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**STATUTES**

## GETTING INTO THE ACTS

*A comment of about 1,200 words by* Michelmas Bentham.

For some time now a sporadic campaign has been fought for the right of all New Zealanders to have the laws they are governed by written in language they can understand. This basic demand has been expressed in a variety of ways. Thus, from time to time, the draftsman has been urged to make his work intelligible to a Judge (not, interestingly enough, to a Magistrate), the average 12 year-old, the average member of the Booksellers Association, and even to the draftsman himself.

However expressed, the message is the same: the law draftsmen of the world should stop teasing the rest of us, and tell us what they really mean. After all, if TAB tickets can be drafted in language even disenfranchised voters can understand, why not our laws?

Now, it's not so many years ago that I was a law student and would have given a week's beer money to find even one statute in the prescribed course that I could understand. So naturally I welcome this present campaign, but only as a useful first step. For it is my contention that the crusaders have set their sights too low.

It surely makes no difference how intelligible a book may be if nobody can be induced to pick it up to read in the first place. Furthermore, intelligibility is probably a disadvantage if it serves only to disclose that the subject-matter of the text is inherently boring. Even if one could understand every word of the Plumbers, Gasfitters, and Drainlayers Act 1976, for example, would one really want to spend an hour or two actually reading it (unless, perhaps, one is a plumber, gasfitter, or drainlayer)?

What we really need is statutes that are not merely intelligible, but attractive and gripping as well. Statutes that any bookseller would be proud to have under his counter; statutes that our average 12 year-olds could hide with pubescent pleasure from their unsuspecting parents; statutes that our intelligentsia could collect and congratulate itself on being avant garde.

And to achieve this desirable state of affairs, we need far more than the mild reforms so far suggested. Our statute book requires nothing less than radical surgery.

We should start with the titles. Occasionally an Act is passed with a title that needs nothing more. A recent example of this genre is the Massage Parlours Act 1977. But who can possibly work up any feelings of salacious expectation when confronted with the Transport Act 1962? Suppose, instead, the draftsman had called it the Law of the Dragstrip or, even better, the Lore of the Dragstrip. Such a title by itself would have guaranteed a sale of the film rights.

Next, the cover. One does not have to be an adherent of an alien philosophy to question the visual appeal of the New Zealand Coat of Arms. The Lore of the Dragstrip would certainly require something better. Perhaps a suitably unclad blonde, standing next to a petrol pump, pointing the hose at the reader, and saying something like "Truckies, 'til you've seen my Act you don't know what it's all about!"

Then a blurb about the author. "Written by E S Quire, author of the Shipping and Seaman Act and countless other bestsellers. Based on an idea by the Hon. M Carr, Minister of Transport." And on the back cover, of course, a

short biographical note: "Ed Quire has been writing professionally now for a number of years. His hobbies include . . . and reading. He says he enjoys anything intelligible."

Finally from the presentational point of view, the powers of the Indecent Publications Tribunal would be widened to allow it to make appropriate pronouncements in respect of statutes. "This Act is unintelligible in the hands of persons under 12 years old and members of the legal profession." Splashed across the cover of an Act, such a finding would add immeasurably to its visual appeal and ensure huge sales.

Once we had a product that looked good, we could turn our attention to the contents, just in case someone of more scholarly bent did manage to get past the arresting cover. This is the area where the greatest change is needed. For far too long the silent majority in this country has meekly accepted that law draftsmen should concern themselves only with matters of law. The result has been a mass of legislation of no possible interest to anyone outside the legal profession (and plumbers, gasfitters, and drainlayers, of course). This must stop immediately.

The draftsmen must be reminded that they are public officials, paid by the taxpayers. We have a right to expect them to respect our tastes and interests, and to choose their topics accordingly. After all, in the private sector they would soon become redundant if they failed to appeal to their readers. Why should it be any different in the public sector?

In short, each Act must be designed to be all things to all men (sorry, persons). This can be achieved in two ways. First, each statute would have the interpretation clause invented by that great draftsman, Lewis Carroll, in the Wonderland Code of ordinances: "Words used in this Act have the meanings the reader wishes them to have."

Secondly, Acts would continue to be divided into separate Parts as at present, but each Part would be aimed at a different section of the community. Thus, if we must continue to bother with legal matters, they could at least be hidden away in a separate Part under the heading "Provisions of Interest to lawyers (and Plumbers, etc) Only". Then there would be a "Young persons part". (On reflection, that heading may need some redrafting.) In this Part would be things of interest to our junior citizens. For example, a riddle:

> Q What is old, grey, completely surrounded by musty old books, and incapable of writing intelligible English?
> A A law draftsman.

Then a special Part for Judges' wives. This could feature quick menus "for when your husband rings up unexpectedly to tell you he is bringing home the entire Court of Appeal for dinner in twenty minutes".

The possibilities are endless. Under "Miscellaneous provisions" we could have cartoons, small ads, crossword puzzles, and spot the logical tree competitions. We could even have a competition to see who could write the most intelligible sentence for inclusion in the next Act of Parliament. First prize, a copy of the Hansard report of the debate assuming, of course, that the reporters haven't all been sent home suffering from exhaustion.

This leaves only the question of sales promotion. What I suggest here is this. Instead of the Royal Assent being given in the lonely if splendid isolation of Government House, it could be done just as well during ordinary business hours in the Government Bookshop. Citizens could purchase a copy of an Act from the counter and have it personally assented to there and then. Would that not be a perfect blend of constitutional proprieties and practical economics?

## RECYCLING PRACTICE NOTES

It has been suggested that the substance of a practice note dealing with further submissions and reported at [1968] NZLR 608 requires revitalisation. It is as follows:

> Where either counsel after the hearing of as matter is concluded, but before delivery of judgment, desires to make further submissions, application must first be made to the Judge for leave. It is only in exceptional circumstances that leave will be granted as, for example, where some pertinent consideration or authority has been overlooked or a new matter has arisen since the hearing which has not been anticipated by counsel. In the event of either counsel desiring to make such an application, an appointment should be sought with the Judge in chambers through the Registrar. No submissions or memoranda filed without leave will be considered.

# CASE AND COMMENT

**Real estate agent's commission — Failure to pay deposit on part of the purchaser agent's request.**

In *Barsdell v Metcalf*, Supreme Court, Wellington; judgment 3 August (No M 331/78); Davison CJ. The appellant wished to sell her Wellington property and placed it in the respondent real estate agent's hands for sale. She gave him oral instructions to sell but no specific terms were discussed. A salesman for the respondent took a Mr Smith to inspect the property and an acquaintance of the latter, a Mr Marchant, went with them. Mr Smith signed an offer to purchase on 1 March 1977 for $28,000 subject to a previously existing option timed to expire on Monday, 7 March 1977. The offer stated that a 10 percent deposit should be paid in part payment of the purchase price "forthwith upon written acceptance hereof." The salesman took the offer to the appellant on 1 March and she accepted and appointed the respondent to act as agent to sell and agreed to pay commission according to the REINZ scale. The respondent and his salesman both tried to collect the deposit — indeed tried hard — but to no avail. On 9 March the appellant's solicitor wrote to the purchaser's solicitors to state that the option had not been exercised and that the purchaser's offer was in full force and effect and for settlement on 1 May 1977. On 18 April 1977, the appellant's solicitor wrote to the purchaser's solicitors in order to note that the deposit had not been paid and that it would be appreciated if the matter could be attended to as soon as possible. The following day the respondent wrote to the appellant's solicitor and reiterated his attempts to collect the deposit from the purchaser and stated his lack of success. The purchaser did not settle on 1 May. On 9 May the appellant's solicitor wrote to the purchaser's solicitors pointing out that the purchaser was in default, advising that time was now of the essence and that, unless settlement was completed by 20 May, damages and/or specific performance would be sought. About 20 May, Mr Marchant asked the appellant if he could buy the property and was referred by her to her solicitor. He drew up a contract for sale at $29,000 and, on 20 May, terminated the contract with Mr Smith, the original purchaser. The sale to Mr Marchant was completed. When the respondent applied for payment of his commission on the abortive sale, the appellant refused to pay on the ground of failure to collect the deposit.

The respondent succeeded in the Magistrate's Court. The appeal came before the learned Chief Justice, who made the following points:

(1) Under a simple authority to sell, a real estate agent is prima facie entitled to his commission, so long as there has been no breach of duty as agent, as soon as he has procured a person approved by the vendor to enter into a binding contract of purchase upon terms warranted by his authority, and it is immaterial that the purchase may not be completed: *McLennan v Wolfsohn* [1973] 2 NZLR 452, at p 458.

(2) There is a line of authority showing that, when a contract provides for a deposit and it is the express or implied duty of the agent to collect it, an agent has no right to commission unless such deposit is paid: *Progressive Agency v Bennett* [1928] NZLR 100; *Herdman v C Dickinson & Co Ltd* [1929] NZLR 432; *Columbus v Williamson & Co Ltd* [1969] NZLR 708. In the last of these cases, Wilson J had, in effect, said (at p 711) that, if it was the duty of an agent to collect a deposit, then a simple failure to collect it would deprive him of his commission.

(3) This strict test had not been followed in the *McLennan* case, where Cooke J had held that it was enough to entitle an agent to commission if he had substantially performed his duty by using his best endeavours to collecct the deposit and by notifying the vendor if he cannot collect it and asking him for instructions.

(4) Faced with a choice between the strict test of Wilson J and the more lenient one of Cooke J, it was the latter which must be preferred. As Davison C J observed, it would, obviously, be unjust to deprive an agent of a commission simply because he had not collected a deposit, or had failed to report his failure to do so to the vendor, in cases where a sale has proceeded and been completed and the vendor has obtained the benefit of it. Correspondingly, his Honour stated, it would be unjust to a vendor to compel him to pay commission where no deposit had been collected and the sale had fallen through because of the purchaser's

default. "The absence," he added, "of a deposit in such case which could be forfeited by a vendor has deprived the vendor of a fund from which to pay the expenses of the abortive sale." Davison C J continued: "It was having regard to these circumstances that Cooke J in McLennan's case decided that in cases where an agent had substantially performed his duty by obtaining a binding contract of sale and has notified his vendor of his failure to obtain a deposit then he should be entitled to his commission unless there has been any loss or prejudice resulting to the vendor by the failure to obtain [the deposit]".

(5) In *Visser v Beardsley* (Supreme Court, Christchurch; judgment 9 June 1976, (No A 449/75), Roper J) the approach of Cooke J had been adopted, though, on the facts, the vendor had been prejudiced and the agent's claim for commission had been turned down.

