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GAUDEAMUS IGITUR . . .

PROFESSOR Keith Sinclair has added to his list of distinguished publications *A History of the University of Auckland 1883-1983* which is a model of its kind, comprehensive, judicious, and well written. He has a neat, but depressing paragraph on the beginning of legal education at Auckland.

> In 1883-4 lectures on real property and equity were delivered by Judge Seth-Smith, but he was too busy and resigned. In 1888 Dr A McArthur, MA, LLD offered to teach some law. He was an Australian who had been Principal of the Teachers' Training College, but had been dismissed. On this occasion Council declined his offer. However in 1898 he offered to give lectures in jurisprudence and constitutional history in return for fees only and was now accepted. It was not necessary for would-be lawyers to attend lectures at a university college; up until 1882 they could serve articles under a solicitor for a few years and pass an examination set by the Judges. In 1877, the University of New Zealand established the LLB degree and, in 1889, the Judges' rules provided that the law examiners should be appointed by the University of New Zealand. It became customary, but not obligatory, for law clerks to attend university classes at night. Most lawyers did not complete a degree, but sat for the easier law professional examinations to qualify as solicitors. In 1898 a new Act introduced the "back door principle" whereby a solicitor could become a barrister after five years in practice. The standard of legal education was deplorably low.

As was noted in a brief announcement in the May issue of the *New Zealand Law Journal*, the Law School at the University of Auckland proposes to celebrate its centenial from August 16 to 20, thus paying tribute presumably to Judge Seth-Smith on the one hand and to the pre-eminence of the law of real property as the financial basis of the profession on the other. The celebrations are open to all lawyers and not only to former Auckland students. Lectures are appropriately to be a substantial part of the celebrations with contributions from local and overseas Judges and academics including the Chief Justice, Sir Owen Woodhouse P, and Professors Julius Stone QC, L C B Gower and others. The Centennial Dinner will have as guest speaker the Governor-General who in his earlier manifestations can claim both judicial and academic qualifications, as I can attest through having appeared before him in one role, and sat at his feet in the other.

If back in 1883 the standard of legal education at Auckland was as Professor Sinclair says "deplorably low" it has not remained so. But change did not come quickly. In 1925 the Reichel-Tate Commission was moved to report "Legal practitioners have always been regarded as members of a learned profession, as, indeed, is shown by the customary courtesy of allusion to 'my learned friend'. It appears to us that, unless a marked change is effected in the legal education provided in the Dominion, this term runs the risk of being regarded as a delicate sarcasm."

The profession in New Zealand owes a great debt to the teachers of law at the various universities. In a very real sense it is the law schools that set the standards not only for an understanding of legal principles, but also for the appreciation of the law as an intellectual discipline and a professional undertaking that requires the observance by those in it of standards of behaviour in relation to one another, of respect for the Judiciary, and of obligations to their clients. The code of professional ethics of the Law Society, and the practices and procedures of the judicial system can do no more than reinforce the understanding of what the law is, that is first acquired by all of us as students. Intellectual and professional standards are first set in the Universities and it is appropriate therefore for practising members of the profession to acknowledge this publicly from time to time, as will be able to be done at Auckland from 16 to 20 August. This will be a week in which the profession in Auckland will be able to rejoice with the professors and staff of the Law School, both intellectually and socially.

P J Downey

Tribute to Sir Clifford Perry

ON Tuesday, 24 May a tribute was paid at a special sitting of the High Court in Auckland, to the late Sir Clifford Perry. Mr Paul Temm QC spoke on behalf of the Auckland District Law Society and the New Zealand Law Society. Mr Justice Moller presided at the ceremony. He spoke first on behalf of the Judiciary in the following words.

We meet today to pay tribute to the late Sir Clifford Perry. It is particularly fitting that we should meet in this Courtroom, because it is the one in which he chose to sit whenever it was possible, and, indeed, he had a very tender spot in his heart for this Court and for the whole building which houses it.

Sir Clifford was appointed to the Bench of what was then the Supreme Court on 30 August 1962, and he retired on 10 July 1979, the day on which he became 72. He was born in Oamaru, but, of course, spent his very energetic and successful days at the Bar in Christchurch. It was during that time, in 1960, that there occurred the occasion which, in his quiet and modest way, he always looked upon as one of the most satisfying of his experiences in the law. It was then, at a time when the appearance of members of the New Zealand Bar before the Privy Council was a rather rare event, that Mr A C Perry of Christchurch appeared before Their Lordships in London to argue the important case of *Lee v Lee's Air Farming Ltd.* He was, of course, successful, and that success remained a matter of quiet pride for him from then on.

The profession will, a little later, pay their tribute to him as a force in the affairs of that profession before his appointment to the Bench, but I cannot let this occasion pass without mentioning his Presidency of the Canterbury District Law Society in 1950, and his work generally as a member of the Council of the New Zealand Law Society, emphasising particularly his 10 years of service as a member of its Disciplinary Committee. Nor can one possibly leave unrecognised the conscientious, time-consuming, and very thoughtful contribution that he made, both as practitioner and Judge, to the cause of legal education in New Zealand during his very many years as a member of The Council of Legal Education.

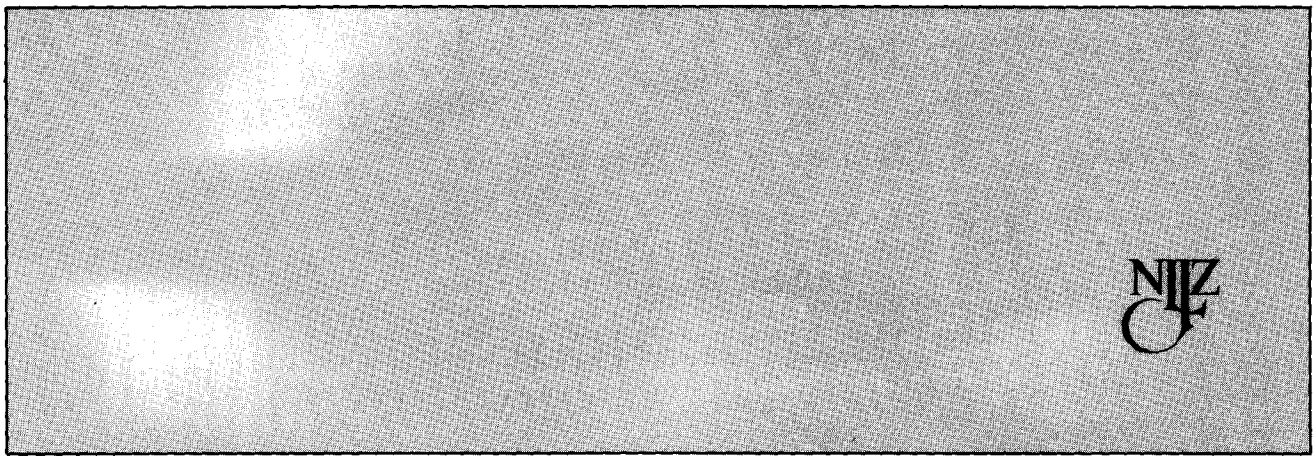
But it is as a Judge that most of us here knew Sir Clifford. He came to Auckland almost immediately on his appointment and remained here until his retirement, at which stage he was not only the Senior Judge in Auckland, but also the Senior Puisne Judge of what, even then, was still the Supreme Court. Reference may well be made to other aspects of his judicial life, but I am sure that I speak for all of those on the Bench with me this afternoon who had the privilege of working with him during his years of service, when I say that, in his relationships with us, Sir Clifford could not have been more easy to approach, more kind and helpful to us in our problems (particularly as beginners), or a more pleasant friend in the unofficial area of our lives. As a Judge, in his work, he was particularly conscientious and hard-working, his judgment was particularly sound, and his written decisions not only were instructive but also were framed in a way that made good reading.

And all this work at the Bar and on the Bench was accomplished in this way, unsparing of himself, during years when his sufferings from asthma must have been an added strain.

Today I am speaking not only for myself and for those Judges sitting with me, but for many others. In the first place I have to tell you that the Attorney-General has sent me a message regretting his inability to be present.

Then, too, it is a matter of considerable regret to him that the Chief Justice had for today a long-standing speaking engagement which he could not cancel, but he also joins with us in paying this tribute to Sir Clifford. Moreover, the Chief Justice has asked me to say as well, that all other High Court Judges throughout the country join with us too, and this applies very especially to the Judges of the Court of Appeal.

To Lady Perry and to all other members of his family, and to all others who were close to him, all of those for whom I speak offer our sympathy in their loss, knowing that, in their close personal relationships, they too, just as did his brother Judges, had reason to experience deeply all the fine qualities that Sir Clifford had.



Case and Comment

The Form of bankruptcy notices

The decision of Sinclair J in *Manning v Commercial Advances Nominees Ltd* (High Court, Auckland, judgment 11 November 1982, B No 381/82) concerns two points of considerable practical importance relating to bankruptcy notices. The first question on which the decision sheds some light is whether interest can be claimed when a notice is issued in respect of a judgment debt, and the other is the extent of the Court's power to amend a bankruptcy notice which is defective.

In this case, the notice simply claimed $444,125.04 "being the balance due on a final judgment", without indicating that this sum included an amount for interest on the judgment debt. The debtor argued that interest on a judgment debt could not be included in a bankruptcy notice. Sinclair J rejected that argument. In the absence of any New Zealand authority on the point, he followed the English decision in *Re Lehmann; ex parte Hasluck* (1890) 7 Morr 181 and three recent decisions of the Australian Federal Court; *Re Mullavey, ex parte Australia and New Zealand Banking Group Ltd* (1977) 20 ALR 276; *Re Manion, ex parte Deputy Commissioner of Taxation* (1979) 23 ALR 270 and *Re the Bankruptcy Act 1966, ex parte Commercial Banking Co of Sydney Ltd* (1979) 23 ALR 522. Those decisions establish that a judgment creditor may include a claim for interest in a bankruptcy notice, although he is not required to do so, and that this is possible whenever the judgment debt is one which carries interest. In New Zealand this is the case with all High Court judgments, because of the effect of R 305 of the Code of Civil Procedure.

In addition to deciding that interest on a judgment debt could be claimed, the three Australian decisons also indicate the form which such a claim should take. Sinclair J discussed this aspect of the judgments at some length and adopted the statements which they contain into the following summary:

> I am of the view that it is competent in this country to include in a bankruptcy notice the interest which has accrued on a judgment debt, but if that is done it is necessary for the judgment creditor to set forth in the notice itself the amount of the judgment debt, particulars of any amounts which have been credited towards it and particulars as to the interest claimed on the judgment debt which, of course, must have reference to the rate at which interest is calculated, the period for which it is calculated and the total amount of interest which results from these calculations.

It is suggested that this statement provides an extremely useful guide to any practitioner faced with the task of drafting a bankruptcy notice on a judgment debt which carries interest.

The second question before the Court was the extent of its power under s 11 of the Insolvency Act 1967 to amend a defective bankruptcy notice. The notice in this case was not only defective in the manner in which interest had been claimed, but also because various other amounts had been added to the judgment debt without any explanation. The only decision on the effect of s 11 was *Best v Watson* [1979] 2 NZLR 492 in which the Court of Appeal rejected an argument that the section only applied where the defect was one of form, and that it could not be used to rectify a defect of substance. However, the Court considered that if the document were so defective as to be a nullity, then the section could not be used to save it, since in that case there was nothing before the Court to rectify. Sinclair J relied on that statement and decided that the bankruptcy notice in this case was so defective as to be incapable of amendment. It was accordingly set aside.

Johanna Vroegop

Booth Licences — Sale of Liquor Act 1962, ss 69, 119

The two cases of *Ashby v Waikato Licensing Committee* (unreported, Supreme Court, Hamilton, 27/10/78 (M291/78)) and *McKenzie v The Bay of Plenty Licensing Committee and Another* (unreported, High Court, Rotorua, 11/3/83 (A15/83)) indicate a difference of judicial opinion on the question of the issue of booth licences for the sale of liquor on Sundays.

Issue of booth licences is a common enough occurrence and over many years most "proper" public amusements such as dog trials, sporting events and agricultural and pastoral shows, have operated licensed booths. It might or might not be going too far to say that existence on such occasions of a well-stocked and patronised booth is almost a convention. Certainly, since their forerunner the "conditional licence" became available in 1881 pursuant to the Licensing Act of that year, there appears to have been no lessening of public demand.

The 1881 provisions did not limit the day or days of the week in respect of which a conditional licence might or might not be issued. There was merely a seven-day maximum currency period for the particular occasion. Over time, however, authorised hours for the sale of liquor to the public became subject to increasing regulation until ultimately a more or less general prohibition was statutorily imposed with regard to supply of liquor on Sundays. Booth licences were caught in the web. For a long time, their issue for Sunday events was proscribed.

In 1978, however, Mahon J had occasion to consider the matter of Sunday issue in *Ashby v Waikato Licensing Committee*. The world rowing championships were to be held at Lake Karapiro near Hamilton over the period 1 to 5 November 1978. A booth licence was sought by the organisers for that period. Because 5 November was a

Sunday, the Chairman of the Waikato Licensing Committee, Mr A D Richardson, SM declined to issue the licence for that day.

On appeal, Mahon J traced the various provisions of the Sale of Liquor Act 1962, including the Sale of Liquor Amendment Acts of 1976 and 1977. He concluded that Sunday issue *was* permissible, but that "the question raised by the case is certainly open to different conclusions".

Until the question was recently considered by His Honour Savage J in *McKenzie v The Bay of Plenty Licensing Committee and Another* Sunday issue seemed to no longer be a problem. The 1881 ethos prevailed and "days of the week" seemed not to be a criterion. Now, *McKenzie* has flipped the coin again.

Mr McKenzie applied on behalf of the Rotorua Rugby Referees' Association for a booth licence on the occasion of a 10-a-Side rugby tournament. The tournament was to be run by the Rotorua Rugby Referees to raise funds for a charitable organisation. The Chairman of the Bay of Plenty Licensing Committee heard submissions from the Police opposing the application, and from Mr McKenzie in support of it. The dispute was whether issue of a booth licence was precluded by the provisions of s 690(4)(a) and the Third Schedule to the Act, or, whether it could be issued within the terms of s 69(4)(b). Section 69(4)(a) and (b) states:

> (4) Subject to the provisions of subsection (b) of this section, a booth licence may be granted in respect of—
>
> (a) Any of the occasions or events set out in the Third Schedule to this Act; or
>
> (b) Any entertainment or amusement held on a special occasion at a place to which the public are admitted; or . . . (paragraphs (c)-(f) follow).

The Third Schedule states:

> S 69(4)(a) THIRD SCHEDULE OCCASIONS OR EVENTS FOR WHICH BOOTH LICENCES MAY BE GRANTED
>
> Agricultural and pastoral shows
> Bowling tournaments
> Cricket matches
> Dog trials
> Golf tournaments
> Gun club meetings
> Industrial fairs
> Ploughing matches
> Race meetings within the meaning of the Gaming and Lotteries Act 1977, and hunt club meetings
> Ram and ewe fairs, stock sales, horse sales, machinery sales
> Regattas, rowing matches
> Sports tournaments or carnivals to which the public are admitted, but *not including football matches*, motor race meetings, or events (other than gun club meetings) at which firearms are discharged (other than signal guns).
> (emphasis added)

Having considered the submissions the Chairman refused the application on the ground of a lack of jurisdiction, ie, because football matches were specifically excluded from the category of occasions listed in the Third Schedule, in respect of which booth licences could be issued pursuant to s 69(4)(a). Mr McKenzie applied to the High Court for a review of the Chairman's decision.

Savage J delivered his judgment on 3 March 1983, followed by his reasons on 11 March. He held:

(1) The occasion must be "special" to attract s 69(4)(b) and there was nothing special about this occasion. The nature of the entertainment or amusement cannot make the occasion special; the occasion must in itself be special and the entertainment or amusement is then held on the special occasion.

(2) The day's activities amounted to a sports tournament (10-a-Side rugby plus stalls and amusements) and so was prohibited by s 69(4)(a) and the Third Schedule. Therefore s 69(4)(b) could not be construed so as to enable the prohibitory provisions of para (a) to be circumvented. The word "entertainment" was not intended to include a sports tournament.

Having thus disposed of the case, His Honour went on to comment about the issue of booth licences on Sundays. He referred to *Ashby*, supra.

Savage J regretted that he was unable to share the view taken by Mahon J, and stated that in his view, the 1977 amendment to the Sale of Liquor Act 1962 limited the days on which a booth licence could be issued on Monday to Saturday inclusive, except that no licence could be granted for Good Friday; Christmas Day, however, was not excluded. Both Judges had arrived at their respective conclusions after tracing and interpreting the effect of the several amendments to the Act. Further, their Honours both pleaded for legislative clarification of the situation.

So, the matter of Sunday issue of booth licences is, for practical purposes, confused. Applicants, their solicitors, Chairmen of the Licensing Committees and the Police might be forgiven for any feelings of uncertainty they might experience. From a legal point of view, the matter is just a little clearer. Mahon J reached his decision in respect of the specific matter of Sunday issue of booth licences; *that* was *the* point in dispute in *Ashby*, supra. Savage J did not *have* to consider Sunday issue to dispose of the matter before him, but, chose to do so. His comments on Sunday issue were not necessary to resolve the principal question of jurisdiction (or lack of it) of the Chairman to issue a booth licence pursuant to s 69(4)(a). Thus, Mahon J's pronouncement, as decided law, would appear to have greater legal effect than Savage J's obiter dicta.

On this reasoning the way is open for applications for issue of booth licences for Sundays to continue to be made and licences issued. However, given that their Honours both pleaded for legislative clarification, uncertainty reigns. It may be that Chairmen of District Licensing Committees will find it difficult to adopt an approach consistent throughout New Zealand. If so, where will this leave future applicants and the Police to whom applications are referred? Perhaps the following suggestion is the only practical way to approach the matter.

Unless there is some good reason for objecting to issue of a booth licence beyond the fact that it relates to a Sunday occasion, applications in relation to Sunday occasions should not be objected to by the Police. Rather, they should report on the applications in the usual way and draw the attention of the Chairman of the District Licensing Committee to the conflict between the *Ashby* and *McKenzie* cases. Committee chairmen will thus be required to consider and resolve the question in each case, aware at least that the question of Sunday issue is unclear.

Whilst on the face of things the problem might seem small, one could, it is suggested, pretty safely hazard a guess that thousands of once thirsty booth patrons would see things differently. Clarifying legislation may indeed be the answer. After all, if Sunday issue was socially acceptable in 1881. . .?

D L Bates

Undetectable damage — When does the cause of action accrue?

Section 4 of the New Zealand Limitation Act 1950 and s 2 of the English Limitation Act 1939 (now Limitation Act 1980) provide that for actions in tort an action cannot be brought more than six years after the "date on which the cause of action accrued". In *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 1 All ER 65 the House of Lords reversed the English Court of Appeal decision in *Sparham-Souter v Town and Country Developments* [1967] 2 All ER 65 and unanimously decided that a cause of action in negligence accrued when damage occurred to a building, regardless of whether or not such damage could with reasonable diligence have been discovered by the plaintiff. According to this decision, a plaintiff's claim in negligence could be statute-barred before the plaintiff ever discovered or ought to have discovered that an action in negligence could have been brought.

