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INTER ALIA

Wanganui Computer Centre

When the Wanganui Computer Centre was first mooted, opposition centred on the possibility of personal information recorded within it being misused. The counter-argument was that the security systems would be sufficiently stringent to prevent this. There has now been a breach of security. That the person involved was detected indicates that the system works, or so the Prime Minister has been reported as saying. One could also say a decrepit stable door is an effective means of restraining a horse because when it is found open it will be known the horse has bolted.

Following the announcement of the breach of security a man called Harrison on a TV1 programme, and Arnold Herbert Helm by the Prime Minister on a news bulletin some time after, admitted to being one person (may be the only person), who had wrongly obtained information from the system. He outlined how he had been approached by a person who later proved to be an undercover policeman and asked to obtain information, how he had obtained it, how his living premises had been searched, how cannabis had been found and how he had been prosecuted for being in possession of it, and the events surrounding the termination of his employment at the centre.

The security of the system is under study by the Privacy Commissioner. There are two other matters arising out of Helm's account of events which are every bit as important as the security issue and it is worth mentioning them specifically in case they are not within the scope of the present inquiry. Did the police misuse their powers of entry and search? Why was Helm not prosecuted for the breach?

It seems the police, understandably, had mounted an intensive campaign to detect the person responsible for the security breach. According to Helm, his premises were entered, not under the authority of a search warrant, but in the exercise of powers vested in the police by the drugs legislation. If Helm is correct it looks decidedly odd that the police, in the course of pursuing inquiries into misuse of computer information, should enter and search premises in the course of that inquiry, pursuant to powers contained in legislation that has nothing to do with computers. Was their entry justified in terms of the drugs legislation? Why could a search warrant not be obtained? Maybe there is nothing in it. On the other hand, discovering the person responsible for the breach was of great importance in view of the degree of public suspicion that has been directed towards the system and there is more than a slight smack of the end justifying the means. The lack of comment from the police does nothing to negate this belief. The circumstances call for an explanation. If we have a computer security system that depends for its effectiveness on the marginal, dubious, or even misuse of police powers then we should know it.

As for the failure to prosecute, if literature on the overseas experience is to be believed, the unwillingness of companies to prosecute those involved in misuse of computers because of possible embarrassment is of great assistance to those involved in the finer points of computer fraud. It enables the offender, or criminal, to continue his operations without the disadvantage of the notice of his propensities that a conviction gives. In a small country like New Zealand this may not be so important. Still a demonstration of a more responsible attitude towards other computer users in Australasia would not go amiss

in the future.

Helm may be gilding the lily. His, though, is the only version of events we have. The Prime Minister has described him as a "suspect witness". The Prime Minister should know what happened. If Helm's version is not correct it would be better that he outline what did happen. If Helm's version is correct it is wrong that he should imply otherwise by attacking his credibility.

One day there will be a report. It needs to cover the matters outlined above. It also needs to be made public.

There but for the grace of God . . .

Was it Ulysses S Grant who made a statement to the effect that the repeal of a bad law is secured not by ignoring it but by its stringent enforcement. The same genus of statement could apply as well to changing administrative structures in general and the procedures of land transfer registration in particular.

A few quiet but pungent comments by O'Regan J in the recent case of *Bradley v Attorney-General and Burton* [1977] Current Law 335 suggest that the response of the legal profession to administrative shortcomings in the land transfer system has been to adopt practices falling short of the contractual duty owed to clients.

The facts are complex, but in brief the defendants, a firm of solicitors in Rotorua, settled a land purchase transaction in reliance on the information shown on a search of the land title register carried out by their agents in Hamilton. Had the land transfer journal also been searched it would have disclosed that a further mortgage had been registered but not yet entered on the register. In the end result the purchaser found his newly acquired land was subject to an additional mortgage securing $5000 – and *that* he had not bargained for.

All this happened back in 1974 and evidence was given that the writing of memorials on the register was then at least four weeks behind, the journal book would normally contain a record of some 5000 instruments not entered on the register, and there was but one journal book to which some 30 clerks should refer in respect of thousands of searches a year. One can understand the defendent's submission that "the practical difficulties in searching the journal book . . . were such that to hold that a solicitor was under a duty to do so would be to impose an impossible standard." Certainly, judging by its practices, one could say that that view is shared by the legal profession as a whole.

O'Regan J disagreed "Difficult perhaps, time consuming, yes, but not impossible". In 1890 Prendergast CJ, had considered it negligent not to search the journal and his decision had stood and been accepted by the Courts, textbook writers and the profession for three quarters of a century. Times may have changed but the "cavalier attitudes of those entrusted with the administration of [Torren's] enlightened system" provided "no reason for diminishing the standards required of the legal profession which holds itself out as providing . . . protection for the citizen in circumstances such as with which we are presently concerned". He was kind enough not to indicate a suspicion that the reason for not searching the journal is due not to practical difficulties alone but also to the thought that the chance of a journal search yielding information in the average case is so remote as to make the considerable effort not worth while, not to say uneconomic. That gamble will now be one a practitioner takes for himself, and not for his client.

Of relevance to the U S Grant approach were his Honour's comments on reform. As far back as 1968 Mr E K Phillips, a former Registrar-General of Land had expressed the view (at [1968] NZLJ 545) that the journal system was inept and he pointed to better systems. One wonders whether an insistence by the profession on maintaining the standard demanded by Prendergast CJ rather than allowing itself to be overwhelmed by administrative ineptitude would have brought about this change – although in fairness it should be recalled that in recent years the sheer volume of registration threatened the system with collapse and the first priority was keeping it going.

The defendants were unlucky. The not entirely unexpected blow has fallen in the random manner that chance tends to dictate. Where matters now proceed is partly a matter for individual practitioners and partly for the profession as a whole and it would be as well to look beyond matters relating to title alone. If one may make a prediction, it is that it will not be long before an action is brought alleging that a solicitor has been negligent in failing to discover that land is affected by a Ministry of Works requirement, or has a public drain running through it, or that a stream running through the property is adversely affected by water rights. This information is not to be found on the certificate of title, but it affects the land as much as any registered encumbrance. It may be discovered by those prepared to take the trouble.

These matters were raised at the last triennial conference – and there it seems they were also lowered. Whoever is unlucky enough to be sued, however, can reflect, along with the defendants in *Bradley's* case, that their misfortune will have resulted in part from the lack of contemporary guidance on what is, or should be, expected of a solicitor engaged in land transfer.

Clear and simple

The Minister of Social Welfare (Mr Walker) is reported as saying "a clear and simple definition of what constitutes a de facto relationship had always been available for those prepared to understand it". The clear and simple definition to which he refers it seems is s 63B of the Social Security Act 1964. This section gives the Social Security Commission a discretion, for the purposes of any benefit, to "regard as husband and wife any man and woman who, not being legally married are in the opinion of the Commission living together on a domestic basis as husband and wife".

As a definition that is neither determinate, nor distinct nor precise. In fact it is not a definition at all. It is one of the most extraordinarily difficult and sensitive discretionary powers yet to be visited on any government authority and one that, for uncertainty of operation, surpasses even tax avoidance provisions.

The problems to be faced in applying or living with this section have been touched on in this Journal ([1976] NZLJ 385 and 490), in *The Listener* and in the daily newspapers, discussed at the AULSA conference in Christchurch last year, and are among the matters being considered by a Commission under the chairmanship of Mr Horn SM that was set up to enquire into the domestic purposes benefit. Yet the Minister says it is clear and simple.

He then went on to refer to the principle behind the legislation as being "that a couple who live on a domestic basis as husband and wife should not be placed in a better situation as far as social security benefits are concerned than a legally married couple." And later "that where a man and a woman have so merged their lives that it would be reasonable to treat them no better and no worse than a legally married couple then for social security benefit purposes they will be regarded as husband and wife."

That may be so. Yet the principles he mentions (none of which find expression in the legislation) give no guidance whatsoever when it comes to advising whether a person is entitled to a domestic purposes benefit.

A more realistic appraisal is that the grounds for asserting that a de facto relationship exists are not clear, and anyone who thinks they are is simple.

Tony Black

MR JUSTICE WILSON RETIRES FROM THE BENCH

Although, Mr Justice Wilson did not retire from judicial service till some time later his retirement from the bench was marked by a special sitting of the Supreme Court in Christchurch in late 1976. Although in recent years His Honour has been resident in Auckland he was resident Judge in Christchurch for the first 10 years of his appointment and planned his last sitting in the City in which he had held his first.

For the occassion His Honour wore the wig and gown that he had worn for his first sitting. The wig in particular had known distinguished service having belonged originally to Mr Justice Callan who had given it to Sir Alexander Turner who had in turn passed it on to Mr Justice Wilson.

Mr J G Robertson, President of the Canterbury District Law Society spoke of His Honour's career in the law:

"Members of the legal profession in Canterbury are delighted that you have chosen to hold your final sitting as one of Her Majesty's Judges in Christchurch, and thus provide us with the opportunity to pay this tribute to you and to express our gratitude to you for all that you have done during your term of office for justice, for the law and for the public and the profession throughout New Zealand and particularly in Canterbury where we were privileged to have you as one of our resident Judges from 1963 until 1973.

"Your Honour's appointment to the Bench followed a distinguished career at the Bar in Auckland where you had first practised in partnership, then for four years as a barrister and ultimately, after your call to the Inner Bar in 1958, as a Queen's Counsel.

"Throughout your life, your Honour has taken part with energy and enthusiasm in a very wide range of activities and interests both associated with the law and profession and outside them. To indicate the extent of your interests and experience I mention that you played senior tennis and hockey, you were President of the Auckland University Students' Association, Chairman of the Auckland Hockey Association, you served in the Royal New Zealand Air Force in New Zealand and the Pacific, you were a member of the Council and Vice-President of the Auckland District Law Society, a member of the Council of the New Zealand Law Society, a member of the Council of

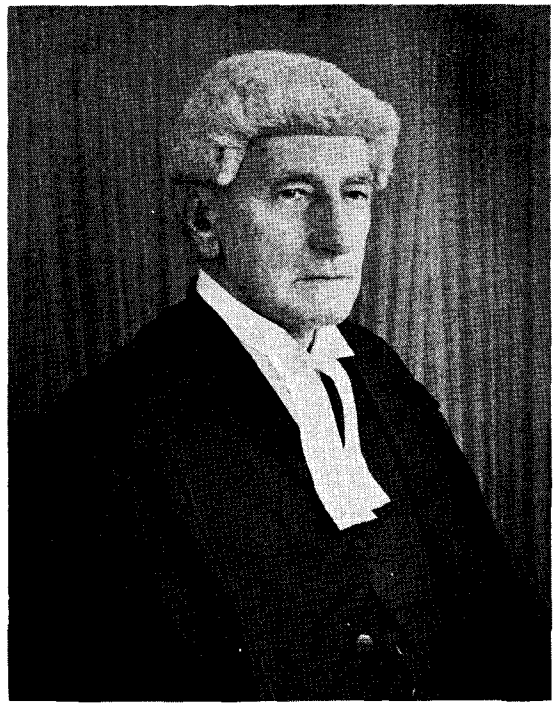
Legal Education, President of the Auckland Medico-Legal Society, President of the Constitutional Society, a member of the New Zealand Patriotic Fund Board, Vice-Chairman of the Auckland Veterans' Home Board and President of the 2nd NZEF Association. In addition to meeting the demands of your practice and these activities, you still found time to publish your well known textbook, *Contractors' Liens and Charges in New Zealand.*

"With that background of success at the Bar and service to the profession and to the community, we in Christchurch looked forward to your arrival here to take up your appointment. The expectations which we held were more than fulfilled.

