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NDA : THE FIRST INQUIRY

This month will see the first Planning Tribunal Inquiry instituted under the National Development Act 1979. There are limitations — even gaps — in the NDA inquiry procedures. Depending on how the Tribunal interprets the Act there may well prove to be matters of substantial importance that are not considered at the hearing. This position will be greatly exacerbated in future cases if controls are placed on the scope of the audit to be conducted by the Commission for the Environment.

The important point to recognise about the coming inquiry is that it is not to be a full-scale general inquiry into a national development project. It will be but "an inquiry into the matters of relevance to the consents set out in [the] application." When one considers the wide range of matters declared to be of national importance in the Town and Country Planning Act 1977 it would seem at first sight that the scope of the inquiry may be as broad as the Tribunal decides. However s 9(2) of the Act directs that "the Tribunal shall not be concerned to inquire into the criteria set out in s 3(3) of this Act." Section 3(3) refers to "a major work that is likely to be in the national interest", to "the orderly production, development, or utilisation of New Zealand's resources;" and to "the major expansion of exports or of import substitution;" to name but a few. In his book "Environmental Law" Mr D A R Williams suggests (para 911) that s 9(2) may be interpreted to preclude consideration of "matters of national importance" when deciding whether to recommend whether consent be given under the Town and Country Planning Act 1977. This interpretation is to some extent underlined by s 11 of the NDA which directs the Governor-General in Council, before declaring the work to be of national importance, to further consider the criteria set out in s 3(3).

All points to an intention to preserve the wider issue of national interest solely to the Government. Should this approach be endorsed by the Planning Tribunal then it should be recognised that its recommendation on town planning matters and also, probably, on water rights, will be founded on a narrower range of criteria than is usually the case.

It is difficult to see how a decision on the interrelation between ss 9(2) and 3(3)(a) can be avoided at this first hearing and it will be a very crucial decision for the future.

There have been strong indications of moves afoot to redefine the function of the Commissioner for the Environment. In terms of the NDA the Commissioner is required to "give his opinion on the *environmental implications* of the work in the form of an audit". The term "environmental implications" is not defined and there are those who would like to see the term so circumscribed as to exclude any consideration of economic and policy matters. What this would mean in effect is that the Commissioner would not be able to examine the wider implications of a project and in particular whether it could be regarded as a wise use of resources (a matter of national importance at least in town planning). If that constraint is to be placed upon the Commissioner, and if a restrictive interpretation is given to s 9(2) as suggested above, then nowhere in the procedures laid down in the NDA will there be scope for considering the economics or wider

implications of a project.

It may be noted that the redefinition of "environmental implications" would be by Cabinet and this underlines the essentially insecure position of the Commissioner for the Environment whose office it will be recalled is based on a Cabinet minute; not statute.

The Commissioner has now been given statutory responsibilities under the NDA and this does open "environmental implications" to judicial interpretation. However it is unlikely that the Planning Tribunal will be called upon to interpret the term for it is not concerned with the wider duties of the Commissioner under the Act; so those who look for some guidance from this Inquiry as to the audit obligations of the Commissioner are likely to be disappointed.

Guidance may be expected on the role of the Commissioner before the Planning Tribunal. The Commissioner must be represented at the Inquiry and available for cross-examination. He has also the right to be heard. The scope of the Commissioner's audit and the scope of the Planning Tribunal Inquiry are different. So the first question to decide will be whether cross-examination may range generally over matters contained in the audit or whether it must be specific to those parts that relate to statutory consents. While logic may suggest the latter a final decision will not be simple and will depend in part on whether the Commissioner's audit will be admissible as evidence or excluded as hearsay. Admitting the audit may be to admit cross-examination on matters not relevant to the Inquiry while excluding it may place the Commissioner in the invidious position of having to face cross-examination without being able to adequately establish the foundation for his opinion or present his case in its totality. Again it is unlikely that the Planning Tribunal will be able to avoid resolving this difficult and complex point.

The matters outlined above will have a bearing on two specific issues that are likely to arise during the course of the hearing. The first concerns the control of chromate emmissions. It is in this area that we may see debate on whether control conditions should be based on the best available technology or be in accord with the most practical course. Although not presented so starkly these alternatives are not new to the Planning Tribunal. Thus in the *Pikarere Farm* case (6 NZTPA 545) the Planning Tribunal was prepared to impose a condition involving expenditure of an additional two million dollars to preserve the quality of receiving waters. But the significance in this case must be seen against the background of the possible redefinition by Cabinet of "environmental implications", for at the level of national development projects, and considering the nature of the emission, a decision such as this on control measures cannot but be argued in the context of the wider economic and other implications of the project as a whole.

The other issue likely to arise concerns regional matters such as pipeline corridors and other petro-chemical development in the area and their needs. These could well be excluded from consideration altogether by a restrictive interpretation of s 9(2).

From the legal point of view then this first National Development Act Planning Tribunal Inquiry may be expected to provide some definition of the nature and scope of the inquiry itself and to give some guidance as to the role of the Commissioner for the Environment before that inquiry. How the Planning Tribunal decides will mark the course for the future.

As far as the Commissioner for the Environment is concerned, in many ways his trial is still to come. His office, being without a statutory basis, is vulnerable and when one looks at the potential limitations on NDA inquiries and hears of the possible redefinition of his function it is difficult not to feel alarm at the way in which an elaborate structure has been established, supposedly for environmental protection, but with such in-built limitations as to virtually ensure that all matters are debated except the really important ones.

TONY BLACK

MATRIMONIAL PROPERTY

REDISTRIBUTING MATRIMONIAL PROPERTY WITHOUT PAYING DUTY

By MOIRA E THOMPSON

Can the provisions of the Matrimonial Property Act 1976 be used to redistribute Matrimonial Property between happily married spouses? If they can be, then worthwhile savings of gift and stamp duty may be effected.

There has been some uncertainty as to whether the provisions of the Matrimonial Property Act 1976, and in particular s 25, may be used to effect a redistribution of property between a happily married husband and wife. The significance of using the Act in this way is that resettlement will not attract gift duty or ad valorem stamp duty.

Re E [1978] 2 NZLR 40 is the only reported case to consider the question of the jurisdiction of the Court. There O'Regan J said:

> "In my view, there is jurisdiction to make the kind of order sought. Subsection (2) of s 25 (which deals with the more common circumstances in which orders are sought) is expressly made subject to subs (3), and the latter subsection confers jurisdiction 'notwithstanding anything in subsection (2) . . .'. It follows, in my opinion, that 'at any time' application pursuant to s 23(a) may be made to define the interest of either spouse in property which is subject to the provisions of the Act. On a consideration of such an application the Court has a discretion whether or not to make such declaration or order but such discretion is circumscribed by the requirement of the subsection that any declaration or order is to be exercised 'subject to the provisions of this Act' and 'as it [the Court] considers just'."

He found confirmation of this view in the preamble which stated among the objects of the Act, an aim "to provide for a just division of the matrimonial property . . . when the marriage ends, or in certain other circumstances". These other circumstances in which order may be made, he considered, were specifically provided in s 25(2) and (3).

He saw one problem in this use of s 25(3). Discussing the relevance of the applicants' wishes, he says:

> "To give them weight could be to encourage the abuse of the provisions of the Act and to make one of its purposes the provision of tax free gifts between spouses".

However there, the discretion in the Court to make such order or declaration as it considers just counted against any problem in the light of the facts of this case.

Some unreported decisions have followed. These agree with the interpretation of O'Regan J on the question of jurisdiction. In *Harrex v Harrex* (unreported; Dunedin Registry (M8/79), 14 August 1979) White J found further support for the argument from the power to make agreements under s 21(1). Savage J in *Re M* (unreported, Rotorua Registry (M125/78) 29 July 1980) had no doubt that "the plain words of the section" gave the Court jurisdiction to make the order.

Counsel in the latter case submitted that applications of this kind should not be regarded as a device to circumvent stamp and gift duty legislation. This submission was accepted by the Court. A further submission, which, to Savage J seemed to be correct, was that s 4 of the Matrimonial Property Act purports to make the Act a code and requires all other enactments to be read subject to it. The application of estate duty is expressly preserved and there is no similar express preservation of stamp or gift duty. This suggested to Savage J that the rights under the Act are intenced to override the gift and stamp duty consequences.

In conclusion, then, are two points. First, it seems beyond doubt that the Court has jurisdiction, to make this type of order. Secondly, there is acceptance of the view that resettlement of property between happily married couples and in accordance with the object of the Matrimonial Property Act is not an improper use of the Act though the result is to avoid stamp and gift duty.

This is a desirable interpretation, for it would be a pity if financial considerations were allowed to discourage those who wished to bring their legal title into accord with the social objects of this Act from doing so.

TRUSTS AND TRUSTEES

PURPOSE GIFTS AND UNINCORPORATED ASSOCIATIONS

By C E F RICKETT*

Recent English decisions concerning the manner in which funds subscribed to political parties are held have significantly affected the law relating to non-charitable gifts and gifts to unincorporated associations. Guidance is also given on the definition of an unincorporated association.

The purpose of this brief paper is to draw attention to recent developments in England in the areas of non-charitable purpose gifts and the holding of property by unincorporated associations. The two areas are linked, in that associations are often established in an attempt to dedicate property for the pursuit of non-charitable (and sometimes charitable)[1] purposes. The developments have been the work of Vinelott J in the English High Court decisions in *Re Grant's Will Trusts*[2] and *Conservative and Unionist Central Office v Burrell (Inspector of Taxes)*.[3]

1. Purpose Gifts

The orthodox view is that it is very difficult to dedicate property successfully (ie subject to a legal obligation) to the pursuit of non-charitable purposes. A recipient of property will be under no more than a moral obligation unless a *non-charitable purpose trust* is established. To be valid, any non-charitable trust must have a beneficiary capable of enforcing that trust, thereby providing an adequate element of control over the trust in the Court. Before 1969 there had to be a cestui que trust in the traditional sense of the word[4] — thereby eliminating the possibility of non-charitable purpose trusts except in a few historically anomalous cases,[5] which were explained away rather shakily by Roxburgh J in *Re Astor's Settlement Trusts*[6] as being in fact, consistent with the requirement of enforceabiltiy.[7]

In 1969, in *Re Denley's Trust Deed*,[8] Goff J held that the existence of *factual* beneficiaries would suffice.[9] When this approach was approved by Oliver J in *Re Lipinski's Will Trusts*,[10] it seemed that most worthwhile non-charitable gifts would be upheld. Only purely abstract or impersonal gifts would fail.

