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OMBUDSMAN'S REPORT — SOME COMMENTS

The report of the Chief Ombudsman, Sir Guy Powles, for the year ended 31 March 1976 makes interesting and profitable reading. It is interesting for the views of the Ombudsman on administrative matters and profitable as a reminder that there is an effective remedy for maladministration outside the formal Court structure. It is one thing to know that the Ombudsman exists; it is quite another to know what he does. The Report includes a range of case reports including some which show that his recommendations bear not only on Government departments but may also result in reconsideration of Ministerial decisions and even the variation or revocation of a proclamation.

The following is a sample of topics covered.

Powers of entry on to private property

Some publicity has already been given to the observations in the report on the large number of legislative provisions authorising government officers to enter on to private property. Sir Guy's inquires indicated that at least 150 statutes authorised entry and that this number was increasing at an average of four or five Acts each year.

He noted that the vast majority of these provisions authorise entry in circumstances which would not be permitted by the common law (which generally requires either the consent of the occupier or the approval of an independent judicial officer before entry may be effected). Is this desirable? Although obtaining consent may take time, energy and money he felt that in non-emergency situations endeavours should be made to secure either the consent of the occupier or an independent approval, or at the very least prior notice should be given. There will, he acknowledges, be exceptions as in emergency situations or where the giving of notice will nullify the very purpose of making the entry. But these exceptions should not detract from the desirability of changing the rules.

He also noted that few statutory provisons required or even provided for the identification of the entrant and he felt that any person who is authorised by statute to enter property should be able to demonstrate to the occupier his or her authority for doing so.

These observations are to be referred to the Minister of Justice and Sir Guy considers that it would be appropriate for the Law Revision Commission to examine the desirability of the entry procedures being regulated by a single statute.

Prior to the presentation of the Report to Parliament there had been criticism of provisions in the Electricity Amendment Bill which if passed would have given the General Manager of the Electricity Department or any person authorised by him the right "at all reasonable times having regard to the circumstances" to enter any premises for specified purposes. Before entry, the person entering was "where practicable" to give reasonable notice to the owner or occupier and, if required, to show written evidence of identity and authority. What seems to have escaped attention is that that original proposal has now been modified. Notice of a proposed amendment was given in a Supplementary Order Paper dated 27 August 1976.

The proposed amendment places limits on entry into dwellinghouses. Rather than having a "right" of entry an authorised officer may only "claim entry" for the purposes in question. Before entering or claiming entry the authorised officer "*shall* give reasonable notice to the owner or occupier" of his intention to claim entry and "*shall* produce and show authority or delegated authority . . . under which he claims to enter".

Of particular interest though is the provision

that "if the occupier of any dwellinghouse unreasonably refuses to admit any authorised officer to enter the dwellinghouse . . . the authorised officer may discontinue the supply of electricity to that dwellinghouse and may if necessary enter that dwellinghouse for that purpose".

This section at least leaves the choice of permitting or refusing entry with the householder. He has the choice of permitting entry and receiving the benefit of a public utility or declining and powering his television with candles.

Whether the amendment goes as far as many would like is open to question but the Minister concerned, the Honourable Mr Holland, should at least be commended for acting in response to a very real criticism of the original proposals.

Consultation or information?

Case No 9757 concerned proposals by the Department of Education for the expansion of facilities at a Teachers' College. This expansion involved the acquisition of a number of neighbouring residential properties and these properties were purchased as they came onto the market rather than by compulsory acquisition. The complainant maintained that the department had a duty to inform those persons who would be affected by the future proposals of their nature and consequences. The department on the other hand believed that publicity regarding its proposals must await its submission to Government and Government's approval of them and that it would then be for Government and not for the department to decide on the form the publicity would take. It also felt that the procedures which were available under the Town and Country Planning Act 1953 would afford affected residents adequate opportunity to voice objections. The comments of the Ombudsman are worth quoting in full:

> "It was an essential ingredient in this case history that the department spoke and acted for 'the Crown', and deliberately availed itself of a privileged position. This privileged position stemmed from the ancient doctrine that 'the King can do no wrong' and that he had these privileges because in law he did no wrong. It was my view that nowadays the exercise of such privileges imposed a corresponding duty to be fair, open, honest, and above-board in dealing with those affected and to give most sympathetic consideration to the wishes and interests of those persons.
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> "As a consequence I was of the opinion that the department was mistaken in concluding that it would be premature for it to consult with local residents regarding its proposals for the future development of the college and for the acquisition of additional land to which this development would give rise. I did not regard the formal rights of objection, which were available under the Town and Country Planning Act 1953 against a ministerial requirement placed on land acquired for the college's future needs, as being an adequate substitute for the free and informal discussion with local residents which I believed should precede the formulation by the department of firm proposals for submission to Government."

As a result of the intervention of the Ombudsman the department arranged to call a public meeting of residents to inform them of its intentions and to write individually to those residents whose properties were affected advising them of their statutory rights. The Ombudsman made it known that that was not in accordance with the principles which he considered should be followed. He had emphasised the importance of consultation as part of the formulation of proposals. The department's action did not involve consultation, but was directed at informing residents of the implications of a course of action already decided upon and advising them of how they might take advantage of such statutory rights they might have in relation to that course of action.

The distinction drawn by the Ombudsman between consultation and information goes to the core of any theory of participatory democracy.

Secrecy

The secrecy obligation of public servants was considered in Case No 9999. A member of a religious sect said that if, in the course of his employment he became aware that another member of the sect had acted improperly he would regard himself as being bound in conscience to counsel that member. The complainant raised a number of points including whether the legislation governing the disclosure of information should in fact cover all information or whether a more restricted definition of "official information" could be made which would leave the sect free to speak on moral matters.

That view was rejected because of the impossibility of defining the information to be covered without risking leaving areas of official information beyond the scope of the secrecy provisions. The decision continued:

> "The discussion, however, could not in the long run ignore or avoid the basic reason for the existence of these security obligations. Public servants are charged with the execution of manifold duties in the course of the business of the Government of the country, which in our society touches the lives and

personal circumstances of all citizens in many ways. A relationship of trust between Government and the people is involved, and it is especially important in our participating democracy that this relationship should be maintained and not eroded in any way. There is a strong case in the public interest for the maintenance of an absolute obligation of secrecy resting upon each individual public servant in the terms already quoted, [ie no communication of information acquired in the course of duty except in the discharge of duty] and no case can be made for any exception."

There is a view that participatory democracy requires wider disclosure of government information. Does this decision run counter to that view? It does so only if the reference to an absolute obligation to secrecy is given an extraordinarily literal interpretation. Attention should rather be focused on "the discharge of [public servants'] duties", and the extension of those duties to include making more information available to the public. The obligation to preserve secrecy then becomes limited to the non-disclosable residue. That approach would certainly be consistent with the open approach adopted in the Teachers' College case. Defining what is or is not to be disclosed is no easy task but it has been tackled in other countries and there is no reason for not tackling it in New Zealand.

It has often be said of New Zealand that by virtue of our size and population we are in a unique position to set the lead in environmental protection. For the same reasons it could be said that our government administration has not become as remote and depersonalised as that of other countries and that we are in a similarly unique position to lead in the practice of open government. The Ombudsman's Report illustrates the important role his office is playing in attaining that end.

Tony Black

FAMILY LAW

SHOTGUN DIVORCES

By P R H WEBB, *M A, LL B, LL D, Professor of Law, University of Auckland.*

The "shotgun" marriage, that is a marriage contracted under duress, is all too familiar a facet of modern life *(a)*. Such a marriage may take place because of a specific threat of danger to life, liberty or health by, eg, the "wife's" father to the "wife" *(b)* or because of a present, continuous apprehension thereof due to the situation in which the affected spouse finds himself or herself as a member of a particular class of person in special danger *(c)*. On the other hand, the "shotgun" divorce seems to constitute a newer, if rarer, topic for the law reports to feature. The first case to require mention is the English case of *Re Meyer* [1971] P 298. The spouses, to put it briefly, were German citizens domiciled in Germany when they married in 1932. The husband was Jewish, but the wife was a gentile. In 1938, the husband managed to escape secretly to England from the persecution of Jews in Germany, leaving his wife and delicate child in Germany on the understanding that they would reunite when possible. In their particular circumstances, the lot of the wife and child in Germany was extremely unenviable and the only hope of alleviating it was for the wife to divorce the husband, thus removing the Jewish "taint" attaching to her. This she did, against her will, in 1939, with the help of a non-Jewish lawyer. It would seem that she was still then domiciled in Germany. The divorce was, and remained, valid under German domestic law. The husband had, of course, no notice of the divorce proceedings and, therefore, had no opportunity to be heard. In 1949 the wife and child came to England (the husband being by then domiciled there and a naturalised British subject) and, so far as was possible in their circumstances, cohabitation was resumed, thus showing that the divorce meant nothing to them. In 1965, the husband died and,

(a) See the cases collected in Bromley & Webb, *Family Law* (1974), pp 96-99.

(b) See *Parojcic v Parojcic* [1959] 1 All ER 1; *McLarnon v McLarnon* (1968) 112 Sol Jo 419. For a case where the "husband" was responsible for the duress, see *Scott v Sebright* (1886) 12 PD 21.

(c) See *H v H* [1954] P 258 ("wife" came of family engaged in Hungary in a substantial way of business and in comfortable circumstances, who might not be well or sympathetically regarded by a communist government); *Szechter v Szechter* [1971] P 286 ("arranged" marriage to enable petitioner to leave the communist regime in Poland and thus avoid appalling imprisonment and threats of a mental home controlled by security police).

in 1970, the wife, who had never acted on the divorce, sought a declaration that the German divorce was void for duress because, if she could obtain one, she would be able to claim a pension as her husband's widow from the Federal German Republic authorities. There appears to have been little for counsel or Bagnall J to go on, except for an obiter statement by Barnard J in *Burke v Burke* (The Times, 17 March 1955) to the effect that, had the marriage in Russia with which he had there been concerned been valid, he would have been prepared to hold that a Russian decree purporting to dissolve it was ineffective because the wife was being "persecuted and tyrannised to obtain a divorce" (P 307). It would seem that "the Russian wife and her mother were being threatened with terms of imprisonment unless she obtained a divorce". Bagnall J had evidently sent for the file and examined it. He decided that there was no reason why he should not apply, by way of analogy, the duress rules as to the formation of the marriage contract to the obtaining of a divorce decree overseas under duress. Thus, he said:

> "I accordingly conclude that this Court will declare a foreign decree of divorce invalid if the will of the party seeking the decree was overborne by a genuine and reasonably held fear caused by present and continuing danger to life, limb or liberty arising from external circumstances for which that party was not responsible. I add that I think that "danger to limb" means a serious danger to physical or mental health; and that "danger" must include danger to at least a parent or child of the party" (P 307).

His Lordship then traversed the very distressing facts surrounding the wife's institution of divorce proceedings and obtaining of the decree, noting in particular the general fear of danger, as the spouse of a Jewish person, to liberty and health and the specific fear of losing her job and her flat and that she and the child might not survive at all. Being satisfied that these feared dangers were serious dangers and ones which were continuously existing and for which the wife was in no way responsible, and that her fears were genuinely and reasonably held, Bagnall J decided that she would never have attempted to obtain the decree had her will not been overborne by those fears *(d)*. He accordingly granted her the relief sought, adding that, had he taken a different view of the law, he would have found as a fact that the stated grounds on which the decree was sought *(e)* were not true, but were a sham (pp 317-318).

