A SURVEY OF NEW SOUTH WALES LAW—1978

I INTRODUCTION

Prepared by the Editorial Board of the *University of New South Wales Law Journal*, this Survey of legal occurrences in New South Wales in 1978 was undertaken primarily because, despite the wealth of legal literature being proliferated, there has been no real attempt to provide an annual overview of the legal activities in the state which is traditionally at the vanguard of Australian legal thinking. This is not to deny the value of publications such as the *Annual Survey of Commonwealth Law* edited by Professor H. W. R. Wade, or *An Annual Survey of Law* edited by Professor R. Baxt, both of which attempt to provide practitioners and students of Commonwealth and Australian law respectively with a source by which to keep themselves up to date in many significant areas of the law. The aforementioned publications undertake a much broader geographical and jurisdictional coverage than that attempted here. It is hoped that this project will be of use and interest to practitioners, academic lawyers and law students in New South Wales and beyond, either generally or with respect to specific areas of the law.

The Survey looks particularly at cases and decisions—but also, where appropriate, at legislation, reports of governmentally established bodies, and at the developments of some organisational aspects of the legal and judicial systems—from the period 1 January 1978 to 31 December 1978; the cases abstracted were heard or decided in New South Wales courts, or in higher courts on appeal from New South Wales courts.

While the Survey is basically a compendium of legal activities, and not intended necessarily to be evaluative, this approach allows some other observations to be made: regarding, for example, the trends in judicial decision-making that are becoming apparent in certain fields of law in New South Wales, and the areas of the law that are in confusion or need of reform.

II ACTIONABLE WRONGS

1. *Animals*

In *Higgins* v. *William Inglis & Son Pty Ltd*[1] the appellant was injured while inspecting cattle at an auction sale. The New South Wales Court of Appeal had to determine: first, whether escape from confinement is a condition of liability for injury caused by an animal; secondly, whether the owner in possession ceases to be the keeper when he entrusts the animal to an independent contractor; and finally, whether contributory

[1] [1978] 1 N.S.W.L.R. 649.

negligence is a defence. After briefly surveying the authorities, the Court concluded that liability does not depend upon proof of escape, but simply on the keeping of the animal with knowledge of its dangerous propensities. In answer to the second question, the Court said that "where liability is strict responsibility cannot be delegated to an independent contractor . . .".[2] On the third question, Glass J.A. (Moffitt P., Reynolds J.A. concurring) referred[3] to the position prior to the introduction of section 10 of the Law Reform (Miscellaneous Provisions) Act 1965 (N.S.W.). That section defines fault in respect of which damages will be reduced as "negligence, or any other act or omission which gives rise to a liability in tort or would apart from this Part, give rise to the defence of contributory negligence". Thus, this section provided no basis for the defence of contributory negligence in this case. However, the Court ordered, despite its finding as to delegation of responsibility to an independent contractor, that since the owner had disclosed the dangerous tendencies of the bull to the auctioneer, he should recover a full indemnity under section 5 of the Act.

2. *Damages*

In Nicastri v. Australian Iron & Steel Pty Ltd[4] the Court of Appeal considered the meaning of section 106 of the Supreme Court Act 1970 (N.S.W.). This section empowers the Court to set aside an assessment of damages and to order a new trial where it appears from "matters" which have occurred since the trial that the damages awarded at trial are manifestly too high or too low. The section further allows the Court to receive evidence as to such matters where "special circumstances" make it desirable to do so and to make findings of fact thereon. The appellant sought to challenge, by tendering fresh medical evidence, the quantum of damages awarded in a workers' compensation claim. Samuels J.A. (Glass and Mahoney JJ.A. concurring) considered that an applicant must first establish the existence of "special circumstances" to the satisfaction of the Court, and then must persuade the Court to exercise its discretion in his favour. While his Honour agreed with the respondent's submission that a medical opinion obtained after the trial did not satisfy the description of "matter" in section 106, he believed such evidence in principle to be admissible under the section. However, he refused the application because he considered "special circumstances" of an appropriate nature did not exist here. In so deciding, his Honour relied on the test propounded by Lord Wilberforce[5] and subsequently approved by the Supreme Court.[6] However, as a

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[2] *Id.*, 653.
[3] *Id.*, 654.
[4] Unreported, N.S.W. Court of Appeal, 20 July 1978.
[5] *Murphy* v. *Stone Wall-work (Chatton) Ltd* [1969] 1 W.L.R. 1023.
[6] *Costi* v. *Keats* [1972] 2 N.S.W.L.R. 957; *Warr* v. *Santos* [1973] 1 N.S.W.L.R. 432.

matter of policy, Samuels J.A. suggested that, even if there were special circumstances, the exercise of the discretion would be inappropriate in a case such as this, since the applicant had merely sought a medical opinion more favourable to his case. Reassessment in such circumstances would challenge the finality of proceedings and open courts to a deluge of claims.

In another workers' compensation case, Podrebersek v. Australian Iron & Steel Pty Ltd,[7] the Court of Appeal (Moffitt P., Reynolds and Glass JJ.A.) considered the direction to be given to the jury on the question of apportionment of damages under section 10(1) of the Law Reform (Miscellaneous Provisions) Act 1965 (N.S.W.). Since it would seem that there is no authoritative decision of the High Court of Australia[8] on this matter, the Court followed a decision of the House of Lords[9] where it was found necessary to compare the conduct of the plaintiff and defendant in respect of the extent of the departure from standards of due care and the extent to which each had contributed to the plaintiff's damage. The plaintiff argued that in simply reading the section to the jury, the trial judge had failed to instruct them adequately in point of law and this amounted to a misdirection within Part 51 Rule 16 of the Supreme Court Rules 1970 (N.S.W.). In *Broadhurst* v. *Milner*[10] the Court assumed the direction was deficient—though it declined finally to decide the issue—and amounted to a misdirection within the Rules. While the Court accepted that there was sufficient evidence of a miscarriage, it was considered inappropriate to grant a new trial where the trial judge had not been asked to correct his summing-up.[11]

Apportionment of damages for contributory negligence under section 10(1) of the Law Reform (Miscellaneous Provisions) Act in an action by a plaintiff against several concurrent tort-feasors was considered in *Barisic* v. *Devenport*.[12] In this difficult case, three alternatives were examined. First, the conventional approach that the responsibility of the plaintiff is compared with the sum of the responsibilities of the defendants so that the plaintiff recovers fully against each, irrespective of their relative degrees of fault. Secondly, the responsibility of the plaintiff is compared separately with that of each

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[7] Unreported, N.S.W. Court of Appeal, 15 September 1978.

[8] The decision of that Court in *Pennington* v. *Morris* (1956) 96 C.L.R. 10 confined apportionment to a comparison of culpability; the question of causative comparison did not arise there.

[9] *Stapley* v. *Gypsum Mines Ltd* [1953] A.C. 663. This decision was followed by the Victorian Supreme Court in *Kakouris* v. *Gibbs Burge & Co. Pty Limited* [1970] V.R. 502; *Broadhurst* v. *Milner* [1976] V.R. 208.

[10] Note 9 *supra*.

