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YOU CAN'T FIGHT MURPHY'S LAW

The Report of the Wanganui Computer Centre Privacy Commissioner on the Helm affair serves, in retrospect, as a reminder that "there is no surer way of creating a major scandal than by trying to conceal a minor one". A little more openness at the beginning may well have seen this matter disappear as a ripple on the water rather than stirring the mud on the bottom and, in the process, subjecting the police to a barrage of criticism that their Minister, joining his equally uninformative colleagues, did little to dispel. Not only this but the assurances given by various ministers that a finger was now firmly jammed in the dyke stand in contrast to the cautious pronouncement in the Report that "certain measures have been taken" but "whether those measures are or will continue to be, effective is I apprehend a matter for consideration by the policy committee". It is worth reflecting that systems with a human component have a facility for contrariness – a phenomenon known to scientists as Murphy's law. When it is demonstrated that Murphy's law is wrong will be the time to start believing in foolproof security systems.

Meanwhile, the Report points out that the methods adopted to detect Helm included feeding fictitious information into the computer – a procedure that is not authorised by the Wanganui Computer Centre Act 1976. Are we to witness the sight of those staunch advocates of infallible security arguing for an amendment to the Act "just in case"? – a phenomenon known to lawyers as blowing hot and cold.

The police bore the brunt of the criticism.

In an earlier editorial the question was asked whether the police had misused the powers of entry and search given by the drugs legislation. It is now confirmed that they had obtained a search warrant but the point in mind was that the Misuse of Drugs Act 1975 authorises entry without warrant on reasonable grounds of suspicion of the commission of a drug offence. Would it be proper to use that power when the manifest object of securing entry relates to a matter not in the least concerned with drugs?

If a power can be properly used and an additional benefit gained then why not use it? If the use is not approved then attention is better directed towards the framing of the power rather than the method of its exercise.

Also criticised was the decision not to prosecute. The reasons for not prosecuting are set out in the Report. One reason not given but which may be inferred was that the question of a prosecution was the least of the worries of the police. Their prime object was to find the leak and plug it. This they did.

Opinions will vary as to whether the reasons for not prosecuting are convincing. Helm's act in breaching confidence was not of a type that normally attracts prosecution – dismissal yes, but not prosecution. Yet balanced against that is the public interest in ensuring that the computer system is as secure as possible. The deterrent effect of prosecution plays some part in this.

At the time, the Wanganui Computer Centre Act 1976 with its separate penalties was not in force, leaving only the heavier artillery of the Official Secrets Act 1951. In the judgment of the police that Act "was too heavy and uncertain a weapon to use against the employee in these circumstances". We agree. In the circumstances that reason by itself justified the decision not to prosecute.

After all, a prosecution under the Official Secrets Act is a Big Thing. Prosecutions are written about in books and dissected with all the skill and deference due to this Notornis of the law. Prosecutions are traditionally reserved for Spies, and for Those who Threaten the Democratic Way of Life.

Certainly it has been said that the Act is wide enough to enable prosecution of the janitor who discloses the number of rolls of toilet paper in the departmental loo, but without wishing to sound patronising that sort of storyline will simply not do. There is no intrigue in high places, no bottles of milk spilt in briefcases while fumbling for imaginary micro-dots, nothing to arouse the emotions of the populace. As for Helm, at best his scenario fell short of being even remotely acceptable as a pot-boiler. No, the police did well to let him be.

The Official Secrets Act has rarely been invoked and then only in serious cases. It is though, held in terrorem over the heads of all civil servants. If Helm had been prosecuted under it, then the interests of consistent and fair administration of justice would demand prosecution in all cases of improper disclosure of information and what a can of worms that would open! The police have quite rightly recognised the boundary that should not be crossed. Would that our legislators would do the same and produce legislation relating to disclosure of Government information that is a little more in accord, not only with reality but also with the public interest.

The story has now been told. One wonders why so much of the factual information could not have been disclosed much earlier. Still, most closely guarded information, when finally released evokes the same wonderment.

Tony Black

CRIMINAL LAW

THE PLEA BARGAINING PROCESS: TRIAL BY ERROR

At our request Mr ROBERT D SEIFMAN, B Juris, LLB *has kindly consented to republication of this article which first appeared in the* NEW LAW JOURNAL. *Mr Seifman is a post graduate Research Student in Law at London University.*

The recent reversion by the Court of Appeal *(a)* to the principles outlined in *Turner* (1970) 54 Cr App R 352, has cast novel significance upon the informal practice commonly termed "plea bargaining". In accordance with renewed public awareness in the rationale of judicial sentencing, it is perhaps a timely opportunity to re-examine the proper place of plea bargaining in the criminal justice system.

Plea bargaining has traditionally been justified as a necessary adjunct to the administration of criminal cases *(b)* for "... with each guilty plea the state avoids the high cost and the vagaries of the common-law trial by jury" *(c)*. Indeed the American Bar Association found that the compromise of criminal cases by "plea negotiations" was a pervasive practice *(d)*, endorsing the judicial sanction previously accorded the practice of plea bargaining *(e)*.

However the English attitude has reflected distaste for plea negotiations both at a judicial level *(f)* and in the legal literature *(g)*. Following an interim period of confusion as a result of the *Cain* decision *(h)* it would appear that the directives in *Turner* now specify the guidelines for plea bargaining in England.

The American stance on plea bargaining is less clear, the current trend being to recommend the abolition of plea bargaining *(i)* and negotiating

(a) Practice Direction – [1976] Cr LR 561.

(b) "The essence of the criminal justice process is not the trial stage but the negotiation for a guilty plea between the prosecutor and defence counsel", S S Nagel and M Neef "The Impact of Plea Bargaining on the Judicial Process" (1976) 62 US Bar Assoc Journal 1020.

(c) J L Heberling "Conviction Without Trial" (1973) Anglo-American LJ 428 at 435.

(d) "A substantial number of these (guilty) pleas are the result of prior dealings between the prosecutor and the defendant or his attorney". American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty. Approved Draft, Chicago, American Bar Association, 1968, p 60.

(e) See eg Santobello v New York 404 US 257 (1971) where the Court stated that plea bargaining was in effect "... an essential component of the administration of justice" per Burger CJ at 260.

(f) "There is something more than convenience and expedition. Above all there is the proper administration of criminal justice to be considered". R v Coe [1969] 1 All ER 65 per Lord Parker at 67.

(g) "... it would seem that we are better off without bargaining, and the weakening of the authority of the courts that is implied by that word and the practice it stands for". A Davis "Sentences for Sale: A New Look at Plea Bargaining in England and America" [1971] Cr LR 218 at 228.

(h) [1976] Cr LR 464. See R D Seifman "The Rise and Fall of Cain" [1976] Crim LR 556.

(i) See M Berger "The Case Against Plea Bargaining" (1976) 62 US Bar Assoc Journal 1062 but note the proposals for reform (rather than the abolition) of plea bargaining in Note "Plea Bargaining and the Transformation of the Criminal Process" (1977) 90 Harv LR 564.

practices *(j)*. Such recommendations are not surprising in view of the abuse of plea bargaining which has become commonplace in several jurisdictions. Indeed, the American system seems to have provided few safeguards against such abuse and in the words of Professor Enker ". . . the truth is that we just do not know how common such a system is" *(k)*. A more lucid appreciation of the rationale behind the English attitude may be derived from a redefinition of the term "plea bargaining".

Plea bargaining is a "compendious term" *(l)* which encompasses a complex permutation of circumstances wherein the accused determines to plead guilty. The term refers to a variety of situations involving the exchange of a guilty plea to one or more of the charges being preferred *(m)* against the defendant in return for one or a combination of the following concessions:

(a) The prosecution agrees to modify the charge(s) alleged by proceeding with a lesser charge.

(b) The prosecution agrees not to press the charge(s) being alleged.

(c) The prosecution agrees not to bring further charges related to those already indicted, or not to institute legal proceedings against co-defendants or others associated with the accused. In addition to the foregoing situations, the American prosecutor may use his powers of sentence recommendation as a requital for a guilty plea.

Plea bargaining in England has come to connote "deals" *(n)* which transpire in the Judge's Chambers. Largely as a result of adverse publicity in the media, the term conjures up images of pettifoggers conducting negotiations sub rosa with judicial sanction. In practice, however, an approach is sometimes made to the trial Judge in order to explain certain details about the case – details which would either cause embarrassment or distress to the accused if revealed in open Court, or which would facilitate the conduct of the case.

Thus, for example, unbeknown to the defendant he may be suffering from a terminal illness which has come to the attention of his advocate. Such information may be relevant to sentence considerations and is clearly most aptly couched in the form of private communications with the Judge. Therefore the advocate must also serve the client's interests outside the formal arena of the Courtroom, although the possibility of ethical problems may arise *(o)*.

A more common occurrence is the situation where a defendant is fearful of incarceration but contests the charge(s) in the vague hope that he will somehow be acquitted (and thus avoid imprisonment). The barrister may deem it necessary to approach the Judge for an indication as to the range of sentence he is minded to impose upon a conviction. In like fashion, the prosecution may feel that the circumstances of the case do not correlate fairly to the charges on the indictment. Lack of evidence, an overloaded indictment, unreliable witnesses, the particulars of the defence etc may all contribute to a decision not to prefer the original charges.

In both instances counsel for the defence and for the prosecution should consult the Judge. Generally either party will have discussed his intentions with his opponent before an approach is made to the Judge on this issue. If the Judge is so minded, he may welcome a discussion clarifying the accused's dilemma or the obstacles confronting the prosecution especially if he feels that justice and the case may be expedited without any loss of propriety. He may allay the fears of the accused and indicate, irrespective of plea, that the alleged crime does not warrant a custodial sentence. Alternatively he may feel that insufficient information is at his disposal at that stage for him to indicate a range of penalties; or he may accept the prosecution's submissions regarding the charges and may tacitly call upon the defence counsel to request his client to reconsider his plea in the light of the discussion in Chambers.

Thus without formal negotiations or "deals" the defendant may elect to change his plea. No agreement or threat has been imposed. Rather, the defendant is more aware of the sentencing alternatives being contemplated and is in a more

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(j) National Advisory Commission on Criminal Justice Standards and Goals. Courts . Washington DC, 1973 p 46.

(k) "Perspectives on Plea Bargaining" p 108 at 113 in Appendix A of The President's Commission on Law Enforcement and Administration of Justice – Task Force Report: The Courts, Chapter 12. Dickenson Publishing Co, California, 1968.

(l) S McCabe and R Purves By-passing the jury. Oxford University Penal Research Unit 1972, p 10.

(m) Or to a lesser charge. A typical example is where the defendant is originally charged under s 18 of the Offences Against the Persons Act 1861 – wounding with intent to do grievous bodily harm – and agrees to plead guilty to the less serious offence of unlawful wounding – s 20 of that Act.

(n) "Lawyers to probe plead guilty Court deals" Daily Mail 14/4/1970, p 7.

(o) For a full discussion of the conflicting pressures upon counsel in such circumstances see J E Adams "The Second Ethical Problem in R v Turner: The Limits of an Advocate's Discretion" [1971] Crim LR 252.

informed position to consider the advantages and disadvantages of his defence.

Counsel plays an active and prominent role in this process. He submits to the defendant that the case will probably not attract as stringent a sentence as the defendant had envisaged. (Or he may suggest that a harsh line is being taken in the case because of the nature of the offence or the defendant's previous criminal record). Counsel may also point out that the evidence appears to favour overwhelmingly the prosecution and that, within the confines of the sentence being contemplated, if the defendant admits his guilt this factor may invite a sentence concession. Counsel's submissions should be conducted with the utmost propriety and without pressure upon the accused as to how he should plead. If the accused maintains his innocence, counsel will not seek further guidance and should strive to vindicate his client's claims *(p) (q)*.

However, if the client confesses his guilt or criminal involvement counsel is duty bound to advocate only a plea in mitigation. To do otherwise would be to infringe his ethical obligation and to deceive the Court. Despite the dicta of Lord Parker in *R v Turner* a penumbra of suspicion has been cast upon the processes of English justice leading to the final submission of guilty pleas *(r)*.

The *Turner* decision alleviated the former discrepancies in practice, especially among a minority of over-zealous barristers (and on occasion Judges) who sought to expedite justice by encouraging a guilty plea without due consideration of the case in question. The guidelines in *Turner* expressed in cogent lucidity the mode of conduct to be observed, both in approach and in substance, to plea bargaining. In turn, some members of the judiciary have qualified their former willingness to accommodate the more vexing problems of counsel in the privacy of judicial Chambers. Apprehensions of adverse repercussions, should counsel misconstrue the Judge's sentiments, have dulled the keen rapport between the bar and the judiciary concerning this practice *(s)*.

