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INTER ALIA

Should crime pay?

The proposed formation by the Great Train Robbers of a company to make profits from the film and book rights in respect of their crime has, so one British MP believes, "shocked the honest and moral feelings" of Englishmen to such an extent that he has introduced into the House of Commons the Criminal Profits (Expropriation) Bill. The purpose of the Bill is to enable the expropriation in appropriate cases of any sums paid to persons who have committed crimes and who have obtained a benefit by describing, writing or illustrating the commission of those crimes.

"Crime", said Mr Nicholas Fairbairn in introducing the Bill "must never be justified for its own glamour and must never be seen to benefit those who choose to take the risk of committing crime and to obtain a benefit for themselves." He noted that "those who have committed the most obscene offences against our society are able to get the largest benefit by writing about them or indeed by making a film about them" and "while some may say that a released criminal has already served his sentence" he makes his own position perfectly clear in saying that "a person can never entirely atone and it is wrong to say by use of mathematical formula, that one is entitled to commit a crime, to pay for it in eight years and then benefit from it not simply once but a second time."

The introduction of the Bill was opposed not only on the ground that it was unworkable but also because it was bad in principle. It was urged that once a criminal has been found guilty and served his sentence then that should be the end of the matter. That person is then in the same position as the rest of us and his rights as a citizen should be fundamentally the same as the rights of the rest of us.

It was acknowledged that in practice that does not work and that difficulties may arise over, for example, employment. However, it was felt that such considerations should not detract from the basic principle that on completion of sentence there should be an end of the matter.

Nor, it was said, should the importance of writings of ex-criminals be disregarded. In the case of war crimes they have enabled some self-examination of a sick society and in other cases they may be of value to penal reformers and others. The fear was expressed that if passed the Bill would limit authorship on the subject of crime and criminal activities to "retired lawyers and policemen, relatives and friends of criminals, journalists and the like".

The notion that there should be finality reflects in a different context the view expressed by Lord Wilberforce sitting as a member of the Committee for Privileges in the Russell peerage case concerning the Barony of Ampthill. "The law," he said, "aimed at providing the best and safest solution compatible with human fallibility and having reached that solution it closed the book".

It is of course always possible for the Legislature to insert a bookmark as the occasional immigrant with a long forgotten past has found to his often undeserved disadvantage but such instances are exceptional. While the possibility of ex-criminals making profits by writing about their crime may arouse feelings of indignation the supposed evil is hardly sufficiently widespread, at least in New Zealand, to justify departing from the view that there should be finality in such matters. The greater evil seems to be in empowering a government official to enquire into the affairs of ex-criminals and to impose by expropriation what many would regard as a penalty additional to that imposed by the Courts.

After all, there are others beside the ex-criminal who would prefer not to live with the smell of a decaying albatross.

Unwitnessed attestation

While it may frequently be convenient to attest a signature that has not actually been witnessed it must be recognised that anyone who does so is placing not only the person whose signature is supposedly being attested but also himself in some jeopardy. The former is illustrated by the well known case of *Frazer v Walker* where the attestation of an unwitnessed forged signature resulted in the person whose signature it was represented to be being deprived of an interest in land. The latter is represented by the case of *In re A Solicitor* reported in *The Times* of 10 May 1976.

To avoid the "tiresome and irritating task" of sending a deed back for attestation of a signature the solicitor concerned signed it himself as a witness. In fact the person whose signature was supposedly being witnessed had not signed the deed. As a consequence the Solicitors' Disciplinary Tribunal suspended the solicitor for a period of two years from which suspension he appealed. When the case came before the Queen's Bench Division the Court was referred to other cases that showed a variation in sentence for such matters from a small fine to five years imprisonment and it was therefore felt desirable to give some guidance to the Law Society on the question of penalty. The following extract from *The Times* report is of interest not only in respect of the Court's attitude to unwitnessed attestation but also in respect of discipline generally:

> There were four basic penalties for professional misconduct by a solicitor: reprimand, fine, suspension and striking off. The great divide came between fine and suspension, for suspension and stiking off could well mean professional disaster.
>
> Where there had been a genuine signature and a solicitor elected to attest it without witnessing it, he would be acting wrongfully. He was supposed to know better, but no one would imagine that his penalty would be severe. Where, however, the signature had been a forgery, then a more serious view would be taken of his conduct. But the essential questions were whether he honestly believed the signature to be a true signature and whether he did so on reasonable grounds. One would not expect a solicitor to be suspended or stuck off in those circumstances, if he had not been dishonest.
>
> Applying those principles to the present case, one found that the signature was false but that the solicitor thought it was genuine. There was clear room for criticising him, but there was no ground for saying that he had been dishonest. The worst that could be said of him was that he had been negligent. He had not reached the stage where he ought to be suspended.
>
> Accordingly, the court concluded that he should not have been suspended and would substitute a fine of £250, for the tribunal's order.

It is worth recalling that an attesting witness has been described as a person who has seen a party execute a deed or sign a written agreement, and who subscribes his signature for the purpose of identification and proof at any future period.

Tony Black

CASE AND COMMENT

Court practice – Preservation of evidentiary material

Donselaar v Mosen Court of Appeal. 26 March 1976 (CA 44/75). On 26 March 1976 the Court of Appeal delivered judgment in a decision which is bound to find its place in the pre-trial procedural armoury. As the facts emerge from the judgment the plaintiff claimed to recover for the cost of work carried out by him for the defendants. The parties were panelbeaters. The defendants held the only accurate records of costing and payment.

In the Supreme Court an ex parte order had been made under R 478 authorizing the Sheriff's officer to enter premises of the defendant and take into custody books of account ant relevant records. The relevant part of the Rule reads:

> "The Court . . . on such terms as may seem just, may make any order for the . . . preservation, or inspection of any property which is the subject of the action or in respect of which any material question may arise in the action, and . . . may authorise any person . . . to enter upon . . . any land . . . in the possession of any party to such action and . . . may authorise any samples to be taken, or any observation, measurement, or plans to be made . . . which may seem . . . expedient for the purposes of obtaining full information or evidence."

Against that order the defendants appealed contending that R 478 did not apply because the records taken into custody were not "property which is the subject of the action or in respect of which any material question may arise in the action".

The Court of Appeal determined on the evidence before it, that it was difficult to ascertain which, if any, material question would arise in the action in relation to the particular records but went on to hold "that the Court had an inherent jurisdiction to make an appropriate order to preserve evidentiary material . . . if that were necessary in the interests of justice". In the circumstances the order was, however, varied limiting the classes of documents to be retained by the Sheriff. The retained documents were to be released after 30 days within which period the accountants of the plaintiff (but not the plaintiff) were permitted to take copies of materials which would in their opinion be helpful in prosecuting that claim but not of other material.

