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Legal Encyclopaedias

The story is told that back at the turn of the century the then proprietor of Butterworths, Stanley Bond, pursued Lord Halsbury to Nice, where the Lord Chancellor was on holiday, to get him to agree to be Editor-in-Chief of the proposed *Laws of England*. The first volume of the new work appeared in 1907. While not immediately successful, it is a publication that has since become an indispensable part of every substantial law library in the common law world.

Halsbury is an encyclopaedic work. In this sense it belongs with the group of major works that were published in England at the end of the 19th and the beginning of the 20th century. There was the monumental 63-volume *Dictionary of National Biography* (1885-1900), the authoritative *New English Dictionary* (1884-1928), the *Cambridge Modern History* (1902-1910), and the famous 11th edition of the *Encyclopaedia Britannica* (1910-1911). In a sense then *Halsbury* can be seen in context as the legal expression of a more general movement for the unification and consolidation of extensive areas of knowledge.

It is perhaps significant and historically appropriate, that the decision to publish a similar New Zealand legal encyclopaedia should have been taken shortly after the decision to publish *The Dictionary of New Zealand Biography* (see review in [1990] NZLJ 221). The first volume of the *Dictionary* has recently appeared. Material on the announcement of *The Laws of New Zealand* of which Sir Robin Cooke KBE is to be Editor-in-Chief can be found at [1990] NZLJ 153, 158 and 302.

Several chapters of *The Laws of New Zealand* have already been commissioned and planning work is proceeding. It is a large undertaking, but it has already been well received as indicating the development and maturity of our own indigenous, though still derivative legal system.

Scotland is publishing a multi-volume *Laws of Scotland* which has been appearing over a period of some years now. In Australia the publication of two legal encyclopaedias from different publishers was announced some considerable time ago. It would now appear that publication of both of these works is likely to begin within the next few months. Both will be encyclopaedic loose-leaf works of over 30 volumes.

Here, *The Laws of New Zealand* is not intended to be in the normal loose-leaf format which is updated by removing individual pages and inserting new ones. This is an ideal system for many works like *Mazengarb* or Butterworths *Family Law Service*. It is also appropriate for an encyclopaedic work like *New Zealand Forms and Precedents* where precedents in the form of documents that are complete in themselves should be preserved. But an encyclopaedia in narrative form consisting of 20 or 30 or more volumes raises some obvious difficulties.

The Laws of New Zealand accordingly is planned to be published in booklet form for each chapter and then updated by cumulative services. There should never be a need to look at more than two publications – the main text and the regular cumulative service – but the main text will be readily useable as a self-contained unit rather than a set of loose pages. This is considered to be more appropriate, in the New Zealand professional context, for a high quality publication as distinct from publications that are more in the nature of working manuals.

Halsbury's Laws of Australia will be like *The Laws of New Zealand* in that it will be closely related to the English *Halsbury*. In a real sense the three works will be inter-related and to the extent this is reasonable and practicable will be cross-referenced. In addition both the New Zealand and the Australian works will be tied into *Current Law* and *Australian Current Law*.

Halsbury's Laws of Australia will be written in what is called a narrative propositional style. That is it will publish, in an authoritative form, the law on a particular point and will set out the statutory and case law that justifies this. It is not intended to be a text-book, nor a set of monographs. Each proposition will be vouched for by authority. In many ways it will follow more closely its English predecessor than the competing Australian work according to the publicity material that has been issued.

The number of chapters, or titles, in *Halsbury's Laws of Australia* has been fixed at 90 (some of which like Intellectual Property will then be subdivided). The aim is to publish the first volume in late 1991 and thereafter to publish five volumes a year. Publication of the New Zealand work will follow a few months later in 1992.

The publication of these substantial legal works in Australia and then in New Zealand should be a great boon to practitioners. The cross-referencing, the citation of authority, and the concise statement of principle will ensure that these works should become the first point of reference for all legal research. *Halsbury's Laws of Australia* will be most useful for New Zealand practitioners as a means of checking on the law across the Tasman and will have the advantage of showing in what ways the law there is developing.

P J Downey

Case and Comment

Fiduciary duties — A recent decision

Cable Price Corporation Limited v Ronald Eric McFadyen (unreported, 8 March 1991, High Court, Christchurch CP 37/91 Holland J; 14 TCL 13/6)

McFadyen was an employee of the plaintiff company for six years, eventually becoming a product sales manager, with duties almost exclusively related to the management and control of an agency of the plaintiff's known as Sunnen.

In October 1990 the defendant resigned his position with the plaintiff after a dispute over his remuneration. Prior to that he had formed a private company, the second defendant. His notice was due to expire at the end of November 1990, but he negotiated for it to finish a week earlier to enable him to visit Singapore at a time when representatives of Sunnen would be present. The defendant knew that on 31 October 1990 Sunnen had written to the plaintiff indicating that it did not intend to extend its distributor contract with the plaintiff when the current contract expired on 23 December 1990.

On 28 December 1990 the defendant was appointed New Zealand distributor for Sunnen.

The plaintiff sought a restraining injunction against McFadyen and a declaration that assets acquired by McFadyen [and/or his company] be held in trust for the plaintiff.

Mr Justice Holland declined the injunction finding that the balance of convenience lay with the defendant. In the course of his judgment he said:

> It will be an extension of the present state of this aspect of the law if a product sales manager, by virtue of that position alone, is held to owe a fiduciary duty to his employer beyond the obligations, express or implied, in his contract of service.

The possibility of a fiduciary relationship existing between employer and employee was accepted by Holland J. What was not accepted was a product sales manager's position being of sufficient status to come within the category of "fiduciary office."

His Honour said:

> . . . [the Defendant] was not ever in charge of the administration of the agency in an unsupervised role within the plaintiff's organisation. He did however, have direct contact with persons in the American organisation, although it must have been clear at all times to those persons that the first defendant was nowhere near the top of the hierarchy in the first plaintiff's organisation.

To determine whether a fiduciary duty has arisen in an employer/employee relationship the Courts' approach has been to ascertain whether the defendant has had duties of trust and confidence placed in him. Status is but one element.

In *New Zealand Netherlands Society v Kuys* [1973] 2 NZLR 163, 166 (PC) Lord Wilberforce said:

> . . . [their Lordships] stress the necessity to give consideration to the nature of the relationship between Kuys and the Society and to question whether that relationship imposed upon him, in relation to the particular transaction under investigation, duties of a fiduciary character.

A product sales manager has the task of managing a specific distributorship. He or she must build and keep a relationship with the supplier for the purpose of on-selling the product/s. For those businesses which do not manufacture, these distributorships may be the only source of revenue and the product sales manager the only, or main, point of contact.

Although, in this injunction application, the facts could be analysed only at an interlocutory level the connection between opportunity and office is apparent.

Jayne Francis
University of Auckland

Debentureholders 2: Landlords 0

The judgment of Jeffries J in *Metropolitan Life Assurance Company of NZ Limited v Essere Print Limited* (In Receivership) [1990] BCL 1574, noted [1991] NZLJ 49, has been affirmed on appeal.

It will be recalled that Essere Print, after leasing premises from Metropolitan, executed a debenture in favour of the BNZ. Amongst other things, the debenture created a fixed charge over chattels, which chattels included a printing press. Rent being in arrears, Metropolitan distrained on chattels in the premises, including the printing press. In broad terms, the question was whether Metropolitan's right to distrain for arrears of rent prevailed over the interest conferred on the BNZ as debentureholder by the fixed charge over the same chattels. Specifically, the question was whether the printing press was a chattel of Essere Print, as tenant, within the meaning of s 3 of the Distress & Replevin Act 1908 ("the DRA").

Though the matter was "finely balanced", the Court of Appeal, like Jeffries J, considered that the interest of the debentureholder prevailed. Because the BNZ had an equitable charge over the printing press, the press could not be said to be a chattel of the tenant within the meaning of the Distress and Replevin Act.

It was recognised in the Court of Appeal that many lawyers had assumed, without question, that a landlord would prevail over a debentureholder in all circumstances. For this reason, a practice, by no means universal but common, had built up whereby debentureholders would seek waivers from landlords. However, some lawyers had raised the possibility that there might be some doubt as to the correct position. (See Connard, *Studies in the Law of Landlord and Tenant* at 235; *Morisons Company Law* 4th edn, 24.26; Dukeson [1990] NZLJ at 183.)

The real difficulty was in interpreting s 3(1) of the Distress and Replevin Act. It gave no clue as to what was meant by the phrase "the chattels . . . of any person save and except of the tenant . . .". References in the literature frequently stated that s 3(1) was intended to prevent the interests of third parties from being prejudiced. However, it was difficult to determine just what that meant. (It would seem that clues were not to be found even in *Hansard*: see Cain, [1959] NZLJ 167 at 168.) In the end, the Court of Appeal concluded that chattels could not be said to belong to the tenant if another person holds an equitable charge over them which exhausts their full value. On balance, it was concluded that s 3 is "probably" intended to ensure that third party rights should not be defeated by distress.

Both Hardie Boys and Thorp JJ recognised that the provisions of the Distress and Replevin Act and the Chattels Transfer Act 1924 may not have been drafted with the distinction between legal and equitable interests in mind or in the knowledge that these provisions may have created anomalies within the law.

The decision does not answer all questions and will not satisfy everybody. For one thing, the question arises as to whether a landlord's right of distraint will prevail over a floating charge over (for example) stock in trade in the face of an automatic crystallisation clause (where one of the crystallising events is the exercise of distraint by a landlord). Though our Courts have accepted the concept of automatic crystallisation, perhaps it could be argued that crystallisation occurs too late, by an instant, to be of assistance to the debentureholder. At the time of the *commencement* of the distraint, which must occur before crystallisation can take place, the chattels are "of" the tenant because the tenant has both legal and equitable title at that stage. However, by virtue of s 4(2) of the Chattels Transfer Act 1924, a landlord would be fixed with knowledge of the automatic crystallisation clause in so far as it relates to chattels and it may be that on the authority of cases like *Re Manurewa Transport Limited* [1971] NZLR 909, the debentureholder would prevail even in these circumstances. (In *Re Manurewa Transport Limited* (supra), the combined effect of s 4(2) of the Chattels Transfer Act 1924 and the automatic crystallisation clause was to afford priority to the debentureholder over a subsequent grantee of an Instrument by Way of Security notwithstanding that the crystallisating event (the charging of the company's property) had to occur before crystallisation could take place.)

Further, there are anomalies. Perhaps the most obvious is that the grantee of an Instrument by Way of Security over chattels from a human person grantor has to concede that a landlord exercising a right of restraint will have priority. (S 4 of the Distress and Replevin Act.) On the basis of *Essere Print*, that is not the case where the instrument is granted by a company.

Amongst other things, the case illustrates the need for an accessible and sensible statutory regime with respect to the law of securities. It can only be hoped that the labours of the Law Commission and professionals in the area of commercial law will bear fruit in the not too distant future. It may be that, as part and parcel of that exercise, the landlord's right to distrain may be abolished.

Steven Dukeson
Auckland

Recent Admissions

Barristers and Solicitors

Ballance J A	Wellington	24 May 1991	Herbison C D	Wellington	24 May 1991
Brookes D	Wellington	24 May 1991	Hikaka G F	Wellington	24 May 1991
Bulmer K D	Wellington	24 May 1991	Howard F L	Christchurch	8 May 1991
Carpenter P A	Wellington	24 May 1991	Jardine W H	Wellington	24 May 1991
Choong Fatt C	Wellington	24 May 1991	Kelly J	Wellington	24 May 1991
Courtney P H	Wellington	24 May 1991	King R L	Wellington	24 May 1991
Cronin L M	Wellington	24 May 1991	Latimer J A	Wellington	24 May 1991
Culy A D	Wellington	24 May 1991	Leech C M	Wellington	24 May 1991
Duggan M J	Wellington	24 May 1991	Lindop F M	Wellington	24 May 1991
Duval-Smith J	Wellington	24 May 1991	MacKinnon P A	Wellington	24 May 1991
Espie S M	Wellington	24 May 1991	McGill D S	Wellington	24 May 1991
Gibson K J	Wellington	24 May 1991	Mason G P	Wellington	24 May 1991
Guzman R	Wellington	24 May 1991	Mercer C L W	Wellington	24 May 1991
Harvey J L	Wellington	24 May 1991	Narev I M	Auckland	10 May 1991

Opening of High Court complex, Auckland

The High Court at Auckland was the first Court of superior jurisdiction in New Zealand when Sir William Martin held the first sessions on 28 February 1842. The original building in Queen Street has of course long since disappeared. The building that was used for so long, the castellated edifice designed by Edward Rumsey in the 1860s, has been refitted and added to. On 31 May 1990 the new building was officially opened and the speech of the Minister of Justice, the Hon Douglas Graham, is reprinted below. The speeches made by the Chief Justice and the Attorney-General will be published in the July issue of the Journal.

The Minister's speech is followed by an article supplied on behalf of the designers of the complex.

Speech by Minister of Justice, Hon Douglas Graham at opening of Auckland High Court complex, 31 May 1991

It is a great pleasure for me, both from a personal point of view and as Minister of Justice, to be able to open this magnificent High Court complex which blends together the old and the new.

From a personal point of view, as an Auckland practitioner who appeared in the old Supreme Court in the 1960s and 1970s, I have a great affection for the old building. I know that that feeling is shared by many. But 100 years before that my great grandfather, Robert Graham, was Superintendent of the Auckland Province when planning for the Supreme Court on this site was first undertaken.

As the Chief Executive of the Province in those days he was involved amongst other matters with concerns relating to the Judiciary and law enforcement.

In March 1865 for example, the then Chief Justice, concerned at the rising crime rate in Auckland, requested that immediate steps be taken to strengthen the Police Force. Robert Graham agreed to take action to solve the problem and arranged to provide no less than seven additional Police Constables to be paid at the rate of seven shillings per day. With great extravagance he also directed an increased allowance for Police greatcoats. I rather suspect my colleague the Minister of Police has somewhat more ambitious plans today.

In the early 1860s when a site for the Supreme Court was being chosen my great grandfather was a member of a Public Buildings Commission appointed to supervise the completion of the Court House and other public buildings in Auckland.

It is absorbing 130 years later to read the records of the many meetings held to discuss the merits of different sites, then the design of the building itself, and the materials to be used in its construction. Intensive debate centred on whether to build in brick which was thought to be good for at least 50 years, or scoria or stone or a combination of them. And of course all within the allocated budget of £25,000.

The site on which we now stand was ultimately chosen and at the ceremony for the laying of the foundation stone in November 1865 Sir Frederick Whittaker described the site as having been covered 25 years earlier by "impenetrable and impassable ti-tree, upon which the foot of civilised man had seldom stepped."

Sir Frederick told of an occasion when he had been lost for some time in this area when returning from a visit to a friend.

But despite the best endeavours of the Public Buildings Commission the old Supreme Court building had its problems from the start.

After it was opened although it was described as "a superb and magnificent structure" and "one of the finest buildings in New Zealand", within a short time of its opening there were complaints that streams of water were pouring on to the Chief Justice's desk. Another account described the Court House as containing "as many fleas as there are lawyers in Auckland".

The restoration of the old building as part of this project has provided the opportunity to make the building

waterproof, it is hoped, perhaps for the first time in its life. Roofing slates were removed, cleaned and replaced where necessary.

The opportunity was taken to redesign the gutters and to renew all the flashings with lead sheeting.

The old building, of course, was required to be preserved because it had been given an "A" Classification by the Historic Places Trust.

As a result much in the way of heritage has been preserved:

The distinctive gargoyles fashioned by the Prussian carver Anton Teutenburg,

The old press bench in the historic Number One Courtroom upon which has been preserved the doodlings of previous generations of Court reporters,

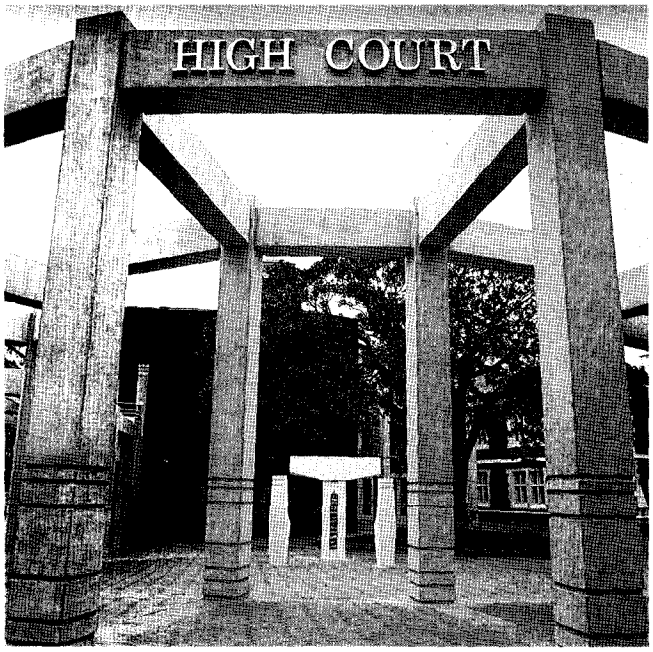
And the room where Registrars have officiated for well over a century.

For those of us with an interest in matters traditional it is perhaps fitting that the Registrar of the Court today will still sit in the old Supreme Court as sheriff and with responsibility for the granting of probate. Both of these functions represent ancient facets of the law.

The old building has been incorporated as part of a working Court complex rather than simply being preserved as a monument. All those who have had to endure long trials will be pleased to note that the No 1 "ceremonial" Courtroom has benefited from the addition of padding for seating which together with air-conditioning will make the experience more bearable.

It has been a remarkable achievement to blend the old and new buildings with access between the buildings in a most convenient way. This new purpose-built Court complex provides many important improvements for those who will use it. In recent years, to have had five leased buildings in different locations not only created a major administrative problem but resulted in the public having to constantly ask for directions and move from one building to another in all kinds of weather.

The initial planning for this new Court complex began as long ago as 1979 when a committee was formed at the direction of my predecessor in office, the Hon J K McLay. The first meeting of the committee was convened in May of that year by Sir Clifford Perry, and a great deal of work has been done in the intervening years. It is also proper, I believe, to acknowledge the contribution made to the project by the Rt Hon Sir Geoffrey Palmer when he was Minister of Justice.



High Court, Auckland, from between the pillars of the colonnade, on the corner of Waterloo Quadrant and Parliament Street.

The new building has 12 Courtrooms and accommodation for a range of supporting services. There are valuable improvements in security with a high tech system which monitors both buildings.

The new facilities provide comfortable and spacious accommodation for jurors. In the past although 150 or more jurors were called the jury room could only accommodate 90 which necessitated those called for jury service spilling out into the corridors as they were assembled.

But all who will be involved in the administration of justice in this new High Court complex will undoubtedly benefit.

As Minister of Arts and Culture I have been pleased to receive a report of the committee which planned and selected the art works for this building. On that Committee were representatives of Courts management, the Judiciary, the Auckland City Art Gallery, and of Ngati Whatua and Tainui.

Sir Hugh Kawharu, Professor of Maori Studies at the University of Auckland was an adviser to that committee.

Considerable efforts have been made to ensure that the art works have been carefully selected to reflect both Maori traditions and those of other cultures.

Throughout this project one of the highlights has been the revival of old trades and skills in the restoration of the Supreme Court building. Bricklayers, stonemasters, slaters, plumbers, joiners, plasterers, painters and many other tradespeople have made important contributions.

I would like to express the Government's appreciation to all groups that have assisted in the planning and development of the new High Court complex over the years; – the Judiciary, the Auckland District Law Society, the Historic Places Trust, the Auckland City Council, Kaumatua from tribal areas served by the High Court, and my own Justice Department staff.

Thanks also go to the WORKS Consultancy team, which designed and supervised both construction and restoration, to the structural engineers KRTA and to the contractors, Civil and Civic who brought the architects' plans to reality. I am especially pleased that

was completed on time and within budget.

All of those who have been involved deserve our thanks and they are entitled today to enjoy a moment of quiet satisfaction and pride in a job well done.

And so we now look to the future. But in doing so, we can draw from the past. An expression of faith in the work of the Court was made at the laying of the foundation stone of the original building. Although political and social changes which have taken place since 1865 make some of the terms used by Sir Frederick Whittaker outdated, this expression of faith is still valid today. In slightly modified terms it was expressed thus:

Before the High Court all people are equal; the poorest receives the same attention as the most powerful and wealthy among us.

Neither the Prime Minister nor the Governor-General can influence the decisions of the High Court.

All New Zealanders, whatever their situation; whatever their cultural background, have the greatest stake in the existence and integrity of the High Court.

And so we can be confident today. There is an undeniable strength in our judicial system and in our independent Judiciary. Our Judges have at all times maintained the best traditions of the law. Not for us the corruption and bribery of judicial officers which afflicts so many other jurisdictions. We as a nation have much to be thankful for. And I am sure that from this magnificent complex the law will continue to be applied without fear or favour.

My best wishes go therefore to the Judiciary, to the Bar, to officers of the Court and all citizens who come to this place seeking justice.

May the Courtrooms again ring with the oratory of counsel as the trials and tribulations of human life are presented, competing interests adjudicated upon, and conflicts resolved. May true justice, administered with understanding and compassion, again be found here in the years to come.

With great pleasure I now declare this new High Court complex open.

Restoration and refitting of Auckland High Court

Legal and architectural history combine with the latest technology and justice design philosophy in the newly-opened High Court at Auckland.

WORKS Consultancy Services Ltd, Auckland, designed the complex, restoring the old Edward Rumsey High Court building to its original glory, and marrying it with a sensitive new addition five times the size of the old landmark.