"The qualities which had made you a leader of the profession were immediately apparent. These qualities, particularly your wide knowledge of the law and the breadth of your experience in many spheres of life, enabled you to deal with the variety of cases that came before you with skill, efficiency and understanding.

"For most of the time your Honour was in Christchurch, the Court carried a heavy workload and there was a backlog of cases awaiting trial. Your Honour's concern for justice to be done, caused you to drive yourself to work intensely hard and for long hours, beyond the reasonable calls of your duty, to expedite the work of the Court and to keep the backlog to a minimum. Since your transfer to Auckland the work has kept increasing and early this year a third resident Judge was appointed in Christchurch to cope with the volume of work. Notwithstanding the expeditious manner in which you dealt with the Court's business your Honour was courteous, helpful, considerate, and when necessary kind, to witnesses and counsel and you offered guidance to younger or less experienced counsel when desirable. You had a genuine human concern for every litigant or defendant as a person. This was evident during a hearing so that whatever the outcome they knew that all the relevant circumstances of their case had been brought out and fully and carefully heard.

"Your Honour had the misfortune to be suffering from a painful disability whilst you were on the Bench here but with the courage and determination which has marked your career you minimised its effects and resolutely continued working as hard as usual, earning our respect and admiration. Despite the difficulties of the excessive work load and the ill health I have just referred to, your Honour's ready sense of humour appeared whenever the circumstances were appropriate. It would lighten the proceedings, and as well, sometimes it would put a witness at ease or it would show your humanity. It was quick and good natured and those who appeared before your Honour will be able to recall those brief interludes with pleasure.



Mr Justice Wilson

"During your term of office in Christchurch, Christchurch and Canterbury enjoyed a period when the law was well served by its resident Judges and its Bar – the resident Bench comprised the late Mr Justice Macarthur and your Honour and the senior Bar included three practitioners who are now Supreme Court Judges and I refer to their Honours Mr Justice Roper, Mr Justice Mahon and Mr Justice Somers. Your Honour's contribution to the law here during that period is appreciated and remembered by members of the profession.

"Your Honour's ability and industry were recognised in January 1971 when the Chief Justice appointed you a member of the Rules Committee for the special purpose of assisting the Committee to carry out the revision of the Code of Civil Procedure. Later that year you were appointed a substantive member of the Committee and in 1973 on the retirement of Sir Thaddeus McCarthy as Chairman of the Rules Committee you were appointed Chairman of the Committee.

"During the time you have been on the

Committee you have combined your knowledge and experience of the law with your capacity for work to the revision of the Code. You have worked on the revision during convalescence and during your sabbatical leave so that now drafts of the final parts of the revised Code are very near completion and I understand that at your own request you will continue your work on the Code in your capacity as a special member until your statutory retirement in April next year.

"To have been a member of the Committee which has virtually completed the daunting and onerous task of revising the Code is a notable accomplishment. To be appointed Chairman of the Rules Committee is a tribute to your achievements in the law and a recognition of your desire to see improvements in the law and its procedures. We wholeheartedly endorse the tribute and recognition which were embodied in your appointment as Chairman of the Rules Committee.

"Your Honour, the public and the profession in Canterbury were indeed fortunate to have you sitting as a resident Judge here for ten years. On behalf of the profession I thank you for your outstanding dedication and service to justice and the law and extend to you and Mrs Wilson our good wishes for a long, happy and well earned retirement."

His Honour's reply was succinct and to the point, and, like the retiring address of Sir Thaddeus McCarthy, leaves the feeling that it is a pity that so much that needs to be said by Judges must await their retirement.

After thanking the Registrars and those who had been associated with him His Honour continued:

"I perceive a diminished respect for the Law and for the Court and Judges who preside over its sittings. This is a dangerous trend because every civilised community depends upon this respect for the law and those who administer it, for without it the community relapses swiftly into a state of savagery where the only law is the law of the jungle.

"Have we, the Judges, failed to maintain the standards of the past? That is a question which, obviously I cannot answer. The verdict must come from the public and, particularly, from the profession. In these circumstances it is disturbing to note that the diminished respect for the Judges is not "confined" to those who despise the established order of things but is shared by those who, most of all, might be expected to show us respect.

"I refer to what is popularly known as the Government but which is more precisely, Cabinet.

"A few years ago the then Government (with the concurrence of the then Leader of the Opposition) revised the order of precedence for official functions and demoted the Judges to a position below that of back-bench members of Parliament.

"We had always yielded precedence to Her Majesty's Ministers, recognising that as right and fitting but it is difficult not to regard this demotion as a deliberate denigration of Her Majesty's Judges.

"In effect, those who exercise the Royal prerogative of justice, have been relegated to a position "below the salt".

"This is also a factor which, placed alongside the disparity between a Judge's salary and the incomes of leading barristers, may make it more difficult to make the most suitable appointments to the Bench. I have now reached the end of the road as a Judge and it seems fitting that I should declare the principles by which I have tried to be guided in performing my official duties as such.

"In the first place, at a time when the Christian religion seems to have become unpopular to so many, I am proud to say that I am a Christian. I am ashamed to say that I am not a good Christian, but every day since I took the oaths of office I have offered up the prayer of Solomon: 'Give therefore thy servant an understanding heart to judge thy people that I may discern between good and bad.'

"I have tried to follow the Christian principle of hating the sin but loving the sinner.

"Next I have tried to keep always before me the fact that the most important person in the Court is not the Judge, nor the jury, nor counsel – but the litigant; because we are where we are because he is seeking justice, and I have held very firmly the opinion that justice delayed is justice denied. And I have also believed very strongly that the Law is made for man – not man for the Law – and, accordingly, within the limits imposed by the rules of precedent and interpretation I have sought to declare the law in the way that will best serve the interests of the community.

"The time has now come for me to say goodbye and I do it with sadness, conscious that in all probability I shall not pass this way again – that I may never again see those present today from who I have received respect, kindness, sympathy and affection far beyond my deserts."

We wish him well in his retirement.

A helping hand – Another factor in assessing the penalty (for contempt of Court) was that it would be a great pity if the Courts allowed newspapers to think that the cost of their legal department was unjustified. *R v Evening Standard Co Ltd ex parte Attorney-General* The Times 3 November 1976.

CASE AND COMMENT

Term of years or life estate? – Duncan v Paki: a query

In *Duncan v Paki* [1976] 2 NZLR 563, briefly reported on one matter only, it was assumed that an agreement to lease entered into by a life tenant for the remainder of her term was an agreement for a term of years, and it was held that the agreement, which comprised farm land (apparently of an area of more than 5 acres), was not one "for a term of not less than 3 years". Hence s 23 (1) (b) of the Land Settlement Promotion and Land Acquisition Act 1952 did not apply to it and the consent of the Administrative Division of the Supreme Court was held not necessary.

The judgment of O'Regan J raises some difficult questions. If one amplifies the official report by reference to the whole of the judgment (Palmerston North A 135/74) one learns that Mrs R H Paki (who was not one of the defendants) was the life tenant of Maori freehold land at Otaki. The life tenancy was determinable on her remarriage. In 1971 Mrs Paki entered into an agreement with the plaintiff by which "the Lessee [plaintiff] shall hold the property as Lessee of Mrs Paki as life tenant on the same conditions as above referred to [as to rent etc] but the term of the lease shall terminate on the death or remarriage of Mrs Paki". The validity of the agreement to lease came in question in the suit for an injunction sought by the plaintiff to prohibit the defendant's interference in his occupation of the land.

From earlier provisions in the conditions of the agreement there was some ground for arguing that the term was for 14 years, determinable on Mrs Paki's death or remarriage. If that argument had been successful the agreement to lease would have been void, since no consent had been obtained under the Land Settlement Promotion and Land Acquisition Act 1952. But O'Regan J effected to save the agreement by holding that the 14 year provision applied only to an alternative transaction under it which had not taken effect and that the "term" was simply for the duration of Mrs Paki's determinable life interest. Further, since there was nothing to show that the lease might not determine within 3 years from its commencement, s 25 of the Act did not apply to render it void. (O'Regan J's actual words, at p 565 of the report, are that "[T]here is nothing in the agreement to portend that it might not determine until after three years". But his meaning is evidently as just stated).

O'Regan J reached his decision by analogy from a line of cases on s 4 of the Statute of Frauds 1677, which section provided that contracts not to be performed within a year had to be in writing. From such cases as *Peter v Compton* (1693) Skin 353; 90 ER 157, *McGregor v McGregor* (1888) 21 QBD 424, and *Hanau v Ehrlich* [1912] AC 39, it appeared that, where no definite time was stated for performance of a contract, the contract was not within the statute unless, according to its terms, it appeared incapable of performance within the year.

Underlying O'Regan J's analogical use of these cases is the assumption, mentioned at the beginning of this note, that the agreement before him was an agreement for a term of years, a leasehold. But this assumption cannot be supported and if, as will also appear, s 23 (1) (b) of the Land Settlement Promotion and Land Acquisition Act 1952 applies only to land to be held in leasehold tenure, then the agreement could not be saved by the learned Judge's reasoning.

It is clear that a lease for life creates not a term of years or leasehold but a life estate which is, of course, a freehold: *Sinclair v Connell* [1968] NZLR 1186 noted by the writer [1969] NZLJ 79; *Amalgamated Brick & Pipe Co Ltd v O'Shea* (1966) unreported but see Goodall and Brookfield, *Conveyancing* (3rd ed 1972) 513. In the present case Mrs Paki was herself the holder of a life interest in land, determinable on her remarriage. In agreeing to lease the land so held for the duration of her interest, she retained no reversion. Therefore, on the better view justified below, she did not herself agree to grant the land so that it would be held by the plaintiff from her for the duration of her interest but, rather, assigned (or agreed to assign) that interest to him.

But under either of those principal alternatives the plaintiff was not lessee for a term of years but held a determinable estate or interest pur autre vie – for the lifetime of Mrs Paki determinable on her remarriage. He had, therefore, a freehold estate or interest.

Does s 23 (1) (b) extend to the creation of freehold interests less than the fee simple, such as in the instant case, or merely apply to the creation of terms of years? Certainly "leasing" could include the act of granting land for life, according to the older usage; as s 315 of the Land Transfer Act 1952 and the passage cited below from

Sheppard's Touchstone remind us. But, even if the wording of s 23 (1) (b) did not in itself indicate that the older usage does not apply here, the context makes that clear:

> "(1) Subject to the provisions of this section, this Part of this Act shall apply to every contract or agreement –
>
> "(a) For the sale or transfer of any freehold estate or interest in farm land, whether legal or equitable:
>
> "(b) For the leasing of any farm land for a term of not less than 3 years:
>
> "(c) For the sale or transfer of any leasehold estate or interest in farm land, whether legal or equitable, of which a period of not less than 3 years is unexpired:
>
> "(d) . . .
>
> "(e) . . ."

It will be seen that para (a) of the subsection deals with freeholds generally so that life estates or interests as well as fees simple are within its ambit, the only doubt being whether the initial granting of a life estate or interest is included. However that may be, paras (b) and (c) are clearly complementary in covering respectively the creation of a class of terms of years in (b) and the sale or transfer of terms so created in (c). Clearly then neither the creation nor the sales or transfers of freeholds are included in (b) or (c).

With respect, O'Regan J appears to have misconceived the nature of the interest which the agreement before him created and, consequently, to have used a line of reasoning only applicable if that interest was, as he thought, a term of years.