[11] It is interesting to note that in so finding the Court distinguished its own decision in Stevenson v. The Commissioner of Main Roads, unreported, N.S.W. Court of Appeal, 9 March 1978.

[12] [1978] 2 N.S.W.L.R. 111.

defendant, so that different judgments may be given against each defendant. Thirdly, the share of the responsibility of the plaintiff and each defendant is determined and judgment given for the plaintiff against each defendant according to that defendant's share of the total responsibility.[13]

The Court of Appeal (Moffitt P., Hope and Samuels JJ.A.) was unanimous in favouring the first alternative, *inter alia*, on the construction of section 10(1).[14] Unanimity of result should not obscure divergence of reasoning, for instance with regard to policy considerations regarding the potential impecuniosity of defendants.[15] The whole Court agreed that for the purposes of section 10(1) the plaintiff's fault should be compared to the combined fault of the defendants viewed as a whole. However, Moffitt P. felt that in order to determine the percentage responsibility of the plaintiff, some intermediate comparison of individual faults may be appropriate.[16] Samuels J.A. disagreed;[17] the damages of the plaintiff should be reduced within section 10(1) having regard to the plaintiff's departure from the standard of the reasonable man. Once the respective shares to be borne by plaintiff and defendants have been determined then it is necessary to apportion the defendants' share.[18]

The Court of Appeal (Moffitt P., Reynolds and Glass JJ.A.) considered apportionment of damages under section 4 of the Compensation to Relatives Act 1897 (N.S.W.) in Gullifer v. Pohto.[19] That section provides that damages are assessed and awarded as a single judgment, then appropriately divided amongst individual claimants. The Court considered it appropriate to examine the losses of individual claimants where losses were not shared in common. Since section 5 of the Act contemplates that losses common to individual claimants should be assessed together to avoid duplication, in cases where particular benefits accrue to some but not all claimants, it is proper to debit such benefits against the loss sustained by the claimant.

3. *Defamation*

Morosi v. Broadcasting Station 2GB Pty Ltd[20] considered the question whether the context in which defamatory material is published would render the publication harmless. In an action relating to an early morning broadcast, the defence asserted the discrediting statements were made for the purpose of refuting those statements. The resolution

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[13] The practical effects of each of these alternatives are elucidated by Moffitt P., *id.*, 118.
[14] *Id.*, 121 *per* Moffitt P.; *id.*, 150 *per* Samuels J.
[15] *Id.*, 121 *per* Moffitt P.; *id.*, 151 *per* Samuels J.
[16] *Id.*, 121. *Cf.* Podrebersek's case, note 7 *supra.*
[17] *Id.*, 152, 153.
[18] *Id.*, 154.
[19] Unreported, N.S.W. Court of Appeal, 14 December 1978.
[20] Unreported, N.S.W. Court of Appeal, 28 September 1978.

of the matter was said to depend upon a comparison of "the bane and the antidote".[21] The problem was approached from that of general impression, taking into account the circumstances under which such a broadcast would be heard. The finding in favour of the plaintiff at first instance was upheld.

In *Edelsten* v. *John Fairfax & Sons Ltd*[22] the plaintiff sought the continuation of a temporary injunction to restrain the defendant from publishing further material, namely the defrauding of Medibank by doctors. The allegedly defamatory articles had not mentioned the plaintiff by name; however, the defendant had subsequently reported the granting of the temporary injunction enabling many to identify the subject of the articles. The application was refused, *inter alia*, upon the ground that the defendant had *prima facie* established a defence of qualified privilege,[23] and further, there was no evidence of malice. Also, upon general policy considerations it was thought to be undesirable to restrain fair discussion of a matter of public interest.

The Court of Appeal in *Petritsis* v. *Hellenic Herald Pty Ltd*[24] considered in detail sections 9(1) and (2), and 29 to 31 of the Defamation Act 1974 (N.S.W.) and their effect on the common law, and also the effect of Part 67 Rule 17 of the Supreme Court Rules 1970 (N.S.W.). The appellant (defendant) had submitted that in a defence of comment it is the imputation and not the matter published that must be considered. The Court (Reynolds and Samuels JJ.A., Mahoney J.A. dissenting) rejected this argument affirming that the 1974 Act had not altered the common law as to what constitutes comment, and thus "the submission that the imputation has become the cause of action is quite wrong".[25] To the extent that Part 67 Rule 17 countenances the proposition that imputation is comment, Reynolds J.A. indicated[26] the law had been misinterpreted and the rule required reframing.

4. *Fraud*

In *Gipps* v. *Gipps*[27] the Court of Appeal clarified the proposition of Lord Jessel M.R. in *Redgrave* v. *Hurd*[28] that knowledge of the falsity of representations defeats a case based on those representations as misrepresentations. In a case where the plaintiff suspected some irregularity in the defendant's representations, the Court (Hutley J.A. with whom Glass and Samuels JJ.A. concurred) affirmed that the

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[21] *Per* Alderson B. in *Chalmers* v. *Payne* [1835] 2 C.M. & R. 156; 150 E.R. 67.
[22] [1978] 1 N.S.W.L.R. 685.
[23] *Id.*, 696.
[24] [1978] 2 N.S.W.L.R. 174.
[25] *Id.*, 185 *per* Reynolds J.A.
[26] *Id.*, 183.
[27] [1978] 1 N.S.W.L.R. 454.
[28] (1881) 20 Ch. D. 1.

knowledge required is that which destroys the effect of the misrepresentations as inducements.[29]

5. Negligence

In *Shirt* v. *Wyong Shire Council*[30] the Court of Appeal re-examined the law relating to negligence. The plaintiff had succeeded at first instance[31] in a claim for personal injuries resulting from a water-skiing accident. The plaintiff had alleged that because of a sign reading "Deep Water" erected by the defendant Council he had been misled into skiing in water too shallow to be safe. The plaintiff had asserted that the placing of the sign amounted to a breach of duty owed to him by one or more of the defendants: the Council, the Maritime Services Board and the local aquatic club. The plaintiff succeeded, however, against the Council only and appealed against damages awarded. The defendant Council cross-appealed against the verdict and judgment for the plaintiff. It also cross-appealed against the verdicts in favour of the other defendants from whom the Council had cross-claimed for contribution.