Naturally enough, plea bargaining, as with any system dependent upon human relationships and understanding, is susceptible to and fraught with human failings. It would be naive to assume that ethical malpractice does not exist. However in England it is the exception rather than the rule. Any practitioner who resorts to such devices sacrifices his reputation and forfeits respect from colleagues and adversaries alike – he additionally foregoes certain courtesies otherwise extended to many practitioners. This means that he may be precluded from participating in discussions in the Judge's Chambers or that guidance from the judiciary relating to issues of plea changing or sentence may not be forthcoming.

Plea bargaining in the "bargaining" sense does exist but at a much earlier stage than is currently supposed. Inducements at the arrest and charging stage are not uncommon and are one of the many weapons in the vast arsenal of police techniques of securing vital information *(t)*. Often the bewildered accused seeks guidance from the charging officer (who is vested with the discretion as to which charge(s) to lay) who may urge the former to plead guilty. Reassurances that a fine or non-custodial sentence will result are not always borne out and unwittingly the accused (especially if he has previous convictions) may have secured his own incarceration, as a written admission of guilt is often unassailable. Such imperfections are generally corrected with full legal representation before a Judge and jury yet this places the unrepresented defendant at an iniquitous disadvantage.

Thus inconsistencies may occur even with judicial guidelines such as those expressed in *Turner*. What advantages can plea bargaining provide and why has the Court of Appeal justified the practice? If injustices result from the system why has it received judicial sanction rather than forensic exclusion?

(p) The author bases his contention on the strength of interviews conducted with over 60 barristers all of whom had considerable experience in criminal law matters.

(q) Referring to counsel's advice to the client "It is perfectly right that counsel should be able to do it in strong terms, provided always that it is made clear that the ultimate choice and a free choice is in the accused person" at p 325.

(r) Note the instances cited in A E Bottoms and J D McClean Defendants in the Criminal Process. Routledge and Kegan Paul 1976, pp 126–130.

(s) The vast proliferation of new additions to the judiciary as a result of the Courts Act 1971, meant that a number of silk who previously shared strong personal ties with Judges, in turn were appointed to the judiciary. As such, junior counsel, inexperienced or with only limited experience of criminal litigation, came to frequent the Crown courtrooms, having had scant acquaintance with the confidentialities shared by the bar and the bench or with "plea bargaining".

(t) It should be pointed out that the practice of eliciting information from accused persons by the police varies from county to county and from police station to police station. London police seem to be faced with more cases than their provincial counterparts and are unable to always pursue the minutiae of detail that is required to bring the appropriate charge.

The advantages of plea bargaining are many and benefit the prosecution as well as the defence. Prosecutors avoid the tedious hazards of establishing their case beyond reasonable doubt and to the satisfaction of a lay jury; a vast amount of valuable Court time and expense is spared, and the appropriate charge is pursued. The defendant is relieved of the stigma attaching to certain crimes (eg in cases involving sexual offences); he may concede his involvement in the offence and show his remorse whilst nevertheless avoiding a stringent penalty, and the uncertainty of long delays is alleviated.

Judicial recognition has been accorded to plea bargaining in England solely because the "bargaining" element has essentially been eliminated. To negotiate a deal whereby a specified leniency in sentence is guaranteed is contrary to and an abuse of the English criminal justice process. Unlike certain jurisdictions in America where prosecutorial achievement is subjected to a win-lose syndrome, counsel are disciplined to prosecute as well as plead in mitigation. Another essential difference between the two countries is that the English prosecutor, unlike his American counterpart, has no sentence recommendation discretion. Thus " ... the etiology of the US situation ... differs from the English at almost every level" *(u)*.

The term plea bargaining portrays a distorted picture of the informal practice of judicially supervised discussions about the accused's plea and the disposition of his case. It has emotional overtones of "innocent" defendants being coerced to plead guilty merely for the convenience of the Judge or counsel. It presupposes "behind the scenes" justice and bartering with sentences. Whilst the American jurists may dread the prevalence of such methods in a system which elevates the prosecutor to the prominent position of recommending sentence, the English experience presents no such cause for concern. The days in England of "peine forte et dure" to induce pleas are long since departed.

(u) Purves "That Plea Bargaining Business: Some Conclusions from Research" [1971] Crim LR 470 at 475.

A CANON LAW CHALLENGE TO CIVIL LAW? A NEW ZEALAND RESPONSE TO THE NE TEMERE DECREE

By Dr LAURIE BARBER, *Lecturer in History, University of Waikato, Hamilton.*

Most New Zealand barristers and solicitors hold the decree of bachelor of laws (LLB), but few of these graduates have any knowledge of the second area of law indicated by the Latin plural – canon law. The growth of the nation state and a corresponding diminution of church authority has reduced canon law to a highly specialised practice confined to the Roman curia and Canterbury palace. Despite the removal of canon law from undergraduate prescriptions there have been several occasions in New Zealand's history when an understanding of Canon law precedents would have allowed the nation's lawyers to reduce sectarian hysteria occasioned by misunderstanding the law. Had several senior members of the New Zealand legal profession been learned in canon law at the introduction of the papal decree on mixed marriage, Ne Temere, in the first decade of this century, the storm that followed might have more quickly abated.

The promulgation of the decree Ne Temere by Pope Pius X, on 2 August 1907, and the Pope's command that this decree come into effect on 19 April 1908 opened another campaign in the four centuries old battle between Roman Catholicism and Protestantism. Ne Temere was designed to remedy the confusions of the Tridentine Tamatsi decree of 1513, a decree designed to suppress clandestine marriages involving Roman Catholics. Tamatsi had not been published in Protestant states and the Sacred Congregation, concerned at the lack of uniformity in canon law marriage regulation, decided to enact a new decree that would carefully regulate the obligations of Roman Catholics in marrying outside their faith. The implications of the new encyclical for Australasian Catholics was clearly outlined by the Roman Catholic Bishop of Christchurch, J J Grimes, in his 1908 Lenten pastoral:

> "Hitherto when a Catholic in this Dominion, as in the whole of Australia, was wicked enough to contract marriage with another Catholic, or even with a non-Catholic, before the civil registrar or an heretical minister, the marriage was valid though sinful, and entailing

ecclesiastical censure. But from next Easter, any such marriage contracted by a Catholic, either in a registry office or before a non-Catholic clergyman, will be null and void; in other words, the parties will, in the sight of God and His Church, still remain unmarried" *(a)*.

Ne Temere was intended as a disciplinary regulation for Roman Catholics. It was meant to prevent Roman Catholics from solemnising their marriages without the benefit of sacrament that could only be provided by their own clergy. The Church was simply asserting its authority over its own.

Protestant reaction to Ne Temere was speedy and fierce. Dr R P Davis has noted that the Loyal Orange Federal Council of Australia and New Zealand quickly organised Protestant reaction to the decree *(b)*. In New Zealand anti-Catholics responded rather more slowly, and it was not until 1911 that New Zealand Protestant guns were concentrated upon this new target.

Between 1908 and 1911 New Zealand's anti-Catholics had better ways of attacking Rome. The Liberal Government's leader, Richard John Seddon, had died in 1906, and had been replaced by his Catholic lieutenant, Joseph Ward. The dapper Ward had already provoked a scandal concerning his personal finances and now he was subjected to numerous accusations of favouritism towards Roman Catholic applicants for public service vacancies. Besides this personal vendetta against Ward, ultra-Protestants also saved their strength in the years between 1908 and 1911 for one of their many campaigns in favour of the introduction of Bible teaching into the state schools *(c)*.

By mid-1911 Ward's government's days in office were numbered. Rural and small town conservatism had rallied under the leadership of William Fergusson Massey, a Presbyterian and an Orangeman, who was pleased to encourage any anti-Catholic sentiment disadvantageous to his opponent. Massey's advantage was aided by a spate of attacks on Ne Temere in overseas religious journals, in early 1911. By August 1911 the decree was a point of issue in New Zealand.

James Gibb, founding father of the United Presbyterian Church of New Zealand (the Dominion's second largest denomination), was amongst the first to jump upon the new anti-Catholic bandwagon. In August 1911 he invited the Presbytery of Wellington to support an overture to the Presbyterian General Assembly protesting at:

> "This intolerable invasion of the civil and religious rights of the people . . . [and calling the Assembly to] expose the machinations of the Papacy and put the people on their guard against the subtle encroachment of the Roman Catholic Church on the liberties of the nation" *(d)*.

Gibb objected to Ne Temere on several counts. He objected to the decree's suggestion that only marriages solemnised by Roman Catholic priests were ecclesiastically valid. Objection was raised to the promotion of variable and changeable ecclesiastical law as the arbiter of the validity or invalidity of marriage. Without providing any instance, Gibb contended that the decree interfered with the liberty of the subject. He protested that couples legally married according to New Zealand's law were now open to slanderous accusations of immorality and concubinage. He also charged that the decree might be used by irresponsible husbands who could claim that their marriages were non-canonical and thereafter repudiate their marriage vows.

When in later 1911 Gibb's overture reached the General Assembly patriotic sentiment was introduced to leaven the anti-Catholic argument. Gibb was aware that in 1906 Pope Pius X, by his decree Provida Sapientiaque, had suspended the application of Tamatsi in Germany. He wrongly assumed Ne Temere would continue this exemption, and charged:

> "It makes the blood of the British boil to think that Germany should be free of this yoke. That they [the Papal curia] dare to impose on freeborn Englishmen . . . . I believe that one of her [the Roman Catholic Church] ideals is the recapture of England to the Papacy" *(e)*.

Throughout 1912 the Loyal Orange Lodge and a handful of anti-Romanist Evangelicals attempted to rouse the public against the new Papal decree. In 1912 the Reform Party led by Massey, was at last the government. Protestant rhetoric and virtues were in the ascendant. A Romanist plot was identified by Protestant extremists, and early in 1912 John Dickson, Presbyterian minister of Picton, published a book of 246 pages attacking the decree. In *Shall Ritualism and Romanism Capture New Zealand?*, Dickson decried the failure of New Zealanders to perceive the Catholic threat to land and liberty:

(a) Lenten Pastoral of the Roman Catholic Bishop of Christchurch, 1908. In *Outlook*, 15 August 1911.

(b) R P Davis, *Irish Issues in New Zealand Politics, 1868-1922*, (Dunedin, 1974), p 69.

(c) The New Zealand Education Act of 1877 stipulated that primary school education should be compulsory, universal and *secular*.

(d) Minutes of Wellington Presbytery, 8 August 1911.

(e) *Outlook* (Dunedin), 26 December 1911.

> "We treat the question as if it did not vitally concern us. Australia has been loudly giving expression to its indignation through all kinds of meetings, resolutions, and newspaper comments. Canada is alarmed. For months the Old Country has been in a state of ferment .... The question of questions was debated on the floor of the House of Commons, and even Mr Birrell, the Home Secretary of a supine government, was stirred up to make an effort to find and bring to justice the man McCann, who, at the bidding of the Roman Church, had deserted his wife and left her childless, homeless, penniless, and, as far as he could do it, ruined in character" *(f).*

The anti-Catholics waxed eloquent over the McCann case in Britain, where a Catholic husband at his priest's bidding removed himself from his Protestant "wife". Canadian examples of family disruption were cited as additional evidence of the evils brought by the Papal decree. Overseas cases, suspiciously distant, were regaled to the New Zealand public, but the anti-Papists were hard placed to find a New Zealand instance. The best Dickson could do was to cite the case of a country girl, from a Loyal Orange family, who had run from her home to marry her Catholic sweetheart from a nearby town *(g).* This was hardly the case to inflame New Zealanders, who were more likely to congratulate the runaway lovers on their defiance of bigotry.

Lack of local instances of injury to family life did not prevent the 1911 Presbyterian General Assembly from forming a committee on "Romanism and Ritualism". At the 1912 General Assembly, correspondence from leading Canadian Protestants was cited as evidence of the existence of a Roman Catholic plot in Canada to make canon law binding on the state. Whilst Protestant fanatics sounded that the tocsin more moderate Protestant leaders reminded troubled couples that the 1908 Marriage Act allowed for a second certificate to be issued to parties who desired a second marriage ceremony. This provision allowed couples who had been married by a civil registrar, or by a Protestant cleric, to regularise their union in the eyes of the Roman Catholic Church by the simple solution of a quiet visit to their parish priest. How did Roman Catholic priests implement the Ne Temere decree? There is no evidence to suggest that parish priests placed pressure on invalidly married members of their flocks to hustle their mates to the altar. The Presbyterian Committee on Romanism and Ritualism warned that Catholic priests would blackmail the Roman Catholic party into agreeing to remarriage, on the ground that their children were illegitimate. No complaints appeared to support this charge, and it therefore seems ill-founded. The Presbyteries of Christchurch, Taranaki and Timaru petitioned Parliament to bring legislation to protect the Protestant parties to mixed marriages from slander. These petitions lay on the table of the House of Representatives and members appear not to have taken the petitioners seriously *(h).* The Roman Catholic hierarchy seems to have handled the imposition of the new regulation gently. There is no evidence to suggest that its promulgation led to any case of criminal slander. Protestant objections to the decree seem to have been dismissed by most New Zealanders as proceeding from motives other than altruistic.