The conclusion here submitted that, on the better view, Mrs Paki assigned or agreed to assign her interest to the plaintiff (the "lessee" under the agreement) is reached by a path for the most part fairly well trodden. Few would dispute the orthodox view that the tenant for a term of years who "sublets" for the residue of his term thereby assigns that residue to the intended sub-tenant: Megarry & Wade, *Law of Real Property* (4th ed 1975) 650–651; Garrow, *Law of Real Property* (5th ed 1961) 745. Recently Paul Jackson has re-examined the matter ("Subleases as Assignments" (1967) 31. The Conveyancer (NS) 159) and has reinforced the orthodox view. He quotes (at 164) as still correctly stating the law a passage from *Platt on Leases* (1847) Vol 1, 19:

> "A reversion is essential to a lease . . . where all the grantor's interest is transferred, the instrument will operate as an assignment notwithstanding the reservation of a rent to the grantor, or a right of re-entry on non-payment, or on the non-performance by the grantee of covenants contained in it, and although words of demise be used instead of words of assignment".

The principle, so widely stated in the quotation from Platt (whose work is not available to the present writer), clearly applies not only when the tenant for a term of years purports to sublease for the rest of his term but also when the holder of a freehold estate – a fee simple or an estate for life – purports to create a lease for the duration of his estate.

Hence a lease in perpetuity in the strict sense (not the familiar lease for 999 years often loosely called that, which theoretically reserves a reversion) cannot be created by the tenant in fee simple: *Sevenoaks, Maidstone & Tonbridge Railway Co v London Chatham and Dover Railway Co* (1879) 11 Ch D 625, 635. Such a lease would appear to operate as an agreement to transfer the fee simple in the land subject to the giving of a rent charge: *Doe d Roberton v Gardiner* (1852) 12 CB 319, 333, 138 ER 927, 933; Hill and Redman, *Law of Landlord and Tenant* (16th ed 1976) 57–58.

Similarly where, as in the present case, a tenant for life purports to grant a lease for the duration of his interest. It was held in *Earl of Derby v Taylor* (1801) 1 East 502, 102 ER 193 that a conveyance by a tenant pur autre vie for 99 years created merely a leasehold, the term not being co-extensive with the tenant's freehold. As the case shows, it is substance not form that matters and one may clearly infer that a *lease* for the remainder of his freehold interest would have operated as a conveyance of it. No doubt this passage in *Sheppard's Touchstone* (8th ed 1826) Vol 1, 266, like that quoted from Platt, correctly states the law:

> "A lease doth properly signify a demise or letting of lands . . . unto another for a lesser time than he that doth let it hath in it. For when a lessee *for life* or years doth grant over all his estate or time unto another, this is more properly called an assignment than a lease" (Emphasis added).

To summarise, it is suggested with respect that two important points were overlooked in *Duncan v Paki*. First, in accordance with the established principle stated in *Sinclair v Connell* (supra) and *Amalgamated Brick & Pipe Co Ltd v O'Shea,* (supra) the interest of the plaintiff Duncan could only be a freehold, an interest pur autre vie, and not a term of years. Secondly, since no reversion was reversed by Mrs Paki, the plaintiff held the land (or would have held it, if the transaction had been effective) as Mrs Paki's *assignee* and not *in tenure* from her; with what consequences as to rent and convenants we are not here concerned (see Jackson, loc cit, 164 et seq). In the result, the agreement between Mrs Paki and the plaintiff

clearly seems to have been, by virtue of s 219 of the Maori Affairs Act 1953, an "alienation of Maori land by way of transfer" which, under s 224 of that Act, had no force or effect until confirmed by the Maori Land Court.

If it was not such an alienation by way of transfer, then Part II of the Land Settlement Promotion and Land Acquisition Act 1952, held by O'Regan J not to apply, would indeed apply to the agreement as being "for the . . . transfer of . . . [a] freehold estate or interest in farm land" under s 23 (1) (a) of that Act. But, whichever was required, neither the Maori Land Court's confirmation under the one Act nor the consent of the Administrative Division of the Supreme Court under the other was in fact obtained.

It may then be submitted that the agreement was of no effect and that the reasoning in O'Regan J's judgment afforded no proper ground upon which the injunction granted to the plaintiff could be sustained.

One matter remains to be briefly mentioned. If the necessary Court confirmation or consent had been obtained, the assignment from Mrs Paki to the plaintiff would on one view take place by operation of law (subject to whatever effect the Land Transfer Act 1952 might have, if applicable). On another view there was merely an agreement to assign the life interest, of which specific performance could be granted. On this undecided point, see *Milmo v Carreras* [1946] KB 306; Megarry and Wade, op cit, 651–652; Jackson, loc cit, 162.

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Conversion – The doctrine of accessio and the assessment of damages

The judgment of Speight J in *Thomas v Robinson* (Supreme Court, Auckland, 13 December 1976 (M 330/75)) raised some fundamental difficulties which for a very long time have existed in the tort of conversion where either the converter or (as in this case) an innocent third party purchaser for value has added improvements or done something which has increased the value of the chattel. In attempting to make a fair and just award of damages the courts have been faced on the one hand with the principles of the law of accession to the effect that anything added to the chattel (or indeed realty) becomes a part of the original; accession being a doctrine which is essentially proprietorial in its operation: on the other hand the principle that the aim of damages in tort should be restitutio in integrum. Accession favours the property rights of the deprived owner, whereas restitutio in integrum would give some recognition to the value added by the converter or innocent third party. There is a considerable body of case law in favour of both principles (some of these are analysed in Gordon, "Anomalies in the Law of Conversion" (1955) 71 LQR 346 and Guest, "Accession and Confusion in the Law of Hire Purchase" (1964) 27 MLR 505).

This was the problem which Speight J had to grapple with in an appeal against a decision of a Magistrate (Mr H Y Gilliand SM). In 1973 Mr Thomas had bought a Singer motorcar from a man named Carnegie. Unbeknown to him the motorcar was at the time of the supposed purchase held by Carnegie under a customary hire purchase agreement. Carnegie had obtained the car from the defendant John Robinson, a licensed motor vehicle dealer, who had discounted the hire purchase agreement to Broadlands Limited.

After Mr Thomas obtained the car (and believing it to be his own) he had considerable work done on it by way of improvement. A number of accessories (such as a car radio) were added, but what was more important, some of the essential wiring components and the motor were replaced. Carnegie defaulted in his obligations to Broadlands under the agreement and decamped. The respondent, acting as the agent for Broadlands, sought and repossessed the motorcar (which was of course in Mr Thomas's possession) and subsequently sold it elsewhere. Carnegie has since been located and has accounted to Broadlands for his financial obligation to them.

The appellant sued the respondent as first defendant and Broadlands as second defendant, for return to him of all the items he placed upon or in the motorcar or, as in some cases, incorporated in its essential works or, alternatively, claimed damages equivalent to the total value of these parts.

The Magistrate had before him an argument as to whether or not the parts in both categories had merged with the principal chattel, the motor car, which of course was the property of the respondent and/or Broadlands Limited, The submissions pro and con were based on the Roman Law doctrine of accessio. A number of authorities were canvassed in argument and the Magistrate held that the remaining articles in the first category had been made part of the car and had lost their separate identity and accordingly passed on repossession to the ownership of the respondent or his principal. (In other words, to these he applied the doctrine of accession.) He held differently in respect of the items in the second category as these were accessories (and could have been readily removed) and that as notice to the respondent had been given prior to resale, the appellant was entitled to damages for the value of these accessories in lieu of their

return. He assessed damages for conversion in respect of the accessory item. Also, because of the disregard of the appellant's rights of which the respondent had notice, a sum of $30 for damages was awarded.

The appellant appealed from the judgment, claiming that all the added chattels in both categories remained his property throughout. Both counsel and the Judge used the article by Professor A G Guest in 27 MLR 505 to assist them.

Some of the cases considered dealt with virtually inseparable mixtures, and many of the cases in this area have dealt with the raising of coal or other minerals to the surface. Speight J concluded that in more mechanised times different considerations will prevail, in some situations the possibility of separation will be easier (although any test based on a consideration of the nature of the goods would not be an easy one for courts to apply. For example, in a Canadian decision in which a number of English and American decisions were considered, fur pelts were held to be indivisible: *Jones v De Marchant* (1916) 10 WWR 841. Should in fact different considerations apply to motor vehicles?)

More recently there have been a large number of motorcar cases, for it is in such a mechanical field that problems such as the one under consideration will be most likely to arise. In his article, Professor Guest, with access to more law reports, particularly in the American jurisdiction, than are normally available, analysed a large number of decisions and propounded possible tests as to when the lesser chattel will be regarded as having merged with the principal one.

First there is the case of injurious removal, namely, where the added chattels cannot be separated from the principal without destroying or seriously damaging it. Such cases could involve welding metal or similar irreversible process, as contrasted with cases of those mechanical constructions which can be separated into integral parts. Given sufficient skill and patience even a motorcar engine can be removed leaving a non-functioning but undamaged remainder. According to Professor Guest's first suggestion, if the part can be removed without damaging the principal chattel then there would be no accession even though the removed part is of vital functioning importance. This test was adopted in several cases relating to tyres, in particular in New South Wales in *Fergusson v British Motors Ltd* (1950) 30 SR (NSW) 61, and in Canada in *Goodrich Silvertown Sales v McGuire Motors Ltd* (1936) 4 DLR 519.

The second test which is suggested is even more stringent against the interests of the owner of the principal chattel and the inquiry is as to "separate existence". The judicial basis for this suggestion is to be found in the dissenting judgment of Manning J in *Lewis v Andrew Bayley Ltd* (1956) 56 SR (NSW) 439. On this approach accession would only arise if there has been complete incorporation to the point of extinction of identity, such as a brick in a house or a plank in a ship. No authority the Judge had found would question that that at least is a case of accession, but he asked himself "Need the incorporation be as final as that?"

The third test and one which, on first sight, makes most appeal in modern conditions from the point of commercial sense, is that of destruction of utility. The question would be: Even though the article can be removed without damage to the principal chattel, would that nevertheless destroy its usefulness as such? To this effect was a Canadian case *Regina Chevrolet Sales Ltd v Riddell* (1942) 3 DLR 159 which had for reasons of common sense appealed to the learned Magistrate. The judgment of Macdonald JA is based upon the concept that an article, such as a motor vehicle, is looked on in ordinary terms as a functioning unit and not as a collection of separate parts, and the intention of he who makes the substitution or addition is that the parts should blend with the principal chattel for the purpose for which it is in existence. With respect his Honour suggested that no compelling authority was cited to support the learned Judge's statement of broad principle.

A fourth test is suggested by Professor Guest – one, as Speight J said, of his own devising – namely, the degree and purpose of annexation. He suggests that the Court's approach should be flexible and empirical so that the articles intended to be permanent parts of the chattel would pass on accession but others could be treated as mere accessories depending on each case on the facts of the case including the degree of annexation, the nature of the chattel and the intention of the parties. This practical and attractive test, being an extension of the third test in the *Regina Chevrolet* case, was applied by the Magistrate in the lower Court.