This was achieved by siting the bulk of the new building well away from the old; at the front it is two levels high, stepping back to a height of four levels above Waterloo Quadrant. Features of the original building have been echoed but not imitated – the brick veneer, the size of the windows, a Mt Somers stone lintel carving on Parliament Street that recalls the gargoyles and sandstone heads on the old High Court.

"We live in the 1990s, and while we can appreciate these wonderful old buildings, there is no practical purpose in trying to imitate them," says project architect Carl Thomas.

The similarities and the differences between old and new can be best seen in the glass atrium which provides the central entrance to the complex.

Original and new building alike have been designed to serve the legal system with maximum efficiency. Before the new High Court opened, its functions were housed in several buildings spread throughout the city. Now the five civil and seven criminal Courts are under the same roof as the Registry Office, Criminal Office, and Law Library.

The Court rooms, all on the ground and first floor levels, are dramatically different from the richly carved Victorian Gothic splendour of the Number One Courtroom next door – light and airy, with furniture of pale tawa and security glass windows overlooking the Waitemata Harbour. All are wired for microphones, computers, infra-red headphones, electronic security, video playback, and in some cases, video conferencing for the use of remote evidence. Counsel tables are equipped with power points for laptop computer users.

The library is situated on the lower ground floor. It receives good natural light. It has four carrells, and more access terminals to the LINX computer system. Via its Anzac Avenue entrance, it is accessible for extended hours. The stack area is sized to accommodate increasing book stocks for another 20 years. Two support offices, a large work room, and a research office and counter, provide space for more staff.

Adjacent to the library are robing rooms and a Members' Lounge. Seven "battle rooms" above the library will be leased to participants in long trials, to provide an "office away from home", accessible all hours.

The upper floors accommodate Judges and their associates, and have been laid out so every office receives natural light and a view.

Artworks

A distinctive feature of the new complex is the artworks of prominent contemporary New Zealand artists. Jacob Scott's glasswork dominates the linking atrium; Claudia Pond Eyley's murals enliven the ground floor, and Darcy Nicholas and Buck Nin's collaborative murals the first level; Denis O'Connor's stone triptych dominates the Parliament Street entrance; Fred Graham's stone sculpture sits beneath the colonnade at the corner of Parliament Street and Waterloo Quadrant; and Turahui Grace's traditional carving is sited on the lower ground floor.

WORKS Consultancy Services participated in a special committee to choose the works – along with representatives from tangata whenua tribes, Judges and Department of Justice staff.

The WORKS Consultancy Services brief ranged from fine art to plumbing. The team has eliminated the problems that dogged the old building. Designed by Edward Rumsey in the 1860s, it was described in a *New Zealand Herald* of the time

as "the first public building of durable material that will be erected by the Province". Its grand Gothic Revival style was not reflected by working conditions within. The lantern-light roof to the Number One Courtroom let in torrents of rain as well as sun, and downpours halted Court proceedings. The ceiling's shape created bad acoustic problems. Fleas and the smell of the earth closets added to the discomforts. The building was even described as a "huge and expensive failure".

It survived the criticism, and went on to host every key figure in New Zealand's legal history; and to collect an "A" rating from the Historic Places Trust, requiring its preservation.

Glass installation at the front of the atrium, where it meets the cloistered wall of the old building.

Stone lintel carving over the lower ground floor entrance, Parliament Street.

Challenges

As the project progressed, WORKS Consultancy Services was faced with a number of challenges. The windowed ceiling in the foyer was taken apart and found to be substantially rotten. Colour-matched demolition timber was spliced in, and the structure was reinforced with steel connecting plates. Along with that ceiling, the elaborate Number One Courtroom ceiling was stripped of its turn-of-the-century layer of white paint and finished with shellac. Careful paint scrapings revealed decorative stencilling, which has been reinstated on the walls of the foyer gallery and in the Crown Prosecutor's office beneath the old tower. Every window in the building was removed, repaired and replaced. And the lead guttering of the old building has been replaced but redesigned, to give the Court a watertight roof for the first time in its life. Earth closets were replaced with the flushing kind many years ago — and now each of the Judiciary offices in the old building has full ensuite facilities.

Concealed behind the kauri panelling and ashlar plastered walls is modern air conditioning. Uplights enhance the glow and detail of the wooden ceilings. Furniture in the Number One Courtroom has been refurbished or replicated; the Masters' Courts have had new furniture created that complements their 1920s design. The Regimental Colours of the 58th Rutland Regiment, the first colours unfurled in New Zealand and hung in the Supreme Court, have been re-made.

The masterpiece of the conservation project, however, is virtually invisible. The building has been substantially strengthened. New foundations were hand-dug four metres deep, and several 100mm thick concrete "shear" walls that reach from the foundations to the roof-line were sprayed in place. A system of steel and plywood diaphragms was also installed, and the tower and chimneys had steel frames inserted.

The restored old building is not a museum but a fully functioning public building. Its east wing houses a public cafe, which will no doubt become a gathering place for the legal fraternity.

The Department of Justice is delighted with the new facilities, according to Kerry Clark, Northern Region Courts Manager. "The planning and the standard of finish are a credit to the designers, contractors and the many suppliers who have contributed."

The $40 million complex was handed over to the Department in May, three years after work began, a long anticipated facility for the justice system and a notable addition to Auckland's public buildings. □

Hung juries or majority verdicts: The jury on trial

By W J Brookbanks, Lecturer in Law, University of Auckland

The author in this article looks at the question of whether there is a strong case for the introduction of majority verdicts in criminal trials in New Zealand. He comes to the conclusion that there is no strong argument in favour of this. Certainly there does not seem to be in New Zealand an inordinate number of hung juries.

A "hung" jury in the second of the now celebrated cases of *R v Chignell & Walker* has raised once again the question of whether New Zealand should follow England's lead in abolishing unanimous verdicts in criminal jury trials in favour of a system of majority verdicts. The political response to the questions raised will turn, not upon consideration of the legalities involved, but rather upon issues of policy, and analysis of the values which underscore the criminal justice system in New Zealand, including the presumption of innocence.

The thrust of this paper will be to argue that the case for majority verdicts is far from having been proved. It will be argued that there are few powerful reasons for now abandoning the requirement of unanimity, a custom hallowed by a very long history, and an important part of our legal heritage.

Present law in New Zealand

The present law in New Zealand is that in all criminal cases the verdict must be unanimous. (Adams, *Criminal Law and Practice in New Zealand* (2nd edn, para 3082); Garrow and Caldwell, *Criminal Law in New Zealand* (6th edn, p 353).) This requirement derives from the Common Law. There is no statutory requirement for unanimous verdicts. Section 17 of the Juries Act 1981, simply states that "[e]very jury shall comprise 12 jurors". The Act says nothing about the numerical balance required to support a true verdict! Nevertheless, it seems clear enough that not only must the jury be unanimous, but that it is wrong for a jury in a criminal case to arrive at a verdict by compromise. (Garrow & Caldwell, op cit 353. See also *R v Flood* (1914) 10 Cr App R 227.) While a jury of less than 11 jurors is legally possible in New Zealand, a Court is prohibited from proceeding with less than that number unless the prosecutor and accused both consent. (See Crimes Act 1961, s 374(3).) The rule of unanimity is concerned not to preserve numerical strength as much as to ensure a quality of agreement amongst those jurors that remain empanelled.

While a jury should always be directed as to the need for unanimity, such a direction is not required as a matter of law and its absence has not been held to vitiate the trial. (*R v Potter* [1962] Crim LR 55). However, where a direction on the need for unanimity is given, nothing must be said which might lead jurors to think that the need for unanimity is relaxed, or that a juror may for the sake of mere conformity or convenience concur in a verdict with which he or she does not agree. (Adams, op cit, para 3082. See also *R v Davey* (1960) 45 Cr App R 11; *R v Walhein* (1952) 36 Cr App R 167.)

Adams notes (para 3085) that the unanimity requirement is formally addressed in the Registrar's questions to the jury when the verdict is being taken, namely:

> (1) "Members of the jury, have you unanimously agreed upon your verdict?"
> (2) "And so say you all?"

That this interrogation is to be undertaken in a "clearly interrogative manner" and not "perfunctorily" (ibid) may suggest that the unanimity principle is not merely an unstated presumption of the jury trial system, but rather a constitutive element of a system designed to ensure that innocent people are not convicted.

The problem of disagreement

It is a long time since jurors were coerced into agreement by denying them heat and refreshment, or simply starving them into agreement. (Adams, paras 3062-4)

The present rules relating to a Judge's power to discharge a jury unable to agree are contained in s 374 of the Crimes Act, as amended by s 13 of the Crimes Amendment (No 2) Act 1980. The Amendment repeals ss 152-154 of the Juries Act 1908. (See Crimes Amendment (No 2) Act 1980, s 13(2).)

Section 374(2) now provides that where a jury has remained in deliberation "for such period as the Judge thinks reasonable, being not less than four hours", the Judge may discharge the jury without their giving a verdict, if it is unable to agree on its verdict.

Where a jury is so discharged the Court is required to either direct the empanelling of a new jury or postpone the trial "on such terms as justice requires" (s 374 (6)). This means that there is no longer any automatic right for the prosecution to seek an order for a new trial, since the aborted trial is necessarily postponed. This would seem to imply that where a new jury is not empanelled, and the trial is postponed in terms of s 374(6), the Attorney-General is bound to order

a stay of proceedings if, after successive disagreements, it is decided not to proceed with a retrial. While s 378 clearly implies that the power to order a stay of proceedings is discretionary, a stay would seem, in these circumstances, to be essential in order to avoid the absurdity of a criminal trial being indefinitely postponed, with no real prospect of a renewed hearing ever taking place.

In England, if at the second trial the jury still disagree, it is theoretically possible for the accused to be tried for a third time. However, the usual practice is for the prosecution to offer no evidence at the third trial so that the accused is acquitted. (Cross, Jones & Card, *Introduction to Criminal Law*, 11th edn, 1988, para 5.14).

Arguments for and against majority verdicts

In *R v Walhein* (1952) 36 Cr App R167 the Court of Criminal Appeal laid out a formula which has been used in directing juries on the issue of unanimity. It included the observation ". . . it makes for great inconvenience and expense if jurors cannot agree *owing to the unwillingness of one of their number to listen to the arguments of the rest*".

The statement in italic identified one of the principal arguments in favour of majority verdicts. It is often supposed that juries disagree not so much because of the objective situation of the case, but rather because once in a while an eccentric juror will refuse to play his proper role (the lone juror holding out for acquittal). (Napley D, "The Jury System", [1967] NZLJ 132 at 133.) However, research suggests that juries which begin with an overwhelming majority in either direction are not likely to hang. Rather, it requires a massive minority of four to five jurors at the first vote to develop the likelihood of a hung jury (ibid). Therefore, the infamous "lone" juror is unlikely to be the true cause of a hung jury.

Behind the popular antagonism towards the lone or eccentric juror, is an assumption that somehow dissent is unreasonable or even perverse. However, as one writer has astutely discerned, majority verdicts will result in the conviction of the innocent unless the majority is always right. (Letter to the editor, [1989] 13 Crim LJ 1989.) Recent incidents in Australian legal history confirm that from time to time a dissenting minority of one or two will be right (ibid). Unless we are prepared to say that the minority will never be right, it is difficult to contend that majority verdicts are somehow "fairer" than unanimous ones, or better able to serve the demands of substantive justice.

A second popular justification for majority verdicts, and probably the major justification, is that it would prevent jury nobbling. It is suggested that the provision for majority verdicts in the English Criminal Justice Act 1967, was based upon the suspicion that one or two cases had occurred in London where single jurors had been bribed. There was evidently no suggestion that the practice had occurred elsewhere in England.[2] In any event, official data seem to suggest that even to the extent that juror intimidation or bribery does occur, resulting in jury disagreement, the incidence of disagreement is relatively inconsequential. Figures available prior to the introduction of majority verdicts in England indicate that of 436 cases at Assizes and the Central Criminal Court only 10 resulted in disagreement. When the ten cases in question were retried, there were six findings of guilt and three acquittals; in the tenth case the jury again disagreed and the defendant was discharged.[3] In fact, juries disagree in only a small percentage of cases, usually less than 4%, accepted as the standard proportion in various jurisdictions in Australia, England and the United States. See Molomby "Letter to the editor", [1989] 13 Crim LJ 198.) Furthermore most of these disagreements involve more than one juror. Recent US research has found that in more than half of the cases investigated, the minority dissent was more than two (ibid). On this basis, verdicts by a majority of ten to two would reduce, but by no means entirely remove, jury disagreement.

If, indeed, jury interference did occur in a regular or systematic way Molomby suggests two features might be expected to emerge: first, a significantly increased proportion of juries which disagreed through only one juror (because it is easier to influence only one), and secondly, an increased proportion of disagreements in cases involving wealthy or powerful defendants, with known criminal associations (ibid). Overseas research does not appear to reveal these features. Nor is there empirical evidence in New Zealand to suggest the existence of these features here. In reality hard evidence of jury interference, apart from the anecdotal accounts that periodically arise, is extremely sparse.

The more important point, however, is that while jury nobbling (or attempts at it) may occur, the problem is not eliminated with majority verdicts where more than two jurors are influenced. In England, where an accused is acquitted it may, in any event, never be known if jurors had been "got at". Under s 13 of the Criminal Justice Act 1967, no disclosure of whether the verdict was unanimous or that of a majority is permitted in the case of verdicts of acquittal.

At the time of the adoption of majority verdicts, the general perception of the English Judges was that the incidence of perverse verdicts was negligible. (See "The Jury System" [1967] NZLJ 132 at 133.) This evaluation would now appear to be supported by the general figure of 4% of trials resulting in hung juries.

While there may be genuine reasons for advocating majority verdicts there is nevertheless a danger that some calls to abolish the unanimity rule in order, ostensibly, to eliminate jury nobbling, may simply disguise a pragmatic desire to make convictions easier to achieve.[4]

Conclusion

While there is, no doubt, a certain instrumental value in the presumed ability of majority verdicts to obviate costly retrials, the adoption of such a system must ultimately compromise the procedural protections currently afforded criminal defendants. In particular the presumption of innocence must be given less real weight that it is allowed when unanimity is required.

While hopefully, the actual instances of procedural injustice would prove to be a rare occurrence under such a system, the danger would always remain that an innocent person may be convicted because the dissentients were right.

In New Zealand there is no

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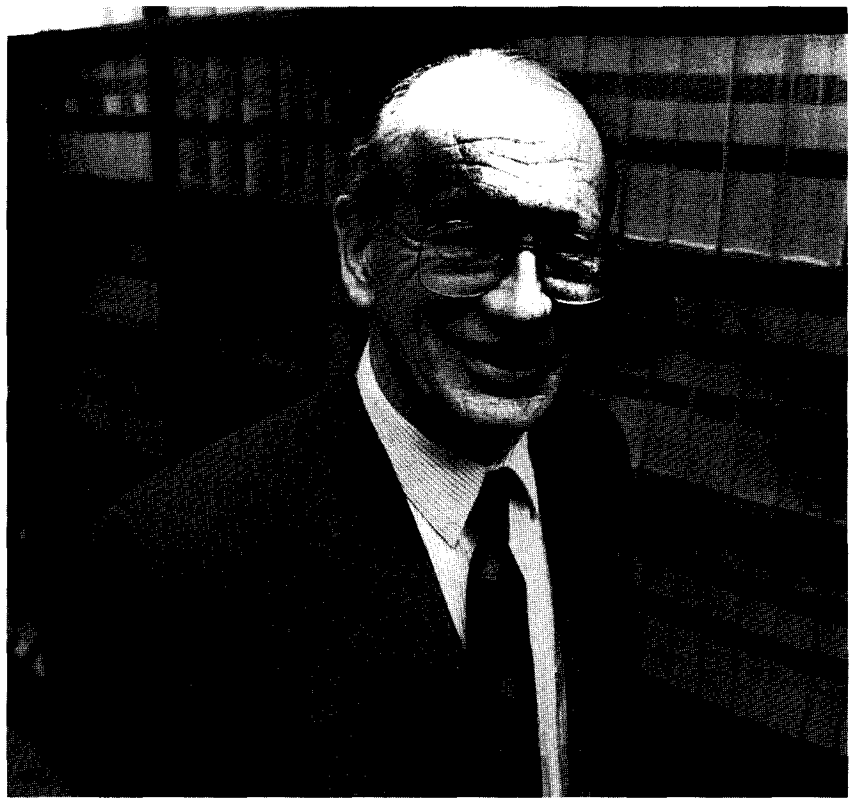
Judicial appointment

Mr Justice McKay



At the end of May the Attorney-General announced the appointment of Mr I L McKay to be a Judge of the Court of Appeal. The new Judge was due to be sworn in on Monday 10 June 1991.

Mr McKay was born in Waipawa in 1929. He is a graduate of Victoria University of Wellington. He has practised in Wellington in a wide variety of areas of the law. He has appeared before the Privy Council and more recently has been very involved in commercial activities being on the board of a number of companies. At the time of his appointment he was the senior partner in the law firm of Kensington Swan practising in Wellington.

The new Judge has taken an active part in Law Society affairs. After serving on the Council he became President of the Wellington District Law Society in 1972. He was a Vice-President of the New Zealand Law Society from 1979 to 1982. He has served on numerous Law Society committees and was convenor of the committee which prepared the Law Society's submissions in respect of the Review of the Companies Act in 1968 and thereafter.

Among his other roles His Honour has been a member of the Council of Law Reporting in the 1970s and served on several Law Reform bodies. He was chairman of the Torts and General Law Reform Committee from 1971 to 1983, the Committee on the Law of Defamation from 1975 to 1979 and the Committee on the Law of Evidence from 1982 to 1987.

His Honour has taken an active interest in the field of arbitration and is a Fellow of the Chartered Institute of Arbitrators and of the Arbitrators Institute of New Zealand. He is on the panel of the Australian Centre for International Commercial Arbitration and of the Hong Kong International Arbitration Centre. His international activities include his being a Fellow of the International Academy of Trial Lawyers, an honorary member of the American Bar Association and a member of the International Bar Association. He has taken an active interest in professional disciplinary matters being chairman of the New Zealand Society of Accountants Disciplinary Appeal Tribunal in 1977 to 1978, and also chairman of the Disciplinary Committee of the Research Based Medicines Association.

The appointment of the new Judge directly to the Court of Appeal follows a precedent established in 1958 with the appointment in that year of Mr Justice Cleary. All other appointments since that time have been from the existing High Court Bench. As was stated by the Attorney-General in making his announcement this appointment recognised His Honour's outstanding qualities as a lawyer and the fact that he had been regarded for many years as one of New Zealand's leading barristers.

The new Judge is married and has six children. He has been active in local school affairs. He is certainly very well known in Wellington for the great interest he has taken in highland pipe bands and is a piper himself. □

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empirical research to suggest that our criminal justice system is burdened with an inordinate number of hung juries. Neither is there evidence that jury interference is a significant problem. In these circumstances there seems to be little justification for seriously considering the adoption of majority verdicts. □

1 Arguably, a requirement for unanimity is implied in s 374(5) of the Crimes Act 1961, which deals with the procedure when one or more jurors have been discharged, the phrase ". . . their verdict shall have the same effect as the *verdict of the whole number*", would seem to imply unanimity in the remnant of non-discharged jurors.

2 Napley, supra, [1967] NZLJ 132 at 133. In England, a consequence of the innovations effected by the Criminal Justice Act 1967, is that the verdict may now be that of a majority of ten out of eleven or twelve jurors, or nine out of ten. However, the operation of these provisions has not been uncontroversial, on the grounds, inter alia, that majority verdicts violate the sanctity of the jury room. See Brett J "Statistics and Majority Verdicts" (1968) 118 NLJ 787. See also *R v Pigg* [1983] Crim LR 177; *R v Wright* [1974] Crim LR 324. See further, "Majority Verdicts – But Unanimity Still", (1968) 118 NLJ 338.

3 Ibid.

4 Molomby notes that the Police Association in England, not satisfied with a majority of ten to two, suggested some years ago that a majority of eight to four would be sufficient. See [1989] 13 Crim LJ 158 at 159.

The Wills Act formalities: A need for reform

By Rosemary Tobin, Lecturer in Law, University of Auckland

Wills speak from beyond the grave. It is for this reason that the legal requirements of due execution have been so stringent. In any other situation the intention of a declarant can be stated subsequently by him or her. Even Parliament can oveturn a Court decision interpreting a statute by passing another statute to state more explicitly what its original intention was, or is now pretended to have been. But obviously, testamentary instruments are different. In this article Rosemary Tobin questions the rigidity of the rules as applied in New Zealand and discusses the situation now in some Australian States. She argues in favour of reform along the lines of the Australian situation, and indeed suggests it should go further to require only the civil standard of proof on the balance of probabilities.

From time to time the Courts are asked to consider whether a will, which has not been executed in accordance with the requirements of s 9 of the Wills Act 1837(UK) and s 1 of the Wills Act Amendment Act 1852(UK) (both in force in New Zealand), should be admitted to probate. Such an example came recently before the Supreme Court of South Australia in *In the Estate of Pantelej Slavinskyj* (1988) 53 SASR 221. Ignoring for the purposes of this discussion any questions as to domicile or jurisdiction, the facts of the case were as follows: The testator was a Ukrainian although he had lived in Australia for many years. He became ill, and about 10 days before he died he asked two close friends to come to his home to witness his will. He stated he was going into hospital and wanted to leave his estate to his nieces in the Soviet Union. In their presence he wrote, in pencil, in Russian, on one of the interior walls of his home some writing he referred to as his will. The name and address of one of his nieces was written on the wall, and an envelope bearing the name and the address of another was inserted in a crack in the wall alongside the writing made in the presence of the two witnesses. One of the witnesses appended his signature; the other who could neither read nor write in English or Ukrainian refused to sign although requested to do so. The South Australian Court, being satisfied that the writing represented the testamentary intentions of the author, made a grant of letters of administration with the will annexed.