The Council challenged the finding of negligence on the basis that there was no evidence on the issue of liability fit for the jury. The Court of Appeal (Glass and Samuels JJ.A., Reynolds J.A. dissenting) dismissed this cross-appeal of the Council. Glass J.A. (Samuels J.A. concurring) considered the test to determine the question of duty "relates to the foreseeability of harm resulting to the plaintiff from the conduct of the defendant . . .".[32] Since the defendant had undertaken the dredging of the lake (actuating the placement of the pertinent signs) with the knowledge that members of the public used the waters of the lake for recreational purposes, there was a sufficient relationship of proximity with water-skiers generating a *prima facie* duty to exercise due care. There were no policy considerations to exclude this duty of care.[33] Applying the principles established in the two *Wagon Mound* cases,[34] a two-fold test for breach was formulated. First, injury to a class of persons of which the plaintiff is a member must be shown to be foreseeable as a possibility, albeit remote. Secondly, it must be shown that a reasonable man would have taken steps to eliminate that remote possibility.[35] The first requirement satisfied, Glass J.A. considered a reasonable man would have eliminated the possibility of injury, for

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[29] See especially note 27 *supra*, 460.
[30] [1978] 1 N.S.W.L.R. 631.
[31] Unreported, Supreme Court of N.S.W., Ash J. and jury.
[32] Note 30 *supra*, 640.
[33] See particularly *Home Office* v. *Dorset Yacht Co. Ltd* [1970] A.C. 1004.
[34] *Overseas Tankship (U.K.) Ltd* v. *Morts Dock and Engineering Co. Ltd (The Wagon Mound (No. 1))* [1961] A.C. 388; *Overseas Tankship (U.K.) Ltd* v. *Miller Steamship Co. Pty Ltd (The Wagon Mound (No. 2))* [1967] 1 A.C. 617.
[35] Note 30 *supra*, 642.

instance by a mere re-wording of the sign.[36] A breach of duty established, there was also sufficient evidence to justify the finding of the jury on the issue of causation.

On the question of remoteness of damage, Glass J.A. considered that the degree of foreseeability is identical to that necessary for breach. Rejecting a test based on "likelihood" endorsed by the High Court,[37] Glass J.A. adopted the approach that the injury must be "reasonably foreseeable as a possible outcome of the defendant's negligence".[38] In doing so, it was asserted by Glass J.A. that the question of remoteness of damages was to be determined by the Privy Council authority of the *Wagon Mound* cases, authority accepted by the High Court.[39]

The local aquatic club was also found negligent. By the provision of facilities attracting water-skiers the Club had placed itself in a position of proximity such as to generate a duty of care. The same foresight of the possibility of injury attributed to the Council was attributed to the Club, who were said to be more familiar with the hazards of skiing. This conclusion was reached despite the fact that the Club had no legal power to modify Council signs, since the Club could have by other means (for example, warnings on the Club notice board) eliminated the power of the signs to mislead.[40]

In *Maloney* v. *Commissioner for Railways (N.S.W.)*[41] the High Court declined to enter a finding of negligence against a statutory body. In this case, where a child was injured when thrown from the open door of a railway carriage as a result of the lurching of the train, the Court was prepared to accept the risk of such accidents occurring. It was expressly denied that proof of risk automatically generated a duty to take steps to eliminate such risk. There would have to be some evidence of the degree of risk, and the practicality of possible safeguards, before the Court would rule that a failure to eliminate the risk would amount to negligence. This was because the question ultimately is dependent upon the reasonableness of the defendant's conduct.

In *Geyer* v. *Downs*[42] it was held the existence of a duty of care owed by a schoolmaster to pupils depended upon "whether the particular circumstances of the occasion in question reveal that the relationship of schoolmaster and pupil was or was not then in existence".[43] In this case, the headmaster knowing that there were many working mothers in the district, opened the school gates at 8.15 a.m. partly for the purpose of providing the children with a safe place to play and partly

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[36] *Ibid.*
[37] *Caterson* v. *Commissioner for Railways* (1973) 128 C.L.R. 99, 110.
[38] Note 30 *supra*, 644.
[39] *Mount Isa Mines Ltd* v. *Pusey* (1970) 125 C.L.R. 383.
[40] Note 30 *supra*, 646.
[41] (1978) 52 A.L.J.R. 292.
[42] (1978) 52 A.L.J.R. 142.
[43] *Id.*, 144 *per* Stephen J.

to allow teachers to arrive early. However, no supervision was provided from 8.15 a.m. to 9.00 a.m. To satisfy the requisite standard of care as laid down in *Richards* v. *State of Victoria*,[44] to "take such measures as in all the circumstances were reasonable to prevent physical injury to [the pupil]", supervision of the children ought to have been provided from 8.15 a.m.

In *Preston Erections Pty Ltd* v. *Rheem Aust. Ltd*[45] the High Court dealing, *inter alia*, with an issue of contributory negligence, considered whether an employer is entitled to rely on the expertise of a sub-contractor to take precaution against risk. Fire had damaged the building of the employer respondent when flammable materials had been ignited by molten metal from the welding operations of the sub-contractor appellant. Gibbs A-C.J. (with whom Stephen, Mason and Aickin JJ. concurred) endorsed a proposition laid down by Atkin L.J. that such contractors "were bound to exercise care, not generally but in relation to the conditions they found . . . and [adopt] precautions commensurate with the danger".[46] However, this did not automatically absolve the employer from all responsibility for its own protection—it would depend on the circumstances. In the present case, the allegation of contributory negligence failed because although they were aware of the risk, there was no evidence that the respondents knew or should have known that the welding equipment was being used in close proximity to the flammable material.

III ADMINISTRATIVE LAW

1. *Going Beyond Power*

Development in this area in 1978 was marginal. *Hatton* v. *Beaumont*[47] raised the questions whether a procedure for an appeal from a licensing court to a full bench of licensing magistrates was mandatory or directory, and thus, whether non-compliance with it deprived the full bench of jurisdiction to hear an appeal. The procedure, governed by regulation 14 of the Liquor Act Regulations (N.S.W.), required a payment (or surety) of ten pounds "within seven days of lodging his notice of appeal". The High Court held the procedure to be directory only, so that although the sub-regulation had to be complied with in substance, a failure to comply within the prescribed time did not deprive the magistrates of their jurisdiction to hear an appeal. Jacobs J. stressed the need to examine the framework and language of the statute or regulation irrespective of procedural requirements being usually or *prima facie* mandatory.

In contrast to *Hatton* v. *Beaumont* is *Logue* v. *Shoalhaven Shire*

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[44] [1969] V.R. 136, 141.
[45] (1978) 52 A.L.J.R. 523.
[46] *Ellerman Lines Ltd* v. *H. & C. Grayson Ltd* [1919] 2 K.B. 514, 535.
[47] (1978) 20 A.L.R. 314.

Council.[48] There Powell J. held that where a council wishes to sell land for overdue rates without recourse to a court or to any independent public body, the provisions of section 602 of the Local Government Act 1919 (N.S.W.) must be strictly observed. In this case the Council's sale was held to be invalid as a notice stating the amount of overdue rates was incorrect.

Horne v. *Locke*[49] dealt with the jurisdiction of a board set up within the Public Transport Commission to hear appeals from officers passed over for promotion. The Supreme Court found on interpretation of sections 76(1) and (3)(b) of the Government Railways Act 1912 (N.S.W.) that the issue before the board was the suitability of the appellant for the position, and not the suitability of the other successful applicants. In a similar vein, it was held in *Felvus* v. *Fay*,[50] a case concerning the conditional removal of a liquor license from one area to another, that it was sufficient that the license might, and probably would, be lawfully used to fulfil an existing reasonable requirement of the area. It was irrelevant that the license might lawfully be used for another purpose for which a reasonable requirement had not been shown to exist.[51]

2. *Natural Justice*

Three issues of interest relating to the principles of natural justice arose in *Calvin* v. *Carr*.[52] The primary issue concerned whether a later hearing can "cure" any defects in natural justice evident in an earlier hearing. In *Calvin's* case stewards of the Australian Jockey Committee had disqualified a horse owner for not running his horse "on its merits" as is required under regulation 135(a) of the A.J.C. rules. The Committee of the A.J.C., which could decide issues on their merits and hear all the evidence as well as any new submissions, dismissed the horse owner's appeal.