In considering which test to apply the learned Judge concluded that different situations clearly arise where the chattel annexed is the property of an innocent third party and more particularly where the principal chattel has been stolen and has come bona fide into his hands without notice. Mr Thomas, being an innocent third party added, as he thought, his own accessories and working parts to what he believed to be his own motor vehicle. Therefore he can only lose his ownership by some principle of law capable of depriving a man of his own chattel. Unbeknown to him, rights in the

principal chattel did exist in the respondent. The respondent repossessed not only the remnants of the original motor vehicle but also Mr Thomas's chattels. The action was brought in conversion and detinue with Mr Thomas the aggrieved party. In the Judge's view the proposition most consonant with the principles of property ownership in such a case is to be found in *Lewis v Andrew Bayley Ltd* (1956) 56 SR (NSW) 439 in both the majority and dissenting judgments.

In the present case the articles had not lost their separate identity and the Judge concluded that the appellant was entitled to the return of the articles in both categories or damages in lieu, though this might be offset by his liability for trespass to the plaintiff's chattel if he had depreciated it.

A consideration of the remedies available to the Court would, the learned Judge hoped, show that a practical and just resolution can be had of conflicting rights. An action for recovery of a chattel is a possessory action arising in tort, so that the Court has considerable discretionary powers. Many of the reported cases have been, like the present one, founded in detinue or conversion and orders for delivery, or for damages in lieu, may recognise such matters as added value and orders can be made on terms as to compensation. In *Munro v Willmott* [1949] 1 KB 295 an action for detinue and conversion of a stored motorcar, damages for improper sale were offset by credit for amounts spent by the defendant for work done and materials supplied. (See also *Greenwood v Bennett & Ors* [1973] 1 QB 195 as to the conditions upon which return will be ordered in cases of detinue and conversion or analogous actions and, in particular, the judgment of Cairns LJ on alternative forms of action and remedies which may arise in possession cases.)

In matters such as the present, if the minor chattel can be physically detached, an order may be made for its return, or refused subject to compensation or damages in the case of its loss. If it cannot be conveniently detached then compensation may be imposed as a term of repossession or detention. In the present case the learned Magistrate had said he would have ordered the return of the chattels in the second class, but as they had been wrongfully sold after notice, he properly awarded damages in lieu and (as the learned Judge stressed) there can be no quarrel with that.

In relation to the balance of the claim, the Judge held that the correct conclusion in respect of the "functional" parts of the machinery, viz engine, extractors, carburettor, exhaust muffler and the like, is that they remained the property of the appellant. Had they been available the appellant would have been entitled to their return, he paying for the labour of removal, and being obliged to reinstate the original parts or their equivalent. Because the vehicle had been sold the appellant was entitled to a measure of damages representing the value by way of addition to the vehicle measured by a comparison of price before and after alteration.

What this judgment does illustrate is that whilst the doctrine of accession may have been perfectly reasonable as a means of protection when the nineteenth century notion of protection of property (not only in relation to personal but also to real property) prevailed, but it may not be so practical in the twentieth century in relation to goods, particularly where an innocent third party may be the sufferer.

In the present case to apply what virtually amounted to the doctrine of restitutio in integrum was clearly the fair way to resolve the dilemma, and would seem to accord with the approach taken by the English Court of Appeal in *Wickham Holdings Ltd v Brooke House Motors Ltd* [1967] 1 WLR 295 (a case involving an entirely different set of facts, where the action was between persons each having an interest in the chattel. The measure of damages was held to be the injury suffered, or the "real loss", and was therefore limited to the interest in the chattel (at the time of the conversion)). (See also *Belvoir Finance Co Ltd v Stapleton* [1970] 3 WLR 530.) This in fact is to apply the principles of equity recognised by the House of Lords in *Livingstone v Rawyards* (1880) 5 App Cas 25 (at p 35) in which Lord Hatherly said that in an action in conversion due to inadvertence "then the simple course is to make every allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie". A similar suggestion was also made by Lord Macnaghten in *Peruvian Guano Co v Dreyfus Bros* [1892] AC 166 at 176 where he said that equity (with its power to order restitution of the goods) would not "assist the claimant if he refused to do equity by making just allowances".

Among other things, this judgment, by shifting the emphasis from the doctrine of accession to the "value" of the goods at the time of the conversion (or the detention), in effect helps to bring the assessment of damages in the situation where the defendant has improved the chattel, closer to "limited interest" situations and goes some of the way to putting the assessment of damages in relation to torts to goods on a more rational basis (and closer to the general principles applied in other tort claims).

M A Vennell
Auckland University

COURTS

PRACTICE NOTE

Summary judgment

It is generally accepted that there should be some procedural advantages for a plaintiff who sues on a claim to which there is unlikely to be any genuine defence. In the last century merchants suing on dishonoured bills of exchange given for goods supplied objected to long delays in obtaining judgment which arose merely from the defendant filing a statement of defence which had no real merit; it was necessary to set the action down for trial and obtain a fixture and the defendant often did not appear at the trial. The costs awarded against him could be a minor consideration against the time advantage gained at the expense of the plaintiff. The bill writ was evolved in England to counter these tactics and was adopted in this country, now represented by RR 490-504. As readers are aware, these rules enable actions on bills to be commenced by the special form of bill writ within six months of the bill becoming due, and on proof of service, the plaintiff may at once sign judgment for the claim, interest and costs unless the defendant has obtained leave to defend, and has filed his statement of defence within the time allowed. He is to apply for leave to defend within 12 or 18 days of service, depending on distance. Leave to defend is available as of right if the amount claimed is paid into Court or secured, and at discretion of the Court, and on terms if necessary, on his filing affidavits showing a good defence. 'Bill of exchange' is defined to include bills proper, and any written contract under which a sum certain became due on a day certain, or within an elapsed certain time.

But there are objections in principle to this procedure. It unduly favours the plaintiff, who is enabled to take judgment automatically, without proof of his claim, if the defendant does not obtain leave to defend. He must apply for leave to defend where he has a meritorious defence, eg that the bill was given on fraudulent misrepresentation of the plaintiff. It seems contrary to natural justice that a defendant with a good defence should have to obtain leave to defend merely because the plaintiff has issued a particular form of writ. Also, the extension of the procedure to money due under a contract such as a mortgage, agreement for sale, or hire purchase agreement unduly enlarges its application; it is one thing to have a simplified procedure for actions on bills of exchange, in which only in the exceptional case will there be a good defence; it is another to extend the facility to what are now everyday contracts where there is wider opportunity for bona fide defences and where the range of defendants is drawn from the public at large, and not only from those traders who deal in commercial paper and are familiar with the consequences of dishonour of it.

In England the bill writ has been superseded by O 14 which introduces a different method of treatment. The scheme of the Order is that after service of the statement of claim on the defendant and entry of appearance by him, the plaintiff may apply to the Court for judgment on the ground that the defendant has no defence to the claim, or to part of, except as to the amount of damages claimed. The plaintiff's application is by summons supported by affidavit verifying the facts and stating the belief as to no grounds of defence (this is not a mere formality). The summons and affidavit are served on the defendant not less than 10 days before the return day; he may oppose the application; he does not have to show that he has a good defence, but he must satisfy the Master that there is an issue or question in dispute which ought to be tried, or that for some other reason there should be a trial. Thus a plea of limitation would suffice but not a mere assertion of inability to pay. Unless at the hearing the defendant so satisfies the tribunal, judgment may be given for the plaintiff; execution may be stayed, particularly where the defendant has an apparently valid counterclaim against the plaintiff. The defendant may show cause by affidavit or otherwise; and he may be given leave to defend. If he has a counterclaim he may take similar steps against the plaintiff. The procedure is available in all types of claim except claims for libel, slander, malicious prosecution, false imprisonment or fraud.

The result is that the plaintiff has to initiate an application for judgment, alleging that there is no defence and verifying his claim and assertions by affidavit; he has to establish his right to early judgment on his merits and he cannot obtain the special privilege of early judgment merely by making his claim and obliging the defendant to move for leave to defend. This being so, there can be no objection to extending the procedure to all types of action, but the exceptions of libel etc are no doubt chosen because of the difficulties of assessing damages and the desirability of having trial for this purpose, especially as the plaintiff in such claims usually prefers a jury trial.

A number of commentators on the new draft Code, as distributed to Law Societies, have recommended the adoption here of the O 14 procedure, and the Revision Committee, after considering the position is in favour of doing this, with some modifications. The proposed new rules on Summary Judgment are as follow:

PART II

SECTION 4A – SUMMARY JUDGMENT PROCEDURE

57. Application of section – This section shall apply to every proceeding other than one which includes a claim by the plaintiff alleging defamation, malicious prosecution, false imprisonment or fraud.

58. (1) Judgment where no defence – Where in a proceeding to which this Section applies the plaintiff satisfies the Court that a defendant has no defence to a claim in the statement of claim, or to a particular part of such a claim, the Court may give judgment against that defendant.

(2) Leave to set down for trial or question of amount only – Where in a proceeding to which this Section applies the plaintiff satisfies the Court that a defendant has no defence to a claim in the statement of claim, or to a particular part of such a claim, except as to the amount claimed, the Court may give judgment against that defendant on the issue of liability and direct a trial of the issue of amount at such time and place as it shall think fit.

59. Interlocutory application for summary judgment – (1) Application for judgment under rule 58 shall be made by interlocutory application notice of which shall be served on the defendant at the time of serving the statement of claim.

(2) There shall be filed and served with the application an affidavit by or on behalf of the plaintiff verifying the allegations in the statement of claim to which it is alleged that the defendant has no defence and deposing to the plaintiff's belief that the defendant has no defence thereto and the grounds of such belief.

60. Form of notice of proceeding – Rules 46 and 47 [relating to general notice of proceeding] shall not apply to a proceeding under this Section. In every such proceeding there shall be filed and served with the statement of claim a notice of proceeding in form SJ.

61. Time for service – The statement of claim, notice of proceeding, notice of interlocutory application and supporting affidavit shall be served on the defendant not less than 21 days before the date for hearing the application.

62. Affidavits in answer – Any affidavit by or on behalf of the defendant in answer to the affidavit by or on behalf of the plaintiff shall be filed and served not less than 3 days before the date for hearing the application.

63. Disposal of application – On hearing the application the Court may enter judgment and/or direct trial of the issue of amount pursuant to rule 2; but if it is not satisfied as required by that rule it shall dismiss the application and give such directions as to the time for filing a statement of defence and otherwise as may be appropriate:

Provided however, that if it appears to the Court that the defendant has a counterclaim that ought to be tried the Court may give judgment for such amount as appears just on such terms as it thinks fit or may dismiss the application and give directions as aforesaid.

(cf present RR 300 and 301.)

64. Application to counterclaim – This Section shall apply, with all necessary modifications, to counterclaims as though the defendant counterclaiming were a plaintiff and the plaintiff against whom the counterclaim is brought were a defendant.

65. Setting aside judgment – Any judgment given against a party who does not appear at the hearing of an application under this Section may be set aside or varied by the Court on such terms as it thinks just.

FORM SJ

NOTICE OF PROCEEDING WHEN SUMMARY JUDGMENT SOUGHT

To the above-named defendant(s)

Take Notice that a claim, a copy of which is served herewith, has been filed by the plaintiff in this Court and that he has also applied to this Court for immediate judgment against you thereon [to the extent stated in the notice of application for summary judgment also served herewith] (words in square brackets to be omitted if judgment sought on full claim) on the ground that you have no defence thereto.

And Further take Notice that if you have a defence to the plaintiff's claim, you must, not less than three days before the date of hearing shown in the notice of application for summary judgment also served herewith, file in the office of this Court at and serve on the plaintiff an affidavit sworn by you or on your behalf setting out your defence to the plaintiff's claim. Should you fail to file and serve such an affidavit, or to appear personally or by your solicitor or by counsel on the date of hearing of the plaintiff's application to oppose it, the Court may give such judgment on

the plaintiff's claim against you as may be just.