The Supreme Court is given by s 16 of the Judicature Act 1908 "all judicial jurisdiction which may be necessary to administer the laws of New Zealand" and to enable the Court to act effectively within its jurisdiction certain inherent powers are necessary. The extent of that jurisdiction was described by Master Jacob in "The Inherent Jurisdiction of the Court" (Current Legal Problems (1970) 23) in the following passage at p 24:

> ". . . the term 'inherent jurisdiction of the court' is not used in contradistinction to the jurisdiction conferred on the court by statute. The contrast is not between the common law jurisdiction of the court on the one hand and its statutory jurisdiction on the other, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision."

The decision reflects the comment by Turner J (as he then was) in *McKnight v Davis* [1968] NZLR 1164 at 1170:

> ". . . we think that the Court must always be the master of its own procedure, and must when necessary use its inherent jurisdiction to ensure that justice is done. Due inquiry for the truth is not to be stifled by outmoded procedural restrictions."

In the English context *Anton Piller K G v Manufacturing Processes Ltd* [1976] 1 All ER 779 is worth noting. For some 18 months the Courts there have been making ex parte orders in the inherent jurisdiction requiring respondents to permit applicants to enter premises for the purposes of inspection and removal of documents. Thus where foreign manufacturers who had supplied English dealers with confidential computer information learned that the information was being misused an appropriate order was made. The Court of Appeal has made it clear that such orders can be justified only in the most exceptional cases. Refusal to permit entry of the applicants would, one assumes, constitute contempt of Court by the respondents.

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Costs in divorce suits

Practitioners will need to be aware of the decision of Wilson J in *Seymour v Seymour* (his Honour gave his oral judgment on April 1 last). The case concerned a petition for divorce on the grounds that the parties had been separated pursuant to a separation order made in 1972, the order being still in full force and effect. The said order contained provisions for the custody and maintenance of the child of the marriage, but it contained no provision concerning the wife's maintenance. She now sought costs against her husband – who did not defend – on the basis that she was not receiving maintenance from him and that it would be "fair" that he should "at any rate contribute by having to pay the scale costs of" the divorce proceedings.

In his Honour's view, this line of argument was not correct. He stated that: "The position is that this lady is entitled to a decree of divorce and I shall make it, but it is a decree that she seeks for her own purposes. In obtaining it she has not in any way been hampered by her husband, who has done nothing to obstruct the making of the decree. The decree of divorce is not necessary to her except for the purpose of remarriage, because the separation order already relieves her of the need to live with her husband. It is, in fact, a decree that she seeks for her own purposes and her own advantage, and in those circumstances I can see no justice in requiring a contribution to be made by her husband to the cost of a decree which he is not seeking but which he is not preventing her from seeking." His Honour continued: "it is a common experience of this Court that people seek a decree of divorce in order to remarry. Now I have not inquired of this petitioner whether that is so or not but if it were so, that would be an added reason why the husband should not pay any costs." Wilson J therefore made no order for costs.

In support of his decision, his Honour relied upon *Chapman v Chapman* [1972] 3 All ER 1089 (CA). It was there held that, where a husband or wife presented a petition for divorce relying only

on the fact that the spouses have lived apart for a period of five years (which is the period laid down by the English divorce legisiation), and the petition is not defended the petitioner – there also the wife – should in any event pay the costs of the suit.

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RESCISSION FOR INNOCENT MISREPRESENTATION

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In a recent note in this journal ("Innocent Misrepresentation and the Sale of Goods" [1975] NZLJ 76), Dr Lawson suggests that it is still a matter of conjecture whether a contract for the sale of goods can be rescinded for innocent misrepresentation and that the recent cases of *Academy of Health and Fitness Pty Ltd v Power* [1973] VR 254 and *Holmes v Burgess* [1975] 2 NZLR 311 "have done little to clarify the matter". With respect, the writer disagrees with both of these conclusions.

In *Riddiford v Warren* (1901) 20 NZLR 572 our Court of Appeal held that a contract for the sale of goods cannot be rescinded on the ground of innocent misrepresentation unless there has been a failure of consideration. While this decision can be strongly criticised (see eg Threitel, *Law of Contract* (4th ed 1975) 246) and there are contrary English authorities, it must be regarded as representing settled law in New Zealand. It is a binding decision of the Court of Appeal which has stood for 75 years. Furthermore, it was a decision on a provision of the Sale of Goods Act 1895 which was subsequently re-enacted in the 1908 Act. Accordingly, Parliament must be regarded as having adopted the interpretation placed on that provision by the Court of Appeal.

With regard to the recent cases mentioned above, the first, *Academy of Health and Fitness Pty Ltd v Power,* was not a sale of goods case at all. Furthermore, it concerned the quite separate issue whether a right to rescind for innocent misrepresentation is lost if the representation becomes a term of the parties' written contract which can be classified as a warranty only. Crockett J gave a negative answer and allowed recission.

The second case, *Holmes v Burgess*, is also regarded by Dr Lawson as bringing us "no nearer a solution to the problem". This is a little difficult to follow because Casey J applied *Riddiford* and held that a contract for the sale of a horse could not be rescinded on the ground of innocent misrepresentation, an entirely predictable course of action and, indeed, the only one open to him. It followed that the decision in *Power,* which was relied on by counsel for the defendant, did not require consideration. Whether or not that case was rightly decided, *Riddiford* was a separate and insuperable bar to the defendant's claim on the ground of innocent misrepresentation. Casey J merely observed obiter (at p 317) that "it may be doubtful whether the decision [in *Power*] would necessarily be followed in New Zealand in contracts other than for the sale of goods". This doubt is clearly well-founded. It is difficult to see how a representation which has been incorporated in the parties' written contract can still retain an independent existence outside of it. Isn't it a spent force at the relevant time of entry into the contract? It is the term that induces the contract, not the earlier representation. Furthermore, if the position were otherwise, it would be contrary to the spirit of Equity's decision to allow rescission for mere innocent misrepresentation. A right to rescind was conferred in order to remedy the deficiencies of the common law which provided no remedy unless the representation was a term of the contract. However, the question is still an open one. Casey J was not called upon to decide it.

There are a few other points made in Dr Lawson's note in relation to the decision in *Power* which require comment. First, in common with Crockett J, he regarded the English Court of Appeal's decision in *Leaf v International Galleries Ltd* [1950] 2 KB 86 as posing an obstacle in the way of allowing rescission for an innocent misrepresentation which becomes a term of the contract classifiable as a warranty only. However, that case merely held that the right to rescind for innocent misrepresentation is lost when, had the representation been a condition, the right to rescind for breach of condition would have been lost. In other words, it added a further limit to the established categories of limits on the right to rescind for misrepresentation. It was not held that the right to rescind for innocent misrepresentation is lost where a representation is or becomes a term

of the contract. The decision in *Leaf* would only have posed a difficulty for Crockett J in *Power if* the term was a condition and *if* for some reason rescission for breach of condition was barred. It is clear that this was not the case. The failure to recognise the limited effect of the decision in *Leaf* also led Dr Lawson to suggest that, if *Power* is right, the odd result follows that "a minor breach could produce a rescission, but not necessarily a major breach". With respect, it is suggested that, although the law's division of misleading statements into various categories and sub-categories does occasionally lead to some curious results, this is not one of them. It is inconceivable that a Court would grant rescission where a representation can be treated as a warranty but not if it happened to be a condition. The sensible reasoning in *Leaf* applies a fortiori. It is most unlikely that Crockett J in *Power* would have granted rescission for innocent misrepresentation if the subsequent term was a condition and the right to rescind for breach of that condition was barred. (Incidentally, it is very arguable that, in the circumstances of that case, the term *was* a condition, but that is another story.)