This short-lived outbreak of anti-Romanist hatred was one of the several explosions of sectarian hysteria that periodically marred the good relations of the New Zealand Churches. Before the 1880s anti-Catholicism had been played in a minor key by the colony's Protestant leaders. Ministers occasionally denounced the "Beast of the Apocalypse" when hard-pressed to find a Sunday sermon subject, or when the Loyal Orange Lodge marched in for its church parade. With their British contemporaries Australian colonists studied Foxe's *Book of Martyrs,* republished in 1875, revelled in Maria Monk's *Awful Disclosures,* with their imputation of frightful goings-on in the Hotel Dieu Convent in Montreal, and believed some of the "revelations" of Papist tyranny and clerical immorality detailed in many evangelical tracts of the times. *(i).*

From the 1880s anti-Catholicism had become more pronounced and vicious. The development of a network of Roman Catholic schools was regarded by the ultra-Protestants as provocative. The Catholic hierarchy were equally disenchanted by Protestant attempts to circumvent the secular provision of the 1877 Education Act by introducing Bible-in-School bills into the legislature. Irish nationalism and the Coronation Oath Controversy of 1901 added to sectarian suspicion and conflict. The Ne Temere dispute was one more incident in a contest that would reach its crescendo in the few years after 1917, when the New Zealand churches engaged in what Henry Cleary, the Catholic Bishop of Auckland, described as "a cycle of sectarian epilepsy" *(j).* The Ne Temere dispute contributed to the anti-Papist,

(f) J Dickson, *Shall Ritualism and Romanism Capture New Zealand?* (Dunedin, 1912), pp 179-180.

(g) Ibid, p 182.

(h) *NZ Journals of the House of Representatives,* Session 1-11, 1912, p 164.

(i) C E R Norman, *Anti-Catholicism in Victorian England* (London, 1968), pp 13-22.

(j) *The Month,* 18 August 1918. See particularly P S O'Connor, 'Sectarian Conflict in New Zealand, 1911-1920', *Political Science* (July 1967), pp 3-6.

anti-Irish, and anti-Catholic viciousness that was ignited by Howard Elliot, the Secretary of the Committee of Vigilance of the Protestant Political Association, in 1917 into a fierce blaze *(k)*. Those opposed to Ne Temere in 1911 and 1912 could not be aware that their activities would have serious repercussions in the years ahead. The promulgation of Ne Temere had provided them with yet another opportunity to cry "Wolf!"

(k) CHS Moores, 'The Rise of the Protestant Political Association: Sectarianism in New Zealand during World War I' (Auckland University, 1966). See also: L H Barber, 'The Social Crusader: James Gibb at the Australasian Pastoral Frontier, 1882-1935' (Massey University, 1975).

TRUSTS

THE VARIATION OF THE CHARITABLE TRUST

By M F L FLANNERY, *a Wellington Practitioner.*

Two words continue to trouble both Court and Counsel in applications under the Charitable Trusts Act 1957 for the variation of subsisting purposes. The subtlety of the draftsman's change of the mandatory "shall" to the discretionary "may" in the succeeding subsection of the same section and then the use of the word "may" in a later section when "shall" is anticipated have escaped any exposition by New Zealand textbook writers on trust law.

Changing fiscal accents and social values in the Welfare State and continuing inflation have rendered many subsisting charitable purposes superfluous, useless or impossible. Few applications for variation are reported; and none in Western Australia whose Parliament with its enactment of the Charitable Trusts Act 1962 virtually adopted in toto the New Zealand legislation.

More than 50 years ago Hosking J laid down in *Public Trustee v AG* [1923] NZLR 433 (at 442).

> "All that appears to me to be required under section 15" (of the Religious, Charitable and Educational Trusts Act 1908 as Amended) "is that the new purpose to which the property is applied is a charitable purpose within the meaning of Part III of that Act, without regard to its resemblance to the old purpose. No doubt approximation of the new purpose to the old would not go unconsidered as an element in the matter of deciding upon the new purpose, but the Act does not appear to me to compel such an approximation as the guiding principle".

The Court is free to direct the application of the property for a new charitable purpose without regard to the resemblance of that purpose to the original purpose indicated by the testator: *In re Palmer* [1939] NZLR 189.

The Act applies whether or not there is a general charitable intention: *In re Strong* [1956] NZLR 275.

Each of those dicta is applicable to the exercise of judicial discretion under the Charitable Trusts Act 1957 for the Court has periodically acknowledged a duty or obligation to consider the settlor's or testator's wishes. A differentiation is necessary between deference to and dictation by the settlor and testator.

New Zealand's legislation has the intent (but the Supreme Court often fails to accord the practical effect) of largely supplanting and not merely supplementing the cy-pres doctrine because the Charitable Trusts Act 1957 contains those two all-embracing exemption clauses: "(whether or not there is any general charitable intention)" in s 32 (Part III) and again (without parentheses) in s 40 (Part IV).

Part III (ss 31 to 37) represents in effect a statutory extension of the general jurisdiction of the Court to apply the cy-pres doctrine or to approve of schemes for the administration of certain charitable trusts or to prescribe the mode of administering a charitable trust.

Section 32

Subsection (1) of s 32 provides that where property or income is held or given upon trust for a charitable purpose and it is impossible or impracticable or inexpedient to carry out that purpose or the amount available is inadequate to carry out that purpose or that purpose has been effected already or that purpose is illegal or useless or uncertain then (whether or not there is any general charitable intention) the property and income or any part or residue thereof "shall be disposed of for some other charitable purpose or a combination of such purposes . . ."

Therefore in the first subsection the property of income *must* be disposed of for some other charitable purpose or combination of such purposes if any of the stated conditions obtain whereas in subsection (2) excess property or income already impressed with a charitable trust

or arising from a charitable trust *may* be applied for some other charitable purpose or combination of such purposes. An obligation in the first subsection; a discretion in the second subsection, that in effect reserves to the trustees the discretion either to retain or apply any excess in the charitable manner they wish. Accordingly, Wild, CJ in *Re Palmerston North Hall's Trust Board* [1976] 2 NZLR 161 held (at 165):

> "The retention of 'may' in s 32 (2) is understandable having regard to the fact that that subsection relates to excess property, in respect of which the trustees would have had to exercise a judgment in deciding whether to seek approval to apply it to another charitable purpose or to retain it against the possibility that it might be required for the existing purpose".

Counsel had submitted that the substitution of "shall" for "may" could be regarded inter alia as merely a matter of draftsmanship.

Section 34

However it is also s 34 that has attracted speculation because its use of the word "may" clearly (and unexpectedly) denotes a permissive, discretionary power allowing and permitting but not demanding the formulation of a scheme of disposition for the Court's approval. S 34 reads:

> "Where the trustees of any such property or income are desirous that it shall be dealt with subject to this Part of this Act, they may prepare or cause to be prepared, in accordance with this Part of this Act, a scheme for the disposition of the property or income and for extending or varying the powers of the trustees or for prescribing or varying the mode of administering the trust".

Beattie J in *AG v Waipawa Hospital Board* [1970] NZLR 1148 said (at 1153, 1154)-

> "It is curious, however, that the word 'may' has been retained in s 34 despite the mandatory nature of s 32, but at least no one is empowered to prepare and submit a scheme other than the trustees. I accept ... that s 34 imposes an obligation on trustees of a charity to prepare a scheme in every case where the original purpose cannot be carried out, but subject to consideration of any special statutory provisions affecting the disposition of the trust property. "No doubt no change was made in s 34 in mandatory terms because trustees even under an earlier section were under a duty to prepare a scheme. It could not have been intended that a stalemate would arise from inactivity on the part of trustees. It follows that if this view is correct, then the change in s 32 merely removed the Court's discretion, leaving unchanged the duty imposed on trustees at all times under s 34. In any event, the use of the word 'may' in s 34 does not in my opinion conflict with the view just expressed".

With respect, neither does it substantiate such a view. (The permissibe "may" in s 15, Religious, Charitable, and Educational Trusts Act 1908 as Amended and too in s 3 of its predecessor the Charitable Trusts Extension Act 1886 was of course transformed into the mandatory "shall" in s 32 (1) of the Charitable Trusts Act 1957).

Section 34 represents a considerable redrafting of s 16, Religious, Charitable and Educational Trusts Act 1908 as Amended and s 4, Charitable Trusts Extension Act 1886; and the retention of the word "may" perhaps signifies the Legislature's intention not to trammell in any way the common law duty vested in trustees of impartiality between beneficiaries and the trustees' right to apply to the Court for directions: see *Moggridge v Thackwell* (1803) 7 Ves 36; All ER Rep 219.

However the Charitable Trusts Act 1957 clearly differentiates between the conditions under which there must be a disposition of property for some other charitable purpose (s 32 (1)) and when there may be a discretionary application of excess property or income or proceeds of sale for some other charitable purpose (s 32 (2)) and therefore it may seem worth while for s 34 to show when trustees must prepare a scheme and when (pursuant to s 32 (2) they may prepare a scheme.

If that suggestion were superficially accepted then s 34 could be re-drafted to provide inter alia that

> (1) In any case to which the provisions of subs (1) of s 32 shall apply the trustees shall prepare or shall cause to be prepared in accordance with this Part of this Act a scheme for the disposition of the property and income and for extending or varying the powers of the trustees or for prescribing or varying the mode of administration of the trust; and
>
> (2) In any case to which the provisions of subs (2) of s 32 apply the trustees may prepare or may cause to be prepared in accordance with this Part of this Act a scheme for the disposition of the excess property or income or proceeds of sale and for extending or varying the powers of the trustees or for prescribing or varying the mode of administration of the trust.

Or section 34 could be clarified to provide that:

> "Where the trustees of any such property or income or where the trustees of any excess property or income or proceeds of sale (as the case may be) are desirous that

it shall be dealt with subject to this Part of this Act they shall or may (as the case may be) prepare or cause to be prepared, in accordance with this Part of this Act, a scheme for the disposition of the property or income or for the disposition of the excess property or income or proceeds of sale (as the case may be) and for extending or varying the powers of the trustees or for prescribing or varying the mode of administering the trust".

The first change may avoid a somewhat cryptic s 34; the second suggested change may cloud it. Neither would have been necessitated had the Legislature inserted a marginal note against the section. There is a plethora of dicta whether marginal notes can be used as aids to construction: see *Chandler v DPP* [1964] AC 763 (HL); but "(N)o Judge can be expected to treat something which is before his eyes as though it was not there": Rupert Cross, *Statutory Interpretation*, 113 (Butterworths, 1976).

However, upon examination, one can appreciate the distinction between logical necessity and empirical demand. S 32 (1) already provides the necessary conditions for the mandatory disposition of property for some other charitable purpose and s 32 (2) for the permissible application of excess property or income or proceeds of sale for some other charitable purpose. Therefore "may" in s 34 must (if felt necessary) be read as shall when the trustees decide to seek approval to apply excess property for another charitable purpose that may be either related to or different from the subsisting purpose or spatially separate from the administration of the existing charity.

The spatial separation is well illustrated in the facts that necessitated the enactment of a private Act of Parliament, the Mary Bryant Trust Board Enabling Act 1955. The trustees had determined that they had sufficient funds for the future requirements of the home established for children in Hamilton West. The deed of trust restricted the trustees to "the provision and conduct of a home for children on the said land in perpetuity" but they wished to establish further homes and "benefit other charitable organisations formed for the protection, advancement, education or benefit of children".

Section 2 provided that the powers and authorities conferred on the trustees by s 1 "may be exercised only out of funds derived from such of the income of the said Board as it deems from time to time to be surplus to the requirements of the object set out in the said deed of trust".

The question arose in *In re Martin* [1968] NZLR 289 whether the Court had power under s 32 to distribute the capital of a charitable bequest where the will clearly provided that only income be distributed. Tompkins, J after examining subs (1), s 32 held that it had been abundantly proved that it was impracticable and inexpedient to carry into effect the charitable purpose of the testator in the manner envisaged by him. He did not find it necessary to examine s 34 because in his oral judgment he found (at 291) that the scheme had been "consented to by all parties" and clearly that unanimity would have strenghened the duty imposed upon the trustees to prepare a scheme.

Section 53

However had one or more of such otherwise consenting parties submitted an alternative scheme independent of or complementary (in part) to the trustees' scheme, then the Court would have been precluded from approving any scheme (no matter how meritorious) other than that submitted by the trustees. Such are the consequences of section 53 which (as with the tenor of the Act itself) are benevolent in the literal sense of well willing but deny it the commendable degree of beneficence in the meaning of well doing.

Section 53 (Part V: Miscellaneous Provisions) reads:

Where application for approval of any scheme is made to the Court under Part III or Part IV of this Act –

(a) The Court may decide what persons shall be heard before it in support of or in opposition to the scheme:

(b) The Court shall have jurisdiction and authority to hear and determine all matters relating to the scheme:

(c) The Court may make an order approving the scheme with or without modification, as it thinks fit.

