pénal Français*, 1924, Vol 5, p 370.)

The extreme paucity of references to abortion in the authorities on English criminal law prior to the 19th century could be due to the fact that the offence was one of ecclesiastical cognisance. One of the greatest authorities on the common law, Sir Edward Coke (who became Chief Justice in 1606) wrote in his famous Institutes: "If a woman be quick with child, and by a potion or otherwise killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, and no murder." This was the same Sir Edward Coke whom G M Trevelyan described as one of the most disagreeable figures in our history, and whom Lord Birkett called narrow-minded, obstinate, and fanatical. These few lines were Coke's sole contribution to the subject of abortion, but sufficed as a precedent for later writers for generations.

As indicated by Coke, abortion before quickening was no crime. Even after quickening, it was never classed, with murder, as a felony, for it was a misdemeanour ("misprision") only.

The distinction between a foetus that has quickened and one that has not may seem nowadays to be not only a fine one but also to involve difficulties of proof. Obviously there could be no evidence of it other than the testimony of the mother herself. Yet the law stood in this condition for centuries, very likely because prosecutions were so rare.

It was not until 1803 that the English Parliament passed a law to make pre-quickening abortion a crime. Historically, there is no evidence to suggest that the Legislature was activated either by philanthropic motives or by the Church's moral influence. In the lengthy preamble to the 1803 Act the stated purpose of the Legislature was to provide adequate means for the prevention and punishment of "divers cruel and barbarous outrages" which were being "wickedly and wantonly committed in divers parts of England and Ireland, upon the persons of divers of his Majesty's subjects, either with intent to murder, or to rob, or maim, disfigure, or disable, or to do other grievous bodily harm to such subjects . . . and . . . certain other heinous offences, committed with intent to destroy the lives of his Majesty's subjects by poison, or with intent to procure the miscarriage of women, or with intent, by burning, to destroy or injure the buildings and other property of his Majesty's subjects, or to prejudice persons who have become insurers of or upon the same."

Only the more fanatical supporters of the modern law as it affects abortion would claim that in enacting this statute (the direct ancestor of the New Zealand legislation) the English Parliament of 1803 was motivated by a humanitarian concern for the rights of the unborn child. The Act is a relic of the Industrial Revolution in its harshest era. The Parliament that passed it represented the growing class of industrialists who were making fortunes from child labour. This was the time when, by means of the widespread adoption of the Speenhamland Act, wage rates were being successfully held down, and real wages reduced, so pauperising whole areas of the working population to the profitable advantage of the largest employers. "Frequent strikes, bread riots and machine wrecking riots kept the Government in a state of terror. The whole country was covered with a network of barracks . . . The industrial areas were treated almost as a conquered country in the hands of an army of occupation. Troops were freely used to suppress disorder," as at the Peterloo Massacre of 1819. (A C Morton, *A People's History of England*, 1965, p 349.) This was the time of the jailing of republican lecturers, and of the eight-year suspension of habeas corpus; of rick-burning and pillaging, of the seizure of food by unemployed labourers for sale at a reduced price; when anyone unable to find work was branded a pauper and forcibly deported to the parish of his birth; when pauper apprentices were transported to the mills in thousands. It was an age that saw the banning of Tom Paine's *The Rights of Man* and the exile of its author to America; an age when his notion that politics was the business of the whole mass of the common people was regarded by the governing oligarchy as dangerous and subversive nonsense. In this historical context Lord Ellenborough's Act of 1803 can be seen for what it was: a frantic and repressive "law and order" measure.

For our purpose the relevant parts of this rambling statute are as follows (italics added):

> "1. If any person or persons . . . shall wilfully, maliciously, and unlawfully administer to, or cause to be administered to or taken by any of his Majesty's subjects, any deadly poison, or other noxious and destructive substance or thing, with intent such his Majesty's subject or subjects thereby to murder, or thereby to cause and procure the miscarriage of any woman, *then being quick with child*

. . . then . . . the person or persons so offending . . . shall be and are hereby declared to be felons, and shall suffer death . . .

"2. And where as it may sometimes happen that poison or some other noxious and destructive substance or thing may be given, or other means used, with intent to procure miscarriage or abortion where the woman may not be quick with child at the time, or it may not be proved she was quick with child . . . if any person or persons . . . . . shall wilfully and maliciously administer to or cause to be administered to, or taken by any woman, any medicines, drug, or other substance or thing whatsoever, or shall use or employ, or cause or procure to be used or employed any instrument or other means whatsoever, with intent thereby to cause or procure the miscarriage of any woman *not being, or not being proved to be, quick* with child at the time of administering such things or using such means . . . the person or persons so offending . . . shall be . . . guilty of felony, and shall be liable to be fined, imprisoned, set in and upon the pillory, publickly or privately whipped, or to suffer one or more the said punishments, or to be transported beyond the seas for any term not exceeding fourteen years."

Under this first statutory attempt to prohibit abortion, there was no fixed penalty for abortion before quickening, either by an instrument or by a drug; for abortion by a drug after quickening the death penalty was mandatory; abortion by instrumental means after quickening was not even mentioned.

Difficulties were caused by the Act's requirements as to proof of quickening. In a prosecution under s 1, reported in 1811, the woman swore that although she was in her fourth month of pregnancy she had not felt the child alive within her before taking the medicine: as her testimony was incapable of contradiction the Judge was able to direct an acquittal. (The prisoner was subsequently indicted under s 2 and again acquitted after telling the jury that he had given the woman "an innocent draught for the purpose of amusing her" because she had threatened suicide.) In 1828 a Court of 12 Judges ruled that despite the words "not being or not being proved to be quick" there could be no conviction under s 2 where the woman was not pregnant at all. (*Anon* 3 Camp 73; *Scudder* 3 Car & P 605.)

The omission of the case of abortion by instrumental means after quickening seems to have been accidental; an amendment was passed in 1828 making this an offence and putting it on the same basis as the use of a drug after quickening, the death penalty being mandatory in both cases. An amendment passed in 1837 abolished the death penalty, and the maximum term of transportation was enlarged from 14 years to life for all cases, whether the woman was pregnant or not, regardless of whether she had quickened. The law was amended again by the Offences Against the Person Act 1861, which rendered the woman herself liable to prosecution; the 1861 Act remains in force in England as amended by the Abortion Act 1967.

The earlier law was automatically imported into New Zealand with the establishment of the colony in 1840. The first New Zealand legislation was the Offences Against the Person Act, 1866, which was passed through all its stages in both house of Parliament without debate. It was an exact replica of the English law of 1861. It was re-enacted the following year as part of the Offences Against the Person Act 1867, a codifying statute. This in turn was replaced by the Criminal Code Act 1893, which reduced the penalty for the mother to a maximum of seven years, whilst retaining life imprisonment for any other party. But whereas under the 1866 version the mother herself committed no offence unless she was actually pregnant, the enactment of 1893, though reducing the maximum term of imprisonment, extended it to the case of every woman who tried to procure a miscarriage on herself, by taking any noxious thing or using any instrument, whether she be pregnant or not. The 1893 Act was not the product of an enlightened spirit of humanitarianism. During its passage through the House of Representatives, one member described its provisions as being sharp as an eagle's talons and as savage as an untamed wild beast; it aimed, he said, at the deprivation of human liberty; it contained clause after clause containing the punishments of flogging and whipping.