Finally, it is to be doubted whether the decision in *Power* "effectively means that the rule limiting a breach of warranty to a claim in damages has in most circumstances evaporated". That case, if accepted, can be invoked only where a statement is made in the course of pre-contractual negotiations and the same statement is later incorporated in the parties' (usually written) contract. There will be many cases, particularly where the contract is oral, where the representation *is* the warranty or the question is simply whether the statement is one or the other. There will also be cases where the warranty is expressed only in the parties' written contract. Certainly, the fact that "the giving of such warranty at least partially induced the contract" cannot mean that the statement exists independently as a *representation.*

THE MATRIMONIAL PROPERTY BILL — MISGUIDED CHIVALRY?

By R L Fisher – *a Hamilton barrister enjoying a year at the University of Southampton*

In October 1975 New Zealand wives were treated to a heartening sight. The government of the day was rushing up the garden path with another well-earned slice of the matrimonial cake. The cake was the 1975 Matrimonial Property Bill, the keenly awaited response to a report *(a)* prepared in 1972. Having waited for three years, the wives were no doubt reassured by the sense of urgency with which the Bill was finally introduced. *(b)* If they could not help noticing the proximity to a certain important political event, they doubtless dismissed such thoughts as entirely churlish.

In the following month matters suffered a setback. The Government tripped at the very doorstep and the Bill flew from its hands into temporary oblivion. In the long run however this matters not, since the Bill's recipe is non-partisan and remains for anyone else to use. The one point on which all agree is that a spring-cleaning is needed in matrimonial property law. Does the solution lie in re-introducing the Bill? This article is an attempt to answer that question.

(a) *Matrimonial Property,* Report of a Special Committee presented to the Minister of Justice in June 1972 (hereinafter "the Report").

(b) There was apparently no time for a White Paper actually to precede the Bill, nor was there time to find a solution for widows, whose case was to be left for further legislation: see p 14 of *Matrimonial Property – Comparable Sharing,* the White Paper which accompanied the Bill (hereinafter "the White Paper").

A hypothetical case

A useful test of the Bill is to apply it to some assumed facts. Suppose that when a couple marries the husband has no assets. The wife has pre-marriage savings and also the shares in a family business. With her savings the wife buys the matrimonial home and has it transferred into her name. She makes an oral gift of the shares to the husband as an incentive for him to run the business as his own. She believes that in this way the whole family will benefit from her generosity in the long run.

Over the next twenty years the wife slaves night and day. She raises six children with considerable reliance on preserves, gardening, sewing and other housewifely economies. For good measure she takes part-time work and with

the proceeds furnishes the home and acquires a seaside bach worth $10,000. The husband acknowledges that as the bach and house have been acquired by her efforts, they should be regarded as hers alone.

For his part, the husband contributes in only a minor way to the domestic scene and devotes nearly all his time and income to building up the business. He is encouraged to do this by the wife who, looking forward to a wealthy retirement both eggs him on at every turn and shoulders nearly all the demands of house and children to leave him free. She actually works longer and harder than he does, running the home virtually singlehanded, waiting on him hand and foot, helping to entertain his business friends, rescuing him from alcoholism and providing the real strength behind his regrettably weak character.

After twenty years of ploughed-back profit and a good dose of luck, the business is worth a million dollars. The husband then announces that he is selling the business. True to his sex he is emigrating to America encumbered only with his attractive secretary and the million dollars. The timing is unfortunate because just at that stage the wife needs capital urgently to repair the house which is run-down and of little value, to replace a worn-out car and to repay a debt for medical attention which she had received during the marriage. She also lacks any reserve of liquid capital for contingencies.

Effect of the Bill

Under the Bill the position seems to be this. The wife has no claim to any part of the million dollars. Under cl 8 (7) and 15 (6) the business shares became the husband's separate property from the time of the gift. The informality of the gift and the change of circumstances are immaterial. The increase in the value of the business remained separate property under cl 8 (3). Although throughout the marriage she worked longer and harder than he, her contributions were "domestic" and therefore "not traceable" to the business for the purpose of cl 8 (3) and 14 (1) (b) *(c)*. What is more, the wife cannot turn to capital maintenance as the solution. Her contributions to family welfare, her need of capital, the husband's impending departure and his obvious wealth are not enough. All existing provisions for capital maintenance are abolished by cls 52 and 53. The agency of cohabitation which would otherwise cover the debt for medical attention is abrogated by clause 44 (1).

Retiring from the field to her humble house, furnishings and bach, the wife discovers that even here she will have a fight on her hands. Under cls 9 (2) (a), (b) and (f) and 12 (1) the husband is prima facie entitled to a half interest *(d)*. The wife's lawyer explains that although the gift of the shares was binding under cl 15 (6), the agreement over her ownership of the house and bach is void under cl 15 (3) since it was not executed before a solicitor. Her only hope is to convince the Court that there are "circumstances of a special character" under cl 12 (2) (c) sufficient to rebut equal division. Clause 12 (2) (b) shows that this will be no sinecure. There is no question of "dissipation" on the husband's part and even though his contributions to domestic assets were "disproportionately small" this is not per se enough to rebut equal division of domestic assets unless it was due to "neglect of responsibilities in relation to the other spouse". The husband could hardly be accused of neglect when the family had an adequate standard of living and the wife had herself encouraged him to concentrate on the business. Since contributions alone are not the criterion and the Bill gives no other obvious clue, the wife will have to go to Court to find out how the Judge allotted to her will exercise his discretion on the day.

In summary, the wife contributed all the property brought into the marriage at the outset, she subsequently worked the harder of the two and it was expressly agreed that at least the house and bach belong to her. Under the Bill the wife, who badly needs liquid capital, finishes up with only a half interest in her own run-down house, contents and bach, together with the possibility of the other half under an unpredictable judicial discretion. The husband, who has no particular need of capital, finishes up with all the real wealth of the marriage together with a prima facie half interest in his wife's domestic property.

