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REGULATIONS AGAIN

Earlier this year the Minister of Justice the Honourable J K McLay announced new procedures for regulations. (See [1980] NZLJ 162). These new procedures required a justification to Cabinet of the need for the regulation, were intended to encourage consultation with interested parties, and were seen by the Minister as a step towards ensuring that regulations were kept in their proper place, that is, as subordinate legislation — or as he put it as "an extension, within defined limits, of an existing law." It only remained to be seen whether there was the political will to make these new procedures work as the Minister intended.

Added to these procedures we now have the report of the Statutes Revision Committee on the Remuneration (New Zealand Forest Products) Regulations 1980, a report which points to resurgence of the will of Parliament to control the regulation making power of the Executive. The subject-matter was highly political and highly controversial. However the Committee under the Chairmanship of the Member for Kapiti, Mr Brill, set aside politics and turned to what it saw as its main role, namely, that of acting "as a non-partisan Parliamentary control of the exercise of executive power." It also recognised the value of the preventive and educational aspects of its role and in this connection pointed to the experience of the Australian Senate Committee on regulations and ordinances — "many commentators have observed that the generally high quality of subordinate legislation in the Commonwealth of Australia is in no small part due to departmental consciousness of the standards and guidelines set down by that Committee in the course of its regulation reviewing functions."

The Committee gave useful guidance on the manner in which it would expect a Government to act when Remuneration Regulations were in contemplation. From the point of view of regulations generally however it was its observations on:

- The waiver of the provisions of an Act of Parliament by regulation and
- The review of regulations made under "Henry VIII" clauses

that are most significant.

The regulations created criminal offences and permitted an information for an offence to include two or more offences alleged to have been committed by a defendant. In this it departed from the general rule laid down in s 16(1) of the Summary Proceedings Act 1957 which permits an information to be for one offence only. That provision applies "except where it is otherwise provided by any Act". By virtue of the Acts Interpretation Act 1924 the word "Act" includes a regulation. Parliament had, probably unconsciously, set the stage for this statutory provision to be overruled by regulation. The Committee was of the opinion "*that no amendment or alteration of an Act of Parliament should be effected by simple act of the Executive unless Parliament has made a conscious decision that such a course is appropriate in all the circumstances.*" It recommended that consideration be given to amending the Acts Interpretation Act 1924 to ensure that would be the case in future.

The regulations in question were made under the extraordinarily broad regulation-

making power contained in the Economic Stabilisation Act 1948. The Committee had this to say:

> "Where an Act which authorises the making of regulations on certain specified subjects lays down virtually no guidelines to indicate the circumstances in which such regulations may be made, then any limits imposed on that power by the Courts is sure to be fairly minimal. If the Statutes Revision Committee did not have the jurisdiction conferred on it by [Standing Order 377] then there would be virtually no institutional safeguards against any abuse of the regulation-making power at all. As was stated in last year's report on the Petroleum Regulations made under the Economic Stabilisation Act, *the Committee feels that its powers of scrutiny and review assume enhanced significance where regulations are used to introduce substantial matters not specifically dealt with in the empowering statute.* This same significance will attach to regulations made under an Act which, while it may deal in some detail with the subjects on which, while it may deal in some detail with the subjects on which regulations can be made, lays down only the most general criteria for the way in which the regulation-making power is to be exercised."

It is most encouraging to see, at last, this ascertion of authority on the part of the Committee. The Chairman and members * deserve to be commended on the non-partisan approach adopted and it is to be hoped that they will, on this issue and on any others that may arise, receive the support of the House.

TONY BLACK

*Members of the Statutes Revision Committee are: B E Brill (Chairman), Hon J K McLay, P C East, M J Minogue, G W F Thompson, R M Gray, D R Lange, D F Caygill, G W R Palmer, B C Beetham.

COMPANY LAW

PRACTICE NOTE

Applications under Rule 25 of the Companies (Winding-Up) Rules, 1956 for Substitution of Creditors

Subject to the over-riding discretion reserved to the Court by Rule 25 to determine any application for substitution in accordance with the justice of the particular case by such procedure and on such terms as it deems appropriate to the exercise of that discretion:

1. An order for substitution will be made on the application of any creditor who has filed a Notice of Intention to Appear under Rule 22, or by leave of the Court on the application of any other creditor, such order being conditional upon the applicant by a date to be fixed by the Court at the time of application filing in Court an affidavit verifying:

Either: The company's indebtedness to the applicant both at the date of presentation of the petition and at the date of the application for substitution:

or: The company's indebtedness to the applicant at the date of the application for substitution, and that the company was then unable to pay its debts.

2. Upon the order becoming unconditional the applicant shall file an amended petition, and shall serve the same upon the company, and prove such service by affidavit unless the company being represented at the sittings at which the conditional order is made then consents to such service being dispensed with.

3. If advertisement of the petition has already been effected no re-advertisement of the amended petition will be required.

(This Practice Note is issued to promote uniformity of practice in the common case of an application for substitution being made in Court following advice by the original petitioner that the debt upon which the petition was based had been satisfied.)

Davison C J
5/6/80

CONTRACT

THE CONTRACTUAL REMEDIES ACT 1979

Introductory remarks by Mr C I PATTERSON, *Chairman, Contracts and Commercial Law Reform Committee, for a series of seminars conducted by the New Zealand Law Society.*

On taking the Chair of English Law at the University of Oxford, Professor Atiyah delivered his inaugural lecture under the title, "From Principles to Pragmatism". The lecture is in print, and is available from the Oxford University Press.

The word "pragmatism" is one of those troublesome words that has remarkably changed in meaning over the years. According to the *Shorter Oxford English Distionary*, in early times it connoted pedantry or officiousness, but the modern usage refers to a "matter-of-fact treatment of things". A modern pragmatist thinks an idea is good if it works. It is in that sense that it is used by the Professor. If I give you a pragmatist's definition of a principle, you will see the idea in mind. A principle, according to a pragmatist, is a rule that enables a Judge to dispose of ten cases a day, without inquiring into the merits of any of them.

The theme of the lecture is that in the last hundred years there has been a revulsion from the "yoke of principle" manifested by an insistence that disputes between parties should be settled on their peculiar merits. Society now insists upon "individualised justice", dispensed after the parties concerned have said all they wish to say.

The theme is put forward as a matter of observation — as a statement of what has in fact occurred. One is reminded of a similar observation by Sir Henry Maine — "that the development of progressive societies has shown a movement in the law of persons from status to contract". Professor Atiyah sees a similar movement affecting all our laws. He concludes with a plea that the movement he sees should not go unnoticed, and that the questions arising out of it should not be answered by default.

> "I have argued that one cause of the trend to individualised justice has been the rejection of principle as a form of authoritarianism, a demand by individuals for the right to make their own decisions and not to submit to the yoke of principle. But as discretion succeeds principle, the individual may have escaped one yoke only to bow before a heavier one. For one consequence of the growth of discretions has been a vast decrease in the individual's freedom to plan and order his own life, and a corresponding growth in the power and paternalism of the State. I do not doubt that the answers to these questions are likely to be controversial. Some may see grave dangers in the continuance of present trends into the future; others may think the danger much exaggerated; while others may welcome the continuance of these trends. But I do suggest that these questions should not be answered by default."

I think we can confirm the accuracy of this thesis from our own observations.

- Everyone takes the view that a litigant is entitled to his day in Court, even if the days become weeks and months.
- Motions to strike out actions (the modern equivalent of demurrer so freely used in earlier days) have become futile proceedings, especially in contract cases.
- Our Courts are congested with proceedings which, society seems to insist, must be examined on their particular facts, with resort to principles only after a full hearing of the evidence on all sides.

Like Professor Atiyah, I do not wish to criticise the movement now. I wish to point out that the movement has occurred, and that it needs to be appraised. There is much to be said for individualised justice, so long as it is recognised that the cost of attaining it is high, in terms of effort and resources. Many undoubtedly think it is worth that price.

Nowhere is the Professor's thesis more clearly demonstrated than in the development of the law of contract. It is clear that 19th century doctrines are not acceptable today. "Litterae scriptae manet" has little weight with us — it is not so much that we know that the ink

fades — it is more that we have seen how seldom the written word, especially that preserved in printer's ink, truly records the concurrent intentions of contracting parties.

Especially in the 20th century, we have seen a growth of devices enabling the Courts to go behind the written word in a quest for what is sometimes called the "real bargain" between the parties. I put this, too, as a matter of observation which I think you will confirm from your own experience.

- It was referred to in the Report of the Contracts and Commercial Law Reform Committee on which the legislation is based, and I refer you particularly to the example cited by the Committee in para 7.2 of the 1967 Report.
- It was discussed in a paper by Mr E J Somers (as he was then), delivered to the 1972 Law Conference at Christchurch, under the title, "Consensus and the Written Contract", [1972] NZLJ 485.
- and it was again referred to by the Contracts and Commercial Law Reform Committee in their final submissions to the Statutes Revision Committee on the consideration of the Bill which has now been enacted, in the following terms —

> "As the merits of a claim or defence based on pre-contract exchanges can be laid open in Court on appropriate pleadings of misrepresentation, collateral contract, or rectification, is it not just that the parties should not be encouraged to waste the time and money of all concerned in reliance on doctrines now superseded? As the so-called 'sanctity' of a written contract is in truth an illusion because of the growth of shifts and devices mitigating the severity of that notion, is it not better to face the matter directly? . . . What is needed is a more direct route to the merits."

Two aspects of the discussion on Mr Somers' paper are worth special notice. *First*, there was a detailed description of the means of going outside the writing. There are at least five of these:

- Rectification
- Misrepresentation in its various categories of innocent, fraudulent, and negligent
- Conditions precedent, of which the familiar example is the escrow
- Collateral contracts or warranties
- Promissory estoppel (although strictly a post-contract notion, yet it has been argued that it can arise out of exchanges pre-contract or contemporaneous with contract).

Secondly, there was a discussion of the notion of "freedom of contract", with emphasis upon the liberty of the parties to devise their own rules.

- The theme is that each contract should be regarded as unique.
- The central idea is that the parties themselves devise the rules of their relationship.
- Even to the point, as the Right Hon Sir Alexander Turner observed, that "there seems to me to be no reason at all why both parties should not be made to adhere to a statement or recital contained in the contract which is known to both of them to be false." (p 497). He gave as an example the doctrine that a tenant is estopped from denying his landlord's title even where both parties know that the landlord has no title.

The Contracts and Commercial Law Reform Committee took the view that, subject to some very limited overriding rules of public policy, the function of the Courts in disputes between parties to contracts was two-fold:

- To identify and ascertain the terms of legal significance, and
- To interpret and apply those terms.

The overriding rules of public policy are, in common law jurisdictions, within a very small compass.

There are some specific rules, notably about illegality and restraints of trade, and there is a vague notion of morality which does not begin to approach the civil lawyer's idea of contra bonos mores. *Pearce v Brooks* (1866) LR 1 Ex 213, on morals and the equitable rules against the enforcement of penalties, may be referred to as examples. Those notions do not detract from the main thesis that in considering the legal rights and obligations of the parties to a contract, the main line of inquiry is to identify, interpret and apply whatsoever the parties have agreed.