(6) In so far as the Magistrate had found that the respondent had procured a binding contract, had failed to collect the deposit, had duly advised the vendor thereof, but had substantially performed his agency contract, his finding could not be disturbed.

(7) The vital question left for decision was whether or not the appellant vendor had suffered loss or was prejudiced by the failure to collect the deposit, the Magistrate having held that there was none. The Magistrate had so concluded on the basis that, before the settlement date of the transaction with the original purchaser, the appellant had already been treating with Mr Marchant for sale at a higher price; that Mr Marchant had visited the property through the salesman's instrumentality so that, indirectly, the respondent had found an ultimate purchaser for the appellant and, in the circumstances, the appellant was quite happy to get herself out of the original deal when she had a new buyer in the shape of Mr Marchant. It thus was necessary to analyse the reasons for the Magistrate's so finding and the effect of them. Davison C J said that: "Where no deposit is collected by an agent and the sale goes off through the default of the purchaser, a vendor will usually be prejudiced or suffer loss because he will have incurred various expenses and will not have any deposit to forfeit out of which he can recoup them. In such circumstances one would normally accept that a vendor would suffer prejudice or loss unless there are some unusual reasons as to why this is not so. Where a vendor resells a property he will usually have to pay a commission on the resale and the usual costs of such resale so that the loss suffered on the first abortive sale will remain. In the present case, however, by reason of the association of Mr Marchant with Mr Smith and his having been shown the property by [the respondent's salesman], an approach was made by Mr Marchant direct to the appellant which resulted in her making a sale to Mr Marchant at a higher figure without any payment of any agent's commission." The Magistrate had had regard to this — in the writer's view somewhat rare — situation but, to continue with the words of Davidson C J, "more importantly perhaps, he came to the view that the appellant was happy to extricate herself from the earlier transaction and to enter into the new one so that not only did she not incur any commission on the resale but she was able to make the resale at a higher price (even although she had to leave certain moneys in on mortgage which was not the case with the first sale)".

The appellant challenged the conclusion of the Court below that there had been no loss or prejudice to the appellant. The Chief Justice was not prepared to upset this finding and dismissed the appeal with $125 costs and disbursements.

It is respectfully submitted that his Honour was correct in adopting the approach of Cooke J and there is no doubt that this decision will be welcomed by the real estate agency profession and their lawyers. But, one wonders, will vendors' solicitors now begin to advise their clients to insist that collection of a deposit will be regarded as "of the essence"? Nous verrons! In any event, readers of Luxford's Real Estate Agency (5th ed, 1979) must take careful note of this decision when reading paras 99 and 100.

P R H Webb
University of Auckland

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**The power of precedent** – "I have not the slightest desire to question that decision which I follow loyally, but I am bound to say that I do not understand it"; *Frost v Minister of Health* [1935] 1 KB 286 per Swift J.

**Habeas corpus applications** – Habeas corpus applications are peculiar in two respects; first, the judgments almost always begin with genuflection and obeisance to the supreme importance of this great writ by which the freedom of the subject is so protected in English Law; secondly the applications are almost always unsuccessful – Professor J A G Griffith in the 1978 Pritt Memorial lecture.

HUMAN RIGHTS

# THE HUMAN RIGHTS COMMISSION AND GOVERNMENT PRACTICES

*Last year the University of Auckland Students' Society Inc, represented to the Human Rights Commission that a condition imposed on the entry of a South African scholarship student prohibiting participation in political activities infringed international standards of human rights. The report of the Commission has attracted widespread interest, not only because of the subject matter but also because it is the first decision the Commission has made on matters concerned with its more general function of measuring the practices and policies of the government against the standards contained in international instruments on human rights. The text of the report follows*

**Origin of representations**

On 9 October 1978 the Human Rights Commission received a letter from the University of Auckland Law Students' Society (Inc) (hereinafter AULSS) expressing the Society's desire to make representations before the Human Rights Commission pursuant to s 5 (1) (c) of the Human Rights Commission Act 1977, as it was entitled to do on any matter affecting human rights.

The basis of the proposed representations was the specific condition of entry that had been imposed by the New Zealand Government on anyone receiving an award from the Southern Africa Scholarship Trust Board of the New Zealand University Students' Association (hereinafter called NZUSA). A date for a private hearing of the oral submission before the Commission was set. At this stage the Minister of Immigration as head of the Government Department concerned was informed of the intention of the Commission to receive the submission and to make an investigation.

**Hearing before the Human Rights Commission**

The representations were presented to the Commission in writing and supported orally by Mr J Hannan and Mr A Shaw on behalf of the AULSS.

(1) *Background To The Representations*

The basis of the AULSS representations concerned Miss Mabel Kawanzaruwa, a black citizen of Southern Rhodesia who had resided in Zambia since 1962. Miss Kawanzaruwa had been awarded the Scholarship to come to New Zealand to study law at Auckland University in 1979 by the New Zealand University Students' Association's Southern Africa Scholarship Trust Board. The Trust Board sought approval of the entry of Miss Kawanzaruwa to New Zealand from the Department of Immigration. In a letter dated 2 August 1978 to the Trust Board Chairman, the Minister of Immigration, the Honourable F Gill in reply to the application of approval of entry stated (inter alia):

> "The Cabinet has considered the terms of your Trust Deed and has agreed to recipients of the Scholarship who meet the requirements of private student entry policy being admitted but only *on the basis that it will be a specific condition of entry that the students will not be permitted to participate in political activities, including making political speeches while they are in New Zealand*".

It was to this imposition of a specific condition of entry that AULSS objected.

The NZUSA Southern Africa Scholarship Trust Board is an incorporated Board created by NZUSA and registered as a charitable Trust. Broadly speaking the objects and purposes of its Trust scholarships are to bring to New Zealand students who because of their political beliefs are unable to continue their studies in their home country. Students chosen for scholarships are to come from the Republic of South Africa, Southern Rhodesia or Namibia. While the trust scholarship is given primarily to support the chosen course of study, recipients are also expected to speak to interested groups in New Zealand on matters concerning Southern Africa.

AULSS is an affiliate of Auckland University Students' Association (hereinafter AUSA) which is in turn an affiliate of NZUSA, the founder of the Trust. The Trust scholarship recipient, Miss Kawanzaruwa, was to attend Auckland University Law Faculty. The Human Rights Commission received written expressions of support endorsing the AULSS representations from both NZUSA and the Southern Africa Scholarship Trust Board.

(2) *Submissions made before the Human Rights Commission*

(a) *Factual background.* The basic factual background details of the Scholarship Trust and the standing of AULSS as submitted have been outlined in the previous section of the report.

Along with the legal representations both oral and written, the AULSS also provided the Commission with an account of the sequence of events and correspondence tracing the imposition of conditions of entry on Southern Africa Scholarship recipients. Included among other things were relevant correspondence between NZUSA and the Trust Board and Government Departments; minutes of the Trust Board Meetings (all of which provided background details); and the documentation of the case from mid-1976 onwards.

(b) *Action requested of the Commission* This area of the submission centred upon the Commission's general powers and functions in matters affecting human rights as found in ss 5 and 6 of the Human Rights Commission Act.

Specific references were made to the function of making public statements on any matter affecting human rights. (Section 5 (1) (d)); to the function of working towards and reporting to the prime Minister on progress being made towards the elimination of discriminatory laws and discriminatory practices which infringe the spirit and intention of the Act (s 5 (1) (e) (ii)); and to the function of reporting to the Prime Minister on any matter affecting human rights including the need to change policies and practices to comply with the standards laid down in international instruments on human rights (s 6 (1) (a))

It was further submitted that where the practices and policies of the New Zealand Government were being questioned, it was a power and duty of the Commission to apply in its deliberations the standards laid down in international instruments on human rights. At this stage reference was made to the long title of the Act read in conjunction with ss 5 and 6. The long title states that the Act is to. . .

> ". . . promote the advancement of human rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights".

It was submitted that the specific condition of entry imposed by the Government infringed international standards of human rights. It was requested that the Commission make a public statement to this effect and further report to the Prime Minister recommending the removal of the specific condition.

(c) *Arguments in respect of human rights* This part of the submission encompassed four lines of approach.

(i) *The duties of New Zealand as a state to fulfil its international treaty obligations.* Reference was made to the International Convention on the elimination of all forms of racial discrimination ratified by New Zealand on 23 December 1972.

It was submitted that Articles 2, 5, and 7 of that Convention had been violated by New Zealand's Government imposition of the specific condition of entry.

Specific analysis of each of the articles was presented to the Commission and emphasis was placed on the obligations in law that these articles imposed on the New Zealand Government. It was submitted that violations under this ratified Convention were in fact a breach of international law.

(ii) *Duties of New Zealand in respect of other international instruments laying down international standards on human rights.*

*International Covenant on Civil and Political Rights:* At the date of hearing this instrument had not been ratified by the New Zealand Government but it was brought to the Commission's notice that ratification by this country was anticipated by 31 December 1978. It was submitted that Article 19 as to the right of freedom of expression regardless of frontiers was also violated in the case at hand.

*Universal Declaration of Human Rights*:

It was submitted that the specific condition was in violation of Articles 1, 2, and 19 of the Universal Declaration of Human Rights which read as follows:

> *"Article 1*
>
> "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
>
> *"Article 2* "Everyone is entitled to all the rights and freedom set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> "Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation or sovereignty.

"*Article 19* "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

(iii) *Freedom of New Zealanders to seek and receive information and ideas*

It was submitted that the imposition of a specific condition restricting the matters about which the scholarship holder could speak publicly in effect amounted to the New Zealand Government claiming for itself the right to select what information citizens of New Zealand were to receive. This was contrary to Article 19 (2) of the Covenant on Civil and Political Rights as to the right of everyone to receive information.

(iv) *Rights of scholarship recipients to freedom of expression*

The submission was also put forward that the rights of the scholarship holder were violated by this restriction on freedom of expression. This submission was based on Article 19 of the Universal Declaration quoted above; and also on Article 19 (2) of the Covenant on Civil and Political Rights which provides that freedom of expression includes the right of everyone to "impart information . . . regardless of frontiers". This was a standard of international conduct that the New Zealand Government should observe.

At the conclusion of the hearing the Commission requested certain extra letters and documents from the representatives of AULSS to be sent to the Commission along with additional written submissions on various maters arising at the Hearing.

**Commission investigation**

Before the formal hearing the Commission requested from the Secretary of Labour, under s 73 (1) of the Human Rights Commission Act, the Department of Labour file on the matter. This was received shortly after the hearing of representations.