The supreme irony is that had there been no matrimonial legislation at all, the husband would have had no claim to the domestic assets, the original gift of the shares to the husband would have been void and the medical expenses would have been subject to an agency of cohabitation. The wife's problems are due solely to a Bill whose long title is expressed to be:

> "An act to reform the law of matrimonial property; to recognise the equal contribution of husband and wife to the marriage partnership; to provide for a just division of the matrimonial property between the spouses when their marriage ends by separation or divorce and in certain other circumstances . . . ."

(c) The Bill makes no attempt to abrogate *E v E* [1971] NZLR 859, CA in this respect.

(d) The bach is included under cl 9 (2) (f) and possibly also cl 9 (2) (a) (as to which see definition of "matrimonial home").

The Bill's scheme of reapportionment

To understand how the case just outlined could occur it is necessary to break down the Bill's scheme of reapportionment into its four compartments. The reapportionment of ownership involves (a) equal division of certain "domestic assets", the most important of which is the matrimonial home, (b) contribution-based apportionment of certain "general assets", which broadly speaking comprise the assets acquired non-gratuitously since marriage and (c) continued "separate property" in the remainder. This reapportionment of ownership is then supplemented by (d) discretionary powers concerning the use of property, at which stage it seems to be intended that considerations pertaining to support will figure prominently. Each of these four compartments must be considered separately.

(a) *Domestic assets* – The first compartment is that of "domestic assets". On the credit side, the half share to each spouse ensures certainty and a guaranteed minimum for wives. Equally it ensures inflexibility, complexity and imbalance. The Bill is inflexible because (i) only theoretical regard is paid to intentions (what spouse will solemnly execute before solicitors the property agreements envisaged in cl 15?), (ii) no attempt is made to assess contributions for the purpose of this division and (iii) the provision for exceptional cases is highly restricted. The formal complexity usual in all community schemes is reflected in the Bill's thirty-five pages. The imbalance flows from an arbitary concern with ownership of a particular class of assets whose value in relation to the rest of the property will be quite fortuitous. The hypothetical case at the beginning of this article was intended to illustrate this. Indeed for a spouse sufficiently Machievellian to foresee a marriage breakup, it should not be too difficult to manipulate in advance the proportionate value which the domestic assets bear to the rest of the property without exposing the exercise to retrospective avoidance under cl 39.

Above all, in attaching special significance to the ownership of domestic assets the Bill appears to confuse two concepts. One is the *use* of matrimonial property, where the classification of assets into such categories as "matrimonial home" and "domestic" clearly has special significance for support both during and after marriage. The other is the *ownership* of property where the quantum of reward for contribution in cash or in kind is the paramount consideration and asset classification is largely, if not entirely, a red herring.

(b) *Contributions* – Some of the flexibility lost on the Bill's treatment of domestic assets is recouped in the next group which is that of "general assets". Not only is reapportionment of this group based on actual contributions but for this purpose contributions to domestic assets are also taken into account. While this by no means absorbs the rigidity of the domestic property division the complementary relationship between the two groups is ingenious. Essentially on marriage each spouse receives a guaranteed minimum with an opportunity to earn more.

Unfortunately the Bill's contributions system perpetuates most of the deficiencies of its 1963 predecessor. This is the more surprising since those deficiencies are expressly spelled out on p 5 of the White Paper. It is hard to see why when one comes to assess contributions under cls 12 (3), 13 and 14 of the Bill wives would not continue to suffer from the adverse onus of proof, uncertainty, inadequate quantum and arbitrary barriers between domestic contributions and particular assets which are complaints validly made by the White Paper regarding the present system. In the Bill the concept of causation of property ownership as the basis for reward has still to be taken to its logical conclusion. In addition, clause 13 perpetuates the scant recognition of spouses' intentions already encountered under domestic assets.

(c) *Separate property* – The Bill's third group is that of "separate property", in the main consisting of assets acquired before marriage or acquired gratuitously after marriage. Such property is immune to statutory reapportionment under the Bill. A point in passing is that a heavy price is paid in complexity when it comes to defining the separate property. The main problem however is the Bill's ambivalent attitude to the spouses' intentions. Whereas intentions played a negligible part in the first two compartments, inter-spouse gifts are here treated by cl 8 (7) as sacrosanct. A gift between spouses converts the asset in question into "separate property". Categorisations as "separate property" overrides the division which might otherwise occur under domestic property or contributions. It follows that before a Court has jurisdiction to deal with property under the first two compartments, it must first grapple with the complexities of inter-spouse gifts.

Four problems arise on this approach. First, there will be considerable difficulties of proof. For all inter-spouse gifts, cl 15 (6) waives the traditional guidelines for determining the point at which a gift becomes enforceable. The fate of a farm or factory can therefore hang on the razor edge of an imperfectly remembered uncorroborated oral remark whose precise wording will determine whether or not it amounted to a gift. Such a remark is to be not merely a factor

influencing a discretion or value judgment but an absolute criterion of ownership.

Secondly, once the Court has established that there is a gift there is no room for flexibility. The fact that circumstances may have changed beyond those contemplated by the parties will be immaterial.

Thirdly, a question familiar to pre-1963 lawyers will be resurrected in all its glory: in putting property in his wife's name did the husband intend to make a gift or is the wife merely a trustee? To answer this the dust will need to be blown from pre-1963 and English decisions in equity. For this purpose the presumption of advancement is abolished by cl 45 but not so the presumptions of resulting trust *(e)*, equality *(f)* and gift of a wife's income when used by her husband with her consent *(g)*.

Fourthly, and perhaps disastrously, the formal exclusion of gifts from the reapportionment exercise threatens to undermine the Bill's whole scheme. In a sense whenever a spouse makes a direct or indirect contribution of money or property to the overall assets of the marriage without reserving strict beneficial title to himself, a gift occurs since the other spouse benefits without giving any adequate and related consideration. At what point is traditional gift law under cl 8 (7) to stop and the "domestic assets community" under cl 12 or the "contributions division" under cl 13 to begin?

These problems are neatly avoided under the existing Matrimonial Property Act. Under that Act expressed common intentions are binding only where unequivocal and still applicable to current circumstances *(h)*. Otherwise they are downgraded to a merely persuasive role *(i)*. By this means the Court retains a robust flexibility which can sidestep the technical problems inherent in the Bill's approach to intention.

(d) *Support* – Although it is apparently intended to complement the principal maintenance statutes in its provisions for family support on termination of marriage, the Bill coyly refuses to say so. No guidelines are given for the exercise of the various ancillary powers under the Bill eg selection of the form in which a property division is to be implemented under cls 20, 24, 25, 26 and 28, use and possession under cls 22 and 23, protecting children under cl 21 and varying existing maintenance orders under cl 27. It seems probable that these powers are primarily concerned with support rather than with equal division, agreements and contributions which are the only criteria for adjusting rights expressly referred to anywhere in the Bill. However if this is the intention an odd approach to statutory interpretation is required. Inferences which one might normally draw from the title and context of the Bill itself must be ignored. Instead the criteria for exercising the powers referred to are largely those spelled out in other statutes *(j)* and the common law thereon.