Such an order could not have been made by a New Zealand Court. Unless a will has been executed with the requisite formalities it cannot be admitted to probate in New Zealand. That is, in the above case our Court would have had no option but to pronounce against the validity of the will, and Mr Slavinskyj would have died intestate. Why should this be so? While the medium upon which the will was subscribed was certainly unorthodox, Mr Slavinskyj had attempted to comply with the formalities by arranging for the presence of two witnesses. There would seem no reason why a New Zealand Court should not have some power to dispense with the formalities when a witness, after observing the testator append his signature to a will, subsequently refuses to sign the document as a witness. Certain jurisdictions have recognised the injustice of allowing this to happen and have enacted legislation to ameliorate the harsh effects of a strict adherence to the Wills Act formalities. This note considers the effect of the relaxation of the formal requirements by examining some of the recent decision in the Australian states, and in accordance with the spirit of CER suggests that we follow the lead given by them and enact an amendment similar to that of s 12(2) of the Wills Act of South Australia.

The formalities

It is apposite at this point to consider the formal requirements themselves. The effect of s 9 means that:

(1) A will must be signed by its maker, or by some other person at the direction of its maker, at the end thereof.
(2) That signature must be made or acknowledged by the maker in the presence of at least two disinterested witnesses present at the same time.
(3) The witnesses must attest and subscribe the will in the presence of its maker but no form of attestation is necessary.

Before 1837 a testator was able to dispose of personalty without the necessity of attestation, indeed even the requirement as to signature could be dispensed with in certain circumstances. So why then were the formal requirements imposed? The problem relates to the nature of the document concerned. By the time it is before the Court the testator is no longer available for questioning so the formalities are intended to ensure that the document is genuine and represents the testamentary wishes of its maker. Professor Langbein notes that there are four primary functions of the formalities: evidentiary, channelling, cautionary and protective! The argument runs that by imposing the formal requirements a testator is

required to carefully consider the effect of the dispositions made, thus decreasing the chances of a careless and ill considered gift. As the witnesses who attest the will must be disinterested any possibility of fraud, forgery or coercion is lessened. Put briefly the result is intended to achieve evidence of both certainty of testamentary intent and the specific terms of the will. The end result should be a testamentary document wherein the wise and just testator has carefully considered both the size of his estate, and those who should be the objects of his bounty, and effected distribution accordingly.

In fact in many of the cases where the Courts have pronounced against the validity of the will the testator has done just that. The difficulties that have arisen have done so because the Wills Act does not allow the Courts to relax the formal requirements when the reason for their existence is unquestionably satisfied, but they themselves have not been complied with by the testator. The effect of this rigid application of the formalities has, as a result, often completely defeated the expressed testamentary intentions of the testator.[2] How have the Australian states attempted to resolve this?

None of the Australian states have actually revoked s 9 or its equivalent. Rather they have enacted a provision which allows the Court to dispense with strict compliance of the formalities where the document or writing before the Court meets certain conditions. The most radical provision, and the one enacted first in 1975, is to be found in the Wills Act of South Australia. Legislation modelled on this was enacted in Northern Territory in 1984, Western Australia in 1987 and New South Wales in 1988. Queensland however opted for a less dramatic solution in 1981.

The South Australian solution

Section 12(2) of the Wills Act 1936(SA) is as follows:

> A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for the admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.

Thus before the section can become operative the following criteria must be met:

(a) there must be a document which purports to embody testamentary intentions.
(b) That document will not have been executed with the necessary formalities.
(c) The Court must be satisifed there is no reasonable doubt that the deceased intended that document to be his will.

Once these requirements have been met the Court can admit the document to probate. The primary thrust of the dispensing power is directed towards testamentary intention.

In the Estate of Graham (1978) 20 SASR 198 was the first case to be decided under the new legislation. It is proposed to briefly look at this case before considering the categories into which the cases decided under the provision fall. There was nothing on the face of the document in Graham to suggest that it had been executed otherwise than in accordance with the Act, but evidence was placed before the Court to show that the deceased had signed the document and then had handed it to her nephew telling him to "get it witnessed", but they in turn had not signed the document in the presence of the testatrix. The Court had been asked to read down the plain and ordinary meaning of the section, because to allow it, so counsel argued, would revive the very problems that s 9 was designed to overcome. This was something the Judge was not prepared to do. Jacobs J said:

> [S]12(2) is remedial in intent, that is to say, that its purpose is to avoid the hardship and injustice which has so often arisen from a strict application of the formal requirements of a valid will, as dictated by s [9] of the Act.

All of the evidence available to the Court in this instance pointed towards the deceased regarding the document as her will. Probate was granted.

Nor was the Judge prepared to accept that before the section could apply there had to be some attempt at compliance with the formalities. However the Judge pointed out that inherent in the section itself was a deterrence against its abuse. The standard of proof was not the civil standard of balance of probabilities but a higher standard; the Court was required to be satisfied that no reasonable doubt existed that the deceased intended the document to be her will. Morever:—

> It seems to me that in most cases, the greater the departure from the requirements of formal validity dictated by s[9], that is to say, to the extent that those requirements have not been, or do not appear to have been observed, the harder will it be for the Court to reach the required standard of satisfaction.

These words have been borne out by the cases which followed. It has however been clear that where the evidence before the Court has pointed overwhelmingly towards testamentary intent, probate has been granted notwithstanding what has been, in some cases, very little attempt to comply with the formal requirements.

There are three broad categories into which a breach of the formalities may fall. The first, and most obvious category of case, arises where a testator or testatrix omits to sign their name at the foot or end of the document. The cases show that this has arisen (a) either because two wills are being executed at the same time and the wrong document is signed and witnessed, or (b) due to inadvertence on the will maker's part the document is not signed at all. In *Graham* Jacobs J had also expressed the view that before the section could be invoked there had to be a signature on the document. These words were obiter, as White J in *In the Estate of Blakely* (1983) 32 SASR 473 pointed out. In *Blakely* His Honour was concerned with mirror wills prepared by a solicitor, and executed by a husband and wife. The husband signed the wife's will and the wife signed the husband's will. The mistake was not discovered until after the husband's death.

White J pointed out that there were two aspects of execution – execution by the testator and execution by the witnesses. Here all the evidence available confirmed that the husband intended the document to constitute his will. That being the case "there does not seem to be any reason in logic why the husband's signature on the wife's will should not be notionally transposed to his will and deemed to be his signature thereon." Thus in a pragmatic way, and with the assistance of s 12(2), White J overcame the difficulties faced by the Court in cases such as *Re Foster* [1956] NZLR 44.

The matter came before the Full Court in *In the Estate of Williams* (1984) 36 SASR 423. The facts of the case are as follows: the testatrix and her husband were going on a trip, and because there was no time to have their wills professionally prepared they decided to draft their own. After doing this they made arrangements for two neighbours to come over and act as witnesses. All four persons met, and sat down around a table. The husband's will was properly executed, but inadvertently the testatrix omitted to sign her will although both witnesses appended their signatures. Affidavits from the two witnesses confirmed that the deceased had intended the document they had signed to be her will. Her son also filed an affidavit confirming that his parents had told him that they had made their wills, and had asked him to read them. He too failed to notice the omission of his mother's signature from her will. The wills had both been kept in an envelope which had been labelled "wills" by the testatrix.

King CJ in a brief judgment found himself unable to agree with the contention that the words "has not been executed with the formalities required by this Act" meant that there had to be a signature to the document. He pointed out that signature and execution were not synonymous:

> Execution is the validation of a document by going through the formalities required by law for that purpose. The notion of execution of a will other than in accordance with the formalities prescribed by s [9], is therefore a self-contradictory notion. It follows that the saving effect of s 12 is only required and is only operative when the will has not been executed. Signature is simply one of the formalities required by the Act for valid execution. There is no reason, as a matter of construction or logic, to differentiate between signature and any of the other formalities for execution required by s [9].

Legoe J delivered a more extensive opinion. Confirming the remedial aspect of the section he continued:

> [s 12(2)] contains its own criteria for its application, namely a document that (a) embodies testamentary intentions, and which (b) has not been executed with the formalities required by the Act, and which (c) the Court is satisfied is a document in respect of which there can be no reasonable doubt that the deceased intended the document to constitute a will. In my judgment equal stress should be placed on all these criteria. If this approach is adopted then the document itself, the circumstances regarding its contents (including such marks, signatures or other components as may be proved to be done or made contemporaneously with the document) and all other relevant material establishing the testator's intention in relation to that document, can be taken into account for the purpose of applying s 12(2).

The same rational was applied in *In the Estate of Hollis* (1984) 37 SASR 27 where the testator, after signing his name at the foot of the first three pages of a four-page will, neglected to sign at the foot or end of the fourth page. The attesting witnesses signed on all four pages. The will was admitted to probate, testamentary intent having been established.[3] This approach is to be welcomed, and is in accord with the remedial thrust of the legislation. Once it is acknowledged that the signature of the testator is but a part of the execution of a document; that is, that it is only one of the formalities to be observed, then it is illogical to argue that it alone cannot be saved by s 12(2). The approach is also in conformity with other sections of the Wills Act 1832 which do allow for nuncupative, or informal, wills in the case of privileged persons.

The second category of case relates to the requirement that the attesting witnesses either observe the testator sign the will or have the signature acknowledged to them. *Graham's* case was in this category.[4] Provided the Court has been satisfied that the document does represent the deceased's testamentary intentions the failure of witnesses to observe the testator sign the will has not been permitted to prove fatal to it.

The third category of case is closely linked with the second. In this category the number of persons who subscribe as witnesses is insufficient; in several of the reported cases there have been none at all. In *In the Estate of Clayton* (1982) 31 SASR 153 "a man who had not much formal education" filled in and signed a printed will form which bore full instructions for attestation. Nonetheless the document was not witnessed, although there was some evidence, apart from the instructions on the will form, to suggest that the testator was aware of that requirement. The Judge referred to the absence of witnesses, and appeared to accept the lack of formal education as an excuse for the testator's failure to attempt to comply with the formalities. The document was admitted to probate the required level of satisfaction being attained. Mitchell J did however say:

> I wish to add only that in applications under s 12(2) each case must be considered upon its own facts. The mere production of a document in the handwriting of a deceased person and with his signature which, on the face of it, purports to be a will but which is not witnessed, is unlikely in most cases to lead to probate of that document.

However in a later case no excuse at all was offered for the absence of witnesses; the testator simply did not want to be bothered with getting the document witnessed. Nonetheless the necessary order was made admitting the document to probate.[5] Thus while it is clear that each case is decided on its facts the cases demonstrate that, provided the document is supported by affidavit

evidence which demonstrates testamentary intent, it will be admitted to probate.

In the light of these cases it should come as no surprise to find that the same principles are applied to unwitnessed alterations and additions made to a duly attested will.[6] Provided the evidence put before the Court satisfies the Judge that the deceased person intended the alterations to have testamentary effect the document, including the alterations and/or additions, will be admitted to probate. There are moreover indications that the Courts of Western Australia are following a similiar path. *In the Estate of Crossley* [1989] WAR 227 dealt with a signed but unwitnessed will made by an "astute businessman". He made no attempt to have the will properly witnessed although the Court found that he knew of the formal requirements. Nicholson J found no distinction of substance between the statutory provisions in the two states. He noted that "attempted or substantial compliance was not a precondition to successful operation of the South Australian provision", and finding himself satisfied as to testamentary intent ordered the will be admitted to probate.

Two further reported cases which involved the suicide of the two respective testators are of interest. Both involved unsigned, unwitnessed wills and in each case the will was admitted to probate. The first of these was *In the Estate of Richardson* (1986) 40 SASR 594 where the testator left a suicide note in a car which included the statement "I have left a will with this". The document in question was a single handwritten sheet, in pencil, headed "To whom it may concern" and followed by the words "Last will and testament". Then followed certain dispositive clauses the final clause being "Any money left over to be given to mum". There were no testimonium or attestation clauses, and the document had not been signed or witnessed. The Judge looked at the sequence of events, and found the only inference open to him was that the deceased, "decided to terminate his life and in connection with that decision and in anticipation of carrying out that decision the deceased wrote the document" referred to. The Judge made the order requested. As it happened the only person who would have been disadvantaged by the grant (the testator's mother) was the applicant.

In the Estate of Vauk (1986) 41 SASR 242, an application for directions, went even further, and probably represents the high water mark of the South Australian decisions. Here the testator had duly executed a will in 1971. This was found after his death with substantial alterations made in pencil none of which had been executed with the necessary formalities. Evidence was adduced to show that the deceased, three or four days before he died, had instructed the Public Trustee to draw up a will in accordance with the pencilled alterations. Although this had been done the testator had committed suicide before the time arranged to execute the document. When the deceased's body was found, underneath it was a barely legible piece of paper which referred to the instructions given to the Public Trustee. The question for the Court was which document, if any, should be admitted to probate. Legoe J applied the principles now elucidated by the Courts, and decided that, while the deceased may have been in a disturbed state of mind, all of the evidence pointed towards the draft will held by the Public Trustee as expressing his testamentary intent: "he had in mind at the time he was in the car in the forest near Lenswood, the will which he had instructed the Public Trustee to prepare." The Judge accordingly refused probate of the 1971 will, and directed that an application should be made to admit the draft will to probate under s 12(2).

In *Richardson* at least the document had been in the deceased's handwriting; in *Vauk* the document was a draft will which the deceased had not even seen. Only the very special facts, supported by the tight time frame involved in the latter case, could allow the Court to admit the document under s 12(2). Even so it must be questioned whether this decision did not go too far. It would seem unlikely that the legislature ever envisioned that s 12(2) would be applied to a document that had not been sighted and approved by its author. Certainly its is possible that some disquiet was felt by the Judge who in noting that the Public Trustee had written down the testator's instructions, commented on the desirability of getting such instructions signed and witnessed.[7] Conversely the decision is in accord with the judgment of the Full Court in *Williams*, and did ensure that the testamentary wishes of the testator were performed. Again the indications were that all parties disadvantaged by the decision consented to the draft will being admitted to probate.

Queensland

The South Australian approach may be contrasted with that of Queensland where the legislature adopted a different solution to the problem; that of substantial compliance. Where there is any question about the validity of a will in Queensland the Court must be satisfied that the document in question has been executed in "substantial compliance" with the formalities before it can be admitted to probate. Section 9(a) of the Succession Act 1891-1983 (Qd) is as follows:

> The Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator.

In applying the section the Courts have had to decide the meaning of the words "substantial compliance". There was a possibility that even with the difference in wording between the two pieces of legislation the interpretation of these words could have led to similiar results. This has not turned out to be the case.

In *Re Grosert* [1985] 1 Qd R 513 Vasta J declined to grant probate of the will in question. As in *Graham* the will at first sight appeared to have been validly executed. Again as in *Graham* the evidence before the Court proved otherwise. Although one of the witnesses had signed in the presence of the testator, she had not seen the testator sign the will although she believed that he had signed the document that day. Moreover she was unaware of the identity of the other witness or the time and place when that witness

subscribed their signature to the document. Vasta J commented:

> The material before me indicates that the signature of the testator was not subscribed in the presence of two witnesses which is a requirement provided for by s 9. The material further shows that it is unclear as to whether the signature of the testator was placed in the presence of either one of the witnesses. In those circumstances, there has been a lack of compliance with what I would regard as a most important provision of the section. It is difficult therefore to say that in those circumstances, there has been substantial compliance with the formalities prescribed by the section. It is true that there can be no doubt that the instrument expresses the testamentary intention of the testator, but the view I take is that unless there is substantial compliance, the satisfaction in the Court of the testator's testamentary intention becomes irrelevant.

This is in stark contrast to the South Australian approach. The decision was followed by *Re Johnston* [1985] 1 Qd R 516. Once again the testatrix did not sign the document in the presence of the witnesses, indeed it appeared that her signature was not there when the first witness signed the document. Instead of the single occasion envisaged by the formal requirements there were in fact three separate occasions when execution and attestation took place. Thomas J pointed out that two criteria had to be met to allow the Court to grant probate:

(a) substantial compliance with the prescribed formalities, and
(b) satisfaction that the document expresses the testamentary intentions of its maker.

He acknowledged that the powers given to the Courts "were obviously designed to reduce the excessive formality which the Court decisions had helped to create" and continued:

> The alteration to the law effected by s 9 was obviously to enable the rigid attitudes that had been developed by the Courts to be departed from. It would be unfortunate if Courts, by a series of decisions, returned to the old rigid attitudes, and I would expect a liberal approach be taken in applying the "substantial compliance" provisions.

Nonetheless he felt that a limit had to be placed on what could amount to substantial compliance. In his opinion that limit had been exceeded in the instant case which revealed "substantial departures from even the basic formal requirements". Where the Courts in South Australia have placed the emphasis on the testamentary intentions of the maker of the document, these two cases indicate that a Court in Queensland will look first at any compliance with the formalities. Substantial compliance is viewed as a prerequisite to consideration of testamentary intent. If there is no substantial compliance then the dispensing power of the Court will not be invoked irrespective of a proved testamentary intent. It is certainly open to argument in both of the above cases that a liberal approach was not adopted by the Courts. Professor Langbein, when discussing the doctrine of substantial compliance, pointed out that it was intended to permit the proponents in cases of any defective execution to prove the existence of testamentary intent and the fulfilment of the Wills Act purposes.[8] That is, once testamentary intent was established, an applicant would then need to demonstrate that the defect was harmless, and that the protective, cautionary, evidentiary and channelling functions of the formalities had not been impaired.

In a later case the applicant was more successful. In *Re Mathews* [1989] 1 Qd R 300 the will under consideration had been made by the testator the day before he died, when he was very ill but still had testamentary capacity. That day he had sent a friend to purchase a will form because he wanted to alter his will. Upon receipt of the form the testator wrote out his will and signed the document in the presence of one witness who also signed the document. As he was feeling tired he asked the witness to take the document to another friend so that he too could witness the will. Had there been substantial compliance? Carter J referred to the decided cases under the section and agreed with the sentiments of Thomas J cited above. Declaring that there had been substantial compliance he said:

> On the occasion in question the testator was obviously intent on expressing his testamentary intentions. At that time only one witness was available. He was aware of the statutory requirement for two witnesses but at the time he was intent upon making the will he had only one to call upon. It would in my view be unduly harsh to insist unduly on rigid formalities to deny efficacy to a testator's expressed testamentary intention merely because he had only one witness available and not two. One can readily perceive of circumstances in which, on account of geographical isolation or because of some other circumstance only one witness is available at a time when it is of central importance to a testator to express his testamentary wishes; perhaps he is suddenly afflicted with an illness and fears an untimely death. Perhaps other circumstances reasonably require of him that he make his will but he has one witness available. This is only to say again that each case will depend on its own facts and that the question whether there is in the circumstances substantial compliance will remain a matter of degree.

This approach is to be preferred and follows more closely the doctrine espoused by Professor Langbein. The testator had made an attempt to comply with the formalities. Given the circumstances he had done the best he could do with what was available to him at the time. It is indeed unduly harsh to think that no relief could be afforded to such a testator in New Zealand.

Conclusion

The position in which the testator in *Mathews* found himself encapsulates the reason for permitting the Courts to dispense with the formal requirements and points to the need for reform in New Zealand. While the relief afforded applicants under the South Australian legislation is greater than that offered by its Queensland counterpart, if and when reform is

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Opening of Law School, Waikato University

On 3 May 1991 the new Law School at Waikato University was officially opened by the Governor-General Dame Catherine Tizard. The beginning of a fifth law school in New Zealand is a significant development in the legal history of the country. The speeches and addresses at the opening ceremony are published for the information of the profession and as an acknowledgment of the importance of the event. There is a certain significance that some might read into the occasion in that three of the speakers, the first Dean, the Chief District Court Judge, and the Governor-General are all women. An editorial comment on the proposal for a Waikato Law School was published at [1988] NZLJ 101.

Speech by K H Haggie, Kaumatua consultant to Law School.

E te Kawana Tianara
E te Tumuaki o te Whare Wananga
E nga rangatira e tau nei
Tena koutou

As the kaumatua to the Law School I want to stress the importance of the establishment of this School for the development of education opportunities offered by this University to the people of our region.

This Law School is intended to be somewhat different from traditional law schools. Waikato does not only want to produce lawyers in the narrow sense of the term, but also graduates who have a broad grounding in law and legal systems.

The basic philosophy of the School is to bring together three major streams of study, namely, international law, domestic law and Maori case law within a comparative context.

Given the acknowledgment by Government that the Treaty of Waitangi is our founding document, it is imperative that long-standing Maori grievances are resolved. We believe that this Law School will have a major role to play in helping the nation bring these issues to fruition. Thus, for our people, this Law School has been given a three-fold task and challenge.

Firstly, to provide Maori students with the opportunity to graduate in law.

Secondly, to ensure that the curriculum reflects how the law can take into account the rights of Maori to their land and culture.

Thirdly, to undertake research to ensure legal recognition of Maori lore/law, culture and rights.

We realise that this is a challenging task that will require the development of mutual support and co-operation between the School and the iwi of the region.

From the outset, Maori students comprise a significant group within the School. In Law I, 18.5% of the students identified themselves as Maori. In Law II, 17.4% identified themselves as Maori. Given that the only criteria for entry was based on academic performance, this is indeed encouraging both for us as parents, and for the community at large.

Finally, it is only fitting that as tangata whenua Tainui should provide the lead in registering their support and we trust that the wider community will also be able to contribute likewise.

No reira, tena koutou, tena koutou, tena koutou.

Remarks made by the Vice-Chancellor, Professor Wilf Malcolm

Kia whakahonoretia Te Ariki Nui, a Te Atairangikaahu, ki tona whanau, ki te kahui ariki hoki.
E nga manu, e nga tapu, e nga wehi, e nga ihi o nga mata a waka o te motu nei.
Tena koutou, tena koutou, tena tatou katoa.