Parliament has accepted this thesis in enacting the Contractual Remedies Act 1979. Section 4, which deals with "merger clauses", is an arresting example. The section recognises the paradox that a merger clause may be a part of a contract which has in fact been induced by statements, promises and undertakings not recorded in it. The section affirms the jurisdiction of the Courts to examine the pre-contract "communings" between the parties to see whether there were in fact exchanges which should have legal significance despite the provisions of a merger clause. Section 5 enables the parties to stipulate their own remedies — so long as they do stipulate a remedy. Section 6 provides that inducing representations will be treated as if they were terms of the contract, whether they were made negligently, fraudulently, or innocently.

This broad conception of the notion of freedom of contract has, it seems, prevailed at last in the House of Lords, in the case of *Photo Productions Limited v Securicor Transport Limited* [1980] 1 All ER 556. Their Lordships emphatically overruled the doctrine of "fundamental breach" which had been developed in the English Court of Appeal, exemplified by the case of *Harbutt's Plasticine Limited v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447. Lord Salmon summed it up by saying, "Any persons capable of making a contract are free to enter into any contract they may choose, and providing the contract is not illegal or voidable, it is binding upon them."

Their Lordships were, it seems, more readily led to their conclusion by the enactment in the United Kingdom of the Unfair Contract Terms Act 1977. That Act enables the Courts of England, Wales and Scotland to deny efficacy to unreasonable exemption and limitation clauses in certain kinds of contracts. It may be that one of the next steps in the reform of the New Zealand law of contract is to consider whether or not similar legislation should be enacted here. For the purposes of this seminar, however, it is sufficient to notice that the Contractual Remedies Act does not purport to introduce new rules of public policy like the provisions of the Unfair Contract Terms Act 1977.

The Contracts and Commercial Law Reform Committee was especially disturbed by the development of the concept of negligence which, the Committee thought, had exceeded its proper bounds in such cases as *Capital Motors v Beecham* [1975] 1 NZLR 576, and *Esso Petroleum Co v Mardon* [1976] 2 All ER 5. The Committee wanted to emphasise that the law of negligence, resting on the Atkinian principle that one must not injure one's neighbour, was only one of the great streams of authority for civil liability. The Committee emphasised, at p 70, para 9.4.3 of its Report, that there is another stream which rests on the proposition that a person should be held to his undertakings. As the idea of pre-contract negligence showed signs of development, it seemed to the Committee that a new accommodation had to be worked out, applying to the exchanges between contracting parties before they make their contract. Most clearly was this new accommodation required in cases where the contract had been performed in whole or in part.

Writing extra-judicially, Sir Robin Cooke has described some of the difficulties presented by the present law about the assessment of damages in tort and contract — "Remoteness of Damages and Judicial Discretion", 1978, C L J 288. He began by saying, "The law about remoteness of damage in contract and tort is in a strangely unsettled state. Pursuing justice in individual cases, the Courts have felt driven into vacillations on points of general principle which have not shown our system of case law at its best." At p 297 he says:

> ". . . the basic purpose or principle in both contract and tort is to place the plaintiff, as far as money can do it, in as good a situation as if his rights had not been violated by the defendant. That is to say, as if the contract had been performed or as if the plaintiff had not been harmed by the tort — between which two propositions there may be a difference in result, flowing from the difference that in the one class of case the plaintiff claims that he has not received a promised benefit, whereas in the other he claims to have been injured by the defendant's activities."

It seemed to the Contracts and Commercial Law Reform Committee that where the defendant's activities have induced a contract, the doing of justice between the parties depends upon the fate of the contract. Accordingly, the Committee thought, and Parliament has accepted the advice, that where a defendant's misrepresentations, whether innocent, negligent, or fraudulent, had induced the plaintiff to contract with him, the rights of the parties should be adjusted as if the representation was a term of the contract that had been broken. Section 6 of the Act gives effect to this principle, and to make the situation plain, that section further enacts that in such cases the representee shall not be entitled to damages for

deceit or negligence. The principles of assessment in contract will be applied.

When the Bill was before the Statutes Revision Committee, Honourable Members suggested that the rules about the assessment of damages should be reformed. It has become fashionable to talk of the "interests" of the aggrieved party. They have been classified into two kinds, first the "expectation interests", and second, "reliance interests". It seems that damages for unfulfilled expectations have been freely allowed in contract, but that in tort, emphasis has been placed upon injury resulting from reliance. Professor Atiyah, in his "The Rise and Fall of Freedom of Contract", Clarendon Press, Oxford 1979, suggests that:

> "The time is plainly ripe for a new theoretical structure for contract, which will place it more firmly in association with the rest of the law of obligations. . . . this new structure must, I suggest, rest on the three basic pillars of the law of obligations, the idea of recompense for benefit, of protection of reasonable reliance, and of the voluntary creation and extinction of rights and liabilities." (p 778)

Another relevant notion is that of exemplary, punitive or aggravated assessments, and the Statutes Revision Committee raised questions about them. It is generally thought that punitive damages are not available for breach of contract, and it may be that this subject should receive further consideration. For the moment, however, it is sufficient to note that by enacting s 6, the Legislature has clearly opted for an assessment of damages for inducing misrepresentations on the basis of the representee's "expectation interests".

In approaching the questions about damages, the Law Reform Committee took the view that the fate of the contract is a paramount consideration. The Committee considered that the representee has a freely exerciseable option either to cancel or affirm the contract, and that the classical exposition of this option should be affirmed, (Report, para 16.1). It may be observed that the English reform (Misrepresentation Act 1967) appears to have got into trouble on this point, for s 2(2) confers upon the Court or an arbitrator a jurisdiction to "declare the contract subsisting, and to award damages in lieu of rescission if of opinion that it would be equitable to do so". Our view was that the question whether or not the contract should subsist should not be decided by the Court; it should depend upon the decision of the party aggrieved. However, the Committee also considered that the remedy of rescission for misrepresentation should not be available in cases where the misrepresentation did not have a substantial effect. Here, the Committee advised that the right to rescind for misrepresentation, and the right to terminate for breach, should be put on a uniform basis, which you now see enacted in s 7.

Section 8 contains two particular rules, viz:

- Subsections (1) and (2) deal with the method of cancellation, and generally require communication.
- Subsection (3) makes it clear that cancellation operates for the furture. Consequentially, the notion that rescission for misrepresentation avoids the contract ab initio on the basis that the parties will be restored to their pre-contract situation, is no longer a relevant notion.

Section 9 confers a wide jurisdiction upon the Court to make orders granting relief of various kinds, and s 10 preserves the common law rights to recover damages, but on the basis that any relief granted under s 9 will be taken into account in assessing the damages.

Finally, in s 11 an attempt has been made to elucidate the position of assignees. The sections proceed on the basis that the remedies provided by the Act will be available to and against assignees, but the liability of an assignee is limited to the value of the performance of the assigned contract to which he is entitled by virtue of the assignment. The assignee is entitled to indemnity from his assignor in certain cases. Important savings relate to s 104 of the Property Law Act 1952, s 18 of the Hire Purchase Act 1971, and to the law relating to negotiable instruments.

I hope what I have said gives you some introduction to the thoughts that have motivated the new deal in contract law. I do not doubt that further attention will be required to particular problems. Section 5 will need to be reconsidered if it should be decided to introduce reforms like the UK Unfair Contract Terms Act 1977. Section 10 will need to be considered in any general reform of the law relating to the assessment of damages. Both of those topics will call for major studies. Some of the problems give grounds for suggesting other reforms. The law about the time for performance where the parties have not made their intentions clear, is possibly one of those.

There are many questions outstanding

which cannot be dealt with at once. However, I hope you will agree that the work has been started on a correct basis by directing attention to the legal effect of whatsoever the particular parties have said and done in establishing their legal relationship.

CASE AND COMMENT

Matrimonial property — Sale of home — Maintenance

In *McKillop v McKillop* [1978] *Butterworth's Current Law*, 468 Supreme Court, Dunedin; 21 April 1980 (No M2/80); Casey J) the spouses married in April 1966 and had two children now aged nine and six.The wife left their home in 1978 and went to live with another man. She left the children with her husband, taking her personal effects only, and he had the custody of the children. In October 1978 the wife sought orders under the Matrimonial Property Act 1976. The hearing was adjourned for six months as the husband proposed selling their home (which was at Mosgiel) and moving to Dunedin on transfer. A maintenance order for $5 per week for each child was made against the wife. The property in dispute included the Mosgiel home. The value of that home and the family chattels was about $28,000 subject to a mortgage of about $4,000. The husband's superannuation entitlement was agreed at $2,873.67 and there was no dispute that the wife was entitled to half of all the matrimonial property, which counsel agreed could be put at $14,000.

By the time of the adjourned hearing the husband had taken up his new post, sold the Mosgiel home and used the proceeds to buy a Dunedin home for himself and the children. The sale of the Mosgiel home fetched $20,416 net, all of which went towards buying the Dunedin home for $34,500 which was mortgaged for $15,650. The equity thus represented virtually all the parties' interest in the Mosgiel home. At the adjourned hearing, the wife sought orders for the immediate payment of her share on the grounds of hardship. Hence the real issue — was it desirable to have a speedy disposal of property on marital breakdown? Or should a home be retained for the children? The wife was enduring difficulties in her home in Waiouru with the other man, for their means were limited and they had but modest domestic assets. At the same time, these circumstances were largely of her own making, for she had chosen to live in a place where employment was scarce. In the Court below it was pointed out, relying on *Hackett v Hackett* [1977] 2 NZLR 429, that the desirability of an expeditious division yielded to the needs of the custodial parent to keep a home for the children. The point was also made that the husband without referring to the wife, had used the whole of her share to buy the much higher priced Dunedin home. The Magistrate had regarded that as a factor to be taken into account in his overall discretion about the time and mode of payment. Casey J upheld the Magistrate's view that the need of a settled home for the children was "the most important single factor in this case." The husband's decision to move was, in his Honour's view, reasonable.Indeed, Casey J said that, had the husband chosen to remain in Mosgiel, "it is unlikely that any order would have been made that would disturb the continued occupancy of their house." Even so, he found it "difficult to escape the suspicion that [the husband] has consciously taken advantage of his situation with the children to tie up all his wife's money in a property that may be rather more expensive than his circumstances warranted." Casey J admitted that he had very little information on this matter but, even allowing for comparative costs between Mosgiel and Dunedin, "the difference in price was substantial".

It would seem that the Magistrate considered the short-term retention of the wife's share was not unreasonable. It would also seem that the husband had been asked if he would rent a house and had replied that he would buy one because he did not believe in renting. Casey J, however, thought the husband's "somewhat cavalier assumption that he was entitled to buy a house, regardless of any other options for accommodation, may have been too readily accepted."

At all events, the Magistrate fixed the apportionment and the value of the disputed

items and ordered the husband to pay his wife interest at 12 percent on her share of the proceeds of the Mosgiel property ($10,208.17) calculated from the date of sale with yearly rests. He indicated that a further loan could be obtained on the Dunedin home to pay out a sum between one-third and one-half of her share during the ensuring year, and left this for either spouse to arrange, the wife being reserved liberty to renew her application for sale if an instalment of at least one-third had not been paid by 1 October 1980, or if there should be any change in the balance of relative hardship thereafter. The Magistrate found it difficult to see that any order for sale or release of further instalments could be made before 1984, when the younger child would be 10. These comments, it seems, were made "for the guidance of the parties". No settlement along these lines was reached, no application for further directions was made and, eventually, each spouse appealed.

For the wife it was said that the Magistrate's judgment was too indefinite and made no provision for security or payment out of her share and that virtually immediate payment should have been ordered and that the onus of establishing greater hardship should not have been put on her.