On request, the Secretary of Foreign Affairs supplied to the Commission the full text of the Prime Minister's address to the United Nations on 25 September 1978 in which the Prime Minister made reference to matters dealing with racism and human rights. Other reports were also obtained later from the Ministry of Foreign Affairs.

**Factual matters determined by the Commission after hearing submissions by complainant and after investigation by Commission**

(1) NZUSA wrote to the Department of Immigration enquiring about the possibility of establishing a permanent visa to attach to the NZUSA Southern Africa Scholarship in December 1976.

(2) The matter was passed to the Ministry of Foreign Affairs for advice and to the Inter-departmental Committee on Private Students' Policy with instructions to provide guidelines for a policy on Southern Africa students.

(3) The Inter-Departmental Committee guidelines including the veto on political activity were communicated to NZUSA in July 1977, and found by them to be unacceptable.

(4) The Inter-Departmental Committee reconsidered the matter on 10 April 1978 and withdrew both provisos found objectionable by NZUSA.

(5) Cabinet decisions to retain the provisos were made on 3 July 1978 and 4 September 1978.

From the material available the Human Rights Commission found that Cabinet did not appear to have been informed in writing of:

a the Inter-Departmental Committee decision to reverse the guidelines; or

b the positive support of the Ministry of Foreign Affairs for the NZUSA Southern Africa Scholarship Trust.

(6) The Prime Minister addressed the United Nations General Assembly on 25 September 1978, making specific reference to the "right of freedom of opinion and expression".

**New Zealand's ratification of the International Covenant on civil and political rights**

On 28 December 1978 New Zealand ratified the above International Covenant in accordance with an undertaking given by the Prime Minister in his address to the United Nations. Article 19 of this Covenant is as follows:

"1 Everyone shall have the right to hold opinions without interference.

"2 Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally or in writing or in print, in the form of art, or through any other media of his choice."

**Attendance on the Minister of Immigration**

In early March 1979, Mr P J Downey, the Chief Human Rights Commissioner met with

the Minister of Immigration, the Hon J Bolger. The representations made by AULSS were discussed and the Minister was informed of the stage that the Commission's proceedings in the matter had reached. Further to this discussion the Chief Human Rights Commissioner forwarded a letter dated 23 March 1979 to the Minister of Immigration, setting out the Commission's impressions and opinion of the matter at that stage of proceedings. (A copy of this is attached to this report and marked Annex 1).

**Minister of Immigration's reply**

On 1 May 1979 the Human Rights Commission received a letter from the Minister of Immigration, the text of which stated inter alia:

> "I have recently reconsidered this matter in the light of New Zealand's ratification of the International Covenant on Civil and Political Rights and have decided that it is no longer appropriate to impose a condition that students holding such scholarships "must not participate in political activities, including making political speeches, while they are in New Zealand".

(Full text of this letter is attached to this report and marked Annex 2).

**Disposal of representations**

The decision of the Government to remove the restrictive entry condition on the visa of the Southern Africa scholar effectively disposed of the matter before the Commission.

**Concluding remarks**

Although the matter has been effectively disposed of the Human Rights Commission considers that some general comments are appropriate.

(1) The Commission considers that the AULSS representation concerning the specific restriction intended to be imposed on the scholarship holder was a proper subject for representations under s 5 (1) (c) of the Human Rights Commission Act. The matter raised was one of substance involving important principles affecting human rights.

(2) If the New Zealand Government's decision had not been reversed the Human Rights Commission would have invited a formal response from the Minister of Immigration on all the representations received. This would have included a response to the matters raised in both the oral and written representations of AULSS, the investigations made by the Commission, and any other matters considered pertinent by the Commission.

(3) As both sides had not been heard before the Government revoked the entry condition, the Commission is unable to present any conclusions in the matter.

(4) These are the first representations received by the Human Rights Commission under its general functions concerning human rights. The following points should be made.

(a) The Commission is cognisant and appreciative of the extensive research behind the submissions, their clarity of presentation, attention to relevant detail and full documentation.

(b) The expeditious and thorough compliance by AULSS with requests for further documentation and submission after the oral hearing is appreciated by the Commission.

(c) Had the Government's position not changed, the Commission would have taken all the AULSS submissions into account as they all appeared to be relevant to reaching any conclusion in the matter.

(5) The Commission appreciates and welcomes the action of the Government in being prepared to change its decision in this instance. On the basis of the material the Commission had available to it, the decision to remove the restriction on political activity and speeches appears to it to have been the right course of action.

(6) This case underlines several significant features of the Human Rights Commission Act.

(a) It has implications for the principles of human rights as a local issue since any person in New Zealand can make representations to the Human Rights Commission on any matter affecting human rights. In this sense the Human Rights Commission can be seen as a forum for the "concerned citizen" in all matters affecting human rights.

(b) It emphasises New Zealand's obligations under ratified instruments such as the International Covenant on Civil and Political Rights. These can be seen as creating a legal obligation on the State to comply with the various Articles, both in policy and legislation. Such an obligation is binding in international law. It is the responsibility of the Human Rights Commission to consider alleged breaches and when it is satisfied that breaches have occurred to seek redress.

(c) It focuses attention on the wide and

extensive role and function of the Human Rights Commission on any matters affecting human rights. the function of investigating alleged breaches of international instruments which New Zealand has ratified is particularly important. Furthermore, in cases where it is considered appropriate the Commission can also recommend changes in legislation and administrative practices to the Prime Minister.

ANNEX 1

23 March 1979

S2/27/1

Hon J Bolger,
Minister of Immigration,
Parliament Buildings,
Wellington 1.

Dear Mr Bolger,

Southern Africa Trust Scholarship

You will recall that I discussed with you a couple of weeks back the situation that had been reached about the representations made to the Commission last year by the University of Auckland Law Students' Society. These representations referred to the decision of the Government last year that as restrictive condition against public statements should be imposed on recipients of the scholarship.

The Commission has not come to any final decision on the matter, and of course will not do so without giving the Government a full opportunity to reply in a formal way. As I indicated to you however, it seemed that you could well reconsider the whole question at this stage, and if Government now decided to remove that previous restriction it would not be necessary for the matter to proceed through the Commission.

First I wish to emphasise that the issue raised does appear to the Commission to be one of substance, and to involve important principles. The representations made last year were solidly based, and if the Hearing proceeds the Commission will require detailed submissions from the Crown on a number of issues. Since the representations on behalf of the law students were presented, the Commission has done some further investigating. I have been awaiting some information from the Ministry of Foreign Affairs, but as this has been delayed, I have decided to take the matter further with you at this time in any event.

Since the student representations were first received the position has changed somewhat in that New Zealand ratified the International Covenant on Civil and Political Rights on 28 December 1978. This was done in accordance with an undertaking given by the Prime Minister in a speech to the United Nations earlier in the year. This would appear to put the earlier immigration restriction in a new context.

The Inter-departmental Committee on Private Overseas Student Policy apparently revised its original view on the restriction and does not now support it. Nor does there seem to be any validity in the analogy that has been drawn with restrictions imposed by other Governments on their own nationals who come to New Zealand under the Colombo Plan.

I also understand that the Ministry of Foreign Affairs was opposed to the imposition of the restriction in the first place, and will presumably be even more strongly of that view now that the Covenant has been ratified. Again I emphasise that the Commission does not yet have a concluded view, but prima facie it would appear that the New Zealand Government would be in breach of its new international obligation if it persisted in retaining the proposed restriction.

Furthermore, since the original decision was taken, the Prime Minister in his United Nations' speech on 25 September 1978 stressed certain points relevant to the question now before the Commission. These included:

(a) the necessity of learning to co-operate with Southern Africa;
(b) New Zealand 's commitment to the right to freedom of opinion and expression;
(c) New Zealand's concern that such rights are still denied to millions of people;

In view of the Prime Minister's speech, and the subsequent ratification by New Zealand of the Covenant on Civil and Political Rights, after the earlier decision to impose the restriction on freedom of speech on the scholar, the . . . Commission would be interested to know whether any change of policy is now being contemplated, as I assume it would be.

As a matter of courtesy, I am providing copies of this letter to your colleagues, the Minister of Foreign Affairs and the Minister of Justice.

Yours faithfully,

P J DOWNEY

Chief Human Rights Commissioner

cc Messrs B Talboys (MOF) and J McLay (Justice)

ANNEX 2

1 May 1979
Mr P J Downey
Chief Human Rights Commissioner
Office of the Human Rights Commission
P O Box 5054
Lambton Quay
Wellington

Dear Mr Downey

I am replying to your letter of 23 March 1979, reference S2/27/1 about the representations you have received from the University of Auckland Law Students Society concerning the conditions the Government had intended to place on the entry of recipients of the New Zealand University Students Association Southern Africa Scholarship.

I have recently reconsidered this matter in the light of New Zealand's ratification of the International Covenant on Civil and Political Rights and have decided that it is no longer appropriate to impose the condition that students holding such scholarships "must not participate in political activities, including making political speeches, while they are in New Zealand".

I have written to the New Zealand University Students Association and informed them of this decision.

Yours sincerely

James Bolger

Minister of Immigration

## GAMING AND LOTTERIES

# GAMBOLLING AMONG THE GAMING LAWS

*By* Neil Scott *Christchurch practitioner.*

Gaming and Lotteries Act 1977 was passed to streamline and update what was a very antiquated body of law regulating gambling in New Zealand. However, as seems inevitably to be the case, the new statute brought with it a few small enigmas of its own. One of these relates to gaming machines, and it is with this that the present article will be concerned.

A very useful innovation in the new Act is to define, in s 2 (1), the crucial term "game of chance". (An omission from the earlier legislation). Having done that it goes on, in s 3 (1), to define an "illegal game of chance". (Not altogether surprisingly, participation in such illegal games is prohibited, and constitutes an offence under s 4). By s 3 (1) (h) an "illegal game of chance" includes one "that is played by way of a gaming machine".

From this it would seem that gaming machines as such are not illegal, but become so only when used to play a "game of chance". So, what is a "gaming machine"? Once again the definitions section (s 2 (1)) comes to our rescue. It tells us that a "gaming machine" is "a machine that is constructed or adapted for use in" wait for it "a game of chance . . ." (There is a good deal more relating to the mechanics of the thing, but they do not concern us here).

So, the lynch-pin of the whole business is this phrase "game of chance", which is defined as:

> ". . . a game
>
> "(a) In respect of which direct or indirect consideration is paid to participate; and
>
> "(b) That is played with a view to winning money or money's worth; and
>
> "(c) The outcome of which depends wholly or partly on chance;
>
> but does not include an athletic game, or a sporting event, or a prize competition, or a lottery, or a New Zealand lottery, or a New Zealand prize competition."