The present law in New Zealand is set forth in the following sections of the Crimes Act 1961:

182. Killing unborn child—(1) Every one is liable to imprisonment for a term not exceeding 14 years who causes the death of any child that has not become a human being in such a manner that he would have been guilty of murder if the child had become a human being.

"(2) No one is guilty of any crime who before or during the birth of any child causes

its death by means employed in good faith for the preservation of the life of the mother.

"183. Procuring abortion by drug or instrument—(1) Every one is liable to imprisonment for a term not exceeding 14 years who, with intent to procure the miscarriage of any woman or girl, whether she is with child or not,—

"(a) Unlawfully administers to or causes to be taken by her any poison or any drug or any noxious thing; or

"(b) Unlawfully uses on her any instrument.

"(2) The woman or girl shall not be charged as a party to an offence against this section.

"184. Procuring abortion by other means —(1) Every one is liable to imprisonment for a term not exceeding 10 years who, with intent to procure the miscarriage of any woman or girl, whether she is with child or not, unlawfully uses on her any means whatsoever, not being means to which section 183 of this Act applies.

"(2) The woman or girl shall not be charged as a party to an offence against this section.

"185. Female procuring her own miscarriage—Every woman or girl is liable to imprisonment for a term not exceeding seven years who with intent to procure miscarriage, whether she is with child or not,—

"(a) Unlawfully administers to herself, or permits to be administered to her, any poison or any drug or any noxious thing; or

"(b) Unlawfully uses on herself, or permits to be used on her, any instrument; or

"(c) Unlawfully uses on herself, or permits to be used on her, any other means whatsoever.

"186. Supplying means of procuring abortion—Every one is liable to imprisonment for a term not exceeding seven years who unlawfully supplies or procures any poison or any drug or any noxious thing, or any instrument or other thing, whether of a like nature or not, believing that it is intended to be unlawfully used to procure miscarriage.

"187. Effectiveness of means used immaterial—The provisions of sections 183 to 186 of this Act shall apply whether or not the poison, drug, thing, instrument, or means administered, taken, used, supplied, or procured was in fact capable of procuring miscarriage.

Section 182 is a re-enactment of s 200 of the Criminal Code Act 1893, which is substantially similar to the (English) Infant Life Preservation Act 1929. This section, like the infanticide section, is an appendage to the law of murder (*R v Bourne* [1939] 1 KB 687, 691). It was considered necessary because of the common law rule that the law of murder protects only those human beings that are born—completely born, though the umbilical cord need not have been severed. Whereas our statute speaks of a "child that has not become a human being" the expression used by the English enactment is "child capable (ie at the time when the act is done) of being born alive . . . before it has an existence independent of its mother".

Several points deserve comment. First, s 182 assumes that the child of which it speaks is not a human being. No further definition of the expression "child" is vouchsafed to us, but the words "capable of being born alive", though not appearing in the New Zealand enactment, would certainly be assumed in its interpretation. The Births and Deaths Registration Act 1952 uses the expression "still-born child" for one which has issued from its mother after the expiration of the 28th week of pregnancy and which was not alive at the time of issue. The birth of such a child, though not its death, must be duly registered. Still-births occurring after the twentieth week but before the expiration of the twenty-eighth week are termed "foetal deaths", which are not registrable in any way, although they must be notified by any doctor or midwife who happens to be in attendance at the time. There is no provision for registration or notification in any case occurring before the expiration of the twentieth week.

Secondly, subs (2) plainly justifies the killing of an unborn child if its mother's life is at stake. This provision was necessary, for otherwise it would be a crime to save the life of the mother, a procedure which has always been acceptable to the majority of obstetricians. Presumably no Roman Catholic surgeon could take advantage of the subsection, and one hopes that in an appropriate case a Roman Catholic surgeon would feel able to refer his patient to some other practitioner.

Thirdly, no proposal is mooted to mitigate the severity of subs (1) nor is there any proposal from the conservative side for the repeal of subs (2) in the interests of the unborn child.

With regard to s 183, we see at once that it contains no provision corresponding with s 182 (2). Yet, if s 182 enables the lawful destruction of an eight-month child to save its mother's

life, how, one may ask, can the law justly prohibit an abortion done for the same purpose on an eight-week embryo? The clue is in the use of the word "unlawfully", which is Parliament's way of saying that if the operation is "unlawful" then it is a crime; but that if the operation is performed otherwise than "unlawfully" then it is not a crime. The law remained in this state of mystic simplicity for many decades without challenge. In 1938, however, Mr A W Bourne, a prominent obstetric surgeon and gynaecologist of London, publicly announced that he was going to perform an abortion on a 14-year-old victim of gang rape. "I have done this before," he said, "and have not the slightest hesitation in doing it again. I have said that the next time I have such an opportunity I will write to the Attorney-General and invite him to take action." Mr Bourne was as good as his word and was duly prosecuted. At the trial the Attorney-General admitted that fear of danger to life would be a good defence. Mr Bourne and other medical witnesses argued that this was too narrow. "We cannot draw a line," they said, "between danger to life and danger to health. If we waited for danger to life, the woman is past assistance." Counsel for Mr Bourne stigmatised as a "revolting proposition" the view that a doctor faced with the practical certainty of his patient's complete mental or physical breakdown must not procure her abortion.

After comparing the Offences Against the Person Act with the Infant Life Preservation Act (ss 183 and 182 of the New Zealand Crimes Act) Mr Justice Macnaghten decided that an abortion done in good faith for the purpose only of preserving the mother's life is not unlawful; that, in other words, the killing of her unborn child is justified in such a case by necessary implication, just as it is expressly justified in s 182. But Mr Justice Macnaghten went further. The medical witnesses had testified that if the girl were forced to bear her rapist's child she would almost certainly have some sort of mental breakdown and be in grievous danger, and Mr Bourne himself was sure that her physical health would be undermined with symptoms which might wreck her whole life. Faced with this evidence, Mr Justice Macnaghten put a further gloss on the word "unlawfully". For life depends upon health, and it may be that health is so greatly impaired that death results. He concluded: "If the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of saving the life of the mother."

His Lordship contrasted the case with one which had come before him earlier in the same session, and which he mentioned to the jury to show how cases can be altered by circumstances. In the other case a woman without any medical skill or medical qualification used an instrument for procuring the miscarriage of a pregnant girl; she used her instrument and within an interval of time measured not by minutes but by seconds the victim of her malpractice was dead on the floor. That, observed Mr Justice Macnaghten, was the class of case which usually came before the Court. Mr Bourne was acquitted.

Though the case of *R v Bourne* was a milestone in medical and social jurisprudence, it leaves most doctors in doubt as to the exact degree of danger to the mother's health that justifies aborting her. Most doctors would no doubt consider it impossible for a lawyer to formulate a workable criterion. The expression "physical or mental wreck" has created among many doctors and in some hospitals the notion that, short of imminent danger to the mother's life, only the most drastic peril for her health can lawfully warrant the operation. According to one eminent jurist, the *Bourne* decision does not extend beyond the preserving of the mother's longevity, and the possibility of her becoming a physical or mental wreck must be considered only in this context and not as a separate criterion. (Glanville Williams, *The Sanctity of Life and the Criminal Law,* Faber 1958, p 153.)