Dated this day of 19 .

Plaintiff (or Solicitor for Plaintiff).

(Your attention is particularly directed to the Memorandum endorsed hereon or attached hereto.)

MEMORANDUM

1. (as in General Form – No 3)
2. (as in General Form – No 3)
3. If you object to the jurisdiction of the Court to hear and determine this proceeding you may, within the time allowed for filing your affidavit, and instead of so doing file in this Court and serve on the plaintiff an appearance stating your objection and the grounds thereof. Such an appearance will not be or be deemed to be a submission to the jurisdiction of the Court.
4. (As in Form 3, para 10)

Registrar.

The types of claim to which the procedures would apply are co-extensive with the types in O 14. The changes are: the interlocutory application for judgment is to be filed with the statement of claim, and not after the defendant enters an appearance; service of the statement of claim, a special notice of proceeding (Form SJ – to be later numbered), copy of the interlocutory application and affidavit, is to be effected not less than 21 days before the hearing of the application. If the defendant wishes to oppose the application he is to file and serve his affidavit in answer not less than three days before the hearing. This affidavit would disclose his proposed defence; O 14 requiring him to establish a triable issue is not adopted; his affidavit should give the Court sufficient information to decide whether the proceeding should go to trial.

Any reader wishing to comment on the draft rules is invited to write to the Editor of this Journal; it is expected that the letter and any discussion of it can be published so that any differences of opinion are ventilated.

Gordon Cain

LANDLORD AND TENANT

TIME LIMITS AND RELIEF AGAINST FORFEITURE OF A LEASE

By JACQUELIN LOWE, *a Christchurch practitioner.*

Time limits are of vital importance to the legal practitioner and any failure to observe these may well lead to a loss to the client and a claim in consequence against the practitioner. In some cases, failure to register documents in time may be covered by way of a monetary penalty as in the case of stamping land transfer documents or of filing company documents. In past years, the failure to file personal injury claims within the statutory time limits was a well known risk. However, although failure to observe those time limits could cause extra expense and inconvenience to the practitioner and his client, in most situations, relief could be obtained either by way of payment of a relatively minor monetary penalty or by recourse to the Court under a discretionary statutory provision. Only in rare cases would failure to observe a time limit result in a negligence claim against the legal practitioner.

A relatively unrecognised problem concerns the giving of notice within the time specified in a lease for the exercising of a right of renewal or purchasing the freehold. Few lessees or their solicitors keep records adequate to ensure that notice is given within the stipulated time. A renewal is often prompted by the lessor at about the time of expiry of the lease, but after the expiry of the lessee's time limit (normally at least three months prior to the expiration of the lease). The common impression was that, at least in the case of renewals that the failure to give notice within the time or in the manner specified was protected by the provisions of s 120 of the Property Law Act 1952, which give relief against forfeiture. This impression may have been incorrect, but the recent amendment to this Section now clearly provides jurisdiction for the Court to grant relief, and the relaxation of the strict time limits should be welcomed by the forgetful lessee who has failed to give notice in time. It will also relieve the burden on legal practitioners whose clients expect or want them to take the ultimate responsibility regarding the requisite notice.

The provisions for relief against forfeiture were inserted in the Act more to prevent a lessor from taking advantage of a breach of duties imposed on the lessee under the lease, than to facilitate the lessee in the exercise of a right or privilege under the lease. Jurisdiction to grant relief was formerly available under s 120 (3) of the Act where the lessee was refusing a renewal or the assuring of the reversion on the grounds of a breach of certain "covenants conditions or

agreements". Subsection (6) provided that where there was a breach of any such covenant, condition or agreement, relief could be given notwithstanding that the lessee did not give notice within the time, or in the manner, specified in the lease. It was at the very least arguable that there was no jurisdiction to grant relief to a lessee who was not in breach of any covenant, condition or agreement but merely failed to give notice within the specified time.

The problem of late notice was directly raised before the Court of Appeal in *Vince Bevan v Fingard Nominees Ltd* [1973] 2 NZLR 291. The lessee gave notice claiming a renewal of the lease; (there was in fact no set time in which notice had to be given under the lease, but the lease itself had expired). The Court of Appeal held that the lessee could not establish jurisdiction for the giving of relief because he could not prove that the failure to grant the renewal was on the grounds of the breach of any covenant, conditions or agreement under the lease. It is implicit in the decision that mere failure to give notice within time did not confer jurisdiction unless the lessee could prove a breach of the lease on which the lessor was relying to refuse the renewal. The lessee was unable to prove any such ground and failed in his claim brought under s 120 of the Property Law Act 1952. If mere lateness in giving notice had been considered to be a breach of a covenant or condition of the lease, then this would have been patent from the correspondence and the lessee's evidence and jurisdiction could easily have been established. The Court suggested that the proper procedure was for the lessee to bring a claim for equitable specific performance, and if the defence was raised by the lessor that the lessee was in breach of his lease, then the proceedings should be amended to include an application under s 120 for relief. With respect, I think this is unnecessarily complicated and there would appear to be difficulty in logically upholding a claim for specific performance where the lessee had himself not complied with all the terms.

If this analysis of *Vince Bevan v Fingard Nominees Ltd* is correct then the anomalous situation arises as the lessee in default of a covenant under the lease could obtain relief because subs (6) permitted this, but a lessee who had merely failed to give notice in the time and manner required under the lease was not so entitled. This precise point was considered in the Supreme Court by Johnston J in *Re a lease Wanganui City Corporation to Knight* [1942] GLR 483, 485:

> "While construction of the section when examined presents certain difficulties it expressly applies to actions brought by the lessor or the lessee where the lessor has refused to grant a renewal and does not depend on prior forfeiture of the lease by the lessor and breach of performance of the covenants by the lessee is not a complete answer to a lessee's action. At first sight it would appear that breach of a condition precedent to the right of renewal might be an answer. There is, however, express provision that failure by a lessee to give to the lessor a notice of his intention to renew shall not limit either the rights of the lessee or the powers of the Court under the section. I think it would be inconsistent with the intention of the Legislature and the meaning of the section to hold that failure to give notice of intention to renew could be excused in the case of a lessee in default in respect of covenants such as that to pay rent punctually or to repair and could not be excused where the only default of the lessee as here is failure to give the required notice. Taking the section as a whole it appears to me that if effect is to be given to the provision that the lessee's rights and the Court's powers are not to be affected by a failure to give notice of renewal, it is clear the Court is given power to grant relief to those cases where the lessee's only default has been failure to give notice as required".

Relief was given in that case to the lessee whose notice of his desire to have a renewal of the lease was not given until four months after the expiry of the lease. In granting relief, the learned Judge followed an earlier decision of the Supreme Court in *Re a lease Aotea District Maori Land Board to Cockburn* [1941] NZLR 629 where notice was given requiring a renewal seven months after the expiry of the lease. Relief was granted on the basis that proper notice of a desire for a renewal was a condition of the lease which had been breached and therefore the Court had jurisdiction and subs (6) applied in the case so as not to limit the Court's jurisdiction.

In *Re a lease McNaught to McNaught* [1958] NZLR 72 it was agreed that no question of jurisdiction arose even though the time for giving notice of the desire to exercise the right of renewal and option to purchase had expired.

Relief was given by Mahon J in *Verran v Public Trustee* [1976] 1 NZLR 518 where the only breach appears to have been the failure to give notice within time to the trustees for the lessor who had died.

In *Benson v Haines* (unreported, 1973), Cooke J considered the effect of a notice exercising an option to purchase which was a week late and decided that it was a plain case for the granting of relief on the basis that the defective

notice could be cured or excused under s 120. He decided that the Section applies where there is a right of purchase, expressed to be subject only to the condition of giving a prescribed notice.

Often it would appear that the lessee's claim for relief is reinforced by the principle long-recognised in *Nash v Preece* (1901) 20 NZLR 141, 154 that the provision for relief should be liberally construed in favour of lessees. The effect of the equivalent of s 120 (3) of the Property Law Act 1952 was considered by Reed J in *Re a lease, Kennedy to Kennedy* [1925] GLR 539 at 541. He said:

> "This provision gives the Court the fullest discretion, and, as I read it, the intention of the Legislature is that this Court, regardless of technicalities, should endeavour to do what may be colloquially expressed as "a fair thing between man and man". An order such as is sought, if granted, is taking away from the lessor a right to which by virtue of the contract between the parties, he is entitled. The paramount question is whether, apart from deprivation of that right, the lessor would be otherwise prejudiced by the granting of an order."

This traditionally liberal approach appears to be the decisive factor in, for example, the *Benson, McNaught and Kennedy* cases (supra). However, in *Reporoa Stores v Treloar* [1958] NZLR 179 which dealt with an application for relief under s 118 of the Property Law Act 1952, the majority of the Court of Appeal agreed that a failure to exercise an option to purchase under a lease was not a breach of a covenant entitling lessee to relief but was merely a right which had lapsed by effluxion of time.

The problem highlighted by *Vince Bevan v Fingard Nominees Ltd* led to an amendment of s 120 in 1975. That amendment sought to resolve the position by providing that if no reasons were given for the lessor's refusal to grant a renewal then it would be presumed that he was alleging a breach of the covenant by the lessee. However, that amendment was open to the criticism that if the lessor was able to show that his refusal was for some reason extraneous to the lease, the section could not be invoked.

Section 120 as it now stands makes it clear that there is jurisdiction to grant relief where the lessee is merely late in giving notice. Subs (3) now provides as follows:

> "Where –
>
> "(a) By any lease to which this section applies the lessor has covenanted or agreed with the lessee that, subject to the performance or fulfilment of certain covenants, conditions, or agreements by the lessee, the lessor will –
>
> "(i) On the expiry of the lease grant to the lessee a renewal of the lease or a new lease of the demised premises; or
>
> "(ii) Whether upon the expiry of the lease or at any time previous thereto assure to the lessee the lessor's reversion expectant on the lease, and
>
> "(b) The lessee is in breach of any such covenant, condition, or agreement, or has failed to give to the lessor notice of his intention to require or to accept a renewal of a lease or a new lease or an assurance of the lessor's reversion, as the case may be, within the time or in the manner, if any, prescribed by the original lease, and
>
> "(c) The lessor has refused to grant that renewal or that new lease or to assure that reversion, as the case may be,
>
> the lessee may . . . apply to the Court for relief."

This gives jurisdiction but, of course, does not direct the Court to give relief. Generally once jurisdiction is assumed by the Court, relief is granted. It may well be that relief will more readily be given where there is a renewal of the lease sought by a lessee who remains in occupation of the premises. The renewal of a lease is typically subject to an assessment of the current market rental. However an option to purchase is typically at a figure fixed at the commencement of the lease and with the rapid escalation in land prices and depreciation in money values, the option to purchase normally gives the lessee a benefit which was not contemplated at the time the lease was executed. The earlier cases would appear to indicate that this was not relevant to the question of granting relief, but that attitude might well be reexamined in the light of present conditions.

Nevertheless so far as the question of jurisdiction is concerned, the 1976 amendment to the Property Law Act would appear to resolve the previous judicial conflict as to jurisdiction. The difference of judicial opinion in the cases and the frequent lack of reference to earlier authority may be described as "a curious corner of the law" which it is hoped will now be of no more than historic interest.

Judicial retorts – An eminent QC noted both for his tippling and condescending manner on one occasion offered, quite unnecessarily, to simplify a point for the benefit of the Court. He stated:

"It would be almost as if I were to see your Lordship coming out of a low-down publichouse."