For the husband, counsel made detailed submissions contrasting the consideration the Courts usually bestow on a custodial wife with the demands made on the husband, whose income was not much greater than a mother receiving a DP benefit and other available State assistance. In her case, counsel suggested, the Court would be unlikely to make any order for payment until the children were off her hands. Casey J held that while this may be so, there were "obvious differences". In the first place, the husband, with the aid of the wife's share, had a substantial equity in the house and secure, well-paid, employment which gave him superior access to finance and the ability to service it. His Honour accepted that the need to care for the children imposed a financial burden not measured solely in weekly outgoings and that the cost of additional finance was high at current interest rates. On the other hand, with the equity in the Dunedin house, the husband "should be able to raise more on first mortgage." In the Judge's view, the husband was "being unrealistic in expecting that he can continue to enjoy the benefit of his wife's interest in the property without any return or recognition, especially having regard to the inroads of inflation." Casey J considered that, without imposing too heavy a burden on his income, the husband could raise and service another $5,000 on the Dunedin home — and he was fortified in this view by the evidence that the husband was prepared to raise this sum in Mosgiel for a full settlement in October 1978. Accordingly he ordered that it be paid to Mrs McKillop within three months and that it bear simple interest at 12 percent pa from the date on which the sale of the Mosgiel house was settled until payment to her. The balance of $9,000 was directed to be secured over the Dunedin home by a memorandum of mortgage ranking after the securities for the existing loan and any additional advance to provide the above-mentioned $5,000.

Apparently the Magistrate had felt the money due to Mrs McKillop should bear interest at 12 percent. His Honour noted that she had paid no maintenance and doubted whether she would readily comply with any realistic order. Interest at 12 percent on the balance came to $1080 pa, which was near enough to the equivalent of $10 per week for each child — "a modest enough contribution" in his Honour's opinion. In these circumstances the existing maintenance orders were suspended pursuant to s 32 of the 1976 Act from the date of making until the further order of the Supreme Court. The balance secured was to be free to interest so long as both children were in the husband's care and custody. Counsel for the husband had conceded that to tie up these funds for too long would be unduly rigid. The Magistrate had thought 1984 to be a suitable time for review, but Casey J could see no special reason for selecting that date and preferred to direct that the balance secured should not be repayable, and that interest should be not paid thereon, save pursuant to any further order for which he reserved leave to either party to apply in the event of a change of circumstances, on 21 days' notice. Should the parties be unable to agree on the terms of the mortgage, either spouse might apply for further directions. The costs of the mortgage were ordered to be paid by the husband, but the costs of the valuation of the home and chattels were directed to be shared equally between the spouses. No order for costs on the appeals was made.

It is respectfully suggested that this solution to the dilemmas facing these particular parties was eminently fair. The Court of Appeal set its face against the presentation by one spouse of a fait accompli to the other in the maintenance case of *Seabrook v Seabrook* [1971] NZLR 947. There thus seems to be every reason why Casey J should have viewed Mr McKillop's

purchase of the Dunedin home in the way that he did.

P R H Webb

Matrimonial Property — Marriage of Short Duration — Matrimonial Property Act 1976, s 13

In *Fothergill v England,* [1980] Butterworths Current Law 506 (High Court, Rotorua; 28 April 1980 (M No 159/77); Greig J) It would seem that *Edwards v Edwards* [1979] 2 NZLR 218 (CA) and *Martin v Martin* [1979] 1 NZLR 97 (CA) notwithstanding, the question of whether a marriage is to be regarded as one of short duration for the purposes of s 13 (3) of the Matrimonial Property Act 1976 is still bedevilling to the Courts.

The hearing was limited to the wife's application in respect of the husband's property (hereinafter described as the Papamoa property) it having been agreed that the matrimonial chattels were no longer in issue and that a car and a caravan should be transferred to the wife.

The parties first met in March 1962 and entered into a de facto relationship. The husband already owned the Papamoa property, "which was then little more than a beach cottage." The wife owned a property in Nelson. In about October 1962 a house in Wanganui was purchased in the husband's name, the wife contributing most, if not all, the cash required therefore. The husband provided some labour and cash, for the renovation and repair of that house. In March 1971 the parties married. In February 1972 the Wanganui house was sold and the husband moved to Papamoa. When the Wanganui house was sold, the net proceeds were divided between the spouses. There was a dispute as to this division and, whatever might be the true position, there was evidently not a precisely equal division of the proceeds.

Apparently, from about April 1972, there were marital difficulties. The parties lived together from time to time thereafter, finally separating in 1974.

The wife now claimed the Papamoa property to be the matrimonial home and that she was thus entitled to half of it. The husband claimed that the Papamoa property was never the matrimonial home and was, and indeed remained, his separate property. It should be explained that the Papamoa property was converted from a beach cottage to a residence after the marriage and before the separation and was settled as a joint family home.

In form, the marriage lasted three years and eight months. It was clear that the spouses did not live together for the whole of that time. The Judge considered that, for the purposes of s 13 (3) of the 1976 Act, he was required "to consider the details of the period of the marriage. It is not sufficient that the marriage in form has continued for the requisite period. It is necessary to inquire whether during that marriage period the parties had lived together as husband and wife for at least three years. In any such inquiry it may be necessary to give consideration to the quality of the periods during which the parties lived together. If there are periods during which there is a form of cohabitation but not in the true sense of marriage then these periods may have to be disregarded."

There is, as Greig J observed, some difficulty in any case in ascertaining, even over a period of three years and eight months, the details of cohabitation of a husband and wife. The Court was assisted in this respect more by the husband's diaries than by the wife's "mere recollection".The diaries were not treated as conclusive as to the whole period, or, indeed, as a complete record of the married life, but rather as "a noting of some particular events which left unexplained gaps during which the husband and wife were at least visiting each other from time to time."

The Court concluded that there were "some 26 months of the marriage" during which the parties had lived together as husband and wife. "That comprises", said Greig J., "the period from the marriage on 24 March 1971 to April 1972, [a] visit to Australia between September 1963 and January 1974 and the period from April 1974 to November 1974 when they separated." It was taken that the parties were not happily married during those periods, and the last period in particular. On the other hand, the marriage was not considered to have been " merely a shell", for, during those months, the parties had "shared both bed and board living together as man and wife in spite of the strains and upsets which occurred during these periods."

As to the remaining months, they apparently comprised three periods of living separately. Between May and December 1972, "during which the wife spent some little time in hospital", the parties lived separately. There were, however, some unsuccessful reconciliatory meetings and, indeed, the wife in September 1972, actually had "commenced correspondence for separation". Between January and August 1973 they were apparently separated

once more, but there were again "periods of reconciliation which appear to have been more frequent than in the previous eight months in 1972 but were not of any length". The third period was one between February and March 1974, immediately after their return from the above mentioned Australian trip. There was evidently no attempt at reconciliation in that time. Indeed, the parties were, through their solicitors, then corresponding about divorce proceedings.

Greig J held it to be clear that in the period of "separation and occasional reconciliation", as he called it, there was no cohabitation in excess of three months.Even if he included the periods of reconciliation and discounted the husband's evidence as supported by the diaries, the Judge found it impossible to draw from the above-mentioned period sufficient cohabitation as man and wife to add 10 months to the 26 month period of cohabitation to make a total of three years. He accordingly found the marriage to be one of short duration, adding that, even if the marriage were to be seen as one which did last for three years and eight months, he would, having regard to all the circumstances, consider it just to treat it as a marriage of short duration.

It was urged upon the Court that it should bear in mind the period of the de facto marriage for the latter purpose. Greig J held that it was not open to him "to take into account the circumstances of the parties before the marriage on this head". "In any event," he continued, "even if I gave regard to the period of de facto marriage it is clear that de jure marriage was short in period, was marked with particular strain and upset and was broken with lengthy periods of separation and two instances of formal correspondence aimed at terminating the marriage."

Having found the marriage to be one of short duration, Greig J had to determine, in accordance with the contribution of each spouse to the marriage partnership, the shares in the Papamoa property that each was to take. It will be recalled that that property was wholly owned by the husband when the parties married in 1971. It was held that the property was the matrimonial home, the period of eight months between April and November 1974 in which the parties lived together there being sufficient to make it so. The Judge said: "During that period the property was used habitually by the husband and wife as the only family residence. It is clear, however that during the marriage there were other periods in which the house was used from time to time as the only family residence. There can be little doubt therefore that this became the matrimonial home.It is therefore matrimonial property which falls to be divided by the contributions of the parties."

The Court accordingly proceeded carefully to consider all the circumstances of the marriage and the relevant contributions of the spouses to their marriage partnership. Beginning with those of the wife, Grieg J noted her contribution to the Wanganui house. That, he said, "was brought formally into the marriage by the husband it being in his name but her cash contribution to that was made before the marriage. That must be treated as a contribution by her." During the marriage the wife had contributed cash, as the parties apparently shared expenses "and she contributed at least during the periods of cohabitation such ordinary wifely contributions as the management of the household and the performance of household duties."

As to the husband, he had contributed the Papamoa property, his share of expenses, and both cash and labour for the renovation and improvement to the Wanganui and Papamoa properties. Both parties had received "back monies" from the sale of the former, but it was not possible on the evidence for the Court to say whether or not the wife had received a sum of $2,000 which the husband said he had paid. In any event, Greig J was clear in his own mind that, in spite of her contributions, the wife had "been left with little but cash but whereas the husband has been enabled to retain an asset which has increased in value by way of inflation." Having found that the wife's misconduct during the marriage had had no effect at all on the value of the Papamoa property, the Judge held that, taking into account both car and caravan, $5,000 was the proper amount to award to the wife. No order for costs was made.

Comment

Greig J was most unlucky to be confronted with a case where the relationship between the spouses was so "on and off", though it is fair to say that the case is not as bad as *West v West* [1977] 2 WLR 933, where the wife had refused to cross the threshold into marriage in any effective sense at all, with the result that the effective duration of the marriage had really been nil. The case under review may usefully be read together with *Stallinger v Stallinger* (No 2) [1978] 1 NZLR 727.

P R H Webb.

CRIMINAL LAW

THE JURISTIC BASIS OF DRUG POSSESSION OFFENCES

N L A BARLOW *discusses developments since Warner (a) and the Misuse of Drugs Act 1975. Mr Barlow is an Auckland barrister and law lecturer at Auckland University.*

Drug possession and the criminal law

The concept of possession is the ratio essendi of three drug offences in this jurisdiction. The incidents of simple possession for personal use *(b)*, possession for the purposes of supply *(c)*, and possession of utensils for drug use or preparation *(d)*, are all proscribed. These offences are relational rather than ultimate.They are concerned with preventing harm rather than punishing that which has already materialised. The ever-increasing radius of the criminal law reaches out to catch this kind of conduct to provide a legal basis for early state intervention into the lives of actual or potential drug users. The purpose of drug control is to prevent the presumed social harm of use. A person in possession of prohibited drugs does not because of this factor alone pose any threat to society but the availability of the drugs for use does. So too with commercial possession. There is no social harm in making a fortune out of marketing drugs any more than there is with any other of nature's commodities. The social harm is not making money but circulating harmful drugs. By prohibiting their possession for the purposes of distribution the likelihood of their eventual use is diminished. The same objective underlies the prohibition of the possession of any mechanical apparatus which might be necessary or helpful in effectuating drug use. With drug control the main thrust of legislative policy and law enforcement efforts has in fact been against the relational offender.The offence of use seems unimportant by contrast. In the Misuse of Drugs Act 1975 it is retained as a summary offence.