It is naturally interesting to speculate whether the German decree in this case would have been entitled to recognition in New Zealand under s 82 of the Matrimonial Proceedings Act 1963. Subsection (1) of that section, so far as it is material, reads:

> "The validity of any decree . . . for divorce . . . made (whether before or after the commencement of this Act) by a Court . . . of any country outside New Zealand *shall*, by virtue of this section, be recognised in all New Zealand Courts, if – (a) One or both of the parties were domiciled in that country at the time of the decree . . .".

If the word "shall" is to be taken to mean "shall", then the divorce would have to be regarded without more ado as valid in New Zealand *(f)*. It is submitted, however, that, despite the absence of anything express in the section as to the non-recognition of foreign decrees *(g)*, a New Zealand Court would apply the accepted common law discretionary rules as to when recognition of an overseas decree should not be accorded on account of, for instance, denial of natural justice, fraud or contrariness to public policy *(h)*.

An even more extraordinary case is that of *Gaffney v Gaffney (i)*. In 1940, the plaintiff validly married her husband in a Roman Catholic Church in Dublin. She lived in Ireland with him and their children. The plaintiff and her husband were expressly found to have been domiciled in Ireland until the husband died intestate in Spain in

(d) At pp 314-315, as to the general situation in Germany in the late 1930s and at pp 315-318 as to the wife's own plight.

(e) Viz desertion, refusal to provide support and refusal of sexual intercourse. See the remarks of Bagnall J at pp 302-303; 315-316.

(f) See J L R Davis, [1966] NZLJ 271.

(g) See and compare the Australian Family Law Act 1975, s 104 (4), discussed in Nygh, *Conflict of Laws in Australia* (3rd ed, 1976), pp 321-324.

(h) This so-called residuary discretion to refuse recognition has not been without its critics. See Nygh, op cit supra, pp 209-210; Cheshire, *Private International Law* (9th ed, 1974), pp 157-159; Morris, *The Conflict of Laws* (1971), pp 172, 512-513; the latter reference is substantially repeated in Dicey & Morris, *The Conflict of Laws* (9th ed, 1973), pp 74-75; and see further p 326 and the cases listed in notes 37 and 38 (which includes the *Meyer* case itself). See also Webb & Davis, *A Casebook on the Conflict of Laws of New Zealand* (1970), pp 283 et seq.

No doubt the decree in the *Meyer* case would now be refused recognition in England under s 8(2) of the Recognition of Divorces and Legal Separations Act 1971 (UK) – which now sets the limits to the English Courts' discretion to refuse to recognise an overseas divorce decree –either on the public policy ground or because Mr Meyer was not given notice of the Gestapo-inspired divorce proceedings and, consequently, could have no chance to be legally represented and heard in them.

(i) [1975] IR 133. And see Duncan in (1974) 9 Irish Jurist (Part 1) 59.

1972. The husband had said to the plaintiff, on a number of occasions, that he wanted a divorce from her. She did not want this, but, in 1957, the husband, nothing daunted by the fact that a divorce is not to be had in Ireland, instructed a firm of solicitors in the English city near where his mother lived (in a house he had bought her) to act for his wife in obtaining a divorce against him on the ground of his own desertion. The wife, who had long suffered ill-health, never gave the firm any instructions in the matter. The firm in due course prepared a petition, in which it was stated that the husband resided in England and that the plaintiff and he were domiciled in England – which was all palpably false. The engrossment of the petition and the verifying affidavit to be sworn by the plaintiff were sent to the husband in Ireland. He took them to the plaintiff, who was then living apart from him, but with the children, in a house in Ireland which he had bought for them to live in. He threatened her with physical violence if she did not swear the affidavit. The plaintiff was pregnant at the time. She swore the affidavit. She later went to England by air, with her husband and eldest daughter, to give evidence in the divorce case because she had been threatened with physical violence by him and she genuinely and reasonably believed that he would assault her if she did not do as he told her. The two spouses were "coached", apparently by the solicitor acting in the case, as to what they were to say to the English Court. At the end of the "successful" proceedings, the plaintiff and the eldest daughter and the husband had lunch together. It need hardly be said that, had the true facts been known to the English Court, no decree nisi would have been made. At any rate, the plaintiff and her daughter flew back to Dublin the same evening, the husband following them on the next day.

In due course the decree nisi was made absolute. Not long afterwards, the husband proceeded to marry the present defendant in an English register office and lived with her in Ireland until he died in 1972. Meanwhile, in April 1964, the plaintiff had entered, as a result of the husband's threats and duress, into a very much one-sided written agreement by which she improvidently commuted certain rights, eg, to maintenance, that had been conferred on her by the order of the English Court. The plaintiff never took any step to have either the divorce or the agreement set aside. On the death of the husband it had to be determined who was his widow for the purposes of intestate succession – the plaintiff or the defendant? One very easy answer, of course, was that only the decree of the Courts of the husband's domicile would be recognised by the Irish Courts and this English decree was not such a decree and that the plaintiff was therefore the widow *(j)*. Another answer was that, because of the threats on the husband's part, the divorce was not entitled to recognition on the ground of duress, so that, again, the plaintiff was the widow *(k)*.

It was also urged upon the High Court that the plaintiff was the petitioner in the divorce suit and could not therefore impugn the validity of the English decree on the principle that a person cannot be allowed to approbate and reprobate. Kenny J accordingly had to decide whether she was estopped from denying the validity of her non-domiciliary English divorce. He held that she was not estopped in any way, pointing out (inter alia) that if there had been children of the second marriage and if the husband died intestate (as, in fact, he did, as indicated above) the plaintiff could not have disputed their legitimacy, while, on the other hand, the children of the first marriage could have done so, as the estoppel would bind the plaintiff only, and could have excluded the children of the second marriage from any benefit by succession *(l)*.

Kenny J accordingly concluded that:

(j) See at pp 138-139, per Kenny J in the High Court, relying on, in particular *Bank of Ireland v Caffin* [1971] IR 123 and *Le Mesurier v Le Mesurier* [1895] AC 517 (PC). That Kenny J considered that he was entitled to investigate the circumstances to see if the English Court had jurisdiction is evident from pp 138-141 passim.

(k) See at pp 139-140, from which it appears that Kenny J agreed with Bagnall J's decision in the *Meyer* case, although it had not been cited to him in argument. It will now be appreciated that, in the *Meyer* case, the petitioning wife *was domiciled in Germany at the time of the divorce proceedings,* and that, in the case now under review, *the decree was not that of the Court of the wife's domicile at all.*

(l) At pp 141-143, esp at pp 141-142. The learned Judge rejected *Re Plummer* [1942] 1 DLR 34 as leading to "extraordinary results", going, as it did, in favour of estoppel. See the discussion in Dicey & Morris, *Conflict of Laws* (9th ed, 1973) at p 336 and the cases there cited pro and contra, especially *Schwebel v Schwebel* (1970) 10 DLR (3d) 742; and Webb & Davis, *A Casebook on the Conflict of Laws of New Zealand* (1970) at pp 296-297, and the cases there cited. One cannot but agree with Cheshire, *Private International Law* (9th ed, 1974) where it is stated (at p 391) that ". . . there is in principle no room for estoppel, since the paramount issue from which all else flows is the marital status of the parties at the time of the husband's death, and of that there can be no doubt." See, too, Chapters 2, 12 and 13 of Spencer Bower & Turner, *The Doctrine of Res Judicata* (1969).

> "In my view a spouse who has obtained an invalid decree of divorce in another State is not estopped in the State of the domicile from establishing the invalidity of the divorce and her status as spouse, for there can be *no estoppel of any kind* as to whether a marriage has been validly dissolved or not. Therefore, even if the plaintiff were a free agent, her application to the Courts in England for a divorce and her signature to the agreement of April, 1964, do not estop her from contesting the validity of the divorce" *(m)*.

Extraordinary though it may seem in the light of the forceful judgment of Kenny J, an appeal was taken to the Supreme Court by the defendant.

> "The real point of the defendant's appeal" said Walsh J, "which does not appear in so many words in the notice of appeal, is that the evidence tendered by and on behalf of the plaintiff in support of the allegation that the divorce was improperly obtained, and in support of the claim that the plaintiff and the husband were not at any time domiciled in England, should not have been received by the judge on the grounds that the plaintiff was estopped from giving such evidence. The basis of the claim of the estoppel was that, as she was the petitioner in the divorce proceedings and on the face of it had invoked the jurisdiction of the English court, the plaintiff should not now be heard to say that the English court did not have jurisdiction; it was further submitted that, having obtained a dissolution of the marriage on foot of the said petition, the plaintiff should not now be heard to say that the purported dissolution was invalid for want of jurisdiction in the court which granted it" *(n)*.

His Honour took the view that Irish Courts did not recognise overseas divorce decrees unless the parties were domiciled within the jurisdiction of the foreign court in question *(o)*. Turning to the matter of estoppel, Walsh J said:

> "The paramount issue in the present case is the status of the plaintiff and her husband at the date of his death. The plaintiff was either his wife or she was not. Apart from other legal incidents in this country, certain constitutional rights may accrue to a woman by virtue of being a wife which would not be available to her if she were not. The matter cannot, therefore, by any rules of evidence be left in a position of doubt nor could the Courts contenance a doctrine of estoppel, if such existed, which had the effect that a person would be estopped from saying that he or she is the husband or wife, as the case may be, of another party when in law the person making the claim has that status. In law it would have been quite open to the husband to have denied at any time after his marriage to the defendant that he was in law her husband .... Consent cannot confer jurisdiction to dissolve a marriage where that jurisdiction does not already exist. The evidence which the plaintiff sought to offer in the present case was directed towards showing that the court in question did not have jurisdiction. In my view the learned trial judge was quite correct in admitting that evidence .... It is quite clear from the evidence that the husband never had an English domicile and was not in fact resident in England ..." *(p)*.

Hence the plaintiff was the wife of the husband and the appeal should be dismissed.

Hendry J agreed with the dismissal of the appeal. The "crunch" sentence in his judgment was: "I am satisfied that there can be no estoppel by record when the record arose in proceedings, domestic or foreign, upon which the court in question had no jurisdiction to adjudicate" *(q)*. He also dealt with the question whether the plaintiff was estopped by her conduct in adopting and executing the agreement of April, 1964. He decided that there "might be force in this submission if the deed of 1964 was the genuine act of the plaintiff" *(r)*, and proceeded to say that she

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(m) At p 143. Italics supplied. He considered (ibid) also that an objection to the application of the doctrine of estoppel was that public policy was involved in the question whether a marriage had been dissolved and that the Courts should not allow the doctrine to be raised on such an issue. His conclusion at least accords with *Hodges v Helleur* [1952] NZLR 652 and *Hayward v Hayward* [1961] P 152, if not with the strict view taken in *Woodland v Woodland* [1928] P 169 and *Bullock v Bullock* [1960] 1 WLR 975 (DC).

(n) [1975] IR 133, p 149. O'Higgins CJ agreed with the judgment of Walsh J: see at p 147. None of the judgments, however, deal with the duress point.

(o) At pp 150, 153. The view is taken in Ireland that, while a valid marriage continues to subsist, the wife's domicile remains the same as, and changes with, that of her husband.

(p) At pp 152-153. His Honour suggested obiter at pp 153-154 that, if only the duress had been in question, it might well have been incumbent on the plaintiff to have had the English decree set aside by the English Court before she could successfully assert the status of wife. Sed quaere.

(q) At p 155, having cited *Bonaparte v Bonaparte* [1892] P 402; *Shaw v Gould* (1868) LR 3 HL 55; *Middleton v Middleton* [1967] P 62.