Accordingly, had one of the parties in *Martin* not given consent but had instead submitted a proposal or report on its own scheme then the Court would have been precluded from acting upon it and would have been forced to confine the Court's activity to the approval, amendment or rejection of the trustees' scheme. A successive application would have been necessary that would have caused delay and resulted in further expense. Hence the Act is benevolent but it is not beneficent.

Tompkins, J had encountered the problem of the inadequacy of s 53 in a case three years earlier, *In the Estate of Arthur Powys Whatman* (unreported: Wellington; 16 July 1965) in which (at 7 and 8) he said:

"I would think, however, but without deciding the point, that if a trustee felt that there was reasonable doubt as to which of two or more schemes was preferable for the disposition of the trust property, he would not

be exceeding his powers under s 38" (sic) "by preparing alternative schemes, asking the Attorney-General to report upon each and applying to the Court for approval of one of them. Indeed, a trustee might well think it was his duty in the best interests of the trusts to do so. However, this was not done in this case, and I agree that the power of the Court on this application is limited to approval, amendment or rejection of the Board's scheme. But in deciding this the Court must necessarily consider the alternative scheme put forward by the Council and the Society pursuant to their notices of opposition. . . .

"It seems to me that the Act might well be amended, so as to authorise those opposing approval to apply for approval of an alternative scheme, so that the Court could consider both schemes at the same time and avoid the possibility of the expenses and delay of successive applications. However, the Act clearly contemplates that successive applications may be necessary because s 54 provides inter alia that notice of the refusal of the Court to approve any scheme shall be published in the *Gazette* . . . while s 56 (2) provides that any refusal of the Court to approve any scheme shall not prevent fresh steps being taken to obtain the approval to any other scheme in respect of the same property, income or money".

(Tompkins J in the first paragraph referred to s 38 which defines the meaning of the term "charitable purpose" under Part IV. It seems likely that he must have intended to refer to s 35 (Part III) on the scheme to be laid before the Attorney-General).

T A Greeson, J in *In re Goldwater* [1967] NZLR 754 (at 756) expressed agreement with the conclusion of Tompkins J in *Whatman* and acknowledged that the Court under s 53 could only approve or reject the trustees' scheme as submitted. He added: ". . . and it (the Court) at present lacks the power to approve any alternative scheme put forward by the parties in opposition".

Tompkins, J's awareness that the "Act clearly contemplates that successive applications may be necessary" still detracts from the efficacy of the section and provides no comfort for an aggrieved person or society. Clearly, it is in the spirit of the Act that the Court be acquainted with all the facts and those present in an intended, alternative scheme which may be both complementary (or at least, partially so) to and in opposition with the trustees' scheme; and clearly too the Court can fulfil its functions under s 53 by having not only all parties present but also *all* schemes and intended proposals before it; and so to ensure that, each should be first submitted to the Attorney-General. These amendments to s 53 would mean the matter of approval, amendment or rejection could be dealt with expeditiously and with the minimum expense and delay. This to some extent would reduce but not avoid the risk of and need for successive applications.

Provisions as to Schemes

Part IV (ss 38 to 50) relates to Schemes in Respect of Charitable Funds Raised by Voluntary Contribution. It replaced Part IV (Appropriation of Charitable Funds) of the Religious, Charitable and Educational Trusts Act 1908 and introduced a number of significant changes.

Section 38 defines "charitable purpose" in the same manner as s 31 of the 1908 Act (and as section 2 of the Charitable Funds Appropriation Act 1871) in that it recites the same specific purposes that are to be included in the term and in addition provides that it "means every purpose which in accordance with the law in New Zealand is charitable".

Section 40 considerably expands s 33 of the 1908 Act ("Failure of Original Purpose") (being s 4 of the 1871 Act) and expressly negatives the application of the cy-pres doctrine. The section alternates between the use of the words "shall" and "may", a differentiation not easily overlooked and a distinction not immediately explicable.

Subsection (1) says that in any case (a) if it becomes impossible or impracticable or inexpedient to carry out the charitable purpose for which the money raised is held, or if the amount available is inadequate to carry out that purpose, or that purpose has been effected already, or that purpose is illegal or useless or uncertain; and (b) if the money has not been entirely applied and is not in the course of being applied for the charitable purpose for which it is held at any time after the expiration of one year after the contribution or receipt of any part of the money or the sale of any part of the goods, then whether or not there is any general charitable intention, the money and the income therefrom or any part or residue thereof shall be disposed of for some other charitable purpose or a combination of such purpose in the manner and subject to the provisions of Part IV of the Act.

If the conditions contained in clause (a) *and* if the money has not been all applied and is not being applied after 12 months from the time of its contribution or receipt, then whether or not there is any charitable intention both the money and its income must be disposed of for

some other charitable purpose or combination of charitable purposes. The use of "shall" demands such application.

Subsection (2) says that in any case where the money raised and the income which has accrued or will accrue or any residue is more than is necessary to carry out the original purpose, then any excess money or income *may* be disposed of for some other charitable purpose or a combination of charitable purposes. The use of "may" permits such application.

In neither case is it necessary that there be any general charitable intention.

The important distinction between the mandatory and permissive elements in these two subsections has been overlooked in the summary in *Garrow's "Law of Trusts and Trustees"* 3rd Edition (1966) p 146 4th Edition (1972) p 170.

The effect of s 39 is correctly paraphrased but not that of s 40.

The meaning and effect of the two subsections are quite separate: there is an obligation *demanding* application under subs (1); there is permission or discretion *allowing* application under subs (2). What the two subsections do have in common is the absence of the need for any general charitable intention: this is made explicit by subs (1).

There seems no immediately apparent reason why there should be this distinction between the effect of subs (1) and subs (2). "May" was used in s 4 of the 1871 Act and in the identical s (33) of the 1908 Act but the new section in the 1957 Act is no mere repetition of the sections formerly used; but clearly the Legislature must have intended the permissible, discretionary element denoted by "may" in subs (2) to apply to instances where an excess of funds has occurred and it is this excess "money or income" which may be disposed of for some other charitable purpose. This certainly gives the trustees a discretion as to the retention or application of funds to another charitable purpose and for that reason there is present both benevolence and beneficence in this part of the Charitable Trusts Act 1957 because the total funds are already impressed with a charitable trust and money accruing thereto or investment arising therefrom will likewise be impressed with the same trust and so it is clearly proper that the decision of what and when application should be made of any surplus should be determined by the trustees themselves, whether to "the original charitable purpose" or to "some other charitable purpose"; and that is, then, the intention and effect of subs (2).

The distinctions then between the two subsections are both logical and practical and further evidences that the common law cy-pres doctrine has not merely been modified by the Charitable Trusts Act 1957; it has been supplanted.

Decisions on "contributions"

There does not seem to be any reported New Zealand case on s 40 and few on Part IV; but the Court has laid down that when funds are raised by voluntary contributions, then the procedure in Part IV must be followed if a variation of the purposes is later sought and this procedure is applicable even though part of the money raised may have been actually applied for the purposes for which it was originally raised. If a sum of money is made up of contributions and bequests and subsequently a variation of purpose is necessitated, then it is essential for the trustee to proceed under both Part III concerning the bequests and under Part IV concerning the money voluntarily contributed: *Wellington Diocesan Board of Trustees v A-G* [1937] NZLR 746; [1937] GLR 444 in which case the facts briefly were that money (made up of contributions and bequests for the purpose of erecting a cathedral in the City of Wellington on a specified site) was held by the trustees as a separate fund for the erecting and furnishing of the cathedral. Subsequently, it became impracticable and inexpedient to erect the cathedral on that site. A new proposal was made for its erection on another site. The Supreme Court held that there had been a change of purpose, and that the position was thenceforth governed by Part II of the Religious, Charitable and Educational Trusts Act 1908 as to the bequests and by Part IV of the same Act (both Parts enumerated the same under the consolidating Charitable Trusts Act 1957) as to the voluntary contributions.

For largely similar reasons to those submitted concerning the re-drafting of s 34, s 42 could be consistently extended so that the varying consequences of subs (1) (a) and (b) and of subs (2) of s 40 and of s 41 are clearly and unequivocally shown. The use of the word "may" being permissive and discretionary in effect is applicable to only one of the eventualities postulated in s 40. No provision is made for the consequences flowing from the mandatory, obligatory "shall" but it may well be that such logical demand is empirically not necessary. Again, marginal notes may have been useful reading aids without becoming interpretative devices.

Section 41 contains provisions allowing for the extension of powers or alteration of the mode of the administration of the trust, but the section has no application where the essential purpose of a modification of the powers contained in the trust instrument is in effect to change the method of operating a charity from that of a large institution into a series of smaller

family-type units: *Baptist Union of NZ v A-G* [1973] NZLR 42 in which Woodhouse J (in an oral judgment) held that such new proposals should be put forward by way of a scheme under the Charitable Trusts Act 1957.

Part IV is measurably improved in the 1957 Act for there is an enhancement of the provisions relating to the disclosure of the proposed scheme and any propsals offered in opposition or in combination. The Court and the Attorney-General are both ensured of the fullest amount of detail produced by the advertisements and meetings.

Cy-pres doctrine unjustifiably lingers on ...

The Charitable Trusts Act 1957 is more than a gloss on the common law doctrine of cy-pres: it has supplanted it, with the result that the Court is no longer bound to follow or be guided by the testator's or settlor's expressed intention. Nevertheless the New Zealand Courts when approving or rejecting the trustees' scheme (pursuant to s 53 of the 1957 Act) do often acknowledge a duty to the settlor or testator of the trust property to dispose of it as nearly as possible in accordnace with the settlor's or testator's intentions.

T A Gresson, J in *In re Goldwater (deceased)* [1967] NZLR 754 acknowledged (at 757) the presence of such a duty to the settlor and he added:

> "If (the Court) owes a duty also to those proposed to be benefited by the trust, and to the public generally, to dispose of the fund or property as nearly as possible in accordance with the charitable purposes of the trust, and in such a way as will best serve the interests of those intended to be benefited".

T A Gresson, J had been relying upon a similar statement made in *Whatman* in which Tompkins, J (at 11) added:

> "It (the Court) is not bound however by the cy-pres doctrine as a guiding principle and may, if the original charitable purpose cannot be carried out, approve a scheme without regard to its resemblance to the old purpose. "It must, of course, see that the scheme complies with s 56, ie, that it is a proper one, and should carry out the desired purpose or proposal, and is not contrary to law or public policy or good morals; and that it can be approved under Part III; that its purpose is charitable and can be carried out; and that the requirements of the Act have been carried out".

The Court is not intended by the statute to be hampered about equating or approximating the new purpose with the old purpose of the settlor or testator when approving a scheme to vary a subsisting charitable trust. The Court's acknowledgment at times of the expressed intentions of the settlor or testator may (at best) be more a matter of judicial deference than of statutory obligation but in no way is the Court compelled to make such acknowledgment any part of its guiding principle. It may be essentially a matter of courtesy and deference which may help the Court to formulate a new scheme; but there is nothing in the Act requiring it.

The Bullock-Webster case

The jurisdiction of the Supreme Court both statutory and inherent relating to the effectuation of charitable trusts by means of schemes was considered in *In re Amelia Bullock-Webster (deceased)* [1936] NZLR 814. A memorandum on the matter of jurisdiction was prepared by counsel K M Gresson (as he then was) and appended by Northcroft J to his judgment.

That Memorandum in traversing both history and application

(1) *recites* that "the numerous English statutes from the Charitable Trusts Act 1853 have no application to New Zealand, and there is nothing in New Zealand corresponding to the Charity Commissioners to whom many of the functions formerly exercised by the Court are today delegated. Possibly the Charities Procedure Act 1812 (Eng) and the Charities Procedure Act 1832 (Eng) are in force in New Zealand ..." (Clearly, as later suggested in the Memorandum, the then Trustee Act 1908 (and now that of 1956) had made provision principally for breaches of trust; but the earlier part of the quoted material does not consider Ostler, J's judgment in *Kjar v Masterton Borough Council* (unreported: NZLJ June 24 1930), a case concerning the validity of the council's lease. Ostler J said: "The law in England before the passing of the Charitable Trusts Act 1853 was the law which was in force in New Zealand in 1887 when that lease was first granted and was the law still in force in New Zealand". He said the lease of land vested in the corporation for library purposes was not ultra vires. The case does illustrate the conceivably continuing effect, no matter how indirect, of certain enactments in force (and, of course, since repealed) at the date of the inception

of some long-established New Zealand charitable trusts).

(2) *includes* an unfortunate error in the penultimate line (817) which concludes the recital of s 15, Religious, Charitable, and Educational Trusts Act 1908 as Amended: "or a continuation of such purposes in the manner and subject to the provisions hereinafter contained". "Combination" in that statute should have been transcribed and not "continuation". There is a significant difference. The Memorandum was presumably handwritten.