A second prerequisite of validity is that the trust be limited in operation to a period within the rule against perpetual duration,[11] part of the general perpetuity law. Third, the purpose must

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* MA, LLB, Lecturer in Law, Victoria University of Wellington.

[1] See C E F Rickett (1980) 39 CLJ 88, at pp 90-94.

[2] [1980] 1 WLR 360. Noted by A M Tettenborn (1980) 130 NLJ 532; Brian Green (1980) 43 MLR 459; C E F Rickett, op cit, at pp 100, 105-106, 109-111.

[3] [1980] 3 All ER 42.

[4] *Morice v Bishop of Durham* (1804) 9 Ves Jun 399; (1805) 10 Ves Jun 522; *Re Wood* [1949] Ch 498; *Re Astor's Settlement Trust* [1952] 1 Ch 534; *Re Shaw* [1957] 1 All ER 745; *Re Endacott* [1960] Ch 232.

[5] See, for example, *Re Dean* (1889) 41 Ch D 552; *Pirbright v Salwey* [1896] WN 86; *Re Hooper* [1932] 1 Ch 38; *Re Thompson* [1934] Ch 342. In *Re Endacott*, op cit, at p 246, Lord Evershed MR cited the classification of these anomalous cases given by Morris and Leach in their *The Rule Against Perpetuities*: (a) trusts for the erection and maintenance of monuments and graves; (b) trusts for the saying of masses; (c) trusts for the maintenance of particular animals; (d) trusts for unincorporated associations (?); (e) miscellaneous cases.

[6] [1952] 1 Ch 534.

[7] *Cf* L McKay (1973) 37 Conv (NS) 420.

[8] [1969] 1 Ch 373.

[9] *Cf* L McKay, op cit; and L McKay (1977-78) 9 VUWLR 1.

[10] [1976] Ch 235.

[11] A non-charitable purpose trust is void at common law if it may last for a period in excess of a life in being plus 21 years. By the New Zealand Perpetuities Act 1964, s 20(2), the concept of wait and see (during the common law period) is made applicable to any non-charitable purpose trust which is not otherwise void. Cf United Kingdom Perpetuities and Accumulations Act 1964, s 15(4).

[12] See *Re Astor*, op cit; *Re Taylor* [1940] Ch 481; *Re Price* [1943] Ch 422.

be stated with a degree of certainty,[12] although just what degree is not clear.

What has been the effect of Vinelott J's decisions? First, in *Grant* he distinguished *Denley* as having nothing to do with purpose trusts, but being in his view a case of a private discretionary trust (at pp 370-371). If accepted, this reasoning returns us to the pre-1969 law on enforceability in non-charitable purpose trusts, in effect limiting the class of such trust to the extrememly narrow anomalous group. I have argued elsewhere that Vinelott J's reasoning is not acceptable, and will not repeat those points here.[13] In my view, the law on enforceability remains as stated in *Denley*, since Vinelott J's statements were obiter dicta.

Secondly, in *Conservative Central Office*, Vinelott J has created a new method of imposing a legal obligation on the recipient of property given for the pursuit of non-charitable purposes. The new method, as will become clear herein, can apply only to inter vivos donations. In the case of testamentary gifts we are left with the traditional trust, with its various limitations, and if Vinelott J's interpretation of *Denley* is correct, its scope greatly emasculated.

Having examined the structure of the Conservative Party, Vinelott J held that it was not an unincorporated association, but "a political movement with many parts (some of which are unincorporated associations) which in practice work together to a common end" (at p 60). How then, were the funds (which had been subscribed directly or channelled through the local constituency Conservative associations) controlled by the Party's Central Office held? There was clearly no charitable trust and a non-charitable purpose trust could not be upheld because of (a) a lack of a human beneficiary even within *Denley*, and (b) perpetuity. Did the Party treasurers or the Party leader (who ultimately controlled the use of the Party funds) own the funds beneficially? It was to prevent this absurd conclusion that the equally absurd argument that the Conservative Party was an unincorporated association was advanced. Vinelott J rejected an argument that the choice was exclusively between a trust on the one hand and a beneficial holding on the other, in favour of a half-way house which explains why the Party treasurers held the subscribed funds subject to a legal obligation to use them in the furtherance of Party purposes. He said (at pp 62-63):

> "It appears to me that if someone invites subscriptions on the representation that he will use the funds subscribed for a particular purpose, he undertakes to use the fund for that purpose and for no other and to keep the subscribed fund and any accretions to it (including any income earned by investing the fund pending its application in pursuance of the stated purpose) separate from his own moneys."

The contractual obligation which thus binds the recipient means that he is not the beneficial owner of the subscribed fund. In fact, the beneficial ownership is suspended:

> ". . . whilst the purpose remains unperformed and capable of performance the subscribers are clearly not the beneficial owners of the fund or of the income (if any) derived from it. If the stated purpose proves impossible to achieve or if there is any surplus remaining after it has been accomplished there will be an implied obligation to return the fund and any accretions thereto to the subscribers in proportion to their original contributions, save that a proportion of the fund representing subscriptions made anonymously or in circumstances in which the subscribers receive some benefit (for instance, by subscription to a whist drive or raffle) might then devolve as bona vacantia".[14] (at p 63)

This method of dealing with non-charitable purpose gifts is not available in a testamentary situation, since there can be no question of a contractual obligation arising between the legatee recipient and the testator.

The advantages of the trust method are obvious. First, it encompasses a host of possible purposes, including abstract and impersonal purposes (as the purposes of the Conservative Party amply illustrate). Second, it is possibly not hampered by the rule against perpetual duration, since the Conservative Party is, one assumes, to continue indefinitely.

There is one limitation, relating to the "contractual" nature of the method. The purpose must be sufficiently well defined and if an order is to be made by the Court it must be one which would not necessitate constant and possibly ineffective supervision by the Court.

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[13] See (1980) 39 CLJ 88, at pp 105-106.

[14] The reference to the return of the fund to the subscribers in proportion to their original contributions does not equate the position here with that under a resulting trust: see [1980] 3 All ER 42, at p 64.

This requirement must be a matter of degree in each circumstance, as Vinelott J illustrated. The method would not apply in a case where an explorer invited subscriptions to a fund to finance an expedition to some unexplored area of the world; but it would apply where a fund was raised by subscription for immediate distribution to a class of persons not objects of charity or of a private trust. These examples are Vinelott J's. The method also applies, of course, in the Conservative Party case.

This development — suspended beneficial ownership coupled with contractual obligations — is of immense importance in the area of inter vivos non-charitable purpose gifts, and it will be interesting to see if it gains wide acceptance in the future.

2. Unincorporated Associations[15]

In *Grant*, Vinelott J confirmed that the prima facie construction to be given to the property of unincorporated associations is the contract-holding theory, as developed through *Neville Estates Ltd v Madden*,[16] *Re Recher's Will Trusts*,[17] *Re Lipinski's Will Trusts*[18] and *Re Bucks Constabulary (No 2)*.[19] The members of the association hold the property benefically, but on the basis that it should be dealt with in accordance with the rules of the association by which the members are contractually bound inter se.

However, *Grant* indicates most clearly the limitations to this construction. It cannot be applied where *either* a trust is declared *or* the rules of the association forbid the retention of any beneficial interest over the property in the members (eg, a rule forbidding the division of the property at any time or in any circumstances between the existing members.) In *Grant* there was a testamentary gift to a local property committee for the benefit of the Chertsey Headquarters of the Chertsey and Walton Constituency Labour Party.

Vinelott J held: (a) there was an express non-charitable purpose trust for "headquarters' purposes", which failed for lack of enforceability (he distinguished away *Denley*) and one supposes, for perpetuity; (b) even without a trust, the gift could not be saved as a beneficial gift to the members in any sense, because the rules of the CLP did not allow the members any control over the funds of the CLP. The testamentary gift therefore failed.

But what of the subscriptions given inter vivos by the members? Was there beneficial ownership in the recipients of these funds (which would be absurd); or was there a non-charitable purpose trust, which would fail, and thus give rise to a resulting trust in all the members past and present in proportion to their contributions? Vinelott J avoided the application of this unsavoury choice by stating that the subscriptions were made "on terms that they will be applied by the general committee in accordance with the rules for the time being, including any modifications imposed by the annual party conference of the NEC" (at p 374). This was the concept of suspended beneficial ownership coupled with a contractual obligation (and thus not applicable in testamentary circumstances) in its embryonic form.

In *Conservative Central Office*, Vinelott J summarised the applicability of his new method in the area of unincorporated associations (at pp 63-64):

> "A testamentary gift to a named society which is not an incorporated body must fail unless it can be construed as a gift to the members of an unincorporated association either as joint tenants or as an accretion to the funds of the association to be applied in accordance with its rules (commonly with a view to the furtherance of its objects).[20] But in the case of a testamentary gift there is no room for the implicaton of any contract between the testator and the persons who are to receive the bequest. In the case of an inter vivos subscription the intention of the subscriber can be given effect by the implication of contractual undertakings . . . ."

The English Courts have dealt with property holding by unincorporated associations in a very piecemeal manner, and the decision in *Grant* illustrates the consequences of this patchy approach. To borrow from Brightman J in *Re Recher's Will Trusts*:[21]

> "It would astonish [Mr Grant] to be told that there was a difficulty in his giving a legacy to an unincorporated non-charitable society which he had or could have supported without trouble during his lifetime."

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[15] See, generally, C E F Rickett, op cit.
[16] [1962] Ch 832.
[17] [1972] Ch 526.
[18] [1976] Ch 235.
[19] [1979] 1 All ER 623.