Your Excellency, Dame Catherine, Dame Silvia, honoured and welcome guests and colleagues.

The Chancellor of the University, Mrs Joy Drayton, joins with me in welcoming you to the University. We are delighted to share with you in this occasion marking the formal opening of the University of Waikato Law School.

We have already had two public occasions associated with the establishment of the Law School.

The first was in October 1989 when the then Deputy Prime Minister, Ms Helen Clark, announced

Government's approval of the School, together with the provision of a special grant to meet the initial costs of its establishment, especially those involved in setting up the essential Law Library.

The second was in February of this year when in a special ceremony Te Arikinui, Dame Te Atairangikaahu, gifted the name Te Piringa to the Law School and its building.

On both those occasions I acknowledged publicly my gratitude and that of the University to a number of men and women who had played key roles within the University and more widely in developing the plans leading to the establishment of the Law School.

On this occasion, held when the Law School is now actually established, with students enrolled and a first term of classes nearly completed, I want to pay public tribute to Professor Margaret Wilson, the foundation Dean of the School, for the remarkable skills of leadership she has shown in bringing the school to life.

It is not yet a year since she took up her appointment.

At that time this courtyard and buildings were stones and car parks. Degree programmes have been developed and approved, staff have been appointed, buildings have been constructed, a library is being established, students have been enrolled, teaching programmes have been initiated and many diverse and varied groups and communities have been informed of the Law School and its intentions.

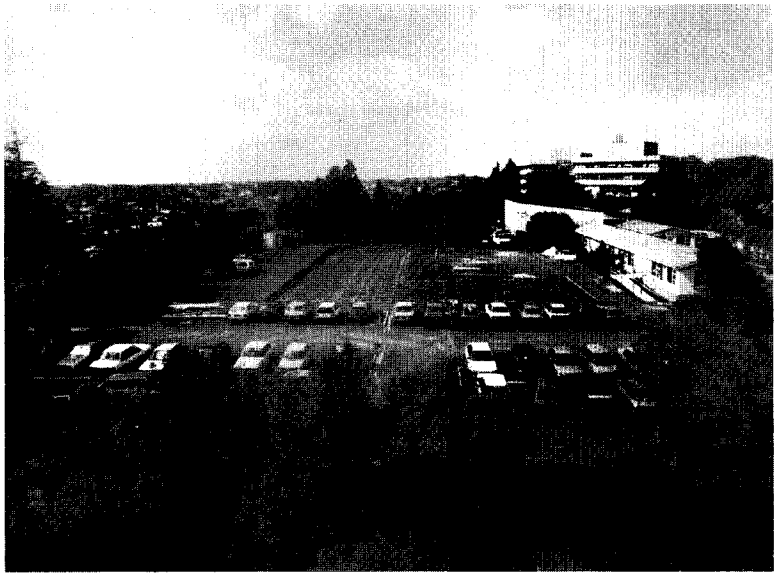
Yes, Margaret would insist that what has been accomplished is the outcome of the work of many people, including in increasing measure the staff of the Law School.

Yes, of course this is right, but it is her qualities of leadership, academically and administratively, together with a fearsome capacity for hard work, that have brought inspiration and accomplishment through these critical and turbulent months.

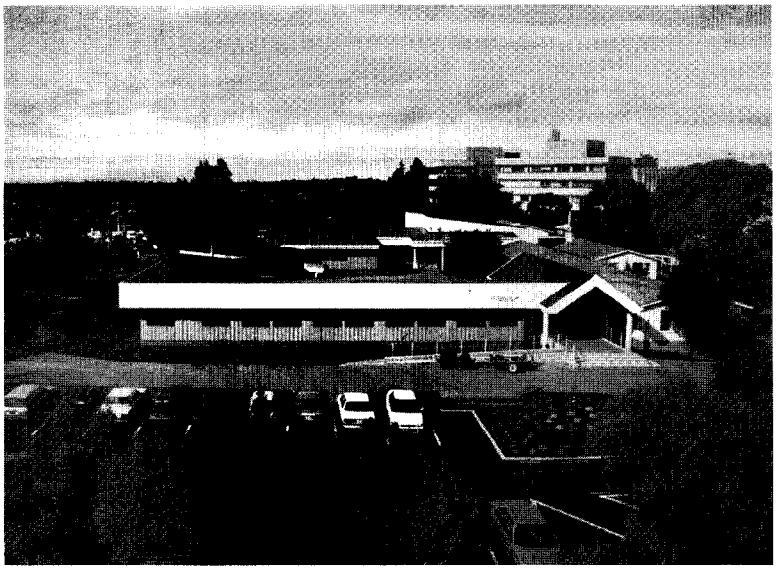
And turbulence there has been in the progress of the Law School to this formal opening.

I can only comment with sadness on the action of the Government last December in withdrawing the special grant needed to establish the School.

Sadness in the first instance because the decision put in jeopardy the establishment of the School.



Site of Law School, October 1990



Law School buildings, April 1991

The courage and resolve of the Law School staff under the leadership of their Dean, the commitment of the wider University and the willingness to shift for the short term much needed resources from other areas has allowed the School to continue.

And continue now it will, and prosper academically despite adversity.

But the critical resource is the Law Library and we cannot fund that from our present resources. We are establishing a University of Waikato foundation through which we will be seeking funding support for the School and its library, from a variety of groups and agencies.

Tainui support

At this time, too, I want to express my thanks and that of the University to Te Arikinui, Dame Te Atairangikaahu, Mr Puke and the Tainui Trust Board and the Tainui people for the most generous gift they have given this morning towards the establishment of the Law School library.

Right from the time of its planning for the School the Tainui people through the Trust Board have stood strong with the University in the developments. Their support at the end of last year when the future of the School was called into question was most appreciated and their gift today is confirmation of their commitment to its continuance.

But, if possible, I have a deeper sadness as an outcome to the government's December decision.

The case for the Waikato Law School was begun afresh in 1987 — previous approaches had been made without success.

Through 1988 and 1989 the case was developed and approved within the University. It was submitted to the University Grants Committee, the body then responsible for advising Government on University developments. The University Grants Committee sought guidance from the Council of Legal Education (and I acknowledge with pleasure the presence today of Sir Ivor Richardson, the chairperson of that Council). The Council subjected the proposal to a most searching scrutiny, guided the University to a better understanding of its intentions and advised the University Grants Committee of its support for a Law School development at Waikato. Guided by that advice the University Grants Committee came to its own decision to recommend approval to Government.

Establishment funding grant

Government, through the due process of Cabinet approval, agreed to the establishment of the School and to the special setting up grant to be paid over a period of four years.

That grant began to be paid from 1 July 1990, the start of the new financial year following the Cabinet decision. In December the Government unilaterally announced its withdrawal from the agreement.

How can a government govern if it fails to honour its own agreements properly and legitimately established?

Yes, it was a different party in government. But the integrity of government action requires a continuity of contractual relationship independent of a change of party in government or of an individual person as minister. Without such continuity of contractual agreement the integrity of the Crown becomes a mockery. Without such integrity the action of government becomes the exercise of arbitrary power.

If unchallenged and unchecked such actions will lead to a wide collapse of faith and confidence in good government.

The December decision was no doubt a small matter for government although large in consequence for the University and Law School. But in terms of integrity and moral value the issue is also a large one for government. And so I yet hope that government will reflect on these deeper issues in its decision and seek accommodation with the University in the matter.

Replies to criticism

We have been criticised as a university on at least two counts for the establishment of this Law School.

First, it is said why open a new Law School when some law graduates are finding it difficult to obtain positions within established law practices at the present time.

The lesser answer to that criticism is that the demand for law graduates from the traditional law practices responds to relatively short-term changes in the economy. Just a few years back when we first prepared our proposal, demand for law graduates exceeded supply. If and when the economy improves, no doubt that situation will return. But universities must plan and function within a longer term cycle. In passing it is interesting to note that this year the other New Zealand law schools have significantly expanded their intakes. I have not seen criticism of their actions in so doing.

But the more important answer to the criticism lies in the broadening nature of legal education and the high level of demand for that education.

A major point made by the Council of Legal Education in its advice concerning the development of the Law School was that a law degree has become not only a qualification leading to a traditional professional career in law, but also and importantly, provides a very valuable general education serving as a base for a growing breadth of career opportunities.

When one couples this recognition of the general educational value of a law degree with the high level of demand for access to law schools (over 1000 applications for the 350 available places this year here at Waikato) not to mention the value of law as a discipline to the wider academic and intellectual life of the University, one begins to see the strength of the arguments that led to the establishment of this Waikato Law School.

Sadly, in its reflection on aspects of New Zealand society we have been criticised for seeking to provide a large place for the concerns and values of Maori people in the life of the new School.

And yet I am glad of the criticism if only for the fact that it is based on a correct recognition of our firm intentions. Consistent with the character of the University itself, consistent with the nature of the region of which we are a part in which the four great Maori tribal confederations of Tainui, of Arawa, of Matatua and of Tairawhiti flourish, consistent with the need to build partnership between our various peoples in the development of a specifically New Zealand jurisprudence, we intend and welcome a large Maori presence in the development of the Law School.

This will not be easy. It will require dedication and commitment from us all, including Maoridom, for the vision we have is large and the standards for fulfilment high. No doubt there will be tension in the life of the School itself in working out over time this commitment. For the Law School is not apart from the society within which the legal systems which it studies function, but is itself a small part of that society and so will face the same challenges that we all face to give full expression to bicultural and multicultural values and perspectives.

It will be the character of the Maori participation in this Law School, reflecting what we would seek at best for our wider New Zealand society, that will be a strength of this Law School in the years to come and will be a rich part of its scholarly and professional reputation in the national and international communities.

Your Excellency, honoured guests, I pray that this Law School will go from strength to strength. May coming generations of students and scholars have cause to look back with gratitude to those who have the high responsibility of shaping its traditions in these foundation years.

Aku mihi ki a tatou katoa.

Speech by Russell Karu, student representative

Cultural heritage, as handed down by our Tupuna, dictates a holistic and esoteric approach to the content of my speech. It is for this reason that I begin with Te Matahauariki, which is the horizon, the meeting place of the earth and the sky. It represents to me two streams of thought, ideals, and beliefs, Maori and Pakeha, thus fulfilling the true meaning of bi-culturalism.

Te Matahauariki is the principle by which the Waikato School of Law is guided. Therefore, the creation of this Law School is a reaffirmation, practical expression, and professional extension of our university's commitment to bi-culturalism.

This is the physical venue in which those ideals that I see personified and perpetuated in the Treaty of Waitangi can be explored and realised. I see this Law School fulfilling my dreams of empowerment for my people, and, more importantly, of partnership. This is the first objective of our Law School.

The second objective is law in context. This means to me, the recognising of a social, political, and cultural diversity within a community. It is logical, therefore, that these qualities have come to be reflected not only in the aims and objectives of the Law School, but also in the content of what is taught, and in the student body, and thus meet the demands of the community as a whole.

Concluding summary of *Te Matahauariki* (February, 1988)

In preparing this report, we have consulted widely, undertaken a significant amount of research, and grappled with a wide variety of issues and ideas.

We have found an increasing, accelerating demand for law graduates by the community, and by the legal profession. Side by side with this growing demand, there has been a perceptible slowing in the rate of production of law graduates.

We have found that where the demand has increased most dramatically, in the northern half of the North Island, the growth in number of graduates has been at its lowest. The gap between unmet need and diminished supply is at its greatest north of Taupo.

We have found within the University of Waikato region a huge increase in the number of students wishing to study law. In this same region we find a legal profession struggling to recruit graduates.

It seems to me that in reflecting the pursuit of knowledge within a non-threatening environment of challenge, and emphasising the equality of opportunity, the resulting effect can only be one of excellence and the uplifting of mana for all who tread this path. Such excellence can only lead to a high standard of professionalism. This is the third objective.

These aims and aspirations and our belief in and commitment to them, provide those of us who are here today, and New Zealand as a whole, with a unique opportunity.

In conclusion, therefore, and on behalf of all students, I wish to thank the University, and the staff of the Law School, for their commitment to these three key objectives.

I would like to leave you with this thought

He iti ra, he iti mapihi pounamu.

Let us not forget that even the smallest possession can be the most valuable.

Speech by Denise Harding, student representative

Your Excellency the Governor General, Te Arikinui Dame Te Atairangikaahu, Mr Haggie, Professor Malcolm (Vice-Chancellor), Dame Silvia Cartwright, and Professor Margaret Wilson, guests and students.

We, as representatives speaking here today, wish to acknowledge the diversity of students within the University of Waikato School of Law — in terms of age, ethnic background and social circumstance — not only of those students from within New Zealand, but also students from abroad.

But as a student body we are as one — we are Law Students, and we are actively committed to supporting and participating in the principles that Russell has already spoken of. It is the intention that all students, when we leave, carry on those principles in our professional lives.

We also acknowledge the hard work and dedication of all those involved in the establishment of the University of Waikato School of Law - particularly, the Vice-Chancellor (Professor Malcolm), the Dean (Professor Wilson), and all the Law Faculty Staff — some of whom have travelled great distances to be part of this Law School.

This Law School offers us, as students a unique opportunity — in pursuing the study of law in context within a framework of biculturalism. As foundation students we take pride in being here, and we are aware of the responsibility placed upon us to demonstrate the value of this new approach to legal education.

We accept that there is a challenge, and it is the intention of every student here to rise to and meet and to succeed in that challenge.

Thank you.

Speech by Professor Margaret Wilson, Dean of the Law School

Te Arikinui Dame Te Atairangikaahu,
Your Excellency, Dame Catherine Tizard,
The Rt Hon Sir Ivor Richardson,
Chief Judge Dame Silvia Cartwright,
Chancellor, Mrs Joy Drayton,
Vice-Chancellor, Professor Wilf Malcolm,
Distinguished Guests, colleagues and students.

It is my task this morning to welcome you on behalf of the Law School to the official opening of the School.

Before I undertake to address my few comments to you however, I want to acknowledge the generous gift from Tainui. It is the first financial contribution to be made to the Law School fund. It demonstrates the commitment Tainui has to the School. It is now the task of the School to justify that faith within the School. We intend to do that through the graduation of Maori graduates, undertaking research that will assist the iwi of the region to pursue their rights under the Treaty, and contributing to the debate on the development of a legal system that reflects the values and aspirations of both Maori and Pakeha cultures.

I want also to thank the Vice Chancellor for his appropriate and well chosen comments. He rightly identifies that the credibility of any system of government depends on its integrity in its dealing with people. If contracts are not honoured by successive governments, then there can be no stability or confidence in governments. Ultimately this would be to the detriment of the country as a whole. The support of the Vice Chancellor at all times has been the decisive factor in the School remaining open. We therefore publicly thank him for his courage and foresightedness.

Finally I want to acknowledge the statements by the student representatives, Denise and Russell. Through their comments we hear their expectations of the School and also the contribution they are prepared to make to the School. It is the achievements of the students that will determine the success of the School's educational programme. Today we have had a glimpse of the Waikato law graduates of the future. I think their contribution today vindicates the commitment to keep the School open.

First initiatives

It is difficult to describe the feelings that many of us have today. For some this moment has been a long time in the planning and preparation. The first initiatives to start a Law School at Waikato University began in 1964 and came from the local profession. Since that time many people have given of their time and energy to make the School a reality and I wish to thank them publicly today. Their vision and determination has enabled those of us who arrived more recently to continue their work and bring it to fruition. I want to also publicly thank the staff who have come from all parts of the world to be part of this enterprise, and who have remained steadfast in the face of considerable adversity for their contribution to the achievement of this day.

I arrived less than a year ago when there was very little of what you see as the law school today. At that time there was only myself and Don Kerr, the School administrator. We were not alone of course because we had the full assistance and cooperation of the University as a whole to assist with the task of preparing the school for opening to students at the beginning of the 1991 academic year. The ability to be able to co-operate is what distinguishes this University. It understands adversity and lack of national government support. I want formally to acknowledge the contribution of all the people who have undertaken those thousands of small but vital tasks that contribute to the success of a new initiative. Finally, my personal thanks go to those individuals who advised me on the academic development of the School. Their wisdom and guidance has made a major contribution to the intellectual life of the School.

Withdrawal of establishment funding grant

Although the task of opening the school did not seem totally impossible a year ago, it did present a challenge. Just how much of a challenge we were not to realise until the National Government removed the establishment grant funding six days before Christmas last year. This decision came after the planning for the opening of the School in March 1991 had been nearly finalised. Sixteen staff had been contracted, the regulations for the degree programmes had been drafted and approved, the buildings were nearing completion, the library had purchased over 18,000 law books, and over 1000 students had already made application to enrol in the law.

Although it may have seemed reasonable to the government that the Law School should close, it was not an option to the University of Waikato. The investment in financial and human energy and resources was too great to waste. Also it was impossible to deny so many applicants an opportunity to study law within their region. The reason given for the withdrawal of funding was that there were lawyers who could not get jobs in 1990, therefore the development should be stopped. The logic of this argument was best described by Tom Scott in a cartoon published at the time, where he depicted the Minister of Education saving money by closing all schools because there were no jobs. The publicly stated rationale for withdrawing the funding was not supported on a close examination of the evidence. This did not alter the fact that the funding was withdrawn.

When the University moved quickly and decisively to reaffirm its commitment to the establishment of the law school, the Minister assured the University that it would not move to prevent the University proceeding with the school. Such a move by the government would of course have been a gross interference with the autonomy of universities. The action of the University was

essential in enabling the School to proceed with the preparing the School for opening in March. Perhaps the most difficult task during this period was the selection of 350 students from the 1000 applications for Law I and Law II courses. All the students and staff had spent a very stressful Christmas and New Year period because it was difficult to communicate effectively with people during this holiday period. Despite all obstacles however the School opened to students on 4 March with a legal education programme that has innovative, challenging, relevance to the needs of legal professionals in the future.

As with any new enterprise, the school has attracted its supporters and its critics. This is only to be expected. People do not always initially respond well to change. The university is the institution in our community however that has the responsibility to think beyond the obvious and to prepare students to meet the challenges that will face the country in the future. It is a fact that many of the country's future leaders will come from people educated within the university system. In the past, those who have had the privilege of a university education have been expected to accept the responsibility of giving back freely to the community some of their time, expertise, and energy.

Mutual co-operation

It would appear that this value of mutual co-operation within our community is now seen as being inappropriate in a society that we are told must be market driven to survive. It is interesting to speculate on how long a society can maintain a unity and community of interest if all relationships and transactions are to be subject to a cost benefit analysis. The time is overdue for a more serious questioning by the community as to whether the dominance of economic policy is the best way in which to conduct our affairs, both individually and as a community. There are cultural and social values that are equally important and if ignored for too much longer will ultimately defeat the economic policy initiatives.

The depression that prevails within New Zealand at the moment would seem to result from a lack of energy and creativity, and ability to think of new solutions to old problems. I would argue strongly that this situation arises because we are not using the skills and strengths of all members of our community. We have marginalised and continue to marginalise so many people from decision making – women, Maori, the unemployed are obvious examples of this human waste. We should not be surprised if those in power have exhausted and are unable to provide the answers to the country's problems. They are so few in number. It is time to share the responsibility of power and invite in those previously excluded. Waikato Law School is providing some of those people with the opportunity to contribute to the collective well being.

The need to provide a new and different perspective is what this Law School is all about. It is why the withdrawal of government funding could not be allowed to stop the university from proceeding, however difficult that decision is proving to be. Governments should not be able to put at risk the educational future of this country. After all it is not governments that fund universities but people through their taxes and the fees they pay. It is time that there was a reassertion of educational priorities and values. Waikato Law School intends to be part of developing a better way of decision making. We can only undertake this role however with your support. Your presence with us today gives us that support for which we are grateful. Thank you.

Speech by Chief District Court Judge, Dame Silvia Cartwright

Your Excellency, Vice-Chancellor, Professor Wilson.
Tena koutou, tena koutou, tena koutou.

Challenge for legal practice in the 21st century

This is a new beginning. A dawning of opportunity for legal education. So it is also a chance to look at what the future holds for those who will graduate over the years ahead and as the 21st century approaches. Any glance at the stars no matter how fleeting, is accomplished while one's feet remain prosaically on the solid ground of our present world.

Those who predict future trends and events do so from a grounding of reality and reality in legal practice in New Zealand in 1991 is heavily influenced by our present economic worries and concerns. Yet only four years ago we were surging along in the sure hope and expectation of golden years ahead.

The world of the lawyer

In 1987 many lawyers confidently expected that their futures were tied to the extraordinary achievements of a booming economy. Admission to a mega-firm was seen by many as the pinnacle of success. It is now questionable whether the practice of commercial law will assume such significance for the future law graduate. Because even by 1987 there were literally dozens of developments in the world of the lawyer which made the corporate law firm likely to be only one actor on a stage of great diversity and colour. And it is from many of these developments that the future young legal graduate will choose.

In 1991 there are lawyers practising in community law centres, advising on the law of landlord and tenant for the person of low income about to be evicted from his home. The young lawyers are challenging the validity of ministerial actions in the Court of Appeal.

There are lawyers advising Ministers of the Crown, in business themselves, or acting as commercial advisers. There are lawyers who earn their living from the practice of environmental law, who advise on medico-legal issues, who work for the Law Commission. There are those working in law firms and in

accounting practices. There are barristers and Queen's Counsel, as well as teachers and professors of law.

Lawyers are to be found chairing or participating in Tribunals as widely diverse as the Casino Control Authority and the Waitangi Tribunals. There are lawyers conducting inquiries into the leak of government documents or the standards expected of the psychology profession.