The Privy Council held that whilst there was no definite rule as to later hearings "curing" any lack of natural justice at the first hearing,

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[48] [1978] 1 N.S.W.L.R. 710.

[49] [1978] 2 N.S.W.L.R. 88.

[50] [1978] 1 N.S.W.L.R. 604.

[51] Radford v. Local Government Appeals Tribunal, unreported, Supreme Court of N.S.W., 31 August 1978, clarified the power of that Tribunal, holding that where the Tribunal entertained an appeal against a council decision that an extension to a building had exceeded the boundary, it was able to allow the appeal subject to modifications to the extension. Other cases in 1978 that dealt with going beyond power were Ex parte Administrative and Clerical Officers Association, unreported, High Court of Australia, 2 May 1978, regarding the power of the Public Service Arbitrator with respect to the appointment of "outsiders"; Stratton v. Illawarra County Council, unreported, Supreme Court of N.S.W., 13 December 1978, which considered "regrading" council employees; McAway v. Commissioner of Police, unreported, N.S.W. Court of Appeal, 5 May 1978, which discussed police promotion lists and choice within and outside them.

[52] (1979) 22 A.L.R. 417.

there were three typical situations to which some general principle could be inferred: rehearings by the original body mean that the second hearing supersedes the first; some sets of hearings are so structured that they require natural justice at all levels; and there are intermediate situations where a court must determine whether the result was fair, the methods were fair, and they were fairly accepted by the parties on joining the association. The Privy Council did not elaborate on how a court would make such a determination for the intermediate situations, although it did approve (whilst noting its different "emphasis") *Reid* v. *Rowley*,[53] which held that a court should take into account in exercising its discretion all preceding proceedings, the conduct of the complainant, and the gravity of the breach of natural justice. *Annamunthodo* v. *Oilfields Workers Trade Union*,[54] *Pillai* v. *Singapore City Council*,[55] *Meyers* v. *Casey*[56] and *Twist* v. *Randwick Council*[57] were all explained as supporting this tripartite understanding of first and second hearings. *Hall* v. *N.S.W. Trotting Club*[58] and *Ethell* v. *Whalan*[59] were both overruled insofar as they conflicted with this finding.

A second issue in *Calvin* concerned the content of natural justice.[60] The Privy Council held that the minimum requirements were that the stewards lay formal charges, that they hear the horse owner in defence, and that he know the evidence laid against him. However, in *Maloney* v. *N.S.W. National Coursing Association Ltd*[61] the Supreme Court, dealing with an original hearing by a domestic tribunal, held that an adequate opportunity to state one's case was sufficient for natural justice, even when one of the members who imparted hearsay evidence when the member facing expulsion was not present, was not able to be cross-examined.

A third issue may be seen where the Privy Council in *Calvin* expressed the desire of the courts to avoid introducing into domestic disputes "too great a measure of formal judicialization",[62] particularly where there is an inquiry and appeal process. The *Maloney* case and

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[53] [1977] 2 N.Z.L.R. 472; see also note 52 *supra*.
[54] [1961] A.C. 945.
[55] [1968] 1 W.L.R. 1278.
[56] (1913) 17 C.L.R. 90.
[57] (1976) 12 A.L.R. 379.
[58] [1976] 1 N.S.W.L.R. 323.
[59] [1971] 1 N.S.W.L.R. 416.
[60] Other cases that dealt with the content of natural justice were Bartzios v. Leichardt Municipal Council, unreported, Supreme Court of N.S.W., 17 February 1978 (public notice of proposal); Boyd v. Humphries, unreported, Supreme Court of N.S.W., 24 May 1978 (calling witnesses, addressing a tribunal on a penalty); Cleworth v. Barrow, unreported, Federal Court of Australia, 29 May 1978 (bias in tribunal); Sullivan v. Delegate of the Secretary Department of Transport, unreported, Federal Court of Australia, 28 June 1978 (the duties of the Administrative Appeals Tribunal with respect to granting reasonable opportunities to present one's case).
[61] [1978] 1 N.S.W.L.R. 161.
[62] Note 52 *supra*, 429.

Dale v. *N.S.W. Trotting Club Ltd*[63] both implicitly support this. In *Maloney*, an expulsion from a sporting association by its committee for conduct unbecoming a member was challenged on the ground that one of the members of the committee might reasonably have been suspected of bias against the plaintiff. The Supreme Court dismissed this, holding that a member of a domestic tribunal will not be disqualified for suspected, as opposed to actual bias. It also held that witnesses of contested facts would only be disqualified from membership of the committee if they gave evidence; and that whether they acted upon their own knowledge of the facts in issue was irrelevant as it is not possible to segregate under legitimate and illegitimate heads the various sources of information accessible to members of a domestic tribunal. Similarly, in *Dale's* case Hutley J.A. suggested that only an *actual* surrender of a domestic tribunal's responsibilities (to a barrister assisting it) would invalidate its disqualification of a member.[64]

An unrelated issue arose in *Bray* v. *Faber*[65] where it was held that there was no duty of natural justice resting on a council to hear a landowner on matters affecting him when there was an application by an adjacent landowner for approval of the erection of a building.

3. *Remedies*

The nature of a court's discretion[66] in granting a declaration where no consequential relief is guaranteed was elaborated on slightly by *McGarrigle* v. *Public Service Board*.[67] Rath J. held that it was sufficient that the declaration establish that there *was* a statutory duty that had been breached in this case, and that it might enable the plaintiff to take further steps towards relief.[68] In contrast, the Supreme Court denied that it had jurisdiction to grant a remedy in *Anderson* v. *Director-General of Education*.[69] Sheppard J. held that even if appointments within the Department of Education contravened the Anti-Discrimination Act 1977 (N.S.W.), the contracts would still be valid. He also held that the unlawful action was the discriminatory conduct of the employer and this did not presuppose that any contracts of employment entered into contrary to the provisions of section 25 of the Anti-Discrimination Act would be "on that account invalid". He further held

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[63] [1978] 1 N.S.W.L.R. 551.

[64] See also Waverly Municipal Council v. Ladac Holdings Pty Ltd, unreported, Supreme Court of N.S.W., 13 June 1978.

[65] [1978] 1 N.S.W.L.R. 335.

[66] Or "jurisdiction" *per* Hutley J.A. in *A.C.S.* v. *Anderson* [1975] 1 N.S.W.L.R. 212.

[67] [1978] 1 N.S.W.L.R. 243.

[68] The Court, in this context, has been prepared to give a declaration as to the invalidity of a rate, under a counter-claim to an action for its recovery, even though the ratepayer had failed to appeal under the Local Government Act 1919 (N.S.W.) s. 133(2): *Burns Philip* v. *Blacktown Municipal Council* [1976] 1 N.S.W.L.R. 531.

[69] [1978] 2 N.S.W.L.R. 423.

that the power to void such a contract lay in the Anti-Discrimination Board only under section 113(b)(iv).