[20] He might also have mentioned the possibility of a non-charitable purpose trust, had he not ruled this out as a "legal impossibility" (at p 60), presumabley a view formed after his interpretation of *Denley* in *Grant*.
[21] [1972] Ch 526, at p 536.

This is not to criticise the actual decision of Vinelott J, but merely to indicate that perhaps the time has come to consider a comprehensive statutory reform — a definition of unincorporated associations and the granting to them of a quasi-corporate status, at least in property matters.[22]

But what is an unincorporated association? Vinelott J has also, in *Conservative Central Office*, provided a workable answer to this question in applying the "characteristics test" to the Conservative Party. The basis of the definition is that an unincorporated association has six characteristics, three necessary and three usual or normal:

The necessary characteristics

(a) *Membership.* There must be members of the association, but a collection of unincorporated associations cannot constitute the membership of a separate unincorporated association.
(b) *Contract.* There must be a contract between the members *inter se*, and this will usually be found in a set of written rules.
(c) *Formation.* There must, as a matter of history, have been a moment of time when a number of persons combined or banded together to form the association, although of course satisfaction of the first two requirements will be taken as implying this requirement as also satisfied.

The additional usual characteristics

(a) *Constitution.* There will normally be some constitutional arrangement for meetings of members and for the appointment of committees and officers.
(b) *Adherence.* A member will normally be free to join or leave the assocation at will.
(c) *Continuity.* The association will normally continue in existence independently of any change that may occur in the composition of the association.

3. Conclusion

Vinelott J has produced two judgments of immense skill, interest and importance. They will repay serious study from all concerned with the problems of purpose gifts and unincorporated associations.

[22] A theory of quasi-corporate status has been developed by the Courts to deal with trade unions: see *Bonsor v Musicians' Union* [1956] AC 104 and *Electrical, Electronic, Telecommunication and Plumbing Union v Times Newspapers Ltd* [1980] 3 WLR 98.

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ABA Committee on International Associates
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USA

ADMINISTRATIVE LAW

REVIEW OF DEPORTATION PROCEDURES

By PROFESSOR J F NORTHEY

This article examines the relationship between the principles of natural justice and the duty to act fairly in the context of a recent deportation decision.

The Court of Appeal unanimously allowed an appeal from Mahon J in *Daganayasi v Minister of Immigration*, judgment 31 October 1980. The appellant had made an application for review of the decision of the Minister on 5 June 1979 declining to order that she be not deported.

The essential facts are these. The appellant entered New Zealand under a temporary permit. She applied for permanent residence on the ground that she had two New Zealand born children, one of whom had a rare liver complaint which was being treated in Auckland. Before sending the file to the Minister for decision, the Department of Labour asked Dr Blake-Palmer, a retired Director-General of Health with experience of medical services in the Pacific Islands, to comment on the letter from the child's medical adviser. Dr Blake-Palmer's report was attached to the file sent to the Minister. It conveyed an inaccurate impression of the child's condition and of the availability of suitable treatment in Fiji. It was not disclosed so that the prejudicial statements could not be commented on by the appellant. This was seen as a breach of the Minister's obligation to be fair when disposing of an application under s 20A of the Immigration Act 1964. One of the grounds for the exercise of the Minister's discretion in favour of an applicant is "exceptional circumstances of a humanitarian nature", rendering it unduly harsh or unjust to deport the individual. The Court of Appeal allowed the appeal and declared "that the appellant's request under s 20A . . . was not validly dealt with by the Minister before her deportation . . .".

The effect on the appellant is unclear. Obviously her request has not been disposed of and now must be considered, but whether this results in her being granted permanent residence in New Zealand is by no means certain. She will be given the opportunity of commenting on the medical report and correcting the impression it created. There will also be a radical change in the procedures followed by the Department in s 20A cases.

The two other members of the Court of Appeal agreed with the long judgment of Cooke J concerning the effect of a breach of fairness but both left open the second issue — mistake of fact. This note will be confined to the fairness issue. The appeal presented an opportunity for the general question of the relationship between the principles of natural justice and the requirement of fairness to be discussed and settled. It is doubtful that this has been achieved. There remain some areas in need of clarification and resolution.

Many years ago the writer contributed a short note on the issues here involved entitled "Pedantic or Semantic"; see [1974] NZLJ 133. It was there suggested that the movement to treat the principles of natural justice and the requirement of fairness as synonymous should be resisted, that the contents of the principles of natural justice, though flexible, were reasonably well understood and, because they apply to judicial decision-making, they were more demanding than the notion of fairness, and that fairness as a requirement of administrative decision-making should be permitted to develop separately on a case by case basis. Only much later would it be possible to contrast the two requirements.

That approach seemed to have some judicial support. For example, the English Court of Appeal consisting of Denning MR, Lawton and Scarman LJJ in *R v Race Relations Board ex parte Selvarajan*, [1976] 1 WLR 1686; [1976] 1 All ER 12 recognised that the Board, being an administrative body, could not possibly conduct its inquiries and make its decisions as if it were a judicial tribunal. It was agreed that, whereas the Board could delegate some of its functions to a few of its members, this would be wholly unacceptable in the case of a judicial body. The same point of view was taken by Barker J in *Chandra v Ministry of Immigration* [1978] 2 NZLR 599, *Tongia v Bolger*, unreported but noted in [1979]

NZ Recent Law 266 and in *T Flexman Ltd v Franklin County Council* [1979] 2 NZLR 690 and by Mahon J in *Meadowvale Stud Farm Ltd v Stratford County Council* [1979] 1 NZLR 342. It also appeared to be the view of the Court of Appeal in another deportation case, *Movick v Attorney-General* [1978] 2 NZLR 545. Sir Robyn Cooke in his address entitled "Third Thoughts on Administrative Law" published in [1979] NZ Recent Law 218 also appeared to take this viewpoint. At pp 225-226 he declared:

> "It may be said that all authorities having powers affecting the rights of citizens owe this duty. If their work is judicial or analogous thereto the duty will not be discharged without complying with natural justice — in itself an elastic term. But in other cases the idea of some lesser obligation is receiving increasing currency. The immigration cases in England are an example. At present our Court has reserved judgment in a case concerning an architect employed by a building owner but, as the House of Lords said in *Sutcliffe v Thackrah* [1974] AC 727, bound to act fairly towards the contractor in making various decisions under the contract. What is the content of such a duty?"

What appeared to be emerging was a separation of administrative decision-making where no hearing took place and judicial decision-making where a hearing was essential. Those in the first category were obliged to satisfy the requirements of fairness (which might in some respects be similar to natural justice) and those in the second category were bound to observe the principles of natural justice. The decision in *Daganayasi* was taken by the Minister; no hearing was given before the decision was made. It would be classified as an example of administrative decision-making to which the obligation of fairness attached.

The judgment of Cooke J on this point may be summarised in a series of propositions:

(1) The requirements of natural justice vary with the power exercised and the circumstances.

(2) Those requirements, in their broadest sense, are not confined to occasions described as judicial or quasi judicial.

(3) Their applicability and extent depend on the terms of the relevant legislation or on judicial supplementation.

(4) Recent cases have used the term "fairness" instead of or as an alternative to natural justice.

(5) Fairness is the requirement which the Minister of Immigration must satisfy.

The only proposition with which the writer is tempted to quarrel is the second. If it means that natural justice and not fairness applies to administrative decision-making, the writer must respectfully disagree. If however it means that on some occasions the requirements of natural justice and fairness are identical and that the administrative decider can therefore be said to be obliged to comply with natural justice, it becomes a matter of semantics as Cooke J acknowledged in an earlier passage reading:

> "This apparent variation in views is basically semantic. It is not important whether one says that natural justice as more traditionally understood is confined to courts and authorities whose work is in some way significantly akin to judicial work or that the more remote the analogy is with judicial work the less exacting are the requirements of natural justice. Fairness is the dominating criterion."

Having decided that the Minister was required to act fairly, Cooke J then examined the procedure adopted. Section 20A did not constitute a code. But the time limit of 14 days for the written request to be made negated the need for an oral hearing. The Minister was entitled to make his own inquiries and to engage a medical referee as a consultant. This was reasonable. But disclosure of any prejudicial material was not only reasonable but also fair. The appellant must be given the opportunity of correcting or contradicting anything prejudicial to her point of view. If this is not done, the appellant's "legitimate expectation" of being permitted to remain in New Zealand and avoid the sanction of deportation will be disappointed. *Jeffs v New Zealand Dairy Board* [1967] NZLR 1057 emphasised the need for an accurate summary of the evidence and submissions being placed before the decider. The principle applies to the Minister of Immigration. As already indicated, substantial changes in procedure must now be adopted in s 20A cases. Though the person making a request to avoid deportation is of necessity either an alien or one who is not a New Zealand citizen, he/she is not without protection. The Minister, in determining a question affecting their rights to remain in New Zealand, may act only after a fair procedure has been observed. That procedure is less demanding and less formal than the procedure adopted by a court of law, but it is designed to ensure that the issues arising for decision are fairly presented.

EVIDENCE

SOME OBSERVATIONS ON THE EVIDENCE AMENDMENT ACT (NO 2)

By C B CATO, Barrister.

The Evidence Amendment Act (No 2) 1980 broadly implements the recommendations of the Torts and General Law Reform Committee contained in three reports; the first, "Hearsay Evidence" being presented in July 1967, the second relating to the rule in Hollington v Hewthorn[1] in 1972, and the third, "Professional Privilege in the Law of Evidence" in March 1977. The article examines the provisions affecting hearsay, the dying declaration, convictions as evidence in civil proceedings and medical privilege.

In the Act, various changes are made to the law of hearsay in civil and criminal proceedings. There is further provision for the admission of a conviction in subsequent civil proceedings as evidence of the fact of conviction. The decision of the Court of Appeal in *Jorgensen v News Media Ltd*[2] has been extended in principle so that now a previous conviction is presumptive evidence in the absence of proof to the contrary that the person committed the offence, which is the subject of defamation proceedings. Finally, there are various changes to the law relating to privilege, and provision is also made for the examination of witnesses overseas or on behalf of an overseas Court.