The latter part of the definition, dealing with exclusions, can be disregarded for the purpose of this discussion. In order to see whether a particular machine is "constructed or adapted for use in a game of chance", and is therefore a "gaming machine", we must apply to it the criteria set out in the three "limbs" of the main part of the above definition.

**(a) Direct or indirect consideration**

From a legal standpoint this is possibly the easiest of the three criteria to apply. However, it could still prove difficult in some practical situations. It will usually be quite clear whether any consideration has been paid to participate. The use of the words "direct or indirect" makes it plain that it is the over-all purpose of a transaction that is to be examined, ignoring artifices aimed at circumventing the law. For instance, it would be possible to devise a scheme whereby contestants paid to enter a "game of skill" which was sufficiently easy to ensure that the great majority "won" — for instance, throwing a dart at a dart-board from a distance of one metre. The "prize" for "winning" in this game would be entry into a game of chance.

So in this situation the money paid would be consideration to participate in the "game of skill". Entry in the game of chance would be a prize, with no element of consideration involved or so it might be argued. Quite clearly, however, the new law would look beyond the formal arrangements to the reality of the situation, and find that an indirect consideration had been paid for participation in the game of chance.

This is a particularly simple example. What happens where the "game of skill" becomes increasingly genuine, in the sense of involving real difficulty or challenge? And if the right of entry comes as part of a larger, quantifiable, prize? These would be situations of much

greater ambiguity, making the "direct or indirect consideration" test much more difficult to apply.

**(b) Played with a view to winning money or money's worth**

This is where the trouble really starts. What constitutes "winning"? Well, everybody knows what "win" means. If your horse comes in first, you have won. If it finishes down the track you tear up your ticket. But what if it is a red-hot favourite and pays 95 cents for your $1 investment. Have you "won" then?

The same problem applies with gaming machines. If the machine simply refunds the money initially paid to participate, or allows another turn free of charge, does this count as "winning"?

The most recent case-law says it does not. In *McCollom v Wrightson* [1967] 3 All ER 257, Lord Parker CJ (delivering the decision of the Queens Bench Division on appeal from the County Court) stated that:

> "It seems to me that in this context, the context of gaming, 'winnings' does connote the money or money's worth that comes to a player over and above what he has staked."

There is not much doubt about that the "money back" or "free replay" machine does not qualify as a "game of chance".

But, the Act will not let us off that easily. We have seen that s 3 (1) defines illegal games of chance; but subs (2) of that section goes on to state that such games shall not be illegal if they comply with the requirements of ss 8, 9 or 10 of the Act. Sections 8 and 9 do not concern us here, being concerned with games of "spin-the-wheel" at bible class picnics and the like, but s 10 does. It states that:

> "(1) A game of chance may be played by way of an amusement device if
>
> (a) The amount payable for one opportunity to play the game does not exceed 20 cents; and
>
> (b) A successful player is neither offered nor given any benefit other than
>
> (i) The oppertunity, afforded by the automatic action of the device, to play the game once more without further payment; or
>
> (ii) The delivery, by the automatic action of the device, of a coin or coins not exceeding an aggregate value of the amount paid for the opportunity to play the game once; or
>
> (iii) Both of the benefits specified in subparagraphs (i) and (ii) of this paragraph; and
>
> (c) The opportunity to play the game is not the only or principal inducement to persons to attend the premises in which the device is situated, unless the device is situated in premises licensed as an amusement gallery under bylaws made by a local authority."

It is subparas (i) and (ii) of para (b) that are significant for the present discussion. These are, clearly, the "money back" and "free replay" ie refund situations. The player gets back no more than he put in. It appears logical to assume, therefore, that these would be illegal if s 10 (1) did not render them legal. It follows from this that the word "winning", as used in the definition of "game of chance" in s 2 (1), includes situations where no more can be gained than a refund and that *McCollom v Wrightson* is not good law in New Zealand.

To express this another way, if the game which allows only a refund is not a "game of chance", and is therefore not illegal, it does not need to be "legalised" by subparas (i) and (ii) of s 10 (1) (b). This would imply, then, that those provisions are meaningless. Our commonsense tells us that this is by no means impossible; but our legal training tells us (against all reason) that Parliament is to be presumed not to make meaningless laws. If there is a possible interpretation that will make a law effective, that interpretation should be adopted. And in the present case the interpretation which does this is that which gives the broader meaning to "winning", to cover a mere refund.

But, we are not out of trouble yet. This paper is concerned with "gaming machines", and it is this term which is defined in s 2 (1), Section 10, on the other hand, refers to "amusement devices", a term not used let alone defined in either the general definitions in s 2 (1), or in the extended definition of "illegal game of chance" in s 3.

It must be assumed that as a new term is used in s 10 it must be intended to cover a different situation. But what? It is difficult to envisage any "amusement device" to which s 10 might apply that would not also be caught by the definition of "gaming machine" in s 2.

One possible explanation is that "amusement device" is a more limited term, referring to games which are concerned mainly with providing entertainment through "petty gambling" (such as are commonly found in hamburger bars and dairies), as distinct from the more single-mindedly gambling-oriented "poker

machines" and "fruit machines". In this case all "amusement devices" would be "gaming machines", and subject to the general rules in the Act covering such machines, but would be able to take advantage of the provisions of s 10. But not all "gaming machines" would be "amusement devices", and those that were not would remain subject to the blanket prohibition, unless they could be brought within one of the other exemptions in ss 8 and 9.

This interpretation is not offered with the greatrest of confidence, but it seems the best available.

**(c) The outcome depends wholly or partly on chance**

This third limb of the definition of "game of chance" is not greatly different from the test developed under the earlier law. The basic test was set out in *Bracchi Bros v Rees* (1915) 84 LJKB 2023, where it was held that where a game has no element of skill, or only a very small element, a game of chance is being played.

Indeed, the new legislation appears more restrictive. The earlier cases suggested that, provided a "significant" degree of skill was required, the fact that the outcome was partially dependent on chance did not turn the whole transaction into a "game of chance". Under the new Act even a partial dependence on chance turns it into a "game of chance".

It remains, however, to find some definition of the terms "skill" and "chance". This was the problem confronting the Court in *Goldsboro v Mills* [1933] NZLR s 77. This case concerned what are popularly known as "fruit machines". The insertion of a coin activated three revolving discs, each bearing a variety of painted symbols. If certain combinations of symbols appeared when the discs ceased spinning the player won a prize. The machines also had three "finger stops" which purportedly enabled the player if sufficiently skilled to still the discs as desired. The presence of these "finger stops", it was argued, converted this into a game of skill.

In the course of his judgment Herdman J gave what remains a useful analysis of the distinction between a game of skill and a game of chance:

> "When one speaks of a game of skill and contrasts it with a game of chance one means that the exponent of the game is able to produce a result which is not a mere accident. The result is to some extent deliberately designed and achieved by superior skill. There is an element of certainty about it. Intimate knowledge of the machine, incessant practice, and natural aptitude may enable a man to lessen the chances against him when manipulating the fruit machine, but from the time the reels begin to revolve until the time they are all at rest chance must, in my opinion, substantially determine the ultimate result."

So, this indicates that the degree of "predictiveness" is the essential test for whether a game is or is not one of chance. The extent to which this "predictiveness" is present can vary according to circumstance. In *Dawson v Sinclair* [1926] NZLR 724 (a case cited approvingly in *Goldsboro v Mills*) it was found that the character of the participants and the conditions under which they played may lead to the conclusion that "skill and dexterity could not predominate over chance".

An illustration of this is to be found in *Police v Brighouse and Gordon* (1950) 7 MCD 24, a case concerning the placement of "slot machines" in a milk-bar. The Magistrate found as a matter of fact that the location of the machines meant that that they were played by a highly transient "clientele", consisting mainly of children in the 7 to 12 age-group. Thus, even if a substantial "skill" element was present in the game, the predominant participants were unable to attain and exercise the necessary skill. In the circumstances, therefore, this must be a game of chance. These general observations regarding the relationship between "skill" and "chance" appear to apply with undiminished force to the new law, due allowance being made for the stricter test now imposed. "Skill" and "chance" cannot be absolute qualities, so there will no doubt remain some scope for arguing that, in the particular circumstances, the outcome of the game does not depend "wholly or partially on chance". But equally doubtless, it will be even more difficult than before to argue this successfully.

**Conclusion**

The new gaming laws have certainly improved things in a number of ways, not least by giving us a few useful starting definitions. However, they have also introduced some new uncertainties at least so far as gaming machines are concerned. The crucial definition is that of "game of chance" and, as has been demonstrated here, it is by no means easy to apply, particularly the second limb pertaining to "winning".

All in all, then, we can probably still say that the new law regulating gaming machines is well a bit of a lottery.

STATUTES

# CURRENT APPROACHES TO STATUTORY INTERPRETATION

*By* JG FIOCCO *LLB (W Aust), LLM (Virg), Lecturer in Law, Department of Management, the University of Western Australia, and* AN KHAN *MA (Pesh & Keele), LLB (Kar), Dip Ed (Reading) FIL, AFAIM, Lecturer in Labour Law, the University of Leeds.*

The principles relating to statutory interpretation have long been a source of confusion in countries which inherited the English common law. The problems involved in the process of determining the meaning of a particular piece of legislation have occupied the attention of eminent legal scholars and practitioners throughout the British Commonwealth. Nevertheless, as Sir Carleton Allen once commented "it cannot be pretended that the principles of statutory interpretation form the most stable, consistent, or logically satisfying part of our jurisprudence"*(a)*. While certainly some of the principles are based upon old and established authority *(b)*, others may correctly be said to be in a state of flux *(c)*. This article examines, in the light of some recent New Zealand, British and Australian decisions, the current state of one aspect of these principles; namely, the use of certain materials extrinsic to a piece of legislation as an aid to interpretation *(d)*. In particular, we shall discuss the use of Parliamentary debates, Royal Commission or Select Committee reports and finally deal with the more general problem of determining Parliamentary intention.