This particular inconsistency is not new *(k)* and may prove to be of little consequence in practice. The same cannot be said of the Bill's unheralded abolition of capital maintenance. The present extensive powers of the Courts to award maintenance in the form of lump sums, property awards and settlements *(l)* are removed under the Bill. All further maintenance is to be essentially periodic and revocable. Implicit in this move is the assumption that the Bill's improved proprietory rights are in every case an adequate substitute for capital maintenance. Again this suggests a confusion of concepts. The Bill's property division is based on the four elements of agreement, strict community, contributions and separate property. This clearly influences but could never supersede support measures based on the quite different considerations of actual personal circumstances, the effect of the marriage and the cause of its breakdown. Granted that the number of cases warranting capital maintenance might be reduced by the Bill, cases calling for maintenance in capital form would continue to arise. The hypothetical case given at the beginning of this article is intended to illustrate this. Other examples are occasions where there is a particular need for immediate capital which normal periodic maintenance will not satisfy, *(m)* a husband whose resources consist of capital rather than income *(n)*, a husband who himself prefers to pay capital to

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(e) eg *Masters v Masters* [1954] NZLR 82; *Hendry v Hendry* [1960] NZLR 48.

(f) eg *Jones v Maynard* [1951] Ch 572; *Richards v Richards* [1961] NZLR 157.

(g) eg *Elder's Trustee etc v Gibbs* [1922] NZLR 21; *Buckley v Foster* [1950] NZLR 695.

(h) *West v West* [1966] NZLR 247; *Morris v Miles* [1967] NZLR 650; *Wacher v Guardian Trust* [1969] NZLR 283; *Dryden v Dryden* [1973] 1 NZLR 440.

(i) See *West* and *Wacher* supra; also *Milton v Milton* (1975) 1 RLNS 219, CA; *Jones v Jones* (1975) 1 RLNS 274.

(j) ie Matrimonial Proceedings Act 1963, s 43; Domestic Proceedings Act 1968, ss 27 – 29 and 32 – 34.

(k) see eg the selection of the form of orders under s 5 Matrimonial Property Act 1963 and Matrimonial Proceedings Act 1963, ss 58 and 59.

(l) eg Domestic Proceedings Act 1968 s 26 (2) (c) and 31 (1) (c) Matrimonial Proceedings Act ss 41 and 44 (1) (c), maintenance also being a permissible consideration under ss 58, 59 and 62 (2).

(m) eg *Higgie v Higgie* [1970] NZLR 1066.

(n) eg *Von Mehren v Von Mehren* [1970] 1 All ER 153, CA.

gain a corresponding freedom from periodic maintenance, a husband with unusual wealth *(o)*, a particular need for security in a capital form *(p)* and an estate which cannot otherwise be readily distributed *(q)*. In matters of support the Courts need the utmost flexibility. Reducing the options available to them will not help them in their task.

A sequel

Continuing the saga commenced at the beginning of this article, when the husband leaves the matrimonial home the wife forbids him to return. However, a few weeks later the husband does so. Hoping to avoid periodic maintenance, the husband wants to see whether the wife has sought male consolation. In the early hours of the morning he and a private detective enter the house. They are chagrined to find the wife asleep in bed-alone-but the wife awakes and the fright she receives is the final straw. She has a nervous breakdown. She sues the husband and the detective for trespass. In defence they rely on the husband's prima facie half interest in the house under the Bill. Proceedings under the Bill itself were at that stage still unresolved.

Assuming that in the trespass proceedings the sole issue is ownership of the matrimonial home at the time of the alleged trespass, the Bill raises a problem. Do the interests conferred by the Bill take precedence over conventional separate property rights before the Bill's interests are crystallised by agreement or judicial decision? No-one can be sure. Clause 4 the house. They are chagrined to find the wife asleep in bed alone but the wife property rights in the absence of express exceptions and cl 4 (3) requires all litigation, including litigation between the spouses and third parties, to be decided on the Bill's principles. The Bill then goes on to create property interests on special principals flowing from the state of marriage. Thus far, there seems to be a form of immediate community property displacing from the date of marriage the beneficial interests which would otherwise arise. Clauses 5 (1) and 10 (2) create certain express exceptions for particular purposes but there is no general provision which would waive the operation of the Bill's special matrimonial interests until they are crystallised by a judicial decision. If one stopped at this point most of the torts, crimes, insurable interests and revenue obligations consequent on property ownership seem to turn on the Bill's special property regime.

(o) eg *Davis v Davis* [1967] P 185.

(p) eg *Curtiss v Curtiss* [1969] 2 All ER 207.

(q) an argument which still seems available despite *Long v Long* [1973] 1 NZLR 379, CA.

Then proceeding to cl 10 (1) it is said that:

> "Notwithstanding any legal or equitable interest that a husband or wife might otherwise have in the matrimonial property, each spouse shall by virtue of this Act and *arising from his or her marriage* to the other, have a *present interest* in the nature of an unsecured charge over the whole of the matrimonial property."

The meaning and consequences of cl 10 (1) are obscure. What is the nature of the "present interest"? By way of explanation, p 10 of the White Paper states that the interest arising from equal division and contributions "should not simply be a nebulous one taking effect at the end of a marriage but a present and actual interest akin to a floating charge." Unfortunately this obscures the matter further by confusing two things. One is the *owner's* specific beneficial interest which the Bill apparently does not confer until later. The other is the *chargeholder's* interest which is merely a security for the satisfaction of a right. The intention of cl 10 (1) seems to be to give the matrimonial interest some legally operative effect without waiting for a judicial act to crystallise it but just what this effect is is left unexplained. The charge has no effect on other creditors because their position is spelled out expressly in cl 11. It seems to have no effect on the owner-spouse either, because cl 10 (2) gives him the power to deal with the property as if the "charge" did not exist. In any case the "charge" is said to be "unsecured", a rare animal indeed!

Proceeding further to cls 12, 13 and 19 one encounters yet another approach. From cls 12 and 13 it emerges that the scope of the Bill's special matrimonial interests cannot be determined by exclusive reference to an objective formula in the Bill. It requires the agreement of the parties or the value judgment of the Court. Even in the case of domestic property the prima facie equal division is subject to a judicial discretion. If the parties or the Court are given a creative rather than a declaratory role in defining the matrimonial interest, the result cannot be retrospective. It would be absurd if the parties and the Courts were given the power to retrospectively create or nullify those torts, crimes, revenue obligations and other legal implications which must have already arisen on the basis of existing interests in the property. Now if the interests in matrimonial property are inherently indefinable in the terms of the Bill's property regime until agreement or judgment, some other regime must fill the vacuum in the meantime. However inconsistent it may be with other parts of the Bill that regime must be conventional separate property. This view is strengthened by clause 19 which seems to rest on

the assumption that notwithstanding loss of rights under the Bill due to the expiry of a limitation period, conventional separate property has been there all along to fall back on.