The Act incorporates the term "possession" into the three offences unaccompanied by any statutory meaning. The task of defining it is left with the Courts. And although the concept of possession has long been a part of the common law its application has often occasioned great difficultly.So much so that Erle CJ despaired, in a criminal case at the end of the last century, that "possession is one of the vaguest of all vague terms" *(e)*. And a modern successor of his, Lord Parker CJ, complained that "the term possession is always giving rise to trouble" *(f)*, a state of affairs incidentally for which his Lordship may claim some responsibility *(g)*.

Without exception the problems of the Courts may be traced to the attempts of both jurist and Judge to prescribe a concept of possession applicable to all branches of the law *(h)*. In spite of his frustration even Erle CJ appreciated that possession was not a universal concept. In *R v Smith* he went on to say that the term "shifts its meaning according to the subject matter to which it is applied - varying very much in its sense, as it is introduced either into civil or criminal proceedings." Most modern writers and some Judges agree with him. Dias, in his chapter on the classic theories of possession, in *Jurisprudence*, argues that possession is not one but many ideas, a connotative rather than a denotative concept, the only common element being its use as "a device of convenience utilised chiefly to effectuate the policy of the law in different branches" *(i)*. And in a 1974 case in the Privy Council, Lord Diplock said that possession, "turns on a consideration not only of the particular provision creating the offence but also of the policy of the Act disclosed by its provisions taken as a whole", and that, "the technical doctrines of the civil law

(a) *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256.
(b) S 7(1) (a) of the Misuse of Drugs Act 1975 (NZ).
(c) S 6(1) (f) of the Misuse of Drugs Act 1975 (NZ).
(d) S 13(1) (a) of the Misuse of Drugs Act 1975 (NZ).
(e) *R v Smith* (1855) 6 Cox CC 554, 556.
(f) *Towers and Co Ltd v Gray* [1961] 2 All ER 68, 71.
(g) See footnote (aa).
(h) See Dias *Jurisprudence* 3rd ed (Butterworths), chapt 12. See also Shartel "Meanings of Possession" (1932) 16 Minnesota Law Review 611 and Bingham "The Nature and Importance of Legal Possession" (1915) 13 Michigan Law Review 638.
(i) Op cit, 337. See also pp 349-350.

are irrelevant to this field of criminal law" *(j)*.

The policy approach dictated by the jurisprudence of possession corresponds with the judicial rule of statutory construction authorising the examination of the social purpose behind an ambiguous enactment in order to ascertain its correct application.This ancient rule of equitable construction is known as the "mischief" or *Heydon's* rule *(k)*. Very often penal codes contain no material definition of an offence and the Courts must denominate the essential criteria after taking account of the principles of criminal theory formulated by jurists, doctrines derived from rules from previous cases, and its own policy appreciation of the penal harm with which the statute is concerned. With drug control statutes the legal interest the legislature seeks to secure is clear - the prevention of the social harm of use. A judicial definition of possession must accord with this objective.Unfortunately this has not always happened in practice and Courts have opted for definitions far exceeding the legal interests of the drug control statutes before them. In some instances by defining the substantive law to enable the conviction and punishment of both culpable and non-culpable persons, and in others by ignoring important and relevant principles of penal construction *(l)* or subjecting drug defendants to procedural disabilities governing the burden of proof *(m)* and this with statutes prescribing punishments equal to those reserved for the most serious of crimes.

The unsatisfactory nature of the case law seems particularly apparent when viewed against the sober perspective of the old authorities on penal possession. At common law simple possession was never the basis of criminal liability. A case in 1810, *R v Heath*, confirms this. Here it was held in respect of an indictment alleging the possession of counterfeit silver, a state of affairs of considerable potential harm in those days when coins were still the main market currency of the realm, that "having in his possession . . . could not be an act, and that an intention without an act was not a misdemeanour" *(n)*. Only when the intention was manifested in an outward act, such as uttering, did the common law provide law provide a remedy *(o)*. This was not to say that the Courts did not recognise status offences. The vagrancy and other such status offences, which required neither an act nor an omission, were long known to the law. These were passive status offences imposing liability regardless of capacity to conform. Such "offences" were not attributable to the conscious will for they existed without reference to specific points in time. Was there such a thing as an active status offence in which the prescribed state of affairs could be said to be subject to voluntary control? Previously, possession had only been considered incidentally in criminal Courts, as in the larceny cases where the prosecutor had to prove an interference with his possessory rights *(p)*. But as the causal chain expanded to reach preparatory as well as actual harm it suddenly became the basis of liability in a wide range of penal statutes.

Like the modern Courts deciding the recent drug possession cases the Courts of the early nineteenth century had to fashion a workable theory of possession that harmonised with the statutes's penal objectives and yet took proper account of the heavy sanctions operable upon breach. This was no easy task, as the state of possession, an environmental relationship

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(j) *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840, 841, 843.

(k) *Heydon's Case* (1584) 3 Co Rep 7a.

(l) Both the rule requiring the interpretation of penal statutes in favour or the liberty of the subject in cases of doubt and the presumption that Parliament intends its legislation to harmonise with the common law, would, if applied in the landmark case of *Warner v Metropolian Police Commissioner* [1969] 2 AC 256, have compelled recognition of mens rea defences. The former because strict liability raises a real issue of liberty and the latter because the traditional case law recognises both guilty intent and control as essential elements in penal possession: *R v Sleep* (1861) Le & Ca 44.

(m) In drug possession cases the presumption of innocence was replaced with a presumption of guilt upon proof of custody of the drug; the defendant being required to prove the absence of knowledge and intent elements on the balance of probabilities: ss 6(5); 6(6); 7(3), 30, of the Misuse of Drugs Act 1975; *R v Carr-Briant* [1943] KB 607; *R v Edwards* [1974] 3 WLR 285. Less stringent standards govern the offences under ss 5(3) and 9. Though this does not really represent a departure from the old authorities, for it is simply an analogous version of the doctrine of recent possession (see *R v Langmead* (1864) 9 Cox CC 464 and Scott "The Possessor's Explanation" 1961-62 4 CLQ 248 (Canada)), it is an inappropriate standard in a criminal case.

(n) Russ & Ry 184; 168 ER 750, 751. See also *R v Dugdale* (1853) 1 El & Bl 436; 118 ER 419.

(o) In the words of the headnote to *R v Heath*, supra "having counterfeit silver in possession with intent to utter it as good, is no offence; for there is no criminal act done."

(p) See *R v Riley* (1853), Dears CC 149; Hall *Theft, Law and Society* 2nd ed, 1952.

between man and object, could exist in total independence of any harm. Conciliation was reached by importing the entrenched criminal law principles of responsibility into the statutes. The idea of actus reus found expression in the requirement of proof of the "physical" elements of custody (the proprietory "right" of dominion over the object) and knowledge of this custody (an awareness of one's power over an object). These elements served to ensure that only those who voluntarily came into possession would be liable. The idea of mens rea found expression in the requirement of knowledge of the nature of the object (ie that it was contraband) and of a guilty intention to maintain control of the object. Recklessness concerning either knowledge or intent elements would also suffice.

In this way the Courts in the early possession cases took account of both the physical conduct and state of mind of the defendant. But as the concept of possession became increasingly utilised in Victorian public welfare statutes, the object of which was simply to promote economic efficiency among the licensed trades, and where both breach and penalty were "not criminal in any real sense", the Courts began to dispense with mens rea requirements and convict on proof of the "physical" elements only. Thus in *R v Woodrow (q)*, a prosecution for the possession of adulterated tobacco, a failure to support the policy of the state concerning hygienic standards in trading premises, the offence was held to be complete without proof of a guilty mind. In the case of *R v Sleep* on the other hand where the offence was truly criminal, it being akin to the possession of stolen property, the Court imported both physical and mens rea elements. As Cockburn C J said:

> "It is a principle of our law that to constitute an offence there must be a guilty mind; and that principle must be imported into the statute, as has already been laid down by *R v Cohen* (1858) 8 Cox C C 41, although the Act itself does not in terms make a guilty mind necessary to the commission of the offence."*(r)*

In a line of succeeding cases broken only by what Lord Reid in *Warner v Metropolitan Police Commissioner* described as "isolated and extreme"*(s)* exceptions, and the first line of drug control cases *(t)*, Courts faced with criminal, as distinct from regulatory possessory offences, have consistently honoured the underlying assumption of Anglo-American jurisprudence that a person may not be punished by the State unless he has voluntarily caused the occurrence of a forbidden harm and has no recognised moral excuse for doing so *(u)*. This has been the position whether the case has involved the possession of arms *(v)*, explosives *(w)*, offensive weapons *(x)*, burglary tools *(y)*, or stolen property *(z)*. In this way the appropriate juristic correspondence between the fact of status of possession, and the harm subject to criminal suppression, has been preserved.

Now in the late 1950s and 1960s, when the news media began publicising the seamy side of drug use, the Courts, no doubt eager to add their voice to the popular denunciation of society's latest aberration, decided to reduce alleged drug offenders to some sort of second class defendants, treating drug offences as minor regulatory matters for the purpose of liability and serious criminal matters for the purpose of sentence. It must have been a consoling thought for drug possessors who were languishing in prison to remind themselves that juristically speaking their wrong was no

(q) 15 M & W 404.

(r) (1861) Le & Ca 44, 54.

(s) [1969] 2 AC 256, 273. The view expressed by seven of the panel of 14 Judges in *R v Ashwell* (1885) 16 QBD 190, that a person who received a sovereign thinking it to be a shilling did not possess the sovereign until he realised his mistake was approved in *R v Hudson* [1943] KB 458. This leaves *Chajutin v Whitehead* [1938] 1 KB 506 as the only remaining case "out of line with the other authorities" (per Lord Reid, 280) together with the early drug possession cases cited in the following footnote.

(t) *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256; *Lockyer v Gibb* [1969] 2 All ER 653; *Searle v Randolph* [1972] Crim L Rev 779. See also *Sweet v Parsley* [1968] 2 All ER 337 (CA).

(u) And they have adopted the customary analytical labels with describe this assumption even though they seem semantically inappropriate to offences involving status and not an act or omission. See *R v Grant* [1975] 2 NZLR 165, 168-170 (per Mahon J) and Howard *Australian Criminal Law* (2nd ed) 12.

(v) *Sambasivam v Public Prosecutor of Malaya* [1950] AC 458. Here the offence was actually of carrying a firearm but this expresses the same idea as possession.

(w) *R v Hallam* [1975] 1 QB 569. Here the word 'knowingly' in s 4(1) of the Explosive Substances Act 1883 was held to mean that the accused "must know that it is an explosive substance". *Hallam* was distingished in the minority judgments in *Warner* because the word 'knowingly' was not used in s 1(1) of the Drugs (Prevention of Misuse) Act, 1964, but as Devlin J (as he then was) pointed out in *J Roper v Taylors Garage* [1951] 2 TLR 204, 208 "all that the word "knowingly" does is to say expressly what is normally implied".

(x) *R v Cugullere* [1961] 1 WLR 858.

(y) *R v Webley* [1967] Crim LR 300.

(z) *R v Sleep* (1861) Le & Ca 44.

greater than a fellow citizen's failure to renew his television licence or register his dog *(aa)*, because proof of mens rea was not, as with other regulatory offences, necessary.