(3) *fails* to emphasise the cardinal point of that statute: the Court in dealing with trusts under that Act is not bound by the cy-pres doctrine. All that is necessary is the approval of the application of the property to a charitable purpose as defined by the Act: see *Public Trustee v AG* [1923] NZLR 433.

(4) *does not* adequately differentiate between the instances when the cy-pres doctrine is demonstrably applicable (as in *Bullock-Webster)* and when the then existing Act provided a means for effecting a scheme. No mention is made of a number of cases decided in favour of the charity on the cy-pres doctrine: *Murdoch v A-G* (1892) 11 NZLR 502; *In re the Trusts of Will of Jacob Joseph* (1907) 26 NZLR 504; 9 GLR 329; *In re Buckley, Public Trustee v Wellington Society for the Prevention of Cruelty to Animals (SPCA) (Inc)* [1928] NZLR 148, [1928] GLR 127; *In re Campbell* [1930] NZLR 713; [1930] GLR 539; *Standing Committee of Auckland Diocese v Campbell* [1930] GLR 162; *In re Wilson, Guardian Trust v Auckland SPC* [1934] GLR 54.

(5) *fails* to demonstrate the then emerging statutory role in place of the doctrine of cy-pres in dealing with the variation of the purpose of subsisting charitable trusts: *Public Trustee v AG* (supra) contains an important enunciation of the principles to be applied.

(6) *and misconstrues* the effect of s 75 of the then Trustee Act 1908 in suggesting that it may be invoked "for a scheme to be approved in the case of any trust where the circumstances ..." and that "the more correct view would be that (it) strenghens or incorporates the jurisdiction which exists independently ..." (S 75 allowed a trustee, executor or administrator to apply to the Court "on any question respecting the management or administration of the trust property or the assets of any testator or intestate. S 66 of the Trustee Act 1956 is similar in intent and effect. The case of *In re Williams* (1908) 11 GLR 133 in support of the first suggestion is no authority regarding schemes; all that the Court may do is to make a declaration as to the powers of the trustees in administering trust funds. Directions will only be given on points of management, and questions of will construction (and interpretation) must be decided in the usual way: *In re George Gould* (1889) 7 NZLR 733; *In re Oliver* [1927] GLR 910; *In re Griffiths* [1910] 12 GLR 533).

The Memorandum (intituled) *Memorandum of Counsel as to the Jurisdiction of the Supreme Court in Relation to Scheme for Administration of Charitable Trusts)* has been given imprimatur by being appended to the judgment of Northcroft, J, but it is hardly definitive or comprehensive. The Memorandum does not now appear to draw much judicial notice (Wild CJ distinguished it in *Re Palmerston North Halls*); and in any case the innovations introduced in the consolidating and reformative Charitable Trusts Act 1957 have made it less useful aside from the criticisms noted. New Zealand text-writers appear to have taken the Memorandum at face value and refrained from any exploratory work on its content and value.

Conclusions, and then Recommendations:

Despite changes the charitable trusts legislation in New Zealand is far from perfect. Uncertainty surrounds the duties of the trustees to prepare a scheme, the Court is not empowered to approve alternative schemes proposed by other parties, the disclosure provisions relating to schemes are not satisfactory and there remains an undue emphasis on the cy-pres doctrine. Changes will ideally give recognition both to the principles of *benevolence and beneficence* to promote and inculcate the concept of charity.

INTERNATIONAL LAW

THE DOMICILE ACT 1976

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Introduction

The purpose of this article is to set out and amplify briefly the new rules laid down by the Domicile Act 1976 to be applied by the New Zealand courts when confronted by a domicile problem.

Section 1 (2) of the Act states that the Act is to come into force on a date to be appointed by the Governor-General by Order in Council. At the date of writing, however, no Order in Council has been promulgated. The examples which are given in the body of the article in order tentatively to illustrate the various new rules accordingly proceed upon the assumption that the new Act is in force.

The time factor

According to s 3 of the 1976 Act, the domicile that a person had at a time before the commencement of the Act is to be determined as if the Act had not been passed. If, therefore, it becomes necessary at any time to determine what was the domicile of, for instance, a married adult man in 1974 and of an unmarried minor girl in 1975, the previous rules must be looked to.

By s 4 of the Act, the domicile that a person has at a time after the commencment of the Act is to be determined as if the Act had always been in force. This could, of course, depend on facts occurring before the Act comes into force.

Abolition of wife's domicile of dependence

The deservedly maligned common law rule is that a married woman's domicile is the same as that of her husband and that, if his domicile changes, hers changes with it whether she likes it or not *(a)*. This rule remains the law in New Zealand apart from ad hoc statutory reforms *(b)* until the present Act comes into force. This rule has now been totally interred at last by s 5 (1) of the Act, which says:

> "(1) Every married person is capable of having an independent domicile; and the rule of law whereby upon marriage a woman acquires her husband's domicile and is thereafter during the subsistence of the marriage incapable of having any other domicile is hereby abolished.
>
> "(2) This section applies to the parties to every marriage, wherever and pursuant to whatever law solemnised, and whatever the domicile of the parties at the time of the marriage."

We may illustrate the new rules as follows:

Illustration 1. W1, domiciled in Scotland, validly married H, domiciled in Scotland, in Edinburgh. H deserts W1 and acquires a new domicile in Queensland, where he bigamously marries W2 and commits adultery with her. W1 has never left Scotland and does not intend to do so. At common law it would have to be held that W1 is domiciled in Queensland, but, under s 5 of the 1976 Act, she is, for all purposes, domiciled where her home is, viz, in Scotland *(c)*.

Illustration 2. W, domiciled in Ontario, validly married H, also domiciled in Ontario, in London, Ontario. They go to live in Alberta. W there obtains a decree of judicial separation. W continues to live in Alberta, and means to live their indefinitely. At common law it would have to be held that W is domiciled in Ontario

(a) See, eg *Lord Advocate v Jaffrey* [1921] 1 AC 146 (HL), *Attorney-General for Alberta v Cook* [1926] AC 444 (PC); *De Reneville v De Reneville* [1948] P 100 (CA). Lord Denning MR has described the rule as "the last barbarous relic of a wife's servitude": *Gray v Formosa* [1963] P 259 (CA), at p 267.

(b) Section 3 (1) of the Matrimonial Proceedings Act 1963 and s 6 (1) of the Domestic Proceedings Act 1968 provided that, for the purposes of each Act, the domicile of a married woman, wherever she was married, was to be determined as if she were unmarried and, if she was a minor, as if she were an adult. Section 22 of the Guardianship Act 1968, which was seemingly of general application, provided that the domicile of a minor who is or has been married shall be determined as if the minor was an adult. A further provision, also not related to matrimonial proceedings, was to be found in s 62 of the Administration Act 1969. This last is too long to set out in full and is concerned with succession to, capacity of, and construction of wills of, married women and minors in certain cases. It should be noted that the Domicile Act 1976 does not alter s 3 of the Domestic Proceedings Act 1968, which defines "marriage" for the purposes of the latter Act. The section refers to domicile, which will, of course, have to be interpreted in the light of the 1976 Act.

(c) Cf *Lord Advocate v Jaffrey* (supra).

while the marriage lasts, but, under s 5 of the 1976 Act, she is, for all purposes, domiciled where her home is, viz, in Alberta *(d)*.

Illustration 3. W, domiciled in England, validly married H, domiciled in France, in Paris. H is impotent. W, having lived with H in France for several years, returns to England and settles there. Assuming that a New Zealand Court would regard the marriage as voidable (as opposed to void), at common law it would have to hold that W was domiciled in France, but, under s 5 of the 1976 Act, it must hold her to be domiciled, for all purposes, where her home is, viz, in England *(e)*.

Illustration 4. W, domiciled in New Zealand, validly marries H, domiciled in California, in Auckland. They subsequently go to live in Los Angeles, California, the marriage breaks down and they enter into a formal agreement to separate. H remains in California, W returns to New Zealand with intent to live there indefinitely. At common law it would have to be held that W is domiciled in California, but, under s 5 of the 1976 Act, she is, for all purposes, domiciled in New Zealand – where her home is *(f)*.

Illustration 5. H, domiciled in Nova Scotia, lived in Canada until he joined the RAF in England as a young man. Whilst serving, he married W, domiciled in England. They visited Canada to see H's relations on several occasions. H retired and took up civil employment. Soon after, H's father died, leaving funds enough for H to retire altogether. Though he would have liked to return to Canada on retirement from the RAF, H did not do so because W did not like the idea, and he bought an English country house. H retained his Canadian citizenship, but gave up the idea of returning to Canada in deference to W's wishes. Nevertheless, despite some 40 years' residence in England, H is really determined to return to Nova Scotia at once should W change her mind about Canada or predecease him. Semble, H is still domiciled in Nova Scotia and W in England *(g)*.

Illustration 6. H and W were validly married in New Zealand where both were domiciled. H decides that he will follow the "brain drain" and emigrate to England. W agrees. H departs first, it being understood that he will find a new home and that W will wind up their affairs in New Zealand and fly to England in six months' time to join H. H will acquire a domicile in England when he arrives there, but W will continue to retain her New Zealand domicile until she arrives in England. At common law she would have acquired a domicile of dependence in England as soon as H arrived there.

Illustration 7. H, domiciled in France, validly marries in Auckland, W, domiciled in New Zealand, who had never left New Zealand. When H returns to France, W means to go with him. At common law, W acquires a French domicile of dependence as soon as she marries H. Under the 1976 Act, however, she cannot acquire a French domicile until she goes to France and thus acquires a new domicile there.

The domicile of children and the attainment of independent domicile

Aside from the statutory exceptions already mentioned *(h)*, the rules governing the domicile of minors during minority were common law rules. A distinction was drawn between children born in lawful wedlock and ex-nuptial minors *(i)* and it was preserved by s 12 (3)(a) of the Status of Children Act 1969. The new rules for ascertaining the domicile of a child are now to be found in s 6 of the 1976 Act. The section is to have effect in place of all rules of law relating to the domicile of children *(j)*, so that the common law rules are displaced entirely and there is no distinction between children born in lawful wedlock and those not so born.

The first new rule as to children is to be found in s 6 (3). It is that a child whose parents are living together *(k)* has the domicile for the time being of its father.

Illustration 8. H, an American diplomat, domiciled in New York but serving in New Zealand, validly marries in Auckland W, domiciled in New Zealand. W has never left New Zealand. A male child, C, is born to them whilst they are living together in a house in Wellington. C is domiciled in New York.

If, when C is aged 11, H acquires a new domicile in California and H and W are still living together, C will automatically acquire a domicile in California *(l)*.

(d) Cf *Attorney-General for Alberta v Cook* (supra) and see *Hastings v Hastings* [1922] NZLR 280, which would seem to have become good law again.

(e) Cf *De Reneville v De Reneville* (supra).

(f) Cf *Mastaka v Midland Bank Executor & Trustee Co* [1941] Ch 192; *Lord Advocate v Jaffrey* (supra).

(g) Cf *IRC v Bullock* [1976] 1 WLR 1178; [1976] STC 409 (CA). It is interesting to speculate how *Harrison v Harrison* [1953] 1 WLR 865 would be decided under the 1976 Act.

(h) See note (b) (supra).

(i) See Dicey & Morris, *The Conflict of Laws* (9th ed, 1973), Rules 14 & 15 (pp 115-122); Cheshire, *Private International Law* (9th ed, 1974) pp 183-186.

(j) Section 6 (1). The word "child" in s 6 means a person under the age of 16 who has not married: s 6 (2). The need for these new rules stems partly from the fact that a married woman now has capacity to possess a domicile different from that of her husband.

(k) Presumably this means cohabiting. See the similar wording in s 6 (2) of the Guardianship Act 1968, and Decision No 158 (1976) 1 NZAR 1; and P Vaver, "Married to the State", [1976] NZLJ 490.

(l) Since the Act draws no distinction between

Illustration 9. C is the male child aged 16 of H and his wife W, who are domiciled in Tonga. They are all living together in the same house in Auckland. C has just been placed under the guardianship of the Director-General of Social Welfare pursuant to the Children and Young Persons Act 1974. Under s 6 (3) of the Domicile Act, C will be domiciled in Tonga, although one might be excused for thinking that the domicile of C would be changed to New Zealand because the Director-General holds his office under New Zealand law.

Illustration 10. C is the female child aged 14 of H and his wife W who are domiciled in Jamaica. They were all living together in the same house in a poor part of Nottingham, England, but the Nottingham local authority has just validly exercised its statutory power to pass a resolution vesting in itself the parental rights and powers of H and W over C. C has been received into the local authority's care. Under s 6 (3) of the Domicile Act, C will be domiciled in Jamaica, although one might be excused for thinking that the domicile of C would be changed to England because the Nottingham local authority is constituted under English law.