Opinions may vary as to the degree of sickness—physical or mental—which may be lawfully averted by means of abortion as the law now stands. There are some who claim that the rule in *Bourne's* case allows abortions to be lawfully performed to cure even minor psychological ailments; and that therefore the law does not need altering. Yet, on any principle, it seems odd that abortion should be thought permissible for minor medical indications but abhorrent for the most drastic non-medical indications; for *Bourne's* case cannot on any interpretation be so stretched as to cover cases of rape (lacking psychiatric indications), feeble-mindedness, mongolism or insanity of the mother, or of the father; transmissible syphilis or other dis-

ease; incest or intercourse with a girl under 16 (or under any lesser age) or where there is risk of the child's being seriously deformed; not to mention the cases of parents endowed already with more children than they can cope with, even where the doctor may feel sure that any addition to the family would cause the marriage to founder or any existing children to suffer deprivation.

B M LITTLEWOOD

A PACIFIC REGIONAL COURT OF APPEAL?

A paper prepared by the HON A M FINLAY *QC, Attorney-General for New Zealand, for delivery at the First Fiji Law Convention, Suva. In Dr Finlay's absence at The Hague, the paper was delivered by Dr D L Mathieson.*

Where the legal buck ought finally to stop is a question that lawyers like to mull over from time to time—some contemplatively, some passionately, some obsessively. Newspaper editors are prone to share their interest, but by and large the public remains unmoved. New Zealand has (or at any rate, had) a reputation for being more British than the British and was certainly among the last and the most reluctant to accept the transformation of Empire into Commonwealth. Anything that slowed down that change and buttressed the old order commanded ready support, and the existence of the Judicial Committee of the Privy Council as the final Court of appeal was accepted as part of the natural order of things. Occasional eccentrics pointed out the oddity of giving the final judicial say to a group of English gentlemen (with an occasional Scotsman or two, trained in a different system of law) sitting 13,000 miles away and enjoying a life-style quite remote from antipodean experience, but this was brushed aside as unimportant.

(To put it this way is to state the populous—or populist—case, and the sources from which the Judicial Committee may supplement this standing membership, do in fact give it some substance as a Commonwealth appellate Court. Most of its "client" countries of any size are now represented on the Committee from time to time, and, in the case of Australia, regularly. Indeed some mysterious process seems to result in an Australian or New Zealand Judge being a member of the Court convened to hear the more important appeals from each other's country—ensuring that any "antipodean aspect" of the issues will not be overlooked.)

Strangely enough, while the winds of change were still but a gentle zephyr a New Zealand Chief Justice not normally listed in the categories of radicals was moving regretfully in the opposite direction. I have failed to unearth details, but came across this interesting passage in an obituary by New Zealand's then Attorney-General, Sir Clifton Webb, to Sir Michael Myers, who died in 1950.

"In Commonwealth family matters, Sir Michael saw clearly the value of the Judicial Committee of the Privy Council, not only as a final Court of appeal for the dominions and dependencies of the Crown, but also, and more especially, as a connecting link in the sentimental ties that bind us to the mother country. He watched with disappointment the decline in the Privy Council's popularity with some of the other constituent members of the Commonwealth. He saw with dismay that some had banished it entirely from their Judicial systems. And so reluctantly, very reluctantly, he had come to the conclusion that, in this phase of its activities, the doom of the Privy Council was sealed. He therefore cast about for an alternative, and was already enlisting support for a proposal to establish one common Court of appeal for the whole Commonwealth."

But it was left to England itself to outline a substitute and at the Commonwealth and Empire Law Conference held at Sydney in 1965 Lord Gardiner, the then Lord Chancellor (of a Labour administration) put forward a plan for a Commonwealth Court of appeal that would replace both the Judicial Committee and the House of Lords. Mr B J Cameron, an officer of the New Zealand Justice Department who was privy to top-level thinking, says of this:

"The idea did not find much favour among the more important Commonwealth countries. The New Zealand Attorney-General, the late Mr Hanan, is known to have expressed a welcome for this move and to have supported it somewhat effusively: once again New Zealand was conspicuous for espousing any move, however anachronous, that might seem to promote Commonwealth ties and for indentifying itself with British proposals. It is plain however that the notion was too much behind its time and

that those countries which had done away with appeals to London, or where dissatisfaction with the existence of an appeal was substantial, were unwilling to subject the decisions of their own Courts to another exterior tribunal. Nothing more has been heard of the proposal. Mr Hanan's own views subsequently altered, and within a year or two he had become convinced that an appeal to any tribunal outside New Zealand was outdated."

He goes on:

"In recent years also, tentative proposals have been made for some species of regional Court, which would hear appeals from Australia, New Zealand and perhaps Malaysia and the remaining Pacific and South-East Asian fragments of Empire. Compared with a Commonwealth Court of appeal, such a regional Court would have both advantages and disadvantages. One seldom-mentioned potential advantage is that it could create a third principal nucleus of development of the common law, comparable with England and America. There have been isolated supporters for it in New Zealand but it has not and is unlikely to command widespread enthusiasm here. More importantly it would almost certainly founder on the rock of Australian unwillingness to subject the decisions of its High Court to review by such an authority. If that authority were the High Court under another name this in turn would be manifestly unacceptable to New Zealand*(a)*."

Mr Hanan supported the Gardiner proposal on the following grounds:

(a) The fact that our legal systems are basically the same gives a practical means of strengthening the links between Commonwealth countries.

(b) The common law system develops best when there is close and regular contact between those who apply it and the Commonwealth Court of appeal would bring the finest legal minds to bear on basically common problems.

(c) The standard of Judicial work in individual countries would be enhanced by the association between Judges of different jurisdictions.

(d) The circumstances of the modern Commonwealth indicate that there should be a supreme appellate tribunal more representative in character than the Privy Council.

A number of other countries (or rather a number of other delegates) also welcomed it but an analysis of their views shows that for the most part they were moved by quite different considerations. Some (for instance certain Malaysian speakers) appeared to envisage a Commonwealth Court of appeal as a guarantor of fundamental rights, which it cannot be. Others (including I think some of the Africans) saw virtue in it as a vehicle for settling intra-Commonwealth disputes. Still others were motivated by the dearth of trained lawyers in their country.

Since then, of course, more and more Commonwealth or ex-Commonwealth countries have rejected the Privy Council though the list of "client" countries or territories still on its consulting panel (as at the end of 1972 and as set out in the supplement to the 3rd edition of *Halsbury's Laws of England*) is impressive on paper, but the business they generate is small compared with that to be derived from the rejecting countries, and many of the "takers" have limited to a greater or lesser degree the type of cases that may go to London.