It seems probable that in the instant case the husband and the detective would be liable on the basis that any interest in the property which the husband might derive from the Bill was not operative at the time of the alleged trespass. Probably latent rights under the Bill are of no more legal consequence than latent rights under the present Matrimonial Property Act. The White Paper's aim of a "present and actual" special interest under the Bill from the date of marriage will thus impress politicians and feminists more than lawyers. More seriously, the Bill contains the seeds of legal chaos on this point.

Conclusion

Much more would need to be said about the Bill to do full justice to all its various merits and demerits but this much is clear. The Bill's objective of comparable treatment for wives is the right one. Its method of achieving it is a disaster. The errors are not peripheral. They go to the very core of the Bill. They could not have been weeded out by a parliamentary select committee.

Two lessons follow. One is that in areas that are socially sensitive and technically complex there should be a degree of public participation in the reform process, and opportunity for comment on draft proposals, before any bill is presented *(r)*. The other is that the theoretical concepts bearing on matrimonial property must be isolated before it is safe to meddle with the law on that topic.

(r) For a suitably cautious and public approach see in Canada the *Report on Matrimonial Regimes* (1968) of the Quebec Civil Code Revision Office; *Report on Family Law* part IV (1974) of the Ontario Law Reform Commission; the prodigious *Ontario Family Law Report Project* (1967–1969) and *Studies on Family Property Law* (1975) of the Law Reform Commission of Canada, and in the United Kingdom, see the publications of the English Law Commission, *Family Law Report on Financial Provision in Matrimonial Proceedings* (1969) No 25; *Family Property Law Working Paper* No 42 (1971); *First Report on Family Property* No 52 (1973); *Second Report on Family Property* (1975) No 61.

MAGISTERIAL APPOINTMENTS

Mr J H Hall SM.

The Minister of Justice, the Hon D S Thomson, has announced the appointment of Mr John Hamilton Hall as a Stipendiary Magistrate. Mr Hall was previously in practice in Masterton.

Graduated MA from Victoria University College in 1950 Mr Hall took up an appointment the following year in Her Majesty's Colonial Service. He served as a District Officer in Tanganyika (now Tanzania) until 1963. Returning to New Zealand he graduated LL B from Victoria University of Wellington in 1966 and has since practised in Masterton. He represented Wellington at rugby for several seasons and Wairarapa at cricket.

Mr Hall is a member of the Salvation Army Advisory Board and a former member of the Marriage Guidance Council. He is married with two children. His daughter began a law course at the Victoria University of Wellington this year and his son is at secondary school.

Mr Hall is stationed at Auckland and took up his duties on 1 April.

Mr I Hay

The Minister of Justice has also announced the appointment of Mr Ian Hay as a stipendiary magistrate in Invercargill.

My Hay is at present a magistrate in Wellington where he joined the bench on 18 January 1974.

From 1970 until December 1973 Mr Hay was Attorney-General for Western Somoa. He had previously been a partner in the firm of Cruickshank, Pryde and Hay in Invercargill.

Southland practitioners will no doubt welcome the Minister of Justices statement that a second magistrate would be appointed to Southland soon.

MINOR RESIDENTIAL ROADS

By E F Schwarz *of the Building Research Association of New Zealand.*

In 1970 a study was carried out to assess the roading standards for the design and construction of residential roads in New Zealand.

Some of the study findings markedly revealed the influence of statutory legislation on the design and construction of residential roads. This influence was felt in planning and engineering standards for minor residential roads.

Residential roading standards are usually grouped into two categories, namely:

(a) Planning standards. These are usually contained in the local District Scheme Statement under the auspices of the Town and Country Planning Act 1953, the Municipal Corporations Act 1954, and the Counties Act 1961.

(b) Engineering standards. These are usually contained in a separate engineering statement covering the type of standards and a roading specification. Both documents appear to be under the umbrella of either the *Municpal Corporations Act* or the Counties Act.

Both (a) and (b) depend on the type of local government unit. Thus a Municipal corporation or a county council. If a county council administers its urban areas under the counties Act, then different planning and engineering standards result, in comparison to a municipal council administering its urban areas under the Municipal Corporations Act.

Before further elaborating on the study and the influence of legislation upon residential roading standards, it is probably wise to refer to some historical examples.

HISTORY

The Hobson Instructions authorised the Crown through the legislative Council to form roads in the New South Wales dependency. The Instructions were followed in 1845, by a Crown Colony of New Zealand Ordinance. This Ordinance authorised the Council to raise levies for road construction. This measure was followed by the Town Board Act 1862, which stipulated a minimum legal road width of 40ft (12m), followed in 1867, by the Municipal Corporations Act. This Act stipulated a legal road width of 66ft (20m). In various subsequent Acts, this 66ft (20m) road width was maintained. Under the existing Municipal Corporations and Counties Acts the road width is 66ft (20m) reducible to 40ft (12m). A further reduction appears to have been suggested by the 1973 review committee for the Town and Country Planning Act 1953.

PLANNING STANDARDS

The Second Schedule to the Town and Country Planning Act 1953 refers to the preparation of a traffic plan under the heading 'public access from place to place'. The same Act under s34, and s170 of the Counties Act, and s191 of the Municipal Corporations Act determine the minimum road width of 66ft (20m), also reducible to 40ft (12m).

But planning standards such as road width however, are usually determined by calculating traffic volumes and parking needs. Also the study on residential roads, previously referred to, has established that a lesser width of 40ft (12m) for kerbed and channelled minor residential roads are possible based on the calculations of traffic volumes. A more detailed explanation on this appears under the heading of engineering standards.

The study further showed up that planning standards are influenced by the National Roads

Board recommendations on residential roads. Local planning data covers carriage width and legal road width. The latter is sometimes known as road formation or the road reserve.

ENGINEERING STANDARDS

Engineering standards for minor residential roads usually fall into two parts:

(a) An actual statement describing standards for minimum and maximum grade, camber, class of road, pavement deflection, base courses, subgrades, number of road seals, type of kerb and channel, and stormwater disposal. camber, class of road, pavement deflection, base courses, subgrades, number of road seals, type of kerb and channel, and stormwater disposal.
(b) Specifications which describe the type of materials to be used in the construction of the residential road and their anticipated performance. construction of the residential road and their anticipated performance.

Both (a) and (b) are controlled by a series of different US originating road tests. These are applied during the design of the road but also during the construction of the roads. Tests are ultimately referenced to the New Zealand Standards Act 1965. Obviously the performance specification relates to contract law.

Only the minimum road grades are controlled through the Municipal Corporations and the Counties Acts, and the width of roads within the confines of 66ft (20m) – 40ft (12m). Under the same Acts counties and municipalities are in charge of the design and construction of Counties and urban roads as opposed to the design and construction of motorways, under the Public Works Act 1928.