In *Pirelli* the plaintiffs engaged the defendants to provide advice about the building of a new services block at the plaintiffs' works. The new block included a chimney approximately 160 feet high that was designed and supplied by a subcontractor which subsequently went into liquidation. Part of the chimney was made of an unsuitable material, cracks occurred, and eventually the chimney had to be partly demolished and replaced. The trial Judge found that the defendants had accepted responsibility for the design of the chimney and were negligent in approving the suggested design. It was argued at the trial and before the House of Lords that the plaintiffs' claim was time-barred as having accrued more than six years before the writ was issued.

The chimney was built in June and July 1969. The trial Judge found that cracks near the top of the chimney must have occurred not later than April 1970. The plaintiffs actually discovered the cracks in November 1977 and the writ was issued in October 1978. Since the plaintiffs did not discover the damage until one year before the writ was issued and it was not established that with reasonable diligence the plaintiffs ought to have discovered the cracks before October 1972, ie more than six years before the writ was issued, the trial Judge held that the plaintiffs' claim was not time-barred. However, the House of Lords decided that the plaintiffs' cause of action accrued when the damage, in the form of cracks in the chimney, occurred. Since that was more than six years before the writ was issued, the plaintiffs' claim *was* time-barred. The House of Lords expressed regret at this conclusion. Lord Scarman, who agreed with the unanimous decision that was delivered by Lord Fraser, indicated (at 72) that the state of the law:

> is no matter for pride. It must be . . . unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury (or damage). A law which produces such a result . . . is harsh and absurd.

Nevertheless, the House of Lords felt that any changes to the harshness of the law needed to be made by Parliament.

Lord Fraser referred to *Cartledge v Jopling* [1963] 1 All ER 341, a personal injury case in which the House of Lords decided that the cause of action accrued when personal injury beyond that which could be considered to be negligible had been caused, even though the existence of the injury was unknown and could not reasonably have been discovered by the victim. In *Cartledge*, the House of Lords felt that the conclusion that they had reached was unfortunate, but s 26 of the English Limitation Act 1939 (like s 28 of the New Zealand Limitation Act 1950) provides that in situations of fraud or mistake the period of limitation does not run until the plaintiff has discovered, or could with reasonable diligence have discovered, the fraud or mistake. It was considered to be a necessary implication that where fraud or mistake is not involved, the limitation period begins to run whether or not the damage could be discovered.

The House of Lords in *Cartledge* called for Parliament to amend the law; Parliament responded with the Limitation Act 1963 that extended the time limit for personal injury claims where material facts of a decisive nature were outside the knowledge of the plaintiff until the limitation period would normally have expired. Since the amendment did not make any reference to claims involving property damage, the House of Lords in *Pirelli* concluded that Parliament deliberately left the law unchanged with respect to actions that did not involve a claim for personal injury. The Law Lords therefore overruled the English Court of Appeal decision in *Sparham-Souter* that stated that a cause of action accrued when a person capable of suing discovered or ought to have discovered the damage, and concluded that a cause of action accrued when damage occurred and that the ability to discover the damage was irrelevant. (Lord Fraser's obiter dictum that the limitation period runs against the owners of a property as a class so that if time runs against one owner it also runs against subsequent purchasers will not be discussed in this comment.)

Applicability of Pirelli in New Zealand

The result in *Pirelli* was recognised by the Law Lords themselves as unjust and undesirable. However, because of the legislative history of the Limitation Act 1939 they felt compelled to conclude that the claim was statute-barred.

Prima facie, one might expect the New Zealand Courts to follow the *Pirelli* decision. Both the English and New Zealand statutes specify that the limitation period begins to run on the "date on which the cause of action accrued" and both include a section that delays the running of the limitation period in cases of fraud or mistake. Further, Lord Diplock in *de Lasala v de Lasala* [1980] AC 546 stated that when Courts in jurisdictions that have appeals to the Privy Council are considering provisions in statutes that are identical to the equivalent English statutory provisions, decisions of the House of Lords are virtually binding.

There are, however, several arguments that cumulatively may provide support for an argument that in New Zealand a cause of action should accrue not when the damage occurs but when the damage or a defect is discovered or ought with reasonable diligence to be discovered.

First, the principle enunciated in *de Lasala* should not apply to the interpretation of s 4 of the Limitation Act 1950. Lord Diplock limits his decision to recent legislation, that is based on English legislation, and that has an identical legislative history to the English statute. Although the Limitation Act 1950 is based on its English equivalent, it is not a recent statute and the relevant legislative history of the two statutes is different. When the English Limitation Act 1963 was introduced to overturn the effect of the *Cartledge* case with respect to personal injury claims, no similar amendment was made in New Zealand.

An argument might also be made about the validity of the "necessary implication" made in *Cartledge*, and adopted in *Pirelli*. Does the existence of a

provision that delays the running of the limitation period in cases of fraud or mistake necessarily imply that in the absence of fraud or mistake, Parliament intended that knowledge of the accrual of the cause of action should be irrelevant so that time begins to run regardless of the lack of knowledge of the damage? An equally possible, or perhaps even more likely implication is that in 1939 in England and in 1950 in New Zealand, Parliament simply did not consider the possibility that damage could occur without there being any reasonable opportunity of discovering that damage. Knowledge about industrial diseases was limited and a cause of action in negligence for defective foundations was far from being a recognised cause of action. Further, since in New Zealand the limitation period has not been amended for personal injury actions and left unchanged for property damage claims, it is therefore possible to argue even more strongly in New Zealand than in England that Parliament did not consider the possibility that damage may occur but yet remain undetected for more than six years due to no fault of the plaintiff.

The general policy of Limitation Acts is that claimants should not be allowed to go to sleep on their rights (*James Wallace Proprietary v William Cable Limited* 15 October 1980, CA 25/78 at 17). But can one sleep on rights that could not with reasonable care even be discovered? Is the need to prevent actions long after the act of negligence so strong or the intention of Parliament so clear that as between a negligent defendant and an innocent plaintiff, the negligent defendant should be protected? Where Parliament's intention to produce a "harsh and absurb" result is not clear and the words in a statute can take a meaning that will afford a more equitable result, the Courts should be reluctant to adopt the interpretation that favours injustice.

New Zealand cases have not dealt directly with the type of issue raised in *Pirelli*, but several statements are of relevance. In *Bowen v Paramount Builders* [1977] 1 NZLR 394 the issue was not whether the claim was statute-barred, but whether a cause of action accrued to a subsequent purchaser who wanted to sue for substantial damage that had occurred to a house, when much more minor damage had happened while the house was occupied by a previous owner. Richmond P indicated (at 414) that a cause of action accrues when there is "actual structural damage to the building which is more than minimal". In most situations this would be damage that would be capable of being discovered by a reasonably diligent person; however, the cracks in the chimney in *Pirelli* would presumably be actual structural damage which was more than minimal so as to start the running of the limitation period. Further, when Richmond P refers to *Sparham-Souter*, he states that he agrees that damage does not occur when the builder erects the house on inadequate foundations; he does not state that he agrees that ability to discover the damage is relevant. It must be noted, however, that Richmond P's statements were made in the course of rejecting an argument that the cause of action accrued when a previous owner had owned the house; the case was not concerned with a situation in which damage remained undetected for more than six years.

Mount Albert Borough Council v Johnson [1979] 2 NZLR 234 was another Court of Appeal case similar to *Bowen* in that it was concerned with a situation in which a small amount of damage occurred when the house was owned by a previous owner but a much more substantial amount of damage occurred when the property was owned by the plaintiff. The relevance of lack of knowledge of damage was not at issue. Nevertheless, Cooke J with whom Somers J agreed, discussed when a cause of action would accrue. He referred to Lord Wilberforce's statement in *Anns v Merton London Borough Council* [1978] AC 728 that the cause of action in that case accrued when there was present or imminent danger to the health or safety of persons occupying the building. Cooke J noted that Lord Wilberforce did not deal explicitly with the relevance of lack of knowledge of the danger on the part of the plaintiff and, further, that the decision in the case was closely related to the relevant legislation that focussed on health and safety. He then stated (at 239) that:

> Such a cause of action must arise, we think, either when the damage occurs or when the defect becomes apparent or manifest. The latter appears to be the more reasonable solution.

Interestingly, in support of this statement, Cooke J did not simply cite *Sparham-Souter*. He referred to Lord Reid's statement in *Cartledge* that points out the injustice of holding that a cause of action accrues before it is possible to discover the injury; Lord Reid concluded however, that the provision that delays the running of the limitation period in fraud or mistake cases precluded any other interpretation and that any change would need to be made by legislation. Cooke J also supported his statement by reference to the judgment of Geoffrey Lane LJ in *Sparham-Souter* (at 79-80) who reached a different conclusion from that in *Cartledge*, decided that the cause of action accrues when the damage is detected or ought with reasonable care to have been detected, and stated that any different conclusion would be "usurping the functions of Parliament". Both Lord Reid and Geoffrey Lane LJ were keen to implement Parliament's intent but came to very different conclusions about what they considered Parliament's intent to be.

Problems with the current tests

If the cause of action accrues when the damage occurs, as *Pirelli* suggests, or when there is actual structural damage which is more than minimal, as Richmond P suggests in *Bowen*, and the need to be able to discover the damage or defect is not included in the test, then there are two potential problems.

First, and obviously, a plaintiff may be statute-barred before ever knowing of a possible cause of action against the defendant. Second, if the plaintiff discovers a latent defect *before* damage to the building occurs and if the cause of action does not accrue until actual damage occurs, then the plaintiff cannot sue because the cause of action has not yet accrued. To require a plaintiff to wait for damage to occur before being able to sue would clearly be absurd, and both Richmond P (at 414) and Woodhouse J (at 418) in *Bowen*, indicate that a plaintiff who discovers a latent defect can sue to *prevent* the occurrence of damage. Arguments could be made that the discovery of a latent defect is "damage" because the plaintiff then knows about the defect. According to Richmond P (at 415), the Courts might recognise a duty on such a person to inform a subsequent purchaser of a "dangerous but latent defect"; if the plaintiff warns the proposed purchaser of any substantial latent defect, damage is likely to be reflected in a decreased price for the building. It might be argued that if the defect were repaired, then the cost of the repairs might be damage so as to complete the cause of action. However, Richmond P himself accepts (at 414) that the discovery of a latent defect does not fit neatly within his test of

actual structural damage to the building which is more than minimal.

Proposed solution

Cooke J's preferred test in *Mount Albert Borough Council* could provide the basis for solving these problems. If a cause of action accrues when a defect or damage becomes apparent or manifest or, it should be added, would with reasonable diligence be apparent or manifest, then the potential injustice of s 4 of the Limitation Act 1950 can be avoided. A plaintiff who exercises reasonable diligence will not become statute-barred and a plaintiff who discovers a latent defect will be able to sue.

Potential problems with the solution

Allowing recovery for a latent defect is not free from difficulties. The problems were discussed in *Bowen*. Should an owner be required to repair a latent defect before damages can be recovered? What should happen if a plaintiff recovers for a latent defect prior to repairing the defect and then sells the property without repairing the defect and without warning a purchaser. Is the builder to be liable a second time to the subsequent purchaser? Richmond P suggested (at 414) that where there is a latent defect, the plaintiff should only be able to recover for the cost of repairs "actually incurred". The latent defect would therefore, presumably, have been remedied. Woodhouse J considered (at 418) that recovery for a latent defect should be allowed either before or after the work had been carried out, because an owner may be financially unable to effect the repairs prior to the recovery of damages.

Once damages were recovered, however, if the owner sold the house without repairing the defect and without warning the purchaser, then the acts of the owner would become an intervening cause. Cooke J stated (at 425) that the cost of reasonably necessary remedial work should be recoverable either before or after the repairs were effected, but it was not clear whether or not he was referring to a latent defect situation. A possible solution to the problem of allowing recovery for a latent defect prior to repair of that defect might be to make provision for registering a notice of the judgment on the title to the property. Once the defect was repaired, the notice could be removed. Such a notice provision would protect both the negligent builder and an innocent subsequent purchaser from potentially harsh consequences and would prevent a dishonest owner who has disappeared from obtaining a windfall at the expense of others.

Conclusion

The lack of a clear Parliamentary intention as to the meaning of s 4 of the Limitation Act 1950, the difference between the legislative history of the English and New Zealand statutes, and the "harsh and absurd" consequence of the *Pirelli* decision provide New Zealand Courts with an adequate basis for refusing to follow *Pirelli*. It is hoped that the New Zealand Courts will decide that a cause of action in negligence accrues when damage or a defect is discovered or could with reasonable diligence be discovered.

Joan Allin

Ethnic discrimination

The House of Lords in *Mandla and Another v Dowell Lee and Another* [1983] 1 All ER 1062 allowed the appeal from the Court of Appeal which had held that Sikhs were not a protected racial group within the terms of the Race Relations Act 1977. This had been one of the final decisions of Lord Denning MR and had stirred up considerable controversy, both for and against.

The facts can be stated shortly. The headmaster of a private school required a boy, who was a Sikh to remove his turban while at school and to have his hair cut. This was on the basis of uniformity in treatment of all the boys attending the school, and as the headmaster saw it to minimise religious and social distinction. The main question to be decided was whether Sikhs are a racial group and that question depended on whether they could be defined by reference to "ethnic origins" in terms of the Race Relations Act 1977. The Court of Appeal unanimously held that Sikhs could not be defined as a protected group within the meaning of their having "ethnic origins", but the House of Lords unanimously held that they could.

The case is of general interest for two reasons. The first is because of the strong criticism made by the Court of Appeal Judges of the attitude taken by the Commission for Racial Equality in conducting its inquiry and in assisting the plaintiff to institute proceedings, by giving advice and providing finance for legal costs. Parenthetically it might be added, that is the procedure provided for in the United Kingdom under this Act and also under the Sex Discrimination Act where proceedings are taken in the name of the complainant. The second reason is that the leading judgment of Lord Fraser of Tullybelton referred to and adopted the reasoning of the New Zealand Court of Appeal in *King-Ansell v Police* [1979] 2 All ER.

The two main judgments were those of Lord Fraser and Lord Templeman with both of whose judgments the other Law Lords stated their agreement. At the conclusion of his judgment Lord Fraser said:

> I must refer to some observations by the Court of Appeal which suggest that the conduct of the Commission for Racial Equality in this case has been in some way unreasonable or oppressive. Lord Denning MR. . . merely expressed regret that the Commission had taken up the case. [In the body of his judgment however he wrote that the Commission "pursued the headmaster relentlessly. They interviewed him. They demanded information from him. Eventually they decided to assist Mr Mandla in legal proceedings against him."] But Oliver J. . . used stronger language and suggested that the machinery of the 1976 Act had been operated against the respondent as "an engine of oppression". Kerr LJ. . . referred to notes of an interview between the respondent and an official of the Commission which he said read in part "more like an inquisition than an interview" and which he regarded as harassment of the respondent.
>
> My Lords, I must say that I regard these strictures on the Commission and its officials as entirely unjustified. The Commission has a difficult task, and no doubt its enquiries will be resented by some and are liable to be regarded as objectionable and inquisitive. . . . Opinions may legitimately differ as to the usefulness of the Commission's activities, but its functions have been laid down by Parliament and, in my view, the actions of the Commission itself in this case and of its official who interviewed the respondent on 3 November 1978 were perfectly proper and in accordance with its statutory duty.

In his judgment Lord Templeman restricted himself to saying that the Commission had a duty to investigate

the complaint "and that their conduct was not oppressive".

The judgment of Lord Fraser is particularly interesting for his references to the reasoning of the New Zealand Court of Appeal in the *King-Ansell* case. It is significant that the New Zealand case was not cited before the Court of Appeal. Lord Fraser refers to the case having been discovered by the industry of the appellant's counsel, and expressed the opinion that if it had been before the Court of Appeal it might well have affected their decision. His Lordship quotes from the judgment of Woodhouse J and twice from that of Richardson J. The second quotation from Richardson J refers to an ethnic group as having among other listed characteristics ". . . an historically determined social identity in their own eyes and in the eyes of those outside the group. . . ." Lord Fraser then comments:

> . . . that last passage sums up in a way on which I could not hope to improve the views which I have been endeavouring to express. It is important that Courts in English-speaking countries should, if possible, construe the words which we are considering in the same way where they occur in the same context, and I am happy to say that I find no difficulty at all in agreeing with the construction favoured by the New Zealand Court of Appeal.

With this encouragement English counsel might continue to display the necessary industry to discover other antipodean cases from time to time, and so establish a certain reciprocity between the common law systems rather than a derivative one as has largely been the situation until the present time. This of course has a particular relevance now with the suggestion being made that in effect New Zealand Judges should cease sitting on the Judicial Committee of the Privy Council. That is not of course the way in which the abolition of appeals to the Privy Council is usually put. It would seem however to be an inevitable, if not immediate, result; and with few, if any New Zealand Judges being appointed as Privy Councillors.

P J Downey

Co-Conspirators — Redirection of the Australian common law

In *R v Darby* (1982) 40 ALR 594, the majority of the High Court of Australia (Gibbs CJ, Aicken, Wilson and Brennan JJ, Murphy, J dissenting) "redirected the common law of Australia on to its true course" (p 601) with regard to two accused jointly or separately tried on a single count of conspiracy between themselves and no other person known or unknown. The High Court held that the acquittal of one of two co-conspirators does not of itself necessitate the acquittal of the other unless in all the circumstances the conviction of one is inconsistent with the acquittal of the other. This is a direct departure from the common law enunciated by the Privy Council in *Dharmasena v R* [1951] AC 1 to the effect that the only possible verdict, where there are two co-conspirators charged with the one conspiracy involving them both only, is that both are guilty or both are innocent. In that case where there were separate trials in the sense that one of the co-conspirators was retried and acquitted, his subsequent acquittal was held to necessitate the acquittal of the other.

Dharmasena had not been applied by the House of Lords in *DPP v Shannon* [1975] AC 717 where co-conspirators, charged with a single conspiracy involving them both only, were tried separately because Shannon pleaded guilty whereas his co-conspirator pleaded not guilty. His co-conspirator was tried and eventually a not guilty verdict was entered for him. Shannon then, not unnaturally, appealed on the ground that the two verdicts were inconsistent and could not stand. The House of Lords ultimately decided that, where two co-conspirators are tried separately for the one conspiracy between them and no others, the acquittal of one does not, of itself, warrant the setting aside of the conviction of the other as different evidence may be offered at each of the separate trials.

In *Shannon* their Lordships considered, in obiter, the position where the two co-conspirators were tried jointly and came to varying conclusions as to the proper rule to be applied in such a case. Lord Morris, in dissent, said the rule in *Dharmasena* should apply even where the admissible evidence against one of the two co-conspirators was stronger than that against the other on the basis that:

> . . . a jury might feel embarrased and might well be perplexed in sorting out the reasoning that would enable them to say that they were fully satisfied in A's case that A conspired with B (with its corollary that in A's case they were fully satisfied that B conspired with A) and yet also to say that in B's case they were not satisfied that B conspired with A. (p 755)

His Lordship said it was desirable that such complications and subleties should be avoided, if possible, in the administration of the criminal law.