## Parliamentary debates

There have been strong arguments presented supporting the use of Parliamentary debates to determine not only the mischief with which a piece of legislation was intended to deal but also as an aid to construction *(e)*. Indeed, a cogent argument has been made that the principle excluding Parliamentary debates as evidence of statutory meaning found acceptance in the common law less than a century ago *(f)*. Nevertheless, the weight of judicial opinion in New Zealand, Australia and England is clearly against the admission of Parliamentary debates for interpretative purposes. This principle was unequivocally reaffirmed in a recent House of Lords decision: *Davis v Johnson (g)*. The respondent had requested an injunction against the appellant under s 1(1) (a) (b) and (c) of the Domestic Violence and Matrimonial Proceedings Act 1976 to restrain him from molesting her or her child and to exclude the appellant from the council house he held as a joint-tenant with the respondent. In the process of construing the subsections of the Act their Lordships were unanimous in concurring with Lord Salmon's comment "that it has always been a well-established and salutary rule that *Hansard* can never be referred to by counsel in court and therefore can never be relied on by the Court in construing a statute or for any other purpose "*(h)*. Their Lordships also confirmed the traditional reasons for this exclusion *(i)*. Viscount Dilhorne stated:

> "What is said by a Minister or by a member sponsoring a Bill is not a legitimate aid to

(a) *Law in the Making*,(1964) at p 526.

(b) Eg The so-called "Mischief Rule" which found its earliest expression in the classic statement of the Barons of the Court of Exchequer in *Heydon's* case, (1584) 3 Co Rep 7a.

(c) For a similar comment, see W Twining, and D Miers, *How to do things with rules*, (Law in Context Series) Weidenfeld and Nicolson, London, 1976, at p 197 et seq. See also, comments of Zelling J in *South Australian Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Pty Ltd* (1975) 12 SASR 214 at 233.

(d) For a recent exposition of some of these principles in Australia, See DC Pearce, *Statutory Interpretation in Australia*, (1974) Chapter 4.

(e) Ibid, pp 143-147. See also English Law Commission Report No 21, the Interpretation of Statutes, 1969, paragaphes 46-52. JB Elkind, "The House of Lords - A new departure in Statutory Interpretation?" (1975) NZLJ 234-238, cf comments made in Report of the Renton Committee, The Preparation of Legislation (1975 Cmnd. 6053) paragraphs 10.7, 19.20, 19.23. See also Cross, *Precedents in English Law* (1977).

(f) P Brazil; "The Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular" (1964) 4 UQLJ 11.

(g) [1978] 2 WLR 533.

(h) Ibid, at 578.

> the intrepretation of an Act . . . If it was permissible to refer to *Hansard*, in every case concerning the construction of a statute counsel might regard it as necessary to search through the *Hansards* of all the proceedings in each House to see if in the course of them anything relevant to the construction had been said *(j)*."

Lord Scarman in a similar vein explained:

> "Such material is an unreliable guide to the meaning of what is enacted. It promotes confusion, not clarity . . . Secondly counsel are not permitted to refer to *Hansard* in argument. So long as this rule is maintained by Parliament (it is not the creation of the judges), it must be wrong for the judge to make any judicial use of proceedings in Parliament for the purposes of interpreting statutes *(k)*."

It must be conceded these statements present formidable obstacles to any argument advocating the use of Parliamentary debates as an aid to interpretation. However, despite Lord Salmon's very wide phrase "for any other purpose", authority may be found to support the use of debates for more limited purposes, including the determination of the so-called "mischief". Moreover, the authority is to be found in statements of the House of Lords. In *Knuller Ltd v DPP (l)* Lord Reid was prepared to consult the House of Commons debates ". . . because it shows the danger of drawing conclusions from Parliament refraining from legislating." Some years later, limited use of *Hansard* was endorsed by Lord Simon of Glaisdale in *Dockers' Labour Club v Race Relations Board (m)*, when he stated:

> "[i]t would be one thing to cite debates in Parliament to help to ascertain the general objective of an Act and the general limitations on such objective - this would be using the debates to identify the 'mischief' which the Act seeks to remedy . . . courts nowadays frequently have recourse for such a purpose to parliamentary papers such as reports of royal commissions, departmental or interdepartmental committees or the the law commissions. It would be quite another thing to have recourse to reports of debates to see whether any understanding was expressed as to the meaning of the statutory language as related to particular situations not statutorily identified. It might be yet a third thing if any such understanding so expressed contradicted the meaning of the statutory language."

In Australia, a very early decision of the High Court of Australia supported certain aspects of Lord Simon's statements. Griffith CJ in *Municipal Council of Sydney v The Commonwealth (n)* approved the use of Parliamentary debates "for the purpose of seeing what was the subject-matter of discussion, what was the evil to be remedied and so forth." Furthermore, a recent decision of the New Zealand Licensing Control Commission, after reviewing some of the authorities mentioned, accepted the view that parliamentary debates could be consulted to determine the mischief intended to be remedied but not ". . . for the purpose of interpreting any statute *(o)*. Therefore" although *Davis v Johnson (g)* affirms the inveterate principle that Parliamentary debates cannot be referred to as an aid to interpretation, there seems to be authority which supports their use in other important contexts. Still, these uses have not been widely accepted and as one scholar has opined ". . . the practice . . . more likely to be followed will be to decline to look at . . . debates for any purpose "*(p)*.

**Royal Commissions' Reports**

The use of Royal Commission and Select Committee reports "to ascertain the mischief against which an Act is directed" has been approved by Courts throughout the Commonwealth *(q)*. The question which has not been clarified is the extent to which reports and other travaux preparatoires can be used as an aid to the interpretation of statutes. This problem was recently considered by the House of Lords in *Black-Clawson International v Papierwerke Waldhof - Aschaffenburg Ag (r)*. Their Lordships were concerned with, inter alia, the interpretation of the Foreign Judgments (Reciprocal Enforcement) Act 1933 as it affected the appellant's claim against the res-

(i) For a full discussion of these reasons refer to the material cited supra, note 5. See also Khan, "Better Law for Battered Wives" (1978) 122 Sol Jo 319, 409.

(j) Ibid, at 570.

(k) Ibid, at 502.

(l) [1972] 2 All ER 898.

(m) [1974] 3 All ER 592 at 601.

(n) (1904) 1 CLR 208 at 213-214. There are a number of other decisions cited by Pearce, supra note (d), as occasions where Judges have referred to parliamentary debates.

(o) *Re An Application By Winton Holdings Ltd* (1978) 1 NZAR, 363 at 366.

(p) Pearce, supra, at 47.

(q) Ibid, 48, eg: *Totalisator Agency Board v Wagner and Cayler* [1963] WAR 180; *Harding v Coburn* [1976] 2 NZLR 577.

(r) [1975] 1 All ER 810; [1975] AC 591.

pondent on two dishonoured bills of exchange. The Act had been passed by the British Parliament after considering a committee report on the enforcement of foreign judgments in the Courts of the United Kingdom. In the case before their Lordships there was an ambiguity concerning the correct interpretation of the Act. Could the committee report be consulted in these circumstances? Their Lordships were unanimous in their willingness to consult the report for determining the mischief that the Act intended to remedy but were almost equally divided on the issue of the use of the report to ascertain the nature and meaning of the remedy. Lords Reid and Wilberforce both rejected the use of either the Committee Report or the Draft Bill which ensued as an aid to construction. As Lord Wilberforce stated:

> "[i]t is sound enough to ascertain, .. . the objectives of any particular measure and the background of the enactment; but to take the opinion, whether of a Minister or an official or a committee, as to the intended meaning in particular applications of a clause or a phrase, would be a stunting of the law and not a healthy development" *(s)*.

However Viscount Dilhorne, Lords Diplock and Simon all saw a more significant use for the Committee's report. Viscount Dilhorne stated:

> "[w]hile I respectfully agree that recommendations of a committee may not help much when there is a possibility that Parliament may have decided to do something different, where there is no such possibility, as where the draft bill has been enacted without alteration, in my opinion it can safely be assumed that it was Parliament's intention to do what the committee recommended and to achieve the object the committee had in mind. Then, in my view the recommendations of the committee and their observations on their draft bill may form a valuable aid to construction which the courts should not be inhibited from taking into account" *(t)*.

Lord Diplock added:

> "[w]here . . . statements are made in official reports commissioned by government, laid before Parliament and published, they .. . may be used to resolve . . . ambiguity in favour of a meaning which will result in correcting . . . deficiencies in preference to some alternative meaning that will leave the deficiences uncorrected. The justification of this use of such reports as an aid to the construction of the words used in the statute is that the knowledge of their contents may be taken to be shared by those whose conduct the statue regulates and would influence their understanding of the meaning of ambiguous enacting words" *(u)*.

The strongest support was found in the language of Lord Simon, who had already foreshadowed his position in an earlier decision of the House of Lords *(v)*. He stated:

> "A public report to Parliament is an important part of the matrix of a statute founded on it. Where Parliament is legislating in the light of a public report I can see no reason why a court of construction should deny itself any part of that light and insist on groping for a meaning in darkness or half-light. I conclude therefore that such a report should be available to the court of construction, so that the latter can put itself in the shoes of the draftsman and place itself on the parliamentary benches -in much the same way as a court of construction puts itself (as the saying goes) in the armchair of a testator. The object is the same in each case, namely, to ascertain the meaning of the words used, that meaning only being ascertainable if the court is in possession of the knowledge possessed by the promulgator of the instrument" *(w)*.

It is clear from these statements that there is a growing judicial support in the House of Lords for a wider use of committee reports in the interpretation of legislation.It may be argued this is a consequence of the influence of the courts and agencies of the European Economic Community upon traditional approaches to the interpretation of legislation in the United Kingdom *(x)*.Certainly, European Courts make liberal use of travaux preporatoires *(y)*. If this is so, it may not be a development considered appropriate either in Australia or New Zealand. A recent decision of the Queensland Supreme Court *(z)*,refused to use a law Commission Report as an aid to con-

(s) Ibid, p 828.

(t) Ibid, p 823.

(u) Ibid, p 836.

(v) See, supra, note (m)

(w) *Black-Clawson* decision, supra, note (r) p 843.

(x) See, Lord Scarman's comments in *Davis v Johnson*, supra, note (g) at 582; see also, comments of Zelling J *South Australian Commissioner For Prices and Consumer Affairs v Charles Moore (Aust) Pty Ltd* supra, note (c).

(y) See, English Law Commission Report No 21, supra, note (e).

(z) *Wacal Development Pty Ltd v Realty Development Pty Ltd* [1978] Qd R 202. This approach is also evidenced in some of the statements of the High Court of Australia in

struction, while recognising that on the basis of the decision of *Black-Clawson v Papierwieke AG (r)* there was in fact authority for doing so. The Judges were only prepared to go as far as endorsing the House of Lords decision as "strong authority" for using a Law Reform Commission report "with regard to determining the mischief at which the Act was aimed . . ." *(aa)*. Similarly, the New Zealand Supreme Court in *Harding in Coburn (q)* affirmed the *Black-Clawson (r)* decision on the basis that if

> "[t]here is ambiguity in . . . [an] Act, . . . [a report] . . . may be looked at for the purpose at least of determining the mischief which the Act was intended to remedy" *(ab)*.