(r) That this kind of behaviour is not confined to Irish husbands may be seen from *Saxon v Saxon* [1976] 4 WWR 300 (British Columbia Supreme Court).

could not be held to have "approbated the divorce decree when the act of approbation relied on was not the genuine act of the plaintiff", and proceeded to say that she could not be held to have "approbated the divorce decree when the act of approbation relied on was not her free voluntary act".

Griffin J also agreed that the appeal should be disallowed. He also thought that, for estoppel by record to arise, the Court pronouncing the judgment must have had jurisdiction and that lack of jurisdiction would deprive the judgment of any effect, whether by estoppel or otherwise (at p 157). He was satisfied that the English Court had had no jurisdiction *(s)*, that the Irish court could properly investigate this question *(t)* and that the decree in the present case, having been obtained by duress, and by fraud going to the point of jurisdiction, wasnot valid *(u)*. The plaintiff was accordingly still married to the husband when the latter died.

Parke J agreed with his brethren (at p 160), so the decision of the Court was unanimously in favour of the plaintiff. It is not known to the writer if and how frequently the kind of tactics described above – even without the element of duress – are resorted to. It is hoped that this forthright decision will deter not only spouses domiciled in Ireland from making fraudulent trips across the Irish Sea to England but also those domiciled in Australia from making fraudulent trips across the Tasman Sea in order to pull the Australian wool over the New Zealand eyes of our Supreme Court and obtain a "quickie" divorce on the ground of adultery rather than wait the one year period of living separate and apart now required by s 48 of the Family Law Act 1975 (Cth) *(v)*.

Before leaving the case, however, it is worth stating that, quite aside from the duress, the English decree could not have been directly recognised in New Zealand. For the purposes of s 82 (1)(a) of the Matrimonial Proceedings Act 1963, which was set out earlier in this article, neither the plaintifff nor the husband were domiciled (in the New Zealand sense) in England at the time of the decree *(w)*.

It is not without interest that a "shotgun divorce" has figured in the New Zealand Magistrate's Court. In *Madaras v Madaras (x)* the wife had been born in Austria, but went to work in Hungary, where she met her future husband, a man of a well-to-do family. They married in 1942. Increasing Communist pressure gave rise in their minds to fears for their safety because both were good Catholics and thus opposed to the Communist regime. They discussed their position and decided that the husband, being a man of some standing, was the more likely to attract attention and sooner or later would probably be liquidated. To give the wife and their children some protection, it was decided to obtain a divorce in order to give the outward appearance of dissociation. They therefore obtained in 1948 a decree nisi on the ground of mutual consent. Who was petitioner and who was respondent is not clear, but the decree became absolute in 1949. There was no real intention to change their mode of living. In other words, the intention was to treat the divorce as invalid. In fact, the spouses' fears were justified, because the husband was later seized by the Communists and his property was confiscated. Eventually, the spouses escaped and came to New Zealand and, in the events which happened, it became necessary to decide whether the Hungarian divorce (which neither spouse ever

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(s) At pp 157-158, relying on *Shaw v Gould* (1868) LR 3 HL 55 and *Le Mesurier v Le Mesurier* [1895] AC 517 (PC), at p 540, per Lord Watson.

(t) At pp 158-159, relying on *Pemberton v Hughes* [1899] 1 Ch 781 (CA), at p 790, per Lindley MR and at p 796, per Vaughan Williams LJ.

(u) At p 159, relying on *Bonaparte v Bonaparte* [1892] P 402 and *Middleton v Middleton* [1967] P 62.

(v) Under this section, the only ground for dissolution of marriage is the irretrievable breakdown of marriage, and such breakdown can be established only by satisfying the Court that the spouses separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for dissolution.

The writer need hardly mention that it would be gravely unethical for a New Zeaband practitioner to "coach" a person not domiciled in New Zealand on how to answer questions so as to make the Supreme Court think he or she was domiciled in New Zealand.

(w) Section 82 (1)(b) would be entirely inapplicable to the situation. Section 82 (1)(c) could not permit of "indirect" recognition because, as has been shown above, the Irish Courts refused to recognise the English decree. It has been held in *Re Darling* [1975] 1 NZLR 382 (noted by the present writer in [1974] NZLJ 536 and in which, incidentally, there was never raised any question of estoppel) that s 82 (2) embraces the "real and substantial connection" basis of divorce recognition laid down by the House of Lords in *Indyka v Indyka* [1969] 1 AC 33. By no stretch of the imagination could it be said that either the plaintiff or Mr Gaffney were really and substantially connected with England. England was simply being used for the purposes of a mere migratory divorce. It would be kind to call the spouses even "sojourners" in England.

(x) (1952) 47 MCR 88, and thus decided before the "residuary discretion" cases referred to in note (h) supra.

acted on) was valid here. Harley SM said that the copy of the decree of divorce "does not look to my eyes like an official document and could well be a forged one" (at p 90), but thought that the decree would be valid in Hungary *(y)*. His Worship concluded the matter, (leaving aside certain difficulties he entertained as to the parties' domicile), by saying:

> "They [sc the spouses] say that the divorce was got for the purpose of obtaining possession of a piece of paper by means of which they hoped to delude the Communist authorities and, to some extent, they did in fact delude them with it. They never changed their marital life right through the story. They were at all times in fact and while in Europe husband and wife and lived and acted and were known as such to their acquaintances. They came to New Zealand and remained in New Zealand as husband and wife. I find on these facts that in our law this divorce was not a real divorce and was never intended by the parties to be a divorce. It is not based on any ground recognised by New Zealand law as a ground for divorce *(z)* and, in the present state of our society, is contrary to public policy. It is therefore not recognised by New Zealand law, and I hold that for the purposes of these proceedings [for maintenance and custody] the plaintiff [wife] and the defendant [husband] are still man and wife" (p 90) *(a)*.

It is submitted, albeit with hindsight, that the Court reached the right conclusion. Public policy was, at that time perhaps, an elusive concept on which to have based the non-recognition *(b)*. One might also suggest, again with hindsight, that the case was one which fell squarely within the Court's residuary discretion to refuse recognition. But the simplest, and no doubt the best explanation, of the case is that the decree was not recognised in New Zealand because it was obtained simply and solely on account of the duress under which both parties were labouring as members of a special class of persons ("good Catholics") in special danger (as being particularly personae non gratae to the Hungarian communist regime).

(y) No reference appears to have been made to s 12A of the Divorce and Matrimonial Causes Act 1928, which then governed the recognition of overseas decrees. The question of estoppel does not seem to have been raised.

(z) Sed quaere, since a divorce was obtainable in New Zealand in 1952 on the ground that a separation agreement had been in full force for three years: see Divorce & Matrimonial Causes Act 1928, s 10 (i), but cf *Wood v Wood* [1957] P 254 (CA).

(a) Semble, this is all but tantamount to saying that the divorce was a complete "sham", to use the word of Bagnall J in the *Meyer* case, and that there was in reality nothing to recognise. Cf the position in *Hornett v Hornett* [1971] P 255, and see especially at pp 260-261.

The *Madaras* case is the only one known to the writer in which a Court has explicitly purported to refuse recognition on the sole ground of public policy.

(b) But public policy is listed now as a ground for discretionary non-recognition by s 8 (2) of the Recognition of Divorces and Legal Separations Act 1971 (UK).

CORRESPONDENCE

Dear Sir,

Law Reform

I have just read your editorial of 3 August ([1976] NZLJ 314).

It may be of interest to you and to other readers of this Journal to know that practically everything you espouse in that editorial was canvassed in detail in 1965 at the Student Conference on Law Reform in Auckland.

I believe it is no accident that shortly after that Conference, the then Minister of Justice, the late Mr Hanan, produced a "grey" paper which set out the proposals for a Law Reform Commission, which, of course, was subsequently formed.

The staggering thing about it all is that you should find it necessary to devote an editorial to the same topic over 11 years later. One would not seek to criticise in any way the work that has been done by the Law Reform Commission which I believe has laboured under extreme hardship and, of course, was subsequently replaced by the New Zealand Law Reform Council for reasons which still seem rather obscure to me. Nevertheless, with the wealth of talent that is being produced from the Universities these days, and the depth of experience within the profession itself, one would have thought that by now such anachronistic legislation as the Sale of Goods Act 1908, the Moneylenders Act 1908 and sundry other statutes of similar antiquity, might have been suitably interred.

I believe that the reason why this has not come about is because successive Governments have steadfastly refused to be persuaded to set up a permanent Law Reform Commission such as the one that operates in the United Kingdom.

Regrettably, I do not have with me now all the information that was produced at the time of the 1965 Conference on Law Reform but I have no doubt that the records will still be held by the Legal Research Foundation or the Law School in Auckland.

I think your editorial is most timely, and, hopefully, it may encourage others who were present at that Conference in 1965 to look afresh at what was discussed at that time.

Yours faithfully,
P R Skelton
(Joint Chairman: Student Conference on Law Reform, 1965, Auckland.)
Hamilton

CRIMINAL LAW

ISSUE ESTOPPEL — ESTOPPED

By R A MOODIE, *Senior Lecturer, Victoria University of Wellington.*

For England at least, the difficulty of applying the doctrine of issue estoppel in one area of the criminal law has now been resolved, for the House of Lords has unequivocally determined in *R v Humphreys* [1976] 2 All ER 497 that it has no application to prevent enquiry into an alleged perjury. The doctrine was hesitatingly conceived for that jurisdiction 12 years ago by the same Court in *Connelly v DPP (a)* but only after a lengthy gestation period lasting a decade did it finally arrive, feet first, in a Leeds Crown Court in the case of *R v Hogan* [1974] 2 All ER 142. In *Hogan* the accused was charged with murder shortly after the victim of an assault, for which he had earned a conviction for causing grievous bodily harm, died. The trial Judge in the subsequent proceedings, Lawson J, held that issue estoppel applied with mutuallity between the crown and an accused in a criminal proceeding, and consequently Hogan, on his trial for murder, was unable to raise any of the issues that had been determined by the former jury on the causing grievous bodily harm charge. Accordingly the prepetration of the act causing grevious bodily harm and the absence of lawful excuse were ruled by Lawson J to have been conclusively determined by the jury against Hogan at the former trial. He was, therefore, estopped from raising those issues again on his trial for murder. The only issues left for the jury's determination in the subsequent proceedings in *Hogan* were causation of the death and provocation. Ironically, in spite of these rulings in favour of the prosecution the jury acquitted the accused on the murder charge. *Hogan* was subsequently affirmed by the Court of Appeal in *Humphreys'* case *(b)*, but the later decision was one which it was quite impossible the crown accept. The circumstances of the case were as follows.