Viscount Dilhorne doubted the applicability of *Dharmasena* to joint trials where the admissible evidence was stronger against one of the two co-conspirators on the basis that the rule was obsolete as appellate Courts are now not limited to correcting errors on the face of the record only but are at liberty to examine the evidence to ascertain whether it justified such a finding (p 761). Lords Simon and Salmon also advocated the abolition of the rule for joint as well as separate trials where there is a material difference in the evidence admissible against each of them (pp 768 and 771 respectively).

The above dicta of their Lordships in *Shannon* were relied on extensively by the High Court in *Darby*. Darby had been jointly tried with one Thomas with conspiracy to rob. They were both convicted. Thomas successfully appealed. Darby then appealed against his conviction on the sole ground that as there had been a joint trial of Thomas and himself they should both be convicted or both acquitted! The Full Supreme Court of Victoria, being bound by *Dharmasena*, allowed Darby's appeal, quashing his conviction and sentence even though the admissible evidence against Darby had been much stronger than that against Thomas (Darby having confessed to the police). The prosecution then appealed to the High Court which "redirected the common law of Australia", on joint trials of two co-conspirators charged with a single conspiracy between themselves and no other, to that stated in the opening paragraph and affirmed Darby's conviction. (The High Court was free to depart from the decision of the Privy Council as a result of the decision of the High Court in *Viro v R* (1978) 18 ALR that it was no longer bound by Privy Council decisions.)

Their Honours in *Darby* also

declared that where there is no material distinction in the evidence admissible against both co-conspirators in a joint trial the trial Judge can still advise the jury that they should either convict both or acquit both, not because of the technical rule enunciated in *Dharmasena* but because the circumstances of the particular case would require that (p 601). So the same effect as reached by *Dharmasena* will apply in joint trials where there is no material difference in the evidence admissible against each of the two co-conspirators but will not apply where there is a material difference. In the latter case their Honours encouraged the adoption of the practice of requiring separate trials of the co-conspirators (p 601).

Darby has thus starkly illustrated the fact that the criminal law today is more concerned with the technical "rules of the game" than with the truth whether the alleged co-conspirators really did conspire together as is alleged in the charge. Juries are lay people who basically still believe criminal trials are about the truth of an accused's guilt or innocence. Lord Morris' concern in *Shannon* that juries will become embarrassed and perplexed by the technicality of the rule now enunciated in *Darby* is surely a valid objection to the rule. However carefully and precisely the rule is explained by the trial Judge to the jury, the jurors are going to be faced by the dilema of holding that A conspired with B but B did not conspire with A where conspiracy involves, as an essential element, an agreement of minds! Separate trials of the co-conspirators where the evidence against each of them is materially different will avoid the worst of the dilemma for juries. However, the High Court merely "encouraged" this practice in *Darby* (p 601), they did not direct that this was to take place.

Another way out of the dilemma is that, in *Darby* their Honours did add a proviso to the rule they enunciated (p 601). They said that the acquittal of one of the co-conspirators did not by itself necessitate the acquittal of the other unless in all the circumstances the conviction of one is inconsistent with the acquittal of the other. This proviso may well allow the jury a way out of the above dilemma.

In so redirecting the common law of Australia their Honours had to state what was the effect of an acquittal. If it meant innocence, then *Dharmasena* should remain law; if it meant the equivalent of the Scottish verdict of "not proven" then *Dharmasena* need not be followed. Their Honours followed Lord Salmon in *Shannon* (p 771) and said an acquittal could mean "not proven" and did not only mean innocence. In the case of a "not proven" verdict of acquittal, their Honours could see no inconsistency in a jury holding one co-conspirator guilty of the single conspiracy with the other, but acquitting the other of that same single conspiracy, where there was materially different evidence admissible against each of the co-conspirators.

Murphy J in dissent argued vehemently (at pp 604-5) that, in Australia, a not guilty verdict means innocence of the accused. He said there are no degrees of acquittal and an acquittal meant that the presumption of innocence had not been displaced. As a result an acquittal made a judgment of innocence replace the presumption of innocence. Murphy J said:

> The history of human freedom is largely the relationship between the individual and the State (that is the Government and the Crown) in the administration of criminal justice. The fundamental feature of that system in Australia, and until *Shannon* in England, is that a judgment of acquittal is, as between the State and the accused, a complete clearance of the accused from the charge. It was no mere immunity from further prosecution as might be obtained by a pardon. It was a judgment of innocence. If this were not so, once a person is charged he can never be cleared; there is no way in the criminal justice system to establish his innocence. Although he would be presumed innocent until verdict, if he is acquitted his innocence becomes questionable.

So the High Court in *Darby* not only redirected the common law in Australia with regard to co-conspirators charged with a single conspiracy between themselves only, their Honours also fundamentally restated the effect of an acquittal. New Zealand Courts are still bound by decisions of the Privy Council so *Dharmasena* is still law in New Zealand. The UK has statutorily enacted a similar, though wider, rule to *Darby* in s 5(8) of the Criminal Law Act 1977 (UK). It will be interesting to see if New Zealand follows the trend.

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Contracts and damages

Two recent vendor and purchaser cases raised interesting damages questions.

In *O'Connell v Hay* (High Court Dunedin, 4 February 1983, A48/82) the plaintiff purchasers sought damages for the defendant's breach of a contract for the sale and purchase of a farm. The claim was limited to wasted expenditure and what is particularly interesting about the case is that Cook J awarded a sum by way of damages representing, inter alia, pre-contractual expenditure incurred by the plaintiffs. This may be of some surprise to many lawyers. The question is whether the recovery of damages for pre-contractual expenditure should be permitted. An alternative action in quasi contract may be possible, though the New Zealand Courts have been reluctant to extend the bounds of quasi contractual actions. Compare the approach taken in *Sabemo Pty Ltd v North Sydney Municipal Council* (1977) 2 NSWLR 880 (noted by the writer in [1979] Auckland University Law Review 467) with the approach taken by Mahon J in *Avondale Printers and Stationers Ltd v Haggie* [1979] 2 NZLR 124).

Cook J followed *Anglia Television Limited v Reed* [1972] 1 QB 60. (That case was distinguished by Cooke J in *Ash v Victor Enterprises Limited*, unreported, noted [1975] NZLJ 29). In that case, Denning MR saw the problem as being one of contemplation. Certainly, the classical remoteness test of *Koufos v Czarnikow (The Heron II)* [1962] 1 AC 350, was couched in simple contemplation terms.

A consideration of the issue of remoteness presupposes that the issue of causation has been determined. However, in this respect, Lawson has argued that the loss of pre-contractual expenditure is not caused by the breach of contract because that expenditure would have been lost in the event that no contract was concluded. ([1975] NZLJ 249. See also Goodhart (1972) 88 LQR 168; Ogus (1972) 35 MLR 423. See generally, Ogus, *The Law of Damages*, pp 346-354.) With respect, it is submitted that in these types of cases, it should be recognised that the *effective* cause of loss is the breach of contract and the important issue for the determination is the measure of recovery.

On the measure of recovery of damages, an argument could perhaps be presented along the following lines. In his lectures at Auckland University,

Professor Coote has suggested that the reason why parties should be regarded as being bound by a contract is because they have assumed mutual obligations to each other and have corresponding rights. In other words, the consideration for the formation of a binding contract is afforded by this mutual assumption of primary obligations. Taking Professor Coote's argument further, and if damages are consensual, then it would be correct to state that, as a consequence of the assumption of primary obligations, the parties also assume secondary obligations ie obligations to pay damages for breach of contract. Accordingly, it could be submitted that in any damages action, the Court should ask, firstly, what damages the defendant has assumed an obligation to pay and secondly, whether the loss suffered by (damages claimed by) the plaintiff should have been contemplated by the defendant. The fact that the expenditure would normally have been expected to be incurred in the circumstances may be a factor which indicates that the party in breach should be taken to have assumed liability for that expenditure. However, this solution may be circular in that it would be difficult to distinguish between the criteria of assumption of liability and contemplation. It may even be that the difficulties surrounding the recovery of pre-contractual expenditure in a contract action are insurmountable.

Most commentators would agree that there should be at least one limitation on the recovery of "reliance" expenditure (whether pre-contractual or otherwise). That would be where the defendant can demonstrate that the plaintiff made a bad bargain ie that the expenditure would have been wasted in any case. In that situation, it would be clear that the defendant's breach was not the cause of the plaintiff's loss and the plaintiff should not be permitted to recover by way of reliance damages, an amount which would exceed the damages recoverable for loss of expectation.

In *McCarthy v Arnot* (High Court Auckland, 8 December 1982, A891/76) the plaintiffs sought damages for the defendant's breach of an agreement for sale and purchase of land. As in the previous case, the damages pleaded were for wasted expenditure (though not pre-contractual). Wallace J considered that, at least where the plaintiff has not made a bad bargain, the plaintiff should have the right to elect between recovering damages representing wasted reliance expenditure or damages representing the loss of a bargain. The right to this election does not appear to be universally accepted.

The doubts that have been voiced as to whether a plaintiff should have this election stem from the classical proposition that damages for breach of contract are intended to place the plaintiff in the same position that he would have been, so far as money can, if the contract had been performed. Reliance damages have the opposite effect ie they place the plaintiff in the position that he would have been had he not entered the contract. The writer wonders whether the classical damages formulation (in terms of expectations) merely reflects the (historical) fact that in most cases, the loss that is *caused* to the plaintiff by the defendant's breach is the loss of a bargain. Yet other losses may occur and there should be no reason why a party cannot recover reliance expenditure (subject to questions of remoteness) provided that the breach of contract is the effective cause of the loss of that expenditure ie provided that the plaintiff did not make a bad bargain. In other words, the fact that damages might be awarded on the same basis as in a tort claim ("restitution") should be no objection. *Harbutt's "Plasticine" Limited v Wayne Tank & Pump Co Limited* (1970) 1 QB 447 demonstrates that in some cases, "restitution" is the appropriate measure of recovery. As is well-known, the effect of the defendant's breach of contract was that the plaintiff's factory was destroyed. The plaintiff recovered damages representing the cost of rebuilding the factory. The principle of "restitution" was applied. Expectation damages were not relevant. If "restitution" is an acceptable measure of recovery in contract actions, the mere fact that a plaintiff may have an election between recovering reliance or expectation damages should not preclude his making the election in favour of recovering reliance damages. There can surely be no objection to the exercise of this election so long as the reliance damages do not exceed the plaintiff's expectation interest.

On a literal interpretation of ss 9(2)(b), 9(4)(c) and 10 of the Contractual Remedies Act 1979, it would be possible for a Court, when a contract has been cancelled, to award a sum representing pre-contractual expenditure. So far as s 10 is concerned, common law principles are no doubt preserved. The question is how s 9(2)(b) and (4)(c) will be applied.

As a general comment, it is submitted that damages issues can be confused by the indiscriminate use of labels such as "restitution damages", "reliance damages", "expectation damages", "net expectation damages" and "gross expectation damages". It should be recognised that these terminologies are only descriptive and that, while they can be useful, damages questions can often be resolved without their aid. Indeed, damages issues might be resolved more simply (both in the cases and the texts) if the issues were considered solely in terms of causation and remoteness. Statements to the effect that the plaintiff cannot recover both reliance and expectation damages would then become obvious. Clearly, a plaintiff who seeks to recover loss of profits by way of expectation damages cannot also recover his reliance expenditure, because that expenditure is relevant to assessing what profits have been lost. This type of issue becomes needlessly confusing when one has to distinguish between "nett expectation damages" and "gross expectation damages". Although labels can be useful descriptive terms, they can hide the wood for the trees.

S Dukeson

Defending a bill writ

Bills of exchange are generally assumed to be a secure means of payment. The basis for this assumption is that liability on a bill exists by virtue of its creation, not because of the contract from which it arises, and in most cases a signature on a bill is sufficient to render the signatory liable. An action on a bill thus becomes a comparatively simple matter, and the form of action known as a bill writ makes it even more of a foregone conclusion, since it does not allow a defence as of right. The defendant may defend only if he pays the amount sued for into Court or gives security for its payment, (R 494 of the Code of Civil Procedure) or obtains leave to defend (R 495). Two recent, as yet unreported, High Court decisions concern the application of these two Rules and provide some guidance on the effect of a bill writ in cases where the defendant believes that he has a defence.

Associated Weavers (Fabrics) Ltd v I C Steele Distributors Ltd (White J, Auckland, judgment 5 July 1982, A No

1294/80) was an application, pursuant to R 495, for leave to defend a bill writ for £22,980.92 sterling, representing seven bills of exchange which had been given by the defendant, a New Zealand distributing company, to the plaintiff, an English textile manufacturer, in payment for furnishing material. The grounds on which it was sought to defend the writ was that the material supplied had proved to be so defective that the defendant had rejected some, which it was holding to the plaintiff's order, while the material which had been accepted and resold by the defendant had resulted in a number of claims against it by customers. The defendant's estimate of the loss suffered by it as a result of the poor quality of the material was $336,000.

The generally accepted rule is that the party liable on a bill of exchange should be able to defend only in exceptional circumstances, a rule which is based on the need to maintain the commercial efficacy of bills as an acceptable form of payment. Lord Wilberforce in *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei Gmbh* [1977] 2 All ER 463 at 470 expresses it clearly:

> When one person buys goods from another, it is often, one would think generally, important for the seller to be sure of his price: he may (as indeed the appellants here have) bought the goods from someone else whom he has to pay. He may demand payment in cash; but if the buyer cannot provide this at once, he may agree to take bills of exchange payable at future dates. These are taken as equivalent to deferred instalments of cash. Unless they are to be treated as unconditionally payable instruments . . . , which the seller can negotiate for cash, the seller might just as well give credit. And it is for this reason that English law . . . does not allow cross-claims, or defences, except such limited defences as those based on fraud, invalidity, or failure of consideration, to be made.

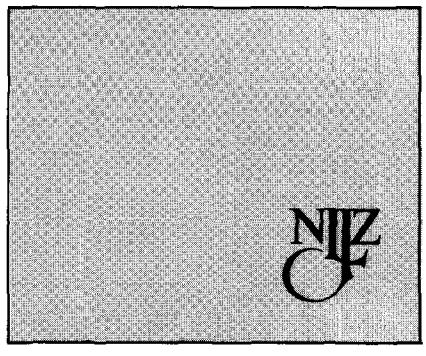
In the same case Lord Russell made a similar statement at 479-480, as has the English Court of Appeal on several occasions (*Brown, Shipley & Co Ltd v Alicia Hosiery Ltd* [1966] 1 Lloyds Rep 668 at 669, per Lord Denning MR; *Barclays Bank Ltd v AZAG* [1967] 1 Lloyds Rep 387 at 388, per Lord Denning MR and at 391, per Salmon LJ; *Cebora SNC v SIP (Industrial Products) Ltd* [1976] 1 Lloyds Rep 271 at 278, per Sir Eric Sachs) and the New Zealand High Court (*Begley Industries Ltd v Cramp* [1977] 2 NZLR 207 at 221, per Barker J; *Finch Motors Ltd v Quin* [1980] 2 NZLR 513 at 516, per Hardie Boys J).

White J decided to depart from that principle and granted leave to defend. His reasoning in coming to that decision is interesting. He chose to emphasise that the rule was not inflexible, and that the Court had a discretion in deciding whether to apply it in any particular case, a point which has been made by the Courts on a number of occasions (*Barclays Bank Ltd v AZAC* [1967] 1 Lloyds Rep 387 at 388, per Lord Denning MR and at 391, per Salmon LJ; *Saga of Bond Street Ltd v Avalon Promotions Ltd* [1972] 2 QB 325 at 328, per Salmon LJ; *Cebora SNC v SIP (Industrial Products) Ltd* [1976] 1 Lloyds Rep 271 at 276, per Buckley LJ; and at 278, per Stephenson LJ; *Reid Development Co Ltd v Rhodes* [1980] NZLR 704 at 712, per Somers J). Instead of examining and following earlier decisions, he used them only as guides to assist him in deciding which way he should exercise that discretion. He seems to have been considerably influenced by the fact that the application was one for leave to defend, whereas in the *Cebora* case it was an application for a stay of the action which had been refused, a distinction which was drawn by Buckley LJ at 276.

It is suggested that it may also have been possible to base the decision on failure of consideration, which is one of the established exceptions to the rule. Lord Wilberforce, in the passage cited above, mentions it and it was relied on by Hardie Boys J in his decision in *Finch Motors Ltd v Quin* [1980] 2 NZLR 513. It is true that, if the decision had been on the basis of failure of consideration, it would perhaps have widened that exception, since, as far as can be ascertained from the judgment, the evidence disclosed only a possible partial failure of consideration. However, in the *Nova* case, both Lords Wilberforce (at 469) and Russell (at 480) accept it as established that a partial failure of consideration is sufficient, provided that it is quantified, and it would appear that, in this case, that part of the amount sued for which represented payment for the rejected material was indeed such a quantified partial failure of consideration. The fact that White J chose not to rely on that line of reasoning can perhaps be regarded as significant, in that it emphasises the discretionary nature of the Court's power to grant leave to defend, at the expense of defining the circumstances in which leave will be granted.

The decision in *Ambrose Waard Ltd v Robert Mong Ltd* (Prichard J, New Plymouth, judgment undated, A No 24/82), on the other hand, is one which is in line with the principle that bills of exchange should be treated as cash. It also concerned a bill of exchange (in this case a cheque) given in payment for goods, but the defendant, instead of applying for leave to defend, paid the amount claimed into Court, which meant that by virtue of R 494, it was entitled to defend as of right. The application which came before the Court was for an order that the sum in Court should be paid out to the plaintiff immediately, instead of remaining in Court to await the outcome of the trial. Prichard J granted the application. He based his decision on the fact that the Code of Civil Procedure appeared to give the Court a complete discretion as to the way in which it is to deal with sums paid in and, in the absence of earlier decisions on the point, he decided the matter in a way which accords with the general principle that a bill of exchange should be treated in the same way as cash. He relied on the statements of that principle by Lords Russell and Wilberforce in *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei Gmbh* [1977] 2 All ER 463 at 470 and 479-480, which have already been referred to. The decision is one which would appear to be of considerable practical importance, since it means that, if the defendant chooses to obtain leave to defend by payment into Court, the plaintiff can have the use of the sum paid in during the period that the action is awaiting trial, surely a great help for a liquidity problem!

Johanna Vroegop



The Whys and Wherefores of Historic Places Legislation

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Architecture is my delight . . . but it is an enthusiasm of which I am not ashamed, as its object is to improve the taste of my countrymen, to increase their reputation, to reconcile them to the rest of the world and to procure them its praise.

Thomas Jefferson

The Challenge

Unlike its 1954 predecesor, the Historic Places Act 1980 deals also with archaeological sites, historic areas and traditional sites — innovations which reflect the recognition that New Zealand's history greatly predates that more recent impact of the European and instead includes the history of those earlier times. Today, we have knowledge of the very recent discovery at Wiri, South Auckland, of the possible remains of the early Polynesian settlers' stone house, indicating for the first time to us in the 20th century the existence of such technology.

The Bill

The submissions which were made to the Parliamentary Select Committee in respect of the then Bill were generally very favourable. Time after time, bodies with large property holding interests, such as the New Zealand Life Officers' Association (with $2,000 million invested in New Zealand land and other assets) or the New Zealand Counties' Association, the New Zealand Building Owners' and Managers' Association and the Bankers' Association endorsed sympathetically the aims of the Trust to preserve our heritage, both Maori and European. Their submissions recognised that the individual and collective identity of all of us in this country depend greatly on those structures and places of the Past being "present" to accompany us into the Future.