In this comment, consideration will be confined to the provisions relating to the admission of hearsay evidence, excluding the provisions contained in Sections 9-13 of the Act, which principally give statutory recognition to existing common law exceptions to the rule against hearsay. Consideration, however, will be given also to the dying declaration exception contained in Section 14 of the Act. Finally, it is proposed to comment on the provisions contained in Sections 23-24 of the Act relating to the admission of convictions in subsequent civil proceedings, and the extension of medical privilege to criminal proceedings, as contained in s 33 of the Act.

The hearsay proposals

The most important proposal is that contained in s 7 of the Act, which admits first-hand oral hearsay in civil cases without a jury. Section 7 provides:

> "In any civil proceedings where direct oral evidence of a fact would be admissible, any oral statement made by a person and tending to establish that fact shall be admissible as evidence of that fact, if the maker of the statement had personal knowledge of the matters dealt with in the statement, and is unavailable to give evidence."
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> A person is deemed to be unavailable if he:
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> (a) is dead
> (b) is outside New Zealand and it is not reasonably practicable to secure his attendance; or
> (c) is unfit by reason of his old age or his bodily or mental condition to attend; or
> (d) cannot with reasonable diligence be found.

The Act clearly embodies the opinion of the Committee that where possible primary evidence should be adduced, thereby preserving the right of cross-examination, and hopefully thereby better ensuring testimony is reliable.[3] This proposal is similar to that embodied in the English Civil Evidence Act 1968.[4] This Act

[1] [1943] KB 595.
[2] [1969] NZLR 961.
[3] Report, paras 13-16.
[4] 1968, Chapter 64.

does not appear to have troubled the Courts greatly in England,[5] and given the strict criteria for admission it seems unlikely that there will be difficulty encountered here. It was difficult to justify the distinction advocated by the Committee and originally implemented in cl 4 of the Bill between admission in Judge-alone civil proceedings and exclusion in civil proceedings with a jury. This distinction is not embodied in the English legislation, and would appear to be a relic of the days when juries were considered "by upper-class English Judges"[6] as poorly educated and unable to properly appraise or give weight appropriately to evidence which was not presented in primary form. It is therefore appropriate that this distinction was not embodied in the Act.

Further, in so far as oral first-hand hearsay is concerned, it is submitted that given the considerations relating to unavailability are met and a trial Judge is satisfied, if there be objection, that the testimony is material and reliable, then logically oral first-hand hearsay should be admissible in criminal proceedings, also. Although it must be conceded that in criminal trials, reliability is crucial because of the serious consequences attaching to conviction, (a point emphasised by the Committee)[7] once it is appreciated that the admission of first-hand oral hearsay would be the exception rather than the norm, the objections to admissibility must in large part disappear. Of course, where there is objection to admissibility, a Judge should closely scrutinise the testimony to ensure that he is satisfied it is material and reliable.[8] Further, the provisions of s 3(2) which render documentary first-hand hearsay inadmissible in criminal proceedings "if the maker knew or should reasonably have known criminal proceedings were contemplated", could be extended to incorporate oral first-hand hearsay. In this way, the prospect of a fabricated defence being advanced, a factor which disturbed the Committee, would be greatly reduced.

A further criticism of the Act relates to the distinction drawn between oral first-hand hearsay and documentary first-hand hearsay in so far as the latter, but not the former, includes evidence of opinion "where direct oral evidence would be admissible". So long as the evidence of opinion is material and reliable it is submitted it is illogical to differentiate. Subsequent judicial interpretation of the English provisions has permitted first-hand oral evidence of opinion to be given in civil proceedings.[9]

It is to be observed that a distinction is drawn between first-hand documentary hearsay and second-hand documentary hearsay in s 3 of the Act. This distinction was also embodied in the Evidence Amendment Act 1945 relating to civil proceedings[10] and the Evidence Amendment Act 1966[11] which was passed to avoid the effects of the ruling of the House of Lords in *Myers v Director of Public Prosecutions*.[12] Further, this distinction was retained, although not without criticism, in the English legislation also. Messrs Newark and Samuel,[13] in a commentary on the English provisions which restrict the admission of second-hand hearsay to business records in a similar manner as in s 3 of the Act, describe the distinction as "unnecessary, illogical and illusory".There is some truth in this criticism. Second-hand hearsay may be quite as reliable as first-hand hearsay; put another way, there is no justification for saying that first-hand hearsay is necessarily more reliable than second-hand hearsay. This point was also made by Professor Glanville Williams in relation to the admissibility of second-hand documentary testimony in criminal proceedings.[14] Newark and Samuel further stress "that the length of the chain should go to weight not admissibility".[15]

However, despite these criticisms, it must be acknowledged that it will be difficult to imagine situations where a Judge would be happy to admit second-hand hearsay in the absence of authenticity such as is derived if an entry is made in the routine course of some business. It is to be noted that definition of business includes "every calling", a definition which has been adopted wisely from the provisions of the

[5] For discussion of the Act, see *Cross*, 5th ed, 1979 UK, pp 484-508.

[6] An American Judge has described the adoption of the hearsay rules as "developed by upper-class English Judges — undoubtedly somewhat contemptuous of lower-class illiterates who sat as Jurors". Weinstein, "Probative Force of Hearsay" (1960-61) 46 Iowa L Rev 331. Cited by R G Murray. "The Hearsay Maze: A Glimpse at Some Possible Exits" (1972), Can B Rev 1, 8. It is to be noted a minority of the Committee were in favour of Admission in proceedings before a Jury. Report, para 21.

[7] Report, para 20.

[8] See discussion text, post.

[9] *Dass v Masih* [1968] 2 All ER 226.

[10] Section 3 (a) (ii).

[11] Section 25A.

[12] [1965] AC 1009. And see *Cross*, 3rd NZ ed, 568-570 for discussion of the Evidence Amendment Act 1966.

[13] [1968] MLR 668, 669.

[14] Williams, "The New Proposals in Relation to Double Hearsay and Records", [1973] Crim L Rev 139, 137-140.

[15] [1968] MLR 668, 669.

Evidence Amendment Act 1966. Hence, the problem which English Courts have encountered in the equivalent of our Evidence Amendment Act 1966 in relation to the exclusion of records of non-commercial activities will not arise.[16] It is a further welcome change to see the exclusion of the requirement that the record be continuous. This criterion was present in the Act of 1945 but not in the Act of 1966. Deletion of this requirement from the Act is welcome quite apart from consistency, because what is important is that the entry be made as a part of routine business practice, not necessarily that the record itself be continuous.

Rather surprising, however, is the inclusion in the business record provisions of the notion of "duty to record". The duty criterion was included in the Act of 1945 but was not present in the 1966 Act. It is submitted that given the wide definition of business, there is no reason to further include the criterion of duty, a concept which Messrs Newark and Samuel have further described as "extraordinarily artificial and inept".[17] Again, however, it must be acknowledged that the duty criterion being disjunctive, its inclusion is unlikely greatly to affect the utility of the business records exception, here.

The Act does not, however, clarify the issue of whether a policeman's notebook can constitute a business record;[18] nor does it expressly make reference to accident reports made in the course of investigations.[19] Both issues have raised problems in the past.

A more serious objection, however, is that business records are not admissible automatically, once a Court is satisfied as to their authenticity. The New South Wales Law Reform Commission in its working paper "Reform of the Hearsay Rule", certainly considered that this kind of evidence should be unconditionally admitted.[20] Indeed, the whole purpose in recognising the business record exception, is that entries are likely to be authentic. Given that the documents should be produced by a responsible officer (a requirement not mentioned in the Act) who is able to depose to their authenticity, is it not self-defeating of the exception to require the maker to give evidence unless the further criteria[21] justifying the admission of hearsay evidence as contained in the Act are satisfied? In the vast majority of cases, the maker will not be able to be identified or located; nor will he recall the transaction, yet unless proof of this is given or he is otherwise unavailable, the entries will be inadmissible. The problems that this can cause may be seen in the following case in which the writer prosecuted. In *Department of Trade and Industry v Michael Fast Limited*[22] the prosecution sought to establish that a retailer had exceeded the permissible markup on items contrary to the Stabilisation of Prices Regulations 1974. In order to establish this, it was necessary to prove the various into-store costs of a number of items and this could only be achieved by producing invoices of wholesale costs. A responsible officer from each of the wholesalers involved was called to produce the documents. These officers were able to relate the invoices to the items in question. Faced with objection, however, Mr Callander, SM, ruled, it is submitted correctly, against the admissibility of the evidence, in the absence of further proof as to the reasons why the employees who had prepared the invoices could not be present to personally testify. The real reason for not producing such evidence was, of course, the considerable inconvenience which would have resulted to the companies concerned, who were already troubled by having to make a responsible officer available. Given that the Court is satisfied with the authenticity of the documents, it is submitted it is self-defeating of the exception to require further criteria to be established before the proponent is entitled to dispense with calling the maker of the entry.Indeed, Messrs Newark and Samuel stress that the criteria for admissibility should be simply whether the entry is likely [23] "to be recorded accurately and be of accurate transmission". These points, it is submitted, can be quite effectively ascertained if a responsible officer gives evidence of the manner in which the entries are recorded. In this regard, it is useful to

[16] See *R v Craydon* [1978] 2 All ER 700.

[17] Loc cit, 700.

[18] There have been divergent views on this. In *Simpson v Lever* [1962] 3 All ER 870, Winn J ruled that an official police notebook containing a series of notes made in the course of duty, was a "continuous record", cf *Newton v Peiper* [1964] I NSWR 42. For similar problems in the United States, see David F Binder, *The Hearsay Handbook*, 1975, McGraw-Hill, pp 77-80, where practice is shown to be inconsistent.

[19] The position in New Zealand is quite unclear, see *North v Union Steam Ship Co* [1973] 1 NZLR 675, 679 (CA).

[20] Report, May 1976, para 3.3.

[21] These criteria are set out in ss 3 (b) (i), (ii) and (iii) of the Bill.

[22] Auckland Magistrates Court, 10 December 1979.