Appeals are still permissible from:

New Zealand
Australia
Zambia
Malawi
Nigeria
Gambia
Sierra Leone
British Honduras
Jamaica
Trinidad
Tobago
Windward Islands
Leeward Islands
Falkland Islands
Uganda
Basutoland
Bechuanaland
Swaziland
Mauritius
Seychelles
West Indies (includes Montserrat and Virgin Islands)
Bahamas
Barbados
Bermuda
Malta
Gibraltar
British Antarctic Territories
St Helena
Malaya
Singapore
Sarawak
North Borneo
Brunei
Hong kong
Fiji
Channel Islands
Isle of Man
Colonial Courts of Admiralty

They have been totally abolished by:

Pakistan
Ghana
Cyprus and Sri Lanka
Canada
South Africa
India

Clearly it is no longer a stabilising or unifying body of any consequence for the Commonwealth as a whole. Equally clear is

(*a*) Extract from "Appeals to the Privy Council—New Zealand", B J Cameron, Otago Law Review, 1970.

the diminished significance of the Commonwealth itself—one needs but mention the number of countries that have opted for complete independence with republic status, and Britain's own entry to the European Economic Community. The Crown and all it signifies persuades only a few, and a diminishing number of countries, to submit litigation for final determination outside their boundaries. The question is whether some other circumstance would make this more acceptable and provide a legal summit better than any that could be established internally. Specifically, are there sufficient community of interest and experience among the countries in or bordering the Pacific for them to agree upon a tribunal of ultimate Judicial resort?

Before turning to this one other point might be mentioned. It is assumed that such a Court would be not just superior, but supreme. In other words that there would also be a right of internal appeal within adherent countries—as now in New Zealand from a Court misleadingly named "Supreme" (though we are not alone in this), to the Court of Appeal—so continuing our familiar 3-tier system. There is no particular magic in this number. Some appeals would succeed and some decisions reversed, however many reviews were provided for. To set up a dozen successive Courts of appeal would make not for certainty but the reverse, with a multiplicity of dissenting, as well as majority judgments. (I confess to an heretical hankering, in fact, to the old single judgments of the Privy Council, which no doubt reveals an authoritarian or elitist streak.)

To be realistic without being offensive, what could each of them contribute to manning such a Court? Australians would, of course, predominate, but which Australians and by how much? No one doubts that the High Court of Australia has built up and will continue to deserve the reputation of being one of the world's outstanding appellate bodies, but if it were drawn from too much, why not just leave it as it is and give it a new (or additional) title as well as the job itself. And would federal representation alone be likely to satisfy the governments (or the people) of the individual states? New Zealand would want some minority presence, but is there sufficient legal strength elsewhere in the South Pacific to warrant representation? In Fiji, with a growing bench and bar, probably yes, and Papua-New Guinea is certainly large and populous enough to demand consideration but the advent of a high level indigenous Judiciary is still likely to be some way off. Such countries as Tonga and Western Samoa today look outside their own boundaries for Judges of their own superior Courts and are unlikely for many years to generate sufficient litigation to support a significant bar. It may be asked therefore whether a regional Court could be much more than a group of Australian and New Zealand Judges set up under some nominating formula and operating under another name.

The attitude of Australia would, I suggest, be crucial. The present recourse to London is a whittled down remnant, and total substitution of an internal Australian appeal has been proposed. It is and is likely to remain a very live political issue, but whatever the outcome I cannot myself conceive any third possibility as being acceptable to either the states or the Commonwealth governments. The question hardly poses itself as "Sydney or the bush", but certainly as "Australia or London", and I cannot see *any* Australian government agreeing to submit the constitutional questions that underlie most keenly disputed issues being submitted to anything other than an Australian or a British tribunal—and even traditionalists may come to suspect the latter, as English law and practice move more and more into the European orbit. (Curiously enough, the advent of the Whitlam Government, with its known inclination towards national self-sufficiency and the increased momentum it gave to the movement to sever all Australian appeal links with the Privy Council, prompted the NSW Attorney-General, Mr McCaw, to speculate on the possibility of a regional Court for all Australian jurisdictions as well as for New Zealand and Perhaps Malaysia. One is inclined to view this as a move in a political chess game.)

The single most important factor that continued to tie units to the Privy Council in face of the centrifugal impetus of the disintegrating Empire was the unity of the Commonwealth—a concept as mystical as it was traditional. With neither mystique or historical associations to provide the cement is there any real hope that a Pacific Court would succeed where the Privy Council failed?

Is there any real need for such a Court? Indeed, is there any real justification? Is there anything more than a vague sentiment that it is good and noble for countries (and peoples) to unite in joint enterprises? The proposition has sometimes been advanced that the Privy Council exercised a stabilising influence, inhibiting too rapid or radical change. On the other

hand, some favoured Lord Gardiner's proposal on the ground that it would protect—and in some countries perhaps establish and extend—fundamental rights. This infers a disposition to innovate and make, rather than declare law. I believe it can be said with complete confidence that any tribunal set up with the object of either resisting or fomenting change is doomed to failure as a Court of law. Moreover, most countries—indeed all countries—have laws, customs and usages—particularly pertaining to land—which are singular to themselves; providing no assistance in elucidating disputes rooted in different life styles and themselves resistant to foreign interpretation. It should not be overlooked, too, that statute law unrelated to the common law is accounting for a larger proportion of the total body of law in all countries. Statutes, because they express policies, often diverge greatly from one jurisdiction to another. Moreover as the pace of law reform proper increases more of the common law will be translated into a statutory form and national differences will doubtless multiply. Behind the idea of a common Court lies the assumption of a more or less common law that it will administer. It is true that the Privy Council managed (perhaps imperfectly?) to cope with a wide range of cultures and even judicial systems, but that could be an exception that proves the rule. What is likely to be the future shape of the laws of Australia, New Zealand, Fiji, Western Samoa, etc? Without the centripetal effect of some economic grouping, such as a common market—which no one has suggested, and which present circumstances and trade just could not support—is not the current trend towards nationhood and self-sufficiency?

It is unquestionably right to cherish the ideal of unity of law as between commonwealth countries and indeed on an even wider basis. We should not, however, confuse unity with uniformity and it may fairly be queried why uniformity of law should be regarded as a paramount value. This question has rarely been asked in New Zealand. In the past our lawyers have assiduously fostered the concept of one legal system for little discernible reason except for its own sake. It may be appropriate now to challenge this myth. New Zealand has as far as the law is concerned attained a state of maturity. The independence and integrity of our Courts and the rule of law are long and securely established. With the creation of a permanent Court of Appeal the quality of legal decisions has improved and I do not think differs in kind from the standard in the United Kingdom and Australia. The Court of Appeal is perfectly capable of acting with distinction as a final tribunal of law. To say that there is need for a further appeal whether to the Privy Council or to a new Court is to imply that our Courts administer an inferior brand of justice—or if these words are too strong and underrate the tradition attaching to a 3-tier structure, then it implies on the part of the middle level that its judicial determinations fall short of total acceptability.

There is little to suggest, therefore, that New Zealand has much to gain from the establishment of and participation in a Pacific Court of appeal. Have we anything to contribute? After all President Kennedy urged that we should not ask what our country can do for ourselves, but what we can do for it. More so, what can we do for others?