Bruce Edward Humphreys was charged with driving a motor cycle on 18 July 1972 whilst a disqualified driver. Humphreys admitted his disqualification but denied having driven on the date in question. The principal witness for the prosecution was a police constable who identified Humphreys as the driver of a motor cycle he had caught in a speed trap. Humphreys' refutation of the officer's evidence was emphatic and he gratuitously added, on oath, that he "had not driven a motor vehicle at all during the year 1972". Faced with this conflict in the evidence the jury acquitted him However, the matter did not end there as the police made further enquiries and subsequently brought a further charge of prejury against Humphreys which was founded on the alleged untruth of his statement at the earlier hearing that he had not driven a motor vehicle at all in 1972. In support of this charge the prosecution called, in addition to other evidence, the same constable to give exactly the same evidence (ie that the defendant was driving on 18 July 1972) as had been given on the disqualified driving charge. The defence responded by objecting to the evidence and sought to set up an issue estoppel. The trial Judge, however, overruled the objection by drawing a distinction between the purpose behind evidence tendered to show Humphreys had driven whilst disqualified, and that behind evidence establishing that he had driven on a date (18 July) in 1972 which was within a period over which he had said on oath that he had not driven at all. There was, of course, a clear distinction between the offences in a technical or legal sense, but from a practical standpoint the objection could clearly be raised that the charge of perjury was simply a re-enactment of the disqualified driving prosecution dressed up in different clothes. In the result, Humphreys appealed his conviction on the perjury charge and the Court of Appeal held, inter alia, that the motive or purpose behind the constable's evidence given at the second trial was irrelevant (p 1027). There was only one issue in the former trial, that was the identity of the driver, and the jury, by its verdict, had determined for all relevant purposes that Humphreys was not the driver with the consequence that:

> "... according to the ordinary application of the issue estoppel principles, it was not open to the Crown to seek to prove again that ... [Humphreys] was the rider of that motor

(a) [1963] 3 All ER 510. Three Law Lords supported the view that it was available, Lord Devlin emphatically denied it and another expressed no opinion on it.

(b) [1975] 2 All ER 1023.

bicycle on the 18th July 1972 . . ."

The Court also rejected an alternative submission by the Crown that an exception to the issue estoppel doctrine had to be recognised in perjury cases – lest the rule should make it possible for a man to profit from his own fraud on the Court. To this argument Lord Widgery responded:

> "We do not feel able to do that. If this is to be done at all, it should be done either in the House of Lords or by Parliament because there is no trace in the books so far of perjury being in any sense exceptional in this manner."

There is, of course, an obvious practical reason for recognising the exception. It arises from the very nature of the perjury offence itself. This has been articulated in the New Zealand Supreme Court in *R v Morrison (c)*. There, Roper J said, in response to an argument advanced in a perjury trial – that issue estoppel operated to prevent a further enquiry into the crucial issues that had been answered in the accused's favour by the tribunal before whom the perjury was alleged to have occurred:

> ". . . it is unnecessary for me to decide whether the doctrine of issue estoppel is available in the criminal law of New Zealand or, if it is, whether there was sufficient isolation and determination of the fact here in dispute by the first jury's verdict . . . to found a plea of issue estoppel, for I am of the firm opinion that if the plea is available in New Zealand, and there has been a sufficient [isolation and] determination of the dispute fact . . . *the plea could never be available to inhibit an inquiry into possible perjury*."

There is of course the danger previously alluded to of allowing the prosecution a second try for a conviction under a different label if the opportunity for commencing perjury prosecutions is not kept under close control. But that issue aside the sense of Roper J's remarks require no further elucidation and clearly disclose the pressure the Crown must have felt to accept, what appears as a clear invitation by the Chief Justice in the Court of Appeal to appeal *Humphreys'* case to the House of Lords.

The Court of Appeal, in quashing Humphreys' conviction certified the general public importance of the following point of law for the opinion of the House of Lords:

> "Where in a trial on indictment there is a single issue between prosecution and defence and the defendant is acquitted, is evidence tending to show that the defendant was guilty of that offence admissible in a subsequent prosecution of the defendant for perjury committed during the first trial."

To this question the law Lords answered a firm "yes", but they did not confine their remarks to the issue. Viscount Dilhorne went on to agree with Lord Devlin in *Connelly* that to allow the application of issue estoppel to the criminal law would be the importation of a new doctrine which, as *Hogan* demonstrated, was undesirable. And Lord Salmon was more emphatic. He was of the view that:

> "In the criminal field the doctrine would be inappropriate, artificial, unnecessary and unfair – for [unlike civil proceedings] there were no pleadings defining the issues and no judgments explaining how the issues (even if identified) were decided."

Lord Edmund-Davies held that issue estoppel had no place in English criminal law, whilst Lord Fraser said it would be a public scandal if a person could not be charged with perjury in a case like *H M Advocate v Cairns* (1967) SC (JC) 37. In that case the accused had deceived a jury with an ingenious web of lies and had subsequently earned substantial sums of money by selling the stories of his deceptions to the press. Those stories subsequently invited a prosecution for perjury.

Whilst Viscount Dilhorne, Lord Salmon and Lord Edmund-Davies favoured a total exclusion of issue estoppel from the criminal law, they did not express any view on whether inconsistency between prior and subsequent verdicts could, or should, be avoided. In perjury cases Viscount Dilhorne saw no difficulty even though evidence given in the perjury trial would lead to the inference that the accused was guilty of the offence of which he was formerly acquitted. And surely this makes sense – there can be no inconsistency between an acquittal won with lies and a conviction for perjury for the lies – which by definition were told with intent to deceive the previous jury. But how does one deal with, for example, cases like *R v Gill? (d)* There the accused killed his son and wife with a single shot gun blast. On a charge of killing his wife by criminal negligence the accused was acquitted, the jury having accepted his story that the shooting was, in every sense, an accident. But Gill was subsequently tried and convicted of killing his son by criminal negligence. In both cases the only real issue was whether the killings arose from criminal negligence. The inconsistency inherent in the two different verdicts was too much for the Quebec Court of Appeal which found an infringement of the issue estoppel doctrine and quashed the

(c) An unreported judgment of Roper J in the Christchurch Supreme Court, 13 September 1974.

(d) (1962) 38 CR 122. Discussed J Miller, "Issue Estoppel in Criminal Proceedings" [1975] NZLJ 703.

conviction. Clearly autrefois did not apply because the two charges were not "substantially the same" *(e)*. Consequently the only protection available to an accused in such a case is issue estoppel – unless there is vested in the Courts some form of inherent jurisdiction to prevent the second prosecution.

The idea of such a power being vested in the Court was promoted by Lord Devlin in *Connelly v DPP*. But there was a divergence of opinion on this question in the House of Lords in *Humphreys*. Viscount Dilhorne said that whilst he did not dissent from the view that High Court Judges had inherent jurisdiction and a general power to prevent unfairness to the accused:

> "... it did not follow that the inherent power of the court went to the length of giving a judge power to prevent an indictment properly preferred from being proceeded with merely because he thought the prosecution should not have been instituted. To recognise the existence of such a degree of omnipotence was unacceptable in any country acknowledging the rule of law."

Lord Edmund-Davies was of the same view, but Lord Salmon thought an inherent power to prevent prosecutions that were oppressive and an abuse of the process of the Court was necessary to deal with cases where a subsequent charge of perjury smacked of "... an attempt by a disappointed prosecution to find what it considered to be a more perspicacious jury or tougher judge". Viscount Dilhorne dissented from this view. Perjury was a serious offence and such prosecutions, where the perjury could be proved, could not ordinarily be said to be "oppressive or vexatious or an abuse of process to institute a prosecution".

The remarks of the Judges in *Humphreys*, on the scope of the Court's inherent jurisdiction to prevent an abuse of the process of the Court, were confined to the use of that power to prevent perjury from being used by the prosecution for a second try at convicting the accused. But the view expressed by Viscount Dilhorne must also apply in the wider context of, for example, cases such as *Gill* referred to above; for coupled with the abolition of the doctrine of issue estoppel it seriously narrows down the ability of the Courts to prevent what must appear to public eyes, as nothing less than double jeopardy.

The decision in *Humphreys* establishes beyond question that a perjury prosecution cannot be frustrated in England by the invocation of the doctrine of issue estoppel. On the wider issue of the place of issue estoppel in the criminal law, however, it is submitted that the decision is not conclusive: although it must be conceded that this only means that the door has not been bolted fast against issue estoppel, for it has at the very least been slammed quite firmly shut. The limits of the Courts' inherent jurisdiction, meanwhile, remains very much an open question; and whilst the sense of Viscount Dilhorne's remarks cannot be ignored, it is to be hoped that where a subsequent perjury prosecution is brought on evidence that clearly demonstrates an improper motive on the part of the prosecution, the Courts will not hesitate to interfere to prevent its continuance.

Issue estoppel has not yet been authoritatively affirmed by the New Zealand Courts although it has received a measure of approval *(d)*. It flourishes in the United States of America, Canada and Australia, although its extension to benefit the prosecution as in *Hogan* has not yet been determined in those jurisdictions. Logically, of course, the doctrine can be more readily applied in favour of the prosecution than against it. As it applies to benefit the defence, even where there is a clear identicality of issues, the general verdict of the jury must always be over-shadowed by the doubt that the acquittal was a response to a failure on the part of the prosecution to discharge its burden of proof, rather than a positive finding by the jury that the accused did not do what was alleged. However, a conviction, is proof beyond reasonable doubt of every essential issue in the former case *(f)*. *Hogan*, though, demonstrates the undesirability of applying the doctrine in the Crown's favour. It is totally unacceptable for a trial Judge to have a confine a jury's enquiry into the facts in that way in a criminal prosecution. A verdict in criminal cases must be seen to be the product of an examination of the facts of the case in their totality, and not a piecemeal enquiry by different juries of different facts at different times. A principal problem with issue estoppel, however, is the necessity to consider its application only in absolute terms. In England the Courts have no statutory power to quash an indictment and the absence of a legislated judicial power to interfere to prevent the bringing of, or to quash, an indictment, has obviously influenced the House of Lords in *Humphreys*. Both Viscount Dilhorne and Lord Edmund-Davies denied the acceptability in England of "any such assertion of judicial omnipotence". The granting of *a discretion* to an English Judge to allow or disallow an objection based on issue estoppel would, therefore, simply aggravate any implication of an assertion of such omnipotence. But the same is not true for New Zealand. We have not entertained any reticence about giving a Judge of the Supreme Court power to quash an indictment. The power to direct that

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(e) Autrefois is discussed by the writer, [1974] NZLJ 169, 194.

(f) Discussed, L W Blake, 140 JP 58.

no indictment be presented or that an accused not be arraigned is given to a New Zealand Judge by s 347 of the Crimes Act 1961 in unqualified language. The Courts have quite properly, however, interpreted that provision in its historical context, so that the power conferred is exercised in the spirit of the Grand Jury enquiry which it superceded. Its exercise does not, therefore, reflect any opinion by the Judge as to the propriety of the prosecution. His enquiry is confined to the contents of the depositions, that is, to the sufficiency of the evidence. Is there any difficulty, therefore, in bringing within the scope of this enquiry the decision of a previous jury on the same facts? I suggest there is not. Thus, for example, if *Gill* had been tried in New Zealand instead of Quebec, the trial Judge could have discharged Gill from the second indictment charging the death of his son on the grounds that the first jury had already decided the same issue in his favour on his trial for causing his wife's death by criminal negligence. Articulated in terms of issue estoppel, such a finding can be seen in terms of the application of a principle in the law of evidence, rather than as reflecting any view of the Judge on the propriety of the prosecution. And the use of issue estoppel in that context would enable the Courts to avoid the doctrine's undesirable consequence because of a Judge's over-riding discretion under s 347 (or s 345) of the Crimes Act 1961.

The writer's conclusion, therefore, is that most of the negative aspects of issue estoppel that have prompted the Courts to reject it in England, can be avoided in New Zealand by confining the doctrine's application in this jurisdiction to the exercise of the discretion given a Supreme Court Judge by s 347 (or 345) of the Crimes Act 1961. In that context two steps are involved in the finding of an issue estoppel. They are, first, that there has been a prior adjudication of an identifiable issue, and secondly, (in the light of the evidence as a whole disclosed in the depositions) a Judge of the Supreme Court considers it proper to exercise his discretion to order that the indictment not be presented or that the accused arraigned thereon. The effect of this, of course, is to change the character of issue estoppel to some degree and to confine its application to indictable proceedings. Thus, a general doctrine of issue estoppel in the criminal law is denied in favour of the view that its invocation is sometimes desirable as an explanation of a process designed, intended and used in this country, to facilitate the administration of justice.