Some lawyers spend much of their professional lives acting as advocates for youthful offenders or for those committed to psychiatric institutions. There are lawyers who give their professional time free to an enormous host of community activities from ethical committees in hospitals to school boards of trustees.

So although I suspect that the public perception of the lawyer is drawn from highly glamorised television programmes, reinforced by the foyers of the mega-firms with their tinkling fountains and expensive art or from the popular image of the clever lawyer who tries to ensure that the obviously guilty will go free, the reality is far more diverse and far closer to the community of which lawyers are a part.

That lawyers are practising in so many different areas in the community is really no surprise. For the last decade or two, changes in the law and in the institutions which administer it have occurred steadily. The examples I draw will largely be from the institution with which I am most familiar – the District Courts.

District Courts

Every day in Courts all round the country from Kaitaia in the North to Invercargill in the South and even occasionally in the Chatham Islands, literally hundreds of people bring their disputes to the District Courts of New Zealand.

Sometimes they come willingly, sometimes they are required to be present. They may be there because they have committed an offence or because they have a matter that they need settled. Many of those people come to the Courts to resolve their family disputes. And over the last ten years the Family Court has presided over some of the most notable changes in the way in which law is administered.

Until ten years ago family disputes were determined in an atmosphere of anger, bitterness, tension and guilt. Decisions made were based on determinations about the guilt or innocence of the family member who sought particular orders.

Today, although there is still enormous tension when a family disintegrates and although there is still far too high a level of domestic violence in our country, there are a few consumer-driven changes which have turned the practice of Family Law on its head.

Resolution of the dispute is now firmly based in the community and lawyers, although important to the process, play a role only when with the community's support and assistance, the couple cannot resolve the dispute. They need a good knowledge both of the law, and of human behaviour. They need maturity, exceptional communication skills, and patience.

Resolution of family conflict in New Zealand today depends however on professional counselling and judicial mediation. Battling a dispute out in Court is now the exception rather than the rule. As a consequence we believe that family members are able to continue with their lives more peacefully than they would have been able to in the past. But it also means that there is seldom a place for the traditional adversary approach. So the advocate needs a large number of skills, and, a readiness to be adaptable.

Youth Court

And now the theme of community and family involvement has been developed and extended to the Youth Court. Since the legislation was enacted almost two years ago, young offenders have been required to attend a family group conference except where the most serious crimes have been committed. The Conference has the power to recommend the manner in which the young person will be dealt with, assuming that he or she admits guilt.

In most cases the process has been positive. The family usually shows that it accepts responsibility for its offending member and that it offers its support to someone who is still young. In return, the young person sees the shame and anger that he or she has brought to the family. Confrontation with a victim often enables the real injury of the offending to be brought home graphically to the offender and family.

I am told that genuine remorse is frequently manifested and early indicators are that there is a strong chance that those who have been through the system of the family group conference are less likely to reoffend in the future.

There are elements of a cultural remedy in this system which was developed in consultation with the Maori community and the late John Rangihau in particular.

It has been suggested recently that the cultural remedy of *muru* be incorporated into the range of criminal sanctions. In fact there are elements of that concept already in our criminal justice system. The Youth Court, for example, emphasises responsibility being shared by the offender's family and reparation being offer in the form of transfer of taonga (treasure) and in service.

There are other examples to be found in the Criminal Justice Act. While our system of justice is undeniably British at base, there are more and more Maori influences which are making our criminal justice system unique. One of those is the ability to bring a respected person to Court to speak at sentencing, on the cultural and family background of the offender.

Although this section of the Criminal Justice Act is used only rarely in many Courts in the country, there are some regions where the Probation Service and the offenders in the community use it liberally bringing along kaumatua, a pastor from the church, or a respected family friend to speak on their behalf.

When this occurs, it achieves two things. The Judge hears from the lawyer speaking for the offender, as well as from the community or the family. That gives an added dimension and considerable assistance when sentencing. It can also show to the Judge that the family and whanau or the community in which the person lives, is willing to accept some responsibility. That can often make the difference between a prison sentence and a community-based one. It is a valuable part of our criminal justice system and one which I would like to see used far more widely.

You may be beginning to wonder just what these examples have to do with the future of the young legal graduate. I believe they demonstrate that those who practise law must bring to their profession a knowledge of and respect for all the different cultures in the community in which he or she will practise, not just because that is the way we would wish the world to be but because in reality, our institutions and our law are becoming more and more responsive to the cultural mix that makes up New Zealand. I predict that these changes will continue and indeed gather momentum.

Courts Consultative Committee

One of my responsibilities is to serve as a member of the Courts Consultative Committee which comprises representatives of the Court of Appeal, the New Zealand Law Society, members of the public and is chaired by the Chief Justice. The role of the Committee is to advise the Minister of Justice and the Attorney-General on ways to make the Court system more efficient and more responsive to the needs of the people it serves.

The principles of partnership under the Treaty of Waitangi are firmly embedded in the work of that Committee and therefore underpin the advice it gives to the Minister. There is an enormous respect for the value of incorporating Maori principles into our system of law. We have seen it working in the Youth Court, we have observed that the Family Court seems to be successful because of its foundations in the community. We have seen that consultation and information from whanau and the community pays dividends and we want this system to be our uniquely New Zealand system of justice.

So not only do lawyers have to embrace the gradual but fundamental changes that are taking place in our legal system and its institutions but they must be able to work with them. It seems to me that respect for the principles of the Treaty of Waitangi will be as important to the young graduate of the future as respect for a system of law which is based on equal justice for all.

Attributes for new lawyers

But how does the young lawyer, educated in these heady principles, actually operate in his or her profession? It is my firm view that there are important attributes that a new lawyer should have. The first is the pursuit of excellence, not only in the study of law both at University but on a continuing basis following graduation.

Without a thorough grounding in legal principle you will not serve well those whom you advise. Respect for the rule of law will diminish and your clients will suffer. Academic attainment is one important skill. It is not however, the only one.

Respect for and knowledge of other cultures and particularly the Maori culture is now an essential ingredient for a young lawyer starting out in practice. Our laws, our institutions, the decisions of our Courts increasingly recognised the unique flavour of our New Zealand society. The future for bi-culturalism in the law is exciting and challenging.

You at this University are in a unique position to be leaders because of your academic attainment and because of your knowledge of and respect for the principles of partnership under the Treaty of Waitangi.

But no matter how skilled you are as lawyers and how much knowledge and understanding you have of Treaty principles, if you cannot communicate adequately with those whom you advise then you will have wasted many years in study. There are rapid changes occurring in archaic legal language. There is constant review being undertaken of old fashioned language in, for example, the jury ritual. The manner in which Judges communicate with those in the Courts is constantly under scrutiny.

Legal documents which use turgid language are derided by the public. Your language must be clear and uncomplicated. It must be understood readily by those to whom you are imparting a message. Your language is one of your main tools. If it is pretentious, respect for you will diminish rather than increase.

Often your client will be in a state of tension whether he is someone poor who has been charged with a drinking/driving offence or a major company which seeks advice to enhance its financial standing.

If you help write a report for the Law Commission and it cannot be understood by the lawyers who read it, or if you teach at a university and your language is impenetrable, then you are not serving those who pay for your services and rely on your advice.

Above all, excellence in everything you do is a standard which can and must be achieved. For you have yet another, and unique responsibility. The academics, the legal profession, and those in power in government will be watching the faculty and its students with great interest. This University has before it one of the most exciting challenges faced in recent years by any similar institution. It has developed out of a demand from the community. Therefore, it starts with considerable goodwill from those who will use the services of its graduates. It is my expectation and the hope of all who have worked towards this day, that by the excellence of your achievements you will demonstrate that a new and special era in legal education has indeed dawned.

It is a great privilege to have been part of this day. The hundred Judges of the District Courts join with all your other well-wishers in expressing our warm wishes for the future of this faculty and for the students who are the first of thousands to pass through these buildings and gain a truly unique legal education.

The words of this tauparapara evoke the beauty of the land on which this University sits and the love of the men and women whom you will serve.

Hutia te rito o te harakeke
Kei hea te komako e ko
Ki mai ki au
He aha te mea nui o tenei ao
Maku e ki atu
He tangata, he tangata, he tangata

The heart of the flaxbush has been removed
Where are the songbirds that sing?
When I am asked, what is the most important
thing in this world
I will say
It is man, it is people, it is mankind.

Speech by Her Excellency Dame Catherine Tizard, GCMG, DBE, Governor-General of New Zealand

E nga mana, e nga reo, e nga iwi o te motu. Tena koutou, tena koutou, tena tatou katoa.
Te Arikinui, Dame Te Atairangikaahu — Tena koe.
Your Worship, Mr Vice-Chancellor, Professor Wilson, Ladies and Gentlemen.

The opening of this Law School marks a significant development in legal education in New Zealand. Not only is it the first Law School to be established in 80 years, but it is offering a programme of legal study that is unique in New Zealand. From the outset the School has developed a programme that is designed to prepare students for a variety of employment opportunities. While students who graduate from the School will be trained for the traditional practice of law, they will also be prepared to enter private and public business enterprises, local and central administration, and to service with legal skills the voluntary sector.

An integral component of the New Zealand environment is an understanding of Maori culture and its relationship with European cultures. Waikato Law School has undertaken the important task of seeing how the integrity of both cultures can be reflected within the legal system. In this sense the School is pointing the way to the future.

This commitment was demonstrated in an appropriate way when the School was launched and blessed by the tangata whenua a few months ago.

The students who graduate from this School will be entering a profession that has a major responsibility to the community as well as to individual clients.

It is often easy to criticise the legal profession, and on occasion criticism is justified. It is important to remember the contribution that the profession does make to the community. It provides a service that is essential to the good governance and order of the society as a whole and provides the framework for the peaceful resolution of disputes.

Members of the legal profession assist individuals to pursue their rights and honour their obligations under the law. The balanced, fair-minded, and often conservative advice provided by lawyers is a necessary part of our constitutional framework. It is often the task of lawyers to tell people what they do not wish to hear. This requires a tough-mindedness that is most often first developed within their legal education. Law Schools do have a responsibility to educate their students with an understanding of the role they play within the community, and their responsibilities to that community. The philosophy of Waikato Law School and the University of Waikato will prepare their students to meet the challenges facing our community.

It gives me personally great pleasure to take part in the official opening of a School whose overall purpose is to contribute to the development of a New Zealand jurisprudence which supports the principles of justice, democracy, equality, and a sustainable environment and that respects and reflects the rights and responsibilities of all peoples and cultures.

The explicit statements contained in the School's official handbook make a refreshing change from the high-minded, piously ambiguous cant which passes for objectives in many educational or political programmes.

The School, and the University, have strong policies on support for equal opportunity and the unacceptability of sexual harassment and sexist language.

I applaud and support the policy of the Law School in bringing these barriers to achievement out into the public arena and unequivocally rejecting them.

It is already evident that there is a tremendous amount of public support for the Waikato Law School. I have had many remarks made to me in Hamilton and the region indicating high esteem for the new venture; a sense of excitement, of high hopes — and of sympathy too, for as the Vice-Chancellor has so forcefully told us, this baby might have died at birth had it not been for the great wave of support and a determination to succeed that came from University, from city and province and marae.

That level of response reflects in no small part the community's respect and admiration for the dedication and personal qualities and achievements of your Dean, Professor Wilson.

I wish her and her staff every success and much satisfaction in their task.

To the students: you, the foundation class of the Waikato Law School are in a very special and privileged position. You are the ones who can turn the noble aspirations of this School into noble deeds. The degree to which you, in the future, practise what you have been taught will be the measure of the School's success or failure.

I wish you well and happy and have delight in declaring the Waikato Law School officially opened by unveiling a plaque to commemorate this great day. □

Mining Law Conference

The Australian Mining and Petroleum Law Association (AMPLA) has sent notice that it will hold its 15th Annual Conference in Melbourne at the Hyatt on Collins Hotel between 24 and 27 July 1991. The Conference will be opened by the former Governor-General of Australia the Right Honourable Sir Ninian Stephen. Papers will be given by leading speakers on such subjects as marine oil pollution, environmental audit and directors liability, commodity sales contracts, sovereignty and political risk and the potential liability of advisers. Those requiring further information can obtain this from:

AMPLA Secretariat
4th Floor
360 Little Bourke Street
Melbourne 3000
Australia

Fax: (03) 670 2616

Books

Pleadings, Principles and Practice

By Sir Jack Jacob and I S Goldrein
Sweet & Maxwell, 1990. ISBN 0-421-40760-3

Reviewed by C R Pidgeon, QC

For generations of lawyers there has been a no better used or more famous text on the drafting of pleadings in the English speaking world than Bullen and Leake and Jacob *Precedents of Pleadings*. That text included not only valuable precedents by way of statements of claim and statements of defence but useful notes to assist the pleader, not only on individual causes of action, but on the technique of pleadings.

In an interesting departure, Sir Jack Jacob who is the current author of *Precedents of Pleadings* with Mr Goldrein decided to publish a new work, drawing much of its material from the discussion of the rules of pleading which had been briefly dealt with in *Bullen and Leake*, as the work is more commonly known, expanding it into a new work which seeks to provide "a complete, comprehensive and systematic exposition of the law and practice relating to pleadings at the present day".

Experienced practitioners are well aware that a case can be won or lost on the quality of the pleadings. The care the authors have taken expanding on the principles of good pleadings is of considerable assistance, not only to newly admitted practitioners, but also to all who spend time, either preparing pleadings or appearing in Court. There is a fascinating section of the book which although of no practical value to New Zealand lawyers, gives an intriguing insight into the drafting styles of practitioners in other countries such as West Germany, Scotland and the USA, with the text being embellished with precedents from those countries. For example, at p 280 in an answer for the defender (the equivalent of the statement of defence) in a claim for damages for breach of contract, the Scots pleadings start:

> Ans. 1. The averments relating to the defender and to jurisdiction are admitted. *Quoad ultra* not known and not admitted.
>
> Cond. 2. By missives dated June 30, July 4 and 14, 1988 concluded by the parties' respective Agents, the pursuers agreed to sell to the defender the shop premises known as the Corner Shop situated at 47 Sunshine Crescent, Edinburgh for the sum of £82,000 subject to the terms and conditions contained in said missives which, or copies of which, are produced and the terms whereof are herein held incorporated *brevitatis causa*.

This section of the book is quite fascinating to dip into. Although the text is liberally cross-referenced to English decisions and English rules and ordinances, it is still of considerable value to New Zealand practitioners who can easily make the necessary adjustments. The section on striking out of pleadings as being frivolous or vexatious or an abuse of the process of the Court, I found particularly useful and is readily adaptable to the New Zealand scene.

The difference between a set-off and counterclaim which many practitioners find confusing is clarified in a useful chapter.

As with all other volumes in the common law or litigation library published by Sweet & Maxwell, the book is attractively bound and presented with a useful index.

Although clearly it is not a text which is essential for a sole practitioner's library, it is a work which no firm's library which has any claim to be comprehensive, should be without. It may be regarded as a companion volume to, but not a substitute for, *Bullen and Leake*. □

Recent Admissions

Barristers and Solicitors

Newdick A R	Wellington	24 May 1991	Saunders B W	Wellington	16 May 1991
Nott P J	Wellington	24 May 1991	Sheehan L J	Auckland	10 May 1991
Overton M L	Wellington	24 May 1991	Sloan M G	Wellington	24 May 1991
Philp S E	Wellington	24 May 1991	Simmers J E	Wellington	24 May 1991
Potter S M	Wellington	24 May 1991	Stewart R K	Wellington	24 May 1991
Prasad G	Wellington	24 May 1991	Wilkinson J E	Wellington	24 May 1991
Prior E A	Wellington	24 May 1991	Springett A D	Wellington	24 May 1991
Ram H	Wellington	24 May 1991	Thomas W G	Wellington	24 May 1991
Richards J J	Wellington	24 May 1991	Van Dieren K	Wellington	24 May 1991
Robertson K E	Wellington	24 May 1991	Voyce J	Wellington	24 May 1991
Salisbury D J	Wellington	24 May 1991	Woodbury M W	Christchurch	8 May 199

Lethal force and the Police Complaints Authority

By Bernard Robertson, LLM (Lond), Lecturer in Law, Victoria University of Wellington

This article analyses the report of the Police Complaints Authority into the Aramoana *incident and refers to other enquiries into the police use of lethal force. The author questions the opinion that officers would not have been justified in firing at David Gray earlier than they did. The author argues that police officers should not be equated with ordinary citizens so far as the use of force is concerned since, in a dangerous situation, the police officer has to do something and the ordinary citizen does not. He is therefore opposed to the prosecution of officers for offences such as manslaughter. It is not sufficient, he argues, that they will be acquitted if they acted correctly, the mere threat of legal proceedings may be a deterrent to firm, prompt and justifiable action.*

Introduction

The Police Complaints Authority has had to deal in short order with two cases involving the deliberate use of lethal force by police officers. In the *Stowers* incident an armed officer was suddenly confronted by a man with a shotgun *(Report of Police Complaints Authority upon death of Paul Melvin Stowers,* 4 Dec 1990) and in the *Aramoana* incident police, at the end of a prolonged operation, fatally shot a man who had previously killed 14 people including a police officer, Sergeant Guthrie (*Report on the Tragedy* (sic) *at Aramoana,* 21 December 1990).

In the course of his *Aramoana* report, Sir Peter Quilliam, the Police Complaints Authority, made several comments on occasions on which police officers had had the opportunity to shoot at David Gray but had not done so. This note aims to consider those comments.

The full facts of *Aramoana* need not be related but the four incidents concerned must be outlined. In the first an officer caught sight of Gray inside his house. The officer was armed with a borrowed .22 rifle. The shot would have been a difficult one and the officer elected not to fire. The Police Complaints Authority states that "this was [the officer's] decision and with that I am in agreement". This cannot be quarrelled with, but the Police Complaints Authority also stated "I have no doubt that the chances of a successful shot in those conditions were so slight that to fire would not have been justified". (p 18) This is more questionable.

Secondly, the same officer, now armed with a police rifle, had a clear view of Gray's head while Gray was seated in the road for a period of about ten minutes. Gray then rose and started to walk towards the officer's position. The officer challenged Gray who ran out of sight between the houses. The Police Complaints Authority comments that, apparently because the officer did not know that more than one person had been shot dead, "[the] situation would not have justified any abandonment of the requirement for a warning". (p 21)

Immediately thereafter, Sergeant Guthrie was suddenly confronted by Gray. Guthrie shouted a warning to Gray and then fired a single shot at him. Both the warning and the shot were heard over the open line radio that the sergeant was using. Sergeant Guthrie then commented that Gray had gone to ground out of his sight. Moments later Sergeant Guthrie was shot dead by Gray. Sir Peter rejected the contention that adherence to the Fire Orders had cost Sergeant Guthrie his life. (p 25)

After Sergeant Guthrie had been shot another officer saw Gray bending over and picking up Sergeant Guthrie's pistol and firing it towards the ground. The officer had a split second in which to decide whether to fire and did not do so because "no other person was in immediate danger". The Police Complaints Authority first says that "no criticism can be levelled at him for withholding his fire" but later says "Police Officer 3 made the correct assessment of the situation when he refrained from firing at Gray. It is easy to say that, in hindsight and with the knowledge that Gray had already killed or seriously wounded 14 people, he should have been shot on sight. This would be the retributive judgment of someone who did not have to take the decision or to answer for the consequences of it. Such a decision at that stage is likely to have gone outside the confines of the statutory authority".

"In summary", says Sir Peter, "[t]he crucial question, which has been highlighted by the Aramoana tragedy, is whether a member of Police ought to be free to decide that the circumstances are such that a warning is no longer necessary and that it should be permissible to shoot on sight". (p 20)

Two incidental points require to be made. First, the Police Complaints Authority elected to investigate the incident of his own motion under s 12 Police Complaints Authority Act 1988. In fact not only were no complaints made to the Police Complaints Authority about this incident but no one chose to make representations at the formal hearing scheduled. There are undoubted benefits to the police in having such incidents independently examined. This incident does, however, indicate that the Police Complaints Authority's title is an unduly negative one, which might usefully be changed.

Secondly, in considering these comments and the relevant law, no criticism is intended of those who had to take the decision which has

been characterised as "The Evil Choice". (Greenwood [1975] Crim LR 4) Police officers deciding whether to shoot have to balance the risk to their own lives on the one hand with the risk of conviction for a serious offence, with resultant prison sentence and a life as welfare dependants for their families on the other. Any critical comments in this article are intended as criticisms of the regime which creates this vice, not of the individual officers caught in it.

The relevant provisions

The relevant law on the use of lethal force is set out in ss 39, 40, 48 and 62 of the Crimes Act 1961.

The duties of the police are nowhere set out but the Police Act 1958 provides at s 30:

> **General Instructions** — (1) The Commissioner may from time to time issue general instructions, not inconsistent with the provisions of this Act or regulations made thereunder, and all members of the Police shall obey and be guided by those instructions.

and at s 64:

> **Regulations** — (1) The Governor-General may from time to time, by Order in Council, make all such regulations as may in his opinion be necessary or expedient for the giving effect to the provisions of this Act and for the due administration thereof.

Police Regulations 1959 para 46 creates the following disciplinary offences:

> (37) Failing to take due and prompt measures . . . for the arrest of any offender
>
> (61) Wilfully violating any provision of these regulations or of general instructions . . .

Police General Instructions relevantly provide:

F61 — USE OF FIREARMS BY POLICE

(1) A member shall not use a firearm except in the following circumstances:

(a) If he fears death or grievous bodily injury to himself or another person and he cannot protect himself or that person in a less violent manner.

(b) To make an arrest if:
  (i) The person to be arrested is believed on reasonable grounds to be a danger to the lives of others; and
  (ii) The arrest cannot otherwise be effected by reasonable means in a less violent manner; and
  (iii) The circumstances are such that the arrest cannot be delayed without danger to other persons.