The Court denied that it even had jurisdiction to hear the appeal in *MacDougall* v. *Metropolitan Water Sewerage and Drainage Board.*[70] It held that it could not decide whether it was fair for the Board to reassess a property owner's rates after an initial lower rating, nor whether this was within the Board's power. It could only decide whether the reassessed rate was correct according to property classifications. Similarly, the Court would not interfere with the Master's assessment of damages in *Bilambil-Terranora Pty Ltd* v. *Tweed Shire Council,*[71] holding that he is the delegate not the deputy of the judge. Nor would the Court interfere in the Metropolitan Licensing Court's refusal to vary the terms of a liquor license: *In the Appeal of Allum.*[72] It followed *Place* v. *Thompson*[73] in finding that the matter under debate related to administration rather than to offences, and therefore, the Court was prohibited from intervention under section 170(5)(a) of the Liquor Act 1912 (N.S.W.).[74]

A final issue in the area of remedies concerns the consequences that flow from a court order. In *Calvin* the Privy Council recognised the problems in the distinction between void and voidable decisions, preferring either "invalid" or "vitiated". However, it did not elaborate and specify what implications these terms might have for the remedies sought and granted.

4. *Building Control and Town Planning*

Several cases examined "use".[75] Foremost amongst these was *Baulkham Hills Shire Council* v. *Iaria,*[76] where the Court faced the question: could an illegal use be an existing use for the purpose of escaping a prohibition specified in an interim development order? The Court held that it could not, with Hutley J.A. commenting that to

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[70] [1978] 1 N.S.W.L.R. 437.
[71] [1978] 2 N.S.W.L.R. 104.
[72] [1978] 1 N.S.W.L.R. 303.
[73] (1949) 78 C.L.R. 464.
[74] Note Parramatta City Council v. Travenol Laboratories Pty Ltd, unreported, Supreme Court of N.S.W., 31 March 1978.
[75] Those uses considered include the removal of soil and whether it is classified as agriculture or an extractive industry: Colo Shire Council v. C.B. Investments Pty Ltd, unreported, Supreme Court of N.S.W., 21 February 1978; the use of land as a site for a private heliport and whether it may be classified as a use for a dwelling house: Warringah Shire Council v. Raffles, unreported, Supreme Court of N.S.W., 19 June 1978; whether a retirement village is to be classified as a hospital, a home for the aged or a residential building: Kuring-gai Municipal Council v. Twibil, Geoffrey & Associates, unreported, Supreme Court of N.S.W., 29 November 1978; what was meant by "grazing" was clarified in Thompson v. Wingecarribee Shire Council, unreported, Supreme Court of N.S.W., 4 August 1978 and also in Marshall v. Wagga Wagga City Council, unreported, Supreme Court of N.S.W., 2 November 1978.
[76] [1978] 1 N.S.W.L.R. 678.

determine whether there is "development" one compares the purpose of the user of the land after the order came into force, with the purpose for which it was being used "when it last was land used in a manner in conformity with the previous zoning".[77] *Parramatta City Council* v. *Brickworks Ltd*[78] was distinguished.

Issues as to the validity and scope of interim development orders also arose in 1978. In *Permewan Wright Consolidated Pty Ltd* v. *Attorney-General (N.S.W.) (Ex Rel. Franklins Stores Pty Ltd)*[79] the High Court of Australia held that upon the true construction of section 7 of the Local Government (Town and Country Planning) Amendment Act 1962 (N.S.W.) the order would be valid, even if there was no express suspension of the relevant statutory provisions.[80]

5. *Liquor Licensing*

The statutory provisions concerning applications for liquor licenses were examined closely by the Supreme Court in 1978. In *Carrall* v. *Horsley*[81] it was held that whilst a conditional grant of a tavern license requires a notice of application at least fourteen days before the application (the return day), this does not mean that the application lapses or terminates if the tribunal is incorrectly constituted on return day and thus cannot hear the application.

In *Carbery* v. *James*[82] the Court stressed that for the operation of section 34(2)(d) of the Liquor Act 1912 (N.S.W.) which disallows a third application for a license within three years of a second application (all applications being for the same area), time runs from the *refusal* of the second application.[83]

6. *Public Health*

The fierce Pure Food Act 1949 (N.S.W.) was the subject of *Boon* v. *F. Hannan Pty Ltd.*[84] In particular, section 47(1)(a), which discharges any person prosecuted under the Act for the sale of adulterated goods if that person receives from the supplier of the good a guarantee that it is not adulterated. The Court held that this section is satisfied where the guarantee applies to *classes* of goods; that is, it can be a continuing

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[77] *Id.*, 683.

[78] (1972) 128 C.L.R. 1.

[79] (1978) 52 A.L.J.R. 218.

[80] In Jones v. Sutherland Shire Council, unreported, Supreme Court of N.S.W., 24 July 1978, it was held that the suspension of the provisions of a scheme under the Local Government Act 1919 (N.S.W.) s. 342(7) did not imply the suspension any relevant prohibitions.

[81] [1978] 1 N.S.W.L.R. 213.

[82] [1978] 1 N.S.W.L.R. 543.

[83] A second issue discussed in Tasker v. Fullwood, unreported, N.S.W. Court of Appeal, 7 March 1978, concerned who, for the purpose of a liquor license, is an "interested person"? In particular, is the lessor such a person if the rent varies with the turnover?

[84] [1978] 2 N.S.W.L.R. 31.

guarantee, and it need not refer to a particular identifiable sale, or to goods already in existence.

7. *Rating*

The exemption from rating permitted public charities was construed to extend to home units erected for senior citizens by the Presbyterian Church (New South Wales) Property Trust when that Trust appealed against rates levied by the Ryde Municipal Council.[85] This was on the grounds that, first, the status of the Trust as a charity was to be determined by reference to the use to which it might (under its Act) put the land; secondly, those purposes were congruent with the purposes of the Presbyterian Church; thirdly, the Church's direct connection with the advancement of religion in the relevant sense was such that its activities should be regarded as charitable, even though its property might be applied to purposes which in the case of another body would not be regarded as charitable purposes; and finally, the Trust in its function was so intimately connected to the Church that it should be accepted as being within the same principle.[86]

On similar reasoning, the High Court held in *Ryde Municipal Council* v. *Macquarie University*[87] that the exemption from rates granted to the University under section 132(1)(fii) of the Local Government Act 1919 (N.S.W.) extended to an area of the campus devoted to commercial and shopping facilities for the staff and students.

IV COMMERCIAL LAW

1. *Banking*

Commercial Banking Co. of Sydney Ltd v. *Patrick Intermarine Acceptances Ltd (In Liq.) and Anor*,[88] the only 1978 decision of note in this area, involved consideration of standby letters of credit—a device much discussed although rarely used in Australia. In 1973 the respondent borrowed $1,500,000 from the State Electricity Commission of Victoria, for a term of two years for the purpose of lending it to First Leasing at a higher rate of interest for the same term. At the request of the respondent, the appellant bank issued its irrevocable letter of credit in favour of the Electricity Commission, to draw upon that credit for any unpaid principal of the loan to the respondent. A similar but separate letter of credit was issued by the First National Bank of Boston in favour of the respondent to secure its loan to First Leasing. The sole link between the two letters of credit appeared in a

[85] *Presbyterian Church (N.S.W.) Property Trust* v. *Ryde Municipal Council* [1978] 2 N.S.W.L.R. 387.