For its part, the New Zealand Historic Places Trust had put forward a Bill which contained some of the most unfair provisions affecting property owners to be seen for some time. The submissions contained criticisms of such provisions. The message was: the concept is excellent, we are in full sympathy with its aims, but the Bill is unfair. Unfair because properties which the Trust (as a *quasi*-governmental organ administered ultimately by the Crown) had decided should be preserved could be adversely affected without proper compensation. It was argued that an Englishman's home was no longer his castle should that castle attract the eye of the Trust. The equally ancient idea of the Crown being unable to compulsorily acquire a subject's land or buildings without due process of law (which included adequate compensation) seemed doomed. Suddenly, principles possibly as old as the Magna Carta appeared themselves to be endangered species. Some of the largest property owners in the country were concerned at their now vulnerable position.

Such submissions asked why the individual property owner should suffer at the gain of the community? The 1980 Act places a great deal of power in the hands of the Trust and the Minister of Internal Affairs who administers the Act. This situation is compounded by the heavy reliance for Trust funds on the government of the day. Such funding is never enough.

As an example of the powers given it under the Act the Trust can by ss 40 and 41 now purchase or insist on the repair of a building which attracts its attention. Thus with what little money it has, it can in the name of the community as a whole, effectively "take" the land and building concerned in various ways without necessarily granting full compensation. It was argued that the property affected was therefore subsidising the community's desire to preserve. Too often things are done in the name of the public's good at the sacrifice of private rights. To quote Mr Justice Hardie Boys in the recent blood alcohol case of *McBreen v Ministry of Transport at p 9:*

> More important than the outcome of an individual case is the integrity of fundamental principle. The taking of a blood sample is an invasion of personal liberty. Whilst the public good must prevail over individual right in certain circumstances, the Courts must be vigilant to ensure that in every case those circumstances, do in fact exist before the invasion of right is permitted, for this is one of the guarantees of freedom."

Thus unless the ancient rights of the property owner to full and adequate compensation are preserved, what may have been a sympathetic mind in the property owner turns instead to upset. Almost dishonestly the community thereby gains preservation at the cost of alienation and expense of a property owner. Even worse is the situation of the "innocent" property owner, the purchaser some 30 to 40 years ago of eg a Californian bungalow (then perhaps two a penny) which suddenly in the eyes of people like us has become unique and thus valuable. Why should the community not be obliged to compensate fully in order to achieve that preservation which it values perhaps more than the owner himself?

Those submissions have about them a ring of truth we must accept. As individuals in communities we will

succeed only if we ourselves take responsibility for preservation. No longer can we necessarily rely on the government. That has been our constant mistake. Often, even with national 'shrines', government has at the last moment decided that the public pressure in favour is not as great as that against and thus another building or whatever is lost. In any event, government assistance will invariably fall short of the desired amount. And by then, it is often too late to appeal for private funds and the building is lost.

Finally, let me say that the best way to preserve a building is to show its owner that for various prestigious or financial reasons, it is in his or her best interests to repair and preserve the building, etc. Any cost over and above such normal repair and preservation should be borne by the community which wishes to see the building or whatever saved and has to that end made the demand and pressured the owner. In exchange for the direct grant or tax relief an owner thereby enjoys for such extra costs, the community can and should restrict the property's development rights or demolition and, eg, demand some form of public use or access. In other words, any gain by the property owner at the cost of the community must be balanced by a concomitant restriction on that owner by the community. And any gain by the community must be balanced by a gain of assistance in some sort to the owner.

The Act

I want now to consider a few of the sections of the new Act.

The Preamble with its opening "An Act to preserve the historic heritage of New Zealand" is woefully inadequate. Given just the many different words (preservation, conservation, reservation, etc) that exist to describe the equally as numerous situations we know are covered by our individual and collective concern, I would like to see a proper and fuller statement of our nation's position plan for the future of its past. The preamble of this new Act should have been much more in the nature of a statement of intent and philosophy, ie *why* are we as a nation interested in this area?

The vague definition of "historic place" appears to require only an "association" with "the past". It will no doubt fall to some hapless Court of Law to define those two terms a little more closely. What *degree* of association is required and how past does "past" have to be? Should we not include (as part of the definition "with the past") some aspect of uniqueness and/or a likelihood of the "place" (defined as "site, building or natural object") not being built or occurring again. To use a parallel example from the mechanical world the Concorde should be as much a qualifying item as the horseless carriage.

The distinction between "historic places" and "historic areas" is unclear and probably unnecessary. Whilst the Act itself (in s 5(c)) endows the Trust with power to "foster public *interest* in historic places *and* historic areas" (and in their identification, investigation and classification), as to *protection* and *preservation* only "historic places" get Homer's favourable nod. Are historic *areas* thus to miss out on the public being interested in their protection and preservation as is apparently to be enjoyed by "historic places"? Likewise s 5(d) makes similar distinction between the two types of definition. Does an historic area have no protection unless it is broken down into components of historic places? Or does s 49(3) cover that?

Membership of the Trust Board is still unnecessarily restricted. No one is specifically able to be appointed to fill a category representing the type of preservation or conservation bodies such as eg the Civic Trust or such local historical societies and their confederations. Furthermore, one person is able to be appointed having a background in and knowledge of local or regional government — a wide category allowing persons retired from such political offices or employment to be appointed. Need the appointee *ever* have been employed or elected — or merely be one with knowledge and a "background" (undefined) in such? (s 7).

The powers of the Trust (s 14) should be widened to include a definite bias in favour of owner control with Trust assistance rather than Trust purchase and ownership. The New South Wales experience is towards private ownership with National Trust support. There, certainly purchase by the National Trust is far from acceptable or common. In New Zealand there is a precedent in the most precious, symbol of the Treaty House — operated not by the "overall" Historic Places Trust but since 1935 (long before that body was formed) by the Lord Bledisloe-inspired Waitangi Trust Board. A latter day example is the separate trust board set up to lobby for the Old Auckland Customhouse — and the Reserves Board eventually created for that purpose by the Crown. Or the joint Trust and City Council committee for Highwic.

Classification of buildings under s 35 is cumbersome and complicated. The most precious of our buildings (eg St Mary's pro-Cathedral) are classified under s 35(a) as buildings whose preservation is regarded as essential — to whom? and for what reason? And what is the real difference between (a) and (b)? Such differences (there are (a)-(d) in s 35!) only confuse the reader and owner of property affected and are more unnecessary than otherwise. If a building is worth preserving it will have to attract sufficient public interest and money in any event. And the mere existence of an "(a)" classification does not seem to protect a building from being, eg moved (as in the case of St Mary's pro-Cathedral). Article 9 of the Burra Charter, which is Australia's adoption of the Vienna-International Convention on Preservation of Historic Buildings (ICOMOS), views moving a building as permissible only if such is the sole remaining way to save that building.

Anyway, by s 35(3) the Trust is powerless to classify any building until three months after the owner has been notified of such intent. Seemingly any owner anxious not to accept a classification can easily destroy, burn or remove the building within that period. Unlike the New South Wales experience, no "freezing" period exists whereby the Trust chairman could put a holding order on any threatened structure. In New South Wales by the Heritage Act 1977 a freeze is possible for 28 days and then for up to two years. For Victoria, see the Historic Buildings Act 1974. In New Zealand s 35(3) is almost an open invitation to owners to protect their investment (especially if the land is valuable). Section 36 which allows the Minister of Internal Affairs to issue a protection notice after the three-month period provides for such notices only over the building's *associated* land. If the building has in the meantime gone, can the remaining land any longer be considered "associated" and hence be protected by incorporation into a district scheme (s 36(2))?

Section 36 also provides that a protection notice can only be isued by the Trust with the approval of the Minister — which may explain why only three have been issued since 1 February 1981. (There were approximately 35 category "(a)" buildings in New Zealand per the previous Act.) Understandably the Minister is not going to issue protection notices as long as a fear exists that such

notices could cost the Trust and the Government full compensation moneys to the property owner. Therefore the co-operative persuasion approach to classifying as adopted in New South Wales may be a better way of relieving the community of some of the burden by encouraging the owner.

Furthermore, the Minister is unable to act on his own initiative even if Rome itself is burning. Perhaps there should be a residual discretion allowing such political power.

Section 38 disallows work being done on a building which is subject to a protection notice. Appeal lies to the Town and Country Planning Appeal Board — but presumably that Board would make a decision according to the precepts, procedures and principles of the Historic Places Act 1980 — although certain procedures under that Act are to be those of the Town and Country Planning Act 1977 and although s 38(3) allows appeal to the Tribunal "pursuant to the Town and Country Planning Act 1977" yet it is my view that substantively the Tribunal hearing any appeal would have to wear its Historic Places Act hat (with its eventual accompanying case law).

Repair notices per s 41 are an example of the Trust's powers to demand an owner repair a building which has become subject to a protection notice. Such owner may not have been able to persuade the Trust of the need for a grant under s 39 (there seems to be no appeal from the Trust's refusal to grant assistance) and, as long as the Minister approves, the Trust can require repairs to the home at the *owner's* expense. In default the Trust itself can do the repairs it deems necessary and can then recover the cost from the owner as a debt. Whilst the owner can appeal (against the repair demand) I wonder whether on continuing refusal or inability the Trust would eventually recover by selling by High Court writ of sale the owner's assets (ie even the subject property) to recover the debt due? And thereby force a desirable property onto the market?

Traditional sites — s 50. This section provides a long needed basis for protecting Maori places. However, it is possibly discriminatory. It takes no account of the other Polynesian cultures of New Zealand. Indeed why should any culture have a special section at all? Traditional sites are defined as being associated with the Maori people — no others are mentioned. A worse feature is that importance is by reason of "historical significance or *spiritual or emotional association*" with the Maori people. Are we to accept that non-Maoris have no spiritual or emotional associations with places or sites? Was not upset over the moving of St Mary's pro-Cathedral because of spiritual and/or emotional associations which many parishioners and Aucklanders (non-Maori as much as Maori) generally had with the place and/or the site? Far better for us to replace the inadequate Preamble referred to above with these admirable words as being applicable to *all* places and sites as the reasons why we all, Polynesian, Pakeha and Maori, desire to preserve. We all are upset by change, especially rapid change,. no matter our colour or our creed. As a fourth generation Wellingtonian my spiritual and emotional associations there have been sorely tried and obliterated in recent years of demolition and destruction.

In s 52, heritage covenants are a positive aspect of the Act worth endorsing. They are the lodestar for our unchartered seas of future preservation. They allow for the "protection, preservation and maintenance as an historic place" *subject to such terms and conditions* as the *parties* think fit. The calm of negotiation before the storm of compulsory acquisition. Their registration against the title should be notice to the world and hopefully will encourage the cognoscenti to seek out and purchase not just for prestige but for preservation. The National Trust in New South Wales now operates as a real estate agent for historic houses purchasers — if it had this New Zealand heritage covenant as well, it would be an ideal marriage. The heritage covenant is a legal interest in the land whose buildings the Trust considers worthy of preservation. Section 52 is *the* part of the Act which the Historic Places Trust should develop before all others.

The Act provides new provisions for the Town and Country Planning Act 1977 regarding the procedures which local planning bodies must follow to incorporate into their district schemes protection notices issued by the Trust. The main criticism is that the particular council affected does not make the decision (as is usually the case). Rather, after hearing the parties and any objections, it *recommends* to the Trust whether the Trust's own notice should be "confirmed, modified, revoked or made subject to conditions, restrictions or prohibitions". The Trust (or minister) then must advise the particular council whether or not it accepts that council's recommendations. If unhappy the Trust, council and all other parties may appeal to the Planning Tribunal (which again presumably must make substantive decisions according to the provisions of the Historic Places Act 1980 and no other Act). Only then is the protection notice or its surviving parts included in the relevant district scheme.

Section 125(c) of the new sections of the Town and Country Planning Act thus inserted provide for an owner of land unable to sell because of a protection notice to apply to the Planning Tribunal which can order withdrawal of the notice or the compulsory acquisition of the land. The suffering of "serious financial hardship" must be proved *unless* the owner was in residence with his or her family in which case "a financial loss" is the only criterion. However that owner must first have tested the marketplace for six months and the protection notice must be the reason no sale has been achieved at the market value otherwise obtainable. A despairing (or public spirited?) owner can even request the Tribunal to take the land if the protection notice is the dog so affecting the manger that the owner's future lawful use of the land within the "amenities of the neighbourhood" will be affected.

Lastly, s 125(f) allows for the alteration of protection notices once included in a district scheme. Surprisingly, (in view of the quasi-public nature of the Council's earlier confirmation hearings) this section makes no provision for public notification of any alteration, restricting such to the owners of the land, the Council (sometimes the Minister) and the Trust itself — even though s 125(g) provides that the *use* of the land subject to such a notice is deemed to be a conditional use — whose alteration would normally require publicity under the Town and Country Planning Act 1977, Apropos such applications for conditional use where land is subject to a protection notice, the good thing is that the council concerned must have regard to a use that is "likely to encourage the protection, maintenance and preservation of the building". It is positive exhortations like that which should occur throughout our fabric of legal protections.

Internationally, we have the World Heritage Trust Convention (a legislative result of the 1972 Stockholm Environment Conference) and the 1966 Vienna ICOMOS (International Charter for the Conservation and Restoration of

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Queen's Counsel Appointed

The NZ Gazette of 19 May 1983 reported the appointment of four new Queen's Counsel.

They are Mr John Edward Shepherd Allen, of Hamilton; Mr Peter Maxwell Salmon of Auckland; Mr Christopher Barrie Atkinson of Christchurch; and Mr William David Baragwanath of Auckland.

Mr Allen, 50, was born in Auckland and educated at Wanganui Collegiate School, and Pembroke College, Cambridge where he graduated with BA (Hons) in 1954. He was admitted to the English Bar in 1955 and in New Zealand in 1957. He was in practice on his own account as a barrister and solicitor from 1961 until 1980 when he commenced practice as a barrister only.

Mr Allen is a past president of the Hamilton District Law Society and has served on the Council and Executive Committee of the New Zealand Law Society. He was a serving territorial force officer in the 6th RNZIR (Hauraki) from 1956-1973. He is a trustee of the Waikato Anglican Boys Trust (St Paul's Collegiate School) and a member of the Outward Bound Committee.

Mr Salmon, 48, was educated at Whangarei Boys High School and Auckland University and graduated with an LLB. He was admitted in 1958 and practised as a barrister and solicitor in an Auckland partnership from 1961 until 1974 before setting up in practice as a barrister only.

Mr Salmon has served as a member of Law Society committees including the New Zealand Law Society Committee on Legislation. He was also convenor of the New Zealand Law Society Committee which considered the Public Works Act.

In 1977 he was a consultant to a United Nations ESCAP Expert Group meeting on the environment held in Bangkok. He has been extensively involved in community and church activities and has recently been chairman of the Auckland Co-Ordinating Committee for the Disabled. Mr Salmon is a founder member of the New Zealand Council for the Disabled.

Mr Atkinson, 47, was educated at Canterbury University graduating with an LLB in 1960. He was admitted later that year and practised in Christchurch as a barrister and solicitor in a local firm from 1965 to 1975 when he commenced practice as a barrister only.

Since 1975 he has been a member of the panel of practitioners instructed from time to time by the Crown Solicitor to appear for the Crown in criminal cases. He was a member of the Council of the Canterbury District Law Society for five years and has been the convenor of the Barristers sub-committee and the Public Issues Committee of that Society and a member of New Zealand Law Society committees. Mr Atkinson is on the General Reserve of Air Force officers.

Mr Baragwanath, 42, was educated at Auckland Grammar School and Auckland University where he graduated with an LLB in 1964. He was awarded a Rhodes Scholarship. He attended Balliol College, Oxford where he was awarded the degree of Bachelor of Civil Law (First Class) in 1966. He practised as a barrister and solicitor in an Auckland partnership from 1969 until 1977 when he commenced practice in Auckland as a barrister only.

He has lectured at Auckland University and has for some years been assessor for the four New Zealand Law Schools in the law of Civil Procedure. He has been a member of committees of the Auckland District and New Zealand Law Societies and is a co-opted member of the Contracts and Commercial Law Reform Committee. In 1982 he received a Fulbright Travel Award to study aspects of the American Freedom of Information Act at the University of Virginia.

Gobbledygook

Margaret C McLaren
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PEOPLE with special training like lawyers and accountants are often accused of using technical terms quite unnecessarily, simply to baffle the uninitiated and intimidate them to employ a specialist.

However the fault does not always lie with specialists in private practice. The government is as good as anyone at obfuscation.

Consider the help given in the March 1983 *Public Information Bulletin* issued by the Inland Revenue Department.

> We have been asked to clarify the article in PIB 118 concerning interest incurred to maintain advances made to shareholders.
>
> The question raised concerned inter-family movements of funds where an advance is made to the company by a shareholder for the purpose of on-lending the money to another family member.
>
> As mentioned in the previous article the overriding factor in deciding whether any adjustment should be made to the deduction for interest paid is "has the company incurred any interest by reason of making the advance?"
>
> Where interest paid is completely offset against interest received no adjustment would be required to the interest claimed as a deduction.
>
> It is considered that, in general, credit balances are not relevant to advances to shareholders. However to the extent that such a relationship did exist between the shareholders' accounts, such an arrangement would be considered on its own merits.

In the first sentence we are told the department has been asked to clarify an article in PIB 118. So far, so good.

The second sentence, we might expect, should clarify the article. Does it? It opens with reference to

"The question raised" although no question had been mentioned. A request is not a question. It then talks of "inter-family movements of funds where an advance is made to the company by a shareholder for the purpose of on-lending the money to another family member". To start with, "movements" are not a place. Presumably "where" means "when". It then talks of "an advance . . . to the company by a shareholder" although the first sentence spoke of advances not by but *to* shareholders. Oh dear! Some information must have been left out. And what about "on-lending"? Does that mean "lending the borrowed money"? And why is our attention drawn to "another family member" without a reminder that a first member has been mentioned? A shareholder might lend money to a member of his or her family through a company. Or a family member might lend money to another family member, again through a company. But when a shareholder is said to lend money to another family member the mind spins. Why are the words "the company" not inserted so that the construction reads "for the purpose of the company lending the money . . . ? The third sentence is still worse. Does "previous" mean "preceding"? And how can a "factor" be "has the company incurred any interest by reason of making the advance"? Even an overriding factor can hardly be a question!

Any lay reader could be excused for having difficulty in understanding the explanation. Perhaps – not certainly but perhaps – this is what was meant:

> Members of a family may form a company and, through that company, can in effect lend money one to another. When this happens the Inland Revenue Department wants to know if the company has incurred any interest through making that particular advance, whether other family members are lending money to the company free of interest or not.

Similar disentangling is needed for the last two paragraphs.

Next time a spokesperson for the Inland Revenue Department sets out to clarify an article, perhaps he or she could test the improved version on a few people outside the department to see if a lay reader can understand it readily.

Trespassing and vagrant vehicles

John Bickley

This is the second of two articles. The first, dealt with the question of towing away vehicles that were unlawfully parked on private property and could thus be considered to be trespassing vehicles. The author, who is a lecturer at Victoria University of Wellington, looks in this article at the removal of vagrant vehicles from roads and other public places.