In England the Judges seemed unable to resist the strength of public disapproval of modern drug misuse. But their decision to convict morally, and sometimes causally, blameless defendants, who mistakenly or accidentally came into custody of prohibited drugs, was however carefully dressed up in the language of statutory construction. Thus in *Warner v Metropolian Police Commissioner (ab)* the House of Lords said that because Parliament failed to expressly include reference to any mental element in the possessory offences set out in the Drugs (Prevention of Misuse) Act 1964, that they themselves would have to assume the task of defining its ambit. It was held to include knowledge of custody but not knowledge of nature, or guilty intent. Though no more dictated by the words of the statute, which simply referred to "possession", this formulation, more akin to the civil theories of possession, represented a radical departure from the principles traditionally imported into criminal offences *(ac)*. Fortunately its currency was short lived. Lord Reid, the dissentient in *Warner* whose judgment there now represents the authoritative law on criminal drug possession, generally supported by academea *(ad)*, and ultimately by the legislature *(ae)*, refused to go along with this heresy, this patent breach of the free will principle, the first postulate of the criminal law, and it was contained and recanted by the House soon after *(af)*, in *Sweet v Parsley* and the illuminating judgment of Lord Reid in that case represents the most important recent judicial prounouncement in the field of strict liability generally.

In the New Zealand reported cases, all of which were decided after *Sweet v Parsley (ag)*, which reversed the policy of excluding mens rea from drug offences, the traditional criminal law principles were imported into the prevailing drug control statute, the Narcotics Act 1965, first in *R v Strawbridge (ah)* in relation to cultivation, and later in *R v Rowles (ai)* in rela-

(aa) A statute would only be construed as regulatory (that is, dispensing with mens rea) where "the public evil was great, when compared with the smallness of the punishment": *Warner v Metropolitan Police Commissioner* [1969] 2 AC 257, 280 per Lord Reid (and see the authority cited therein).See also Sayre "Public Welfare Offences" (1933) Col LR 55. Liability, then, was more akin to that imposed by a revenue rather than a criminal statute. When therefore the majority of the House of Lords in *Warner* approved of Lord Parker's striking observation that drug legislation was "for the public welfare", justifying the dispensation of mens rea, "because the regulation of activities for the public welfare have also been treated as a category of cases in which provisions are more readily held to be absolute offences" (*Yeandel v Fisher* [1965] 3 All ER 158, 160), they were bound to examine the corollary of this proposition to see whether the punishments provided, from six months to 14 years imprisonment for possessory offences, were also regulatory in nature.

(ab) [1969] 2 AC 256.

(ac) *Warner* provides yet another unsatisfactory chapter in the recent history of penal construction. The established rule, affirmed a litte over a decade previously in the Privy Council, and time and again in almost every Court in the English and Commonwealth hierarchies, is that mens rea is to be imported into all statutory offences unless excluded by clear expression or necessary implication: *Lim Chim Aik v The Queen* [1965] AC 160, 174; *R v Gould* [1968] 2 QB 65; *R v Wheat* [1921] 2 KB 119; *New South Wales v Piper* [1897] AC 383, 389, 390, *Sambasivam v Public Prosecutor of Malaya* [1950] AC 438, 470; *R v Strawbridge* [1970] NZLR 909. Much of the present case law cannot be reconciled with this directive however, and Parliament may well have to give it legislative status if it is to survive the prevailing disorder. One is as well armed with a dice as a digest in trying to predict judicial prediction on the matter. There can be no doubt that the Courts retain a great deal of residual control over the mentes reae of criminal offences and in fact are quite ready to tinker with established mental elements. This in fact happened in *R v Smith* [1961] AC 290 and the other objective liability cases where the House of Lords substituted negligence for intention in some cases of murder (see Smith "The Element of Chance in Criminal Liability" [1971] Crim LR 63. Intention was smartly resubstituted by Parliament: s 8 of the Criminal Justice Act 1967). In *Warner* itself the House imported the requirement of knowledge of custody into the governing legislation though there was no express stipulation about this element either. This reinforces the objections to the majority's assertion that a person unable to point to a statutory provision, expressly reasserting a defence long understood to excuse all criminal acts, would be subject to conviction without moral fault. The very reverse of the old rule! When so much energy is expended in the elaborate but pointless ritual to reconciling irreconcilable case law, as was done in the majority judgments in these proceedings, it is little wonder that there is nothing left for the more fundamental problems of principle.

(ad) See "The Mental Element of Drug Offences" [1969] 20 Nth Ire LQ 370; "The Offence of Possession under Narcotics Act 1965 [1971-72] 6 VUWLR 195 (NZ); "Strict Liability Offences of Possession" [1972] Crim LR 780. Contra Goodhart "Possession of Drugs and Absolute Liability" [1968] LQR 382 which generally supports the notion of convicting possessors in the absence of moral fault.

(ae) In the form of the Misuse of Drugs Act 1971, (UK) which gave legislative effect of Lord Reid's judgment in *Warner*

(af) In *Sweet v Parsley* [1970] AC 132 (HL).

(ag) [1970] AC 132.

(ah) [1970] NZLR 909.

(ai) [1974] 2 NZLR 756 (per Mahon J).

tion to possession, and in *R v McIntyre (aj)* in relation to the offence of possession for the purpose of supply.

I Custody

Any concept of possession must include that of custody. This element is necessarily implied by the use of the term "possession" in the wording of the offences. Custody is the proprietary dimension of possession. It is the abstract capacity to deal with an object to the exclusion of others and is often identifiable by environmental proximity or accessibility of the possessor to the object.It is akin to an incorporeal right in civil law and so may confer "rights" of ownership, use, or bailment. But the rights relate to the object itself and may have no relationship with the premises in which it is kept. The early New Zealand case of *Dong Wai v Audley (ak)* demonstrates this point.Here the defendant called upon the local constable to inform that an employee in his market garden had smoked opium at his premises (contrary to s 8(2) and (5) of the Dangerous Drugs Act 1927) and requested that something be done about it. Subsequently other constables, in ignorance of this, searched his premises and found some opium and an improvised opium pipe. The defendant knew of their presence as they had been left there by his employee, whom this model citizen dismissed, after being visited by the first constable. But he did not touch them in any way and left them in his former employee's room. His refusal to exercise rights over the contraband ensured his acquittal. As Callan J concluded:

> "The articles were simply being left there by the appellant awaiting some police action which he anticipated as a consequence of his visit to the constable. In these circumstances it is not established that either of them was in his possession." *(al)*

If any element in possession is equivalent to act it is the element of custody for it provides the factual foundation, of the offence. A denial of this element is a denial of causalty. As *Dong Wai* shows it amounts to a complete repudiation of any relationship with, or responsibility for, the event before the Court.

The "right" of custody exists as a matter of fact and law independently of the mental state of the custodian. Though one may be unaware or have forgotten one's rights over a given object they will, if known and not abdicated, be understood by others without any such interest in it, to continue to inhere in their "legal" custodian *(am)*. Thus a person is in custody of a drug if it is in a container subject to his dominion though he is oblivious of its existence. He is in custody of a speck of cannabis in his shirt pockets or vacuum cleaner though he is quite unaware of its presence. He is in custody of a drug suddenly thrust into his hand or planted on his premises by a stranger. He is in custody of a drug though he thinks it is a sweet if it is subject to his dominion. In all cases he has a closer relationship with the object than any other person. Knowledge of the nature or even existence of an object is not necessary to determine proprietary rights.

II Knowledge of Custody

This element does concern the state of mind of the custodian. While custody implies the abstract right of dominion, knowledge of custody implies the actual exercise of dominion.The right is inert without it for an object has no individual utility so long as its custodian is unaware of its existence. He must be able to perceive its presence or accessibility to it. Unlike custody this element is imported by the criminal law *(an)*. It establishes causal connection between the fact of custody and the conduct of the custodian. Because a person may

(aj) CA 91/77. Unreported, New Zealand Court of Appeal. Woodhouse, Richardson and Quillam JJ.

(ak) [1937] NZLR 290.

(al) [1937] NZLR 290, 293.

(am) Ordinarily one can only have de facto rights over a prohibited drug but the Misuse of Drugs Act 1975 creates de jure rights in favour of such persons as law enforcement officials, drug advisory and research personnel, medical practitioners, and ordinary citizens who (s 7(3) (a) (b)) out of a sense of public duty acquire possession of a prohibited drug. Those with such de jure rights would be able to bring civil proceedings against any person who interfered with their proprietary rights unlike those in illegal possession who would presumably be defeated by the maxim ex dolo malo non oritur actio (an action may not be founded on a wrong).

(an) This element of knowledge is sometimes described by the Latin tag "animus possendendi", a term that originated in Roman law and which perhaps ought to be banished from our criminal law, for its presence is a hangover from the days when the Courts were still purporting to apply universal definitions of possession. In its present form it is a notion put together by the disciples of Savigny who felt that his original term "animus domini" (the intention to hold as owner) was too narrow and so they replaced it with the term "animus possendendi" (the intention to exclude others): Dias *Jurisprudence* (3rd ed) 1970, Butterworths, 338. There would be no difficulty if it retained its literal meaning concerning the power of dominion inhering in custody. But it has been used to describe all mental elements in penal possession, including guilty intent, and this is confusing.

only be punished when he voluntarily engages in forbidden conduct, penal theory dictates that a custodian be aware of his rights over the object. He then has the power of control *(ao)*. He may do as he wishes with it. But if he is unconscious of his custody, say if it has been "planted" on his person or in his premises, or is too diminutive to appreciate, or has inadvertently come into his custody concealed in a package or container, he must be excused from penal liability. In all cases he is ignorant of the object's existence and so unable to exercise power over it. In the latter case he undoubtedly controls the actual package or container itself. But not its unknown contents. They are in his custody only.

This has long been recognised, even in the early drug possession cases. In 1966, in *Lockyer v Gibb*, Lord Parker stated on behalf of the Court of Appeal:

> "... it is quite clear that a person cannot be said to be in possession of some article which he or she does not realise is, for example, in her handbag, in her room, or in some other place over which she has control. That I would have thought is elementary; if something was slipped into your basket and you had not the vaguest notion it was there at all, you could not be in possession of it." *(ap)*

The power of control does not of course depend upon familiarity with the nature and properties of the object. So long as there are custodial rights and its external form is apparent to the point of facilitating movement, use, destruction, concealment, or transfer, control subsists. Many a child must have experienced the situation of being given a strange new present and having to ask its donor what it is. Yet his ignorance concerning the function of the object does not diminish his degree of control as he inquisitively handles it.

Often one may be aware of the existence of an object and yet not be in custody of it and thus have no right to exercise dominion, as is say a visitor viewing the Crown jewels at the Tower of London, or a spectator at a "drug trial" who sees the prohibited object produced as an exhibit. The cognitive element relates not simply to presence or accessibility but to one's custodial rights. It implies knowledge of a very specific and personal kind.

Thus the actus reus of possession is control — the combination of the custodial and cognitive elements. This was recognised by the House of Lords in *Warner v Metropolitan Police Commissioner (aq)* but there are a number of cases decided subsequently that are out of line with this proposition.