The exasperated Judge quickly replied: "Coming in, Mr So and so, surely?"

COURTS

FIRST SUBMISSIONS BY THE NEW ZEALAND LAW SOCIETY TO THE ROYAL COMMISSION ON THE COURTS—PART III

7. District Court

District Court

7.1 The Magistrate's Court handles by far the greatest volume of Court work in this country. Most people who come into contact with or resort to the Courts of New Zealand come before the Magistrate's Court. To the general public it represents the place where justice is done. In the Society's view, therefore, upgrading the Magistrate's Court will have the most beneficial effect on the overall administration of justice in New Zealand.

7.2 The Society believes that the Magistrate's Court should be reconstituted as a District Court. At the same time the Magistrates would become District Judges and be entitled to be addressed as "His Honour, Judge . . .". The Society envisages that the District Court would have the same administration as the existing Magistrate's Court except that the opportunity could be taken to reorganise the Courts on a regional basis. Like Magistrates at present, the Judges would hold warrants to appear in specialist areas of work.

7.3 This reconstitution would upgrade the Magistrate's Court and provide it with a status which is more appropriate to its present responsibilities. Until the passing of the Magistrate's Courts Amendment Act in 1913 Stipendiary Magistrates were not required to be qualified lawyers and it would seem that this lay beginning has beset the Court ever since. Yet its jurisdiction has steadily increased. In 1913 the monetary limit of the Court's civil jurisdiction was £200. It was increased to £300 in 1927, £500 in 1949, £1000 in 1961 and $3000 in 1972. The Magistrate's criminal jurisdiction has also increased until today the Court has the power to impose a maximum sentence of three years' imprisonment or a maximum fine of $1000. It has an even more extended jurisdiction in respect of fines under specific statutes such as the Oil in Navigable Waters Act 1965 and the Clean Air Act 1972 when the Court may impose fines of up to $50,000.

7.4 Reconstituting the Magistrate's Court as a District Court is desirable for a number of reasons. First, as already indicated, it would bring into balance the status of the Court with the extent and degree of responsibility it exercises in the legal system of this country.

The first two parts appeared at [1977] NZLJ 130, 160.

7.5 Secondly, the Society is convinced that this reform would make appointment to the Magistrate's Court Bench more attractive. This in turn would ensure a high standard of performance on the Bench and facilitate the despatch of the vast volume of work handled by the Court. The attraction of the Court could be reinforced by a higher salary level. The combination of an improved status and a higher salary would appeal to many lawyers who are not at present prepared to accept appointment as Magistrates. Improving the calibre of the lawyers appointed could also be of considerable importance if it is accepted that Judges of the Supreme Court may be promoted from the ranks of existing judicial officers.

7.6 Thirdly, on any objective evaluation the judicial officers exercising the extensive jurisdiction now conferred on the Magistrate's Court (not to mention the added jurisdiction proposed by the Society for the District Court) are entitled to the honour and rank of Judges. Their judicial responsibility and power is considerable. Moreover, on becoming Judges, the Magistrates would achieve parity with their overseas counterparts and thus avoid the embarrassment to which many of them are subjected when visiting other jurisdictions.

7.7 The danger of the proposal is that the Magistrate's Court might become remote from the public when it is, and should remain, essentially the "people's Court". However, the Society does not believe that the proposed reconstitution and extension of jurisdiction would have this effect. Indeed, the title of District Court is likely to be regarded as more appropriate by the general public, certainly by those who are aware of its importance in the overall administration of justice. Needless to say, however, the Society would not wish to see the District Court become more formal or rigid in respect of procedural requirements than the Magistrate's Court. The business-like approach and efficient despatch of business of that Court should be retained.

Enlarged jurisdiction

7.8 The Society believes that the District Court should be bested with an enlarged jurisdiction. In this respect it would suggest the following extensions to the jurisdiction of the Court:

(1) Increasing the Court's civil jurisdiction to a maximum monetary figure of $10,000.

(2) Increasing the Court's criminal jurisdiction by: (a) completing a reappraisal of maximum penalties; (b) completing a review of the offences giving a right to trial by jury; (c) vesting the District Court with jurisdiction to hear jury trials in respect of lesser criminal offences, and

(3) Increasing the Court's jurisdiction in matrimonial and family matters.

7.9 Enlarging the jurisdiction of the District Court would free the Supreme Court for the role considered by the Society to be more appropriate for the superior Court of first instance. It would represent the most desirable allocation of work between the two Courts and would be consistent with the functions and strengths of both Courts.

Civil jurisdiction

7.10 The Society regards an increase in the civil jurisdiction of the Court from $3000 to $10,000 as being appropriate. In part, this will off-set the debilitating effect of inflation on the jurisdiction of the Court. Although the Society does not suggest that it should be a dominant consideration, the increase will also assist to relieve the pressure on the Supreme Court. Essentially, however, it is consistent with the Society's appreciation of the respective roles and standing of the Supreme Court and the District Court. Persons bringing or defending a claim for less than $10,000 would not generally wish to resort to the Supreme Court.

Reappraisal of maximum penalties, etc

7.11 The Society accepts that both a reappraisal of maximum penalties and a review of offences giving a right to trial by jury is desirable in order to bring penalties and offences into line with modern conditions and thinking. These reviews, however, should not be carried out solely for the purpose of relieving the criminal workload of the Supreme Court. If three months' imprisonment is the appropriate and proper maximum penalty for a particular offence it is difficult to see why it should be reduced simply because to do so may ease the burden on the Supreme Court. For the same reason, the Society is opposed to any restriction of the right to trial by jury unless it has the effect of removing an anomaly or can otherwise be specifically justified.

Jurisdiction to hear criminal jury trials

7.12 As already indicated, the Society believes that jurisdiction should be conferred on the District Court to hear lesser criminal jury trials. It is contemplated that the demarcation point between trials in that Court and the Supreme Court would relate to the maximum sentence provided in respect of any offence, subject to Supreme Court Judges having the power to order that any particular case be tried in the District Court irrespective of the penalty. This power could be required in respect of cases where it was clear that the full severity of the sentence was inapplicable and, for all practical purposes, the accused person was in jeopardy of a much lesser sentence. At the same time, as already suggested, (see para 6.24 above) the Society believes the Supreme Court should have the ability to grant leave to an accused person whose charge is subject to the jurisdiction of the District Court to have his case tried in the higher Court on the ground that an important point of law is involved or that the facts are exceptionally complicated.

7.13 It is to be emphasised that, subject to a review of penalties, the Society is not anticipating that the present limit of the Magistrates' criminal jurisdiction would be increased in the sense that more serious charges would be heard in the District Court. Rather, it is contemplated that the District Court would be given the power to preside over jury cases in which, had the accused person not elected trial by jury, the Court (that is the present Magistrate's Court) would *now* have full power to determine without the assistance of a jury.

7.14 In this context, the Society takes the view that Judges in the District Court would be quite competent to preside over jury trials in respect of lesser criminal offences. To allow Magistrates as at present to decide criminal issues without a jury when they are both Judges of fact and law but hold that they are not qualified or sufficiently competent to preside over a jury trial, when it is the jury which determines the facts, is just not logical. The Society therefore rejects the suggestion which has been made from time to time that presiding over a jury trial is a demanding judicial task beyond the ability of most Magistrates.

7.15 The Society is fully aware of the practical difficulties which might be involved in implementing this proposal. However, it would point out that these difficulties exist to the same or an even greater extent in respect of any alternative proposal creating an intermediate tier of Courts or Judges. A new administrative section is avoided in that the existing administration of the Magistrate's Court would become the adminis-

tration of the District Court. Jury trials would be handled as part of that administration. Nor would the provision of new courtrooms or court facilities to permit the hearing of jury trials represent an insurmountable or costly problem. In some cases it would be possible to adapt the older Magistrate's Court buildings as they fall due for reconstruction or renovation. In other instances existing courtrooms in the Magistrate's Court could be suitably modified with a minimal amount of work. In many Registries existing Supreme Court Courtrooms could be used (without the Judge and counsel robing) as the venue for jury trials conducted in the District Court. Supreme Court Courtooms are already used in some provincial centres by Magistrates and other tribunals such as the Town and Country Planning Appeal Board. In all, it would be incorrect to conclude that the Society's proposal necessarily involves unreasonable expenditure or the duplication of facilities.

Family Court

7.16 The question of a Family Court is one which would clearly benefit from reference to overseas experience, expecially in Canada and Australia where such Courts have already been established. Not being in the position to carry out such a study the Society's conclusions must be regarded as tentative. Subject to that qualification the Society considers that having regard to conditions in New Zealand the District Court would be the appropriate Court to develop as a Family Court. More specifically, it envisages the Family Court as an identifiable division of the District Court manned by District Judges holding a warrant to appear in that division. Investigative, counselling and supporting services associated with Family Courts would be attached to the division.

7.17 The Society's preference for the District Court is based on a number of reasons. First, from the point of view of allocating work where it may be done most expeditiously the District Court would appear to be the most appropriate Court. It is important in this context to have regard to the volume of work generated in this area. Secondly, as the District Court would replace the Magistrate's Court, it would extend into more places in New Zealand than the Supreme Court and the administration and operation of the Court could ultimately be modified to ensure that the services provided by a Family Court are available throughout New Zealand. Delay and costs are also likely to be a less significant factor in this Court. Thirdly, the District Court will not be hampered by the more formal atmosphere of the Supreme Court. The buildings, courtroom and court attire of Supreme Court Judges and counsel are seen by many as being basically inconsistent with the concept of a Family Court. Fourthly, the District Court will havy a sufficient number of Judges to allocate to the division which operates as the Family Court without having to place an undue burden on any one Judge or number of Judges. It is accepted that no Judge should be expected to do solely matrimonial or family work and it would seem that the District Court will be far better equipped to ensure a more acceptable and equitable level of this work for those judicial officers involved in it. Fifthly, the District Court would exercise an enlarged jurisdiction in respect of the relevant matrimonial and family enactments – or a codification of those enactments – and the difficulties associated with concurrent jurisdiction could be avoided. Finally, the establishment of the District Court will provide the framework within which a new concept such as a Family Court can most effectively develop as and where required and in accordance with requirements in New Zealand.

7.18 The Society therefore considers that the jurisdiction of the District Court should be enlarged to include the matrimonial jurisdiction presently vested in the Supreme Court. Dissolution of marriage and related matters would be transferred to the District Court, a change long overdue having regard to the fact that the Magistrate's Court already adjudicates on the breakdown of a marriage and makes the separation order on which the final dissolution order is based. In matrimonial property disputes the District Court would exercise unlimited jurisdiction but a party to an application would have the right to a hearing in the Supreme Court in respect of disputes over a certain sum. The District Court would have jurisdiction in respect of all custody and access applications but an appeal to the Supreme Court would carry with it the right to a hearing de novo. This latter right is seen as imperative to counter the implication that property issues over a given sum may be regarded as being more important than the custody of a child.

7.19 The Society has, by a majority of its Council, expressly rejected the principle of concurrent jurisdiction. Concurrent jurisdiction has produced many difficulties in practice, not the least of which is the problem of selecting the appropriate forum. Again, the fact that concurrent jurisdiction exists in the Supreme Court has been used to avoid likely adverse decisions from the Magistrate's Court or to delay the course of the proceedings in the interests of one of the parties. Concurrent jurisdiction also carries with it the connotation that it provides one law (or Court) for

the rich and one for the poor and, indeed, it is true that a client's financial resources are a factor which will influence a lawyer or his client in selecting the jurisdiction in which to proceed. The party having the financial capacity may also use the full processes of the Supreme Court in order to obtain an advantage over his or her partner. Finally, it means that the credibility of the parties may be challenged twice over whereas it is preferable that the issues of fact be disposed of at the one hearing while reserving to the parties a right of appeal to the Supreme Court.