Vagrant vehicles

THE law on the removal of vagrant vehicles, that is vehicles illegally stopped or parked on a road or public place, provides a contrast to the problems relating to trespassing vehicles, that is, vehicles parked on private property. The relevant statutory provisions were substantially overhauled by the Transport Amendment Act 1980 which came into force on 1 April 1981. They now comprise an untidy and confusing mixture of amendments to the Transport Act 1962 and The Summary Proceedings Act 1957, but their total effect is relatively straightforward and expedient. The main considerations in this article are:

1 The power to tow away.
2 The recovery of costs.
3 Liability for damage or loss.

The power to tow away

Under s 68B(1)(c) of the Transport Act 1962 the power to tow away a vagrant vehicle arises where:

> A constable or traffic officer believes on reasonable grounds that a vehicle on a road causes an obstruction in the road or to any vehicle entrance to any property or that the removal of the vehicle is desirable in the interests of road safety or for the convenience or in the interests of the public.

In any such case the constable or officer is empowered to enter or authorise any other person to enter the vehicle for the purpose of moving it or preparing it for movement and the vehicle may be moved to any place of safety. By virtue of s 2, "road" includes a street and any place where the public have access.

It should be noted that the power arises on the formation of the required belief. Consequently it should not be necessary to show that any parking offence has been committed, and, on the other hand, it should not necessarily follow that because an offence has been committed the vehicle can be towed away. The fact that a vehicle is parked on broken yellow lines (indicating no stopping — Traffic Regulations 1976, reg 108) should no doubt be a guide, but should not automatically give rise to the power to tow away. A separate assessment of the obstruction or of the desirability of towing away should be made in each case and should be challengable in a Court.

A further power to remove vehicles which appear to have been abandoned is provided in s 356 of the Local Government Act 1974, which replaces ss 76 and 76A of the Transport Act 1962. There are two categories of cases. Subsection (1) enables any person duly authorised by a council to take possession of and remove any vehicle if it appears to *that* person that the vehicle is abandoned and unregistered or unlicensed. In this case the person who is authorised to remove the vehicle (eg the towaway operator) must also, it seems, be the person to whom the vehicle appears to be abandoned and unregistered or unlicensed. It is questionable whether Parliament would have intended the power of removal to depend in this manner on the views formed by an independant person such as a towaway operator.

The second category consists of vehicles which appear to be abandoned but which are registered or licensed. Under subs (4) such vehicles may also be removed by any duly authorised person but the power depends on the rather peculiar requirement that "a council

believes on reasonable grounds . . . that [the vehicle] appears to be abandoned". A council is given a power of sale of vehicles in either category, but where it is registered or licensed a District Court order is first required.

These statutory sources of power provide protection not only for law enforcement officers but also for vehicle owners. To avoid civil liability for interference with possessory rights, law enforcement officers must comply strictly with the statutory requirements. These may be a trap for the unwary. *Wellington City v Singh*[1] illustrates the dangers involved. In this case one traffic officer formed the opinion that Singh's vehicle caused an obstruction on a road. Attempts were made to notify Singh of the obstruction. Subsequently, on instructions, another traffic officer arranged for the removal of the vehicle to a pound from where it disappeared. Singh's action for damages succeeded. The relevant provision at the time required the officer who directly authorised the removal to form the opinion that it was causing an obstruction, and there was no evidence to this effect. Presumably the same result would be reached under s 68B(1)(c) of the Transport Act 1962. The removing officer must have reasonable grounds to believe that the vehicle is causing an obstruction. No doubt this means at the time of removal and relates to the position of the vehicle rather than to the authority of any person giving directions for removal.

The recovery of costs

Prior to the Transport Amendment Act 1980 there was no fixed procedure for recovering towage fees incurred in the exercise of powers under s 68B. Vehicles were simply removed "at the owner's expense". In practice the towaway operator vigorously attempted to retain the vehicle until charges were paid. There was doubt on whether this practice was lawful, and on whether any charge could be made for storage.[2]

The 1980 Amendment, implementing recommendations made in 1979 by the Road Safety Committee, introduced a new alternative procedure for dealing with minor traffic offences by way of notice of traffic prosecution. Section 78A(1)(b) of the Summary Proceedings Act 1957, applying to such procedure, provides that where the offence is a parking offence and expenses have been incurred by an enforcement authority in respect of the movement or proposed movement of the vehicle (whether or not the vehicle is in fact moved), the subject of the proceedings shall not be convicted but shall be ordered to pay such fine (if any) as the Court thinks fit, the amount of the appropriate towage fee[3] and such costs as the Court thinks fit. It appears that the Court is given no discretion regarding towage expenses, the sole determinant being whether an enforcement authority has incurred expense. It is suggested that to justify this statutory imposition of what is, in effect, compulsory civil liability, the expense must at least have been properly incurred. For example, should a towaway operator who is called out for A's car, but who for some reason returns with B's car (illegally parked in the same locality) be entitled to two towage fees, one from A and one from B?

The effect of the amendment is to sever direct dealings between towaway operators and vehicle owners. In fact it is now an offence under s 68B(5) for any person having possession of a vehicle which has been towed away, to refuse to return it forthwith when requested to do so at a reasonable time by a person who produces satisfactory evidence of entitlement to possession.

Some lingering doubts remain. For example there is no provision made for the recovery of any money for storage.[4] More importantly, where a person is the subject of the alternative "old" proceedings, by way of information and summons, there would now appear to be no provision made for either towage or storage fees.[5]

The provisions relating to abandoned vehicles specifically deal with recovery of towage and storage expenses, either as a condition of delivery to the owner (s 356(8) of the Local Government Act 1974) or from the proceeds of sale (s 356(3)).

Liability for damage or loss

Under s 68B(4) of the Transport Act 1962, any person authorised by a traffic officer or constable is entitled to enter or prepare a vehicle for the purpose of removal, and may remove the vehicle, but that person is obliged to do everything reasonably necessary to ensure that the vehicle is not damaged. A careful reading of this unusual provision reveals two distinct components. The first part creates certain rights, the second part balances those rights by imposing certain obligations to prevent damage. This raises two issues with important practical consequences.

The first is whether the right to tow away stops short of a right to damage a vehicle. Consider the case of a vehicle parked illegally on a clearway but which cannot be moved without damaging it, for example by tearing off the door rubbers, or even perhaps breaking a window. Which prevails in such a case, the right to enter and tow away, or the obligation to do everything reasonably necessary (including not towing away) to ensure that the vehicle is not damaged? No clear answer is provided by the language of s 68(B)(4) and the arguments in principle are evenly weighted. There is a public interest in keeping roadways clear and safe, but there must be occasions when the evil does not justify the infliction of damage on a person's property, particularly when there is no provision for compensation.

On balance it is suggested that the public interest in road safety and convenience must prevail. It is hoped, however, that in cases where the obstruction or inconvenience to the public is not great, and where damage to the vehicle would be caused by its removal, a traffic officer should take these considerations into account when deciding whether a vehicle should be towed away.

The second practical issue concerns the burden of proof. It is suggested that the creation of the obligation under s 68B(4) has the effect of reversing the onus of proof in a civil claim for damages. The consequence of this would be that once a plaintiff had shown that a vehicle had been damaged by a towaway operator, the onus would be on the towaway operator to show that everything reasonably necessary had been done to prevent that damage. Any claim for damage should be made against the towaway operator. It has been held that the enforcement authority discharges any obligation it might have under such a statute if it takes reasonable care in appointing a competent person to tow a vehicle away.[6]

In the case of abandoned vehicles there are no statutory provisions affecting liability for damage to such a vehicle. Presumably a common law action based on failure to take reasonable care would be available.

There are also no statutory provisions dealing with the situation where a vehicle is lost or delivered to a person who is not entitled to it. Once again, presumably, the common law as set out in the earlier article would apply. Someone should be liable but the question is who? In practice vehicles removed under the Transport Act are

often left outside the towaway operator's yard on a road so that they can be collected by the owner at any time. The towaway operator may not even see who takes the vehicle away. The view taken, particularly since April 1981 when the Transport Amendment Act 1980 came into effect, is that these removals are the responsibility of the enforcement authority. The logic in this view and the practicality of leaving vehicles outside an enclosed yard are apparent. These considerations, and the absence of any provisions for charging storage fees, tend to suggest that liability should be placed on the enforcement authority. It may be argued, however, that towaway operators are in a better position to take the necessary precautions to ensure that vehicles are returned to the proper persons. The sensible practical solution is for the enforcement authority itself to establish and maintain its own vehicle pound.

Summary and proposals for reform

The discussion in this article reveals a number of minor technical difficulties in the law on removal of vagrant vehicles, but no substantial problems. The law and practice relating to the removal of trespassing vehicles dealt with in an earlier article are, however, in a state of chaos.

The main conclusions reached in the earlier article on the law relating to trespassing vehicles are summarised as follows:

1 A person entitled to possession of private property (occupier) may remove a trespassing vehicle and include the cost of doing so in an action for damages against the driver for trespass.

2 An occupier may exercise the remedy of distress damage feasant only if—

(a) Courts continue to regard this remedy as being appropriate for trespassing chattels; and
(b) the vehicle is doing actual direct damage to the property; and
(c) the vehicle is not in the control of its owner.

The remedy is not available for the recovery of towage or storage fees.

3 In all other cases the exercise of distress amounts to trespass and conversion and the vehicle owner may recover the vehicle either directly (self help) or by action (replevin), and may claim damages.

4 A towaway operator may only—

(a) take action against the occupier for towage fees, but probably not storage fees, pursuant to contract;
(b) as agent of the occupier, take action against the vehicle driver, claiming damages for trespass, including towage but not storage fees;
(c) take action against the vehicle owner for storage pursuant to quasi contract;
(d) as agent of the occupier, but not as assignee, exercise the remedy of distress in the limited circumstances where this is available.

5 The owner of a trespassing vehicle which has been damaged or lost by an occupier or towaway operator may take the following action—

(a) probably against the driver of the vehicle, if negligent, for damage;
(b) against the occupier or towaway operator, whichever is responsible for damage caused by negligence;
(c) against the occupier or towaway operator in conversion or detinue for failure to return the vehicle.

6 The occupier, and probably the towaway operator, may have a defence of volenti, consent or possibly contributory negligence where warning signs are displayed on the property where the vehicle was trespassing.

Some of these rules may be arguable, but it is clear that the law on this topic is unnecessarily complex, and that many existing practices are unlawful. The problem has been compounded by the way in which *Murray v Jamieson's Tow and Salvage Ltd*[7] was decided, namely that unless distress is available, an occupier cannot remove a trespassing vehicle. As a consequence of this, and resulting publicity,[8] persons who pay up to $120 per month for a car park are being deprived of their parks by trespassing vehicles, and most towaway firms, at least in Wellington, have stopped towing away trespassing vehicles unless indemnified by the occupier against liability in any subsequent Court action. Either the law must be changed, or existing practice changed, or both.

The problem is not that there is no power to tow away a trespassing vehicle. With respect to His Honour, it is suggested that the true basis for a finding of trespass in *Murray's* case was the fact that the vehicle was in the control of the owner who was prepared to drive it away. This wrong then merged into conversion when the towaway operator wilfully interfered with the vehicle in a manner inconsistent with the rights of the owner and depriving him of the use and possession of it without lawful justification, that is without any right of distress.

An appeal has been lodged in *Murray's* case, and clarification of the right to remove a trespassing vehicle will go some of the way towards protecting the rights of occupiers. The real difficulty concerns recovery of the costs involved in the removal. Obviously the trespasser should be liable for such costs, but if the procedure for recovery is not effective, the right to remove loses its sting and it becomes an expensive remedy for the occupier.

There are, of course, practical measures which can be taken by occupiers to protect their interests in car parks which are particularly attractive to trespassers. It is not suggested, however, that attendants, electronic devices, chains and gates should be a substitute for effective legal remedies. For the latter, there would appear to be two courses of action possible.

One would be to validate the practice which prevailed before *Murray's* case was decided. In effect this would provide towaway operators with a statutory lien, but with no power of sale. The objections to this are:

1 the remedy would be aimed at the owner of the vehicle who might be quite blameless for the trespass;
2 it would be novel to create a lien in this situation where no work or services are carried out on the goods held and where there is no contractual relationship between the parties;
3 it would give towaway operators a unique advantage compared to other commercial operators who seem to be able to survive without such heavy-handed assistance to recover money owed;
4 in most cases, seizure of a vehicle would be disproportionate to the amount owed;
5 it would retain elements of self help and confrontation which have caused problems in the past.

There are answers to each of these objections. For example;

1 this situation of the blameless owner, would be unusual and in any event this is a matter which can, and should, be sorted out between the owner and driver;
2 trespassing vehicles are a novel problem and novel provisions are required to deal with it;
3 even if towaway operators are given a unique advantage, the main object of the lien is to provide an effective remedy and thus a real disincentive to trespassers;
4 if the owner is prepared to provide other security, the question of the disproportionate value of the vehicle is avoided;
5 confrontation is rarely a problem, but if absolutely necessary it could be met by licensing towaway operators.

In addition, it could be argued, the remedy thus created would have the advantage of simplicity and effectiveness.

The other course of action would be to transfer responsibility to the occupier, who could then recover the money from the driver of the vehicle. This could be done by placing a notice on the vehicle when towed away, informing the driver that he or she had committed a trespass, and that unless specified towage fees were paid to the occupier or agent (eg towaway operator), legal proceedings, adding costs and other damages where appropriate, would be brought. To overcome the difficulty of determining the name and address of the driver, the occupier could be empowered to obtain this information from the owner of the vehicle, or empowered to proceed against the owner in the same manner as if that person were the driver.

The resemblance to parking offence procedure is startling. The obvious criticism would be that such a procedure would be undesirable for a minor civil wrong. To its advantage, however it would:

1 direct proceedings against the wrongdoer;
2 avoid the creation of novel rights;
3 avoid suggestions of unfair commercial benefits to towaway operators;
4 avoid seizure of the vehicle;
5 be a remedy enforceable when necessary by action at law, rather than by self help and confrontation.

It is also significant that the Transport Amendment Act 1980 did much the same thing by moving responsibility for vagrant vehicles to the enforcement authorities. Furthermore s 9 of the Trespass Act 1980 already gives an occupier of private land the right to require a trespasser to give particulars of his name and address. A failure or refusal to supply details, or provision of false or insufficiently precise information, is punishable by a fine not exceeding $500. That Act was passed to deal with certain trespasses which were serious enough to be made criminal offences. The procedure outlined for trespassing vehicles would not go so far. It would simply draw upon criminal procedures to deal with a problem which cannot be adequately met by existing civil remedies and procedures.

In the majority of cases the threat of proceedings, with costs and possibly an award of damages added, might be sufficient to persuade the wrongdoer to pay towage costs. Difficulty would arise, however, in cases where follow up action was required. Even if the name and address of the driver were known there is no escaping the fact that for small claims such as this, Court proceedings are too cumbersome. If particulars of the driver were not known, the occupier would, at best, be faced with two sets of proceedings, one against the vehicle owner and one against the driver. At worst the occupier might encounter an obstructive vehicle owner. Presumably a refusal or failure to provide details of the driver's name and address could be made an offence, and presumably part of any fine imposed could be awarded to the occupier as reimbursement for towage fees. Such a procedure, and the further step of permitting a civil action to be brought against a vehicle owner, would appear, however, to be too heavy-handed.

It is suggested that, on balance, the first alternative, of creating a towaway operators' statutory lien, notwithstanding its disadvantages, would be the preferable method of dealing with the problem of trespassing vehicles.

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1 [1971] NZLR 1025.
2 Ibid. and see Tuohy, "*Trespassing Vehicles*" (1973-75) 7 VUWLR 188 at 190.
3 Transport (Towage Fees) Notice 1981 contains a schedule of towage fees for various New Zealand centres.
4 On this point see Tuohy, supra n 2, 191.
5 Reference to "the owner's expense" in the general power in s 68B(1)(c) has been deleted and the replacement provisions in the Summary Proceedings Act apply only to persons proceeded against by way of notice of traffic prosecution.
6 *Rivers v Cutting* [1982] 1 WLR 1146 where it was held that the towaway operator is employed as an independent contractor rather than as an agent.
7 1982 Unreported, District Court Wellington, 3729/81.
8 *The Dominion*, 21 December 1982, in a front page story, quoting a Wellington lawyer, said the decision "meant tow firms were converting cars and trespassing against them if they tried to remove the vehicles. It means you can park anywhere".

Corrections

With reference to the first article on trespassing vehicles, [1983] NZLJ 154, a number of footnote references require correction.
The more important are as follows:
8 The words "on taking gage" should be in square brackets.
9 The *Ambergate Railway* case was decided in 1853.
12 *Donselaar v Donselaar* and *Taylor v Beere* are now reported in [1982] 1 NZLR 97 and [1982] 1 NZLR 81 respectively.
21 This should read 21a. Footnote 21 was omitted. It should read "Garrow and Gray, supra n 18, 161, and see now Mercantile Law Act 1908 in respect of warehousemen, Wages Protection and Contractors' Liens Act 1939 in respect of work on chattels, Innkeepers Act 1962 and Carriage of Goods Act 1979.
23 The reference to *MacFarlane's* case should be District Court Wellington, 4131/79.

With reference to this second article on vagrant vehicles, the attention of Wellington readers is drawn, for the sake of completeness, to clauses 24(a) and (c) of the Wellington City Bylaw 1980/8 (Traffic), passed under section 591A(1)(g) of the Local Government Act 1974. The power conferred by these clauses to tow away and detain vehicles is additional to the powers discussed in this article. It appears to be much wider than necessary and may be open to challenge if it is ever used.

Professional Education as Matrimonial Property

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The author acknowledges with gratitude assistance given in the preparation of this article by Professor Susan Westerberg Prager, Dean of the UCLA Law School.

THIS article considers a basic issue in matrimonial property classification which should be of considerable interest to many lawyers: if you are married, is your law degree matrimonial property?

Until quite recently, economists have not considered that the skills and knowledge acquired by a person undertaking advanced education were actually a form of capital, the product of a deliberate investment. Theodore W Schultz, 1979 Nobel Prize-winning economist, has written:

> . . . the productive capacity of human beings is now vastly larger than all other forms of wealth taken together. What economists have not stressed is the simple truth that people invest in themselves and that these investments are very large.[1]

Now, it is obvious when this kind of investment is translated into a family situation, certain questions concerning who made the investment and for whose benefit become important. In a typical situation, the wife might work to support the family while the husband obtains a higher education. In such a family, the first decision which must be made is: Which spouse will work and which will study? Because many women have traditionally contemplated dropping out of the labour force during child-bearing and rearing, more often than not the decision is made to invest in the husband's education. This has two consequences for the working wife. First, not only does she provide the funds which enable him to pursue his course of study, she also sacrifices her opportunity to increase her own human capital through higher education. Secondly, she sacrifices with him the earnings he would have if he were employed. She expects that the return he obtains on this investment by them both will be shared equally in later years. However, this expectation will only be realised if the marriage continues, unless the wife can be said to have a property interest in the husband's education which will be recognised in a division of the matrimonial property in general. In short, the wife is making what could be a high-risk investment, unless the Courts are willing to protect this investment at divorce.