In *Searle v Randolph (ar)* the respondent had consented to being searched at a police station and a number of cigarette butts were found in his custody. Some he had smoked himself and some he had picked up in and around a tent in which he lived and which had been visited by other persons who smoked cigarettes. His story was that he collected the butts to re-roll for further use. Some of the butts were found to contain small traces of cannabis. The Justices accepted the defence submissions that the defendant did not know or have reason to believe that the cigarette contained a prohibited substance. They thus dealt with the matter as an issue going to volitional awareness. There was no proof of knowledge of custody of the commodity that happened to be prohibited. Regrettably, the Appeal Court, a Queen's Bench Divisional Court, composed of Widgery CJ and Melford Stevenson and Milmo JJ, did not follow their example. They reinstated the information with a direction to convict, imputting to the defendant a mistake *(as)* he never claimed to make, namely, of confusing cannabis with tobacco. This missed the point altogether. The defence was not that the cannabis had been observed and mistaken for tobacco but that the defendant was wholly ignorant of the fact that anything other than tobacco was in the cigarette in the first place. His claim was that he never set eyes on the external form of cannabis and without the slightest inkling of its existence as an additional commodity in the cigarette, did not get near the stage where he could have misapprehanded its nature. So while admitting control of the cigarette he denied any

(ao) Often referred to as factual or legal possession. See *Police v Emirali* [1976] 1 NZLR 286.

(ap) [1966] 2 All ER 653, 655. Alderson B said the same thing a century earlier in *R v Woodrow* 15 M & W 404, 418: "A man has not in his possession that which he does not know to be about him. I am not in possession of anything which a person has put into my stable without my knowledge." Dicta to the same effect may be found in *R v Hess* CCC 48 (1949) and *Police v Hart* [1974] 2 NZLR 75 though the principle does not seem to have been properly applied in this latter case.

(aq) [1969] 2 AC 256.

(ar) [1972] Crim LR 779. Commentary 780-781.

(as) Because *Warner* still applied, a mens rea defence of this kind, could not excuse the defendant.

mental relationship with the unknown commodity concealed within it. Nor could he have suspected the existence of the cannabis. Only a minute pharmacologically inert quantity amounting to three milligrams was found; less than one nine thousandth part of an ounce *(at)*.

A case involving almost identical facts came before the New Zealand Supreme Court in 1975. In *Emirali v Police* the "container" was household debris taken from the defendant's vacuum cleaner. Within it traces of cannabis were found. Like the defendant in *Searle v Randolph (au)*, aware of the tobacco in the cigarette, Emirali admitted knowledge of the debris, but not of the cannabis scattered amongst it. Again the quantity was really insufficient to justify a presumption that the defendant knew of his custody. In the opinion of Mahon J there was reasonable doubt "whether the appellant was aware that the household debris contained the illegal components" *(av)* so the defendant was entitled to be acquitted. The traces could, of course, have been of circumstantial value in a prosecution alleging possession on some earlier occasion.

Also in accord with the requirement of proof of control is the 1971 case of *R v Marriott* decided just before the operation of the new UK Act. Here the defendant had a knife with an unobservable quantity of cannabis adhering to the blade. The Court of Appeal, still bound by the majority judgment in *Warner* held that he would have been in possession of a prohibited drug if the quantity had in fact been observable as foreign matter, even though thought to be tobacco or toffee. This was unquestionably correct. Control was all that needed to be proved under *Warner*. But if, as in the present case, the quantity was so minute as to be beyond the visual detection of the defendant, there was little possibility of his being aware of its presence. He was therefore entitled to be acquitted *(aw)*.

In *R v Wright*, a 1975 case, the appellant, a passenger in a motor vehicle, was handed a tin containing 2.49 grammes of cannabis resin, and told to throw it out of the window, which he did immediately. While he suspected that it may have contained a prohibited substance, he did not have an opportunity to check this. The whole episode took only about ten seconds. Nor was it clear whether he knew that the car was being followed by the police. The Court of Appeal, composed of Stephenson LJ and McKenna and Jupp JJ, correctly declined to consider the matter in relation to the mens rea defence of mistake provided by s 28(3) of the 1971 Act, for the issue did not concern this particular mental element. Though they could in fact have invoked the actus reus defence provided by s 28(2), for the defendant's knowledge of custody of an object that happened *(ax)* to be a drug was not established, they instead relied on the corresponding authority governing control in *Warner*. There was a distinction between the mere physical custody of an object and its possession *(ay)* for the commission of an offence *(az)*. The first was an instance of unconscious custody (of the drug not the tin); the second of conscious and wrongful possession. As the facts before the Court fell within the former category, and the trial Judge had not given the correct assistance about the mental element necessary for the proof of the offence, the appeal was allowed and the conviction quashed.

What of the situation where a defendant once cognisant of his custody of a drug erroneously thinks that he has terminated his

(at) 28, 349 milligrams equal an ounce.

(au) [1972] Crim LR 779.

(av) [1976] 1 NZLR 286.

(aw) There are many other reported cases where clear issues of knowledge of custody have arisen but been ignored by the Courts. In *R v Graham* [1969] 2 All ER 1181 the defendant was found in custody of minute traces of cannabis discovered in scrapings taken from his shirt pockets. His explanation was that he had washed the clothes several times, subsequent to a conviction two years previously for cannabis possession, and that the traces could only be the remains. The Court of Appeal assumed, however, that because the traces were capable of scientific measurement, responsibility for their presence had to be imputed to the defendant without considering the more fundamental question of whether it was likely, or in the absence of scientific equipment possible, that he was aware of its existence. The day of the trial by microscope had arrived!

The same objection may be levelled against the Queen's Bench Divisional Court's decision in *Bocking v Roberts* [1974] 1 QC 307. But there are many cases where the issue has been properly considered - see *R v Worsell* [1969] 2 All ER 1181; *R v McBurney* (1974) 15 CCC (2d) 361, 374-375; *People v Leal* 413 p 2d 665, 668; *People v Aguila* 35 Cal Rptr 516, 518; *People v Cole* (1952) 113 Cal App 2d 253; *Emirali v Police* [1976] 1 NZLR 286; *Williams v R* 22 ALB 195. See also NLA Barlow "Possession of Minute Quantities of a Drug" [1977] Crim L Rev 26.

(ax) Section 5(4) requires, of course, that the defendant knows that he is in custody of a drug.

(ay) Meaning control.

(az) See *R v Wright* 62 (1976) Cr App R 169, 172.

custody or is no longer aware of it because of supervening amnesia? The answer is provided in a case that came before Mahon J in the Supreme Court in 1975. In *R v Rowles (ba)* the appellant, like the appellant in the case of *R v Graham (bb)*, had a "clean out" after an experimental period of cannabis use, but forgot about a small quantity in a container inside his bedroom cabinet. After vacating his apartment to move back to his parents' home he brought the cabinet with him, and with it also the unknown traces of cannabis. The Magistrate accepted his story that he had forgotten about the substance but convicted nevertheless. Accordingly Mahon J, on appeal, had little hesitation in reversing the result:

> "If in fact the appellant had forgotten the presence of the cannabis in the cabinet, then I think he was not knowingly in possession of the cannabis. The extinction of conscious knowledge, whether caused by mistaken belief or fault of memory, would be in my view fatal to the required concept of factual possession accompanied by guilty knowledge." *(bc)*

In theory, of course, Rowles would have been guilty of his possession before the point when his knowledge faded. But with the change in his perception went his power of control, and with that went his capacity to threaten the objectives of the statute. Section 28(3) of the Misuse of Drugs Act 1972 (UK) ensures that the same result is reached in the United Kingdom.

The series of cases presently reviewed have all concerned the situation where apparent control has in fact amounted to custody only. There are situations where both custody and knowledge may be present but the defendant is still exculpated because his control is involuntary. Say if a surgeon inadvertently placed a small sealed container of heroin in the stomach of a patient who was duly stitched up and subsequently realised his "possession" of the drug upon observing a post operation X-ray. Unquestionably he controls that drug. But he has lent neither a willing body nor mind to contrive this result; nor had the capacity to prevent it. An independent agency over which he has no volitional influence has caused the prohibited harm. There is no causal connection between the fact of control and the conduct of the patient *(bd)*. Like the epileptic, the insomniac, the assault defendant blown against his "victim", or any other defendant raising the defence of automatism or causal necessity, his conduct does not meet the actus reus requirements of the offence *(be)*.

III Knowledge of nature

As Jerome Hall, in *General Principles of Criminal Law*, states, "the essential meaning of mens rea, ie that represented in the intentional doing of a morally wrong act, *implying concomitant knowledge of the material facts*, has persisted for centuries." *(bf)*

In 1736 Hale wrote that "man is naturally endowed with two great faculties, understanding and liberty of will . . . the liberty of choice of the will *presupposeth an act of understanding to know the thing or action chosen by the will*." *(bg)*.

These classic words are echoed by Lord Devlin (then Mr Justice Devlin) over two centuries later in his well known article "Statutory Offences":

> "Mens rea consists of two elements. It consists first of all of the intent to do an act, and secondly of the knowledge of the circumstances that makes that act a criminal offence." *(bh)*

Mens rea then, includes a cognitive as well as a volitional or international element. The common law defence of mistake protects defendants suffering from a defect or error in the

(ba) [1974] 2 NZLR 756.
(bb) [1969] 2 All ER 1181.
(bc) [1974] 2 NZLR 756, 759.
(bd) A Canadian case of involuntary control is *R v Hall* (1969) 124 CCC 238. Here the defendant had automatically thrown a hypodermic needle and eye dropper out of the window of her friend's apartment, consequent to it being thrown on her lap by her friend, as the police burst into the room. Both women were charged with possession of equipment used for facilitating drug use and the defendant's friend pleaded guilty. In the view of O'Halloran JA of the Ontario Court of Appeal, the defendant's "control" of the contraband, limited as it was to the reflexive act of removing an object imposed upon her, could not attract liability:"Control excludes a casual or hasty manual handling of the subject matter under circumstances, as in the evidence here, not consistent with one's own purpose or use for 'a fix.' "
(be) See Hall *General Principles of Criminal Law* 2nd ed (Bobbs-Merrill) 421-425, and "Some Remarks about the Element of Voluntariness in Offences of Absolute Liability" [1968] Crim LR 23. See also *Sommerset v Wade* [1894] 1 QB 574; *Hill v Baxter* [1958] 1 QB 277; *Burns v Bidder* [1966] 3 All ER 29; *Kilbride v Lake* [1962] NZLR 590; *R v Carter* [1959] VR 105; *R v Cottle* [1958] NZLR 999.
(bf) Op cit, 83.
(bg) 1 Hale PC 14, 15.
(bh) 4 J of Soc Pub Teachers of Law 213 (1958).

cognitive process by relieving them of penal responsibility where their understanding of the facts is at variance with reality. The seemingly evil intention is neutralised by the mistake.

This two-tier analysis of the mental element of a crime now has a statutory basis in drug possession law in England but still a common law basis in New Zealand. The second element mentioned by Lord Devlin, guilty knowledge, requires that a defendant be aware that the commodity subject to his control is a prohibited drug. This element was not recognised by the Court of Appeal in *Lockyer v Gibb (bi)*, or the majority of the House of Lords in *Warner v Metropolitan Police Commissioner (bj)*, but seems to have been readily understood in England since the passage of the 1971 Act. In *Director of Prosecutions v Brooks*, in 1974, Lord Diplock, delivering the advice of the Judicial Committee of the Privy Council, spoke of the "two different requirements of knowledge on the part of a defendant needed to constitute the mental element in the criminal offence of possession" *(bk)*. And a corresponding line of common law authority was developed by Mahon J in the New Zealand Supreme Court decision in *Police v Emirali (bl)*. By the time the *Emirali* appeal had arisen for determination the judicial reaction against the majority judgments in *Warner* had already set in. The House of Lords soon saw the light held up by Lord Reid. In *Sweet v Parsley (bm)* it abandoned the absolute liability doctrine and imported mens rea into the offence of keeping premises for the purpose of drug use *(bn)*. The New Zealand Court of Appeal did the same in *R v Strawbridge (bo)*, in respect of the offence of cultivating drug plants. Tying these various threads of authority together Mahon J formulated a definition of drug possession that included both mental elements:

> "the combination of physical custody and animus possendeni *(bp)*, which creates legal possession is not in itself sufficient to establish liability.There must also be a guilty knowledge on the part of the possessor." *(bq)*

The operation of the defence is well illustrated by the Canadian case of *Beaver v Reg (br)*. Here the defendant claimed that he mistakenly believed that the package found in his custody, which in fact contained morphine, contained only milk sugar. Thus he said he was aware of the existence of the prohibited commodity but mistaken as to its nature. He claimed therefore that he was an innocent custodian of the drug. As the law had long declined to impute moral guilt to a man whose conduct would have been harmless had the facts been as he had supposed, the majority of the Supreme Court of Canada, analogically held, that because there could be no wrong in possessing milk sugar, his plea should be accepted.