(c) To prevent escape from lawful arrest if:
  (i) The person escaping is believed on reasonable grounds to be a danger to the lives of others; and
  (ii) The escape cannot otherwise be prevented by reasonable means in a less violent manner; and
  (iii) The circumstances are such that the firearm can be used without danger to other persons.

(2) . . .

(c) Members who are armed must appreciate the need to evaluate the prevailing circumstances before a shot is fired. Despite an offender's previous actions, where he is no longer a threat to life, there can be no legal justification for shooting him. Where an offender is a member of a group engaged in violent crime, shooting him will only be justified if he presents a danger to life at the time the shot is fired.

(d) An offender is not to be shot:
  (i) Until he has first been called upon to surrender and has refused to do so, unless in the circumstances it is not practical to do so; and
  (ii) That it is clear that he cannot be disarmed or arrested without first being shot; and
  (iii) That in the circumstances further delay in apprehending him would be dangerous or impracticable.

The relationship between the Regulation F61 and the law

The Police Complaints Authority makes two relevant comments: "[i]t is difficult to see how the Fire Orders [ie F61] could be relaxed or made any more flexible without moving outside the limits of the legislation" (p 24) and "[i]t is a fundamental proposition that the Fire Orders can in no circumstances exceed what the law permits" (p 22). The first of these comments seems most questionable, the second cannot be dissented from so far as it goes, but what it fails to state is vital.

There is a dearth of relevant case law in New Zealand since no police officer has been prosecuted in recent times as a result of the deliberate infliction of lethal force. The relationship between such instructions and the law has been considered on several occasions in Northern Ireland Courts however, both in relation to baton rounds and conventional weapons.[1] Soldiers serving in Northern Ireland are issued with a "Yellow Card" which sets out the rules under which they may use their firearms. This guide, which at one time ran to 23 paragraphs, is frequently referred to in Court by soldiers on trial for serious offences. Its status is at least that of the General Instructions; a soldier who fired in breach of the yellow card's provisions would be guilty of a criminal offence under s 36 Army Act 1955. In *R v MacNaughten* Sir Robert Lowry CJ (now Lord Lowry) said:

> There was, of course, at the same time, in existence what is called the yellow card; something the contents of which, it seems, are largely dictated by policy and are intended to lay down guidelines for the security forces but which do not define the legal rights *and obligations* of members of the forces under statute or common law ([1975] NILR 203, 206) (author's emphasis).

It is respectfully submitted that Lord Lowry's formulation is the more correct. While it is true that the Police General Instructions cannot allow the members of the police to exceed their legal powers it is equally true that they cannot restrain them from exercising their legal powers. The officer is individually responsible to the Courts for observing the law and cannot plead an instruction as an excuse for failing to carry out a duty. A similar power to make regulations for the police was described as authorising regulations "to direct the constables

in the due and orderly performance of their duty, to point out to them the manner in which it would be best performed; not to alter the limits and extent of their duty".[2]

In *R v Hegarty* a police officer was prosecuted for manslaughter on the ground, inter alia, that he had discharged a baton round without the authorisation of an Inspector as required by the regulations. Hutton J commented "it is clear that there could be circumstances in which it would be reasonable for an officer to fire a baton round without being ordered to do so". (12 NIJB 25 and see notes by Spjut [1987] *Public Law* 35 and Robertson [1988] *Public Law* 13.) In other words the criterion of legality is the reasonableness of the force, not the adherence to General Instructions.

So far as the law is concerned therefore it is apparent that the "crucial question which has been highlighted by the Aramoana tragedy" is a non-question. Police officers *are* free to decide that a warning may be dispensed with. The General Instructions are not determinative of the reasonableness of force in terms of the Crimes Act. The fact that a warning could in the circumstances have been given and was not may be evidence that excessive force was used but that is so independently of the existence of the General Instructions. An officer who fired without giving a warning might at present be exposed to disciplinary action but it is not clear that the Police Complaints Authority is referring only to the threat of disciplinary action in the "crucial question" comment.

Indeed the tenor of the Police Complaints Authority's remarks is that breach of the General Instructions would constitute a breach of the law and this is almost explicit in his comment that any change in the Instructions might exceed the statutory limits. It is respectfully submitted however, that the existence or otherwise of an instruction requiring a warning prior to firing is of no legal significance whatever.

Sir Peter's discussion ends by saying that he is not prepared to recommend any change to the Fire Orders. This is bolstered by two peculiar arguments. One is that the giving of a warning did not cost Sergeant Guthrie his life. That is a decision this author would not like to have to make; there can be no argument that the warning reduced the time Sergeant Guthrie had to fire careful shots at Gray. But it is in any case irrelevant. Recommendations should deal with the future not the past and the real question is whether the Aramoana incident reveals that an officer's life could be endangered on another occasion by the heavy emphasis placed upon warning. It is submitted that the answer is clearly "yes".[3]

The second argument is that the officers most intimately concerned do not want any change in the Instructions and in particular the Police Complaints Authority was told that "without the present restraints there are occasions when they could fire at the wrong person". (p 25) This is bizarre. Firing at the correct targets is a matter of training and speed of reactions, not rules and regulations. Police officers in the United States of America and the United Kingdom routinely train with "Shoot, No Shoot" films which stop when the gun is fired. These include such things as sudden movements at windows which turn out to be a mother and child, a man who fails to respond to warnings and pulls from his pocket what turns out to be a card saying that he is deaf and dumb, an undoubted offender running away through a crowd of children and a distressed female who continues to fire a pistol into the ground until the magazine is exhausted. It is this sort of training (and more frequent training) which is required to help officers make the Evil Choice, not Instructions.

Police also argued that the Fire Orders were required to ensure some certainty of direction to officers who have this terrible decision to make. As the argument above has shown this is misconceived. The current state of opinion as to the law is clearly one of uncertainty and confusion. If and when an officer is prosecuted for shooting at someone it will be the appropriate sections of the Crimes Act which will determine the Court's decision. Furthermore the Fire Orders will cease to be "simple and absolutely clear" if lawyers persist in importing concepts into them which do not appear in the wording as, it will be argued below, has been done. Words which are "simple and absolutely clear" turn out to mean one thing to one person and another to another.

The natural bureaucratic reaction to uncertainty is to write instructions which are aimed at ensuring that officers will not be exposed to prosecution and which therefore aim well inside any uncertain boundaries. If police officers then regulate their conduct in accordance with these instructions the matters will never fall for decision by a Court. In this way the combination of expression of opinion by authorities without the benefit of proper legal argument and the writing of regulations to accommodate those opinions creates steadily increasing constraints upon police operational effectiveness.

The Police Complaints Authority's specific comments

Certain of the comments quoted above require detailed consideration.

"I have no doubt that the chances of a successful shot in those conditions were so slight that to fire would not have been justified".

This comment was made in respect of the first occasion on which an officer got a fleeting glimpse of Gray. It is not clear in what sense the word "justified" is used here. Sections 39 to 44 Crimes Act 1961 are framed in terms of "justification". Is Sir Peter saying that had this putative shot luckily hit Gray the officer would not have had a defence to a criminal charge? This surely cannot be correct. Does the Police Complaints Authority mean that "not to fire was entirely justified" – a very different matter? For it is not the case that there can only be one correct solution in each situation. From the fact that an officer cannot be faulted for not firing it does not follow that it would have been wrong to fire. Either decision may be legally within the officer's discretion.

It should not be assumed however, that an officer can never be faulted for not shooting. An officer who failed for no good reason to shoot might be guilty of the disciplinary offence of "failing to take prompt measures for the arrest of an offender". Since the police appear to be under no statutory duties with respect to crime or public order an officer

cannot be guilty under s 107 Crimes Act 1961 of failing to carry out a statutory duty. Nor can an officer be guilty of the common law offence of failing to perform a public duty since there are no common law offences in New Zealand. (There has been one recent reported instance of a conviction for this offence in England, *R v Dytham* (1979) 3 WLR 467.)

"[the] situation would not have justified any abandonment of the requirement for a warning".

This comment is made in respect of the occasion when an officer had a clear view of Gray's head as he sat outside his house for several minutes. The officer was clearly in a dilemma. The shouting of a warning would have caused his target to disappear but to fire without a warning might have caused the officer to fall foul of reasoning such as Sir Peter's. General comments on the Instructions have already been made but if they are to be regarded as significant (as Sir Peter evidently regards them) a further point requires to be made. The Police Complaints Authority believes that on the information available to the officer — ie that one person had been shot dead — it would not have been justified to shoot on sight. But this is not congruent with the terms of the Instructions. These require a warning "unless in the circumstances it is not practical". The three requirements of F61 are expressed as successive hurdles. It is not the case that delay in apprehension under (iii) can be so dangerous that it of itself outweighs the requirement for a warning (though it may be good evidence of the practicalities). The question is whether it was practical to give a warning. The answer, for the reason given above, is clearly that it was not.

"Such a decision [to shoot on sight] at that stage is likely to have gone outside the confines of the statutory authority".

This comment is made in relation to the failure of an officer to fire at Gray while he was bending over the body of Sergeant Guthrie. Sir Peter further believes that such a decision would have been retributive. It is submitted that this would not have been the case. The questions in terms of F61 were (i) was it practicable to shout a warning? — answer "no" as Gray was only visible for a split second. (ii) was it clear that he could not be disarmed or arrested without first being shot? — answer "yes" owing to the distance, the paucity of officers and cover available. (iii) would further delay in arresting him have been dangerous? — answer "yes". It must have been obvious at the time that the longer Gray was at large the greater became the danger of further deaths in Aramoana, or worst of all, of his escaping from the area. It is submitted that the officer would have been perfectly correct in terms of F61 had he fired.

In terms of the Crimes Act the question would be whether Gray could "reasonably" have been arrested in a less violent manner. (The word "reasonably" is unaccountably omitted from the Police Complaints Authority's exegesis of s 39 at p 23.) There are two parts to the answer to this question. One is the merits as they appear to the armchair critic. Even with the advantage of hindsight it must be clear that there was no evidence that Gray could have been arrested in a less violent manner. The question was one of risk and how much risk it is "reasonable" to take. Incidents such as this almost invariably end with the death of the perpetrator. Gray had just shot one police officer, there was no reason to think that he would surrender to another. Dark was approaching and reinforcements were some way off. In retrospect a decision at that point to shoot would seem perfectly justifiable. (Though again this is not to say that a decision not to shoot was wrong.)

This is not how the judgment should be made however.

> [T]he postulated balancing of risk against risk, harm against harm, by the reasonable man is not undertaken in the calm analytical atmosphere of the court-room after counsel with the benefit of hindsight have expounded at length the reasons for and against the kind and degree of force that was used by the accused; but in the brief second or two which the accused had to decide whether to shoot or not and under all the stresses to which he was exposed. (per Lord Diplock, *Attorney-General for Northern Ireland's Reference (No 1 of 1975)* 1977 AC 105, 138.)

Applying this standard it is submitted that it cannot seriously be contended that the officer could have been convicted of an offence of murder or assault had he fired. It is respectfully submitted therefore that there are no grounds for saying that such a decision would have been likely to have been outside the confines of the statutory authority.

The reasoning of both the officer and the Police Complaints Authority on this point appears to follow from that of Robert Fisher QC (as he then was) in his report on a previous shooting incident.[4] At para 3.12 Fisher interprets F61(1)(a) as requiring an immediate danger to another person. This is undoubtedly a fair interpretation. He then proceeds at para 3.13 to apply this requirement to F61(1)(b). Fisher therefore denies that future danger can constitute a reason for shooting, and in particular states that there would be no justification for shooting a fleeing felon. This reasoning leads inexorably to his conclusion in para 3.16 that a fleeing armed robber whose intention is only to escape should not be arrested with firearms, and therefore presumably should not be arrested at all.

There appears to be no warrant for this reasoning. Neither s 39 Crimes Act nor F61(1)(b), nor F61(2)(c) makes any requirement of *immediate* danger to others. Whether one could lawfully shoot a fleeing person was one of the questions asked by the Attorney-General for Northern Ireland in the *Reference* case. This reference actually arose from the facts of *R v MacNaughten* in which a soldier was acquitted of murder after shooting a man who had been detained by an army patrol in a rural area and had then run away across a field. The House of Lords was unanimous in saying that this question could not be answered without reference to all the facts of the case and that it was not therefore a matter of law at all. Lord Roskill went so far as to say that the matter was "quite unsuitable for such a reference". ([1977] AC 105, 156). The House had been invited by the Attorney-General for Northern Ireland to rule in the terms of

Robert Fisher QC's statement and they refused to do so. Subsequently the would-be assassin of the Israeli Ambassador to London was shot while fleeing the scene and no prosecution followed (*The Times*, 4 June 1982 and 5 July 1982).

At para 3.14 the Fisher report also neatly turns on its head Lord Diplock's argument quoted above. For Robert Fisher QC the requirement to make a decision in a split second under pressure means that one cannot possibly make a measured assessment of future danger and therefore cannot be justified in shooting. If this reasoning were correct then, in order to be justified under s 39, an officer must not only take a "reasonable" decision but be in a position to assess whether or not there is the opportunity to take a "reasonable" decision. If there is time to do all this then there is almost certainly no need to shoot.

Investigations into the use of force by the police tend to dwell on the concept of self-defence or the protection of others. (*R v Hegarty* is another example of this phenomenon.) Sir Peter Quilliam is entirely right to say (at p 23) that in the Aramoana incident ss 39 and 40(1) Crimes Act were of greater application than s 48. Inconsistently however, he only quotes Fire Order F61(1)(a) in his report. In fact police officers do not primarily use force in self-defence, they use it in order to carry out a duty. The reluctance to discuss this has been attributed to the reluctance of liberals to admit that the police is primarily a coercive force.[5] But so it is. If there were no requirement to use force in order to carry out certain essential activities there would be no need for a police force. Even in quite exceptional cases such as *Stowers*, where an officer is unexpectedly threatened by an armed man, an officer has responsibilities an ordinary citizen does not have. The best means of defence in such circumstances is to leave the area rapidly. This is not expected of a police officer, who must take "prompt measures for the arrest of an offender". Thus even in such cases where the officer's own safety is probably the prime consideration it is not correct to base one's reasoning about the situation on the law of self-defence. Force is used by police officers to effect arrests and the relevant section of the Crimes Act makes no requirement that there must be an immediate deadly threat to a person for the application of lethal force to be justified.

The root of the problem

The central issue is the application of the ordinary law to police officers acting in the execution of their duty. Section 62 Crimes Act 1961 means that if it is decided that a police officer is not entitled, as a matter of marginal decision making, to a defence under ss 39 or 40 the officer is exposed to a charge of murder or manslaughter in the same way as David Gray would have been had he been taken alive. It is allegedly fundamentally important that police officers should operate under the same legal regime as everyone else. This is sometimes referred to as "equality under the law".[6] This assertion proceeds from a fundamental fallacy. The position of a police officer is not equatable to that of an ordinary citizen because the ordinary citizen can, in a dangerous situation, choose to do nothing. That is not an option open to a police officer. The officer must do something. Police officers are therefore in the business of daily making marginal decisions about the use of force, the ordinary citizen is not. Getting a marginal decision wrong is not murder, it is a professional misjudgment. The questions which ought to be asked are "was this action taken in good faith?" and "was it a decision that no reasonable person could have made?"

The matter cannot be put more eloquently than it was by a former British Army Legal Officer.

> The failure of the law to distinguish adequately and clearly between the use of force on the one hand by those seeking, at the State's direction, to restore and maintain peace in the land as part of their professional duty, and armed by the State with lethal weapons for that very purpose, and on the other hand by those acting in purely private capacities who, if the decided cases are a reliable guide, are frequently contributors to, if not the authors of, their own misfortunes, is a serious and intolerable defect. (Letter by J C Wakerley [1975] Crim L R 186.)

Nor is it an answer to say that if one has acted correctly one will be acquitted. The mere threat of legal proceedings may be a deterrent to firm, prompt and justifiable action. Hegarty was suspended from duty for the two years it took his case to come to Court and for him to be acquitted – an example which must have a devastating effect on police morale and effectiveness. There were, in this author's view, clear examples of hesitation to take justifiable action at Aramoana. Unfortunately the interpretations put forward in the Fisher Report and in the *Aramoana* Report will not be authoritatively corrected until some unfortunate officer has been tried for a serious offence. In the meantime why should any officer risk career and pension on the basis of this author's view of the law when eminent legal figures have spoken differently? Who can say that these sort of considerations were entirely absent from the minds of those who had to make the Evil Choice at Aramoana? □

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1 The law is essentially similar. Section 3 Criminal Law Act (NI) 1977 provides: "A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large".

2 Per Tindal CJ giving the unanimous opinion of the Judges on this point, *Miller v Knox* (1838) 4 Bing (NC) 574, 587; 132 ER 910, 915. This was a case where a regulation in terms instructed constables not to do certain things which the Court found it was their duty to do.

3 Waddington gives three examples of English police officers shot while issuing warnings and queries whether a warning is appropriate in any situation where the offender is more powerfully armed than the police. "Overkill" or "Minimum Force"? [1990] Crim L R 695, 702.

4 *Report of Robert Fisher QC to the Commissioner of Police Re: Shooting of Benjamin Wharerau at Dargaville on 14 Mar 86. Presented 17 Nov 86.* Prior to the creation of the Police Complaints Authority it was the practice to appoint an independent examiner to conduct an enquiry into the circumstances of any shooting by police. The cost of these exercises came from the police vote but was not controllable by the police. The report prepared by the Police Complaints Authority on *Aramoana* from within the Police Complaints Authority's own budget is commendably more concise than the previous reports by *ad hoc* independent examiners.

5 Waddington: "Policing to please is not the British tradition" (1984) 26 *Police* No 11, p 28.

6 See, eg, Law Reform Commission of Canada: *Our Criminal Law* (1976) p 9.

Part performance and common law damages

By R D Mulholland, Faculty of Business Studies, Massey University

This article considers the judgment of Fisher J in the case of Ward v Metcalfe *and looks at the legal background. The author takes the view that the decision in that case is to be commended and the award of damages in part performance cases is fully in accord with the contemporary development of the law and provides a more flexible remedy than would otherwise be available.*

Introduction

To those with a proclivity to delve into the dusty recesses of the equitable jurisdiction one of the issues which faced Fisher J in *Ward v Metcalfe and Others* [1990] BCL 1422 will be of considerable interest.

Although that case was primarily concerned with the question of whether or not a contract had been concluded, this article deals only with the issue of the availability of damages, as a remedy, in cases where a party has successfully relied upon the equitable doctrine of part performance.

The plaintiff was an elderly widow whose only assets were an unencumbered residential unit and $10,000 in mortgage investments.

The plaintiff's son, who was an architect and property developer, entered into a partnership with others for the development of a block of residential units. He induced his mother to invest the $10,000, which she held in mortgage investments, in the project, and to exchange her existing unit for an apartment in the new project.

On 30 August 1976 a formal partnership agreement was concluded between, the plaintiff's son, Metcalfe and Gibson who were to be the managing partners, and several others including the plaintiff.

In March 1978 the plaintiff's son persuaded her to contribute a further $19,000 towards the project. This was raised by way of mortgage over the plaintiff's existing property.

In early 1978 an agreement was also reached whereby the plaintiff was to replace her existing apartment with "unit two" in the new partnership block. The plaintiff subsequently moved into unit two.

By 1981 the partnership was in financial difficulties because of cost overruns and debt servicing. An opportunity presented itself for the sale of unit two, and the plaintiff agreed to move into unit one. In July 1981 a written contract was concluded whereby the plaintiff exchanged unit two for unit one.

Later a further opportunity presented itself for a sale and the plaintiff agreed to move to unit eight. The plaintiff alleged an oral contract in respect to the exchange of unit eight for unit one but formal title was not transferred.

On 1 March 1984 the plaintiff's son Michael Ward, was adjudged bankrupt, and the other partners took over the running of the partnership. They alleged that no binding contract had been concluded in respect to the plaintiff exchanging unit one for unit eight and they told the plaintiff to vacate.

The plaintiff issued proceedings on 4 October 1984 but on 7 November 1984 unit eight was sold under a mortgagee sale. The plaintiff then moved into a rented pensioner flat.

Being a contract "for the sale or other disposition of land" the agreement between the plaintiff and the partnership, in respect to unit eight was subject to the Contracts Enforcement Act 1956, which is a partial re-enactment of s 4 of the Statute of Frauds. This provision requires that such contracts are unenforceable unless "the contract or some memorandum or note thereof is in writing and is signed by the party to be charged therewith".

As there was no written contract the plaintiff was forced to rely upon the equitable doctrine of part performance to avoid the statutory requirements. But as the property had been sold the traditional equitable remedy to a successful plea of part performance, that is specific performance, was unavailable to the plaintiff. The Court was therefore faced directly with the issue of whether to award the common law remedy of damages to a right which was known only in equity.

The equitable doctrine of part performance

The doctrine of part performance was developed by the Court of Chancery as an exception to the requirements of the Statute of Frauds. Section 2(2) of the Contracts Enforcement Act specifically preserves the doctrine of part performance.

As it originally evolved the doctrine of part performance had no coherent basis of application. It was administered by the early Judges within the general equitable jurisdiction in a robust but ad hoc manner. The expression "part performance" is a misnomer. The application of the doctrine was never dependent upon there being actual part performance of the contract in dispute. Cases were determined rather upon what

seemed to be the dictates of good conscience in individual cases. A recurrent theme in the early decisions is that as the Statute was passed to prevent the fraudulent fabrication of contracts, equity would not permit the Statute itself to be used as a vehicle of fraud.