[86] See also College of Law (Properties) Pty Ltd v. Willoughby Municipal Council, unreported, Supreme Court of N.S.W., 28 November 1978.

[87] (1979) 53 A.L.J.R. 179.

[88] (1978) 19 A.L.R. 563.

special clause attached to the letter of requisition from the respondent to the appellant. This clause secured the appellant bank against any default by the respondent in the repayment of its loan to the Electricity Commission if such default arose in the event of First Leasing failing in the repayment of its loan to the respondent. There was no contractual provision securing the appellant in the event of the respondent's own insolvency, since this event was not contemplated by any of the parties. However, before the date due for repayment the respondent did become insolvent and went into liquidation and they defaulted in repaying the Electricity Commission, who in turn drew on the appellant bank for $1,500,000, the unpaid principal, and this sum was paid to them.

The appellant claimed to be the secured creditor of the respondent by virtue of a proprietary interest, by way of a charge, in the debt of $1,500,000 due by First Leasing as security for the respondent's indebtedness to it of the same amount. In dismissing the appeal, the Privy Council affirmed the decision of Sheppard J.,[89] holding that there was no contractual provision for the security of the appellant in the event of the respondent's insolvency. Their Lordships recognised that such a provision could have been made, but did not find it necessary to describe what form such security could have taken. They could not find an equitable assignment, in any of the contracts, to the appellant of a proprietary interest in the debt owed by First Leasing to the respondent. They did not have to decide whether the special clause constituted an equitable assignment to the appellant of the respondent's contingent right to draw on the First National Bank of Boston in the event of the default by First Leasing, since even if such a right existed, it was irrelevant when the appellant was seeking to imply a proprietary interest arising from a different liability, namely, the insolvency of the respondent.

The report of the judgment makes no reference to other decisions in this area, although it appears that standby letters of credit are widely used in the United States because of the limits placed on the powers of banks in that country.[90] They are less utilised in other countries, including Australia, which tend to retain "first demand guarantees" and performance bonds. The Privy Council did note that this case concerned an uncommon use, for Australia, of two irrevocable letters of credit, and stressed that the essential nature of the contract between bank and beneficiary was one of guarantee. Here the liability of the banker under the irrevocable credit was not unqualified, as is common in sale of goods situations which involve irrevocable credits; the liability was contingent on the principal debtor defaulting in the repayment of its loan. This significant case demonstrates how standby

[89] Unreported, Supreme Court of N.S.W., 9 August 1976.
[90] E. Ellinger, "Standby Letters of Credit" (1978) 6 *Int'l Bus. Law.* 604.

letters of credit may be used in Australia, but it also exemplifies the sorts of contingencies that ought to be foreseen.

2. *Company Law*

In the field of company law 1978 saw consideration given to directors' duties both from the point of view of the requirements of the Companies Act 1961 (N.S.W.) and also at general law. Several rulings were made regarding the retrospective operation of recent amendments to the Companies Act and there was some further discussion as to when the courts will be prepared to apply section 366 to remedy irregularities as to notice or time requirements under the Act.

In *Kimberley Mineral Holdings Ltd (In Liq.)* v. *Triguboff*[91] an application by the defendants to dismiss the proceedings was refused. The Company and the Corporate Affairs Commission had claimed that several of the defendants had failed to act honestly in the discharge of their office as directors and were, therefore, in breach of section 124. A finding by the Court that that was in fact the case would provide grounds for the application by the Court of section 367B, to order the defendants to repay or restore the $350,000 to the Company allegedly lost by the actions of the defendants. The defendants claimed that section 367B as amended by section 7(b) of the Companies (Amendment) Act 1973 (N.S.W.), together with the expanded definition given to "affairs" in section 168 and its consequent effective amendment of section 178(9), should all operate prospectively only, since the amendments had had the effect of creating new liabilities. The Court rejected this contention on the basis that the substitution of the words "negligence, default, breach of duty" for the word "misfeasance" in section 367B had not substantially altered the law; and, in any case, breach of the common law duty to exercise care, skill and diligence in the performance of directors' duties is properly called "negligence". The Court recognised that the requirements of section 124 do not extend to a duty of care, but section 124(6) provides that the requirements of section 124 as to directors' duties are not exclusive. Therefore, because section 367B could not be seen to be breaking new ground the argument against retrospectivity of its operation failed.

The retrospectivity of the operation of section 178(9) was not directly considered because, the attack on section 367B having failed, no grounds existed for the striking out of the statement of claim. However, in *Lightning Ridge Mining N.L.* v. *Jacombe*[92] the Court had occasion to consider the question directly. The Court held that section 178(9) is procedural in its nature and that it authorises the Minister to take action in the name of the Company in respect of a cause of action arising before the commencement of the section. On a procedural

[91] [1978] 1 N.S.W.L.R. 364.
[92] [1978] 1 N.S.W.L.R. 253.

note, the Court ruled that it was not necessary to plead that the action was being instituted by the Attorney-General in the name of the Company by virtue of section 178(9) as a result of a report by an inspector from the Corporate Affairs Commission; rather, it is sufficient to add a note at the end of the statement of claim to the effect that the proceedings have been instituted under section 178(9). Further, a copy of the inspector's report should only be made available under section 178(11) after interlocutory steps for discovery, inspection and interrogatories have been carried out by the defendant.

With regard to the powers of inspectors of the Corporate Affairs Commission, Re A.B.M. Pastoral Co. Pty Ltd & Ors and The Companies Act 1961; Burke & Ors v. Alexander Barton[93] decided that section 173(1) gave the inspectors very broad powers to carry out their investigations. In particular, it was found that the section not merely permits "fishing expeditions" but was designed to expedite them, that the principles of natural justice do not apply to the inspector's request to produce the specified books; nor will a claim for privilege against self-incrimination regarding the documents be upheld. The provisions of section 173(1) are not directed only to form; they also give inspectors the power to specify exactly what kind of assistance they require to carry out their investigation. In view of the somewhat harder line which the courts are appearing to adopt as to directors' duties,[94] this broad view of section 173 provides the Corporate Affairs Commission with a hefty accretion to its supervisory and inquisitorial armoury.

A further note on directors' duties was provided by the Privy Council decision in *Queensland Mines Ltd* v. *Hudson & Ors*,[95] where the *Phipps* v. *Boardman*[96] test was applied to hold that there had been no breach of fiduciary duty. Their Lordships disagreed with the trial judge, Wootten J., as to the conclusions to be drawn from the facts and held that, since the Company was fully informed and had assented to the directors' actions, there was no real, sensible possibility of a conflict of interest. It should be noted that it was Lord Upjohn's dissenting judgment in *Phipps* v. *Boardman* which used the terminology "real sensible possibility of conflict"[97] of interest, however, in that case Lord Upjohn was not dissenting on the law, merely on its application. It might further be noted in regard to the *Queensland Mines* case, that their Lordships regarded "fully informed" as meaning the Board being fully informed, not the shareholders.