Already we provide Judges or retired Judges to staff Courts of appeal in Fiji and Samoa. I believe this might well be continued and perhaps extended, perhaps on the model of the International Court of Justice. The wholesale and sometimes equivocal disregard of its judgments perhaps does not inspire confidence in the effectiveness of that august body, but the same could be said of any tribunal entirely lacking enforcement capacity. There might be merit in Pacific countries agreeing to nominate lawyers of distinction to make up a tribunal to which parties to an original appeal could, before their appeal is heard, agree should be given a right of further appeal. The final decision would in each country, have to be treated and given effect as if it were the decision of that country's own Court of appeal. The nominated members of the tribunal—say five—would normally be Judges who would continue to sit locally and assemble on an ad hoc basis for the relatively few occasions I imagine they would be called upon.

For a final word I turn to a robust and trenchant onslaught on the whole appellate system by Professor L C B Gower, Vice-Chancellor of the University of Southampton and formerly a member of the English Law Commission(*b*). His target is "the House of Lords, our supreme Court of appeal, (which) has never shone as a law reforming agency and now has ceased to perform the only other justifiable role for an expensive third-tier appeal Court—to settle important questions of law

(*b*) L C B Gower, "Reflections on Law Reform" (1973) 23 University of Toronto Law Journal, 257.

clearly and unambiguously." In an address at the University of Toronto he says: "In 1900 it at least did that. In the volume of appeal cases for that year 27 House of Lords decisions are reported. These comprised considerably less than half the appeals heard and were, presumably, the most important. Yet one opinion only was delivered in six of them, the total number of speeches was 85 and their average length was about 1100 words. Today there are far fewer House of Lords decisions and virtually all are reported. Yet, in the volume for 1971 in which 30 cases are reported, in only three was there but a single opinion. A total of 109 speeches were [sic] delivered and their average length (approximately 2500 words) had more than doubled. In most cases all the Law Lords agreed on the result, but insisted on arriving at it by independent lines of reasoning supported by copious citation from the judgments of other, and less authoritative, tribunals. As a result of this prelixity it is sometimes impossible to tell what legal principle was decided. This of course, delights the Master of the Rolls when, as occurs not infrequently, it is he that is being reversed, for it enables him to go on in his own sweet way despite the reversal. But it gives little comfort to protagonists of Judge-made law."

This disconcerting record leaves the traditionalists unmoved. Lord Reid, for instance, a staunch defender of the common law and proponent of its perfection, justifies multiple and divergent judgments "by an argument which" (comments Professor Gower) "if he had not put it forward, I should have regarded as untenable". "For a time," says Lord Reid, "it was customary in the House of Lords to have only one speech in criminal appeals. But after the disaster in *Smith v D P P* we changed that. I don't believe the criticism would have been solved if there had been more than one speech. Differences would have been expressed which would have taken the edge off it." Professor Gower's sour rejoinder is cutting: " 'In other words, we dare not be clear, in case we are wrong'. What an epitaph for a supreme Court of appeal! And the trouble is that it isn't enough because the body is still alive and kicking." To Gower the problem is a deus ex machina. "Much of the blame," he says, "can presumably be ascribed to typewriters and dictaphones: the rot set in when Judges no longer had to write their judgments in long-hand. [As a result] judgments get longer and longer [and] in appeal Courts each Judge insists on delivering a separate opinion and most of the opinions consist of tedious and unnecessary repetition of what other Judges have said in earlier cases."

The prolixity of the Privy Council seems to have been slightly more restrained but its tongue is also beginning to wag in the same verbose manner. In the base year of 1900 selected by Professor Gower 32 cases are reported with, of course, 32 single judgments averaging 2400 words in length. In 1967 it agreed to reveal whether the Committee was unanimous or divided and began to disclose minority opinions. The 1966 volume of appeal cases reported 10 decisions of the Privy Council, all, of course, single judgments averaging 2400 words. The 1972 volume contained 7 cases, of which two were majority decisions, and they ran to an average of 2800 words: but the seven cases of the previous year, with one more split decision, averaged 3300 words.

If, as I believe, one of the requirements of the law is certainty, is it attained by an elaborate appellate pyramid? Few practitioners will not have found substance in Gower's complaint, and we are all familiar with the on-the-one-hand-but-then-on-the-other syndrome, a phenomenon that manifests itself even at the highest levels of legal eminence.

It is not that the law made (or should I be a purist and say "declared", or even "revealed"?) by Judges needs to be right, so much as practicable. Consonance with legal theory must take second place to feasibility. If "good" law (ie, of impeccable parentage and descent) is unworkable it must be changed and the proper body to do that is the Legislature. But some short experience of government has persuaded me that this is not achieved as easily as I used to believe. The legislative machine is ponderous enough: accumulating its fuel in the shape of bills is slower moving still. And if (as again I believe) another attribute of a good law-making process is speed, then the weak link is that which—tenuously—joins the Courts to Parliament.

On reflection I am inclined to think there is more to be said for a two-tier appellate system rather than three, provided it is coupled with efficient scrutinising machinery, such as a law reform committee, which can examine judgments and if they have unsatisfactory results, recommend remedial measures to Parliament, expressed, for preference, in draft Bills. This would free the common law from the fortuitive artificiality which must restrict and distort its unaided growth. Left to itself it has to await the arrival of an ideal set of facts

through which a developing principle may be applied and extended. Seldom do they arrive—or arrive in time—and cases with facts falling short of the ideal must be seized on and the principle moulded about them. A revisory body seized with the task of evaluating all obiter dicta could fit the pieces into a legislative pattern much more neatly and efficiently than the common law wrestles with its jigsaw.

Such a supervisory function has been suggested as one of the roles a reconstituted second chamber might play in New Zealand's present unicameral administration. It would be odd if dissatisfaction with the Judicial performance of the House of Lords were to result in prolonging and rejuvenating its political life.

SECURITY INTERESTS IN MOTOR VEHICLES

For some considerable time the question of providing better protection to buyers of motor vehicles has been under consideration by the Government. All too often people who have made purchases in good faith, honestly believing they were buying from a person authorised to transfer a clear title, have had "their" motor vehicles seized by persons entitled to charges on them. A simple and effective solution is not easy to find and a number of government departments have been giving the problem close study and have recently joined in an inter-departmental report. This does not claim that it has arrived at a final and foolproof solution but it is a significant contribution to thinking on the topic.

The Attorney-General, the Hon A M Finlay QC, in releasing the report adds the warning that it amounts to no more than a set of proposals put forward for discussion and consideration and must not be taken, at this stage at any rate, as necessarily expressing Government policy.

The Problem

The problem arises when a person without title or authority to pass title to a motor vehicle, purports to do so in favour of a bona fide purchaser for value. This may occur when title in a vehicle is held by a finance company under a hire purchase agreement, yet possession of both the vehicle and the certificate of registration remains with the registered owner who then attempts to sell the vehicle to a third party.

The task of devising a system of registration involves striking some balance between the interests of the owner or the secured party and the purchaser.

While most chattels are to some degree portable or mobile, the problem tends to be particularly acute in relation to motor vehicles for two reasons. The *first* is the attitude of intending purchasers of motor vehicles. There is a common but mistaken belief that provided the person from whom they are purchasing is the registered owner and produces the registration certificate he in fact owns the vehicle and no further inquiries are called for. This is not the case. Under the Transport Act 1962 "the registered owner" is not thereby the owner of the property in the vehicle, and entries on the registration certificate are not in themselves evidence of property ownership.

The *second* reason is the failure of the present system of registration to provide information to prospective purchasers or encumbrancers of motor vehicles about any security interests that might exist in those vehicles.