The second new rule, appearing in s 6 (4), is that if a child whose parents are not living together has its home with its father, it has the domicile for the time being of its father; and after it ceases to have its home with him it continues to have that domicile (or, if he is dead, the domicile he had at his death) until it has its home with its mother *(m)*.

The third rule is contained in s 6 (5). Subject to s 6 (4), a child whose parents are not living together has the domicile for the time being of its mother (or, if she is dead, the domicile she had at her death) *(n)*.

Illustration 11. C is the six year old male child of M and F. M and F never lived together and never married. C never had a home with his father, F. When C was born M, his mother, was domiciled in New Zealand and F was domiciled in Massachusetts. They still possess these domiciles. C is domiciled in New Zealand. If M dies a week hence, still domiciled in New Zealand, C will be domiciled in New Zealand because his mother was so domiciled at her death. If, on the other hand, M were to acquire a new domicile in England when C was 10, C would also become domiciled in England.

Illustration 12. C is the ten year old male child of W and her husband H. H and W do not live together because they have entered into a separation agreement. H is domiciled in England, W is domiciled in New Zealand. Ever since the separation C has, pursuant to the agreement, been living with H in his Auckland home but he visits W in her Hamilton home every weekend. C is domiciled in England by virtue of s 6 (4) of the Act.

The same result would obtain if H and W were living apart pursuant to a separation order, a separation decree or because they had been divorced, and H had been granted custody of C and W had been allowed reasonable access.

When C is 11, H becomes very ill and is hospitalised for a considerable time. He can no longer provide C with a home. C is therefore sent, with W's concurrence, to live with H's parents, both domiciled in Scotland, in their Edinburgh home. C does not thereby acquire a domicile in Scotland. He continues to be domiciled in England – although he has ceased to have his home with H – by virtue of s 6 (4).

When C is 13, H has recovered. Pursuant to s 9 of the 1976 Act (discussed below) H acquires a new domicile in Ireland. A month later C joins him in Dublin. C acquires a domicile in Ireland, not when he arrives there from Scotland, but from the moment that H acquired his domicile there – by virtue of s 6 (4) of the Act.

When C is 15, H dies, still domiciled in Ireland. C retains his domicile in Ireland by virtue of s 6 (4) of the Act.

When C is 15½, he returns to New Zealand and goes to live with his mother at her home in Hamilton. C thereupon becomes domiciled in New Zealand because, by virtue of s 6 (4) of the Act he has now got a home with his mother *(o)*.

Illustration 13. C is the two year old female child of H, domiciled in Victoria, and W, his wife, domiciled in New Zealand. H and W and C were all living together in New Zealand when W died of a heart attack. H and C still live together in the matrimonial home, so that C has her home with her father. Semble, the Victorian domicile she had by virtue of s 6 (3) of the Act will continue by virtue of s 6 (4).

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children born in lawful wedlock and ex-nuptial children, the position in this illustration would be the same if H and W had never got married. It will be noted that the matter does not depend on custody or guardianship.

(m) It is unfortunate that "home" is nowhere defined in the Act. Quaere does it mean where the child resides, or if "kidnapped", where it normally ought to reside? Cf *Re P (G E) An Infant* [1975] Ch 568 (CA) at pp 585-586, noted by P R H Webb (1965) 14 ICLQ 668. It will again be noted that custody and guardianship do not expressly enter into the matter.

(n) It will again be seen that custody and guardianship are not expressly mentioned.

(o) Quaere what is the situation where a child spends six months of the year with its father and the other six months with its mother and so may be said to have its home with both parents?

If, when aged 5, C has her home with an aunt domiciled and resident in Western Australia, she will nevertheless continue to have her father's Victorian domicile by virtue of s 6 (4). As W is dead, C can never have a home with her. Semble, therefore, she will take her father's domicile by virtue of s 6 (4), wherever her home may be *(p)*.

Illustration 14. H1 and W were domiciled in New Zealand when H1 obtained a divorce from W in the Supreme Court on the ground of her adultery. The Court awarded W custody of C, their eight year old girl. W has since validly married in Sydney H2, domiciled in New South Wales. She has taken C to Sydney, having obtained leave of the New Zealand Supreme Court to do so, and C now lives in the Sydney home of W and H2. Assuming W to have acquired a new domicile in New South Wales, C is now domiciled in New South Wales by virtue of s 6 (4) and 6 (5) of the Act. Quaere what would be the position if, when aged 11, C were returned to her father's, ie H1's custody? Semble, her domicile remains in New South Wales.

Illustration 15. H and his wife, W, were domiciled in New Zealand when H died in a motor accident in Auckland. W was then three months pregnant. A few months before their male child, C, was born, W acquired a new domicile in England and still possessed it when C was born. C's domicile at birth is English by virtue of s 6 (5) of the Act.

When C is eight, W acquires a new domicile in Scotland. C then becomes domiciled in Scotland by virtue of s 6 (5) of the Act.

When C is 12, W dies and C is sent to live in Melbourne with the parents of H, who are domiciled in Victoria. C retains his Scots domicile, as being the domicile W had at her death, and does not acquire a Victorian domicile – again by virtue of s 6 (5) of the Act.

Illustration 16. C is the five year old child of W, a single girl domiciled in New Zealand, and H, a sailor on an American warship which visited New Zealand. Nothing is known of the domicile of H, who has never lived with W. C is domiciled in New Zealand, by virtue of s 6 (5) of the Act.

Illustration 17. C1 and C2 are the small children of the marriage of W and H1, who were both domiciled in Scotland and living together there when H1 died. Some time after H1's death, W married H2. They both acquired a new domicile in England, but W took only C1 with her to England, and left C2 behind in Scotland to live with an aunt. At common law it would be held that C1 acquires an English domicile dependent on W, but that C2 would retain a Scots domicile as W has refrained from exercising her power of changing it *(q)*. Semble both C1 and C2 are domiciled, with W, in England, by virtue of s 6 (5).

Illustration 18. C is the minor male child of H and W, a stateless couple domiciled and resident in England. When C is 10, H and W separate by agreement and it is arranged that C shall live with W in London and that H shall have access to him every Saturday. On the last occasion for H to have access, H spirited C out of the jurisdiction by air to Israel. They travelled on a document issued by the English authorities giving them an absolute right to re-entry into England. W asks the English High Court to make C a ward of court and to give her custody of him. The Court does so, but by that time H and C have managed to acquire Israeli nationality and they are living together in a house in Tel Aviv which H has purchased and has decided to live in indefinitely. Assuming that H may at this stage be said to have acquired a new domicile in Israel, quaere whether C has his home with H and is domiciled in Israel pursuant to s 6 (4) or whether C has his home with W and is thus domiciled in England pursuant to s 6 (5) *(r)*.

Illustration 19. C is the male child of H and W1 who were domiciled in England when W1 obtained a divorce there on the ground of H's adultery with W2. C remained with W1 who was granted custody of him. H was granted access. After the divorce, H validly married W2 and emigrated to New Zealand with her intending to live there indefinitely. A year later C came to New Zealand to visit H and W2, pursuant to the access arrangements, for six weeks and then returned to W1's home in England. In the following year, C, now 10 years of age, came for a further six week visit. When he was due to go back to England, C expressed the wish to live with H and W2. H thereupon applied to the Supreme Court for custody of C and was granted it. Quaere whether C is domiciled in England until the date

(p) Section 7, discussed below, shows when C is capable of having an independent domicile. The domicile she has immediately before becoming so capable, however, continues until she gets a new domicile in accordance with s 9 of the Act and then ceases: see s 8, discussed below, and the illustrations relevant thereto.

Compare with the problem the attitude taken by the Ontario High Court in *Re Kemp & Dawson* (1974) 46 DLR (3d) 321.

(q) *Re Beaumont* [1893] 3 Ch 490, upon which this illustration is based, and see *Re G* [1966] NZLR 1028, 1031.

(r) Cf *Re P (GE) (An Infant)* (supra). If it is accepted that C is supposed to be settled in England, that his absence overseas is not in the normal run of his life and that H has changed C's home without the consent of W, then, semble, s 6 (5) governs.

of the Supreme Court's decision and thereafter in New Zealand? *(s)*.

The last new rule devoted to children is one which is to be hoped will rarely have to be invoked. It concerns foundling children and is, of necessity, somewhat mechanical. It is to be found in s 6 (6), which enacts that until a foundling child has its home with one of its parents, both its parents shall, for the purposes of s 6, be deemed to be alive and domiciled in the country in which the foundling child was found *(t)*.

Attainment of independent domicile

Section 7 of the Domicile Act states that, subject to any rule of law relating to the domicile of insane persons *(u)*, every person becomes capable of having an independent domicile upon attaining the age of 16 years or sooner marrying, and thereafter continues so to be capable.

Illustration 20. C is the sane unmarried child of H and W, domiciled and living together in New Zealand. C, aged 17, has just been set up in business in Sydney, where he wishes to settle, by his parents. Section 22 of the Guardianship Act 1968 cannot assist here as C is not married and has not been married. By virtue of s 7 he is capable of acquiring a domicile in New South Wales, his minority notwithstanding, where his home is *(v)*.

Illustration 21. H, domiciled in Nigeria, marries W, aged 13, also domiciled in Nigeria, in accordance with Moslem law. The marriage takes place in Nigeria and is potentially polygamous, but it is valid in the eyes of Nigerian law. H and W go to England so that H may study there. When aged 15, W decides to leave H and settle in England. Despite the fact that she is under 16, W, a validly married woman, is capable of having an independent domicile for the purposes, at any rate, of New married woman, is capable of having an independent domicile by virtue of s 7 of the 1976 Act *(w)*.

Illustration 22. W is a minor whose father is at all material times domiciled in New South Wales. W validly marries H, domiciled in New Zealand, in Auckland and lives with him there until she is tragically widowed. She is still a minor when H dies. At common law, her New Zealand domicile of dependence upon H would revert to the New South Wales domicile of dependence upon her father until she attained majority or validly married again whilst still a minor. By virtue of s 7 of the Act she continues to be capable of having an independent domicile for the purposes, at any rate, of New Zealand law *(x)*.

Continuance of domicile

Section 8 of the Domicile Act provides that: "The domicile a person has immediately before becoming capable of having an independent domicile continues until he acquires a new domicile in accordance with section 9 of this Act, and then ceases."

Illustration 23. C is the child of H and W, who are living together in Auckland and are domiciled in New Zealand and have been so ever since C's birth. C would therefore take the New Zealand domicile of H under s 6 (3) of the 1976 Act – at least until he is 16 or earlier validly marries. C will continue to be domiciled in New Zealand thereafter. If, therefore, when aged 19 and single, C goes to the University of British Columbia and decides to settle in Vancouver, he will acquire a new domicile in British Columbia as from the date of his decision, whereupon he will lose his New Zealand domicile. At common law, C could not have acquired a domicile of choice in British Columbia until he attained the age of majority.

Acquisition of new domicile

According to s 9 of the Act, "a person acquires a new domicile in a country at a particular time if, immediately before that time, – (a) He is not domiciled in that country; and (b) He is capable of having an independent domicile; and (c) He is in that country; and (d) He intends to live indefinitely in that country." A "country" is defined by s 2 of the Act as meaning, unless the context otherwise requires, "a territory of a type in which, immediately before the commencment of this Act, a person could have been domiciled" *(y)*.

This provision does not seem to do great violence to the already accepted rules as to the acquisition of a domicile of choice. It does, how-

(s) Cf *E v F* [1974] 2 NZLR 435. Semble, after the divorce, the parents were not living together and C had no home with H, so that section 6 (5) would give C his mother's English domicile. Now that he has a home with his father in New Zealand *with the blessing of the Supreme Court*, it would seem that s 6 (4) gives him his father's New Zealand domicile. But what would be the case if, after the Supreme Court order, the English Court ordered H to return C to the English jurisdiction?

(t) Cf *Re McKenzie* (1951) 51 SR (NSW) 293. Quaere how does the rule fit the case of a small child with a marked Parisian accent whose parents have gone off into the blue after abandoning it to French-speaking nuns in Belgium? Semble there is an irrebuttable presumption that the child is domiciled in Belgium. The word "country" means, unless the context otherwise requires, "a territory of a type in which, immediately before the commencment of this Act, a person could have been domiciled": s 2, as to which see first note (y) infra.

(u) As to which see Dicey & Morris, op cit, supra, pp 124-126; Cheshire, op cit, supra, pp 186-187 and especially the New Zealand case of *Re G* (supra).

(v) At common law C cannot acquire a domicile in New South Wales independently of his parents until he attains the age of majority.

(w) Cf *Mohamed v Knott* [1969] 1 QB 1; [1968] 2 All ER 563 (DC). The same result presumably obtains under the present s 22 of the Guardianship Act 1968.

(x) Cf *Shekleton v Shekleton* [1972] 2 NSWLR 675. The same result obtains under the present s 22 of the Guardianship Act 1968.