HANGING JUDGES

About five years ago a small group of barristers in Dunedin began a collection of caricatures of visiting Judges, drawn by Mr Sid Scales the well known *Otago Daily Times* cartoonist. The original of the caricature was presented to the Judge at a small function, and a copy was hung in each case in the Robing Room. Permission has been obtained to reproduce the caricatures in the Journal, and further selections will appear in later copies of the Journal. Full size copies of the original caricatures (23 cm x 33 cm) are available from Mr K C Marks, P O Box 1384, Dunedin, for $2 each. The proceeds of the sale of these copies will go towards the Dunedin Robing Room Social Fund which has as one of its objects the refurbishing of the robing room.

Rt Hon Sir Richard Wild, KCMG
Chief Justice

CONTRACT

REPUDIATION — A CONTINUING SAGA

By R J BOLLARD, *an Auckland Practitioner.*

It has been said that "the general law as to the effect of repudiation has long been settled", with *Heyman v Darwins Limited* [1942] AC 356; [1942] 1 All ER 337 being described as "the locus classicus" for reference purposes *(a)*. There, Viscount Simon LC declared: ". . . repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of repudiation, on the other" (361; 341). Of the host of dicta in subsequent cases, this statement by Lord Reid perhaps explains the position after acceptance most succinctly: ". . . when a contract is brought to an end by repudiation accepted by the other party all the obligations in the contract come to an end and they are replaced by operation of law by an obligation to pay money damages. The damages are assessed by reference to the old obligations but the old obligations no longer exist as obligations." *Moschi v Lep Air Services Limited* [1973] AC 331 at 345; [1972] 2 All ER 393 at 399.

On the other hand, if an innocent party, rather than accept repudiation, elects to affirm the contract, then it simply remains in force for the benefit of both parties, without, however, affecting the innocent party's right to claim damages for the other's breach. The innocent party must thus decide whether to accept the repudiation and treat the contract as at an end or affirm it and regard it as still on foot. There is no half-way course. His election must be one or the other *(b)*. Moreover, should he elect to rescind, his election so to do should be unequivocal and made without undue delay.

What has been stated thus far may appear no more than a summary of basic principles. And so it is. But it serves to introduce the principal objects of this commentary to outline the tests for determining when an innocent party can safely regard a contract as repudiated; further, to examine the type of breach which the law regards as repudiatory. Obviously, a contracting party, encounting or anticipating what he regards as a significant breach by the other party, may be minded to interpret the breach or anticipated breach as repudiation of the contract, purport to accept the repudiation, and treat the contract as at an end. If, however, the breach or anticipated breach is subsequently found to have been such as not to justify that interpretation then the rescinding party will himself be liable to be held in breach of the very contract he believed was ended.

At this point, it will be as well to consider what, broadly speaking, is comprehended by repudiation, for like so many terms employed in the law of contract, recurrent use in different contexts is apt to confuse. Firstly, repudiation may involve express renunciation of contractual obligations; secondly, renunciation implied from failure to render due performance; and thirdly, renunciation implied from a party so positioning himself that he will apparently be unable to perform when the time comes.

Hence, it is commonly said that repudiation involves a refusal to perform, either expressly demonstrated or able to be implied from the circumstances *(c)*. Or put another way, it involves conduct showing clearly an intention to breach the contract. But "the breach or threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract" *(d)*. That is, to constitute repudiation, the breach must be what has been variously described as breach of an essential term, or of a fundamental term, or a term going to the root of the contract. Alternatively, it has been said that the correct approach is to ask: "Will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to the remedy in damages as and when a breach or breaches may occur? If this would be so, then a repudiation has taken place" *(d)*. In short, is the breach of such seriousness as to justify the innocent party treating the contract as at an end if he so elects.

(a) *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216 at 227 per Sachs LJ.

(b) Though sometimes the effect of the breach may be so serious as to leave the innocent party with no practical alternative but to treat the contract as at an end — which, of course, was the position in the *Wayne Tank Co* case [1970] 1 QB 447; [1970] 1 All ER 225.

(c) Note: *Bow v McGrath Builders Ltd* [1974] 2 NZLR 442 at 452; *Chatfield v Elmstone Resthouse Ltd* [1975] 2 NZLR 269 at 277-8, and the authorities there cited.

(d) *Decro-Wall International SA v Practitioners in Marketing Ltd*, supra at 232 per Buckley LJ.

Before proceeding further, it should be noted that a refusal or anticipated refusal to perform should not be regarded in isolation. Often enough, refusal stems from sheer financial inability or some other business reason inducing a change of attitude towards the bargain. But sometimes apparent unwillingness stems from a misapprehension of the true effect and meaning of the contract itself, and the parties' respective rights and obligations thereunder. In this situation, a party may still be prepared to fulfil his side of the bargain, but in accordance with his own interpretation of it. For instance, in *Sweet & Maxwell v Universal News Services Ltd* [1964] 3 All ER 30 there was a dispute between a lessor and lessee as to the terms of a lease to be concluded pursuant to a prior written agreement to grant lease. The lessee rejected a covenant proposed by the lessor as not forming part of the prior agreement. The lessor treated this as repudiation, and sued for possession. Harman LJ, (with whom Pearson LJ and Buckley J were in agreement), did "not think that the defendant company in this case may claim that it did not intend to perform the contract". Neither, in his view, was the agreement a "very perspicuous document". He thought it appropriate that the parties should "go to the Court and get the matter (of the agreement's interpretation) determined, as they can" (p 40). As Pearson LJ observed "prima facie the defendant company was not refusing to perform the agreement, but wished to rely on it" (p 42). Hence it seems that, in general, these types of cases need to be carefully assessed in the light of the true contractual arrangements – still applying the basic test; has an unequivocal intention not to perform a substantial part of the contract been shown?

Now in most instances where a party indicates unwillingness to perform his side of the contract before performance is due, a Court's task is comparatively straightforward. But where during performance there is a breach or even a series of breaches, (complicated perhaps by a likelihood of future repetition), the effect of the party's conduct has to be very carefully weighed in the light of the terms of the contract. Hence, in *Decro-Wall International SA v Practitioners In Marketing Ltd* (supra) the Court of Appeal had to consider whether the defendant's failure promptly to meet bills of exchange payable for goods purchased from time to time from the plaintiffs (a French manufacturing company) amounted to repudiation. Defendants incurred heavy expenses in promoting plaintiffs' products as sole distributors in the UK pursuant to an oral agreement made in March 1967. In April 1970, plaintiffs appointed another company sole UK concessionaires without informing the defendants. They alleged that the defendants had wrongfully repudiated the agreements by failing to pay the bills on time. It was held that the failure to pay the bills promptly plus a likelihood of similar delays in the future, did not constitute repudiation of the agreement, since the breaches and likely future breaches did not go to the root of the contract. This was the inference to be drawn from the practical consequences of the defendants' conduct, and there was nothing in the agreement to suggest that the terms as to time of payment were essential. Salmon LJ approached his decision by asking: "How is the legal consequence of a breach to be ascertained? Primarily from the terms of the contract itself. The contract may state expressly or by necessary implication that the breach of one of its terms will go to the root of the contract and accordingly amount to repudiation. Where it does not do so, the Courts must look at the practical results of the breach in order to decide whether or not it does go to the root of the contract" (pp 221-2). Sachs LJ preferred "to adhere to the longstanding phraseology . . . that to constitute repudiation a breach of contract must go to the root of the contract", and he then went on to observe that "whether a breach does go to the root is a matter of degree for the Court to decide in each case" (p 227).

Often, of course, parties employ a word or phrase with a meaning peculiar to their particular contract. In *Schuler v Wickman Machine Tool Sales Ltd* [1974] AC 235; [1973] 2 All ER 39, for instance, the question facing the Lords was the interpretation to be placed upon a clause prefaced with the words "It shall be a condition of this agreement that:" The clause then went on to provide that W was to make regular weekly visits to six selected firms to promote sales of certain equipment manufactured by S. Another clause provided that S might "determine this agreement forthwith if . . . the other shall have committed a material breach of its obligations hereunder and shall have failed to remedy the same within 60 days of being required in writing so to do . . .". Lord Reid pointed out that "sometimes a breach of a term gives that option (whether or not to terminate the contract) to the aggrieved party because it is of a fundamental character going to the root of the contract, (and) sometimes it gives that option because the parties have chosen to stipulate that it shall have that effect" (251; 44). By a majority (4 to 1) it was held that despite use of the word "condition" in the former clause a breach of that clause (through failure to maintain the schedule of regular visits), was not appropriate to allow S to regard the contract as repudiated. Such a construction would have meant an unreasonable result which the parties could not really have intended. By reading the two clauses

together, the difficulty was found to disappear. A breach of the 'conditional' clause was thus construed as a 'material breach' within the meaning of the latter clause, requiring written notice that the breach be remedied. Significantly, Lord Reid remarked: "No doubt some words used by lawyers do have a rigid inflexible meaning. But we must remember that we are seeking to discover intention as disclosed by the contract as a whole. Use of the word "condition" is an indication – even a strong indication – of such an intention but it is by no means conclusive. The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear" (251; 45).

It is now proposed to look briefly at the different terms employed in the authorities in reference to the repudiatory type of breach. For instance, is there a difference between the breach of a fundamental term and a fundamental breach? This question received more than passing consideration in the celebrated *Suisse Atlantique* decision [1967] 1 AC 361; [1966] 2 All ER 61. Lord Upjohn saw the former expression as being suitable to describe a term to which the parties have expressly agreed or which the law regards by necessary implication as going to the root of the contract, so that *any* breach thereof may be viewed by the innocent party as repudiatory without further reference to the facts and circumstances. The latter expression he described as "a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and all the facts and circumstances of the case" (421-2; 86). Both Lord Upjohn and Viscount Dilhorne observed that the two terms had been used as if they were interchangeable when they were not. Lord Wilberforce, however, said they had both been "used in the cases to denote two quite different things, namely, (i) a performance totally different from that which the contract contemplates, (ii) a breach of contract more serious than one which would entitle him to refuse performance or further performance under the contract" (431; 91). And he went on to note that to use the expression "fundamental breach" without showing what meaning is intended "is to invite confusion" (ibid).

But, one may ask, what significance is to be drawn from various other descriptive terms which have been held sufficient to found repudiation, eg breach of an essential term, or of a condition, or total breach. Not unexpectedly, the authorities give little assistance in deriving any definitive distinctions, and lead one to the view that, on a general basis, they are no more than descriptive variations of the type of breach which the law regards as repudiatory. Indeed, Lord Reid, speaking of the term fundamental breach in *Suisse Atlantique* could "find nothing to indicate that it means either more or less than the well-known type of breach which entitles the innocent party to treat it as repudiatory and to rescind the contract" (397; 70).

Hence, it may be concluded that repudiatory breach is comprehended as a genus by a number of descriptive terms which have a common nexus in that employment of any one will generally result in a finding of repudiation.

Furthermore, it may be contended that, in most instances, the approach the Courts adopt is to examine carefully the events flowing from a breach so as to decide whether the effect thereof is such as substantially to deprive the innocent party of his benefit under the contract *(e)*. By this process the true nature of the breach is established by an individual assessment of what has resulted from the breach without the need for a strict delimitation of descriptive terms.