The implementation of a proposal which would in effect confer on the certificate of registration the legal status of a title of ownership would be similar in many respects to the system of Torrens titles in relation to land. The Post Office has consistently opposed the establishment of such a system on the basis that the problem of unauthorised dispositions of motor vehicles is not of sufficient magnitude to justify the likely setting-up and operating costs of such a system. Further the establishment of a State-guaranteed system of titles to motor vehicles would mean that the Crown would have to accept responsibility for the occurrence of all clerical errors in the system. This too has been regarded as untenable by the Post Office.

Since 1962 the Post Office has attempted to overcome the problem by including on both the "Application for Registration" and the "Notice of Change of Ownership" forms provision for the registered owner to assign possession of the certificate of registration to a third party. A finance company can thus gain a considerable measure of protection by arranging for the registered owner of a vehicle bought on hire purchase to complete the assignment in the company's favour. Where this

procedure has been followed the certificate is held by the company until the hire purchase agreement is discharged. An application by the registered owner for a duplicate certificate of registration is not acted on until the person or firm to whom the original certificate was delivered confirms its destruction or loss, and indicates to whom the duplicate should be delivered. Thus a worthwhile degree of protection is available to the legal owner and through him to the prospective buyers of vehicles in respect of which encumbrances exist.

Recommended registration system

The proposed system, formulated in the course of joint discussions between Justice Department, Post Office and Ministry of Transport officials, in essence places the administrative action taken by the Post Office since 1962 on a legal footing. This system also incorporates features of the scheme favoured by the Tariff and Development Board as well as adhering to the approach advocated by the Contracts and Commercial Law Reform Committee. The new approach would involve the following innovations:

— an onus placed on a secured party to:
(a) notify the Post Office of his interest in the vehicle; and
(b) retain possession of the certificate of registration while that interest in the vehicle subsists.
— forfeiture of the right to recover from a purchaser in good faith if the secured party fails to both notify the Post Office in the prescribed manner and gain possession of the certificate of registration.
— a stipulation that the protection given to a secured party will commence upon notification.
— all persons will be deemed to have notice of the secured party's interest once the Post Office has received notification.
— to effect cancellation, the registered owner will be required to file with the Post Office an appropriate form comprising—
(a) an application for cancellation; and
(b) the consent of the secured party to the termination of the interest. The secured party will be subject to a corresponding duty to give the appropriate consent once the interest has ceased.
— a stipulation that priority will be given to the respective interests in the order of the time of notification.
— the creation of a fee structure on a 'user pays' principle.
— the deletion of 'motor vehicles of all descriptions' from the Seventh Schedule of the Chattels Transfer Act 1924.
— the imposition of an obligation on dealers under the Motor Vehicle Dealers Act 1958 to have possession of the certificate of registration before the sale of a motor vehicle is concluded.

The deletion of motor vehicles from the Seventh Schedule of the Chattels Transfer Act 1924 means that in order to gain a similar measure of protection the secured party will be required to avail himself of the proposed registration system operated by the Post Office; under that system unless the Post Office is notified of that interest then, without express notice, that interest will be invalid and ineffectual as against any bona fide purchaser or mortgagee for valuable consideration.

Cost

Because of the attendant publicity, it is expected that more people will make use of the system than at present and for this reason additional staff—possibly up to six people—will be required at the Motor Registration Centre, Palmerston North where the national register of motor vehicles is kept. Salaries for the additional staff would amount to approximately $30,000 per annum.

Consultation

Should the idea of the proposed scheme meet with approval, consultations will need to be conducted at departmental level with the following interested parties:

— the Motor Unions
— the Federated Road Transport Organisation
— the Retail Motor Trade Association
— the NZ Licensed Motor Vehicle Dealers Association
— the Automobile Association
— the NZ Finance Houses Association
— the NZ Law Society
— the Consumers' Institute.

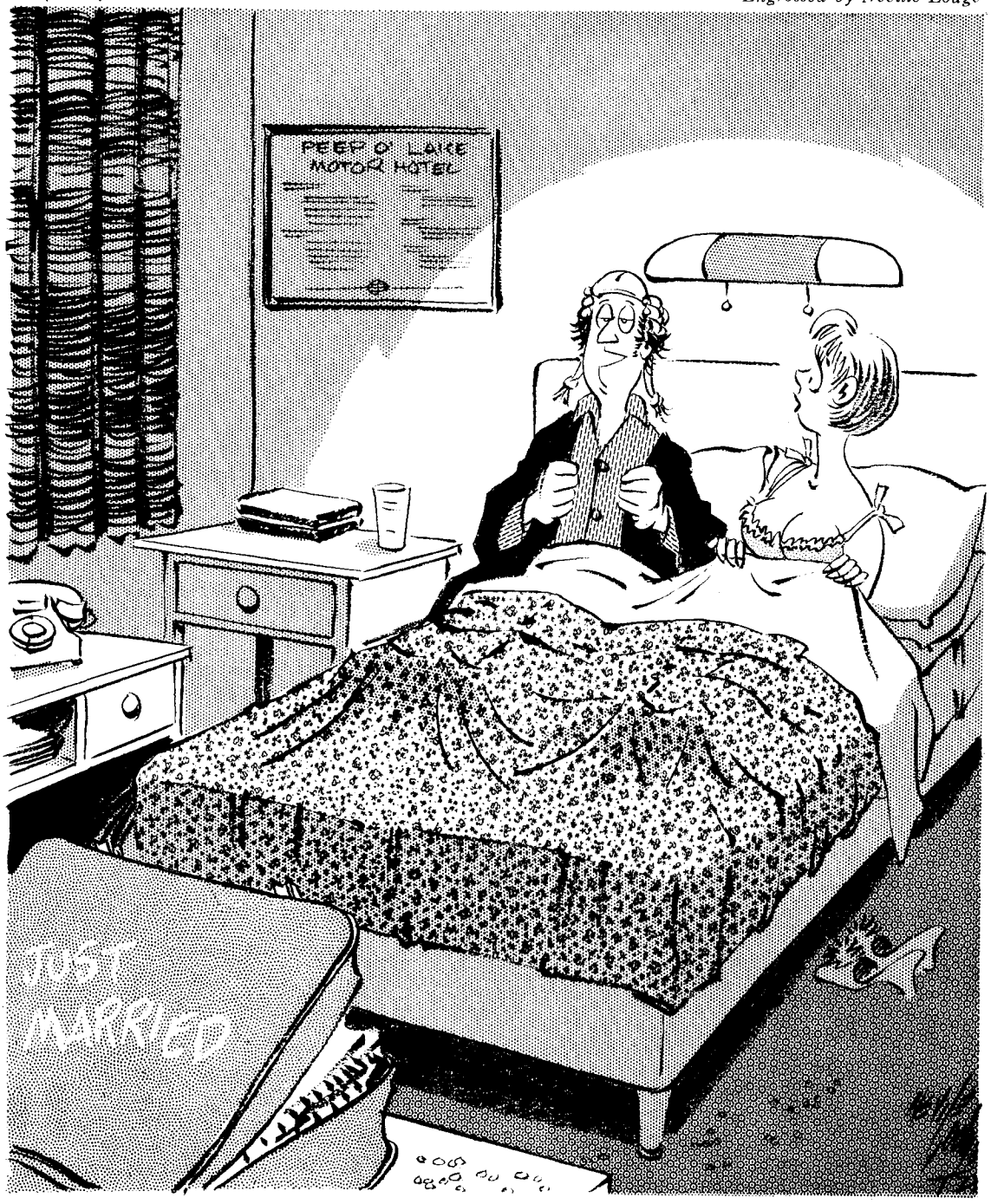
JDP

(Continued from page 484)