(y) See Dicey & Morris, op cit, supra, pp 9, 12-13,

ever, make clear that an intention of "permanent" residence does not have to be looked for – a point which the writers are pleased to see has been made because the situations where a person can be found to have irrevocably and positively stated that he means to live out all his days in a particular country must indeed be few *(z)*.

Illustration 24. H, aged 25, is domiciled in Manitoba when he enters the service of a firm owning cinemas in the Canadian provinces. He is asked if he would care to manage a certain cinema in Saskatchewan. He accepts and moves to Saskatchewan with intent to live in that province until the firm promotes him to a post in another province or he gets another job with another employer outside the province – ie he means to live indefinitely in Saskatchewan *(aa)*. He has acquired a new domicile in Saskatchewan, for he has fulfilled all four requirements of s 9 *(ab)*.

Illustration 25. H, who is domiciled in New Zealand, goes to Cambridge, England, at the age of 23, to accept a university lectureship there which is subject to a retiring age of 67. H intends to live in England until he reaches the age of retirement and then to come back to New Zealand and live in Nelson. He does not acquire a domicile in England under s 9 of the Act because he clearly does not intend to live indefinitely in England, even though his home will most likely be there for the next 44 years, given that he lives so long *(ac)*.

Illustration 26. H, a French naval officer, died domiciled in France leaving him surviving his widow W, also domiciled in France, who had lived with him in France until his death. W was domiciled in England before her marriage and, since H's death, has frequently said she meant to return to England. She leaves her home in Dunkirk with her children en route for England. She is taken so ill on board the boat for England that she and the children had to be taken off it before it left Calais. She remains in Calais for some months hoping to recover enough to cross to England. It becomes clear that her hopes cannot be fulfilled and the family returns to Dunkirk to live. W dies there after a few months. She has not acquired a domicile in England under s 9 of the Act because she is not "in" England and cannot acquire an English domicile by intention alone *(ad)*.

Illustration 27. H and W were both domiciled in England when they validly married there many years ago. Not long after their marriage, unhappy differences arose and they parted. Eventually W went to live indefinitely in Guernsey, but H remained domiciled in England. W has just died in Guernsey in ignorance of the fact that H died six weeks ago in England, still domiciled there. At the time of his death, H and W had been separated for nearly 50 years and W had been living in Guernsey for about nine years. At common law it would be held that W lost her domicile of dependency upon H as soon as he died and had then acquired a domicile of choice in Guernsey even though she never became aware of H's death *(ae)*. Taking ss 5 and 9 of the 1976 Act together, we can say simply that W acquired a new domicile in Guernsey, not when H died, but when she fulfilled the four conditions prescribed by s 9 – which would be long before H died.

Illustration 28. D, a farmer aged 55, owns a large farm partly situated in Northern Ireland and partly in the Republic of Ireland. Hitherto he has lived indefinitely in the main farmhouse, which is situated in the Northern Ireland part of the farm. Having decided to retire and settle in a cottage situated in the Republic of Ireland part of the farm, he has just moved all his furniture and belongings into this cottage and returned to have lunch with his son and daughter-in-law who live half a mile away in Northern Ireland. He there dies of a heart attack. Despite the very short period of time D has been "in" the Irish Republic, it is considered that he has acquired a new domicile there in accordance with s 9 of the Act, having clearly fulfilled the other three requirements laid

86-87; Cheshire, op cit, supra, pp 167-168. Thus a person can be domiciled in New Zealand, in England, in Scotland, in the State of Victoria, in the Province of British Columbia, in the State of Arizona or, even, Southern Rhodesia but not, at any rate yet, in Wales. See, further, however, s 13 of the Act, discussed below, as to domicile in unions. Quaere whether an illegal overstayer in New Zealand from, say, Tonga, could be held to have acquired a domicile in New Zealand under s 9? Cf *Sione v Labour Department* [1972] NZLR 278; *Re Abdul Manan* [1971] 2 All ER 1016 (CA). It is to be noted that s 9 prefers the expression "a new domicile"; it does not use the common law expression "a domicile of choice". It will also be noticed that, though it comes close to it, the section does not actually define "domicile". In our previous examples, where we have used expressions implying the acquisition of a "new domicile", we have been using it in the sense meant by this section.

(z) See Dicey & Morris, op cit, supra, pp 95 et seq; Cheshire, op cit, supra, pp 169 et seq.

(aa) See Dicey & Morris, op cit, supra, pp 98-100; Cheshire, op cit, supra, pp 162-166; and see *IRC v Bullock* (supra).

(ab) Cf *Gunn v Gunn* (1956) 2 DLR (2d) 351.

(ac) Had H gone to England for an indefinite time, though hoping that, when he had made his fortune, he would be able to come back to New Zealand, one could more readily say he had satisfied the requirements of s 9 and had acquired a new domicile in England. Cf *Doucet v Geoghehan* (1877) 9 Ch D 441 (CA).

(ad) Cf *In the Goods of Raffenel* (1863) 3 Sw & Tr 49.

(ae) See *Re Scullard* [1957] Ch 107, on which this illustration is based.

lown thereby *(af)*.

Illustration 29. H is a member of the US orces domiciled in Ohio. He is validly married to W1. At all material times he is stationed outside he United States and outside New Zealand. W1 leserts him. H thereafter spends all his leave in Auckland at the home of the parents of W2, the girl he hopes to marry if he can get a divorce from W1. He has a key to, and keeps his possessions at, his house and he can be proved to have said that he would buy a house in Auckland when practicable. It may very well be that H has acquired a new domicile in New Zealand pursuant to s 9 of the Act *(ag)*.

Illustration 30. H was domiciled in England. He developed spine trouble and retired to Florence, to a villa which he had purchased there. It is clear that he thought that the warmer climate would make his life easier and that his move was not compelled by necessity. H has acquired a new domicile in Italy in accordance with s 9 of the Act *(ah)*.

There are, of course, many more cases in which it has been held that a person was domiciled in the country in which he resided and it is conceived that they remain good law *(ai)*.

Deemed intention

A person who ordinarily resides and intends to live indefinitely in a union *(aj)* but has not formed an intention to live indefinitely in any one country *(ak)* forming part of the union is, by virtue of s 10 of the Act, to be deemed to intend to live indefinitely – (a) In that country forming part of the union in which he ordinarily resides; or (b) If he does not ordinarily reside in any such country, in whichever such country he is in; or (c) If he neither ordinarily resides nor is in any such country, in whichever such country he was last in.

No doubt the draftsman had the Commonwealth of Australia in the forefront of his mind when drafting this section, which may be illustrated as follows:

Illustration 31. H, aged 23, is ordinarily resident in Australia and intends to live there indefinitely but he has not yet formed an intention to live indefinitely in any particular State of the Commonwealth. At the moment, he ordinarily resides in Perth, Western Australia. He must be deemed to live indefinitely in Western Australia.

Illustration 32. K, aged 22, is ordinarily resident in Australia, where he intends to live indefinitely. He has not yet formed an intention to live indefinitely in any particular State of the Commonwealth for he is still touring the country, to see which State he prefers. He has so far toured Victoria and South Australia and is now working at a seasonal job in Canberra before moving on to the remaining States. K must be deemed to intend to live indefinitely in the Australian Capital Territory.

Illustration 33. L, aged 26, is ordinarily resident in Australia and intends to live indefinitely in the Commonwealth. He has decided to break up his home in Darwin, in the Northern Territories, and to start a new life either in Rockhampton, Queensland, or Perth, Western Australia. At the moment, he is holidaying in Singapore on the proceeds of sale of his Darwin home and is trying to decide which of these two Australian cities he will choose to live and work in. Semble, he must be deemed to intend to live indefinitely in the Northern Territories *(al)*.

Abolition of the doctrine of the revival of the domicile of origin

The revival doctrine is part of New Zealand conflict of laws *(am)* until abolished by s 11 of the 1976 Act, which reads: "A new domicile

(af) Cf *White v Tennant*, 31 W Va 790; 8 SE 596 (1888).

(ag) He certainly will have done so if *Stone v Stone* [1959] 1 All ER 194; Webb (1959) 22 MLR 313 is followed. In *Donaldson v Donaldson* [1949] P 363 it was held that an RAF officer had acquired a new domicile in Florida, where he was stationed. Quaere, however, what would be the position if H had been told that he could not obtain a divorce in Ohio or any other country whose decree of divorce would be recognised in New Zealand under s 82 of the Matrimonial Proceedings Act 1963, or in New Zealand itself?

(ah) Cf *Hoskins v Mathews* (1856) 8 De GM & G 13. For a case where an invalid was compelled by necessity to leave the country of his domicile of origin for South Africa and was held not to have acquired a new domicile in South Africa, see *Re James* (1908) 98 LT 438.

(ai) See, eg, *Armstrong v Armstrong* (1892) 11 NZLR 201; *In re W H Peat (deceased)* (1903) 22 NZLR 997; *Hayes v Hayes* (1915) 34 NZLR 592; *In re Orr (deceased)* [1935] GLR 675; *Burfield v Burfield* [1918] GLR 18; *Bently v Bently* (1915) 17 GLR 468; *Boldrini v Boldrini* [1932] P 9; *Zanelli v Zanelli* (1948) 64 TLR 556 (CA); *Cruh v Cruh* [1945] 2 All ER 545; *May v May* [1943] 2 All ER 146. The best New Zealand cases would appear to be *Sells v Rhodes* (1905) 26 NZLR 87 (CA) and *Lipanovich v Amner's Lime Co (1934) Ltd* [1940] GLR 575.

(aj) A "union" is defined by s 2 as meaning, unless the context otherwise requires, "a nation comprising 2 or more countries". It would thus appear that Australia, Canada and the United Kingdom are all "unions" for this purpose. The United States of America obviously constitutes a "union", too, but do the EEC countries?

(ak) See first note (y), supra.

(al) Quaere, if L had spent his holiday in Melbourne, Victoria, instead of in Singapore, would he have to be deemed to intend to live indefinitely in Victoria?

(am) See, eg, *Strike v Gleich* (1879) OB & F 50 (CA); *Holden v Holden* (1914) 33 NZLR 1032; *Leak v*

acquired in accordance with section 9 of this Act continues until a further new domicile is acquired in accordance with that section; and the rule of law known as the revival of domicile of origin whereby a person's domicile of origin revives upon his abandoning a domicile of choice is hereby abolished."

Illustration 34. T was a Welshman by birth who, as a young man, emigrated to Iowa, where he became domiciled in accordance with s 9 of the Act. He became a naturalised citizen of the United States. At the age of 65 he gave up his home in Iowa and started to return to Wales to live there in retirement with his sister, but he perished when the jet aircraft in which he was travelling crashed in mid-Atlantic. At common law, T's domicile of origin would be English and it would revive as soon as he left Iowa sine animo revertendi. By virtue of s 11, however, we are required to come up with the somewhat rigid answer that the Iowa domicile T had acquired under s 9 continued until he died *(an)*.

The standard of proof

It is well settled at common law that a person's domicile of origin possesses an exceptionally durable quality and that, if it is desired to show that a domicile of origin has been abandoned in favour of a new domicile, there is an uphill task for those who seek to prove the change *(ao)*. It would appear that the standard of proof has been lightened by the somewhat cryptically worded s 12. It enacts that: "The standard of proof which, immediately before the commencement of this Act, was sufficient to show the abandonment of a domicile of choice and the acquisition of another domicile of choice shall be sufficient to show the acquisition of a new domicile in accordance with section 9 of this Act". It is submitted that the message of this provision is that the standard of proof is to be proof on a balance of probabilities and not proof beyond reasonable doubt, so that it should be no more difficult to show that an independent sane person has lost a domicile ascribed to him by s 6 in favour of a new domicile allegedly acquired by him in accordance with s 9 than to show that an independent sane person has lost his "section 9" domicile in one country and at once acquired a new "section 9" domicile in another country *(ap)*.

Illustration 35. H had a domicile in New Jersey pursuant to s 6 (3) and s 8 of the Act. For many years after attaining his majority, he worked as a railway contractor in Russia. His health having deteriorated, he is advised to spend most of each year in England, and does so for over 30 years, though with reluctance. His feelings are entirely pro-American and anti-British. In the closing few years of his life, he lives wholly in England. He has never returned to the United States since he

Leak [1924] GLR 248; *Lewis v Lewis* [1944] GLR 144; *In re Dix (deceased)* [1951] NZLR 642. The revival doctrine was held to be inapplicable in, eg, *Mason v Mason* (1900) 18 NZLR 700; *Savile v Savile* (1914) 16 GLR 561; *Grothkop v Grothkop* [1922] NZLR 1; *Stukeley v Stukeley* [1929] NZLR 750; *Lobley v Lobley* [1938] GLR 258.