In *R v Buswell (bs)* the mistake concerned the legal status of the drug found in the defendant's control. Like the defendant in *R v Rowles (bt)*, Buswell had forgotten about his possession of prohibited drugs which were once, but no longer, authorised by a medical prescription. His resumption of control meant that he knew he had custody of a drug the possession of which happened to be illegal by then. He did not say that he was mistaken as to the law prohibiting possession. The principle of ignorantia juris neminem excusat would have quickly disposed of that submission. He claimed a mistake, akin to that of a bigamy defendant thinking himself free to remarry on the erroneous assumption of his first wife's death, of legal status *(bu)*. He simply said that he thought that the prescription had not expired.

(bi) [1967] 2 QB 243.
(bj) [1969] 2 AC 256.
(bk) [1974] 2 All ER 840, 843.
(bl) [1976] 1 NZLR 286.
(bm) [1970] AC 132.
(bn) The onus of proof, on the balance of probabilities, was placed on the defendant.
(bo) [1970] NZLR 909.
(bp) Meaning knowledge of custody.
(bq) *Emirali v Police* [1976] 1 NZLR 286, 288.
(br) [1957] SCR 531.
(bs) [1972] 1 All ER 78. See "Possession Becoming Unlawful" [1972] Chittys LJ 285. *R v Chatwood* [1980] 1 All ER 467, 471, establishes an admission by an accused that he knew the substance he used or possessed was a drug is sufficient prima facie evidence to identify its nature even in the absence of corroborative expert scientific opinion as "in the last analysis, everybody is expressing an opinion" and "these drug abusers were expressing an opinion, and an informed opinion, that, having used the substance which they did use, it was indeed heroin, because they were experienced in the effects of heroin."
(bt) [1974] 2 NZLR 756.
(bu) This amounts to a claim of right, juristically identical to those recognised in property crimes which may also be "unfounded in law or in fact": *R v Skivington* [1968] 1 QB 166, 170. See also *R v Gibson* (1944) 29 Cr App R 174; *R v Hancock* [1968] Crim LR 111; C D Beeby "Colour of Right" (1958) 2 VUWLR 257.

Because a mistake of this nature was inconsistent with conscious wrong on his part he was acquitted.

R v Buswell was in fact decided before the operation of the 1971 UK Act, when the Court of Appeal was still unable to entertain a mens rea defence to possession, without recognising that *Warner* had been overruled on this point by *Sweet v Parsley*. It did not do this but still allowed the defence *(bv)*.

Finally, what of a mistake as to the particular character of pharmacological properties of a commodity known to be a prohibited drug? Section 28(3) (a) enacts the common law rule here. A mistake of this type still involves a criminal intention, and cannot therefore be privileged by the principles of mens rea, any more than would be a murderer's mistake as to the identity of his victim *(bw)*. The wrongful quality of the possessor's intention to control a drug he knows to be prohibited, like the murderer's intention "to kill the man at whom the knife is directed" *(bx)*, is not vitiated by his mistake of identity of subject matter.

IV Guilty intent

As previously stated mens rea has a volitive as well as a cognitive side. It is important to distinguish the moral and mechanical content of this fused concept. The volitive side is intent, the movement of the will, in drug possession the ethically wrong intention to maintain control of an object known to be a drug *(by)*. The cognitive side is the valueless state of awareness associated with the operation of the senses. It implies the spontaneous and involuntary reception of information whereas volition, which involves judgment and the will, is concerned with the uses to which that information is put. So long as our penal philosophy continues to resist deterministic theories expounding the inevitability of human conduct this independent ethical element of mens rea will always be recognised. In the Misuse of Drugs Act 1975 it appears in the form of s 7(3) (a) and s 7(3) (b).

The combind effect of these provisions is to confer a defence, which may be described as "public duty", on a person who voluntarily puts himself into control of a prohibited drug in circumstances inconsistent with a guilty intention towards it. The important point about this defence is that the defendant is always faced with a choice concerning his assumption of control. A father finding a drug in his teenage son's bedroom, can simply elect to leave it remaining in his custody by declining to exercise acts of dominion over it or he can assume control of it and destroy it, or take it to the local police station. So too with a teacher or caretaker finding drugs left in school grounds. An assumption of control in these circumstances is privileged under s 7(3) (a).

Section 7(3) (b) concerns situations, not where drugs have simply been found in the absence of their possessors as under s 7(3) (a) but where they are actively seized or otherwise removed from their possessors. The Canadian case of *R v Benjoe (bz)* illustrates the operation of the provision. Here the defendant, a counsellor, confiscated contraband from a youth under his authority to to prevent its use. He was subsequently prosecuted for his trouble. The Court of Appeal of Ontario affirmed his acquittal on the ground that his assumption of control, a power he intended only to temporarily maintain, did not undermine the object of the Act. Had Benjoe intended, or later

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(bv) *R v Buswell* (supra) demonstrates the enormous practical difficulties in imposing an absolute prohibition on possession. The growth of the large impersonal pharmaceutical industries creating market demands for chemical remedies for every kind of ailment afflicting body, mind, and soul, inevitably entails errors in prescribing, dispensing, and retaining, that accidentally put innocent people in control of prohibited drugs. Similar problems arise as a result of the widespread increase in the use of social drugs such as cannabis and the amphetamines in most Western countries since the early 1970s. The greater mobility of society and relative independence of youth has brought with it a high tenant turnover in residential premises.This creates a danger of innocent persons coming into custody of drug remains left by outgoing residents. The impossibility of eradicating all traces of cannabis, for example, means that minute quantities are often left deposited in carpets, fireplaces, clothes, and cupboards; bringing into custody persons who have absolutely no responsibility for their presence. Though the quantity may sometimes be observable, many are ignorant of the appearance, even of the social drugs.Very few non-users would be able to distinguish between heroin and morphine and other crystalline substances; let alone have any idea of the appearance of the three forms of cannabis or the countless amphetamines.

(bw) See *R v Mennard* (1960) 13 CCC 242; *Warner v Metropolitan Police Commissioner* 1969 2 AC 256, 279, per Lord Reid; *Leverts Case* (1638) Cor Car 538.

(bx) *McGehee v State*, 42 Miss 747 (1885); See *Hall* op cit, 356.

(by) With an offence under s 13(1) of the Act it is to maintain control of pipes or other utensils used, or specifically usable, for the smoking or preparation of opium; with an offence under s 6(1), an intent to maintain control of drugs for supply purposes.

(bz) 130 CCC 238.

decided, to maintain control of the contraband for his own use the element of guilty intent would have been supplied. But his intention towards the contraband, far from being guilty or blameworthy, was morally commendable. Deliberate conduct was there but a criminal intent was not. The will moved for a different purpose.

The defence of public duty has a common law origin *(ca)*. Benjoe acted in the absence of statutory warrant. The Misuse of Drugs Act 1975 simply recognises an established mens rea justification. The defence is of the same genus as necessity, self defence, or duress. Like them it is a mens rea defence justifying intent as distinct from a mens rea defence excusing ignorance such as mistake of fact. The public duty defendant is confronted with an option to commit the physical ingredients of the offence. He is subject to the pressure of moral duty, rather than physical events, though cases are conceivable where the immediate effects of his failure to intervene and assume control are equally serious *(cb)*. But like the trespasser of necessity entering the mountain hut during the blizzard, or the non-licensee seizing the gun from the lunatic, or the assault victim taking the life of his attacker to preserve his own, the public duty defendant finds it necessary to commit an outwardly illegal act in order to preserve a higher value. And to his moral credit it is the life, health, or welfare, of his fellow men that he is concerned with, not his own *(cc)*.

It is not a question of motive. That concerns the complex of psychic or background reasons that impel conduct. Motive in these cases may be good or bad. Benjoe, for instance, may have been motivated by an officious dislike for the ward found with the contraband. Or he may have desired to prove his competence to his superiors. But providing that he intended to seize the drug to pass it on to the authorities, and so prevent the dangers inherent in its circulation, his intent in respect of that immediate action, fortifies rather than offends the ethics of penal drug possession *(cd)*. He acts to conserve what law and morality deem to be a higher value. This is not the essence of a guilty intent *(ce)*.

Like other defences of justification the law permits the public duty defendant to commit the outwardly illegal act only to the least degree necessary. The self defender must use force only proportionate to that given against himself and the trespasser escaping from the blizzard may break down only the door, not demolish the wall of the snow hut, if this is sufficient to obtain entry and refuge. And if he is starving, he may not indulge in a ten-course banquet but use only as much food as is necessary for basic sustenance. So too, the public duty defendant must limit his control of the drug as much as reasonably possible. The law permits only the minimal sacrifice of the lower value. Thus the co-relative duty to the right to control is the obligation to shorten the reign of the availability of the drug. Otherwise there would be no point in justifying intervention. The danger must be terminated, not continued, so the public duty defendant must destroy or take the drug to the nearest police station. So long as he does this, his conduct does not actualise mens rea, and he will be entitled to an acquittal.

Another mens rea justification defence is that of duress. The law refers the evil of obedience to another's criminal commands to the evil of death or injury attaching to disobedience. Custody and full knowledge may be present in the mind of a person in possession

(ca) This is recognised by Laskin JA (as he then was) in *R v Ormerod* [1969] 2 OR 230, 23, in a reference to *R v Benjoe*, supra:"The notion of "public duty" so far as it is reflected in the case, emerges only as an element that supports the absence of mens rea."

(cb) For example where a mother assumes control of heroin her child has found in the streets and is about to put into its mouth, or a citizen, to prevent a possessor sprinkling LSD in an urban water reservoir. It is not enough to say that the police do not prosecute in such cases. *Benjoe* shows that they do. Sometimes they do not believe a defendant's story and think it better resolved by and independant jury of fact.

(cc) A similar instance of a public duty defence, where an outwardly criminal act is necessary to terminate a crime, is given in *R v Wheeler* [1967] 1 WLR 1531 where the Court appears to accept the common law proposition that it is not unlawful to kill "in reasonably defending . . . *someone else* against violent attack". Kenny in para 153 of his *Outlines of Criminal Law* (17th ed) also supports such a defence arising out of "social obligation".

(cd) As *Hall*, op cit, 88 states, the same applies in respect of the other justification defences, such as self defence, citing *Golden v Georgia* 25 Ga 527, 532 (1858):"One may harbour the most intense hatred towards another; he may court an opportunity to take his life; may rejoice while he is imbruing his hands in his heart's blood; and yet, if, to save his own life, the facts showed that he was fully justified in slaying his adversary, his malice shall not be taken into account."