On the width of minor residential roads itself, the study showed that lesser widths were possible than 40ft (12m) for *minor* residential roads, mentioned earlier under planning standards. This dimension was made up of:

(a) carriageway
(b) road berms

For the carriageway, the study looked at maximum legal truck width, turning radii of trucks and the 90 and 99 percentile car. The study also looked at cul de sac heads, vehicle trips per household, generated from single storey detached housing. On street and off street and car parking. Clearly, it appeared that an 18ft (5.4m) wide carriageway, kerbed and channelled was *adequate* for a minor residential road surrounded by single storey housing, in terms of the above criteria.

When considering berms and footpaths, but also underground services, plus the knowledge of the NRB recommendations to the Commission of Inquiry into Housing it appeared that a 5ft 6in (2m) strip on either side was also adequate and therefore the overall legal width of 31ft (9.6m) adequate. This width is made up of 18ft (5.4m) carriageway and two 6ft 6in (2m) berms on each side of the carriageway. The above width is narrower than the statutory one of 40ft (12m) required under the existing legislation and therefore such narrower width cannot be constructed, unless the existing legislation is changed.

FINDINGS

Apart from the above noted observations the study shows clearly that:

Most New Zealand councils' planning standards range between 20ft (6m) – 26ft (7.9m) with 4ft 6in (1.37m) footpaths on both sides. In consequence there is not a great deal of difference between planning and engineering standards of the different councils within the above stated range, and therefore not a great deal of difference in costs.

A disturbing part however is that under the planning and engineering standards widths may be varied by local body officers under a clause in the engineering specifications. This leads to differences in costs, although in some instances site structure and road foundations demand changes in engineering standards.

That the administrative and legal procedures are controlling design and construction of roads complexes are in need of de-blocking and restructuring.

CONCLUSION

The planning and engineering standards, previously discussed are only a part of the whole process of land subdivision. Land subdivision itself is guided from its initial conception to the final delivering up of the contract by legal administrative rules. These rules sometimes form a constraint on the smaller parts, such as on planning and engineering standards controlling carriage and legal road widths. These constraints do not seem to be always logical. This illogicality was shown up earlier by comparing the legally determined widths under the Municipal Corporations Act and the Counties Act to the actual practice of determination of carriage width and footpath width by calculation of vehicular and pedestrian volumes.

OBITUARY

Mr H Rosen SM

At a special sitting of the Magistrate's Court at Auckland held on 14 April 1976 tributes were paid to the late Mr Rosen who was formally the Senior Stipendiary Magistrate of that Court. Mr E C H Pledger, Senior Stipendiary Magistrate noted that all the Magistrates of the northern region were present excepting Mr Taylor of the Auckland Court and Mr Maxwell and Mr Gillies from Otahuhu and Mr Paul from Northland who were unable to attend but wished to be associated with the tributes. Likewise all of the retired Magistrates from the Auckland Court were present excepting Mr McCarthy who was unable to attend but also wished to join the tributes.

"Harry Rosen", said Mr Pledger, "had tremendous intellectual gifts. Always he was in the top section of his class at Palmerston North Boys' High School. At Victoria University contemporaries were Sir John Marshall and Sir Richard Wild and with that kind of standard we find the late Professor Garrow describing Harry Rosen as one of his most outstanding students. It is well known that he attained a Master of Laws degree with first class honours. What is perhaps not so well known is that his progress through law school was studded with prizes and distinctions and he was a leading debater".

"In Wellington Harry Rosen went to the offices of the late E P Bunny and then to Wilfred Leicester. From Wellington he went to Auckland where, pre-war, he joined the staff of Meredith Meredith and Kerr as it then was. War service intervened. On his return in 1947 he became one of the principals of what was then Meredith Cleal. He was engaged mostly in taxation and banco work both of which can be demanding of the best intellectual talents."

Mr Pledger also marked that Mr Rosen was an accomplished violinist, an avid reader, a biblical scholar of note and a man whose intellect and encyclopaedic knowledge of the law are well remembered by those who have been associated with him.

Mr J E Towle, President of the Auckland District Law Society also spoke of Mr Rosen's service and of the high regard in which he was held by the Judiciary, the Police, members of the Law Society and the Auckland Community generally.

CORRESPONDENCE

Dear Sir,

At [1976] NZLJ 83, Mr R A Moodie discusses the shooting of Daniel Houpapa at Taumarunui on 4 January 1976. His primary thesis seems to be to refute the remarks of Commissioner Burnside that the Police Armed Offenders Squad will always shoot only to wound, but in the course of that argument Mr Moodie also stands squarely against holding a public inquiry into the Houpapa shooting and praises the Armed Offenders Squad very highly.

We appreciate that Mr Moodie's note must have been written immediately after the event in question, before certain facts had come to light, but we cannot allow some of his assertions to go unchallenged.

First, Mr Moodie notes that "there has been surprisingly little in the nature of a public reaction" to the fatal shooting. We assume he composed his note before the *Dominion* gave front page treatment to a follow-up story on 5 February. We would also refer readers to lead stories in the *New Zealand Herald* of 5 and 6 January and 5 February, and also the *Auckland Star* of 4 and 5 February. There are strong editorial comments, calling for a public inquiry, in the *Herald* of 7 January and 5 February and in the *Star* of 3 February. Judging by correspondence received by the Auckland Council for Civil Liberties, there was a surge of public interest after the Chief Traffic Superintendent of the Ministry of Transport acknowledged that a traffic officer had been armed with a rifle with a telescopic sight on the day of the shooting and following the release by the Auckland Council of an 18 page report on the shooting (compiled in Taumarunui by Peter Williams, an Auckland barrister).

Secondly, Mr Moodie assumes that the Armed Offenders Squad was in Taumarunui at the time of the shooting, and praises the courage and professionalism of that unit. We could agree that that unit deserves its high reputation, but there is some doubt whether they were in

charge at the time of the shooting, and there is doubt as to whether their commanding officer made the decision to fire. The armed traffic officer certainly cannot be considered part of the Police Armed Offenders Squad.

Thirdly, Mr Moodie assumes, because it was "reported", that the deceased fired two shots at the police; he implies that only fate saved the lives of two policemen. Again, we can only submit that there is evidence to the contrary and that perhaps no shots were fired at policemen.

Finally, Mr Moodie concludes that there is absolutely no reason to hold a public inquiry, possibly because he has "absolutely no doubt that the information supplied [to him] was as complete as could possibly be obtained". We can only protest that the information supplied to him is not the same as that supplied to the public, and certainly not the same as that supplied to the Auckland Council for Civil Liberties. It seems to us, with all due respect to Mr Moodie, that he has defended a police unit which may not have been involved in the shooting, and his treatment of the Taumarunui incident is based on partial information.

May we simply ask two questions, through the pages of the *Law Journal*?