[23] Loc cit, 669-700.

consider the provisions in the "Uniform Business Records as Evidence Act" which has been adopted by 27 States in the USA, which read:

> "E.1 Definition — The term 'business' shall include every kind of business, profession, occupation, calling, or operation of institutions whether carried on for profit or not.
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> "E.2 Business Records — A record of an act, condition, or event shall in so far as relevant, be competent evidence, if the custodian or other qualified witness testifies to its identity and the mode of its preparation and if it was made in the regular course of business at or near the time of the act, condition, or event, and if in the opinion of the Court, the sources of information, method and time of preparation were such as to justify its admission."

Certainly in this country in respect of banking records, there are provisions in the Banking Act 1908[24] which might quite sensibly be extended to business records generally.

It is to be observed that the Act does not contain procedure for notice as does the English legislation. In essence the procedure adopted in England is that the party wishing to introduce evidence of a hearsay nature must serve a notice on his opponent prior to trial. His opponent must, if objection is to be taken to the testimony, serve a counter notice which requires the primary testimony to be given. In the event of the Court ruling that the production of primary evidence was unreasonable then an award of costs could be made. A further power to include evidence, notwithstanding objection, is also given to the Court.

The Committee considered,[25] however, that the English procedure should not be adopted here because there would be a proliferation of pre-trial arguments. Secondly, it was considered that the procedure made it too easy for the admission of hearsay evidence. Instead, the Committee recommended a procedure whereby a party prior to trial in civil proceedings, and on indictment in criminal trials, was required to move for an order that the evidence be admitted, the Court having the power to so admit it if it was considered "expedient and proper to do so." These recommendations were contained in cls 19 and 20 of the Bill as introduced, but in so far as civil proceedings are concerned, the obligation to apply was deleted from the Bill as reported back from the Statutes Revision Committee in May of this year. In one sense this deletion was welcome because the procedure envisaged in the former cl 19 would have probably led to more pre-trial applications than would have been encountered under the English legislation which encouraged and provided incentives for the parties to agree on the admission of appropriate hearsay. What, however, is less satisfactory, is that in the absence of the need to make application there is no provision whatsoever whereby in civil proceedings a party has advance notice of the fact that hearsay evidence may be placed before the Court. An important feature of the English procedure is that it seeks to remove the element of surprise.[26] This is consistent with the Courts' traditional approach to avoid trial by ambush in so far as is possible in civil proceedings, and in so far as the defence is concerned, in criminal proceedings also.[27]

In this latter regard, it is submitted even less satisfactory that the Act makes no provision for advance notice in criminal trials where either party seeks to admit documentary evidence pursuant to s 3(1)(a) of the Act. Documents may contain highly prejudicial or controversial statements of fact or opinion which the parties should be aware of so that the element of surprise is avoided and proper objection taken pursuant to s 18 of the Act. It is arguable that such notice should be given in summary proceedings also, though this may not be so critical in view of the fact that under s 17 of the Act a District Court Judge could be expected to exclude from his consideration unreliable hearsay testimony. Presumably, in so far as trials on indictment are concerned, it was felt that such evidence would generally be disclosed at depositions. This may, of course, not always be the case: but more importantly where the defence seeks to introduce such material, no such advance notice will have been given. It is submitted that the legislation should have contained

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[24] Section 19.

[25] Report, Notes 1-4 to the Proposed Draft Bill.

[26] The desirability of knowing what evidence would be admissible in advance was noted by the NSW Law Reform Commission in its Working Paper, para 3.3.

[27] There has, however, been some criticism of the English provisions. *Cross*, 5th ed UK, at p 509 criticises the time limits. The point is made that parties are frequently not always so advanced in their preparation for trial as to be able to give notice within the prescribed time (usually "21 days before hearing"). *Cross* also suggests there is no need for the notice where the document forms part of a business record. In this regard, it is submitted that it is arguable that the opponent should know in advance the kind of hearsay that will be advanced, so that he can at least be prepared to challenge authenticity of the record at trial.

provision for notice in the case of documentary testimony falling within s 3(1)(a).

Finally, it should be observed that there is provision contained in s 18 of the Act for a Court in proceedings with a jury, to exclude evidence otherwise satisfying the prescribed criteria, if the prejudicial effect of the admission of the statement would outweigh its probative value or if the Court is satisfied that it is not "necessary or expedient in the interests of justice to admit the statement". It is submitted that this clause could have been more appropriately defined. It is doubtful that the first limb adds anything to what is already recognised as proper trial practice, and the criteria of "necessity and expediency in the interests of justice", are extremely vague expressions. It is suggested that a more appropriate and well-recognised criterion would simply have been "reliability". Indeed, in one famous case, *Dallas County v Commercial Union Assurance Co,*[28] the trial Judge, appropriately named Wisdom J, admitted an old newspaper account to establish that a certain Courthouse had been damaged by fire many years before, "not because it was a readily identifiable and happily tagged species of hearsay exception, but simply because it [was] necessary and trustworthy, relevant and material." In this regard, it is to be noted further that the Committee were of the opinion that the mere fact a person might be "interested" in the outcome of proceedings should only relate to weight, not affect admissibility. For this reason, there is no provision restricting the admission of the testimony of persons interested in the proceedings as there was in the Evidence Amendment Act 1945. Given that there is considerable merit in this approach,[29] where in proceedings before a jury, there is a clear danger that a person may have a sufficient interest in the outcome of proceedings to render his evidence suspect, then the testimony, it is submitted, should be excluded because it may be unreliable. In these circumstances if the evidence was crucial it might be unsafe for a jury to act on it. Yet the wording of the section, couched in terms of "expediency" does not make it sufficiently clear that it will be so excluded. It must be conceded, however, that this criticism may amount to merely a quibble over the use of language. A Court will probably exercise its discretion appropriately, despite the language of the section.

The dying declaration

The common law dying declaration will now be admissible in all proceedings, not merely in cases involving murder. This reform is to be welcomed because the declarant may be the only witness to the incident, and yet his statement may not technically come within one of the other exceptions to the rule against hearsay, such as the res gestae. Given that a Court is satisfied with the reliability of the evidence, then such evidence should be admissible. Also welcome is the abolition of the requirement that a witness have no immediate hope for recovery. This was a wholly unrealistic requirement, as the Committee recognised.[30] It is, however, suggested that the test should be simply whether the witness knew that he was seriously injured. Imminence of death, it is submitted, is too onerous a standard, and somewhat unrealistic, also.

Finally it must be conceded that the reforms relating to hearsay in this Act can not be described as radical, and will probably work satisfactorily in practice in the great majority of cases. However it is in relation to business records particularly, that it is disappointing that more far-reaching reform was not effected.

Convictions as evidence in civil proceedings

In so far as s 24 permits evidence of a previous conviction as presumptive evidence in subsequent proceedings for defamation, it extends the ruling of the Court of Appeal in *Jorgensen v News Media Ltd,*[31] to the effect that a conviction was admissible as evidence of guilt. It is to be noted in this regard that the Act deleted the provision originally inserted in the Bill that a conviction would be conclusive evidence, substituting instead a presumption only. It is submitted, however, that the Bill prior to revision was more satisfactory because it is undesirable, indeed artificial, to permit a person convicted of a criminal offence to adduce testimony, allowing him in effect to relitigate the issue in subsequent civil proceedings for defamation.

Further, it is to be noted that s 23 permits convictions only as evidence of the commission of an offence in subsequent civil proceedings; it does not go so far as the English legislation[32] which places a burden on a defendant to adduce proof on the balance of probabilities should it be desired to contest the verdict in

[28] (1961) 286 F 2d 388 (5th Circuit).

[29] Williams loc cit, 139 for example says that generally the law of evidence should not concern itself with weight.

[30] Report Note 11 to Clause 6 of the Draft Bill.

[31] [1969] NZLR 961.

[32] Civil Evidence Act 1968, s 11.

subsequent civil proceedings. In this regard, it is arguable that the English approach is preferable. It is submitted that again, it is somewhat unsatisfactory and artificial that different verdicts exist where the issues before the Court are the same particularly in view of the fact that the onus of proof in criminal trials is higher. To this end, it is submitted, permitting the defendant to adduce proof on the balance of probabilities to contest or relitigate the issue, is a substantial indulgence.[33]

In so far as the Act departs from the Committee's opinion that only convictions entered after guilty pleas should be admissible the former opinion is welcome. The Committee's reasoning was that a witness may not have been effectively cross-examined in the previous defended hearing and so, unless he were unavailable for the civil hearing, primary testimony should be required.[34] Given however the higher onus of proof in criminal trials, and the general desirability of consistency in verdicts it is submitted that the admission of prior convictions is unlikely to result in miscarriages of justice.[35]

Medical privilege

A welcome reform to the law of privilege is that contained in s 33 of the Act which extends medical privilege to "protected communications" made to medical practitioners in criminal proceedings. The kind of communication which is protected is defined to be one "which is necessary to enable a registered medical practitioner to examine, treat, or act for the patient for:

(a) drug dependency;
(b) any other condition or behaviour that manifests itself in criminal conduct.

This reform embodied the recommendations of the Law Revision Committee on Medical Privilege, which reported in November 1974.[36] The Committee recognised that to allow a privilege only in civil proceedings was illogical as "a person is more likely to be deterred from seeking medical assistance where criminal rather than civil repercussions were involved." The Committee did, however, recognise that in criminal proceedings the public interest was a factor to be considered, so that not all communications should be privileged. The basis for privilege was treatment, which included treatment for mental disorders, also. In the opinion of the Committee:

> "Such activities include the activities of various sexual deviates, kleptomania, and 'baby bashing'. Many such conditions permit of psychiatric treatment and the Committee feels that this avenue should not be closed for fear of subsequent disclosure of communication in criminal proceedings. The Committee supports a medical privilege in criminal proceedings covering damaging communication by a patient to a doctor, while in the course of treatment for behaviour that constitutes a criminal offence."

What perhaps is less satisfactory is that the Act further provides expressly that there will be no privilege where:

> "Communications [are] made to a registered medical practitioner by any person who has been required by any order of the Court, or by any person having lawful authority to make such requirement to submit himself to the medical practitioner for any examination, test, or other purpose."