7.20 A simplified procedure is essential in the Family Court for both the hearing of the original application and any subsequent appeal. A simple form of application should suffice to initiate proceedings and only if conciliation fails should it be necessary to require further affidavits in support. This procedure would be more appropriate in the District Court.

7.21 The Society discounts the notion that the adversary system can be entirely abandoned in the context of family matters. It accepts that the adversary system is designed to establish the facts and that it may tend to push people who are already apart even further apart. It also appreciates that the philosophy behind the Family Court is to treat the family as a whole emphasising the consensual element of the family unit. In such a context the facts may not be so important as the parties' understanding of the position. It also accepts that this approach encourages people to get together in conciliation services and introduces a positive post-marital attitude. A decision which is basically unsatisfactory because it is imposed on the parties is avoided. Nevertheless, the Society believes that if all conciliation and other supporting services fail, recourse must ultimately be had to the adversary system to resolve the dispute. This can only be provided by a court of law.

7.22 Consequently, the Society would suggest that the investigative, conciliation and supporting services associated with the concept of a Family Court should first be brought to bear on the problem within the administration of the Family Court. It is only if and when these services fail that recourse should be had to the courtroom to resolve the differences. But this is regarded as an important right to preserve.

Rights of appeal

7.23 If the jurisdiction of the District Court is enlarged as proposed, consideration would need to be given to the rights of appeal available from determinations of that Court. For its part, the Society envisages that the same rights of appeal which exist at present from the Magistrate's Court to the Supreme Court should continue to apply to all matters determined in the District Court. It has considered the proposition that appeals should be heard by three, or just two, Judges of the Supreme Court and is favourably disposed towards a system which would enable appeals involving important questions of law or principle to be heard by more than one Judge of the Supreme Court. Apart from the ability of the Chief Justice or senior puisne Judge to so order, leave could be granted on application in appropriate cases. The question of appeals against conviction resulting from jury trials held in the District Court might also require special consideration. Some members of the Society believe that these appeals should go direct to the Court of Appeal. However, the Society's view is that the appeals should initially lie to the Supreme Court but that leave could be granted by either a Judge of the District or Supreme Court to appeal direct to the Court of Appeal.

Subsidiary jurisdictions

7.24 Finally, consideration is required in respect of the special subsidiary jurisdictions being created at the lower end of the jurisdiction of the Magistrate's Court; that is, the Small Claims Court and the use of trained lay personnel. These special jurisdictions need to be reconciled with the Court structure as a whole. To the Society's mind, they should be kept functionally separate from the District Court but nevertheless come under the administration of that Court. In many cases the same court facilities could also be utilised.

7.25 These special jurisdictions will be considered at greater length in the second part of the Society's submission.

Recommendations

7.26 The Society's recommendations under this head may be stated:

(1) The Magistrate's Court should be re-constituted as the District Court and Magistrates made District Judges.

(2) The jurisdiction of the District Court should be enlarged.

(3) The civil jurisdiction of the District Court should be increased to a maximum monetary sum of $10,000.

(4) The criminal jurisdiction of the District Court should be enlarged by: (a) completing a reappraisal of maximum penalties; (b) completing a review of the offences giving right to trial by jury; (c) in particular, permitting lesser criminal offences to be tried before a jury in a District Court.

(5) (a) A division of the District Court should be regarded as the Family Court; (b) the jurisdiction of the District Court should be

enlarged to include the matrimonial jurisdiction presently vested in the Supreme Court; (c) all appeals from the District Court to the Supreme Court in custody matters should be by way of a hearing de novo; (d) the principle of concurrent jurisdiction between the District Court and the Supreme Court should be rejected save that a party to a matrimonial property dispute where the value of the property exceeds a specified sum should have the right to have the issue tried in the Supreme Court; (e) the right for parties to have recourse to the courtroom in order to resolve their differences through the adversary system when all investigative, conciliation and supporting services have failed should be preserved.

(6) (a) The same rights of appeal which exist at present from the Magistrate's Court to the Supreme Court should exist from the District Court; (b) appeals involving important questions of law or principle could be heard by more than one Judge of the Supreme Court; (c) Appeals against conviction resulting from jury trials held in the District Court should initially lie to the Supreme Court save that leave could be granted in appropriate cases for the appeal to proceed direct to the Court of Appeal.

(7) Special jurisdictions such as the Small Claims Court and the use of trained lay personnel should come under the administration of the District Court.

8. Judicial promotion

8.1 The long-standing view of the Society has been that Judges should be appointed direct from the leading members of the practising Bar. In recent years this view has been modified and the Society now accepts that it could be desirable to appoint to the Supreme Court Bench a person already holding office as a Magistrate or who is on an administrative tribunal. It has not, however, modified its view that the appointment of Judges should be based strictly on merit. To the extent, therefore, that any judicial or quasi-judicial appointment should have regard to a person's personal qualities, professional aptitude and skills and suitability for appointment, the Society regards it as unlikely that those already holding judicial office will commonly be the best fitted for appointment to the Supreme Court Bench. In other words, a person chosen for the Magistrate's Court Bench or to serve on an administrative tribunal is presumably chosen with the capabilities of that person and the requirements of that office in mind. It is considered improbable that the same qualities will later meet the requirements of the Supreme Court.

8.2 However, if the Magistrate's Court is to be upgraded along the lines which have been suggested, the Society considers that it would be more likely that the Judges of that Court could be suitable for appointment to the Supreme Court. It would stress, however, that appointment to the Supreme Court Bench should continue to be based strictly on merit and that this principle must preclude any preference in favour of the holders of an existing judicial office. For this reason the Society cannot give its unqualified support to the principle of judicial promotion or to any system which prefers the holders of existing judicial office when considering appointments to the Supreme Court.

8.3 If either Crown Courts or a system of intermediate Judges is established and the principle of judicial promotion is endorsed the possibility would exist of Magistrates or District Judges being appointed Crown Court Judges. The Society can contemplate the promotion of Magistrates or District Judges to the Crown Court because it already holds that these judicial officers are capable of presiding over criminal jury trials. Such promotion, however, would only tend to highlight the lower status of the inferior Court and react to its disadvantage. Nor is it likely that the possibility of promotion to a Court concerned solely with criminal matters would make appointment to the Magistrates or District Court Bench more appealing to able lawyers. There would also be a limited number of vacancies if the Crown Courts operated in the main centres only. What the Society cannot contemplate is the promotion of a Crown Court Judge to the Supreme Court. It seems to the Society that any lawyer appointed to the Crown Court Bench to hear criminal jury trials and possibly criminal appeals, is quite unlikely to prove suitable for the work undertaken in the Supreme Court.

Recommendations

8.4 (a)The appointment of Supreme Court Judges should be based strictly on merit. (b) A system of judicial promotion from lower Courts or tribunals to the Supreme Court is undesirable. (c) Upgrading the Magistrate's Court as suggested by the Society could increase the likelihood that a Judge of the District Court could be suitable for appointment to the Supreme Court without necessarily departing from the principle that such appointments should be based on merit.

9. The Crown Court proposal

Crown Courts

9.1 The Society remains opposed to the Crown Court proposal irrespective of whether it takes the form of a separate tier of Courts as originally put forward or whether it remains part of the Supreme Court and is manned by Crown

Court Judges. In the latter case there would be an intermediate level of the judiciary and the Society does not consider that the ramifications of this proposal would be significantly different from those which would result from the establishment of a separate tier of Courts entirely independent of the Supreme Court.

9.2 First and foremost, the Society is of the view that the creation of Crown Courts would downgrade the Magistrate's Court. This is a consideration to which the Society attaches the utmost importance. Yet it all too frequently seems to be given insufficient weight. To the Society's mind, however, it would be a tragedy to reverse the trend started in the last decade of seeking to upgrade the status of the Magistrate's Court and the calibre of those appointed to the Magistrate's Bench. The conclusion that the creation of a new tier of Courts or an intermediate categroy of Judges above the Magistrate's Court would be disastrous to the morale and standing of that Court is inescapable.

9.3 It would seem to be impossible to deny that public esteem for the Magistrates' Courts would be lowered. The creation of a new level of jurisdiction for minor criminal jury trials would be taken as an indication that Magistrates were not considered sufficiently qualified or competent to preside over those cases. This would be most unfortunate for it is the Magistrate's Court which will continue to be responsible for handling the bulk of the criminal work in this country.

9.4 Secondly, the existence of Crown Courts would tend to reduce the traditional importance attached to the administration of the criminal law. Under the Crown Courts proposal criminal work could become, or appear to become, divorced from the main work of the Supreme Court. The two jurisdictions for the determination of criminal cases would be the Magistrate's Court when the accused chose not to elect trial by jury and the Crown Court of a Crown Court Judge when he made that election. Under the proposal supported by the Society, however, a wide range of criminal cases would continue to be heard in the Supreme Court. That Court would not be seen to opt out of criminal work and the importance which the profession and public has always placed on criminal justice would be preserved.

9.5 Thirdly, it is most improbable that Crown Courts would operate in all centres. Auckland and Wellington have been mentioned as the places where the Courts would certainly require to be established. Consequently, accused persons choosing to be tried by their peers in some centres would obtain a trial in the Supreme Court while others charged with the same offence in the more highly populated cities would be tried in a Court or by Judges of lower standing.

9.6 Fourthly, the Society considers that there would be difficulty in attracting suitable lawyers to be Judges in the Crown Court because of the fact that they would be concerned solely with criminal matters. Front-rank barristers are unlikely to want to accept the position. On the other hand the appointment of barristers of lesser ability would defeat the aim of attracting the best judicial talent possible on to the Bench.

9.7 Fifthly, the Crown Court proposal has limited support. Over the years suggestions aimed at removing the criminal or routine work from the Supreme Court to an intermediate Court or judicial officers such as recorders or commissioners have been consistently opposed by the Society. It is now implacably opposed to the current proposal. It has little or no support within the profession and has, in fact, been roundly condemned by many of its members. While the Society does not claim that the profession should have priority over the public in determining the structure of the Courts, it considers that any major change in the Court system should have a measure of support from within the profession. The fact that this backing is absent is a good reason in itself why the proposal should not proceed.

9.8 Finally, the Society is convinced that the Crown Court proposal is found wanting when it is measured against the criteria which the Society has advanced as being appropriate for the structure of the Courts in this country. The principle respects in which it fails to meet these criteria may be briefly enumerated. In the first place, it is not appropriate to conditions in New Zealand in that the proposed Crown Court will initially only be required in two, or possibly three, of the main centres. This would not only create an unacceptable anomaly but would represent a refinement to the judicial process which would have little understanding or support from the community.

9.9 Secondly, the proposal does not have the economic advantages that might appear to be the case at first sight. It is true that it represents an economically viable solution if the problem created by the burden of minor criminal jury trials in the Supreme Court is isolated. But that problem cannot be taken out of the context of the overall administration of justice and the future development of the Court system. Other consequential costs cannot be ignored. The cost to the community, for example, if the Magistrate's Court is to be downgraded would be real and enormous. Moreover, as the population grows and the criminal workload of other Supreme Court centres increases, the demand to establish additional Crown Courts to relieve the Supreme Court Judges

in those centres will grow in intensity. Many centres in New Zealand may eventually require a Supreme Court, a Crown Court (or Crown Court Judges) and a Magistrate's Court. It is difficult to see how this situation could be justified economically.