To conclude, one may concur with the assertion that the general law as to the effect of repudiation is well understood. But cases will continue to be reported on the circumstances when repudiation is found to occur. For here the law retains an important element of flexibility allowing for the consistent development of general principles in the context of disparate fact situations.

(e) Vide the judgment of Diplock LJ in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; [1962] 1 All ER 474.

"You must not indulge too sanguine hopes," said the Doctor, "should you be called to our Bar. I was told, by a very sensible lawyer, that there are a great many chances against any man's success in the profession of the law; the candidates are so numerous and those who get large practice so few . . . it was by no means true that a man of good parts and application is sure of having business, though I allow that if such a man could but appear in a few cases, his merit would be known, and he would get forward; but the great risk was that a man might pass half a lifetime in the Courts and never have an opportunity of showing his abilities." – *Boswell's Life of Johnson.*

FAMILY LAW

THE MATRIMONIAL PROPERTY BILL 1975 — SOME FURTHER THOUGHTS

By A H ANGELO *and* W R ATKIN *Victoria University of Wellington and based on a paper presented at the 1976 AULSA Conference*

The Matrimonial Property Bill 1975 has since its first reading last year occasioned a good deal of discussion both in this Journal and in the community at large. The general thinking behind the Bill and the structure of its main provisions are therefore by now *(a)* – fairly well known.

In this comment we tender a few thoughts on matters covered by the Bill which in the main have not as yet been reported upon. These arise from cls 5, 10, 15 and 49 which deal respectively with the limitation of the provisions of the Bill to problems arising during the joint lifetime of the spouses, the "present interest in the nature of an unsecured charge" that each spouse is to have in the matrimonial property, the ability of spouses to contract out of the Act, and the Act's proposed application to de facto "spouses".

Dissolution by death

The White Paper explaining the Matrimonial Property Bill states that the question of dissolution of the matrimonial property regime by death was omitted because the relationship to the law on wills and the resolution in intestacy gave rise to "direct and complex questions". It was further indicated that there were important revenue considerations that had to be taken into account. Since the change of Government it has become clear from statements of the Minister of Justice on a number of occasions that present policy is to amend the Bill to extend it to the death situation. This is a logical step and was clearly in the contemplation of the former Government when it presented the Bill last year. The aim of making the Bill a "code" as expressed in cl 4 will be better achieved by this new decision and anomalies that may have been created, for instance by a divorced wife potentially having better protection property rights than a wife whose husband has died during the continuance of the marriage, will be avoided. The question remains as to the manner in which the Government will legislate for the distribution of the matrimonial property on death. There are several possibilities open, not all of which it is submitted give rise to "complex" questions. On the other hand, a complete review of the succession rules would, it is conceded, be a major task.

Of the important foreign systems with matrimonial property regimes along the lines of that in the Bill, most have incorporated the distribution of marital property on death into their matrimonial property rules. The French system for instance is very simple. The rules relating to matrimonial property are dealt with as a contractual matter and are kept distinctly separate at a conceptual level from succession matters. The practice is that distribution of matrimonial property is identical whatever the cause for the dissolution of the matrimonial property regime may be. If the marriage is dissolved by divorce each spouse gets half of the matrimonial property; if the marriage is dissolved by death each spouse takes half of the matrimonial property and the dead spouse's half share then forms part of his estate in which the surviving spouse may or may not have succession rights. The two matters are kept quite distinct. Applying this system by analogy to the New Zealand situation the position would be that the scheme for division of the property provided by the Bill would be implemented whatever the cause for the winding up of the matrimonial property regime. On death the surviving spouse would take half of the domestic assets and the share that he had contributed in the general assets. The other portion of the matrimonial property would along with the deceased's separate property form part of the deceased spouse's estate in which, in terms of the Administration Act 1969, the Family Protection Act 1955, and any will that may exist, the surviving spouse may have rights as a successor.

A somewhat more flexible but complex method of division is used in West Germany. When the matrimonial property is assessed in West Germany each spouse takes half. Where the marriage is dissolved by death however that half

(a) Cp Fisher, "The Matrimonial Property Bill – Misguided Chivalry?" [1976] NZLJ 253; Inglis, "The Matrimonial Property Bill – Comparable Chaos" [1976] NZLJ 321.

share in the matrimonial property is substituted by an amount equalling a quarter of the deceased's estate. That is the pattern on intestacy; intestacies are the rule in West Germany. Exceptionally the surviving spouse can renounce his rights and claim (presumably only if it is to his advantage) calculation of and payment of his share in the matrimonial property. In the event of a testacy where no provision is made for the surviving spouse, that spouse may claim his half share in the matrimonial property. If testamentary provision has been made he has the option of taking that amount or of disclaiming his testamentary rights and taking the half share of the matrimonial property. In every case the surviving spouse's share in the succession is added to his matrimonial property rights. This succession right is calculated on the basis of an intestate's share. Its extent will always depend on the nature of the other relatives called to the succession but will in no case be less than a quarter of the deceased spouse's estate. Therefore by disclaiming inheritance rights, even on a testacy, a surviving spouse can always expect to take at least a half of the deceased spouse's estate. Which method of claiming is used will depend on which shows the greatest advantage, but typically where the regime is dissolved by death the surviving spouse will take his quarter of the estate under the matrimonial property laws and his intestate share (never less than a quarter).

If this type of solution were to be adopted by the New Zealand legislature we would have, instead of the spouse taking a share under the system presently outlined in the Bill, a surviving spouse taking a fixed share in the deceased spouse's estate. Such share would be set as a policy matter at a level which would normally mean the accrual to the surviving spouse of a greater portion of the matrimonial property than if the regime were dissolved inter vivos. The advantage of this approach is that the complex rules of calculating shares in matrimonial property would not play such a great part. Introduction of a system similar to that of West Germany would however require the legislature, almost necessarily, in a review and reform of a number of statutes in the succession law field.

The spouse's interest in matrimonial property

The Bill is described in the White Paper as proposing a matrimonial regime of "deferred participation". Despite this cl 10 (1) gives both spouses what it describes as "a present interest in the nature of an unsecured charge over the whole of the matrimonial property". This provision is unusual and is described by Fisher as "a rare animal indeed" (ibid, 257). Doubtless the object of the clause is to offer substance to the desire of giving in terms of the White Paper "married women a present interest in the matrimonial property and not simply a nebulous claim to it at some time in the future".

The meaning and effect of this clause, however, is not at all clear, which lends credence to the view that its insertion in the Bill represents more a political gesture than anything else.

It is not at all easy to see what kind of interest a spouse who does not have a legal or equitable interest in the property receives by virtue of the clause. The interest is "in the nature of an unsecured charge". The word "charge" has recently received attention from the New Zealand Court of Appeal. In *Waitomo Wools (NZ) Ltd v Nelsons (NZ) Ltd* [1974] 1 NZLR 484, 490, Richmond J said:

> "... in its ordinary and generally accepted meaning the word 'charge' is apt only to describe a situation in which some particular property, real or personal, is appropriated or set aside in favour of someone who is given by law, or by agreement, will or otherwise, the right to resort to the property to satisfy or discharge some obligation."

Clause 10 (2) states that nothing in the clause "shall affect the title of any third person to any property, or affect the power of either spouse to acquire, deal with, or dispose of any property, or to enter into any contract or other legal transaction whatsoever...." This shows clearly that the Bill does not purport, in the words of Richmond J, to appropriate the matrimonial property in favour of the non-title-holding spouse, nor is that spouse entitled to resort to the property for his own benefit. On the face of it, the clause appears therefore to be self-contradictory.

This element of self-contradiction continues when the juxtaposition of "unsecured" and "charge" is considered. If the interest in cl 10 (1) is not a security, then it is suggested that there can be no charge, as described by Richmond J. No property has been appropriated in favour of the spouse who has no legal or equitable interest.

This is subject, however, to the provisions of cl 11, which relate to the rights of creditors. By virtue of cl 11 a spouse's "interest" in the matrimonial property could in certain instances became available to the creditors for the settlement of that spouse's personal debts. As presently drafted, the clause is ambiguous for it may relate to an "interest" upon division of the property under cls 12 and 13, or it may relate to an "interest" under cl 10. If the former is the correct meaning then the interest will not accrue until a division has taken place. If, however, the latter is the correct meaning, the result will be either startling or nonconsequential. As the

unsecured charge is over the whole of the matrimonial property, is it intended that creditors should have a claim against the whole property irrespective of the legal and equitable interests that the other spouse may have in the property? If this is so, it is suggested that it is both a startling and undesirable result.

On the other hand, if "an unsecured charge" gives no real interest in the matrimonial property at all, since normally an interest would have to be secured before it could satisfy the description proferred by Richmond J, then a creditor under cl 11 would have no claim to the matrimonial property unless it was against property in which the debtor had a legal or equitable interest of the traditional kind.

It is further suggested that an interest such as that purportedly granted in cl 10 (1) is not necessary for the application of a spouse who might fear that his residual interest upon division under cl 12 and 13 is being dissipated. Safeguards exist in the present legislation which give the Court power to restrain or set aside dispositions (ss 80 and 81 of the Matrimonial Proceedings Act 1963 and s 7 (4) of the Matrimonial Property Act 1963). These provisions exist despite the fact that under present law there is no equivalent to cl 10 (1). The Bill retains these provisions (cls 38 and 39).

The Bill does add, however, in cl 37 a new form of protection, namely the registration of a notice of an interest in matrimonial property. This follows a recommendation by the 1972 Justice Department Report on the Matrimonial Property Act 1963 (para 42). This clause raises in an even more acute form the question as to what interest the notice serves to protect and the nature of the interest under cl 10. It is suggested that the difficulties could be more easily overcome by inserting in cl 37 a provision that a spouse may register a notice whether he has a legal or equitable interest or not, and thus obviate any problems to which cl 10 might give rise.

The difficulties of interpretation of cl 10 reflect a basic policy dilemma apparent in the Bill. The policymakers have not been prepared to adopt a full-scale community regime of matrimonial property which would mean that the property is owned jointly throughout the course of the marriage and is subject to management rules *(b)*. They have settled instead for a regime of deferred community. On the other hand, for political reasons they appeared to want to be able to say that the Bill grants spouses, particularly wives, certain immediate rights and ensures that the legal owner of the matrimonial property does not defeat the residual claims of the other spouse by whittling away the assets. In the light of the failure of the compromise contained in cl 10, it is suggested that our legislators should either scrap cl 10 entirely or take the bolder step of introducing joint ownership of matrimonial property *during the course* of the marriage, with accompanying management rules.

Marriage contracts

Just what will result from the power granted in the Bill to spouses to contract out of the Act is difficult to foresee. This is a new power for New Zealand spouses but is one which is currently well known in a number of other jurisdictions, particularly those of Continental Europe. Clause 15 when read with the other clauses of the Bill does not make it clear whether the spouses can completely opt out of the Act or whether they can simply vary, within certain guidelines, the scheme the Act provides. It is at least arguable that the Bill foresees that there will always be some domestic assets even when the spouses contract out under cl 15. The policy behind cl 15 as stated in the White Paper however is clearly that parties may contract out totally.