Although there is probably no objection to disclosure after conviction, where for example a report has been requested pursuant to the provisions of s 47(A) of the Criminal Justice Act 1954, prior to sentence; it is submitted that there is an arguable case for privilege from disclosure of communications for psychiatrists and associated personnel such as psychologists, where the communications are made for the purpose of assessing criminal responsibility. Defence counsel should, of course, have the benefit of disclosure, and privilege may have to be waived if the psychiatrist is called to testify; however, it is submitted failure to provide for a privilege where the conference is to assess criminal responsibility is a serious omission. It may adversely inhibit a true discourse between a psychiatrist and an alleged offender who may be naturally suspicious of any inquiry particularly those forced upon him by Court order.

In conclusion, it is to be noted that when introducing the Bill, the Minister acknowledged that:

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[33] Para 25 of the Report sets out the Committee's opinion, wherein the merits of the English approach were considered, but the approach was not adopted.

[34] Para 17 of the Report sets out the Committee's reasoning.

[35] For a further discussion, see *Cross*, 3rd NZ ed, p 424.

[36] The report of this Committee appears as Appendix I to the Report of the Torts and General Law Reform Committee.

". . . the field covered in this Bill involves relatively complex legal propositions in an area that might often be regarded as lawyer's law."

Indeed, it may be said that this is true of the law of evidence, generally. Now that so much of our law is or will be contained in statutory form it is time to seriously consider once more, whether it may be appropriate to introduce a Code of Evidence rather than persist with what will be a "hotch potch" of common law and statute. It must be acknowledged that this task would not be an easy one; but neither would it be impossible. In recent years, there have been considerable advances made in rationalising the law of evidence, by the Courts themselves. These decisions would serve as important foundations from which to extract principles and codify our law. The advantages for the practitioner and the Judge would, it is submitted, be considerable.[37]

[37] This point has been recently advanced by Mr Black, Editor of the *New Zealand Law Journal* ([1980] NZLJ 185). Also see *Cross* 3rd NZ ed, at page 3, Dr D L Mathieson states: "Subject to the solution of the vexed problem of the right extent of the difference between the rules governing civil and criminal cases, the law of evidence is a fit subject for codification".

STATUTORY INTERPRETATION

COMMENCEMENT ORDERS

By N J JAMIESON.

A further examination of the use of commencement orders to bring into force the Acts on which the orders rely for their authority. This article considers s 12 of the Acts Interpretation Act 1924 (NZ) and s 37 of the Acts Interpretation Act 1889 (UK).

In an earlier article[1] the logic and legal validity of commencement orders were questioned. In purporting to bring into force the very Acts on which the orders rely for their authority, the orders commit the fallacy of circular argument. In purporting to be made pursuant to a delegation of legislative power brought into force by the orders after the orders themselves have come into force, they assume a sovereign legislative function contrary to both their professed origin in the executive branch of government and their subordinate legislative form. They therefore commit the further fallacy of self-contradiction.

The lawyer's dilemma by which logical and legal validity are thus opposed is both widened and deepened by attempts to find a decision procedure. The puzzling nature of this dilemma is frequently instanced in law. It has been named "The Liar Paradox in Legal Reasoning" by J C Hicks in his article[2] of that name. He so calls it after Epimenides the Cretan who evoked discussion of the dilemma in classical times by his famous statement that "All Cretans are liars". By this statement Epimenides meant not only that he himself sometimes told lies but that he always told lies. Hicks has examined the sovereignty of Parliament, the Practice Statement of 26 July 1966 of the House of Lords on stare decisis, and the doctrine of renvoi in the context of the liar paradox. He goes on also to apply Bertrand Russell's Theory of Types[3] and consider the possibility of a logic of imperatives to resolve the meaninglessness[4] self-contradiction,[5] vicious circle,[6] self-reference,[7] and pulling itself up by its own

* Senior Lecturer in Law, University of Otago.

1 Jamieson, NJ, "The Dilemma of Statutory Commencement" [1980] NZLR p 180.

2 [1971] 29 CLJ 275.

3 Russell, B, "Mathematical Logic as based on the Theory of Types" (1908) 30 American Journal of Mathematics 222.

4 Hicks (op cit) 275.

5 Ibid 276.

6 Russell (op cit). See also Russell and Whitehead *Principia Mathematica.*

7 Popper, KR. "Self-reference and Meaning in Ordinary Language" first published (1954) 63 Mind NS 162, See *Conjectures and Refutations* (London, 1963) 304-311.

bootstraps,[8] which characterise instances of the paradox. In the end he concludes[9] that the theoretical implications for the three branches of law considered are clear. "The difficulties met in attempting to apply the rules in question are not legal or factual difficulties which can be overcome by recourse to authority or to evidence but arise from latent contradictions in the logical structure of the rules themselves and so cannot be removed while the rules stand in their present form."[10]

In so far as the example of commencement orders is an instance of the liar paradox in legal reasoning therefore, nothing in section 12 of the Acts Interpretation Act 1924 can resolve the paradox.[11] In the earlier article, however, considerable effort was given to the exegesis of section 12[12]. This was done for a number of reasons. First an attempt to resolve the matter may be made in practice by ignoring the paradox and determining the matter by legal rather than logical validity.[13] This may be a difficult if not impossible task for both literal and purposive interpretations of s 12 as a matter of law. If possible, however, it will be an instance of Coke's[14] artificial reasoning triumphing over natural reasoning, and perhaps also over certain principles of constitutional and administrative law. The second reason for considering s 12 has been to consider the issue as one not just of abstract theory, but also of practical significance in the sense that the issue can arise at any time. Indeed the issue has already been raised in the United Kingdom. The third reason for the prior exegesis of s 12 is therefore to preface a comparison of s 37 of the Acts Interpretation Act 1889 (UK) with our own s 12.

In so far as in both *R v Minister of Town and Country Planning, Ex parte Montague Burton Ltd and others*,[15] and in *Usher v Barlow*[16] it was conceded by counsel that s 37 of the United Kingdom Interpretation Act empowered the making of commencement orders,[17] the judgments of the Court were obiter. Nevertheless because our s 12 in New Zealand owes its origins to and expresses a wording identical with s 37 of the United Kingdom Act it is thought fit to quote the judgment of Tucker LJ[18] on the point of commencing principal Acts by subordinate legislation, whether pursuant to the so-called empowering Act or s 37 of the Acts Interpretation Act 1889.

It is said, in the first instance, that under the provisions of the Act of 1947, standing alone, the Minister could never bring that Act into operation at all. The argument is as follows. Section 120(2) of the Town and Country Planning Act 1947, provides:

> "This Act shall come into force on the appointed day: Provided that" [certain sections there referred to] "shall come into force on the date of the passing of this Act".

The sections referred to as coming into force on the date of the passing of the Act do not include s 120, and, accordingly, it is said that the Minister cannot appoint a day until the Act has come into operation and the Act cannot come into operation until he has appointed a day, with the result that the Act can never come into operation. That ingenious argument does not appeal to me because I think that an ordinary and natural interpretation must be given to a section which itself brings the Act into operation, namely, that it must necessarily come into operation with the passing of the Act, which was on 6 August, 1947. Any other interpretation would really make nonsense of the provisions of the Act.

However that may be, it is conceded by counsel for the applicants that the appointed day was effectively made, but he says that that was only done by virtue of s 37 of the Interpretation Act, 1889 . . .

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[8] Glanville Williams in *Salmond on Jurisprudence*, 11th ed. 187.

[9] Hicks (op cit) 289.

[10] See Fitzgerald, P, "The 'Paradox' of Parliamentary Sovereignty" (1972) Irish Jurist 28, and the reformulation of New Zealand Acts suggested by Jamieson, NJ, (op cit) and post.

[11] Not even by the doctrine of implied repeal which can hardly be applied prospectively.

[12] This was done in a common sense way. It is doubtful whether advances of the last hundred years in logic, language and mathematics (none the less than in the social sciences) however, will allow law to continue with many of its intuitionistic responses. Unless lawyers are prepared to become logicians, linguists, mathematicians and social scientists at least to the extent that they can evaluate the legal relevance of these disciplines, the question of their future survival depends on whether society is prepared to put up with what must then become an increasing arbitrariness and lack of learning.

[13] Thus the dilemma.

[14] *Prohibitions del Roy* (1607) 12 Co Rep 63.

[15] [1951] 1 KB1 (CA), [1950] 2 All ER 282.

[16] [1952] 1 Ch 255 (CA) 255, [1952] 1 All ER 205.

[17] Ie of the type which we have seen to instance the liar paradox in legal reasoning.

[18] The quotation is made from the All England Reports (op cit p 283) as being the clearer expression of no different an argument in the nominate reports (op cit p 5).

Counsel for the applicants concedes that that gives to the Minister power to appoint a day under the Act of 1947.

It may be observed first that in neither of these English cases did the Court of Appeal subject s 37 to any depth of linguistic analysis. In so far as statutory construction takes its origin from and still means "construing" language (with all the rigorousness that construing another language first entailed) there was no construction of the statute at all. The results of the judgment were intuitionistic and should be compared with the results obtained from a close, detailed, and rigorous construction of s 37 which is identical to our own section.

It is because s 37 of the Acts Interpretation Act 1889 (UK) and s 12 of the Acts Interpretation Act 1924 (UK) are identical, and the same method of commencement orders followed in New Zealand as in the United Kingdom, that a great deal of care is required in arguing from the case law relating to one, to a a construction and interpretation of the other.

The two systems of statute law in which these identical provisions appear are quite different. The United Kingdom for the most part professes and practices a non-textual system of legislative drafting. What this means,[19] briefly and thus somewhat inaccurately, is that the United Kingdom statute-user is obliged to set a higher premium on notional significance than the New Zealand statute-user. In New Zealand legislation the words of the Statute Book determine the law to the last letter, in the United Kingdom statute book the statute-user may be faced with a conceptual conflict from which he is left to determine the words of the statute for himself. It is for this reason that Tucker LJ may, in the contextof United Kingdom legislation, be able to conclude in a way that would be completely inappropriate here. In following a non-textual system of legislative drafting the United Kingdom Parliament depends on a lack of verbal explicitness to portray, as fiercely as possible, each conflict of ideas which effects a change in law. As a result of this system, more usually related to, but going far deeper than amendment and the doctrine of implied repeal, the United Kingdom statute-user is faced and made familiar with notional conflict, and forced to take the initiative to resolve it. It is only in this context that Tucker LJ can so divorce himself from the liar paradox in legal reasoning to think that ". . . an ordinary and natural interpretation must be given . . ." and that . . . "[a]ny other interpretation would really make nonsense of the provisions of the Act." Tucker LJ has turned his back on Epimenides the Cretan to support Lord Coke's artificial reasoning.