In order to try to elucidate the issues involved in this question, we shall look at six American cases and one case decided in Christchurch by Casey J.

The first case is *Re Sullivan.*[2] In dissolution proceedings between Janet and Mark Sullivan, the Superior Court of Orange County determined, inter alia, that the husband's medical education, which had been acquired during the marriage, was not community property. The case was appealed to the California Court of Appeal. At the time of the dissolution, the couple had acquired almost no community property.

Janet contended on appeal that the professional education, degree and licence to practice which Mark acquired during the marriage should have been characterised by the trial Court as an item of community property. Mark responded that not only were these acquisitions not community property, they were not property at all.

The Court of Appeal held that a licence to practise a profession in California can constitute property, at least for some purposes. They then examined the nature of an education and a degree in order to determine whether a licence to practise can ever be classified as community property. The Court examined a number of cases and noted that the concept of community property has been greatly expanded in California in recent years. The concept now includes many types of intangible assets or property rights that were not previously considered to constitute community property. They observed that California Courts have long recognised a community property interest in the goodwill attracting to a professional practice when the practice has been built up during the marriage. They also noted that a lucrative law business built by a husband during a marriage was held by an earlier Court to be community property of substantial value.

However, several Courts in other jurisdictions have recognised "the reality of the fact that by their very nature, an education and degree and also a profesional licence can only have actual value to the possessor or holder of same and therefore cannot be considered as marital or community property at the time of dissolution". In other words, that an educational degree has none of the attributes of property in the usual sense of the term. It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on the death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. However, the Court then said:

> We find some serious deficiencies in the various legal theories upon which those Courts relied. . . . We believe that each of those Courts failed to recognise the distinction between an item of property being characterised as community property as opposed to the com-

> munity being determined to have a financial interest in such property. Specifically, merely because an item of property cannot be characterised as being the community property of the parties under the facts of a particular case does not mean that the same item of property cannot be the separate property of one of the parties with the community having a financial interest in the same.

They point out that, under California law, where community funds have been used to enhance the value of separate property, the property in question remains separate, but the community is entitled to a pro tanto recompense for the funds expended. They continue:

> We are unable to see any distinction between the use of community funds and time and effort to increase the value of other separate assets such as an automobile, a residence, a business, or a professional practice, with the expenditure of community funds, time and effort to acquire an expensive professional education, degree and licence to practise a profession.
>
> We hold therefore, absent an agreement to the contrary, where the community has not received any real economic benefit from the acquisition by one of the parties of an education, degree and/or professional licence during the marriage, that *as a minimum* the community should be reimbursed for the amount of any community funds that were expended to acquire the education, degree and licence. Not to provide at least this minimal remedy in this type of situation would have the effect of countenancing a situation where spouses in the position of Mark would be allowed to walk away from a marriage with a "windfall" that might have great value.

The Court then examined methods of determining the extent of the community interest and remanded the case for further proceedings consistent with the reasoning it expressed.

The result reached by the Court of Appeal in this judgment attracted a good deal of public attention. When the rehearing took place, the case ended up before the Court of Appeal for a second time. The Court had this to say:

> Upon further reflection we have recognised that the starting premise for the holding previously reached is wrong.
>
> All seem to agree that husband's medical education is not community property, and existing authority in California, as noted by the trial Court, fully supports such proposition. . . . A professional education acquired during marriage is not *community* property.
>
> We carry [that] one step further and hold that such an education so acquired is not separate property either. . . . Property must have certain attributes, namely, those of being susceptible of ownership in common, of transfer and survival. . . .
>
> Neither the professional education acquired by husband during the marriage of the parties, nor any professional education, has any of these three attributes. . . .

The Court of Appeal thus reversed this part of its own previous judgment and restored the original judgment of the Superior Court of Orange County.

It is instructive to look at some earlier American cases to try to see the lines of thinking which led to the vacillations of the California Court of Appeal in *Re Sullivan.*

The first of these cases is *Todd v Todd.*[3] In this case the wife worked while the husband went through law school. He had a veteran's benefit, but her earnings were used to supplement this and were treated as community income. At first instance the Court valued the husband's law practice at just under $10,000 and awarded the wife no portion thereof. The wife contended that the husband's legal education was a community asset with a substantial worth which must be taken into account for divorce purposes. The Court said: ". . . the value of this claimed asset is nothing $.0 . . .". This was in spite of evidence admitted to the effect that the value of the defendant's legal education was $308,000.

The Court of Appeal was similarly terse: "At best, education is an intangible property right, the value of which, because of its character, cannot have a monetary value placed upon it for division between spouses." Concerning the law practice they said: "While the right to practise law is a property right which cannot be classed as community property, the value of the practice at the time of dissolution of the community is community property."

Todd v Todd was affirmed in *Re Aufmuth.*[4] The Court said: "It should be noted in the present case that, to the extent community assets were the product of husband's legal education, wife has realised their value in the award of these assets to her. Additionally, the trial Court must have considered husband's earning capacity in awarding spousal and child support. . . . The value of a legal education lies in the potential for increase in the future earning capacity of the acquiring spouse made possible by the law degree and innumerable other factors and conditions which contribute to the development of a successful law practice. A determination that such an 'asset' is community property would require a division of post-dissolution earnings to the extent that they are attributable to the law degree even though such earnings are by definition the separate property of the acquiring spouse." The Court thought it would be inconsistent with the concept of community property, which is necessarily acquired during the marriage, to assign to it the value of the post-marital efforts of either spouse.

The next case is one which was extensively cited in *Sullivan v Sullivan.* It is the Colorado case of *Re Graham.*[5] It concerned a Master's degree in business administration. Mrs Graham was a full-time airline stewardess throughout the marriage. Mr Graham worked part-time through most of the marriage, but his main pursuit was his education. The trial Court determined that, during the marriage, the wife contributed 70 percent of the financial support, which was used both for family expenses and her husband's education. No assets were accumulated during the marriage. The trial Court held that the education was jointly-owned property to which the other spouse had a property right. The Colorado Court of Appeals reversed this, holding that an education is not itself "property" subject to division under the Act, although it was one factor to be considered.

The Supreme Court of Colorado agreed in a passage cited in *Sullivan:* "An educational degree. . . is simply not encompassed even by the broad views of the concept of 'property'. It

does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on the death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term."

However, three Judges, including the Chief Justice, dissented. Their judgment was delivered by Carrigan J. The essence of the dissent was that the degree was the most valuable asset acquired by either spouse during the marriage because of the increased earning capacity it bestowed upon the husband. By contributing about 70 percent of the income, the wife "invested" in her husband's education. Carrigan J put it as follows: "The case presents the not unfamiliar pattern of the wife who, willing to sacrifice for a more secure family financial future, works to educate her husband only to be awarded a divorce decree shortly after he is awarded his degree. The issue here is whether traditional narrow concepts of what constitutes "property" render the Courts impotent to provide a remedy for an obvious injustice.

"In cases such as this, equity demands that Courts seek extraordinary remedies to prevent extraordinary injustice. . . . While the majority opinion focuses on whether the husband's master's degree is marital "property" subject to division, it is not the degree itself which constitutes the asset in question. Rather it is the increase in the husband's earning power concomitant to that degree which is the asset conferred on him by his wife's efforts. . . . Unquestionably the law, in other contexts, recognises future earning capacity as an asset whose wrongful deprivation is compensable. Thus one who tortiously destroys or impairs another's future earning capacity must pay as damages the amount the injured party has lost in anticipated future earnings.[6] The day before the divorce the wife had a legally recognised interest in her husband's earning capacity. Perhaps the wife might have a remedy in a separate action based on implied debt, quasi-contract, unjust enrichment or a similar theory. . . . Therefore I would affirm the trial Court's award."

This dissent is reminiscent of some of Lord Denning's judgments in that it is motivated by a real desire to deal with an injustice, but it does not go far towards answering the major objections stated in the majority judgment. Indeed, it is only at the end that Carrigan J actually suggests any heads under which the wife might have a remedy, and then he fails to develop a line of reasoning to support them. From the standpoint of our law, the concepts of quasi-contract and unjust enrichment are unlikely to be of much help to a plaintiff in Mrs Graham's position, since neither of these bases for action is as well-developed in English law as they are in the United States.

The next case presents a slight variation on the pattern of facts which has, by now, become familiar. In *Morgan v Morgan*,[7] the husband and wife married while they were both students. Recognising that both could not simultaneously continue their education and be self-supporting they agreed that the wife should work full-time while the husband obtained a law degree. The wife worked until a child was born, and eventually returned to full-time medical studies, obtaining exceptional grades.

The question before the Court was whether the husband should be obliged to support his ex-wife in full-time study for the period remaining until she completed her medical course, particularly in view of the fact that she already possessed skills as a data analyst and shorthand typist which would enable her to be immediately self-supporting. The Judge decided that Mrs Morgan should receive her husdand's support. He said: ". . . any possible short-term economic benefit which would result from the wife's returning to a position similar to the one she held over two years ago, is far outweighed by the potential benefit, economic, emotional and otherwise, of pursuing her education. . . . 'Self-supporting', in my judgment, does not imply that the wife should be compelled to take any position that will be available when her obvious potential in life. . . will be greatly inhibited. . . . In my opinion, the answer to this issue is that under these circumstances, the wife is also entitled to equal treatment and a 'break' and should not be automatically relegated to a life of being a well-paid, skilled technician labouring with a life-long frustration as to what her future might have been as a doctor, but for her marriage and motherhood."

This may strike an observer as being a fair and enlightened result. However, the husband, who was by now a well-paid member of a prominent Wall Street law firm, appealed. The Appellate Division said: "Absent a compelling showing that the wife cannot contribute to her own support, Courts have 'imputed' or deducted a wife's potential earnings from the amount which would otherwise be found payable as alimony by her ex-husband. . . . While this Court recognises plaintiff's goal in medicine, this pursuit was never in the contemplation of the parties during marriage and appears to be of recent origin. The law requires that the alimony awarded should be predicated upon the present circumstances of the parties. Although the wife's ambition is most commendable, the Court below was in error in including in the alimony award moneys for the achievement of that goal."

The final American case we shall consider is *Hubbard v Hubbard*,[8] decided by the Oklahoma Supreme Court. The facts involved the usual situation: the wife supported the husband through his medical training and, upon divorce, found herself relegated to her pre-marital status without adequate recompense for her assistance to her husband. The trial Court held that the husband's medical training was a valuable property right and that the wife had a vested interest therein. The judgment awarded her 40 percent of her husband's expected earnings over the first 12 years of his practice, the award being in lieu of property division.

The Supreme Court agreed with the majority decision in *Re Graham*, but added, "this determination does not mean, however, that Ms Hubbard is thereby precluded from receiving an award in lieu of property division, for this case presents broad questions of equity and natural justice which cannot be avoided on such narrow grounds". The Court expressed the view that Ms Hubbard had an equitable claim to repayment for her investment in her husband's training. "To hold otherwise would result in the unjust enrichment of Dr Hub-

bard." They pointed out that this investment was the very reason why there were few conventional assets at the time of the divorce. Further, if the divorce had not taken place until after Dr Hubbard had an established practice and had accumulated tangible property by means of his increased earning capacity, Ms Hubbard would have been entitled to compensation for her contribution to that earning capacity. The Court continued: "We are not rendered impotent to do equity between these parties simply because the divorce occurred immediately preceding the start of Dr Hubbard's professional career. We are persuaded by the suggestion in the forceful dissenting opinion in *Graham* that the doctrine of quasi-contract offers a remedy for a spouse in these circumstances."

The Court, acknowledging that it would be among a minority of jurisdictions, thus held that Ms Hubbard was entitled to compensation to prevent Dr Hubbard's unjust enrichment.

Before we attempt to draw any threads together, it is necessary to consider a New Zealand case which touches briefly on the problem. In *Godfrey v Godfrey*[9] Casey J made the following comments in relation to the Matrimonial Property Act 1976:

> ... I cannot see how Mrs Godfrey can maintain a claim under the Act to the respondent's after-acquired assets which now constitute virtually the whole of the property under attack. Mr Willy attempted to rationalise the application on the basis that Mrs Godfrey's contributions to their marriage during their student days resulted in her husband's acquisition of professional qualifications which could be described as "property", giving him the entrée into the substantial assets that he has now acquired as a result of putting those qualifications to use. However attractive this might be in theory, the Act deals with tangible property rights, or those on which a money value can be placed (s 2). The acquisition of personal experience or qualifications in any field cannot fall within this category. Section 9(4) gives the Court a discretion to treat separate property acquired when the husband and wife are not living together as matrimonial property, if it is just to do so in the circumstances ... I am not prepared to say that in no circumstances can s 9(4) be applied in this situation; however, it has usually been resorted to when property owned at the date of separation has been sold and its proceeds used in other ways, leading to an obvious injustice if after-acquired assets could not be substituted. That is not the situation here.

We are entitled to draw some tentative conclusions from the cases we have examined. First, we can probably safely say that American Courts have, on occasion, been willing to disregard the traditional boundaries of the concept of property, in favour of broader equitable considerations. Secondly, a minority of Judges, including the majority of the Oklahoma Supreme Court, has been prepared to find a remedy in the equitable concepts of quasi-contract and unjust enrichment. Thirdly, Casey J has provided authority for stating that the New Zealand Matrimonial Property Act will not usually provide a remedy in these cases, although he leaves the door slightly ajar.

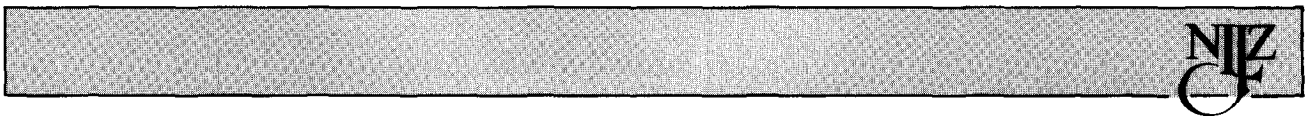
It thus remains to ask what areas of English law might inspire a future Court to open the door, and this, of necessity, involves a brief consideration of the place of unjust enrichment in our law.

It should be said at the outset that this concept is far less developed in English law than in American and Continental law. It is usually dealt with in our equity under the head of constructive trusts. In two cases, *Pettitt v Pettitt*[10] and *Gissing v Gissing*[11] the House of Lords has said that constructive trusts will not be imposed simply on grounds of fairness and equity; rather the basic rules of property law apply. In *Gissing's* case Lord Diplock said that inequitable behaviour might give rise to a constructive trust, but he exemplified this by fraud. However, in *Heseltine v Heseltine,*[12] Lord Denning gave this remark a wider meaning and imposed a constructive trust because he thought it was equitable to do so. He did the same in *Cooke v Head.*[13]

These cases take a very wide view and do not tie up with orthodox principles. This did not deter the Master of the Rolls. In *Hussey v Palmer*[14] he said: "... it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution. It is comparable to the legal remedy of money had and received which, as Lord Mansfield said, is very beneficial and, therefore, much encouraged".

The leading New Zealand case on constructive trusts is *Avondale Printers v Haggie.*[15] Mahon J canvassed the UK cases and concluded that the general doctrine of unjust enrichment was not a part of New Zealand law. He remarked[16] that Lord Denning had evolved a process of unjust enrichment and used it as an appropriate doctrine when questions of fairness or justice were under consideration. However, His Honour thought that the doctrine would create much uncertainty were it to be introduced in New Zealand, and added that he could see no real deficiency in the orthodox restitution system.

In another New Zealand case, *Van den Berg v Giles*[17] Jeffries J seems to assume the existence of the category of unjust enrichment.[18] However, Mahon J analysed this case in *Avondale Printers.*[19] In particular, His Honour said: "No one could quarrel with the result of the litigation in *Van den Berg v Giles,* but I could not agree, with all due deference, with the ratio decidendi founded upon a general right of restitution for unjust enrichment. ..."[20]



It would seem, then, that at present there is no remedy available in New Zealand law which can adequately recompense a spouse for his or her investment in the other spouse's higher education. Yet it also seems that, in the interests of fairness, in many cases such a remedy ought to be available. Whether such a remedy will be evolved by equity or the common law remains to be seen. There is also the possibility of an amendment to the Matrimonial Property Act 1976. Which course, if any, is adopted will depend on pressures exerted by people who feel an injustice has been done. It may be that there are insufficient numbers of such people as yet for the matter to assume any aspect of urgency.

1 28 Kansas LR 379 (1980).
2 127 Cal App 3d 656 (1982).
3 272 Cal App 2d 786 (1969).
4 89 Cal App 3d 466 (1979).
5 194 Colo 429 (1978).
6 This would not necessarily be so in New Zealand because of the Accident Compensation Act.
7 366 NY Supp 2d 977 (1975).
8 603 P 2d 747 (1979).
9 [1980] Mat Prop C 64.
10 [1970] AC 477.
11 [1971] AC 886.
12 [1971] 1 All ER 952.
13 [1972] 1 WLR 518.
14 [1972] 3 All ER 744, 747.
15 [1979] 2 NZLR 124.
16 Ibid at 147.
17 [1979] 2 NZLR 111.
18 See ibid at 117 and 121-123.
19 See [1979] 2 NZLR 124, 144-155.
20 Ibid 149-50.

continued from p 174

Monuments and Sites) parent of the Burra Charter of Australia.

As a great architect and lawyer Thomas Jefferson was not so interested in the future; his passions lay in the inspiration he took from Ancient Rome and its architectural interpreter Palladio. The future could look after itself. However, change without the bulldozer and the other items of this mechanical age was a scarcer commodity in his day. In New Zealand, we could do well to adopt the Burra Charter and to rethink the new 1980 Act before it becomes too settled — and yet unsettling.

In summary, if such wide powers are to be given a public body like the Trust for public reasons involving private rights, then *fully* public procedures must be provided.

Taxation of Estates and Discretionary Trusts

David W Gunson

The author, who is an Auckland practitioner, takes up and expands on a taxation issue discussed by G A Harris in his article on Foreign Trusts in [1983] NZLJ 89.

THE article of Mr G A Harris on this topic in the March issue of the *New Zealand Law Journal* is valuable for concentrating on an aspect of trust taxation which has never received much judicial examination.

Where trustees accumulate income pursuant to a discretion given by the trust deed to do so, and in a later income year subsequently pay that accumulated income to a beneficiary, then it appears that the beneficiary is not taxed on that receipt. The liability of the trustees to tax on trustee's income of course will depend either on whether or not the income has a New Zealand source (if the trustee is non-resident) or if indeed the trustee is resident at all for tax purposes.

It follows that the topic Mr Harris discussed in his article is not confined to non-resident trusts, because a New Zealand-resident trustee may well decide to accumulate and pay tax annually, and subsequently pay out that accumulated income. The nature of the receipt by the beneficiary is therefore the crucial question.

Mr Harris discussed the "double taxation" argument in *Luttrell's* case. The difference between the facts in *Luttrell* (a will trust) and the usual format of an inter vivos discretionary trust is that in *Luttrell* there was some difficulty in deciding who was the taxpayer, because there was an absolute direction in the will to pay an annuity immediately. It just so happened that the circumstances of the estate administration meant that the annuity could not be paid immediately, but ultimately was paid out of what turned out to be accumulated income as a lump sum.