(an) Which does not seem very satisfactory as he is no longer centred in any way upon that State, though it has to be admitted that his most recent domicile was in Iowa. By the same token, we would have to say that, in *Udny v Udny* (1869) LR 1 Sc & D 441 (HL), Colonel Udny's Scots domicile of origin would not have revived when he took refuge in France from his English creditors, that, in *In b Bianchi* (1859) 1 Sw & Tr 511, the deceased's Sardinian domicile of origin would not have revived but that he would have died domiciled in Brazil, and that in *Re Flynn* [1968] 1 All ER 49, Errol Flynn's Tasmanian or New South Wales domicile of origin could not have revived before he acquired his domicile in Jamaica. Compare *McCartie v McCartie* (1903) 23 NZLR 161; *Cables v Cables* (1912) 32 NZLR 178; *Harrison v Harrison* (supra); *Tee v Tee* [1974] 1 WLR 213. The example given in the text is based on *Re Jones' Estate*, 192 Iowa 78; 182 NW 227 (1921). It is sharply criticised by Dr J H C Morris in *The Conflict of Laws* (1971), at pp 15-16. Where a person is known to have intended to return to the country of his domicile of origin, there may seem to be some sense in allowing his domicile of origin, there may seem to be some sense in allowing his domicile of origin to revive. On the other hand, had the sister of T in the above example emigrated to Oregon and T had decided to live with her in retirement in that State, and had been killed in an air crash half way there, it would be less strange to say that he died domiciled in Iowa than that his English domicile of origin had revived. His last home would seem to be more relevant than an abandoned home of his salad days.

(ao) One need only look at cases such as *In b Millar* (1975) NZ Jur Rep (NS) 70; *Winanas v A-G* [1940] AC 287 (HL); *Munt v Findlay* (1905) 25 NZLR 488; *Huntley (Marchioness) v Gaskell* [1906] AC 56 (HL); *Forrest v Westport Coal Co Ltd* (1910) 13 GLR 71; *In re Ah Chong (deceased)* (1913) 33 NZLR 384; *Browne v Browne* [1917] NZLR 425; *Patrick v Patrick* [1921] NZLR 514; *Donald v Donald* [1922] NZLR 237; *Harrison v Harrison* [1928] NZLR 668; *Gordon v Gordon* [1929] NZLR 75; *Ross v Ross* [1930] AC 1 (HL); *Ramsay v Liverpool Royal Infirmary* [1930] AC 588 (HL); *Wahl v A-G* (1932) 147 LT 382 (HL); *In the Estate of Fuld (No 3)* [1968] P 675; *Bosworth v CIR* [1973] NZLJ 512. However, lest it be feared that no New Zealand case has ever shown that a domicile of origin can be displaced by a domicile of choice, see *Sells v Rhodes* (supra) (Italian domicile of origin held to have been superseded by a New Zealand domicile of choice). Cf the cases where an existing domicile of choice was held to be retained, such as *Mason v Mason* (supra); *Grothkop v Grothkop* (supra); *Lobley v Lobley* (supra); *In re Dix (deceased)* (supra).

(ap) See the discussion in Dicey & Morris, op cit, supra, at pp 91, 98-100, 101 et seq, 114-115; Cheshire, opt cit, supra, at pp 168-169, 179; and, for pre-Act cases in New Zealand, in regard to proof see, eg, *Ryley v Ryley* (1878) 4 NZ Jur (NS) CA 50; *In re W H Peat (deceased)* (1903) 22 NZLR 997; *Munt v Findlay* (supra); *In re Dix (deceased)* (supra) and cf *Lewis v Lewis* (supra).

(aq) Cf *Winans v A-G* (supra). No doubt, if this submission is correct, *Ramsay v Liverpool Royal Infirmary* (supra) would now go the other way. Quaere

left as a young man, though he hoped to develop some family property there. It is submitted that the combined effect of ss 9 and 12 of the 1976 Act now permit it to be said that upon his death after nearly 40 years' residence in England, H is domiciled in England and not in New Jersey *(aq)*.

Illustration 36. H had a domicile in Sri Lanka pursuant to ss 6 (3) and 8 of the 1976 Act. He was a Sri Lanka government employee there. He married there and left his wife shortly afterwards. Some 15 years later, he was still in the Sri Lanka government service, but he had paid several visits of some months' duration to New Zealand over this period. On his first visit, he decided he would like to settle indefinitely in New Zealand when his service ended. On his second visit, he sank nearly all his capital in buying some land in Rotorua, saying he meant to build on it as soon as his service ended. On all his visits, he lived in hotels. He has not taken any steps to build a home for himself. He is now physically present in New Zealand and will soon be returning to resume his duties in Sri Lanka. It is not, at the moment, certain exactly when his duties will end, but H proposes to retire shortly and come back to New Zealand. It may very well be that, despite ss 9 and 12 of the 1976 Act, a Court would hold that there is evidence only to the effect that H intends *at some future time* to abandon his domicile in Sri Lanka in favour of a new domicile in New Zealand *(ar)*.

Domicile in unions

It will be recalled that s 2 of the 1976 Act defines a "union" as meaning, unless the context otherwise requires, "a nation comprising two or more countries". Section 13 states that: "A person domiciled in a country forming part of a union is also domiciled in that union". It is accepted at common law that nobody can have more than one operative domicile at the same time. The new provision seems to make clear that a person may be held to be domiciled in, for instance, New South Wales *and* in the Commonwealth of Australia or in Ontario *and* in Canada. It remains, however, to be seen whether a New Zealand Court would recognise the concept of the "Australian" domicile which was laid down in s 23 (4) of the Australian Matrimonial Causes Act 1959, now replaced by s 39 (3)(b) of the Australian Family Law Act 1975 for divorce purposes. Similarly, it will have to be seen whether New Zealand Courts would recognise the notion of a "Canadian" domicile for divorce purposes which was laid down by s 5 (1)(a) of the Canadian Divorce Act 1968 *(as)*.

Consequential amendments and repeals

(1) *Domicile of adopted children* – As we have seen, s 11 of the Domicile Act abolished the doctrine of the revival of the domicile of origin.

Section 16 (2) of the Adoption Act 1955 states that: "Upon an adoption order *(at)* being made, the following paragraphs of this subsection shall have effect for all purposes, whether civil, criminal or otherwise, but subject to the provisions of any enactment which distinguishes in any way between adopted children and children other than adopted children, namely: ... (f) The adopted child shall acquire the domicile of his adoptive parents, and the child's domicile shall thereafter be determined as if the child had been born in lawful wedlock to the said parent or parents: Provided that nothing in this paragraph shall affect the domicile of origin of the child: (g) In any case where the adoption order was made before the adopted child attained the age of three years, the child's domicile of origin shall be deemed to be the domicile which he first acquired under paragraph (f) of this subsection upon the making of the adoption order, but nothing in this Act shall affect the domicile of origin of an adopted child in any other case."

It will now be appreciated that the proviso to para (f) is no longer necessary. It is accordingly repealed by s 14 (2) of the Domicile Act, so that the paragraph must be read without the proviso. It will also be appreciated that the whole of para (g) is no longer necessary since it is entirely devoted to the domicile of origin of an adopted child. Section 14 (2) of the Domicile Act has therefore repealed it in toto *(au)*.

Illustration 37. H and his wife W, both domiciled in California but resident in New Zealand, have just been granted a final adoption order by the Auckland Magistrate's Court in respect of C, the two year old child of M and his wife F, both domiciled and resident in New Zealand. H and W are living together. M and F

whether the same may be said for *Browne v Browne* (supra) in view of the concluding remarks of Stout CJ at p 431? Or for the much more recent case of *Bosworth v CIR* (supra)?

(ar) Cf *Gordon v Gordon* [1929] NZLR 75. Put another way, although H is "in" New Zealand, he does not, *at the moment*, intend to live indefinitely here, where he is only a sojourner.

(as) See *Lloyd v Lloyd* [1962] VR 70 (Australia); *Cagnoni v Cagnoni* (1971) 13 DLR (3d) 763. Note that a domicile in the United States would be irrelevant for divorce purposes since there is no federal divorce law in the United States: *Godfrey v Godfrey* [1976] 1 NZLR 711, at p 714, per Mahon J.

(at) Defined by s 2 of the 1955 Act as meaning an adoption order made under the 1955 Act and as not including an interim order.

(au) As to the effect on a child's domicile if an adoption or adoption order in respect of it is discharged, see s 20 (6)(b) of the Adoption Act 1955. That paragraph needed no consequential amendment or repeal at the hands of the Domicile Act.

are living together. Until the date of the final order (and irrespective whether an interim order was made or not) C has a domicile in New Zealand pursuant to s 6 (3) of the Domicile Act. Upon the making of the final adoption order C will become domiciled in California by virtue of s 6 (3) read in conjunction with s 16 (2)(f) of the Adoption Act.

Presumably the result would be the same if H was domiciled in California but W was domiciled in New Zealand.

Illustration 38. H and his wife W, both domiciled and resident in California have in conformity with the law of that State, there jointly adopted C, the small male child of a single woman whose identity H and W do not know. *Assuming that a New Zealand Court would recognise this overseas adoption pursuant to s 17 of the Adoption Act 1955,* C's domicile will thereafter be determined in accordance with ss 16 (2)(f) of the 1955 Act and 6 (2)-(5) of the Domicile Act. Thus, assuming H and W to be living together (as doubtless they are), C will be domiciled in California because his newly acquired father, H, is so domiciled – see s 6 (3) of the 1955 Act discussed above *(av).*

It is difficult to say what is the position where a foreign adoption is not entitled to recognition in New Zealand under any of the provisions of s 17 of the Adoption Act. Presumably s 16 (2)(g) of that Act could not be invoked at all. Thus, only subs 6 (2)-(5) of the Domicile Act could apply and one would have to look, not at the position of the adoptive parents, but to that of the natural parents in applying them. If the "prospective adopting parents" did not know the identity of the "natural parents", it might well be impossible to ascertain the child's domicile, in which case it might have to be determined as if the child was a foundling *(aw).*

(2) *Other matters* – With the emancipation of married women as regards their domicile, s 62 of the Administration Act 1969 needs to be confined to persons dying before the Domicile Act 1976 comes into force. Section 14 (1) of the 1976 Act accordingly inserts a new subs (2A) in s 62 to the effect that s 62 is not to apply to any person who dies after the commencement of the 1976 Act.

For the same reason, s 3 of the Matrimonial Proceedings Act 1963, s 6 of the Domestic Proceedings Act 1968 and s 22 of the Guardianship Act 1968 are all nugatory as from the date when the 1976 Act comes into force *(ax).* They are, therefore, repealed in toto by s 14 (3) of the Domicile Act.

Conclusion

Though it is not stated to be a compendious code, the 1976 Act has made some very satisfactory substitutions for the common law rules, even if they could sometimes prove to be rather technical *(ay).* The notion is retained that a person's domicile is his actual or technical home and the Act ensures that no one can be without a domicile *(az).*

The burden of proof of change of domicile has not been altered. Thus it may still be necessary for a person desirous of showing that there has been a change to collect and sift through quite a considerable body of evidence despite the less strict standard of proof laid down by s 12.

The 1976 Act nowhere explicitly states, as did s 3 (2) of the Matrimonial Proceedings Act 1963 and the corresponding provision in the Domestic Proceedings Act 1968, that the domicile of any person is to be determined in accordance with New Zealand law. It might have been worth while making this rule clear, but the position is in fact accepted at common law *(ba)* and the failure to repeat such a provision in the 1976 Act is considered to be without ill consequences.

In conclusion, the writers would point to this new legislation as being forward looking and thus within the New Zealand tradition of social reform and would express the hope that there will soon be promulgated the Order in Council necessary to bring these brave new rules into force *(bb).*

(av) According to s 17 (1) of the Adoption Act, if a person has been adopted outside New Zealand according to the law of the place of the adoption, and the adoption is one to which s 17 applies, then, for the purposes of the 1955 Act and all other New Zealand enactments and laws, the adoption is to have the same effect as an adoption order validly made under the 1955 Act and is to have no other effect. Section 17 (2) sets out the various conditions which must be met for an overseas adoption to be recognised under subs (1). None of these are to do with domicile; as they are lengthy, we have omitted them.

(aw) Cf *Re McKenzie* (supra). As to the recognition of foreign adoptions generally, see Bromley & Webb, *Family Law* (1974), pp 480-483.

(ax) See note (b), supra, where these provisions are mentioned in more detail.

(ay) See, eg, s 10, discussed above.

(az) The Act does not lay down rules dealing specifically with persons in a special position such as prisoners, persons liable to be deported, fugitives from justice or refugees, invalids, persons in the armed forces, diplomats or consuls, or businessmen or civil servants. The domicile of an unborn child is not mentioned: cf *In re Callaghan (deceased)* [1948] NZLR 846. Nor are we expressly told how to deal with a person who resides in more than one country.

(ba) *Re Annesley* [1926] Ch 692; *Re Martin* [1900] P 211 (CA).

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