It is less possible to ignore Epimenides in the context of a textual system of legislative expression. This is the system on which New Zealand prides herself.[20] Here there may be no way of coming to construe commencement orders in the same way as Tucker LJ unless the common form of legislative expression earlier mentioned[21] is followed:

> "(2) Except for this section, this Act shall come into force on a date to be appointed by the Governor-General by Order in Council".

The moral is that in following any system, including that of legal system, the critical path lies in abiding by the consequences of our decisions. If we choose to follow a textual system of legislative expression the benefits of that system can only be realized by adhering rigorously to the implications. Any departures, however much convenient to an instant situation will in the end only fail the system. Having once decided that law follows language in our system of legislative drafting in New Zealand, the consequences of that decision must be rigorously adhered to as a matter of legal

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[19] Jamieson, N J, "Two Ways of Drafting Statutes" [1979] NZLJ 308.

[20] Ward, DAS. "Current Problems in the Legislative Process" [1976] 3 Otago LR 529, 537-542. See also "Two Ways of Drafting Statutes" (supra).

[21] See "The Dilemma of Statutory Commencement" (supra) in which this drafting form together with an alternative are discussed. The alternative form, expressed in footnote (h) to the article, overlooks the legislative status of the Title (as distinct from the short title) and any preamble to an Act. It may be that the enacting words of a statute are themselves without legislative force and belong to a different order of things than the provisions which they enact. It is nevertheless clear that an Act consists of more than sections. Accordingly subs (3) of the proposed alternative legislative form should at least read "All other *provisions* of this Act . . ." This change does not resolve all questions relating to Title, short title, preamble, and enacting words, but it does make some attempt to recognise if not to reduce the perplexities arising from them. I am grateful to have had my error over these parts of a statute pointed out to me by a former colleague in the Parliamentary Counsel Office. It becomes evident that more radical drafting measures are required to resolve the dilemma of statutory commencement in so far as the dilemma also taints the Title to Acts and affects their enacting words.

system. By professing to follow a textual system of legislative drafting, New Zealand's parliamentary counsel long ago turned their back on artificial reasoning. The consequence of that decision is that they must now take cognisance of Epimenides the Cretan. By means of telling a lie he has been speaking the truth for over two thousand years.

CONFLICT OF LAWS

JURISDICTION CLAUSES

By A A TARR, *Lecturer in Law, University of Canterbury.*

Parties to an international contract often agree that in the event of any dispute arising between them, a Court, or the Courts, of a particular country shall have exclusive jurisdiction to determine the dispute. The English Court's attitude to jurisdiction clauses is well summarised in the case of *The Chapparal (Unterweser Reederei G m b H v Zapata Offshore Co)* [1968] Lloyds Rep, 158. The plaintiffs, a German company, in a contract with the defendant American company, has agreed that the "London Court of Justice" should be the forum for litigation in the event of any dispute arising between them. Besides this jurisdiction clause the contract revealed no connection with England, but the Court of Appeal gave the plaintiffs leave to serve the writ on defendants out of jurisdiction.

Willmer LJ observed (at 162):

> "Prima facie it is the policy of the Court to hold parties to the bargain into which they have entered . . . I approach the matter, therefore, in this way, that the Court has a discretion which, in the ordinary way and in the absence of strong reason to the contrary, will be exercised in favour of holding parties to their bargain."

Similarly in *The Eleftheria* [1970] P 24 where plaintiff cargo owners instituted an action in rem against the ship "Eleftheria" alleging breach of various contracts for the carriage of the plaintiff's goods, the defendant shipowners were successful in obtaining a stay of these proceedings, their main argument being based on the presence of a Greek jurisdiction clause in all the contracts of carriage. Brandon J stated (at 99-100) that a Court in deciding whether or not to grant a stay is guided by the following principles:

> ". . . (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion, the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

Dicey and Morris *The Conflict of Laws* 9th ed, 1973 at 222 explain the test in different terms ie, Rule 30 states:

> "Where a contract provides that all disputes between the parties are to be referred to the exclusive jurisdiction of a foreign tribunal, the court will stay proceedings instituted in England in breach of such agree-

ment, unless the plaintiff proves that it is just and proper to allow them to continue."

(see also *The Fehmarn* [1957] 2 All ER 333; *Mackender v Feldia A G* [1967] 2 QB 590; *Evans Marshall v Bertola S A* [1973] 1 All ER 992; *The Makefjell* [1976] 2 Lloyd's Rep 29; and *The Adolf Warski* [1976] 2 Lloyd's Rep 241).

In the recent case of *Carvalho v Hull Blyth (Angola) Ltd* [1979] 3 All ER 280 an English Court was again confronted with a jurisdiction clause. The defendant company, which was registered in England, carried on business in Angola through a group of subsidiaries. By a contract entered into in 1973 the plaintiff, who was then resident in Angola, agreed to sell all his shares in these subsidiaries for 76 million escudos, payable in four instalments. The contract contained the following clause:

> "In the case of litigation arising the District Court of Luanda should be considered the sole Court competent to adjudicate to the exclusion of all others."

At the time of contracting Angola was a province of Portugal and the law applied was Portuguese law with a final right of appeal on law to the Supreme Court in Lisbon.

Following a coup d' etat in Portugal in 1974 dramatic changes occurred in Angola. Civil war broke out in 1975 and the country became independent under a revolutionary government. Under the new Angolan constitution Portuguese law was to continue in force to the extent that it did not conflict with the "Revolutionary Process". Although there continued to be a District Court of Luanda, the right of appeal to Lisbon was abolished and Judges were appointed on a different basis to that formerly applying. The plaintiff, fearful for the future, left Angola in 1975 to settle permanently in Portugal. The defendants paid the first three instalments due under the contract but failed to pay the fourth instalment of 20 million escudos due in January 1976. In 1977 the plaintiff issued a writ in London claiming from the defendant company the sum due in escudos or its sterling equivalent, then about £300,000.

The defendants applied to have the English proceedings stayed, placing great reliance on the jurisdiction clause in the contract. Donaldson J dismissed their application and the defendants appealed. The Court of Appeal upheld Donaldson J pointing to the fact that the Court now functioning in Luanda was different to the Court contemplated by the parties when the contract was made. Although the Court continued to exist under the same name it was now an Angolan Court operating under the framework of the new Constitution and there was no longer a right of appeal to Lisbon. Referring to the new Constitution Geoffrey Lane LJ observed (at 289) that

> ". . . those articles make it plain that the existing application of Portuguese law may be very short lived, and it is impossible to predict what effect those articles, when applied, may have on the present system of law in Angola and on the contents of Portuguese laws which are presently administered there."

Consequently both Geoffrey Lane LJ and Browne LJ decided that as a matter of construction the jurisdiction clause was inapplicable; on a true construction of that clause the Court of that name administering the law of an independent state was not the Court in the contemplation of the parties at the time of contracting.

In any event, both Judges would exercise their discretion and refuse the stay. Referring to the test enunciated by Brandon J in *The Eleftheria*, supra that a "strong cause" be shown before a Court will invoke its discretion, and to that propounded by Dicey and Morris, supra that plaintiff prove that it is "just and proper" for him to continue, Browne LJ states that there is "no real difference between the two tests" (at 286G). Counsel for the defendants had argued that the test outlined by Brandon J in *The Eleftheria* was to be preferred and that the following factors pointed clearly to a stay: (1) The proper law of the contract was Angolan law and under this law the "economic hardship" suffered by defendant company as a result of the civil war would entitle them to a reduction or postponement of the fourth instalment. Angolan law differed considerably from English law in this regard; (2) Most of the evidence relating to the state of the Angolan economy and its effect on the defendant company, relevant to the defence of "economic hardship", would be found in Angola; (3) The plaintiff had no connection with England, whereas the defendant still carried on business in Angola, and; (4) The defendants genuinely desired trial in Angola and were not merely seeking procedural advantages.

Browne LJ points out (at 287C) that Brandon J did not intend his list of factors to be exhaustive and that a Court is directed to look at all the circumstances of the particular case. Factors influencing theCourt against granting a stay were: (1) The changed political circumstances in Angola and, in particular, the new structure of the legal system since the time of

contracting; (2) The plaintiff's assertion that he would be in fear of his life if he were to return to Angola, and; (3) The fact that the defence of economic hardship was not sufficiently raised for the Court to have to consider it. For these reasons the Court of Appeal would exercise its discretion in favour of the plaintiff and allow the action to proceed in England.

A further matter arising out of this case is that of the proper law. Where there is no express choice of the proper law the Court is faced with the task of ascertaining by what law the parties' obligations are to be determined. Formerly, in accordance with the principle qui elegit judicem elegit jus, it was held that the selection of a particular Court as the only forum to which disputes arising out of a contract could be submitted, gave rise to a very strong presumption that the law administered by that Court should be the proper law of the contract (see *N V Kwik Hoo Tong Handel Mij v James Finlay and Co* [1927] AC 604; *Tzortsis v Monark Line A/B* [1968] 1 All ER 949). However in *Compagnie d'Armement Maritime S A v Compagnie Tunisienne de Navigation S A* [1971] AC 572 the House of Lords disposed of the notion that the contractual choice of forum for arbitration or litigation amounts almost irresistibly to a choice of the proper law of the contract. Such a clause is only an indication, albeit a strong one, that the parties intended that the proper law should be the law administered by the Court of the selected form. In the *Carvalho* case the plaintiff was not bound to litigate in Angola because as a matter of construction of the jurisdiction clause the Court of Appeal found that the District Court of Luanda as constituted under the Revolutionary Government was not the Court contemplated by the parties when the contract was made. However when the contract was made the selection of that Court carried with it a strong indication that the parties wished any dispute to be determined by the law then in force in Angola ie, Portuguese law. In any event, apart from choice of jurisdiction clauses there are a multitude of other factors from which it may be possible for a Court to infer the intentions of the parties.In the *Carvalho* case many of these factors are present, all pointing to an implied selection of Portuguese law as the proper law of the contract, eg, the contract was drafted in Portuguese (*Jacobs v Credit Lyonnaise* (1884) 12 QBD 589; *Keiner v Keiner* [1952] 1 All ER 643); the parties were both resident in Angola, then a province of Portugal, at the time of contracting (*Re Missouri Steamship Co* (1889) 42 Ch D 321 at 328); payment was to be made in escudos (*The Assunzione* [1954] P 150; *Coast Lines Ltd v Hudig and Veder Chartering N V* [1972] 2 QB 34 at 47; and, the place of performance originally contemplated by the parties was Angola (*The Assunzione*, supra).