The *Luttrell* estate executors had thought initially that there would not be enough to pay the annuity at all. After ten years of hard work it seems, there was enough to pay out of estate income. Of course until that time (although this did not seem to attract much judicial attention) the estate was under administration so that the executors were liable to pay tax on income derived during the interregnum between the date of death and date of completion of administration. It was not clear that the executors had appropriated money from time to time to the account of the annuitant, to answer at least some of the actual future annuity payment, but perhaps they could not afford to do so or decided not to.

Plainly, there are two distinct taxpayers where an estate is under administration; one is the executor; the other is a beneficiary if the latter receives income out of funds appropriated to him during administration. Possibly, *Luttrell* was wrongly decided but the double taxation argument becomes clearer when one examines exactly what the executors did with their accumulated income; that is, either they paid tax as executors and appropriated for the account of the annuitant; or they just paid tax as executors and after administration was completed then started paying an annuity. The former alternative would accord with the Court's judgment.

With discretionary trusts of course there is no requirement that the annual current income belongs to the beneficiary unless the trustees decide that it does so. It follows that the incidence of taxation on the income of a discretionary trust depends entirely upon the trustees' exercise of their discretionary powers.

In the writer's experience as well as

Mr Harris' it is a common practice for trustees who are accumulating income, and who subsequently pay it to a beneficiary to merely call accumulated income capital once it has been taxed. It is submitted that it is trite that first the fact that income has been taxed once does not automatically alter the character of income to make it either non-assessable income or capital in the hands of the trustees. Second, the fact that accumulated income may be paid out in a lump sum, does not of itself mean that the payment has a capital character. For example in *Luttrell* the lump sum payment in lieu of the annuity undoubtedly was treated as if it were of an income nature by the executors, the Inland Revenue Department and the Court of Appeal.

Another example of how accumulated income can continue to have an income character can be given where a testator dies owning shares in a company and his will does not specifically direct the executors to disregard apportionment of income attributable to those shares for the period current at the date of death.

First, dividends for the company's accounting period ending prior to the date of death declared and paid after the date of death will need to be apportioned between capital and income of the estate both for estate duty purposes and for trust accounting purposes if there is a life tenant.

Second, if the executors then accumulate the income portion of that dividend and use it to subscribe for further shares in the company then (subject to the estate's administration having ended or that that income meantime having been appropriated to the life tenant) plainly those shares are held in a revenue account. On the other hand, if the company itself instead of declaring a dividend, declared a bonus issue out of revenue profits (as opposed to capital profits) then those bonus shares too would form part of the revenue of the estate and belong to the life tenant. The fact that they come to the life tenant in the form of something resembling capital is neither here nor there.

To revert to accumulated income of a discretionary trust, plainly therefore something must happen to the accumulated income in order that it can become capital. The answer may lie in the trust deed itself. If for example there is a direction to the trustees to distribute annual income either during the year of receipt or within six months after the end of it, then there will always be beneficiaries' income. The exercise of the trustees' power as to which of the beneficiaries is going to receive it is the only matter which will affect the incidence of taxation on that income, and that in turn depends on the beneficiaries' respective personal tax rates.

If the trust deed goes further and permits the trustees to select not only who is going to receive it and when they are going to, but also directs what happens to the income if it is to be accumulated instead, then we have a clue as to the transmutation of that income to capital. Commonly trust deeds positively direct the trustees if they decide not to make a distribution, instead to add the accumulated income to the capital of the trust fund and treat it as if it were capital. Usually there is a parallel power given to the trustees to decide what is income and what is capital.

In carrying out that direction, the trustees seem to be doing something rather similar to that done by a company when it capitalises its profits by way of paying up bonus shares. In terms of company law, plainly the capital of the company has been increased and indeed the company cannot later treat the funds represented by the bonus shares as if they were income and able to be distributed to the shareholders as such. Any such distribution of course would be treated as a reduction of capital requiring the consent of the Court.

If then trustees can capitalise accumulated income because the trust deed requires them to do that, it would seem to follow that unless the Income Tax Act specifically permitted the Inland Revenue Department to tax the beneficiary's receipt as income, the receipt must be either something other than income, or else it is non-assessable income. The Act does not seem to address this matter at all except that s 227(3) might possibly override the transmutation because it speaks of "income derived by [the trustees] in any income year". But the section does go on to deem the income to belong to the beneficiaries if it is paid or applied to them during "that income year", ie not "any income year". Since s 228 treats "that income" as the trustees' if it is not the beneficiaries' then it follows that the Act requires that it cannot belong to both at the same time.

There is one further matter however, and that is the nature of the receipt by the beneficiary. It has been submitted that accumulated income does not alter its character as such unless something is done to capitalise it. It follows that a payment out of accumulated income unless it has been transmuted to capital will still be income in the beneficiary's hands. Similarly, regular capital payments by one of Mr Harris' non-resident discretionary trusts in a tax haven could well be of an income nature. Although the Income Tax Act does not specifically require that regular payments of capital be deemed income, the common law seems to lean in favour of regarding a regular or periodical payment as income. This is particularly so for payments supplementing income or for meeting expenditure of a revenue nature.

It follows that distributions of capitalised accumulated income ought be made on an irregular basis and for specific needs identified by the trustees, for example purchase of a property but not purchase of clothing.

If Mr Harris is correct in thinking that such capital payments would be taxed, then the statute will need to be amended, because at present it is submitted that the position will depend entirely on each individual trust deed.

Correspondence

DEAR SIR

Re Retrospective Legislation?

I am not sure whether this is another example of retrospective legislation or whether it simply means that some people are expected to die twice but the opening words of subs (2) of s 17A of the Estate and Gift Duties Act 1968 are "subject to this section, where, on the death of a deceased person. . . ."

Yours faithfully

W M L WHEELER

The Australian Constitutional Convention: A Prelude to Constitutional Change

James A Thomson LLB, BA(WA), LLM, SJD (Harv)

ON August 20, 1983, Australian electors will vote at a referendum on four proposals to amend the Australian Constitution;[1] namely, a fixed three-year term for the Australian Parliament, High Court advisory opinions, interchange of power to legislate between Commonwealth and State Parliaments and removal of some provisions concerning the Queen's power of assent and disallowance.[2] Each of the proposals, though not in the identical terms in which they will be put to the electors, were discussed at the fifth plenary session of the Australian Constitutional Convention in Adelaide from 26 to 29 April, 1983.[3]

The Australian Constitutional Convention comprises delegates from Commonwealth, State and Territory Parliaments and local government representatives. The convention has adopted resolutions advocating specific amendment to a number of provisions in the Australian Constitution. Convention resolutions do not, however, have any constitutional or legal sanction.[4] Formal change to the text of the Constitution is initiated and implemented pursuant to the procedure set forth in s 128 of the Constitution. Section 128 permits proposed laws for the alteration of the Constitution to be introduced in either House of the Commonwealth Parliament. Upon passage of the proposed law through both Houses or twice through the Senate or House of Representatives, it is submitted to the electors. Except for those alterations specified in the penultimate paragraph of s 128, the proposed law must be approved by a majority of electors in a majority of the States and also by a majority of all electors voting, before it is presented to the Governor-General for the Queen's assent.[5]

One aspect of the value of the Convention and its resolutions is reflected in the political consensus that may be generated with respect to particular proposals for constitutional amendment. This may assist the Australian Government to assess the likelihood of proposed alterations obtaining the requisite s 128 majorities. Another valuable contribution made by the Convention is the scholarly papers to assist the deliberations and reports of Convention Standing Committees.

Twenty-five agenda items relating to various provisions and aspects of the Australian Constitution were discussed at the 1983 Adelaide plenary session. Some, but not all, of the proposals to amend the Constitution were endorsed by the Convention and several items were referred to a Standing Committee. The categories of the agenda items were the judicature, constitutional conventions and practices, the Australian Parliament, legislative powers of Commonwealth and State Parliaments and constitutional amendment procedures.

Jurisdictional problems arising from the Australian system of Federal and State Courts were the motivating force behind a resolution adopted by the Convention to refer to a Standing Committee the task of recommending a model for a single integrated system of Australian Courts. The resolution envisages three distinct judicial levels — Trial, Appellate and the High Court as the final Court of Appeal. The manner of implementation, whether, for example, by way of direct amendment to the text of the Constitution or by an intergovernmental agreement, is also to be recommended by the Committee.[6]

A proposal, now to be put at the August referendum, to insert a new s 77A in the Constitution to confer upon the High Court of Australia jurisdiction to give advisory opinions, was carried by a majority of delegates. The Governor-General, State Governors and Administrator of the Northern Territory acting on the advice of their executive council would be able to request the High Court's opinion on the constitutional validity of their jurisdiction's legislation or proposed legislation. High Court advice as to questions concerning the interpretation and application of particular sections of the Australian Constitution can also be sought by the Governor-General. Although there is provision for division of opinion that may occur amongst the Justices, the proposed s 77A does not indicate the precedential weight to be given to the Court's advice. There are numerous arguments as to whether the Judiciary should be able to give advisory opinions in constitutional matters. Of the older federations, the debate has been resolved differently in Canadian and the United States Supreme Courts.[7]

The Canadian Supreme Court has jurisdiction to render advisory opinions concerning the interpretation of the Canadian constitution and the validity of any Dominion or Provincial statute. The use of the words "cases" and "controversies" in connection with the judicial power under the United States Constitution, however, has been interpreted so as to constitute a constitutional prohibition on the giving of advisory opinions by the US Supreme Court and Federal Courts.

The appointment, powers and functions of the Governor-General have been the subject of considerable discussion.[8] Somewhat similar questions have arisen in New Zealand.[9] Thus it was inevitable that there was prepared for the Adelaide Convention a paper and report elaborating upon the background and terms of a number of practices relating to Executive Government. A resolution adopted by the Convention recognised and declared

Editorial note

Since this article was submitted the Australian Government has decided to defer the 20 August referendum. The timing of the referendum will now be discussed in the Australian Parliament during the month of August 1983.

that 19 practices should be observed as conventions in Australia. These included the Convention that the Queen exercise her powers, including the appointment of the Governor-General, on the advice of Australian, not United Kingdom, Ministers. Also recognised as a convention was the practice that the Queen does not intervene in the exercise by the Governor-General of powers vested in him by the Constitution. The basis for this convention was found in the Queen's refusal to reinstate Mr Whitlam as Prime Minister following the termination of his commission by the Governor-General.[10] Other conventions related to the composition and operation of the Australian Executive Council.

The Convention did not, however, endorse as constitutional conventions any of the practices and principles which had been identified as operating in relation to the powers of the Governor-General to appoint and dismiss Australian Ministers and to dissolve the House of Representatives and Senate. These practices and procedures were referred to a Standing Committee for further consideration.

The Australian Constitution makes specific provision for the Queen to disallow, within one year of the Governor-General's assent, Commonwealth legislation and for the Governor-General to reserve for the "Queen's pleasure" Bills which have been passed by the Australian Parliament.[11] No Commonwealth legislation has been disallowed and since 1942 Commonwealth Bills reserved for the "Queen's pleasure" have been assented to by the Queen on the advice of Australian, not United Kingdom, Ministers. The Convention therefore recommended that these provisions be repealed. Australian voters at the forthcoming referendum will decide whether to follow that recommendation.

The duration of the Australian Parliament, qualifications of its members, the power of the Senate concerning proposed laws appropriating moneys for ordinary annual government services and an amendment to insert in the Constitution the requirement, for both State and Commonwealth elections, that votes be of equal value were debated. The motion recommending equality in the value of votes cast at Parliamentary elections was defeated. A Standing Committee is to consider Parliamentarians' qualifications.[12] Although that had already been done in respect of questions appertaining to the Senate and money Bills, the Convention did not endorse any substantive change to existing constitutional provisions.

A proposal to extend from three to four years the possible length of the House of Representative's terms was carried but not the motion to provide for a fixed, and generally, unalterable, term of Parliament. Nevertheless, the Australian Government has decided to put to a referendum a fixed parliamentary term proposal. The House of Representatives is to be dissolved before the expiration of a three-year term only where the Government loses the confidence of the House and no alternative government can be formed or where there is a double dissolution under s 57 of the Constitution. Where either of those circumstances occurs the new House of Representative's term will be for the remainder of the three years. At the expiration of that remainder period the House of Representatives is dissolved and following an election, the next three-year term will commence.

Distribution of legislative power between the Commonwealth and State Parliaments was examined in the areas of external affairs, family law, industrial relations and the power to impose duties of excise. Questions pertaining to the paramountcy of the Australian Government and its laws over State legislation were also mentioned during the plenary session.[13] No resolution was adopted as to any of these matters other than to refer all of them to a Standing Committee for further consideration.

The Convention did, however, approve a proposal to amend the Australian Constitution so as to enable an interchange of legislative powers between the Commonwealth and the States.

This proposal is to be included in the August referendum. The Commonwealth Parliament is to be given power to designate a matter within its constitutional power and upon such a designation the States will acquire power to make laws with respect to that matter. There is already provision in s 51 (xxxvii) of the Australian Constitution for the States to refer to the Commonwealth matters within State power so that upon referral the Commonwealth acquires legislative power over referred State matters. One consequence of the ability to interchange legislative powers between Parliaments, without otherwise formally amending the text of the Constitution, may be a substantial modification of the federal nature of Australia's governmental institutions and constitutional structure.[14]

The final items debated by the Convention relating to various aspects of the amendment procedure in s 128 of the Constitution and proposals for alternative procedures were all referred to a Standing Committee.[15]

Whether there will be a further plenary session of the Australian Constitutional Convention and when it will occur are questions which will depend to some extent upon the outcome of the August referendum. If at least some of the referenda proposals are approved, the Australian Government may well be inclined to continue to use the Convention as one avenue in its quest for more amendments to the Australian Constitution.[16]

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1 12 and 13 Vic c 12 (1900) (UK Parliament) (The Commonwealth of Australia Constitution Act).

2 Commonwealth Parliament Debates (Senate) 12 May 1983.

3 Previous plenary sessions have been held in 1973 (Sydney), 1975 (Melbourne), 1976 (Hobart), 1978 (Perth). D Blackwood et al, *A Short Historical Survey of the Activities of the Australian Constitution Convention 1973-1978* (1983).

4 One of the amendment procedures in Art V of the United States Constitution is a Convention, called by Congress on the request of State Legislatures. This procedure has not been used. See, eg W Edel, *A Constitutional Convention: Threat or Challenge* (1981).

5 For literature on Constitutional Amendment, see Thomson, *Altering the Constitution* (1983) Fed Law Rev (forthcoming).

6 See, eg Burt, An Australian Judicature (1982) 56 ALJ 509; Street, Towards an Australian Judicial System (1982) 56 ALJ 515; Standing Committee D (4th Report 27 Aug 1982, Vol 1) at pp 12-18; Standing Committee D (Supp 4th Report 10 Feb 1983).

7 See, eg, Crawshaw, The High Court of Australia and Advisory Opinions (1977) 51 ALJ 112.

8 See, eg, G Sawer, *Federation Under Strain: Australia 1972-1975* (1977); G G Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (1983).

9 See, eg, G Palmer, *Unbridled Power? An interpretation of New Zealand's constitution and government* (1979) at pp 17-21; Quentin-Baxter, The Governor-General's constitutional discretions: an essay towards a re-definition (1980) 10 Vic U Wellington L Rev 289.

continued on p 193

Reforming Inter-State and Overseas Admission Rules in Australia: A Strategy for New Zealand

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This article was referred to the President of the New Zealand Law Society for comment, and Mr Slane expresses the view of the New Zealand Law Society on the issue as it affects New Zealand practitioners at p 191 below.

1 Introduction

THE recent implementation of Closer Economic Relations between Australia and New Zealand reminds us of the durability of the Australia-New Zealand nexus. Relationships between the legal professions in Australia and New Zealand forming part of that nexus, it is timely to discuss the manner in which proposed reforms to those parts of the various State Admission Rules dealing with inter-State and overseas practitioners will affect New Zealand lawyers wishing to practise in Australia. This note outlines the typical means by which New Zealand lawyers obtain admission in Australia, common current reciprocal admission arrangements within Australia and some of their limitations and scope of the proposed reforms. It concludes by suggesting a response to these proposed reforms for the legal profession and Law Schools in New Zealand.

2 Getting admitted in Australia: The Victorian springboard

Especially since the decline in the New Zealand economy in the seventies, Australia has presented as an attractive professional venue for New Zealand lawyers. The typical and preferred mode of entry for New Zealanders to the profession in Australia is entrance to the fused profession in Victoria.

There are no residency requirements in Victoria; principally, the mere fact of admission in New Zealand suffices. The advantages of Victorian admission are patent. There is no need for three years post-admission experience (a requirement in some other Australian jurisdictions) and, because there are no residency requirements, one may simply file the requisite documents by post from New Zealand (or via an Australian agent), pay the appropriate fees, fly to Melbourne and be admitted a day or so after arrival. Victorian admission and a Victorian practising certificate lead to admission to the High Court of Australia which enables one to practise in any Federal Court in Australia. Further, Victorian admission provides a useful prerequisite to admission in other Australian jurisdictions, especially those which have no reciprocal arrangements with New Zealand. For example, in practical terms, no reciprocal arrangements exist between New Zealand and South Australia. But South Australia recognises Victorian admission as a prerequisite to admission in South Australia.

3 Inter-State admission in Australia

Despite the "Victorian springboard" just described, it should not be assumed that inter-State admission within Australia is always a straightforward matter. A recent case from South Australia provides a striking, if extreme, example of the difficulties involved in inter-State admission.

In *In re Goldberg* (1981) 28 SASR 472 the applicant for admission as a barrister and solicitor of the Supreme Court of South Australia was a Queen's Counsel for Victoria and New South Wales. Zelling J in the Full Supreme Court of South Australia summarised the applicant's curriculum vitae as follows:

> The applicant is forty-one years of age and is ordinarily resident and domiciled in the State of Victoria. He obtained the degree Bachelor of Laws with honours at Melbourne University in 1962. He then proceeded as a Fulbright Scholar to Yale University where he obtained a Master of Laws degree in 1964. He was admitted to practice on 1 May 1963 by the Supreme Court of Victoria, on 16 March 1975 by the Supreme Court of New South Wales, and on 3 December 1979 by the National Court of Papua-New Guinea. He has practised solely as a barrister since 30 September 1965.
>
> There is nothing alleged against his good fame or character and his name is still on the rolls of all three Courts.
>
> His legal training is as follows: Apart from his service in articles he served as an employee-solicitor from May to August 1963 and from October 1964 to September 1965, when he went to the Bar. From September 1965 he read in the

> chambers of the present Solicitor-General of Victoria. He has had wide experience in general practice as a barrister in Victoria, New South Wales and Papua-New Guinea. During the course of his practice he has had on occasions to refer to South Australian legislation and to South Australian decisions. He has been a member of the Victorian Council of Legal Education for nine years and has served at various times as a lecturer and tutor in law in the University of Melbourne and the University of Monash. Ibid, 476.

Mr Goldberg's application for admission came before the Board of Examiners of the Supreme Court of South Australia for consideration as to the applicant's eligibility. Earlier, counsel for the applicant gave an undertaking that, if admitted, the applicant would practise only as a barrister in South Australia when briefed by South Australian solicitors and when accompanied by South Australian junior counsel. Notwithstanding Mr Goldberg's experience and undertaking, the Board of Examiners found that the applicant was not eligible for admission because he did not possess an adequate knowledge of South Australian law and practice as required by R 5 of the South Australian Admission Rules.