Housing Corporation Act Commencement Order 1974 (SR 1974/245)
North Shore Drainage District Order 1974 (SR 1974/242)
Northland Harbour Board Administration Act Expiry Order 1974 (SR 1974/243)
Queen's Fire Service Medal (SR 1974/247)
Queen's Gallantry Medal (SR 1974/248)
Queen's Police Medal (SR 1974/249)
Revocation of Economic Stabilisation (Aviation Fuel) Regulations 1973 (SR 1974/244)
Traffic Regulations 1956, Amendment No 27 (SR 1974/251)
Wage Adjustment Regulations 1974, Amendment No 1 (SR 1974/252)

"A FUNNY THING HAPPENED ON THE WAY TO COURT THIS MORNING . . .": 13

Drafted by Scilicet *Engrossed by Neville Lodge*



"If it pleases, m'Lud, I wish to move in solemn form."

GOING TO LAW

At a time when Court structures are under review and the rules of procedure are receiving close scrutiny, the recently published JUSTICE critique of English civil procedure, *Going to Law*, is all the more pertinent.

Basic to the argument is the question of the cost of litigation, and even though the English have problems in that field which we have managed to avoid, the simple fact remains that litigation in New Zealand is overshadowed by the "twin shadows" of delay and expense.

As Lord Devlin has said: "The trouble at the root of our legal system is that we have allowed it to grow up in an atmosphere in which, where justice is concerned, money is hardly an object. But money must always be an object for those who believe in justice, for if the system is too expensive it will not be used and injustices will go without redress." The moneyless, too, are left at the mercy of those with a long purse.

Small claims are an obvious instance—and a Small Claims Court has long been a necessity. But even where legal aid is involved (and perhaps *because* public funds are involved), the system cries out for simplification.

While not claiming perfection for its result, the report goes a long way towards identifying and remedying fundamental defects, and strikes at the root of the current waste of time and money, by devising a new procedure.

Various overseas models are studied (with the caveat, as relevant to our use of their report as to the Committee's own deliberations, that foreign concepts do not always strike on being transplanted). After a far-reaching analysis the Committee comes down with its proposals, designed to focus on the early elimination of as many disputed points as possible and quickly to determine and resolve matters which are genuinely in contest.

These will require full discussion and lengthy consideration. But such an exercise could be as fruitful here as it should be in Britain.

A typical civil action would proceed like this:

(i) The parties should have taken reasonable steps to ensure that they are aware of the general nature and extent of the dispute between them.

(ii) The plaintiff sends his complaint to the Court and serves the defendant with a copy.

(iii) Within eight days (or longer if he resides abroad) the defendant must write to the Court—with a copy to the plaintiff—saying whether he intends to defend the action. If he does not, the plaintiff can sign judgment in default.

(iv) The complaint must set out the plaintiff's whole case, both in fact and in law, in narrative form and somewhat more fully than a statement of claim does now, but otherwise on much the same lines. It must say how each allegation of fact will be proved: if by documents, copies must be annexed or inspection offered; if by oral evidence, the names, addresses and occupations of the witnesses must be given. If the plaintiff thinks that there is no real defence to his claim, he can attach to his complaint affidavits which prove his case, and ask for summary judgment.

(v) Within 21 days, the defendant must send the Court his defence, with a copy to the plaintiff. This pleading will be subject to the same rules as the complaint. If the plaintiff has asked for summary judgment, the defendant can attach to his defence affidavits showing that he has an arguable defence.

(vi) The master assigned to the action will read both pleadings and the enclosures and, of his own motion, make an order for directions. This order can include (among other things) the following items:

(a) summary judgment for the plaintiff, if he has asked for it and there is no arguable defence;

(b) lists of agreed and disputed issues of fact, and of questions of law;

(c) an order for further pleadings or particulars if anything is not sufficiently clear;

(d) an order to have any question of fact determined by a written report from someone having special and independent knowledge of that fact;

(e) an order for affidavits to be sent to the Court (and, when they have all arrived there, for copies to be exchanged) dealing with all the oral evidence on any one or more of the issues of fact;

(f) an order for discovery of additional documents or classes of documents, both to each other and to the Court.

(vii) When the master has received any affidavits he has ordered, he will have power to decide himself any issue of fact which proves not to be seriously in dispute, and to order the trial by the Judge of any peripheral or "unreal" issues of fact, or of any issue of law, separately, at short notice, with an immediate award of costs (payable within seven days) against the loser.

(viii) It will be open to the master to make further orders which he thinks necessary or desirable from time to time so as to ensure that the case is disposed of expeditiously and fairly (including orders specifying what witnesses are to be called at the trial), and it will be open to any party at any time to apply for an order which he thinks should be made.

(ix) If either party wants the master to make any specific order, they can apply for it at any stage by letter, with a copy to the other side, who can write to say that he agrees, or objects, giving his grounds.

(x) All orders made by masters will be orders nisi, made without a hearing. If either party is dissatisfied with any such order, he can write to the Court asking for a variation. The other side can write to say that he consents. If the variation is not granted, the applicant can appeal to the Judge, where there will be an oral hearing. But the loser will, unless he has consented to the variation or the Judge considers that he acted reasonably in refusing to consent, be ordered to pay the other side's costs of the appeal within seven days, and the Judge will assess the amount then and there. If there is no application to vary the order, it comes into effect after seven days.

(xi) The trial of all substantive issues—whether of fact or law, and whether separately or together—will take place before the Judge and follow largely the present and familiar form, except that where affidavits have been filed, these could, in the Judge's discretion, take the place of evidence-in-chief. Also, the Judge will have read the file, so that counsel's opening can be curtailed, and often even omitted.

This, then, is the proposal. Doubtless it will be discussed. Certainly, it will be criticised. It should, however, not be ignored.

JEREMY POPE

BE BOLD

The 1974 annual report of the Law Revision Commission reiterates the Attorney-General's plea for adventure in formulating proposals for law "reform". Also foreshadowed is a possible reform of the Commission itself. Relevant extracts are:

"The year 1974 will be an important milestone for law reform with the commencement on 1 April of the Accident Compensation Act 1972 implementing the report of the 1967 Royal Commission on the subject. It is not without note that this far-reaching reform was recommended by a special body outside the normal law reform machinery in this country. The report of that Royal Commission provides what I believe to be a good example of a thorough consideration of a topic regardless of the political implications of the course of action recommended. Although it took some years, further reports, and a change of Government, the proposals of the Woodhouse Commission are being substantially implemented. It was this type of approach that I was recommending to the law reform committees in my report last year and it still concerns me that some of the committees seem reluctant to tackle a particular problem and formulate proposals for reform without regard to the political ramifications of the proposals. Once again I urge them not to be deterred by the fact that bold action may involve difficulties. If they conclude the only real remedy for a particular problem is a radical one, I hope they will recommend it and let others count the consequences.