As to who is recognised as a director under the Act, the High Court of Australia has given an extended definition to the office of "director",

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[93] Unreported, Supreme Court of N.S.W., 16 February 1978.

[94] For example, *Kimberley Mineral Holdings Ltd (In Liq.)* v. *Triguboff*, note 91, *supra*.

[95] [1978] 52 A.L.J.R. 399.

[96] [1967] 2 A.C. 46.

[97] *Id.*, 124.

holding that section 124 includes a *de facto* director. In *Corporate Affairs Commission* v. *Drysdale*[98] the High Court unanimously overturned the decision of the New South Wales Court of Criminal Appeal[99] to hold that section 124(1) covers any person who "occupies" rather than "holds" the office of director. Thus, the section extends to any person who "acts in the position, with or without lawful authority".[100]

The courts have also had an opportunity to consider the meaning of words such as "interest" under sections 76 and 82, "wages and salary" under section 292(1)(b), and the requirement in section 376 that dividends be paid only out of profits. Section 82(1) provides that before a company invites the public to subscribe for or purchase any interest, it must issue a written statement in the nature of a prospectus in connection therewith. Bullion Sales International (Investments) Pty Ltd[101] instituted a scheme whereby members could make cash purchases of gold or silver at a rate based on the London or New York closing prices. The holdings were to be recorded in a "passbook" in terms of bullion and members could "buy" or "sell" as they desired—the object being to provide an inflation-resistant method of saving. The Supreme Court ruled that the scheme provided for the acquisition of an "actual interest" in the assets of a financial or business undertaking or scheme and the Company was, therefore, offering an "interest" within section 76(1), thereby being bound to comply with section 82(1) and any other relevant provisions of the Act. The Equity Division of the Supreme Court also ruled that claims by employees against a company in liquidation for amounts payable in lieu of notice were not "wages or salary" within section 292(1)(b), and were, therefore, not entitled to priority in the winding up of a company. The Court reasoned that such amounts were not payable under a contract of employment but rather were in the nature of a computation of the amount of damages due should the required notice not be given.[102] The possibility of validating defects as to notice or time were considered once again by the Supreme Court. In *Repco Ltd* v. *Commissioner for Corporate Affairs*,[103] the requirements of section 180N of the Companies Act as to declaration of freedom from prior conditions to be made by an offeror in a take-over bid had not been strictly complied with. The Court ruled that any contracts made under that offer were therefore, void and that neither section 366 sub-section (1) nor (2) could apply to validate them. However, the Court exercised its power under section

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[98] (1978) 22 A.L.R. 161.

[99] *R.* v. *Drysdale* [1978] 1 N.S.W.L.R. 704.

[100] Note 98 *supra, per* Mason J.

[101] *Bullion Sales International (Investments) Pty Ltd* v. *Commissioner for Corporate Affairs* [1978] 2 N.S.W.L.R. 167.

[102] *Re V.I.P. Insurances Ltd (In Liq.) and the Companies Act* [1978] 2 N.S.W. L.R. 197.

[103] [1978] 1 N.S.W.L.R. 350.

366(4) to enlarge the time provided for the publication of the notice under section 180N(3). In refusing to apply section 366 sub-section (1) or (2), Needham J. appeared to be less willing to apply the section generally than had Bowen C.J. in Eq. in *Re Compaction Systems Pty Ltd and the Companies Act*,[104] although the difference may merely be a matter of semantics. Clearly, the section will not be applied where there is a possibility of injustice flowing from its application.

The High Court had occasion to consider section 376(1) of the Companies Act in *Industrial Equity Ltd & Ors* v. *Blackburn & Ors*[105] where the directors of Industrial Equity had adopted a resolution, on 30 October 1975, declaring a dividend in respect of the year ending 30 June 1975 payable partly in cash and partly by the distribution of shares in a subsidiary of Industrial Equity. The evidence disclosed that there were insufficient profits to support that distribution as at 30 June 1975 and the Court held that section 376(1) required that the profit, out of which such dividend is declared, must be in existence within that company at the time of declaration of the dividend. It is insufficient that in the case of a group of companies, profit has accrued to a subsidiary which will in the course of time flow to the parent company enabling the parent company to declare a dividend upon the basis of a future accretion to profit. A company may declare a dividend to be paid in the future, but funds must be in existence in its own hands at the time of that declaration.[106]

3. *Contract*

1978 saw several New South Wales related decisions involving the straightforward application of well-established contractual principles. Murray v. O'Keefe[107] and Magna Alloys Research Pty Ltd v. Bradshaw[108] were cases on the construction of the contract; F. & T. Plastics Products Pty Ltd v. Zincline[109] and Victa Ltd v. Hawker de Haviland Australia Pty Ltd[110] involved breach and Ross v. Allis-Chambers Pty Ltd[111] turned on the existence of a warranty.

In *Yanco Pastoral Co. Pty Ltd* v. *First Chicago Australia Ltd*[112] the High Court held that a contract made by a body corporate carrying on banking business in breach of section 8 of the Banking Act 1959 (Cth) was not rendered unenforceable. The section did not impliedly prohibit the making or performance of such contracts. The contract was not performed for an illegal purpose. Their Honours were concerned with

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104 [1976] 2 N.S.W.L.R. 477.
105 (1978) 52 A.L.J.R. 89.
106 *Id.*, 93 *per* Mason J.
107 Unreported, N.S.W. Court of Appeal, 23 May 1978.
108 Unreported, N.S.W. Court of Appeal, 23 October 1978.
109 Unreported, N.S.W. Court of Appeal, 11 October 1978.
110 Unreported, N.S.W. Court of Appeal, 19 October 1978.
111 Unreported, N.S.W. Court of Appeal, 13 November 1978.
112 (1978) 21 A.L.R. 585.

commercial reality. Gibbs A-C.J. considered the absurd result which would ensue to bodies corporate if such contracts were invalidated: "[C]ontracts to pay its employees, or those who provided it with services, would be void".[113] Mason J. looked to the intention of the legislature and felt that any other conclusion would result in a windfall gain to the defendant. Murphy J. concluded that the effect of finding the contract was unenforceable would penalise the offender too harshly and to a greater extent than provided in the Act.

In Rainbow Textile Printers Pty Ltd v. Kadima Interstate Parcel Express (Aust.) Pty Ltd[114] goods were lost during carriage, as a result of the defendant's negligence. The Court of Appeal allowed the defendant to rely on an exemption clause contained in condition 5 of the contract of carriage which excluded liability "for any reason whatsoever". In the main judgment Samuels J.A. stressed that he was dealing with a problem of construction and cited the tests from *Alderslade* v. *Hendon Laundry Ltd*[115] and from Lord Morton's judgment in *Canada Steamship Line* v. *The King*.[116] He cautioned against applying these tests as rules of law,[117] and rejected the initial claim of the defendant based on the first test of Lord Morton[118] that condition 5 expressly referred to negligence. Using the third test,[119] he held that the exemption was wide enough to cover this event and he divided condition 5 into four exemptions to cover the four contemplated situations, that is, loss, damage, mis-delivery and non-delivery. In this way he decided that liability for "loss" in bailment for reward could be founded solely upon negligence and incorporated this head of damage into the exclusion clause. Secondly, he based his decision on the question of construction. It was plain that the defendant intended to exclude any liability for loss including that caused by negligence. Samuels J.A. upheld the decision of the trial judge that no question of fundamental breach was involved and declined either to apply the "doctrine of reasonableness"[120] or to decide if it is valid since the situation here involved a proper arms length contract. Glass J.A. agreed with Samuels J.A., but expressed concern about applying the principles relevant to clauses of indemnity. In such cases the *Alderslade* tests can have no application since there are no questions as to possible heads of liability. Although Samuels J.A. agreed that these clauses should be strictly construed against the *proferens*, he was prepared to exclude liability in this case. *T.N.T.* v.