Here it should be noted that in the case of an inter-State practitioner, the requirement of an adequate knowledge of South Australian law and practice is typically met by a period of three months employment in a law office in South Australia. It is not suprising that Mr Goldberg did not choose to avail himself of such an educative experience but the result was that an appeal to the Full Supreme Court (against the Board's finding or, alternatively, for an exemption from the relevant portion of the Rule), was predictable.

The Full Supreme Court held, on the facts, that it had been shown that the applicant possessed an adequate knowledge of South Australian law and practice and that subject to the filing by him of an undertaking to practise in South Australia as a barrister only he should be admitted as a practitioner of the Court. Both King CJ and Zelling J (Jacobs J concurring) thought a distinction should be drawn between an applicant who undertook to practise solely as a barrister and any other applicant. As to the former class of applicant, King CJ considered that the eminence and experience of the applicant in his own State was the crucial consideration. Zelling J, more narrowly, said that, ". . . an inter-State Queen's Counsel must be deemed to have an adequate knowledge of South Australian law and practice in order to practise solely as a barrister". Ibid, 578.

The decision of the Full Supreme Court is undoubtedly correct. To hold otherwise, as Zelling J stated, would be "ludicrous". *Goldberg's* case highlights, in an extreme fashion, some of the difficulties involved in inter-State admission in Australia. A H Goldberg QC wanted to reside permanently in Victoria and to practise primarily in that State. In order to occasionally practise as a barrister in South Australia he had to argue his case before the Full Supreme Court of South Australia. A system which requires recourse to a Full Supreme Court in a case like *In Re Goldberg* is in need of reform.

4 Proposed reform of inter-State and overseas admission rules in Australia: General issues

No elaborate case for reforming the various Admission Rules relating to inter-State and overseas lawyers in Australia need be made out. A glance at the Admission Rules of the Australian jurisdictions reveals an absence of uniformity with regard to formal qualifications and the status of inter-State and overseas admissions. At present, a Consultative Committee headed by the Chief Justice of New South Wales, Sir Laurence Street, is undertaking the Bismarkian enterprise of formulating uniform standards for all Australian jurisdictions. The general direction of that committee's deliberations is discussed below. Here, some of the general issues underlying such deliberations will be discussed.

The case for separate admission standards for inter-State and overseas lawyers in each Australian jurisdiction (leaving aside purely historical reasons and legislative peculiarities) comes down to a concern for maintaining adequate minimum standards within the particular jurisdiction. King CJ in *Goldberg's* case put it this way:

> I venture some general observations as to what is to be looked for in an applicant who is not deemed by the Rules to have an adequate knowledge of South Australian law and practice. There should of course be a reasonable degree of acquaintance with the substance of the South Australian statutes commonly encountered in legal practice and with the leading decisions of the Courts as to their meaning and application. Much more, however, is required than merely theoretical acquaintance with the law and practice of the State. There should be a practical familiarity with the structure of the Courts and their methods of operation. There should be a like familiarity with the principal government departments and other administrative agencies which a legal practitioner encounters in his daily practice and with the ways and means, under the practice operating in such departments and agencies, by which a client's legal business must be transacted. These and many other practical aspects of legal practice are not to be learnt out of books, but a knowledge of them is essential if a practitioner is to give the minimum acceptable service to his clients. Such knowledge is acquired by applicants trained in South Australia by means of the Legal Practice Course or Articles of Clerkship. Some equivalent is necessary, in my view, in the case of applicants who have qualified in the law in other places. I suppose that the period of practical experience might be shortened by reason of an applicant's experience in legal practice in a comparable jurisdiction, but, as a general rule, a substantial period of employment in a legal office in this State should be regarded as essential. Ibid, 473.

One cannot quibble with a genuine professional desire to maintain adequate minimum standards for inter-State and overseas practitioners, particularly where those standards are uniformly maintained (as they are in New Zealand) by way of standardised examination on local legislation. It should be recognised, however, that adequate minimum standards is a protean concept. In Victoria it would seem that, in the case of New Zealanders, it simply comprises admission to practise in New Zealand. Presumably, the Victorian policy is that a person admitted to practise in New Zealand will rapidly acquire a familiarity with Federal and State legislation in the course of his or her employment. From the point of view of the New Zealand practitioner wishing to move to Australia, the salient virtue of this policy is that it maximises adequately remunerative employment opportunities in Victoria; there is an incentive to Victorian admission. In South Australia, adequate minimum

standards are ensured by the requirement of an adequate knowledge of South Australian law and practice. But the latter is an ill-defined concept and, in view of the attitude of the Board of Examiners in *Goldberg's* case, one might be forgiven for suspecting that such a fluid concept can become little more than a protectionist device.

The case for uniform inter-State and overseas Admission Rules can be made on various grounds. One turns on the concept of professionalism, aspects of which should include a degree of uniformity and portability of professional training. A further ground would take cognisance of the fact that, at least within Australia, professional legal training occurs within a federal system — that an Australian rather than a State outlook should be encouraged — and that many Australian lawyers will change jurisdictions within Australia in their professional lifetime. The case for immediate and full reciprocity for overseas admissions is less compelling. Nonetheless, factors such as a shared common law tradition, Commonwealth membership, the beneficial effects of professional cross-fertilisation, migration patterns, economic, political and cultural links, etc argue in favour of a relaxed form of reciprocal admission rule. Here, the existence of the Australia-New Zealand nexus would appear to provide an especially strong argument for full and immediate reciprocal Admission Rules between Australia and New Zealand.

5 Proposed reform of inter-State and overseas admission rules in Australia: The general direction of reform

The writer's knowledge of the general direction of reform in this area stems from conversations with Sir Laurence Street, Chief Justice of New South Wales and Chairman of the Consultative Committee engaged in the task of reform of the inter-State and overseas Admission Rules. At this stage, reform cannot be anticipated within the next two years or so but the general direction of reform appears clear and, since the ramifications for New Zealand lawyers and Law Schools are considerable, the proposed reforms require immediate consideration. The general direction of reform is as follows:

1 All law degrees (whether obtained in Australia or elsewhere) will be tested against a common core of legal subjects. The content of this core has not been finally determined. Up to the present time, the Ormrod five subject core has been regarded as that which should be adopted. Recent developments in Victoria, however, suggest the likelihood that there will be pressure to adopt a larger core as the norm throughout Australia. This follows from the recommendations of the unpublished *McGarvie Report* wherein the Victorian Council of Legal Education advised (on 14 October 1982) that the following 12 subjects should comprise the new Victorian core viz; legal process, criminal law and procedure, torts, contract, property, trusts, administrative law, Federal and State constitutional law, civil procedure, evidence, professional conduct and accounting. New Zealand Law Schools presently teach 11 of these subjects. Especially significant in this list is Federal and State constitutional law. Overseas law degrees which do not contain this subject will not be recognised for professional purposes (ie, for admission to a course of professional practical legal education).

2 The status of the various professional practical legal education programmes in Australia for inter-State admission purposes is undecided.

3 Inter-State admissions should be treated on a uniform basis with full and immediate reciprocity.

4 The status of persons already admitted to practise overseas will be completely reviewed. It seems unlikely that a privileged status will continue to be granted to United Kingdom admissions.

The above outline of the general direction of reform in Australia must be regarded as tentative only as there are differing views amongst the States as to the desirability and advantages of complete portability of the right to practise throughout Australia. Nonetheless, it does not appear premature to begin the task of formulating a New Zealand response to these changes. Little justification for formulating such a strategy seems necessary. Without more it is asserted that both the profession and the Law Schools in New Zealand have a duty to New Zealand lawyers and prospective lawyers to ensure that their qualifications are *readily* recognised overseas. In the writer's view, this applies with especial force in the case of Australia. It is worth noting that, for the young New Zealand lawyer, immediate reciprocity will often be a crucial factor in obtaining employment in Australia.

6 A strategy for New Zealand lawyers and law schools

If New Zealand lawyers wish to ensure full and immediate reciprocal admission rights in Australia in the future then an extension of the present arrangements in Victoria on an Australian-wide basis seems desirable. Clearly it is in the professional interests of New Zealand lawyers to ensure easy access to Australian jurisdictions particularly in the case of newly admitted New Zealand lawyers whose professional opportunities should be maximised. Hence, reciprocal arrangements which require three years post-admission experience as a prerequisite for admission should be avoided. How can this be achieved? Street CJ has suggested that the New Zealand Law Society should approach the Secretary of the Admission Board in New South Wales with a view to formulating new arrangements for the admission of New Zealand lawyers in that State. *It may be predicted that, in the event that New Zealand can extend its present Victorian arrangements to New South Wales, such arrangements would survive or provide the basis for that part of the proposed reforms dealing with persons admitted in New Zealand.*

Thus far we have considered the position of a New Zealand lawyer who seeks admission in Australia after admission in New Zealand. What of the New Zealand law graduate who moves to Australia prior to admission in New Zealand? Will a New Zealand law degree be recognised for professional purposes in Australia? At present New Zealand law degrees are evaluated on a case-by-case basis. A further course of study in Australian law is often recommended before a New Zealand law degree will be recognised in Australia for professional purposes.

When the proposed reforms to the Admission Rules in Australia are implemented, it is probable that New Zealand law degrees will be tested against a "McGarvie Core" since it is that core which is most likely to be promoted as the Australian-wide core. Eleven of the "McGarvie Core" subjects are presently taught in New Zealand; Australian Federal and State constitutional law is not. Presumably this requirement could be avoided for the purpose of admission in Australia in

the event that appropriate reciprocal admission arrangements between New Zealand and Australia are effected. But in any event the problem can be easily overcome by the introduction of an optional unit in Australian Federal and State constitutional law into the curricula of New Zealand Law Schools. This might be effected by introducing a new separate unit in the subject or by incorporating the subject into existing Comparative Law units.

7 Conclusion

In light of the proposed reforms outlined above, a strategy for New Zealand might run as follows:

1 The various District Law Societies in New Zealand would consider the matter and forward their resolutions to the New Zealand Law Society for consideration.

2 The matter would be a starred agenda item at the next meeting of the New Zealand Law Society. An immediate approach would be made to the Secretary of the Admission Board in New South Wales with a view on rearranging admission requirements for New Zealanders in New South Wales along the lines of those presently obtaining in Victoria. In this regard, little would be lost in offering full and immediate reciprocal admission rights to New South Wales practitioners — this particular trans-Tasman trade only moves in one direction.

3 New Zealand Law Schools should consider introducing Australian Federal and State constitutional law into their curricula either as a separate unit or within the existing Comparative Law courses currently offered.

One final point: Australian left-wing radicals are fond of describing Australia as a "client State". The question New Zealand lawyers should be asking is, "Whose?".

Overseas Admission Rules: New Zealand Law Society View

B H Slane, President, New Zealand Law Society

UPON the coming into force of the New Zealand Law Practitioners Act 1982 on 1 April 1983 the existing arrangements for United Kingdom barristers ceased. Section 47 provides for Orders in Council for reciprocal admission with any common law country. (The only other reciprocal arrangements made related to New South Wales barristers (SR 1941/254) Queensland (*Gazette* 1934 Vol III p 3568) and Victoria (SR 1937/242).)

At its March meeting the New Zealand Law Society Council considered a paper on the question and decided not to seek any further Orders in Council for reciprocal admission.

Where reciprocal arrangements do not now exist, a person admitted by a superior Court in another country may be admitted subject to such conditions as are prescribed by the Council of the New Zealand Law Society in consultation with the Council of Legal Education. The Society has set up a procedure whereby the recommendation of the Council of Legal Education can be quickly put into effect by the New Zealand Law Society through a delegation to the Secretary-General. Borderline or difficult cases may be referred to the full Council.

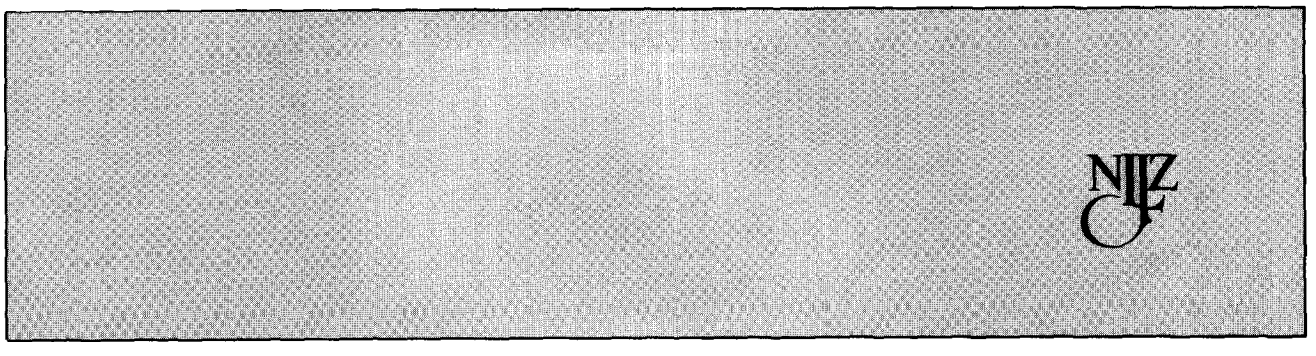
The approval in individual cases has worked well in the past where no reciprocal arrangements existed. It seemed to the Council to be the best way to deal with the small number of cases likely to arise in the future. There are particular difficulties which arise in admissions from jurisdictions where the profession is not fused as it is in New Zealand. The very considerable extent to which New Zealand law and practice now differs from that of other common law jurisdictions must also be borne in mind.

There is also the practical necessity to distinguish between the immigrant to New Zealand and the barrister who wants to come to New Zealand to conduct a particular case. In the former case the proper decision could be made suited to each individual case and there will not be such a number as would make this procedure burdensome. In the case of a one-off appearance regard might be had to the necessity for counsel appearing in New Zealand Courts to properly equip themselves for appearances before the Bench here and that it is more satisfactory that legal counsel in whom the Bench has confidence should appear before them.

The procedure under s 44 for those with some overseas qualifications (but not admitted overseas as a practitioner) is to continue to have their requirements for New Zealand admission prescribed by the Council for Legal Education. I understand the approach of our Council of Legal Education is similar to the core approach referred to by Mr Walker.

Having now had the opportunity of reading Mr Walker's paper I am not convinced that the benefits that might accrue to New Zealanders who decide to go and live in Australia would justify the making of rules which would inevitably be arbitrary for admission in New Zealand rather than deal with each individual case.

It would be for the universities to comment on the teaching of Australian constitutional law here but it would seem that the availability of an optional subject which may not necessarily form part of the agreed prescription would enable those who contemplated shifting to obtain their training in the topic at a New Zealand university before travelling to Australia.



Overseas Correspondence

An earlier letter from Gray Williams, a New Zealander now practising in Wisconsin appeared in [1983] NZLJ 34. In this present letter, he mentions a Wisconsin case that constitutes an addendum to the article by Rupert Glover on matrimonial property appearing on p 180 of this issue of the New Zealand Law Journal.

The value of education

The Wisconsin Supreme Court recently handed down two decisions concerning the issue of how, in a divorce action, to compensate a person who has financially assisted his or her spouse obtain a degree. Both cases involved medical degrees.

The question came before the Court because previous case law had held that while the contributions of a spouse, (for example, financial support while the spouse is in medical school), could be taken into account when dividing marital property, the educational degree itself was not an asset that could be valued, included as marital property and divided accordingly between the parties.

In the instant cases the parties had devoted their financial efforts towards the medical degree and thus they had accumulated little marital property. In Wisconsin the statutory presumption is that all marital property with the exception of gifts, bequests or inheritances will be divided equally between the parties. As there was no substantial marital property, the party who had foregone a career and worked to support the other at medical school could not receive a greater share.

To compound the problem, maintenance payments were not allowed to a spouse who was self-supporting. As the spouse had supported both partners for several years, it was highly likely that he or she was self-supporting. Consequently, a spouse (in both cases it was the wife) who has foregone her career, accepted less than attractive employment, provided most of the income and done most of the household work (even in one case to raising chickens) may find that when husband and medical degree leave the marriage, there was little the Court could do to compensate her.

In reversing the previous decisions the Court had to look at what the wife's contributions were. In one case the wife called on an economist to testify. Using a magnificently convoluted method, he determined that the net present value of the husband's additional income resulting from his degree was between $111,000 and $132,000. Using a second method he calculated that the wife spent $25,510 to support her husband which if invested, would have returned the wife $33,077 by the time of the divorce. Eschewing such methods, the wife asked for $25,000, seemingly a low figure when her earnings over the whole marriage were $88,128 while his were $54,178 and during the medical school years they lived purely from her income. The husband however, had estimated her contributions to have been worth $20,207.39 and was willing to pay that amount.

The Court held that the legislature in a 1977 revision of divorce actions clearly intended that a spouse who has been socially and economically handicapped by contributions to a marriage, should be compensated for such contributions. Furthermore, such compensation can be through either property division, or maintenance payments, or both. Maintenance now is not based solely on need or capability of self-support. Instead maintenance is a tool through which, in a divorce action, a "fundamentally fair and equitable result" may be reached.

The Court concluded that an award of $25,000 to be paid over a fixed period of time was justified when the wife contributed $30,000 more to the marriage than the husband. The costs of support and foregone career opportunities therefore are now compensatable under Wisconsin law. The point was not lost on attorneys a great many of whom breezed through law school while a spouse provided the necessary mental, emotional and financial support.

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continued from p 187

10 The letter from the Queen's Secretary is reproduced in G Sawer, supra, n 11, at p 211.

11 Sections 58, 59, 60 and 74.

12 See, eg, The Constitutional Qualifications of Members of Parliament (Report by the Senate Standing Committee on Constitutional and Legal Affairs, 1981); Pryles, Nationality Qualifications for Members of Parliament (1982) 8 Monash U L Rev 163; G J Lindell, Explanatory Paper: Constitutional Recommendations (Feb 1983).

13 Sections 51(29), 51(21) and (22), 51(35), 90, 109. See generally, R D Lumb and K W Ryan, *The Constitution of the Commonwealth of Australia Annotated* (3rd ed 1981); Lane, The Federal Parliament's External Affairs Power: Koowarta's Case (1982) 56 ALJ 519; Finlay, A Commonwealth "Family Law"? (1982) 56 ALJ 119; Finlay, In Search of the Unstated Premise: An Essay in Constitutional Interpretation (1982) 56 ALJ 465.

14 See, eg, Saunders, The Interchange of Powers Proposal (1978) 52 ALJ 187, 254; Johnson, The Reference of Power in the Australian Constitution (1973) 9 Melb U L Rev 42.

15 These included proposals for State Parliaments and petitions signed by electors to initiate referendums. See, eg, *Proceedings of the Australian Constitutional Convention and Standing Committee Reports* (1978) at lxxiii-lxxvii.

16 See generally, Evans, Changing the System, in *Change The Rules! Towards a Democratic Constitution* (S Encel and E Thompson eds 1977) at pp 141-165; C Howard, *Australia's Constitution* (1978) at pp 129-163; Sampford, Some Limitations on Constitutional Change (1979) 12 Melb U L Rev 210; C Howard, *The Constitution, Power and Politics* (1980).