Consequently the irresistible inference in the *Carvalho* case is that at the time of contracting the parties intended that the proper law of the contract should be law then in force in Angola. But as Nygh puts it, this is a selection of "a living system of law" (P E Nygh, *Conflict of Laws in Australia* 3rd ed, 1976 at 228). So the proper law of the contract in this context means the law as it exists from time to time and cognizance is taken of changes in the proper law since the time of contracting. Consequently if the proper law provides for the discharge or variation of any obligation originally validly created by it, the forum must give effect to it (see *Perry v Equitable Life Assurance Society of the United States* (1929) 45 TLR 468; *Wanganui-Rangitikei Electric Power Board v AMP Society* (1934) 50 CLR 483; *R v International Trustee for the Protection of Bondholders A/G* [1937] AC 500; *Re Claim by Helbert Wagg and Co Ltd* [1956] Ch 323 at 341). Thus the law to be applied in determining the substantive issues in the *Carvalho* case is the law in force in Angola at the time of the proceedings ie, Angolan law. This is subject to the qualification that the Courts of the forum retain an overriding power to refuse to enforce, or in exceptional circumstances, to recognise, rights acquired under a foreign law on grounds of public policy (*In the estate of Fuld (No 3)* [1968] P 675). However an English Court will not lightly intervene on grounds of public policy and under the proper law in the *Carvalho* case defendants may prove the defence of "economic hardship" in an attempt to postpone or reduce payment in respect of the fourth instalment.

In conclusion, if the parties have expressly chosen a forum in which to settle their disputes, an English or New Zealand Court will generally hold the parties to their bargain and will thus decline jurisdiction if the selected forum is a foreign Court, and accept jurisdiction if it is the local Court. In one case, however, the jurisdiction of New Zealand Courts cannot be excluded ie, s 11A of the Sea Carriage of Goods Act 1940, as amended by the Sea Carriage of Goods Act 1968, provides that a stipulation or agreement which purports to oust or restrict the jurisdiction of New Zealand Courts in respect of a contract for the carriage of goods by sea from any place in New Zealand to any place outside New Zealand shall be of no effect. Furthermore, where it is "just and

proper" or a "strong cause" is shown, an English or New Zealand Court will decline to stay proceedings brought in breach of a jurisdiction clause as the Court has an overriding discretion. The *Carvalho* case, when the overwhelmingly Angolan character of the contract is considered, along with the fact that the English company, although amenable to jurisdiction by virtue of its registration in England, had no assets in England and carried on all its business in Angola, demonstrates the width of this discretion which Courts may arrogate to themselves when a jurisdiction clause is pleaded.

LEGAL LITERATURE

Wetter, J **The International Arbitral Process** (Oceana 1979), 5 vols.

This book is a pleasure to read. It is attractively and spaciously set out, using the Photo Offset process. It is indispensable to anyone concerned with any form of International Arbitration.

But in describing this book, it is necessary to emphasise what it is not. It is not a set of reports of International Arbitral Awards. Nor is it a textbook or a casebook in the traditional sense. It is, rather, a carefully selected collection of materials.

Nor is it limited to arbitration between States. It is an attempt to break a tradition in which:

> "Commercial lawyers regard arbitration between States as wholly irrelevant; and public international law teachers, advocates and officials, view commercial arbitration as an essentially alien process, and national arbitration laws as at best remote evidence of State practice which rarely needs to be resorted to for guidance."[1]

Thus the book ranges over the entire field of arbitration drawing examples from arbitration between States, between States and Aliens and from the Commercial Arbitration Process.

An example of arbitration between States which is dealt with in the book is the *Alabama Claims Arbitration* between the United States and Great Britain in 1872. The material dealing with that Arbitration includes not only the award itself, but The Treaty of Washington of 8 May 1871, under which the dispute was submitted, random notes on the Tribunal and its Proceedings, pleadings, letters and other documents of historical interest.

The book deals with three cases of Arbitration between States and aliens including the case between Saudi Arabia and the Arabian American Oil Co (Aramco), in which the main issue before the Tribunal was the law to be applied. The Tribunal dealt with this question in a much more satisfactory way than the famous Abu Dhabai Arbitration.[2] In that case Lord Asquith, finding local law on the subject to be non-existent, used certain principles of English law which he saw as part of a "modern law of nature".

In the *Aramco* Case, there was a serious attempt to apply Saudi Law so far as it was applicable. Saudi law is Moslem Law as taught by the Hanabli school. Moslem scholars served in the capacity of counsel and on the panel of Arbitration.

That chapter is intended to "form a bridge between public international law cases among States and ordinary commercial arbitration among private parties".[3]

Other chapters deal with such diverse topics as the great international commercial arbitration institutions (such as the International Centre for the Settlement of Investment Disputes, to which New Zealand belongs), the Laws and Rules relating to commercial arbitration, remedies against arbitral awards, the mores of arbitration, UK law, US law and arbitration in Zurich, Switzerland.

A useful feature of Wetter's treatment of the Arbitration Institutions is a "Syntagma" in which the Rules of the various institutions are placed side by side for examination and comparison.[4] A similar syntagma compares the ar-

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1 Vol I, p xxiv.
2 18 ILR 144 (1951).
3 Vol I, p xxx.
4 Vol II, pp 260-359.

bitration statutes of six principle institutions in a similar fashion.[5]

In addition to the twelve chapters of text, the last volume and a half contain source material such as National Arbitration Statutes, Rules, Treaties and Clauses.

Wetter has participated as secretary or counsel in Arbitration between States and aliens and in international arbitration. Thus, when he says there is a unity to the arbitral process, his claim must be taken seriously. But it is difficult to discern this unity without reading the entire work. In the author's words:

> "It is seen that the chapters deal with a widely disparate range of topics and it may therefore be argued that they are too divergent and amount to a series of unrelated essays . . . But they have an inner connection. While the chapters approach the subject from different angles, they are linked together by constituting merely different sides of the same structure and that structure is multi-dimensional. If the medium of depiction were a painting rather than a book, probably only a cubist approach would do justice to the subject."[6]

For this reviewer the inner connection falls into place somewhere in the middle of the third volume. Others will no doubt see it at an earlier or a later point in the book.

The essential common element which distinguishes arbitration from adjudication is "party control". The Parties agree to submit to Arbitration by Contract or Treaty and the course of the arbitration is controlled contractually. The parties select, either the arbitrators or the means by which the arbitrators are to be chosen. They must also contractually stipulate the law to be applied and even the rules under which arbitrators are to proceed.

Problems arise as to what constitutes arbitration and as to the proper role of an arbitrator. In Chapter VIII there is an in-depth study of the Venezuela-Guyana Boundary Dispute[7] between Venezuela and Great Britain of 1899. The President of that Tribunal virtually coerced the other members of the Tribunal into accepting a settlement which was based on diplomatic rather than legal considerations and which was manifestly unjust to Venezuela. The Award did not create a solution acceptable to both sides. Rather the dispute festered until 18 February 1966 when the governments of the United Kingdom, British Guiana and Venezuela established a mixed commission to look into the dispute and solve the controversy. That arbitration and the obvious injustice done had the effect of souring South America on International Arbitration.

> ". . . South America does not believe in arbitration and forms a great white spot on the maps depicting adherence to modern principles and conventions of arbitration."[8]

Less far-reaching but similarly damaging to confidence in the process was the case of *Re Hopper*[9] where two arbitrators and the umpire, at the invitation of one party, were wined and dined at an inn kept by him.[10]

This is a five volume book. But it is easier to read through than may seem possible since the book is so attractively set out and since the materials are so interesting. The book could be compressed into a single 1500 page volume and supplement but much would be lost.

Even those who do not want to read the book in its entirety will still find it a valuable source book if they are concerned with any form of arbitration.

J B Elkind

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5 Id pp 412-498.
6 Vol I at p xxvi.
7 Vol III, pp 3-352.
8 Id p 351.
9 (1867) 36 LJQ B97.
10 Vol III, p 742.

CORRESPONDENCE

Dear Sir,

re: Post Admission Practical Training Scheme

The editorial of 16 December (NZLJ 1980 No 23) by Mr Dugdale sets out admirably the somewhat tangled history of this important matter, and dealt with the latest very encouraging developments. It has obviously been a happy accident that the new Law Practitioners' Bill has been delayed. With more careful consideration, a better planned scheme seems certain to result; and, one hopes, a more flexible one than had previously been considered. In this respect, is it necessary to incorporate the details of the scheme in the Act, as was being done previously? It would seem better to leave the fine print to be settled by regulation. Further, it would be sensible to lend support to the scheme being run by the NZLS in conjunction with the Technical Institutes (or Community Colleges) including, of course, the TCI. With the establishment of Technical Institutes well advanced in most of the main provincial cities, classes could be run where numbers warranted. Otherwise, the excellent service provided by TCI could be used. The use by NZLS of the TCI has been markedly successful with the Legal Executive Course, and there seems every reason to suppose that such courses could be run just as well for post admission training. Finally, employers should be more inclined to take on graduates without practical experience, if the latter are concurrently taking a practical study course; which would carry with it the further advantage that such practical study would be "in-service".

Yours faithfully,

B H Bull

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