Whether a committee of Law Reform Commission report could be used as an aid to construction was left open. However the decision of the New Zealand Licensing Control Commission already cited *(o)* was clearly of the opinion that a Report of a Royal Commission could only be used to determine the "mischief" and not "in a matter of Statutory interpretation . . . " *(ac)*.

Consequently, although there has been some clarification of the principles relating to the use of travaux preparatoires in the United kingdom it seems the Courts in Australia and New Zealand, are at least at the present time, reluctant to follow the lead offered by the House of Lords.

**Parliamentary intention**

The traditional task of Courts interpreting legislation has been, in general terms, the determination of Parliamentary intention *(ad)*. In the performance of this task, the Courts have developed a variety of approaches to statutory interpretation which have become so well established as to be referred to as "rules". Although the rules themselves have been critised on numerous occasions, they have survived centuries of scrutiny and are an itegral part of our law. One of these approaches the so-called "literal rule" has undergone a re-examination in two recent English cases, one in the Court of Appeal *(ae)* and the other in the House of Lords *(af)*.

A clear statement of the literal rule was provided by Higgins J in the celebrated *Engineers'* case:

> "[t]he fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient, impolitic or improbable "*(ag)*.

The rule presupposes the language of a particular piece of Legislation is unambiguous and it has been applied with unyielding strictness. Lord Bramwell in *Hill v East and West India Dock (ah)* stated:

> "I think it is infinitely better, although an absurdity or an injustice or other objectionable result may be evolved as the consequence of construction, to adhere to the words of an Act of Parliament and leave the legislative to set it right than to alter those words according to one's notion of an absurdity."

It was this uncompromising approach which prevailed in a judgment of Brown J in the British Employment Appeal Tribunal. His honour refused to add any words to para 10 of the First Schedule of the Trade Union and Labour Relations Act 1974 even though he recognised not to do so would provide a ". .. glaring . . . example of discrimination . .. and . . . a startling anomaly." He continued:

> "Clearly someone has a duty to do something about this absurd and unjust situation. It may well be, however, that there is nothing we can do about it. We are bound to apply provisions of an Act of Parliament however absurd, out of date and unfair they may appear to be. The duty of making or altering the law is the function of Parliament and is not, as many mistaken persons seem to imagine, the privilege of the judges or the judicial tribunals . . ." *(ai)*.

When the decision was considered by Lord Denning MR in the Court of Appeal, it was this

*South Australian Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Pty Ltd* (1977) 14 ALR 485.

(aa) *Wacal Development* decision, ibid, 205.

(ab) *Harding v Coburn*, supra, note (q) 581.

(ac) Supra, note (o), 266.

(ad) See, eg Coke 4 Inst 330.

(ae) *Nothman v Barnet London Borough Council* [1978] 1 All ER 1243.

(af) *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948. See Khan "Unprecedented Judicial Precedents" (1978) 122 Sol Jo 702, 721.

(ag) *Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161.

(ah) (1884) 9 App Cas 488 at pp 464-5.

(ai) *Nothman v Barnet London Borough Council* [1978] 1 WLR 220 at p 222.

passage that he expressly chose to repudiate without qualification. He had no hesitation adding a phrase to give a reasonable and just meaning to the provision.His reasons were a clear condemnation of literal approach to the interpretation of statutes. He stated:

> "Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach'. He said so in *Kammins Ballrooms Co Ltd v Zenith Investment (Torquay) Ltd* [1971] AC 850, 899; and it was recommended by Sir David Renton and his colleagues in their valuable report on the Preparation of Legislation (1975) Cmnd 6053 pp 135-148 . . . . Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it - by reading words in, if necessary - so as to do what Parliament would have done, had they had the situation in mind" *(aj)*.

Although the House of Lords has not endorsed this approach in such sweeping language, it nevertheless recognises the need to mitigate the rigour of the literal approach. In *Stock v Frank Jones (Tipton) Ltd (af)* their Lordships refused to add any words to para 8 of the First Schedule of the Trade Union and Labour Relations Act, 1974 because they were satisfied the words of the provision could be read in their ordinary sense and no question arose of them being interpretated in a restricted or tortured sense. Nevertheless, their Lordships accepted that in special circumstances it may be necessary to depart from the plain words of a statute if the Court were satisfied that:

> "(1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such legislative objective; (4) the language of the statute is susceptible of the modification required to obviate the anomaly" *(ak)*.

Lord Scarman added,

> "If . . . it can be demonstrated that the anomalies are such that they produce an absurdity which Parliament could not have intended, or destroy the remedy established by Parliament to deal with the mischief which the Act is designed to combat . . . then the words can be given a meaning other than their plain meaning" *(al)*.

**Conclusion**

The principles relating to statutory interpretation remain a confused part of our law but there are encouraging developments in the House of Lords which indicate a fresh approach to the problems. We can only hope that Courts in Australia and New Zealand will look more closely at these developments and adopt similar approaches to their future questions of statutory construction.

A lot of time, money and effort are spent these days on commissioning reports. Why waste all this when it comes to establish what the report had recommended and whether the recommendations had been followed in an Act of Parliament? It is submitted that the time has now come when statements made in official reports commissioned by Government and laid before Parliament should be used to resolve an ambiguity. Lord Diplock in the *Black-Clawson* case *(r)* found justification for doing so in the fact that the knowledge of the report's contents could be taken to be shared by those whose conduct the Act, that was passed as a consequence of the report, regulated and would influence their understanding of the meaning of ambiguous words in the enactment. This approach seems to the present authors as sound and worth imitating. Why should the Courts grope in the darkness when material to throw light on the intended removal of mischief is available? Lord Simon of Glaisdale in the *Black-Clawson* case *(r)* could not agree with the statement in *Halsbury's Laws (am)* where it was stated that reference cannot be made to a Royal Commission Report.

The exclusion of parliamentary debates as an aid to statutory construction is based upon reasonable ground as expounded in many cases and summarised in *Davis v Johnson (g)*. However, its rigid application, irrespective of extenuating circumstances, can lead to absurd results. But probably certainty in this respect is better than ambiguity. Nevertheless a bold move by a superior Court, on the lines of Lord Denning MR, one day might remove the ambiguity. As things stand, however, the Judges

(aj) *Nothman v Barnet London Borough Council* supra, note (ae) at p 1246.

(ak) Supra, note (af), per Lord Simon of Glaisdale, at p 954.

(al) Ibid, p 955.

(am) 3rd ed Vol 36, p 411, para 622.

can sometimes find themselves in a strait-jacket, like the Employment Appeal Tribunal in the *Nothman* case *(ai)* where the Tribunal was not very happy with the outcome of their interpretation but had to do so because it was:

> "bound to apply provisions of an Act of Parliament however absurd, out of date and unfair they may appear to be . . ."

But Lord Denning MR's clarification on appeal is far more acceptable when he said:

> ". . . it is the voice of those who adopt the strict, literal and grammatical construction of the words, needless of the consequences."

It is submitted that consequences are more important than the literal application of a statute, when other means may be available to remove the absurdity.

# LEGAL LITERATURE

**Natural Justice**, G.A. Flick, Butterworths 1979. $19.50 xx, 175 including bibliography and index.

This book is based on the thesis submitted by the author for the degree of Ph D at the University of Cambridge. Four of the seven chapters had previously appeared in law reviews.

The first chapter deals briefly with administrative decision-making, including the methods of presentation of the case of each party. It is a useful introduction to the problems. Other chapters are devoted to notice, opportunity to controvert adverse testimony, judicial and official notice, reasons for decisions, impartiality and bias, all of which are or ordinarily embraced by the concept of natural justice. The final chapter discusses the role of lawyers as counsel and as members of tribunals. It reminds us of the limitations of a legal training. The author deals with the well-known authorities but concentrates on the modern ones and gives citations to the principal text books and periodical articles. The bibliography will also be found valuable by the student and young practitioner.

The author has not confined himself to Commonwealth authorities. The statistics that follow show how influential the Courts of jurisdictions outside the United Kingdom have been in the development of the common law. He cites about 230 English, Scottish and privy Council decisions, 80 from Australia, 20 from New Zealand, 60 from Canada and surprisingly 310 from the United States. In many areas, especially in relation to evidence and reasons for decisions, the United States Judges have lessons for others to learn.

Because the author is concerned with the content of natural justice, he is not distracted by the current controversies about fairness, the distinction between void and voidable or the scope of review. Within the limits he has set himself he has produced a book which concentrates on the directions taken by the recent cases and points the way for future development of the principles of natural justice. It will be found to be a welcome addition to the literature on that subject.

J F N

**Is English law capable of further growth within the limits of the common law?** – "The answer lies with the legal profession. If, as a profession, we respond to the needs of society and show by our practice and thinking that we have a socially relevant and helpful contribution to make to the management and regulation of our society as it prepares to enter the twenty-first century, we shall be wanted, and respected. Can we do it? First, the judges: they have behind them 800 years of the common law's independent existence during which they alone have been able to declare what is the common law. Society wishes to lose neither their independence nor their self-confidence. Society, if I read its movement aright, asks only that they transfer their traditional skills, spirit and attitudes from declaring a law, the basis and nature of which no longer suffices to meet society's need, to interpreting, and guarding against the abuse of power, a modern, statute-based, and more activist law. Society asks of the judge no more than that they be true to the ideals of Coke and Cromwell." (from *English Law – The New Dimension,* Sir Leslie Scarman (with thanks to Obiter Dicta)).

**PROBATE AND ADMINISTRATION**

# SIGNIFICANT DEVELOPMENTS IN THE LAW OF WILLS AND SUCCESSION

*By* Andrew Alston*

My subject is "significant developments in the law of wills and succession". I propose to talk about three such developments: first, recent cases on wills made in contemplation of marriage; secondly, the Wills Amendment Act 1977; and thirdly, the Status of Children Amendment Act 1978.

However, at the outset, I wish to mention two significant non-developments.

The first non-development is the English Wills Act 1837 which, subject to a few local amending Acts, is the basis of the law of wills in New Zealand. After nearly 150 years, it is time we had our own Wills Act — an Act containing all the relevant provisions — drafted in modern statutory language — and incorporating changes to all those messy rules with which we now cope.

The second non-development is perhaps a problem about which we can do very little. It is the problem of do it yourself testators whose sorry story is told again and again in our law reports.