The successful pleading of the doctrine deprived a party of the defence that the contract did not conform to the requirements of the Statute of Frauds.

In the nineteenth century the doctrine became systematised as an integral aspect of the regime of bargain based contract law which attained supremacy in the later years of that century. The role of the doctrine of part performance as an aspect of contract law as confirmed by the decision of the House of Lords in *Maddison v Alderson* (1883) 8 App Cas 467 where it was held that the acts of part performance relied upon "must be unequivocally, and in their own nature, referable to some such agreement as that alleged" (ibid, 479, per the Earl of Selborne). Thus a party had to clearly establish the existence of a contract. Acts of part performance could no longer be relied upon to give rise to some broad equity, which a Court might satisfy, but must be specifically related to the existence of a contract.

But the requirements of the doctrine were significantly mitigated by the decision of the House of Lords in *Steadman v Steadman* [1975] AC 536 where it was held that:

> The rule must be that you take the whole circumstances, leaving aside evidence about the oral contract, to see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shown to be more probable than not (ibid, 541-542, per Lord Reid).

It is submitted that the facts of *Ward v Metcalfe* fell squarely within this principle.

This restatement of the doctrine of part performance had the effect of shifting it away from the strict regime of contract law and back towards the more broadly based form which it had assumed in pre-19th century times.

Historical limitation of the remedy to specific performance

However, despite the changes which have taken place in the policy behind the application of the doctrine of part performance in recent years, one aspect of the doctrine has so far remained unchanged. The doctrine of part performance, being a creation of equity, was not available in cases where the plaintiff sought a common law remedy, such as damages. The doctrine was limited to situations where specific performance was available as a remedy.

Over the years many attempts have been made to extend the doctrine to situations where specific performance was not available. These attempts have generally been unsuccessful. Thus the doctrine is not available in contracts of employment. (*Britain v Rossiter* (1879) 11 QBD 123). It has been declined where the contract would require the supervision of the Court. (*J C Williamson v Lukey & Mulholland* (1931) 45 CLR 282.)

The unavailability of damages as an available remedy on a successful plea of part performance was decisively confirmed by the High Court of Australia in *J C Williamson Ltd v Lukey and Mulholland* (supra):

> An action for damages could not but fail, because, where a common law remedy is sought, part performance never did and does not afford an answer to the Statute of Frauds. (at 297, per Dixon J, also *Lavery v Pursell* (1888) 39 Ch D 508, 518, per Chitty J).

The passing of the Supreme Court of Judicature Act 1873 (UK), which provided for the administration of the rules of common law and equity in the one set of Courts, did not affect this situation. The Judicature Act was not intended to fuse the principles of common law and equity. Thus the refusal of damages as a remedy in part performance cases was confirmed following the passing of the Judicature Act.

It was also confirmed, upon a more general basis, that "the operation of the doctrine was not extended by the provisions of the Supreme Court of Judicature Act 1873". (*Britain v Rossiter* (1879) 11 QBD 123 (headnote)).

The Chancery Amendment Act 1858, "Lord Cairns' Act", Judicature Amendment Act 1908, s 16A.

The Chancery Amendment Act 1858, was passed to eliminate the uncertainty which litigants could face, under the system of separate jurisdiction, whether to proceed at law or in equity in those instances where equitable relief as well as damages were sought or where a party did not succeed in equity. The Act thus had the effect of preventing a multiplicity of actions.

The Chancery Amendment Act, and its complementary legislation the Common Law Procedure Act 1854, were made necessary specifically because of the separate jurisdictions which existed until the passing of the Judicature Act 1873. However, as the Judicature Act was not intended to fuse the rules of common law and equity a role for Lord Cairns' Act continued after the introduction of the Judicature System.

The provisions of Lord Cairns' Act are now incorporated in New Zealand law in s 16A of the Judicature Act 1908. This is a much more laconic provision than that contained in the original Statute:

> Where the Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to or in substitution for, an injunction or specific performance.[2]

Lord Cairns' Act has very rarely been invoked in New Zealand. But its exact scope is by no means clear[3] and this uncertainty was revealed in *Ward v Metcalfe* where it was argued that the right to specific relief must exist at the time of the hearing, before there could be a right to damages under the Act. Broader problems also exist in the application of Lord Cairns' Act. For example the scope of the Court's discretion is unclear: must the plaintiff show a clear right to specific performance or is it sufficient to show merely that an equitable remedy would have been available save for the exercise of the discretion of the Court? The rules relating to the equitable damages awarded under Lord Cairns' Act could well differ from the rules relating to common law damages.

But the substantive limiting factor in its application is that it requires Courts to direct attention to the issue of whether or not an equitable remedy would be available before damages may be awarded. Thus to obtain the benefit of the Act plaintiffs must clearly establish that "they are entitled to an equitable remedy before they can get damages". (*J C Williamson v Lukey and Mulholland*, (supra), at 294, per Starke J.) The question could well arise as to whether, as the rules of law and equity are now administered in the same Courts the nature of damages as a remedy purely in lieu of specific performance, could well have been lost sight of. Under Lord Cairns' Act damages were not intended as a mere substitute for equitable relief.[4]

The application of Lord Cairns' Act to cases where the doctrine of part performance has been successfully pleaded could mean that the award of damages, in such cases, could be dependent upon the highly idiosyncratic rules pertaining to the remedy of specific performance. Thus the lapse of time could defeat the remedy. The application of the concept of mutuality could defeat a plaintiff's claim. (See ICF Spry, *Equitable Remedies* (3rd edn, 1984) Ch 3.)

It is contended, therefore, that whatever relevance Lord Cairns' Act may have elsewhere it is entirely inappropriate in part performance cases. It seems quite remarkable that this relic of 19th century formalism could be resorted to in order to defeat a contract which had so clearly been concluded.

The Contracts Enforcement Act 1956

A similar argument could be raised in respect to the application of the Contracts Enforcement Act 1956.

As indicated above, this legislation is the successor of the Statute of Frauds, which was passed in 1677. It prescribed a requirement of written evidence in regard to certain classes of contracts. It was designed to prevent fraudulent practices which had arisen at the time.[5]

By the early years of the nineteenth century the original purpose of the Statute had long since gone but the Statute, with its requirement of written evidence, remained. The formalism which encumbered the doctrine of part performance in the last century, and which was referred to above, was not designed to reinforcing the Statute of Frauds but to maintaining the integrity of common law contract which had attained supremacy by that time. This formalism ensured that the doctrine of part performance could not be satisfied unless a contract had definitely been concluded. It also had the effect of eliminating the broad area of discretion which Courts of Equity had previously enjoyed in their administration of the Statute of Frauds.

As this century has progressed the Courts have come increasingly to regard reliance upon the Statute as a privilege. It is now accepted that the effect of the Statute is procedural, rather than substantive. That is, the rights of a plaintiff continue, despite non-compliance with the Statute, but they cannot be enforced. Also a party may rely upon the failure to comply with the provisions of the Statute only if he specifically pleads the absence of writing. A party may waive the statutory provisions. (Code of Civil Procedure R 183, *Boviard v Brown* [1975] 2 NZLR 694)

The contemporary judicial attitude to the Statute of Frauds is well presented by Stamp J in *Wakeham v Mackenzie* ([1968] 2 All ER 783).

> It is an unhappy reflection that in this year of grace it should be possible . . . to rely . . . on a statute replacing one passed nearly three hundred years ago; . . . a statute which almost from the outset of its existence, was held by the judges was not to be used as an engine of fraud; . . . a statute which was held not to operate to avoid a contract but merely to prevent an action being brought on it. (at 785).

Unconscionable conduct

With the disintegration of 19th century formalism the way was open for the re-entry of judicial discretion into the administration of the doctrine of part performance. Words such as "equities"[6] and "fraudulent" (*Wakeham v Mackenzie*, supra) conduct which rarely passed the lips of the Judges in the administration of the doctrine in the early years of this century are again appearing in judgments. The conduct of parties who attempt to rely upon the Statute of Frauds will be considered under upon a broader basis than simply whether or not a contract has been concluded.

The conduct of the defendants in *Ward v Metcalfe* warrants consideration as to whether or not it could be regarded as infringing the standards which the early equity Judges would have required of parties seeking to rely upon the Statute of Frauds. Firstly, the plaintiff had fully performed her part of the contract.[7] The defendants had received, in full, the consideration which the plaintiff offered, which was vacant possession and title to unit one. Only the title to unit eight remained to be transferred to complete the contract. Secondly, the plaintiff, in moving into unit eight, had acted to the advantage of the defendants and at the instigation of the defendants. Thirdly, the defendants had stood by, without objection while the plaintiff occupied unit eight, without paying rent, for some years. Indeed one of the defendants had actually assisted the plaintiff in moving from unit one to unit eight. Fourthly, the plaintiff had asked for the transfer of the title to unit eight but through the "casual approach" of the defendants this had never been done. But at no time did the defendants deny her title to unit eight, before, that is she was ejected in March 1984. Fifthly it was no fault of the plaintiff that she had lost the right to specific performance.

It is submitted that the equities were balanced very much in her favour. And that there was no way that the defendants in *Ward v Metcalfe* could have relied upon the Contracts Enforcement Act. The conduct of the defendants amounted to an unconscionable insistence upon a statutory privilege. They sought to take advantage of the performance which the plaintiff had carried out. Indeed they sought to rely upon the Contracts Enforcement Act to take advantage of their own "casual approach".

A possible action in estoppel

Apart from any action in contract it is probable that the plaintiff in *Ward v Metcalfe* may have succeeded in an action in estoppel.

The defendants, in allowing, or

acquiescing in, the change of possession of the unit had clearly raised an expectation in the mind of the plaintiff that title to the unit would be transferred to her. (cf *Pascoe v Turner* [1979] 1 WLR 431.) She had clearly suffered the detriment which is a requirement of estoppel in that she had lost possession of her residence and was, at the time of the hearing, living in a council flat.

Had estoppel been successfully argued then the Court would have experienced no difficulty in deciding upon a remedy because in estoppel "It is for the Court in each case to decide in what way the equity can be satisfied". *Inwards v Baker* [1965] 1 All ER 446, 449, per Lord Denning MR).

Thus an action in estoppel would not have been constrained by either the Contracts Enforcement Act or the need to plead the doctrine of part performance. Being equitable the remedy would have been at the discretion of the Court. There is no need, in estoppel, for the remedy to be limited to the specific performance of the expectation which has been raised by the representor. It has recently been decided by the High Court of Australia that damages is available in cases where estoppel has been successfully pleaded. (*Waltons Stores (Interstate) Ltd v Maher* (1988) 62 ALJR 110).

Conclusion: Damages as a remedy for part performance

The time has surely arrived to loosen the constraints which presently exist on the remedy available in part performance cases. As has been indicated there is strong precedent limiting the availability of part performance to cases where an equitable remedy is sought. But it must be remembered that this precedent derives from a period when there was still a strong compulsion to keep the principles of law and equity, and the rules pertaining thereto, separate. *Ward v Metcalfe* appears to be the first case, since the handing down of the restatement of the doctrine of part performance in *Steadman v Steadman*, in which the issue of damages as a remedy for part performance appears to have been directly in issue.

It seems true that the intention of the Judicature Act was to preserve law and equity as distinct systems of law but it will be recalled that when the separate systems of Courts were in existence there was extensive competition between the two for jurisdiction. At the time of the passing of the Judicature Act there was no doubt a strong vested interest in both the judiciary and the bar in retaining the two systems of law separate. It is submitted that there is no longer any need for a rigid division of the principles of law and equity. Despite what the legal purists may say a clear fusion is now taking place between the principles of common law and equity in many areas. (This is especially evident in the case of estoppel where there is little remaining distinction between common law and equitable estoppel.)

There is no good reason why this fusion should not extend to the remedies available for part performance. The common law restitutionary remedy of quantum meruit has been widely accepted as available in part performance cases. *Turner v Bladin* (1951) 81 CLR 463). Also the old, long forgotten, remedy of *indebitatus assumpsit* has recently been applied by the Australian Courts to provide a remedy for the part performance of a contract subject to legislation similar to the Statute of Frauds. (*Pavey & Mathews Pty Ltd v Paul* (1987) ALJR 151)

It has been indicated that estoppel is now providing a more flexible remedy than part performance in many cases where the Statute of Frauds is applicable. If damages are not established as an accepted remedy for part performance it is quite probable that the doctrine will be outflanked by estoppel as a legal concept.

In the older cases it was said that "the equitable doctrine of part performance cannot be made use of for the purpose of obtaining damages on a contract at law". (*Lavery v Pursell* (1888) 39 Ch D 508, 518, per Chitty J). It is doubtful if such deference to legal concepts would find much favour today. The current practice is for a much more direct approach to the facts of a particular situation rather than to fit the facts into a set of pre-determined rules. Remedies are assuming a greater significance. Indeed the reshaping of estoppel was effected largely because common law classical contract theory was unable to provide a remedy in a great many very compelling factual situations.[8]

The facts of *Ward v Metcalfe* graphically illustrate the injustice which may arise through the absence of damages as a remedy in part performance. Two points stand out. Firstly, a contract had clearly been concluded. Secondly, the plaintiff had lost the right to specific performance through no fault of her own. Had orthodoxy been adhered to she could well have been left without a remedy, at least in contract. This could give rise to an extremely artificial situation.

It may be possible to say that the Court, in *Ward v Metcalfe*, applied the old equitable maxim in "regarding as done that which ought to be done". The absence of a remedy in *Ward* would have meant that the substance of the transaction could not be given effect to.

The doctrine of part performance concerns itself essentially with private rights. The application of damages in this area would not mean, for example, that damages would, if awarded, have the effect of circumventing statutory provisions. (*Boyce v Paddington Borough Council* [1903] 1 Ch 109, *Attorney-General v Birkenhead Borough* [1968] NZLR 383.)

There would seem to be no good reason why damages awarded on a plea of part performance should be limited in any way by historical equitable considerations. For example it would appear that nothing could be gained by limiting damages to merely being an addition to, or supplement to, an equitable remedy.

The exercise of the Court's discretion may pose a difficulty to some. Specific performance was granted at the discretion of the Court. Damages have not been regarded as discretionary. There would appear to be nothing to prevent damages also assuming a discretionary nature. Significantly, although the plaintiff principally sought damages for the loss of her bargain she claimed, and obtained, damages for mental anguish and suffering resulting from the breach. Redress on this ground would probably not have been available had the remedy been limited to

continued on p 220

Letters from the law library in Minsk, USSR

By Nigel J Jamieson, presently at Belgosuniversitet, in Minsk, USSR

The author was formerly a senior Lecturer in the Faculty of Law at Otago University. He is currently at the University of Minsk. These extracts from letters are more in the nature of disconnected jottings, made on the dates shown, than a carefully prepared article. They have been only slightly edited in one or two places to make them read more easily. By and large however they have been left as written at the time. The last entry dated 3 April is adapted from two postcards just recently received and tends to be a little more personal and direct.

24 January 1991

To –
My Dear but Much Misunderstood Common Lawyers –
Greetings,

We made our way to Minsk amid wars and rumours of war. We stopped over in Anaheim near Los Angeles. Outside our motel youngsters carried placards across busy intersections. Their object was to encourage motorists to toot their horns. According to the placards this would show support for American action in the Gulf War against Saddam Hussein.

We usually ate our evening meal in a little Chinese restaurant not far from one of these intersections. This was about the time that most traffic was homeward bound. The result was to trivialise the Gulf War for us in a rising crescendo of car horns. At the same time it seriously spoiled our appetite, for the human senses – even those depending on tastebuds and eardrums – are more intimately related than urban life allows. Consequently there was a certain amount of conflict diverted from the Middle East towards delaying our digestion.

Gradually the continual tooting of car horns faded away into the silence of the night. Anaheim was no longer a combat zone. Our stomachs could relax. Eventually one could hear from across Disneyland – as if from a gentler age – the distant horn of the paddle steamer *Mark Twain* making its last voyage before midnight.

Of course we went to Disneyland. After all, Khrushchev had wanted to go there when he was the first Soviet Premier to visit the United States. He had obviously been looking forward to it, for Mickey Mouse and Donald Duck are big folk heroes in the Soviet Union. So, being ourselves en route to Minsk in Byelorussia, we wanted, like Khrushchev to visit Disneyland too.

Khruschev never saw Disneyland. he missed *Splash Mountain*. He could not go through the *Haunted House*. He never went to *Wonderland*. United States officials decided that it would be too much of a security risk for him to visit Disneyland. The result was to sour East-West relations for at least a decade. So we were glad to be unimportant enough to visit *It's a Small Small World*, which we saw three times; and more especially *Great Moments in the Life of President Lincoln*, for which, unlike everything else, there were no queues and lots of empty seats. Interestingly enough, we found that most Americans passed by this part of their heritage. Almost all of the audience were foreigners.

27 January 1991

Security was strict as we left Los Angeles via Chicago for Frankfurt. The Americans still have a major air base in Frankfurt. From here they conduct military operations for the Gulf War.

American Airlines on which we travelled is an obvious terrorist target. The name draws anti-American feeling like a magnetic mine. The flight to Frankfurt was less than one-third full. Many travellers had cancelled their trip. Other Americans we talked to in Los Angeles could not believe that we would still be foolish enough to travel. Later we learned from Soviet television that in a week's time we could have had half-price fares.

Checking through the airline counter at Los Angeles was, from the passengers' point of view, apparent chaos. From the administrative point of view it was probably the best defensive measure against acts of terrorism. We witnessed a few domestic disputes among fellow passengers. The worst – because it was the closest – was that of a case flung over our heads by a wife at her errant husband. This so startled us that we were spared from starting up any disputes among ourselves. It was bad enough to watch the tempers rising round us.

All electronic equipment was disallowed on board. Already we had been obliged to leave behind tape recorders, battery chargers, and even torches at American Airlines in Auckland. Now we were told to abandon even cameras in Los Angeles. We began to pity the avant garde businessman left at a loss once

he had handed over his lap-top computer.

Our delayed take-off from Los Angeles meant a marathon run for us from one end of Chicago's O'Hare Airport to the other. There we found that the airport's chief security officer was prepared to hold up the aircraft another half hour until we had adequately explained, in Russian as well as English, why we wanted to go to the Soviet Union. He was a delightful fellow, one of those people who could have been either Polish or Irish, and whom we'd love to meet and get to know in less trying circumstances.

28 January 1991

Frankfurt – even quiet and studious Heidelberg where we spent a few days – seemed consumed by anti-American feeling. The antipathy seemed to rub off on, and be directed against, whoever spoke English. In Frankfurt's Historisches Museum we saw a model of the desolation wrought on Frankfurt during World War II. At first we felt sad to see it, but then a little angry at the one-sided explanations of how it had happened. Is it possible that post-war help to Germany has been misconstrued as a sign of weakness – perhaps even signifying Allied guilt?

We took a much needed break from the signs of war that seemed to follow us around, by visiting the Kinder Museum. Unfortunately it closed just as we were about to step in the door. The price we paid instead for having cups of coffee back in the Historisches Museum did little to encourage our enjoyment, and a surly attendant refused to explain why the advertised exhibition of early printed bibles was not then being held.

In Heidelberg we watched a little old lady take issue with a peace protester. In her late seventies, she would be old enough to have lived through the rise and fall of the Third Reich. As she wagged her finger at the young man she made it clear that he was still too wet around the ears to know what he was talking about. The young protester just smiled. As a picture of age admonishing respectful youth the scene was pleasant enough. Nevertheless the old church outside which both stood seemed defiled rather than sanctified by the peace propaganda that hung from it. It seems a paradox, but is it not so, that whenever the church fights in the flesh to promote peace, the result is war.

Leaving the scene of conflict we struck out for the hills. We took the cable car to Konigstuhl (King's Seat) above the Schloss (or Castle). There we walked in the snow, beyond dull care – or so we thought until we came face to face once again with the American army. We never found out what a military convoy was doing high above Heidelberg, but there was no mistaking the uniforms and insignia.

From Heidelberg it was back to Frankfurt. We spent a miserable evening walking through the decadent district around the Hauptbahnhof or main railway station. Then followed a furious last half hour as we tried to get our luggage released in time to board the night train for Berlin. The same train would travel on to Minsk but we had been unable to get a booking on it. At ten times the price, we would take off from East Germany's Schoenfeld Airport by Soviet Aeroflot (the biggest airline in the world) for Minsk.

1 February 1991

Why Minsk? And in terms of the question asked of every British traveller during the last war – "is your journey necessary?" Who could be sure at such a time as this with open warfare in the Middle East and food shortages in the Soviet Union? So why Minsk, and, as the security officer at Chicago Airport asked, "exactly what for?"

Academics have been taught to ask and answer questions. A lifetime of sitting and setting exams habituates them to finding some sort of reply. Very rarely do you ever hear academics admit they don't know. The temptation is to rationalise and so pre-empt the process of finding out. The truth is that one engages in the big issues of life simply to find out exactly what they mean. That's the way it was with coming to Minsk.

Sure I had a hunch. I wanted to study the process of legislation in the Soviet Union. I wanted to compare the concept of law between east and west. I wanted to find some formula by which to reconcile common law drafting with continental legislation. And I had been shocked by some of the results of restructuring in my own country of New Zealand, and so wanted to witness the process of *perestroika* in the Soviet Union where it all began.

If this is truly a time of *glasnost* then I need have no fear in saying that my own university was not particularly encouraging. And although I might see my own enterprise as somewhat Churchillian, I could not convince those who administered the Churchill Fund that the project was worthy of any support. So although ultimately allowed sabbatical leave, I was pretty well on my own – or so I thought until I landed in Minsk.

2 February 1991

It is impossible for any westerner to be on his own in the Soviet Union. I am not just saying that this is a collective society. Of course it is a collective society. People will stop you in the street to ask you where you bought your boots, those carrots you are carrying, or the plastic bottles protruding from your shopping bag. The curiosity of a collective society is insatiable. It grows even more when you tell them, amid empty stores, that these things can be bought any day of the week in the open market economy of New Zealand.