It could be argued that the making of such a contract is alien to the general spirit of marriage. However, the current practice relating to wills and the well established common law practices of centuries past of making marriage settlements show that this is not necessarily true. In the present state of the law parties often think of changing their legal position as a result of their marriage in the sense that the fact of marrying is for a number of people a cause for making or changing a will. This they do without necessarily thinking that their marriage may be a disaster and they should take protective measures and without necessarily meaning that the action they take will be to the advantage of their spouse or intended spouse. What is involved is a state of mind and if the profession generally promotes, as it might be said to do in respect of wills, the feeling that this is the right and proper thing to do, then the making of marriage contracts to cover property matters could become a matter of course. The extent to which cl 15 is used will it is submitted depend largely on the profession.

The experience of other countries where systems like this have operated is interesting. The statutory regime applicable in the absence of a special agreement is normally the one that surveys have shown would be that agreed to by most spouses if they took the trouble to make a

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(b) Cp British Columbia Royal Commission on Family and Children's Law (*Report on Matrimonial Property*) (Victoria: Queen's Printer, 1975).

contract. The basic policy is much the same as that in the establishment of intestacy rules. In France couples traditionally did not make marriage contracts. Since the reform of the matrimonial property law in 1965 there has however been an increasing tendency to contract out and current indications are that anything up to 15 percent of marriages are governed by a special marriage contract. Even then of course the French practice indicates that most spouses do nothing. Quebec on the other hand changed its law, approximately in the same direction as that of France, in 1969. The interesting pattern there is that while the statute provides a community of property not too dissimilar from that proposed in the New Zealand Bill, 53 percent of those who married in the period 1969-1974 entered into a marriage contract, the purport of which was to proclaim a regime of separation of property. These two examples show that there is, on the basis of overseas experience, no clear basis for saying that cl 15 would not be used in New Zealand.

De facto relationships? *(c)*

A somewhat more dramatic development in the field of social policy is the inclusion in cl 49 of provision for the application of the principles of the Bill to the parties to a de facto "marriage" provided that the Court is satisfied that those "parties have lived together as husband and wife for a period of not less than two years preceding the date of the application". A number of problems arise in relation to this provision, some of a policy nature, others of a technical or substantive kind. At the policy level it is of course clear that the Government wishes for welfare purposes to protect parties to a relationship like a marriage in the same way as if they were husband and wife. Following from this, it could be said that there will be no advantage in property terms for persons not to marry. The party who might have been reluctant to marry because he did not wish to share property under the matrimonial property system now has that advantage denied him; married or not the sharing of property is likely to proceed on a similar basis. On the other hand, given the freedom that those in a de facto relationship have to terminate their relationship and the fact that the Bill gives equal protection property-wise to parties married or not, it could be argued that this clause is a disincentive to marriage. If things go wrong in a marriage the problem of dissolving the relationship is still a very real one.

With current developments in the common law in England, and in New Zealand, in the field of constructive trust it is at least moot whether the type of protection extended to the de facto situation in the Bill is necessary. If however it is accepted that legislation is required to secure the welfare of persons in a de facto relationship it is still possible to argue that conceptually these provisions should not appear in a statute dealing with marriage. The juxtaposition of the clauses for the de facto situations with those for married parties is inappropriate. It further appears that any agreement made under cl 16 by parties to a de facto "marriage" is not subject to the same controls as those provided under cl 15 for an agreement between husband and wife.

Whatever one's view of cl 49 it gives rise to a critical problem of definition. What exactly is a "de facto marriage"? There is a jurisdictional test of two years prescribed but beyond that the Court has a wide discretion as to which situations it will regard as constituting "de facto marriages". The phrase in itself is contradictory. Also there is the question of whether "marriage" has to be interpreted analogously to the rule in *Hyde v Hyde* (1866) LR 1 P & D 130 that the relationship should be that between a man and a woman to the exclusion of all others, or whether the intent is to move into a general economic and work-sharing definition of marriage, in which case the references to "husband", "wife", and "spouse" would be construed as references to persons living together who share the functions that a husband and wife typically share in the maintenance of a home.

Taking the restricted and traditionally based view, and assuming that criteria are established to make a "de facto marriage" objectively recognisable, there still remains the question which of those "marriages" would get the benefit of cl 49. A number of other states have, in recent times, had to wrestle with this problem. In some cases the problem has arisen because of a division between the secular and religious requirements for marriage and in other cases because of social practices. Where the social or religious rules are clear as to that constitutes marriage, the law in extending its protection to de facto relationships has usually done so on the basis of accepting that religious or social definition as its own. The religiously accepted marriage is put on a par with the legal marriage. In Japan for instance couples traditionally married, in social terms, some months before they registered their union to render it a marriage in legal terms. In other words, a large percentage of Japanese couples in the early months of their joint life are considered at a social level to be man and wife though the law regards them as unmarried. In extending the protection of

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(c) Cp Vaver, "The Legal Effects of De Facto Relationships" (1976) 2 Recent Law (NS) 161.

the marriage laws to such couples the Courts have accepted as the relevant criteria the same criteria used by the community for recognising whether the couple are man and wife.

In New Zealand no such socially recognised criteria exist. The problems for New Zealand Courts could well then be similar to those experienced in recent years in France. The case law there has developed specifically around the right of one de facto "spouse" to sue in tort where the other had been killed or suffered injury. Initially a claim was allowed where the union was of a "durable" nature. Then in the 1930s the decisions in the field indicated that before a person could sue he had to show a legal relationship vis-a-vis the victim and further that that right had to be one protected by a cause of action. On this basis the cause of action was denied to persons living in a free union, but from this point on the Courts slowly relaxed the application of the law, following legislative moves of a similar nature, first by saying that the sole test was the existence of a duty on the part of the victim to provide for the claimant. On this basis too the "de facto spouse" was normally denied a claim because the legal duty to maintain was typically restricted to members of the legitimate family unit. The question then arose whether this obligation to support or assist had to be a legal one or whether it could be a natural or moral obligation. By the 1950s the Court of Cassation had also accepted that a direct legal relationship between the parties was not required. This again indicated a slight relaxation but it was not till 1970 that the Full Bench of the Court of Cassation held that even a legal relationship was not required. Provided the union between the claimant and the victim had been stable and non-delictual, eg not immoral, adulterous, or incestuous, any loss suffered was compensatable.

The French Courts have had great struggles with the concepts involved for most of this century. They have been faced with cases where both wife and concubine had claimed damages, and in some instances allowed the claim of the concubine and not of the wife! In another case the claims of two concubines were allowed, although on appeal the decision was reversed on the grounds that double concubinage was immoral! The 1970 decision which tended to settle the principles involved concerned the claim of a woman who had lived with the accident victim for 35 years – a relatively clear case. However, in applying the test of "stable and non-delictual" the Court is still involved in the exercise of a discretion; while immorality is said not to be a criterion, the exercise of the discretion inevitably involves a moral appreciation of the situation.

What a New Zealand Court might do in defining a "de facto marriage" is hard to tell. It will surely encounter similar problems to those of the French Courts. It may also say that where one of the parties to the free union is a party to an undissolved marriage his claim is barred. Such an interpretation would appear to be against the intention of the Legislature, but unless the Court restricts the definition of "de facto marriage" it stands to become involved in the even more difficult problem of adjudicating on conflicting claims, in the event of a "matrimonial" property dispute, between the spouses and a "de facto spouse". In the White Paper the Government expressed some doubt as to the acceptability of the inclusion of cls 16 and 49 and indicated it was anxious to know what public opinion on the question was. The White Paper stated that this policy move was not a new one citing as examples of its implementation in the existing law, the Social Security Act 1964, the Accident Compensation Act 1972 and the New Zealand Superannuation Act 1974. To these enactments the Government might also have added the Domestic Proceedings Act 1968, ss 27, 30, 35 and 53 in particular *(d)*; and what clearer indication could there be of changing social attitudes and Government policy than s 3 of the Status of Children Act 1969 which states "... the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other..."! The Government places special stress on the importance and value of the family in society. Will the legislating of cl 49 strengthen or weaken the family? – that is the big question.

Postscript

In his interesting article Fisher begins with a hypothetical situation which is designed to show how the Bill can operate a major injustice. One of the salient facts is that the wife in the situation gifts shares in her family's business to her husband, who ultimately turns the business into one worth a million dollars. The learned writer concluded, inter alia, that the wife had no right to share in the million dollars because "[u]nder cl 8 (7) and 15 (6) the business shares became the husband's separate property from the time of the gift". (p 254). Later in the article it is suggested that "the formal exclusion of gifts from the reapportionment exercise threatens to undermine the Bill's whole scheme" (p 256).

It seems though that a key part of cl 8 (7) has

(d) Cp *Letica v Letica* [1976] 1 NZLR 667.

been overlooked. Gifts are not to be classified as separate property if they were "intended for the common use or benefit of both the husband and the wife". The exact meaning and breadth of this provision will be subject to judicial interpretation, but on the face of it "intended for the common . . . benefit" could be construed very widely. In the hypothetical case, however, there seems little doubt that the business shares would not become separate property by virtue of the gift because the wife believed that in making the gift "the whole family [would] benefit from her generosity in the long run". Surely this would constitute an intention that both spouses would be worse off under the Bill than under the present legislation does not therefore arise.

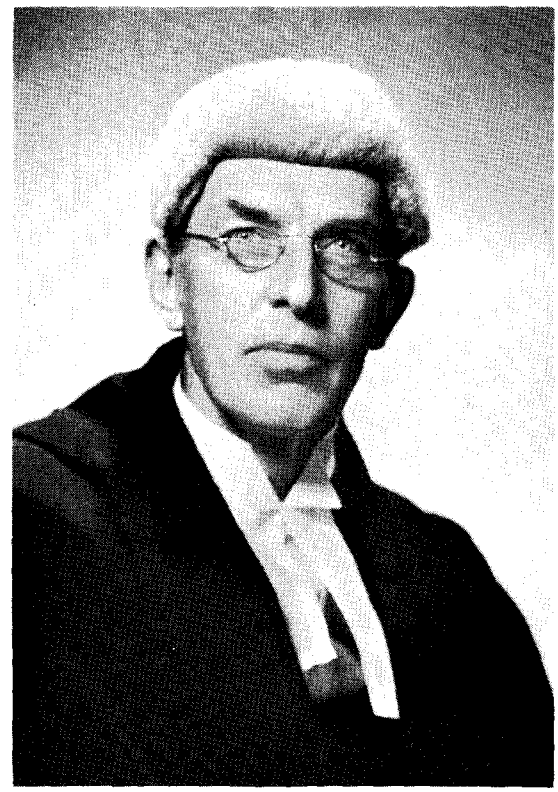
TRIBUTE TO THE LATE SIR GEORGE McGREGOR

On 21 May 1976, Judges, practitioners and the Public gathered at the Supreme Court at Wellington to pay tribute to the life and work of the late Sir George McGregor.

Addressing the assembly the Chief Justice, Sir Richard Wild said:

"We gather this morning to pay our tribute to the life and the services of Sir George McGregor, a retired senior Judge of this Court, whose death occurred on 7 April. I speak not only for the Judges sitting with me and the retired Judges who have joined us, but also for all our brethren throughout New Zealand. As well, Sir David Smith and Sir Alfred North have specially asked to be associated with our tribute.