Do it yourself testators have always been a problem because, full of ignorance, they embark on a task where ignorance is heavily penalised. Inevitably, they fall foul of one or another of the many technical rules — rules which prescribe a particular form of execution or which give meanings to words that do not correspond with a layman's understanding of them.

Of course, while do it yourself testators have been responsible for much misfortune, their wills have sometimes been the source of highly original draftsmanship. An example can be seen in the will of the actor who died in London in 1948. He requested that his body be cremated and that ten percent of the ashes be thrown in his agent's face.

In a similar vein is the will of a New South Wales woman which contained the following provision:

> "I also direct that my executors pay to my husband ten shillings on the morning of my funeral and that the funeral cortege shall halt outside any hotel to be selected by my executors en route to the cemetery while my husband expends the said ten shillings buying drinks for his companions — leaving me for dead outside just as he did so often during my lifetime."

## Wills made in contemplation of marriage *(a)*

Section 18 of the Wills Act provides "that every will made by a man or woman shall be revoked by his or her marriage." This is subject to s 13 of the New Zealand Wills Amendment Act 1955 which provides that "a will expressed to be made in contemplation of a marriage shall not be revoked by the solemnisation of the marriage contemplated." Similar provisions exist in other Commonwealth jurisdictions.

The question that has been left to the Courts to answer is: "What constitutes an expression that a will is made in contemplation of a marriage?" To this question, the Courts have provided at least three distinct answers.

First, there is a line of New Zealand cases beginning with *Burton v McGregor (b)* in 1953 which suggest that the necessary expression is only constituted by a clear statement in the will that it is made in contemplation of marriage to a named person.

Secondly, there are two English cases — *Re Knight (c)* and *Re Langston (d)* — which suggest that it is sufficient if there is a reference in the will to the intended spouse which indicates that the marriage is contemplated — for example, a gift to "my fiancee" or "my future wife". Here, the words "my fiancee" and "my future wife" are taken as a reference to a future status — the fiancee of today is the spouse of tomorrow. Thus the will is said to have been expressed to have been made in contemplation of marriage.

* Lecturer in Law, University of Canterbury. This is the text of an address given in July 1979 to members of the Canterbury District Law Society.

(a) A more complete discussion of this topic is published in (1978) 4 Otago Law Review 132.

(b) [1953] NZLR 476.

(c) [1944], not reported but mentioned in *Re Langston* [1953] P 100

(d) [1953] P 100.

In *Burton v McGregor*, Adams J. regarded the reference to the testator's fiancee as a description of an existing status in the same way that one would regard a reference to "my mother" or "my friend". In his view, words like "my fiancee" could not by themselves be taken as an expression that the will was made in contemplation of marriage and since it is *the will* that has to be expressed to have been made in contemplation of marriage, extrinsic evidence can not be admitted to show that the words were intended to constitute the necessary expression.

Both approaches first found their way into the law reports in 1953. Six weeks separated the decisions in *Burton v McGregor* and *Re Langston* which were decided in ignorance of each other. Academic response tended to favour *Re Langston*. *Garrow and Willis*, for example, stated the decision in terms of an incontravertible proposition of law and submitted, without discussion, that *Burton v McGregor* was wrongly decided *(e)*.

Nevertheless, *Burton v McGregor* was followed in 1973 by Mahon J in *Public Trustee v Crawley(f)* — another case where the testator gave all his property to a person described as "my fiancee". His Honour held that although the testator may have expressed a contemplation of marriage he had not expressed that his will was made in contemplation of marriage.

Again, in the most recent New Zealand case on this matter — *Re Whale (g)* which was decided by Wild CJ in 1977 — *Burton v McGregor* was expressly followed and applied.

So far we have two clear but inconsistent approaches to the problem of what constitutes an expression that a will is made in contemplation of marriage. The third approach came in 1975 with the decision of Megarry J in *Re Coleman (h)*.

Here the testator made dispositions "unto my fiancee Mrs Muriel Jeffrey." He left the residue of his estate to his brother and sister. Soon after, he married Muriel Jeffrey, and then, without making a new will, he died.

Perhaps, this was an unusual situation in that the wife had more to gain from a decision that the will had been revoked by the marriage. However, it happened again in *Re Whale* where, on the one side, the wife of the deceased argued that the will was not expressed to have been made in contemplation of marriage and, on the other side, her mother-in-law argued that it was so expressed.

In *Re Coleman*, Megarry J held that the will was not expressed to have been made in contemplation of marriage and that therefore it had been revoked by the marriage. In his view, the question to ask is "Was the will *as a whole* expressed to be made in contemplation of the particular marriage that has been celebrated?" As he said *(i)*:

> "In my judgement 'a will' means the whole will, and not merely parts of it, even if they are substantial; and the will that is 'made' is of necessity the whole will. It may indeed be that merely trivial parts can be ignored, so that 'a will' can be read as being 'the whole of a will or substantially the whole of a will' but I cannot regard 'any substantial part of a will' as being 'a will'. In my view, the question to ask is 'Was the will as a whole expressed to be made in contemplation of the particular marriage that has been celebrated?"

Megarry J held that the provisions in the will in favour of the brother and sister comprised a part of the will which was not expressed to have been made in contemplation of marriage. Thus, the necessary expression was absent in respect of the whole of the will.

So now we have three approaches. The first — the strict New Zealand approach — virtually demands that there be an express statement in the will that it is made in contemplation of marriage to a named person. Whether it will continue to hold sway in New Zealand or whether it will be diluted by an infusion of *Re Coleman* remains to be seen.

The second approach, which is represented by *Re Langston*, is, I think, now out of favour. It was rejected in New Zealand by Mahon J in *Public Trustee v Crawley* and in England by Megarry J in *Re Coleman*.

The third approach, that of Megarry J has not to my knowledge been applied in any case since *Re Coleman*. In fact the only case since then that I know of is *Re Whale* which unfortunately did not refer to *Re Coleman*.

Before leaving this area, two other situations should be mentioned. First, there are a number of cases where testators declare their wills to have been made in contemplation of marriage but they don't say to whom *(j)*. Invariably, these wills have been held not to be

(e) Garrow and Willis's *Law of Wills and Administration* 4th edition (Wellington 1971) at p 89.
(f) [1973] 1 NZLR 695.
(g) [1977] 2 NZLR 1.
(h) [1976] Ch 1, 1.
(i) [1976] Ch 1, 9.
(j) *Sallis v Jones* [1936] P 43; *Re Hamilton* [1941] VLR 60.

saved from revocation. Section 13 of the Wills Amendment Act 1955 refers to a will made in contemplation, not of marriage but of "*a* marriage". This reference to a specific marriage is reinforced by the concluding words of the section: "the solemnisation of the marriage contemplated."

The second situation is where the testator's will is expressed to be made in contemplation of a marriage but the testator dies before the marriage takes place. Does the will still take effect or is it conditional on the marriage being solemnised?The correct view seems to be that it takes effect *(k)*. Section 13 does not contain a basis for revocation — only for continuance. Thus any provision inserted in a will pursuant to s 13 has the effect only of enabling the will to continue after marriage. By way of comparison, it is worth noting that in Western Australia s 14(2) of the Wills Act 1970 provides:

> "A will expressed to be made in contemplation of marriage of the testator is void if the marriage is not solemnised, unless the will provides to the contrary."

**The Wills Amendment Act 1977**

The Wills Amendment Act 1977 came into force on 1 July 1978. This Act effected two main changes to the law — first, in respect of witnesses who are also beneficiaries and secondly, in respect of the effect of divorce on wills.

The first change affects the rule that a witness and the spouse of a witness cannot benefit under the will. This rule which is embodied in s 15 of the Wills Act 1837, has been modified by s 3 of the Amendment Act. Subs (1) provides:

> "For the purposes of section 15 (of the Wills Act 1837) . . . the attestation of a will by a person to whom or to whose spouse there is given or made any such disposition as is described in that section shall be disregarded if the will is duly executed without his attestation and without that of any other such person."

Sub-section (2) provides:

> "This section applies to the will of any person dying after the commencement of this Act, whether the will was executed before or after the commencement of this Act."

Similar provisions exist in other Commonwealth jurisdictions. They were prompted by the 1968 case of *In the Estate of Bravda (l)* where a testator had his will signed by two independent witnesses and then asked his two daughters to sign so as "to make it stronger." The Court of Appeal held that the gifts in the will to the daughters were void.

Another such case is related by Sir Robert Megarry in his "A Second Miscellany-at-Law" *(m)*:

> "Maurice Healy recounts the story of a well to do Irishman who made his money in America and returned to Ireland to die. He had quarrelled with his own people, and lived with a small farmer and his wife who cared for him well. The wife's one thought was to get his money; she feared that a solicitor would persuade him to make a will leaving all his money to his family. When he lay on his deathbed, the priest, finding that he had made no will, turned the wife out of the room, and helped the dying man to make his will; a servant girl was called in as the second witness. As soon as he had gone, the wife searched everywhere for the will. At last she found it; everything was left to her, her husband and the survivor of them. There it stood, witnessed by the priest and the girl; but she felt unsafe. She took pen and ink and wrote in her own name as a third witness; and thereby signed away the inheritance of herself and her husband to the relatives the testator had declined to benefit" *(n)*.

The situation that arose in this case and *In the Estate of Bravda* seems to me to be most unusual. How many wills are witnessed by a beneficiary or beneficiaries and two other persons who are not beneficiaries? Presumably, the purpose of the amendment is to soften the harshness of the rule imposed by s 15 of the 1837 Act — a rule which itself serves little useful purpose *(o)*. But, in my view, the amendment does not go far enough. It ignores all the other cases where beneficiaries witness wills.

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(k) *Re Natusch, Pettit v Natusch* [1963] NZLR 273; *Ormiston's Executors v Laws* [1966] SC 47.

(l) [1968] 2 All ER 217.

(m) R E Megarry, *A Second Miscellany at Law* (London 1973) pp 298-299.

(n) M Healy *The Old Munster Circuit* (1939) pp 182, 183.

(o) Its original purpose derives from the Statute of Frauds which provided that a devise of land was required to be attested by "credible" witnesses. Persons having a beneficial interest under a will were held not to be "credible" and accordingly, a will of freehold estate attested by such persons was wholly invalid. This was changed in 1752 by the Statute 25 Geo 2, c 6 which provided that beneficial devises, legacies etc to attesting witnesses were void so far only as concerned such attesting witnesses, or any person claiming under them. This principle was adopted by section 15 of the Wills Act 1837.