9.10 Thirdly, while the implementation of the Crown Court's proposal would result in a better utilisation of the talent of some Supreme Court Judges it ignores the effect on other judicial officers. The Society has, for example, asserted that it would have an adverse effect on the status and operation of the Magistrate's Court and would make that Bench less attractive to able and well-qualified lawyers. It has also expressed misgivings as to the appeal appointment to Crown Courts would have to lawyers because of the fact that they would be undertaking criminal work only.

9.11 Fourthly, irrespective of any improvement in the effectiveness of the service provided by the Supreme Court in respect of its criminal jurisdiction, the establishment of Crown Courts would do nothing to improve the service provided by the Magistrate's Court. On the contrary, as stressed in this submission, from the point of view of that Court it would be a retrograde step and the overall standard of judicial services would be impaired.

9.12 Fifthly, the proposal lacks the simplicity of the present three-tier system. Nor would it be uniform throughout New Zealand. To the extent that it did not operate uniformly and was seen to be considered necessary by the authorities (even though Magistrates already determine the same offences without the assistance of a jury) would not be understood or make sense to the general public.

9.13 Finally, Crown Courts would do relatively little to promote the overall administration of justice. This is because it is a limited concept having a limited aim which does not embrace the work and functioning of the Court system as a whole.

Recommendation

9.14 The proposal to establish an intermediate Court or an intermediate tier or Judges to hear criminal jury trials should be rejected.

10. Commissioners or Recorders

Commissioners or Recorders

10.1 In 1975 the Society tentatively raised the possibility of appointing lawyers or magistrates as commissioners or recorders to hear criminal jury trials. It raised this suggestion only in an effort to find an immediate solution to an urgent situation; that is, the pressure of criminal work in the Supreme Court. The Society did not support the idea from a long term point of view.

10.2 Consequently, although the Commission may wish to consider the use of commissioners or recorders the Society now wishes to clarify the fact that it does not support the concept and can see no place for commissioners or recorders in the structure of the Courts in this country.

10.3 Indeed, the proposal to create commissioners or recorders to hear criminal jury work is fraught with much the same disadvantages as those associated with Crown Courts or Crown Court Judges. In particular, the system would also be detrimental to the image and standing of Magistrates. The public would only view it as meaning that Magistrates are inferior to certain members of the bar and cannot measure up to the task of hearing criminal jury trials. It would also lay the Court system, or part of it, open to the charge of administering "second-rate justice".

10.4 It is sometimes suggested that commissioners and recorders could be appointed from the bar to serve on a part-time basis. This proposal is subject to additional difficulties. In the first place, the practice of elevating practising lawyers to judicial status on a temporary basis is wrong in principle. A lawyer may sit on the bench one day and yet be found practising at the bar the next. Elsewhere such a system is regarded as a historical anachronism; the lesson of experience being that one cannot be both a Judge and a lawyer. Secondly, the system is capable of being misused and giving those selected an advantage which may be unfair to other lawyers who are highly competent in this specialised field but who are not appointed. Thirdly, the appointment of a part-time Judge is not free from conflict. He must be both impartial and seen to be impartial. He may be called upon, for example, to preside over and direct a jury in respect of charges and fact situations which are not dissimilar from those he may be engaged in on behalf of a client on another day. Furthermore, a client in the latter position may later come to regard his counsel's duty when on the Bench as having been in conflict with his duty to represent him to the best of his ability. The conflict is essentially a conflict between the duty of a Judge, even when part-time only, and the duty of an advocate in a criminal trial. Fourthly, as a practising lawyer the temporary commissioner may not have the same degree of remoteness from the community which is possessed by full-time Judges. Yet it is from the community that the accused and his accusers will come. Fifthly, the system could create embarrassment at the bar. Many lawyers may not feel

comfortable pressing an issue with a colleague knowing that he may shortly be in a position of judicial influence over them. Finally, largely for the reasons given, part-time judicial officers must tend to damage the overall reputation and prestige of the Bench and lower the public's confidence in the Judiciary. The administration of the criminal law would be downgraded when it is administered by Judges who were not just "temporary", but "part-time temporary Judges".

Recommendation

10.5 Any system involving the appointment of lawyers or magistrates as commissioners or recorders to hear criminal jury trials should be rejected.

11. Conclusion

11.1 In this submission the Society has put forward a comprehensive structure for the Courts of this country. The structure has been designed to meet the basic criteria which the Society considers should be applicable to the Court system both now and in the future.

11.2 , The Society's main proposal has been that the Magistrate's Court should be upgraded. No other change to the judicial system would do more to meet the requirements of the public which it serves or more to further the overall administration of justice. With increased status, enlarged jurisdiction and improved conditions for the judicial officers serving at this level of jurisdiction these objectives can be achieved.

11.3 At the same time the Supreme Court will be relieved of the more routine work. It will become more truly a Court of superior jurisdiction and more effectively perform the appellate and review functions required of it. The quality of the law administered in this country will be assured.

11.4 The Court of Appeal would complete the straight-forward three-tier structure recommended by the Society. Irrespective of whether or not the right of appeal to the Judicial Committee of the Privy Council is retained, the Society has urged that a sufficient number of Judges should be appointed to the Court to enable it to function as a permanent Court of Appeal as originally contemplated.

11.5 This proposed structure for the Courts of this country is neither bold nor radical. It is, however, a serious attempt to advance an integrated Court system in accordance with defined criteria which will at once meet the immediate needs of the community and yet be capable of further development to meet the requirements placed upon it in the future. The Society believes that it will meet those ends.

"MAY IT PLEASE YOUR HONOURS"

In one of the corridors of the Supreme Court in Wellington there are photographs of all the men who have held the high office of Chief Justice of New Zealand. It is an historic collection.

Looking at the photographs I am always proud to recall that I have reported the Courts of six of them from Sir Robert Stout, Chief Justice from 1899 to 1926. I must hasten to add that it was during his last year on the Bench that I reported his cases.

All these eminent jurists were well known to the people of Wellington. Most of them had practised in the city before their appointment to the Bench, and they took a keen interest in all good works going on in the community.

When Sir Robert was made Chief Justice he had already been Premier of the colony and before that had held Cabinet rank. Those who read Sir Robert's judgments so many years after they were delivered will at once realise their great literary content.

Sir Robert Stout was a handsome man. Well-built, his snow-white beard and pink cheeks made him an outstanding figure in any company. Quietly spoken, he was never bustled, and he was always relaxed in the knowledge that he knew exactly what he was about.

Charlie Skerrett, who succeeded Stout on the Bench, was indeed Wellington's own. As a boy he sold evening papers at a street corner and throughout his career at the Bar was widely known, and loved, by people in all walks of life.

His practice at the Bar was one of the largest ever known in the city, and when he went to the highest post a lawyer can attain to, his Courts were models of decorum and his judgments were seldom successfully appealed against.

Sir Charles never married and his spinster sister was his hostess on official occasions at their fine residence in Lowry Bay, later the official residence of the High Commissioner of Canada.

Then tragedy struck. As the result of a medical condition, Sir Charles had to have first one leg and then the other amputated. Even so, he returned to his duties as Chief Justice and a lift was installed in No 1 Court in Wellington for his convenience.

Alas, the end was not to be delayed long. He died at sea on a voyage to England accompanied by his sister. He had been Chief Justice for only three years.

Skerrett was followed by the versatile Michael Myers. Versatile because his work at the Bar covered the gamut of legal practice. He prose-

cuted, he defended, he appeared equally successfully for plaintiff or defendant and he built up a large commercial practice.

There was concern in the underworld when Sir Michael was appointed, for he had the reputation of being 'tough' as a Crown Prosecutor. They need not have worried, for he became a kindly Judge, though I have never known a man, on or off the Bench, less inclined to suffer fools gladly.

At the Bar, Myers had an extraordinary success with Privy Council cases. He attended before the Judicial Committee of the Privy Council in London on several occasions, and it is on record that he never lost a case he took before that august body, or defended before it.

On one occasion the Bench nearly lost Myers to politics. While at the peak of his fame at the Bar he was offered a safe Wellington seat by the Reform Party, but eventually decided not to stand.

Years later, after he had retired from the Bench, I asked him what brought about the decision to by-pass politics (there was a rumour at the time that he had even at that stage in his career set his sights on the Chief Justiceship). Sir Michael told me that one consideration, and one only, had made him decide against becoming a candidate for Wellington North, and that was the need to provide for a young family. He said he had a lucrative practice and did not not feel like vacating it for the ever-doubtful realm of politics.

Humphrey O'Leary, a former partner of Myers, brought a native Irish wit to his duties.

He once told me that he would not sleep much when he had to sentence people on the following morning. He had to be and was, true to his oath of office, but he said no matter how necessary punishment was, he found it difficult to impose.

How well I recall the dramatic scene in the Wellington Supreme Court, when Humphrey O'Leary dealt with an old man who had shot the suspected lover of his very much younger wife. The jury found the old man guilty of manslaughter and made a strong recommendation for mercy. The Chief Justice stood the case down for half an hour after the verdict, and when be returned to Court said: "I cannot find it in my heart to send this old man to prison". O'Leary spoke with emotion when he allowed the man his liberty for the short period of life remaining to him.

The Chief Justice's remarks were followed by one of the most touching incidents I have seen in the court. As the old man stepped down from the dock, his teenage stepson came forward and embraced him affectionately.

Sir Humphrey was followed on the Bench by an Auckland barrister and distinguished soldier, Sir Harrold Barrowclough.

The present Chief Justice, Sir Richard Wild, came from the same legal firm as Myers and O'Leary, though the immediate office he held on his appointment to the Bench was that of Solicitor-General.

Winton Keay

CORRESPONDENCE

Sir,

Simple language

In the Guest Memorial Lecture published in your issue of 17 January, Mr Lester Castle asked that "members of the legal profession continue to strive, not only for clarity in the law, but also for simplicity of language".

One aspect of this is the loading of documents which superfluous words and phrases. Why do will draftsmen still add the words "of whatsoever nature" after "all my property"? Why in leases must consent be "first had and obtained" and why must a lessee covenant that he "shall and will" keep a property in good order?

But the academic and common lawyers too, have what Mr Castle calls "the age-old stereotype language which permeates the judicial system". I suspect that we all have a style of speaking to each other which hints broadly to the listening layman that he is an outsider and that the subtelties of our thought are beyond his understanding.

The double negative is a trick of language which, I suggest, we use so often that it has become a meaningless mannerism – often ugly, sometimes ludicrous. For example, why say "I am not unmindful of the fact that . . ." when "I agree . . ." or "I recognise . . ." would do as well?

In the same issue you have two learned contributions by Professor P R H Webb. In discussing a recent judgment about presumption of death and dissolution he refers to another case as being "not unuseful" and in discussing a case about overseas divorce decrees he speaks of counsel submitting "not unattractively".

Perhaps this is not a legal habit at all but just the diffident Kiwi anxious not to commit himself to the positive. Perhaps it has the same origin as the upward questioning inflection with which so many end their sentences in these days. My use of "perhaps" at the start of the last two sentences, however, will make it not unapparent to the not unperceptive reader that I am not unassailed by doubt on the point.

Yours not insincerely,
N H Buchanan
Christchurch

[Could it have been a New Zealand lawyer who contributed to the Music Hall that line: "And I don't not like no one who don't want no nine inch nails"? – Ed]