(ce) See *Hall*, op cit, 110, 111: "Almost the only constant in the long history of the term is that mens rea includes an intention, a "movement of the will". Indeed, the classical synonym of mens rea is "evil will"; and that valuation placed the emphasis on the precise relevant meaning which escaped Austin [and the later utilitarian writers.]"

under duress whose unwilling or involuntary assumption of custody negates responsibility. A person must desire or tolerate his custody of a drug; it cannot be imposed upon him against his custody of a drug; it cannot be imposed upon him against his wishes as Woodhouse J affirmed in the New Zealand Court of Appeal case *R v McIntyre (cf)* where a possession supply conviction was quashed and a new trial ordered as the trial Judge has failed to direct the jury on the issue of the voluntariness of the appellant's custody after his defence that he assumed custody at gunpoint.

V Reckless possession

The common law operated to impose liability where a defendant "suspects" or "has reason to suspect" that he is in control of a prohibited drug. The defendant must appreciate the probability that the object in his control is a prohibited drug. It is therefore not an objective standard like negligence which connotes a complete absence of awareness. So it is not a failure to comply with a predetermined standard that is penalised here. The requirement of an awareness of imminent danger implied by recklessness separates it completely from the genus of negligence. If there is any inadvertence in recklessness it relates to the known risk. In negligence it relates to the unknown risk *(cg)*.

The reckless possession of a drug is juristically identical to the reckless receiving or possession of dishonestly obtained goods. The old authorities on recent possession have always imposed liability for a "shutting of the eyes". That is regarded as tantamount to full knowledge of the risk *(ch)*.

In the 1975 case of *R v Wright (ci)* where the defendant was told to throw a tin out of a window of a moving car, and did so instinctively, it may be said that he was negligent as to controlling its contents but it could not be said that he was reckless in this regard. He did not suspect or have reason to suspect that a prohibited drug was contained within. Had the facts been different and he knew that a police car was following close by, and it was clear that his companions were jettisoning the object for this reason, the evidence would suggest that he was acquainted with the risk that the tin contained something his companions were not allowed to possess. But this would still not be enough *(cj)*. If he could prove that he thought the tin contained dishonestly obtained goods he would not be liable for any offence under the Misuse of Drugs Act 1975.The language of the statute requires that his recklessness, his knowledge of the risk, specifically relates to his custody of a prohibited drug.

VI Postscript

The burden of this article has been to demonstrate the trend back to the traditional principles of penal possession; a change inspired by a more rational approach by society towards drug misuse coupled with a reappraisal by the Courts and the legislature of the prudence of discarding the centuries of accummulated wisdom to cope with a recent problem that will need more than Draconian laws to solve. It is essential in principle and binding in authority that the principles of responsibility, of actus reus and mens rea, be imported into all statutory offences, unless specifically excluded in which case the legislature bears the political consequences for tinkering with the free-will principle, the first postulate of the criminal law. The history of the law relating to drug possession offences is the story of the correction of a failure by some modern Courts to heed this imperative. So long as the elements of penal possession imported by the principles of responsibility continue to be recognised, the proper balance between the objectives of drug control and the limits of the criminal sanction, will be maintained.

(cf) CA 91/77.

(cg) "Since recklessness connotes awareness while negligence excludes awareness, it follows that, like life and death, where the one is, the other is not. No matter how difficult it may be in particular cases to determine whether the defendant was reckless or negligent, there is a hard impenetrable wall that separates them" *Hall* op cit, 116; *R v Andrews* [1937] AC 576, 583 "an indifference to risk" HL; *R v Cunningham* [1957] 2 AB 396; *Wilkins v An Infant* [1965] Crim LR 730. See also *R v Grunwald* [1963] 1 QB 935.

(ch) *R v White* (1859) 1 F & F 665; *R v Harvard* (1914) 11 Cr App R 2; *R v Woods* [1969] 1 QB 447; See also *John Henshall (Quarries) Ltd v Harvey* [1965] 2 QD 233 *Roper v Taylors Central Garages* [1951] 2 TLR 284. The decision to expressly include recklessness as a basis for possessory liability in *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256, 279 that "it is a commonplace that, if the accused had a suspicion but deliberately shut his eyes, the Court or jury is well entitled to hold him guilty".

(ci) 62 (1969) Cr App R 169, 173

(cj) "This (the defendant's innocence) is so even though the instruction to throw away the container, which he instantly obeyed, made him suspect that there was something wrong about its contents," per McKenna J, supra 173.

CONSTITUTIONAL LAW

THE "TICKS AND CROSSES" QUESTION

By Wm C HODGE, *Senior Lecturer in Law, University of Auckland.*

The Court of Appeal has unanimously given a declaratory order under s 3 of the Declaratory Judgments Act 1908, upon the application by originating summons of J F Wybrow on the "Ticks and Crosses" issue, as decided in the *Hunua Election Petition* case, reported at [1979] 1 NZLR 251, 294-303: *Wybrow v Wright* [1980] Butterworths Current Law 542. The originating summons had been removed to the Court of Appeal under s 7 of the Declaratory Judgments Act 1908.

The plaintiff is the General Secretary of the New Zealand Labour Party, and brought suit in his representative capacity for the New Zealand Council of that party. The nominal defendant was J L Wright, the Chief Electoral Officer, but counsel for the Attorney-General presented opposing argument. The National Party and the Social Credit League had been served but took no part in the argument. The applicant sought a declaration that "a Returning Officer shall not reject a ballot paper as informal under s 115 (2) (a) (ii) of the Electoral Act 1956, if in his opinion the intention of the voter in voting is clearly indicated notwithstanding that the voter has failed to mark his ballot paper in accordance with the directions contained in s 106 (1) of the Act".

The Court first dismissed the submission that it had no jurisdiction under s 3 of the Act to give an order and, alternatively, that it should exercise its discretion (conferred by s 10 of the Act) to decline to give any order. The Court held that a major political party clearly had a substantial interest in the subject-matter of the declaration sought, and held further that s 3 conferred a very broad right to seek the Court's assistance: *Turner v Pickering* [1976] 1 NZLR 129 at 135. It was especially appropriate to resolve a conflict which had emerged in the treatment of electoral petitions, and even more so when the matter was of such "fundamental constitutional importance".

The Court then considered the central problem: the apparent conflict between s 106 of the Electoral Act 1956, and s 115 of the same Act. Section 106 commands the method of voting and gives precise instructions to the voter on the marking of his ballot paper. He is directed to "strike out the name of every candidate except the one for whom he wishes to vote". He is also directed to fold the ballot paper. If the Act were otherwise silent, all votes not marked and folded in precisely that manner would be informal. But, the Act speaks again, directing the Returning Officer, in subpara (ii) of s 115 (2) (a) not to reject a ballot paper "by reason only of some informality", if the intention of the voter is clearly indicated.

The Court found this to be a false conflict: s 106 instructs the voter; those instructions are printed on the ballot paper. Section 115, on the other hand, directs the Returning Officer. It can be no accident that s 115 states a wider test.

The true relationship of s 106 and s 115 is that a ballot not in strict compliance with the instructions of s 106 is in danger of rejection. But a paper will escape rejection on the ground of informal marking by the voter, in whatever way, if it succeeds in conveying the intention of the voter clearly. The Court would be very slow to attribute to Parliament the pedantry of insisting on rejection of the vote if a voter fails to understand the instructions but does succeed in making his or her intention clear. Uniformity in voting methods is not an end in itself.

This interpretation comports with prior decisions of New Zealand Courts on election petitions prior to *Hunua: R v Bagley* (1970) Mac 836, a decision of Chapman J concerning an Otago Provincial Electoral Ordinance which "was designed to facilitate, not to obstruct, the recording of every citizen's vote"; *Hawke's Bay Election Petition* (1915) 34 NZLR 507, an application of the "clear indication" test by Stout C J and Edwards J; *Lee v MacPherson (No 2)* [1923] NZLR 1307, another application of the "clear indication" test in a judgment delivered by Stout CJ, which relied on the *Bagley* case and the *Hawke's Bay* case; *O'Brien v Seddon* [1926] GLR 141, where the Court approved remarks in the *Cirencester* case, infra, where the Court would recognise "a mark in the shape of a cross or a straight line or in any other form, and whether made with pen and ink, pencil, or even an indentation made on the paper, whether on the right or the left hand of the candidate's name or elsewhere. . .": *McAuley v Rishworth* [1929] NZLR 149; *Hogan v Stewart* [1932] NZLR 714; and *Re Raglan Election Peti-*

tion (No 4) [1948] NZLR 65, all of which applied the "clear intention" test. The Court also referred to the *Cirencester* case (1893) 4 O'M & H 194, recorded at p 42 of *Fraser on Election Petitions; Kane v McClelland* (1962) 111 CLR 518, and *Re Dingley and McLean* (1973) 34 DLR (3d) 38.

Comment:

This five-Judge session of the Court of Appeal was a "full" assize of the permanent numbers of that Court and therefore most authoritative. Larger Courts have been convened in New Zealand (see the seven-Judge Court of *In Re Rayner* [1948] NZLR 455), but the present case represents the most numerous assemblage of permanent appellate Judges and Privy Councillors yet seen in this country (made possible by s 7 of the Judicature Amendment Act 1979).

It must be emphasised that this decision was not, in fact, and could not be, in law, an appeal against the decision of the *Hunua Court.* As a matter of factual concern, the Hunua Tribunal devoted only 20 percent of its judgment to the "ticks and crosses" issue, and was more concerned with the sundry problems of voter registration, special ballots, double ballots, votes by the deceased, and the Maori option. As a matter of law, s 168 of the Electoral Act declares that such electoral judgments are final, and not reviewable.

The Returning Officer, on 14 December 1978, originally announced that M Douglas (L) had a majority of 301 votes over the second place getter, W R Peters (N). There were 213 informal votes. Consequent upon the determination of the Hunua Election Petition Court, the appointment of a special Master, a new scrutiny, and a recount, the number of informal votes was increased by 347 to 560, and Peters was declared duly elected with a majority of 192. It is mathematically possible that all 347 of the recategorised informal votes came from the Douglas column, and thus that redesignation alone reversed the result. Such arithmetic, however, is most unlikely, since the four candidates between them lost a total of 815 votes, and over 450 ballots were removed before the recount on various grounds of ineligibility. It seems more likely that each candidate lost votes for a variety of reasons.

It is suggested here that the remarks in *Cirencester* supra, are most persuasive. There the Court held the voter who took the trouble to attend the polling place, stand in a queue, apply for his ballot and retire to a booth, intended to cast a vote for a candidate. A burden, therefore, might be on the Returning Officer to show that the elector intentionally chose to spoil his ballot and cast a vote of "no confidence" in each candidate.

Finally, the unseemly comments of the MP for Kapiti (Mr B E Brill) and the Attorney-General (Mr McLay) should be recorded. As noted in the newspapers of 24 May, Mr McLay criticised the decision and implied that statutory amendment was contemplated. Mr Brill allegedly said, "The law is an ass", and declared that the law had to be changed. While the contemptuous remarks of Mr Brill might be excused, it is disappointing to hear the nation's highest law enforcement officer reject a decision of the most prestigious Court ever to sit in New Zealand.

If the Government undertakes to amend the Act to neutralise this decision, a change will presumably be made to s 115, which is not entrenched. It could be argued that amendment of s 115 would work an implied amendment of s 106, which in turn would mean amendment — by implication — of s 189 (2). Entrenched sections can, of course, be amended by ordinary legislative majorities if the entrenching section is amended first, expressly or by implication.