(1) Was the shooting, as examined in the instant prior to the marksman's shot being fired, a last resort? Was it a shooting made necessary only because all other courses of action had failed, as the only means possible to save human life? or is there a possibility that the deceased, a 17 year old youth with no criminal history, had taken up a hunting rifle to fend off police dogs?

(2) If the shooting, at the critical instant, was absolutely necessary to save human life, could preventative action have been taken earlier in the day to defuse the situation? Was the arming of the traffic officer a necessary show of force, or did it make the later use of firearms more likely?

We do not pretent to know the answers to these questions, but we earnestly hope that they will be sought, publicly, in order to reduce the likelihood that such events will happen again.

The undersigned are officers of the Auckland Council for Civil Liberties.

Yours sincerely,

Dr Wm C Hodge
Dr M W Doyle

Mr Moodie replies:

Doctors Hodge and Doyle base their criticism of my interpretation of the Houpapa shooting on pure speculation. If they have proof of gross mis-management of that incident by the police then they should spell it out. Neither they, nor the Council has done so to date. They are, however, in error in suggesting that I concluded there was "absolutely no reason to hold a public inquiry" into that shooting. I said no such thing. My contention was that that would do more harm than good. I am disappointed that their fixation with the need for a public enquiry into this incident has prevented them from seeing the merits of my wider proposal which would provide follow up action to every such shooting. The two questions they ask are not new. They are raised, in substance, by every police shooting. The Commission I suggest may help us to get closer to the answers to them without destroying the viability of the Armed Offender Squads. Incidentally, are they seriously suggesting that shots fired from a hunting rifle by a 17 year old at police dogs on a three foot leash do not endanger the lives of the dog handlers? Good grief!

Superannuation

Sir,

From the legal point of view you are no doubt correct in your leading article of 4 May that no justification can be advanced for the staying of the Superannuation Act prosecutions, but the Attorney-General's statement shows that he was concerned with the impracticability of the prosecutions and the unfairness which would inevitably result if they were permitted to continue. It may be that you are right, and he is right; and I shall stay out of that issue, but your concern that future private prosecutions to combat Government inaction might be interfered with is really a different issue altogether.

Of course it would be intolerable if private prosecutions in respect of penal provisions in legislation were to be interfered with but I think you should not be too quick to assume that the Superannuation issue raises any likelihood that they would be. It after all involved the staying of proceedings based on legislation shortly to be repealed – nobody doubts this – whereas to stay proceedings based on continuing legislative provisions would be a vastly different affair. Even if one were to assume the worst, that the Executive might interfere with such private prosecutions, it would still be better than having the Executive through its legislative power outlaw the citizen's right to bring any private prosecution, as it certainly could do by its majority in the House at any time.

There is no reason to think that such a Draconian law would be in the minds of any government, but again surely there is no reason to think that private efforts to enforce existing and continuing legislation would be interfered with. From the fact that these sanctions are embodied in many statutes it follows that the Legislature was of the mind that those statutes should be enforced; and the circumstances in which a government would expect the Crown to enforce legislation, but not permit private individuals to do so are frankly difficult to bring to mind. May I therefore sound a warning against your taking the assumptions you make in your article of 4 May too far?

Yours etc
John Burn
Christchurch

[Nonetheless, when penal provisions are used to enforce essentially civil obligations is there any justification for allowing the possibility of a stay of proceeding? – Ed.]

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

Contempt of Court

THEY CAN COOK, TOO . . .

A Christchurch lawyer, Mr I B Prolix, has founded an organisation which, he says, "is intended to bridge the chasm of misunderstanding across which lawyer and layman suspiciously peer".

Called Lawyers for Lunch, the organisation has been set up to enable members of the public to have their lunch cooked for them in their own home by a lawyer. A member of the public who wishes to avail himself of the service which the organisation provides simply dials a number and at lunchtime a lawyer turns up armed with Elizabeth David's "French Provincial Cookery" and prepares the member of the public a delicious light meal.

There is no charge for the service, but the person using it is expected to provide the basic ingredients, herbs, cooking wine and so forth.

"It is my hope," says Mr Prolix, "that by this means lay people will come to realise that lawyers are not just forbidding and expensive figures who charge clients fortunes for typing up forms and failing to persuade magistrates not to send them to periodic detention on blood-alcohol charges, but are interesting and civilised people, equally adept at conversation and oeufs en cocottee. The conversation which takes place between the lawyer and the person for whom he is preparing lunch is the essence of the scheme; the lunch is simply the medium for bringing about this intercourse, this meeting of minds and bellies".

Critics of the scheme have pointed out that it appears to be based on a Canadian experiment called Tree Surgeons for Tea, which flourished briefly and failed dismally in the 1960s. Mr Prolix dimisses this criticism. "Tree Surgeons for Tea" failed, he says, "because tea is a boring meal and tree surgeons are boring people. Lawyers on the other hand, are fascinating, and a well-cooked lunch is the purest expression of the nobility of the human spirit".

One person who has nothing but good to say of the scheme is Mrs Enid Dumpybody, of Beckenham, one of the first people to use it.

"I just rang up", she says, "and round came this ever so nice man, a real gentleman he was. He cooked me something called mushrooms a l'armenienne, a bit spicy, you know, a bit tangy, but quite nice really and certainly a change from the hot pie and fizzy orange I usually have for lunch.

A K GRANT *of Christchurch makes public relations palatable. His pot pourri originally appeared in* The Press.

"He told me about mortgages and adjournments and beneficiaries and that. It was ever so interesting, an eyeopener really, some of the adjournments that man had got you wouldn't believe. And he was awfully good about doing the dishes. I mean, it's more than the doctor does for you, isn't it?"

A spokesman for the Canterbury District Law Society was not so enthusiastic about the scheme.

"We are, of course, in favour of anything which helps the profession's public relations," he said, "but we are by no means sure that this is the way to go about it. We see a number of dangers arising out of confusion in the public mind between the role of the lawyer and that of the chef.

"For example, the public may start turning to chefs for legal advice. And lawyers who louse up a lunch may find themselves being sued for negligence. What's more, the last thing we on the Law Society Disciplinary Committee want is to start receiving a whole lot of complaints about burnt saucepans and impressionable young persons being introduced to garlic."

In *E v E* [1971] NZLR 859 the learned Chief Justice (in his minority judgment) provided an account of the acceptance given to the views of Woodhouse J in *Hofman v H* [1965] NZLR 795 and concluded:

> ". . . I think that Woodhouse J's perceptive discussion of the purposes and scope of the [Matrimonial Property] Act as applied to the New Zealand Scene is right."

Surely, "prognostic" rather than perceptive when Woodhouse J, in his *Hofman* judgment at p 801 is able to say:

> "At least it can be said with confidence that . . . women who have devoted themselves to their homes and families need not suddenly find themselves facing an economic frustration . . . which their . . . wives who are wage-earners have usually been able to avoid."

W V Gazley