"Reports that were presented to me during the current year included the final report of the special committee under the chairmanship of Mr Justice Macarthur that examined the law relating to companies, and the report of the subcommittee of the Law Revision Commission on computer data banks and privacy. I hope to introduce legislation this session as part of a three-pronged attack on the infringement of privacy. A Bill regulating the activities of private investigators and security guards has already been introduced and I am hopeful that legislation will also be introduced generally regulating the use of listening devices and computer data banks.

"Matters reported on by the law reform committees include unsolicited goods and services, protection of trade secrets, and products liability.

"In the last report of the Law Revision Commission I made mention of the fact that I was not satisfied that our law reform machinery was as effective as it could be.

"The idea behind the establishment of the Law Revision Commission was that the commission would advise the Minister of Justice on law reform policy generally as well as deciding what work should be undertaken and by which law reform committee. The commission would also determine priorities and exercise a general supervisory function over the committees. However the commission meets only once a year and the bulk of the meeting is taken up by consideration of committee reports and the report of the Department of Justice. As a result the commission is not really fulfilling its designated function and it seems to me, therefore, that the time is fast approaching when the function of the Law Revision Commission will have to be examined if it is to avoid becoming an irrelevancy in today's society.

"The five standing law reform committees report annually to me as Minister of Justice and I refer the bulk of the new tops to them for consideration. If it is decided to impleemnt a committee's report the Department of Justice or appropriate department prepares the necessary instructions for the parliamentary counsel's office and generally assists in the passage of the Bill through the House of Representatives. The role of the Law Revision Commission is therefore very limited and although most working papers of the committees are referred to commission members for comment very few comments have been forthcoming. There is therefore a very good argument for the abolition of the Law Revision Commission as it now serves as little other than a figurehead .

"Alternatively consideration could be given to the establishment of the Law Revision Commission on a full-time basis to undertake the work at present carried out by the five committees. The advantage of a permanent full-time body is that given adequate facilities and staff it can examine areas of the law more quickly and with greater penetration than is possible at present. Such an approach has been adopted overseas in countries such as Canada where the Law Revision Commission comprises full-time members appointed for a term not exceeding seven years and two part-time members engaged in legal practice appointed for a term not exceeding three years. This approach has much to recommend it as it ensures that appointees will not become "professional law reformers" with the accompanying danger that they lose touch with the practical effects of the law.

"However, there are inherent dangers in merely transposing one system's organisation to another system, and I am not yet convinced that the system that we have evolved is not the best to deal with this country's particular needs. One of the main advantages of the present system of part-time law reform committees is that they combine men of practical experience in a particular field with those of academic distinction, so ensuring a balance between practical considerations on one hand and critical fundamental analysis on the other. While such an approach could perhaps be adopted by a full-time Law Revision Commission I doubt whether we would be able to obtain the same amount of aid from senior practitioners as we have enlisted under the committee system. A temporary or perhaps transitional expedient might be the appointment of one full-time commissioner to supervise, stimulate, and co-ordinate present activities . . ."—A M FINLAY, Chairman.

AIDING DIVORCE

In Parliament on 25 September Mr Wilkinson (Rodney) asked the Minister of Justice, "Is he prepared to call for an investigation into the cost of extending legal aid to divorce proceedings?"

The Hon Dr A M Finlay, Minister of Justice, replied: "I doubt whether such an investigation would yield much useful information. In 1973, 4,852 divorce petitions were filed and 4,157 came to a hearing. I estimate the legal fees involved to have been upwards of $750,000. There is no way in which any assessment could be made of the number of petitioners or respondents who would have qualified for legal aid had it been available, but I understand it was primarily on the score of cost that these proceedings were excluded when the scheme was first instituted. Logic strongly suggests that divorce proceedings should be covered and I am well aware of pressure for it. I would like first, however, to simplify divorce practice and procedure which should also reduce the cost, and my department is working on proposals to this end."

OBITUARY

G R Butler

The death recently in Christchurch of Mr G R Butler, in his 88th year, ended a long and varied life, spent mainly in Canterbury.

Guy Butler practised as a lawyer in Christchurch for some 30 years and was a notable contributor to the development of Arthur's Pass National Park.

He was born in Gisborne in 1886, and spent his early years there and in Whakatane. In his twenties, at a time when opportunity for educational advancement was limited, he prepared himself for entry into the legal profession. Having begun his studies at Auckland University, he came in 1911 to Christchurch, completed his course at Canterbury University College, and was admitted as a solicitor of the Supreme Court.

In the same year he married Grace Butler, who, during the next 50 years, was to win and hold her place as one of New Zealand's foremost landscape painters.

Much of Grace's finest work was done in and about Arthur's Pass, and Jack's Hut became their second home. Until well into his old age, Guy was more than content to play pack-horse to the artist wherever the quest for subjects led her. His own deep love of nature made him a pioneer in the development of the Arthur's Pass National Park, more particularly in the years immediately preceding the earthquake of March 1929, and in the five years of economic depression that followed.

In 1962 Mr Butler had built and opened the Arthur's Pass Hostel. By his own physical labour he had established some of the earliest of the bush tracks, and he is credited with having been the first to introduce skis to the area.

His later years with the Christchurch firm of Muff, Murphy and Butler were combined with his editorship of the *Gazette Law Reports*, a post to which his particular talents and interest well fitted him. He remained editor until his retirement in 1950. Judges and others in the profession in those times, have acknowledged the skill and accuracy of his reporting.

He maintained an interest in the political and social thinking of his times, his outlook on such matters was exemplified by his being an active promoter of the radical periodical *Tomorrow,* which began publication in 1935. But his deepest and happiest involvement by far was with people, especially within the domestic circle, where his warmth and selflessness most endeared him. At all times modest and self-effacing, he was nevertheless a man of action. Many of us are the richer for having known him.

Grace Butler died in 1962. Mr Butler is survived by his three daughters: Margaret (Mrs Bryan Barrer), Helen (Mrs Brew, of Wellington) and Grace (Mrs Hugh Adams). There are 12 grandchildren and seven great-grandchildren.

HJE in the Christchurch *Press*.

R E Booker

The death occurred recently of Reginald Eugene Booker, the senior partner in the firm of Meares Williams Holmes & Booker. He joined the firm in 1923 and was admitted as a partner in 1928. He was 72.

He was educated at Christchurch Boys' High School and Canterbury University.

He was a family solicitor who had wide connections with the farming community. He visited the firm's Akaroa branch office regularly once a month from 1960 until his death.

Wrestling was one of his interests and he was a member of the Committee of the Canterbury Wrestling Association for some years, its president from 1938 to 1947 and its patron from 1949 to 1965.

In addition he served as a Committeeman and Steward of the New Zealand Metropolitan Trotting Club for a number of years, and was still a steward at the time of his death.

A C B.

Computers and Law—The Society for Computers and Law has been formed in London as a ginger group to encourage and co-ordinate research into the subject. Contact may be made through Mr Richard Morgan, PO Box 55, Oyez House, 237 Long Lane, London SE 1 4 PU, United Kingdom.