"Sir George was born at Akaroa. He attended Waitaki Boys' High School and Otago University. He had his early practical training in law offices in Dunedin. As a young man of only 22 he took the courageous step of going north to Palmerston North, where he was hardly known, to set up on his own account. In that centre he remained for the next 31 years, his practice constantly increasing and his reputation as a lawyer and a good citizen steadily growing. He played his full part in the activities of the town and district. To the Law Society in particular he gave long and devoted service. He is remembered as one of the founders of the Devil's Own Golf Tournament, its first secretary, and its organiser for some 15 years. After the war he took in a partner, thereby establishing a firm which has become one of the leading ones in the city. He served for some five years as Crown Prosecutor in which office his reputation for thoroughness and fairness was highly respected. Then on 16 November 1953 he was appointed a Judge of this Court. It was an event of special note, being the first appointment to the Supreme Court of a practitioner from outside the four main centres. As a Judge he was stationed for a time in Dunedin and then at Wellington. He served for years as a member and Chairman of the Rules Committee. Ill health forced his retirement on 31 December 1969, by which time he had served for 16 years and been for some years the senior Judge of the Court.



Sir George McGregor at the time of his appointment

"Those are the basic facts of Sir George's record of service. It stands as a notable example of what can be achieved in the law in New Zealand by a man who, beginning with no more advantages than his own personality and character, attends conscientiously to his clients' affairs and never lets down the standards of the profession.

"Sir George McGregor was a Judge of wide practical experience, a sound knowledge of legal principle, great common sense, and an innate sense of fairness. These qualities made for the balanced judgment which characterised his whole judicial service.

"As a man he was modest and unassuming. It was typical of him that on his retirement he declined a request from the profession for the customary sitting in Court when tribute could be paid to him. His modesty ran through all his judicial work. In his written judgments he disdained any pretension to literary style or any show of scholarship. Not for him the graphic touch or the contrived phrase. He put down simply what he thought, in good plain ordinary words. This tended to obscure the quality of his intellect, and I think he put too low a value on himself. In fact he had been dux of Waitaki at a time when the academic standards of that school were especially high. He had a degree in Arts as well as a Master's degree in Law. He wrote a notable account of the Development of Divorce Law in New Zealand published by Victoria University in the Family Law Centenary Essays in 1967. He had an extensive knowledge of criminal law, and I believe it is true to say that no appeal ever succeeded against conviction at any trial over which he presided. And the Law Reports show that in civil cases he was nearly always right. Even after his retirement the reading of the Reports remained one of his regular pleasures.

"With his modesty the other great characteristic of Sir George was his humanity, his constant loyalty, and his warm friendliness. The essence of that was caught exactly in the tribute paid by Mr Thomson, President of the Manawatu District Law Society, when the practitioners of that district gathered in Court on the day of the funeral. Let me quote a sentence: 'When Sir George came to Palmerston he liked nothing better than to discard his wig and gown (which in any event never seemed to quite adapt itself to his angular figure), light up the inevitable cigarette and over a whisky discuss with his friends both in and out of the profession the most recent goings on in the Manawatu, and this even though he had left Palmerston North over 20 years ago.' That was George McGregor. I would add an expression of the thanks of his brethren at Wellington whom he always did so much to help, and my own special gratitude for the encouragement and guidance he, as senior puisne Judge, gave me when I appeared on the judicial scene 10 years ago.

"Judges and practitioners alike, we all shared a great affection for Sir George McGregor, and we shall miss him sadly. To Lady McGregor, who so gallantly bore the brunt of his declining health, and to her two daughters, I express the deep sympathy of all the Judges of New Zealand and of our former colleagues", the Chief Justice concluded.

Speaking on behalf of the Government, the Solicitor-General Mr R C Savage QC mentioned his service to the community and to Government:

"But it was not only as a Judge that he served. The profession in the Manawatu can bear witness to his service to them and to the community there; the Government in its various departments, is indebted to him for five years of sound advice and representation as Crown Solicitor at Palmerston North; and his many years as Chairman of the Prisons Parole Board left the stamp of his practical human judgment and innate kindness in an area where it must be hard not to become cynical. He was also for many years the Chairman of the Rules Committee and made a lasting contribution to its work. He was one of the first to suggest a complete revision of the Code of Civil Procedure and soon that project may become reality."

Tributes to the late Judge were also paid by the President of the New Zealand Law Society, Mr L J Castle and the President of the Wellington District Law Society Mr P T Young.

Inspiration – I have never accepted what many people have kindly said, namely that I inspired the nation. It was the nation and the race dwelling all around the globe that had the lion heart. I had the luck to be called upon to give the roar. WINSTON CHURCHILL.

The Profession – Lord Macmillan once asked if there existed any profession more delightful than that of the law. With all the differences that existed between lawyers, the same spirit animated lawyers all over the world and made them brothers. The laity did not in the least realise what a fascinating study the law was. Though lawyers were said to be die-hards, they were really progressive. Lord Atkin was at the moment surveying the whole field of legal education, and had done more than any other man to make lawyers realise that they were professional men and not tradesmen. The whole difference lay in this: that the professional man did his work because he liked it and for its own sake, while the tradesman worked in order to make money – a legitimate aim, but a different one.

QUESTION TIME IN PARLIAMENT

For information and inviting comment

Neighbourhood Law Services

Q – Hon Dr A M Finlay (Henderson) asked the Minister of Justice, Does he realise how dampening has been his refusal of financial aid for the establishment of neighbourhood law offices when he aroused such high expectations in the deputation from the Community Law Workshop which met him on 30 January last; and how can he reconcile this with his statement in a letter of 22 July 1976 to the workshop that he sees merit in the establishment of a pilot scheme and that his department will be "initiating such a scheme as soon as is possible"?

A – Hon David Thomson (Minister of Justice) replied, I apologise in advance for the length of my reply, which is not as concise as I would have had it. I made it clear to the Community Law Workshop that the establishment of a pilot scheme this year would be entirely dependent on Government finance being available, and told the group that there could well be difficulty in providing funds this financial year. Several proposals involving the extension of legal aid and legal services have been considered and are certainly desirable in principle. Neighbourhood law office schemes are but one of these. However, the imperative need to hold Government spending has precluded this year the outlay of further Government funds over and above those needed to meet the cost of existing schemes. In my most recent letter to Mr Clad of the Community Law Workshop I pointed out that I have already indicated that I consider the time is appropriate for a reappraisal of existing legal aid schemes and an assessment made of wider community needs for legal services. I went on to say that my department will be initiating such a scheme as soon as is possible, but would stress that reference to a scheme in the context of my letter was to a reappraisal of existing legal aid schemes and an assessment of community needs for legal services, and not to the actual establishing of a neighbourhood law office pilot scheme. I have continued discussions with the New Zealand Law Society on the establishment of a pilot neighbourhood law office scheme, and a working party of members of the Law Society and my department will continue to develop the administrative arrangements for such a scheme. Thus, when Government funds can be made available, there should be no other reason for delay in the actual establishment of the office. (5/8/76)

Q – Mr D M J Jones (Waitemata) asked the Minister of Justice, Is he intending to take steps to ascertain the extent of any unmet need for legal services at a neighbourhood level; if steps are being taken, would he advise the House of the groups participating in them; further, is any venue being considered as the appropriate place for the establishment of such a neighbourhood legal services centre?

A – Hon D S Thomson (Minister of Justice) replied, The Law Practitioners Act has been amended to make statutory provision to authorise the New Zealand Law Society to provide financial assistance or otherwise for the establishment of law offices or legal advice bureaus in localities decided on by the society. I understand that the society is anxious to establish a pilot scheme in Grey Lynn in Auckland. The Government has not, however, in the current financial year, been able to provide any financial assistance as a contribution towards the establishment of an office. In the meantime the Law Society and my department will be continuing discussions as to the future development of legal services of the kind commonly known as neighbourhood law offices. There are existing legal referral centres and citizens advice bureaus in a number of areas, and the growth in legal aid applications under the civil scheme and the Offenders Legal Aid Act, together with the duty solicitor scheme, indicate that the availability of legal assistance is now better known and is being used. I have already indicated to the Law Society that the time is appropriate for a reappraisal of existing legal aid schemes and an assessment made of community needs for legal services. I am hopeful that my department will soon be able to initiate an in-depth study. (16/7/76)

Police Offences Act

Q – Mr Christie (Napier) asked the Minister of Justice, When will legislation updating the Police

Offences Act 1927 be introduced?

A – Hon D S Thomson (Minister of Justice) replied, It is not possible to say precisely when legislation updating the Police Offences Act is likely to be introduced. The Act is a substantial measure and updating it is a correspondingly substantial task. However, I am hopeful that a Bill can be put on the legislative programme for next year. (28/7/76)

Police Powers of Search

Q – Mr Hunt (New Lynn), on behalf of *Hon Dr A M Finlay* (Henderson), asked the Minister of Justice, Will he ask the Criminal Law Reform Committee to consider an article by Dr William Hodge on police powers of search in [1976] NZLJ 62, and make recommendations on clarification of the law?

A – Hon David Thomson (Minister of Justice) replied, The Public and Administrative Law Reform Committee is already making a comprehensive review of the discretionary powers of public officials, including the Police powers of search and seizure. I have no doubt that the Public and Administrative Law Reform Committee will consult with the other law reform committees, including the Criminal Law Reform Committee mentioned in the question, on this aspect before reporting its conclusions. (16/7/76)

Environmental Impact Reports – Simplification

Q – Dr Shearer (Hamilton East) asked the Minister for the Environment, What steps have been taken to simplify environmental impact reports without diminishing the rights of public objections?

A – Hon V S Young (Minister for the Environment) replied, The review I am making of the impact reporting procedures has shown that these should be modified in a number of ways. In particular I want to see the Commission for the Environment involved earlier in the planning of major proposals, and the procedures much more closely integrated with the town and country planning procedures. The current review of the Town and Country Planning Act provides the opportunity for this integration, and I am discussing with the Minister of Works and Development how it may be brought about. I do not propose to amend the current impact reporting procedures until the review of the Town and Country Planning Act is further advanced. (5/8/76)

Town and Country Planning Act Review

Q – Mr Reweti (Eastern Maori) asked the Minister of Works and Development, What steps are being taken by him to fulfil the National Party's declaration in its manifesto to review the Town and Country Planning Act?

A – Hon W L Young (Minister of Works and Development) replied, The instructions for the draft of the revised Town and Country Planning Bill are in the hands of parliamentary counsel, and progress is being made in the preparation of the Bill. It is hoped that the Bill will be ready for introduction into the House during the present session. Following its introduction it is intended that the Bill be referred to a select committee. (22/7/76)

Games Politicians Play

Mr D M J Jones to move, That this House notes the statement in the 1976 *New Zealand Law Journal*, 20 July issue, at page 290, by Professor Geoffrey Palmer, a foundation member of Citizens for Rowling and a Labour Party nominee for the Nelson by-election, that: "In New Zealand now the portents are hopeful. The Courts are open"; and that this House congratulate the Attorney-General and the Minister of Justice for the opening up of the Court system under this National Government.

Mr Hunt to move, That this House deplores the fact that, in a notice of motion on 12 August 1976, the member for Waitemata confused the meaning of an article in the *New Zealand Law Journal* of 20 July 1976 by Professor Geoffrey Palmer, who said that "in New Zealand now the portents are hopeful. The Courts are open"; that the member for Waitemata had the audacity to use this quote as an excuse to praise the National Government for supposedly opening up the Court System; whereas Professor Palmer's article clearly referred to Mr Justice Beattie's decision in the Muldoon superannuation case to rebuff the Crown's strong resistance to the case being heard, and to grant a fixture as a result of which the Chief Justice himself held that the Prime Minister had broken the law; and that this House therefore wonders at the legal competence of the member for Waitemata, a lawyer, who should know – but apparently does not – that a statement taken out of context will no more stand up before his fellow members of Parliament than it would in a Court of law.