What it should have done is not modify s 15 but abolish it. Perhaps this is a debatable point. But I really think that s 15 is a superfluous provision. Its present purpose is to safeguard testators from undue influence and fraud. However, if a villain wishes to exercise undue influence of fraud, he is not likely to be deterred by s 15. Independent witnesses are easily found. The only independent witnesses who might act as a safeguard are those selected by persons who are not going to exercise undue influence or fraud.

I suspect that s 3 of the Wills Amendment Act will be of little importance in practice. In contrast, I think that the other area of reform contained in the Act will be of substantial importance. It introduces a new way in which a will can be revoked.

Before the Amendment Act came into effect, there were four ways in which a will could be revoked:

(1) Under s 20 of the 1837 Act, by another will or codicil;
(2) under s 20, by some writing declaring an intention to revoke the will and executed in the manner required for the execution of a will;
(3) under s 20, by the destruction of the will with the intention of revoking it;
(4) under s 13, by the subsequent marriage of the testator.

Now, by s 2 of the Wills Amendment Act 1977 there is another way by which a will can be either partly or wholly revoked — by the subsequent termination of the testator's marriage.

The essence of s 2 is as follows —

First, to come within the provision, the testator must at his death be a person whose divorce or dissolution or nullity of marriage is recognised by the New Zealand Courts, and, of course, he must have made his will before that event.

Secondly, the will is not necessarily wholly invalidated by the termination of marriage. It is only invalidated in so far as it affects the former partner or the personal representative of the former partner of the marriage. This applies not only to any beneficial disposition but also to any appointment as executor or trustee.

Thirdly, in certain circumstances, provisions in favour of the former partner will not be invalidated. Thus, legal obligations incurred in the testator's lifetime will be enforced — for example, a promise under the Law Reform (Testamentary Promises) Act 1949.

Also, a provision will take effect if it is expressed in the will to take effect notwithstanding the section or in contemplation of marriage but it seems strange to me that a will can be made in contemplation of divorce.

The other circumstance where the provisions of a will will not be invalidated is where after the termination of marriage, the testator makes a codicil expressly showing an intention that the provisions of his will shall have effect.

The fourth aspect of s 2 is comprised in subs 4(a) which provides that for the purpose of the section:

> "Where a will or any part thereof is by any codicil confirmed or ratified or in any manner revived, it shall be deemed to have been made at the times when it was first made, and not of the time it was confirmed or ratified or revived:"

This reverses the usual rule that a will as a whole is taken to have been made at the time of its codicil.

The result of subs 4(a) is that, unless the codicil expressly shows an intention that the provisions affecting the former partner in marriage are to take effect, the will and codicil will be treated as having been made before the termination of marriage and the provisions will be invalidated.

So as to make it quite clear that the reversed rule only applies to codicils for the purpose of the section, subs 4(b) provides that where a will or any part of it is re-executed, it shall be deemed to be made at the time when it was re-executed and not at the time when it was first made.

Finally, subs 5 provides that s 2 applies to every will where its maker dies after the commencement of the Act.

**The Status of Children Amendment Act 1978**

The Status of Children Amendment Act 1978 came into force on 1 October 1978 and in two areas makes considerable amendments to the Status of Children Act 1969. First, it imposes duties on executors, administrators and trustees to make inquiries as to the existence of ex-nuptial children who may have an interest in property by virtue of the Act. Secondly, it amends the rules in respect of the recognition of paternity. I propose to be selective and to deal only with the first area of amendment.

In 1969, the Statutes of Children Act abolished the legal distinction between children born within and out of wedlock. As a result, ex nuptial children now have the same rights in respect of a deceased person's estate as other children.

But, although these rights were given to ex nuptial children, the Act, in effect, provided that only some of them could benefit. Section 6

provided that executors, administrators and trustees were under no obligation to make inquiries about any ex nuptial children who might have a claim on an estate. And, of course, as many such children are not publicly acknowledged by their parents, they were in danger of missing out on receiving the benefits to which they were entitled.

This deficiency has now been rectified by the 1978 Amendment Act. This Act repeals the old s 6 and substitutes new sections — ss 5A, 6, 6A, 6C and 6D. The first four sections impose a duty on executors, administrators and trustees to make "reasonable inquiries" as to the existence of ex nuptial children who may have an interest in any estate. Sections 6C and 6D are machinery provisions and need not concern us.

There are two situations in which reasonable inquiries must be made. First, by s 5A an applicant for a grant of letters of administration must — with certain specified exceptions — file an affidavit saying that he has made "reasonable inquiries" as to the existence of ex nuptial children. These are deemed to have been made if the applicant searches the register of the Registrar General under s 9 of the Act and looks through the relevant papers of the deceased. However, it is not necessary to make "reasonable inquiries" if the applicant shows that to do so would serve no useful purpose or that it would unduly delay the making of a grant of administration or that the getting in and preservation of assets necessitates an immediate grant.

The second situation in which reasonable inquiries must be made is under s 6 which requires an executor, administrator or trustee to make "reasonable inquiries" as to the existence of claimants before an estate is distributed. Here the obligation is not subject to exceptions and the nature of what constitutes "reasonable inquiries" is quite extensive.

Section 6A provides that "reasonable inquiries" shall be deemed to have been made if the inquirer has:

> "(a) Inquired about the existence of any claimant from at least one person whom he believes may have knowledge of the matter (except where no such person can be readily located) and obtained from that person (if he is willing to make it) a statutory declaration concerning the matter; and
>
> "(b) Caused a search to be made of the register of instruments, declarations, and orders maintained by the Registrar-General pursuant to section 9 of this Act and ascertained whether or not the existence of any claimant is revealed in the register; and
>
> "(c) Looked through any papers that have come to his notice in the ordinary course of administration of the estate or property and ascertained whether or not the existence of any claimant is revealed in those papers; and
>
> "(d) In the case of the administration of the estate of any deceased person, inquired from the solicitor (if any) last known to him to have acted for the deceased person in his lifetime whether the solicitor knows of the existence of any claimant."

The second and third inquiries are the same as the two inquiries referred to in s 5A.

The first inquiry — the inquiry from at least one person whom the inquirer believes may have knowledge of the matter — imposes a rather delicate duty on the inquirer. Whom does he ask? Not the spouse. Does he visit all the deceased's old flames and ask them — "Who is the father of your child?"

The problems associated with the first inquiry are those of the inquirer. With the fourth inquiry the problems are those of the person to whom the inquiry is directed. Here, in the case of the administration of a deceased person an inquiry must be made from the solicitor (if any) last known to have acted for the deceased person in his lifetime.

Can the solicitor tell the inquirer about the existence of ex nuptial children without breaching his duty to his deceased client? I would have thought that in most cases the answer is no. However, I understand that after the bill was introduced in Parliament, the Statutes Revision Committee sought the opinion of the New Zealand Law Society and was told that in a number of circumstances a solicitor can and should give information that could result in the discovery of ex nuptial children. I would like to know more about these numerous circumstances.

It has been my understanding that generally a client is entitled to consult his solicitor in the expectation that what he tells him is told in confidence and that, subject to certain exceptions, all communications made to a solicitor and all knowledge gained by a solicitor in the normal course of acting for a client are privileged.

Of course the privilege can be waived by the client. But we are dealing with a situation where the client is dead and, in this situation it is un-

certain whether or not privilege can be waived by the client's personal representatives.

What about the exceptions? There are at least six matters that are not subject to privilege. They are:

(1) Information that is not received in the capacity of a solicitor;
(2) information received before the solicitor's services were retained or after the retainer ceases;
(3) facts which are patent to the senses;
(4) records of public proceedings;
(5) communications made by one client to a solicitor as against other persons having a joint interest with the client in the subject matter of the communication — for example, partners — or communications to a solicitor who is acting for more than one party; and
(6) communications made in furtherance of a fraud or a crime.

None of these exceptions seem to give a solicitor grounds for divulging the existence of ex nuptial children under s 6A(d).

However, there is another possible exception which was suggested by Dr Carleton Kemp Allen in an article published in Volume 57 of the Law Quarterly Review *(p)*. Dr Allen thought that there may be an exception where non-disclosure would result in a grave injustice to some innocent third party. The existence of this exception is uncertain and, even if it exists, it may not extend to the type of communication which we have in mind.

Does it make any difference that in this case an inquiry is specifically required by legislation? Apparently not. In the first place, the legislation places an obligation only upon the inquirer. It does not require the solicitor to divulge information. Secondly, it is apparent that in cases where legislation purports to require a practitioner to divulge confidential information about one of his clients, in the absence of evidence to the contrary, the legislation is intended not to abrogate the usual rules as to privilege. This was so held by the New Zealand Court of Appeal in *Commissioner of Inland Revenue v West-Walker (q)*.

I have not seen the opinion given by the New Zealand Law Society to the Statutes Revision Committee. Possibly it is more soundly based than my own opinion. Nevertheless, I venture to offer two conclusions on this matter.

First, when a solicitor receives an inquiry under s 6A(d) he should decline to respond on the ground that any information which he might possess would be privileged. Secondly, on the basis that solicitors will respond in this way, s 6A(d) serves no useful purpose because any inquiry pursuant to it will not produce any information.

Having spent so long on s 6A, I wish now to comment very briefly on s 6B. It protects a person from liability if he has made reasonable inquiries in accordance with ss 6 and 6A. The interesting part of the section is the proviso:

> "Provided that if it appears to the Court that an executor, administrator, or trustee is or may be personally liable for having failed to comply with those provisions, in whole or in part, but has acted honestly, and ought fairly to be excused for his failure, the Court may relieve him either wholly or partly from personal liability for the same."

This is in similar terms to s 73 of the Trustee Act 1956 where the test adopted to see if it applies is that of the prudent man acting in his own affairs. The appropriate question is, "Did the trustee act reasonably and take all the precautions which a prudent man acting in his own affairs might be expected to have taken?" I suspect, in the context of s 6B that generally the prudent man acting in his own affairs would make the inquiries set out in s 6A.

## Conclusion

I would like to conclude where I began — with a call for reform. Despite the Wills Amendment Act 1977 and the Status of Children Amendment Act of 1976, I support the view that succession is a relatively dormant field of modern law. The recent Acts, while important in themselves, are isolated approaches to reform. They do little to change the fact that we are still primarily governed by an Act which was drafted to suit early 19th century conditions in England. We have seen in s 15 one example of a provision that remains in force long after the need for it has expired. How many other such provisions are there? I re-affirm my earlier statement that "it is time we had our own Wills Act — An Act containing all the relevant provisions — drafted in modern statutory language — and incorporating changes to all those messy rules with which we now cope."

(p) C K Allen, *R v Dean* (1941) 57 LQR 85 at p 108.
(q) [1954] NZLR 191.