What else could be meant by saying that it is impossible for any westerner to be on his own in the Soviet Union? I do not mean that Big Brother is watching you – although he probably is, but whether for good or bad depends on what is meant by having a big brother. Don't misunderstand me – all I am saying is that for as long as a westerner lives and remains a westerner in Russia he needs looking after.

The foreign tourist who comes to the Soviet Union may complain about the extortionate hotel bills charged by Intourist. After all a nice room in Anaheim costs $US24 compared with a Soviet bill for twice as much. And the foreigner is called on to pay five times more than the ordinary citizen for travel. This is the opposite of an open market economy, for in the west the tourist is encouraged to spend more

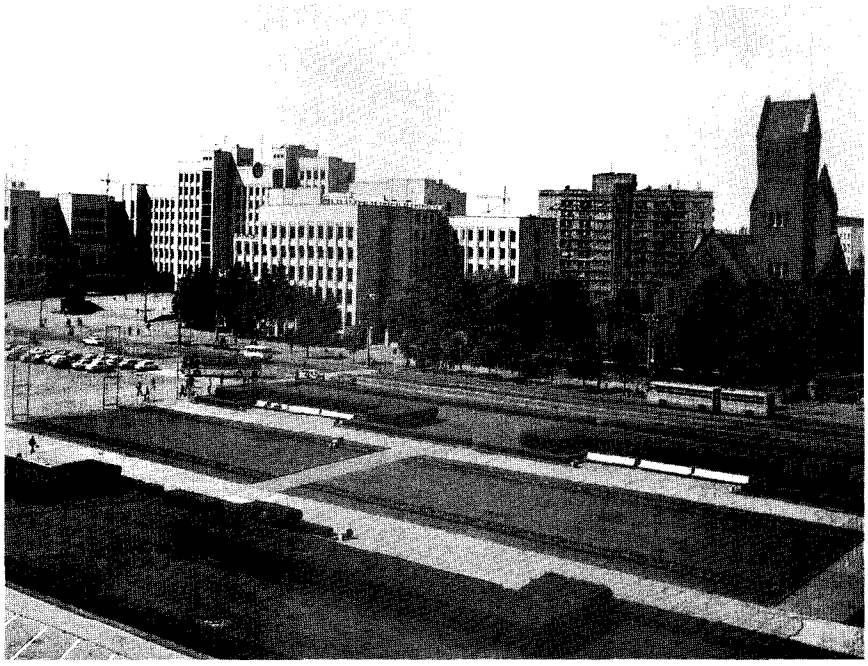
money by cutting rates rather than doubling them. But once the tourist begins to understand what goes into looking after him in the Soviet Union (which is hard for him to understand, for as a tourist he will never know what it is to do without it) he will realise he gets his money's worth.

For example, if the ordinary Soviet citizen wants to travel from Minsk to Lyublin he must spend months getting the appropriate documents, he may stand for a total of two hours in at least three separate queues, and argue his case with the lowliest official who disputes his documents in the rudest fashion. When he leaves, if he does manage to go on his trip, he may have tickets which take him only part of his way and he is as yet unsure of how he will reach his ultimate destination.

During our stay in the Soviet Union we have been blessed by a series of "minders". They have produced the necessary *taloni* or ration coupons without which it would have been impossible to buy food and clothing in the Soviet Union. They have arranged day to day city transport as well as urgent medical services. They have stood in long queues on our behalf — for tickets without which who knows when we would have been able to reach home.

This relationship of being personally cared for while in a foreign country is almost unknown to the westerner. A visa from one western country to another carries little more than a right of entry. In Russia it is different for the academic visitor. He is a privileged guest of the state, the city, the university, the faculty in which he stays and works.

You can imagine my surprise when on landing in Minsk I learned that my stay here was at the personal invitation of the President of Byelorussia. He himself had been in New Zealand as a member of a parliamentary delegation. Apparently I had captured his imagination with my credentials as a former parliamentary counsel who knew at least a little Russian. Thereafter, wherever I went, whether giving lectures, visiting the seat of government, or seeking urgent medical help for our fourteen-year-old daughter, I was always introduced as "the President's man".



Lenin Square, Minsk, from the University.

6 February 1991

Tonight President Gorbachev went to the nation on TV to announce a general referendum on the continuance of the Soviet Union. He spoke with more seriousness than seen before, and, as it seemed, under some degree of personal strain. The culture shock on hearing this news was so great — this sort of open democracy was not what I had been led in the west to expect of the Soviet Union — that I could not believe what I heard. Could it really be true that the Soviet Union would hold a general referendum on the continuance of the Union? Obviously I needed to brush up my knowlege of Russian. Until I knew the language better I was a menace to the legal profession.

7 February 1991

Yes, like all academics I need to see something in print before I can believe it. The general referendum on the continuance of the Soviet Union is to take place, according to *Pravda*, on 17 March.

8 February 1991

What has given rise to this extraordinary turn of events? Having been in the country only a week I cannot say. What has occupied me all this week has simply been learning to walk and learning to talk.

The city is covered with a heavy fall of snow. The day before we arrived the recorded temperature, so we were told, was 26° below. The cold is so intense that one's features freeze. Is this the reason that no one smiles?

Yet, people tell us that this, like last year's winter, is a particularly mild one. It did not snow during December nor even for the New Year. Some folk speak in hushed tones of a change in climatic conditions since Chernobyl. Others think the reasons are those that affect the wider world.

At any rate, bus windows are still frozen over from the inside out. Little private snow storms descend on passengers after their breath first soars roofwards then turns to minute particles of ice. If I miss my bus stop can I find my way back to work on foot? I doubt it, but then realise there is no alternative but to try. How else will I eventually get home?

We have to eat. That means ration cards. It means endless queues. It means going round empty supermarkets in the hope that you happen to be there when the food arrives.

Have you ever seen frozen ox-lung cut in squares? There are calves' feet still with legs attached.

In the Kamarovskii Market you can see a darling little heifer's head *au naturel* with tongue (protruding), hair (carefully combed) and open eyes (*in situ*). I haven't the heart to ask its price. Today that is all there is by way of being meat.

Tomorrow there may be chickens. They will cost four roubles each — less than a dollar, and therefore very cheap. The ox-tails, being posterior to the lungs, will not arrive till later. If we come tomorrow we may buy two ox-tails, still uncut and very swish, at 45 kopecks a kilo.

All the fresh food may be prodded, slapped, tickled, and jerked. In fact it is your duty to do so. The principle of the supermarket no less than that of the market place here is still *caveat emptor*. It is considered very poor housekeeping to make a purchase before feeling one's food. Of course trouble starts when two housewives discover that they are pulling away at the same chicken. The other day just when I had picked up the last pig's knuckle, a little old lady came along and asked me if I "meant to hold on to it". "Yes", I replied, but luckily she gave in quietly without a fight.

9 February 1991

When a foreigner comes to a strange country he is apt to assume that everything there has always been the way he finds it. But food rationing was introduced to Byelorussia not much earlier than our arrival. Citizens were still nervously trying to accommodate the new requirements. And this rationing was being constantly extended. On the very day of our arrival a new purchase tax of 5% was imposed on the sale of goods. What we witnessed in that first week was an extraordinary set of circumstances experienced at the height of a Russian winter. It was a situation which the North Country English are apt to sum up as "starvation weather".

10 February 1991

Empty shops, surly shop assistants, panicking purchasers, and difficulties in food distribution all contribute to a continuing crisis in the marketplace. There is plenty of bread and milk, both (as also meat and fish) being unrationed in Byelorussia. But eggs and cheese are unobtainable — and why not, because this is winter in the northern hemisphere. All the same that is not the only reason. To ask for bacon or ham is out of the question. Potatoes — Byelorussia's national dish — are not on sale. They say that a lot of last year's crop remains unharvested. Why? — Because there is no incentive for productivity. Sometimes there are carrots, more usually just beetroot. And we will go for a month without tea or coffee.

11 February 1991

Looking back on this last week there is no doubt of panic buying. How can it be otherwise when buying anything — and thereby having something to eat — depends on getting one's own hands on its first. There is no time to decide whether one really wants it or not. Life in this overcrowded marketplace is too short for that kind of civilised decision.

12 February 1991

It is not enough for the far flung traveller to realised that life has not always been the way it now is in his new found land. It is not even enough for him to accept that life has just suddenly changed — as if only from the moment of his own coming. That merely tempts him to indulge his desire for further novelty. On the contrary, he is forced, eventually, to admit his own ignorance. For unlike the local inhabitants, he has not lived through the past leading up to the present. And when, at last admitting his own ignorance, he looks around the now empty supermarkets, he begins to see what he otherwise would have overlooked. He sees — to quote from Hugh Walpole's *Jeremy and Hamlet* (a much loved book among English readers in the Soviet Union) that even in mundane places "History, history, history — it lies thick as dust about the town, and only needs a little stirring of the town's soil to send the dust up into people's eyes, making them think of times dead and gone and ghosts closer still about them, perhaps, than they cared to think".

It is not the new taxes or the new ration books or the new food coupons or the continually changing laws required to implement these new procedures in society that cause chaos. After all, the purpose of these new laws is to reduce panic buying. The fact is that underneath everything else there are deeper reasons for panic in the marketplace. The week before we came here, the Soviet people suffered a peculiarly stressful period of monetary reform. Many had the deeply humiliating experience of losing life-time savings.

I do not really want to comment on that period of monetary exchange in which people were given a brief three days in which to change whatever 50 or 100 rouble notes they held before these notes became non-negotiable. After all, I was not then living in the Soviet Union. This makes whatever comments I would make second-hand and hearsay. Nor even if I had been in Byelorussia on 27 January, which was the last day of the permitted exchange, could I have understood what was going on without knowing its previous history. Later on, however, I did experience what I believe to be the consequences of that monetary reform by way of panic buying. Accordingly, some comments, however conjectural, are called for to describe the monetary reform.

First of all, the monetary reform was meant to fight the shadow economy. Travellers to the Soviet Union can expect 5.8 roubles to the US dollar by way of official exchange. (This should be a pleasant surprise because the *Harvard Students' Guide* only allows 63 kopecks!) But "in the shade" (*tushina*) or "on the quiet" (*tishina*) of the black market (*chyernii rinok*) the traveller will be offered up to 27 roubles per dollar — which, after all, is no more than the official rate for Soviet citizens.

Secondly, the monetary reform was intended to restore central government control over the banks. For this reason, non-conforming banks were threatened with security investigations, and no extension of time or extra cash for exchange was allowed in the Republics.

Those who supported the legislation pointed out how the Soviet Union had been for so long oversaturated with cash. Co-operatives who had borrowed heavily were now trying to exchange their bundles of 100 rouble bills still unused. Those who opposed the

legislation pointed out the way in which the constitutional rights of the private citizen had been contradicted by presidential decree. Even Stalin, so they said, had allowed two weeks instead of three days for his monetary reform. At the most cynical extreme were those who described it as the "prime minister's first banana slip", and one which "for lack of a better explanation . . . is being attributed to an attempt to divert public attention from events in the Baltics".

From first to last these are all arguments about the theory of legislation — what was intended by the monetary reform and by what legal means that was to be achieved. The practical side to legislation, however, depends on the way in which law operates in any society. The lawyer learns a great deal about the theory of legislation, but how much does he know about social response?

We were told that a few days before we arrived in Byelorussia, all work came to a standstill in its capital city of Minsk. Factories went on strike, and long lines of humiliated people outside banks waited to change their life-savings. The banks held insufficient cash to effect the transactions and limits were put on how much could be exchanged by any one person. When people across the Soviet Union had time to think they recalled with chagrin how their previous pay packets held as many if not more high-denomination bills than usual. And on the last day, rather than lose everything, ordinary citizens traded in their bills for a fraction of their face value from spivs and racketeers working the queues on the streets.

We emphasise that so far as we are concerned this is all hearsay. We knew second-hand about what was happening because we read in the *Los Angeles Times* of 24 January 1991 that angry crowds were besieging banks across the Soviet Union. And when we flew into Byelorussia a few days later we were warned not to accept any big bills by way of exchange.

A week later we were close enough to testify first-hand to the consequences of these troubled times. It seems quite logical that if people no longer feel secure in saving for their old age then they will convert their currency into whatever is of real worth. If food and clothes seem to be in short supply, as they are now in the Soviet Union, then panic buying will ensue.

One thing we have learned from our experience in Byelorussia, is that panic buying goes on, and possibly began a long time ago in the west. Our New Zealand shops are full and our markets, based on private enterprise, pride themselves on being open. But in principle what goes on by way of exhausting the world's limited resources in a consumer society will have the same if not worse effect as panic buying in the restricted shopping of the east. The question for both east and west is then what happens next?

27 February 1991

How goes the referendum? A fortnight ago the *Moscow News* came out with the headline "Perestroika Grinds to a Halt — For How Long?" How close, indeed, is the continuance of *perestroika* to the results of the referendum?

One of the difficult things about commenting on Soviet affairs is the extent to which all issues are inter-related. The western approach, typified by Caesar's Gallic Wars, is to divide and conquer. Further east, the question for Guderian's panzer groups in 1941 no less than Napoleon's cavalry in 1812, is where to draw the line. Academic theory based on Caesar's military tactics, although successful in the west, will no more work to explain eastern affairs than did Napoleon's invasion of Moscow or Hitler's occupation of Minsk. It is probably safer to decide that Soviet society defies analysis than it is to draw distinctions that must always go against the Slavonic grain.

This is particularly the case with any attempted analysis of the Soviet legal system. There is no long drawn out history of conflict between Crown and commons by which to explain the constitution. There is no division of power by which to explain the several roles of legislature, judiciary and executive. There is no inherent heritage of Roman law by which to distinguish law from morality and politics. Law and society still appear coterminous — which probably explains why socialist legality always appeals to and attracts those who teach the synthesis of law and society, rather than Roman law, jurisprudence, or legal history as the first prerequisite for a legal education.

It is no more possible to relate *perestroika* to the results of the referendum independently of the military question, or independently of the Chernobyl catastrophe, or independently of the current economic crisis, or independently of the failure of attempts at monetary reform, or of the increasing disillusionment of the simple citizen with affairs of state, than it is to debate the issue of the referendum alone without considering *perestroika.*

By now, even as I write this letter in the law library of the Byelorussian State University of Lenin in Minsk, you in New Zealand will already know the results of the Soviet Referendum. Even by airmail this letter will take four weeks at least to arrive. So you will already know the results of the Soviet Referendum long before you read this letter. But will you know what the results mean?

Whatever the outcome of the referendum on 17 March 1991, not just the results, but more importantly the fact that such a referendum was and could be held, will sum up a very complex (*slozhni* is the word on everyone's lips in the Soviet Union) situation. Many people here say (a month before the referendum) that they already know the results. That may be so, but none in either east or west, as yet knows the consequences.

3 April 1991

Events have been moving so fast here, with the introduction of rationing, the holding of the referendum, the breakaway of Baltic [republics] and other provinces etc, that with the delay in post, it is better to keep the letters from here until they can be got through to you without delay . . . you will already know the results of the referendum so these letters must take a different form than the current affairs that will have already appeared . . . in the press. In any case my impressions change. What I would have said first is altered by subsequent events. I am still feeling my way; although with lots to say. I took part in a press conference on commercial law, and have three lectures to give on price fixing and an open market economy.

Meanwhile we have difficulty just in buying food; and a frightening experience for our daughter with ten days in hospital with appendicitis and food poisoning. These ten days were a nightmare for us, needless to say, yet we received all sorts of privileged treatment, and the kindness of the people was a delight to experience. As for work, well, one could not have chosen a more rewarding occasion, but so fast-moving and fraught with a certain amount of danger. I got caught in a crowd moving into a supermarket just before the recent price rise – a very peaceable and law-abiding crowd – but one which by very force of numbers broke the plate glass above the entrance door which just couldn't stand the squeeze. The whole shop front swayed in and out with the surging tide of would-be buyers. Once inside there was barely room to move. It didn't seem sensible – a great change for someone from such a small and sparsely populated country as New Zealand. Five months to go and already I'm looking forward to being a Kiwi again – as I still am, but in my own country once more.

From Belgosuniversitet in Minsk, Nigel J Jamieson

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specific performance. There is no good reason why damages in part performance cases should not include reliance loss.[9]

Despite the pressure of past reasoning the step forward which was taken in *Ward v Metcalfe* is to be commended. The award of damages in part performance cases is fully in accord with the contemporary development of the law relating to other aspects of the doctrine of part performance, and to developments which are taking place in other areas of law. Such a move provides for a more flexible remedy which will enable Courts to provide redress in instances where none would otherwise be available. Also it will enable Courts to strike more effectively at the true substance of a transaction and thereby give effect to the true intention of the parties. □

1 This has been confirmed by the New Zealand Courts:
Wi Rungi Rungi v Sutton (3 Jur (NS) 139 (NZ) *Allen v Fairbrother & Wilson* (1907) 9 GLR 328, *Winstone v Mehaffy* [1917] NZLR 956, *Young v Anderson* [1940] NZLR 239. See also WMC Gummow, RP Meagher and JRF Lehane, *Equity Doctrines & Remedies* (2nd edn, 1984) para. 233, and the cases there set out.

2 This provision was included in the Judicature Act by the passing of the Imperial Laws Application Act 1988. It had previously been held that Lord Cairns' Act was part of the law of New Zealand, *Ryder v Hall* (1908) 27 NZLR 385, 393, per Cooper J.

3 For discussion of the problems associated with the application of Lord Cairns' Act in Australia and New Zealand see Finn, PD, "A Road Not Taken; The Boyce Plaintiff and Lord Cairns' Act" (1983) 57 *Australian Law Journal* 493.

4 There have been instances where damages have been awarded under Lord Cairns' Act in error, eg in *Douglas v Hill* (1909) SALR 28, where no assessment of whether or not specific performance would have been available, was made, cf *Dillon v Nash* (1950) VLR 293, where damages were awarded in addition to specific performance.

5 The rise of the writ of assumpsit in the 17th century allowed oral promises to be enforced. The practice had apparently arisen of litigants attempting to fabricate contracts by inducing witnesses to commit perjury before a jury and falsely testify that a contract had been concluded. It is probable that the Statute was intended to apply only to cases where subjective consent had taken place. It was passed in a time before the concept of objective consent had become fully established.

6 *Wakeham v Mackenzie* [1968] 2 All ER 783, 786, per Stamp J; *Steadman v Steadman* [1976] AC 536, 555, per Viscount Dilhorne.

7 In the early administration of the doctrine the full performance of the contract on one side was regarded as taking the contract out of the Statute of Frauds, *Souch v Strawbridge* (1846) 2 CB 808; 135 ER 1161.

8 *Crabb v Arun District Council* [1976] Ch 179. The constructive trust has also greatly expanded in recent years for a similar purpose. Note also the recent decision of the English Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1990] 1 All ER 512, where the Court was prepared to mitigate the rules relating to contractual consideration to uphold an agreement which had clearly been arrived at. It should also be pointed out that in recent years the equitable remedy of specific performance has, itself, been expanded to cover a wider range of factual situations: *Price v Strange* [1978] Ch 337.

9 It is significant that s 2 of Lord Cairns' Act originally provided that "such damages may be assessed in such manner as the court shall direct". This appears to indicate that the legislation envisaged a judicial discretion in the awarding of damages under the Statute and that the rules pertaining to damages awarded under the Act were not limited by the rules relating to common law damages.

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enacted here it is to be hoped that while it is taken as a model the enactment in New Zealand will go further. Manitoba has a similar provision to South Australia's but unlike the Australian statute only the civil standard of proof must be met before the will can be admitted to probate. This would seem a logical development bringing any application under the provision in line with other civil actions. The statute in Manitoba also encompasses alteration defects, revocation and revival. Again it is to be hoped that an enlightened legislature in New Zealand will see fit to extend the power of the Court to dispense with the formal requirements in these areas as well. □

1 J H Langbein, "Substantial Compliance With the Wills Act" (1975) 88 *Harvard Law Review* 489.

2 A case in point in that of *Re Colling* [1972] 1 WLR 1440 Here the testator started signing his will in the presence of a patient and a ward sister. Before he could complete his signature the sister was called away and the signature completed in her absence. The Court held the will invalid for want of compliance with the formalities.

3 See also *In The Estate of Roberts* (1985) 38 SASR 324 and *In the Estate of Kraehe* (1986) 40 SASR 347. In both of these cases the testator and the two attesting witnesses signed the first page but only the attesting witnesses signed the second, and final, page.

4 As further illustrations see *In the Estate of Kolodnicky* (1981) 27 SASR 374 where the witnesses did not sign in the presence of each other or observe the testator sign, and In the *Estate of Dale* (1983) 32 SASR 215 where the testator signed the will in the presence of one witness who also signed, and then took the will away and signed it again in the presence of a second witness who then signed his name. Both wills were admitted to probate.

5 *In the Estate of Hodge* (1986) 40 SASR 398. His daughter, after sighting the document warned the testator that he would need two witnesses, but he was of the view that what he wanted done was perfectly plain and refused to do any more.

6 For alterations see *In the Estate of Possingham* (1983) 32 SASR 227 where the testator wrote in the margin of the will "deletions authorised by me" followed by his signature and the alterations themselves were initialled where they occurred. For additions see *In the Estate of Ryan* (1986) 40 SASR 305 where O'Loughlin J made a very useful summary of the principles to be extracted from the decided cases.

7 Legoe J referred to *In the Estate of Treloar* (1984) 36 SASR 41 where signed and witnessed "Instructions for Will" were admitted to probate as the will of the testator.

8 Supra n1 at 513 ff.