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[113] *Id.*, 590.

[114] Unreported, N.S.W. Court of Appeal, 7 September 1978.

[115] [1945] 1 K.B. 189, 192 *per* Lord Greene M.R.

[116] [1952] A.C. 192, 208.

[117] *Smith* v. *South Wales Switchgear Co. Ltd* [1978] 1 W.L.R. 165, 168 *per* Viscount Dilhorne, 178 *per* Lord Keith.

[118] Note 116 *supra*, 208.

[119] *Ibid.*

[120] *Levison* v. *Patent Steam Carpet Cleaning Co. Ltd* [1978] 1 Q.B. 69, 79 *per* Lord Denning M.R.

May & Baker[121] was referred to as involving an "exclusion clause markedly similar", yet his Honour did not attempt to distinguish that case.

In allowing the appeal in Wood Hall Ltd v. The Pipeline Authority[122] the Court of Appeal refused to imply terms into the construction contract and bank guarantees on which the respondent contractor relied. They held that the appellants had made a valid demand to the Bank for payment under the performance and retention guarantees. The guarantees had been provided in lieu of cash securities and retention monies in pursuance of the construction contract. They found that breach of the construction contract between the appellant and respondent did not render the demand, of the appellant to the Bank, void. The Court refused to imply a term into the guarantees limiting the Authority's right to demand payment, because this alleged term was inconsistent with the unconditional liability of the Bank under the guarantees. Similarly, their Honours refused to imply terms into the construction contract which would restrict the right of the Authority to demand payment to situations where it could have made demands had the alternative retention fund been utilised. They approved an earlier decision of the Court[123] that a bond or guarantee provided in lieu of a retention fund is a substitute for the latter, but is not its complete equivalent. Since a bond or guarantee has to be accepted by negotiation between the parties, its terms may not be identical with those of the alternative retention fund. For this reason the appellant here was not limited to the terms governing the retention fund. The Court also held that the existing contracts had complete business efficacy, without the addition of a term prohibiting the appellant from demanding payment if the payment would give them an advantage or affect the financial position of the respondent. Consideration of the appellant's motive is irrelevant in these circumstances. The contract expressly provided that any variation would not be a ground for discharge of the guarantor. Had this right existed it would not have benefited the respondent as a third party but would only have been available at the option of the guarantor.[124] Their Honours also upheld the authority of the Executive Member of the Authority to implement the decisions of the Authority, including the right to demand payment in this case.[125] The Court held that injunctions restraining the Authority and the Bank from demanding and making payments were not available to the contractor. They reversed the declarations and orders made by Rath J.[126]

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[121] (1966) 115 C.L.R. 353.

[122] Unreported, N.S.W. Court of Appeal, 20 March 1978.

[123] St Martins Grosvenor Pty Ltd v. American Home Assurance Company, unreported, N.S.W. Court of Appeal, 18 March 1977, overruling the unreported decision of Sheppard J. in the Supreme Court of N.S.W., 14 August 1976.

[124] *Holme* v. *Brunskill* (1878) L.R. 3 Q.B.D. 495, 505, 506 *per* Cotton L.J.

[125] Pipeline Authority Act 1973 (Cth) s. 6(1).

[126] A subsequent appeal to the High Court was dismissed on 24 May 1979.

The doctrine of subrogation was discussed by the High Court in *Australasian Conference Association Ltd* v. *Mainline Construction Pty Ltd (In Liquidation), James Hardie Jamison and Australia and New Zealand Banking Group Ltd.*[127] The Bank claimed the surplus of the security paid out by them under a guarantee (in lieu of the retention fund) which they had provided pursuant to clause 30(c) of the standard form building contract. When the builder, Mainline Construction Pty Ltd, went into liquidation, its contract was determined in accordance with clause 22 and the purchaser, Australasian Conference Association Ltd, called up the security to carry out the builder's obligations created by clause 22(c)(ii) of the contract. The contract did not expressly indicate what was to be done with the surplus in this situation after the builder's obligations had been satisfied. Indications from clauses 30(h) and 30(j) dealing with the normal use and release of the security in lieu of the retention fund, which provided that the surplus was to be returned to the builder, satisfied the majority of the Court that the surplus of the security used to discharge the builder's liabilities created by clause 22(c)(ii) should also be returned to the builder. As the purchaser had no right to the surplus of this amount, there was no basis on which to apply the doctrine of subrogation since the Bank, when placed in the shoes of the purchaser, would have no right to the surplus either. The Bank had no entitlement to the money either at law in contract or in equity. Nor could a term to repay the money to the Bank be implied. The majority found no reason for disallowing the appeal since there was no question of the builder gaining a windfall profit or becoming unjustly enriched if he were paid the surplus.

4. *Hire Purchase*

In *Dunn* v. *Esanda Ltd*[128] Powell J., in the Equity Division of the Supreme Court, held that for the purpose of section 13(1) of the Hire Purchase Act 1960 (N.S.W.), a notice posted to the hirer from the owner for repossession was not sufficient. Under this section a notice is not "served" until it has actually been received by the hirer. In coming to this decision he was influenced by the effect that the alternative conclusion would have on section 48 sub-sections (3) and (4) of the Act. An appeal from this decision has been lodged with the Court of Appeal.[129]

5. *Insurance*

The cases which involved insurance law heard by the New South Wales Court of Appeal in 1978 were concerned with construing key words in the policies. The words "as . . . occupiers", in *Tannous* v.

[127] (1978) 22 A.L.R. 1.
[128] [1978] 1 N.S.W.L.R. 489.
[129] No. 349 of 1978.

Mercantile Mutual Insurance Company Ltd,[130] were held to mean that occupation was essential to the existence of liability and not merely descriptive.[131] The insurance company was not liable since the respondents, who were sued in their capacity as occupiers, had not insured the contents of the building under the same policy.

The decision in Leighton Contractors Pty Ltd v. Queensland Insurance Co. Ltd[132] turned partly upon the meaning of "occurrence" as did the case of Atkinson-Leighton Joint Venture v. Government Insurance Office of New South Wales.[133] In the latter case, it was observed—and the former case was cited on this point—that the term "occurrence" is not uncommonly used. Although there are sometimes difficulties in identifying the occurrence, such is not the case here.

6. *Sale of Goods*

In *Allied Mills Ltd* v. *Gwydir Valley Oilseeds Pty Ltd*[134] Mr Justice Hutley took the opportunity of observing that section 25 of the Sale of Goods Act 1923 (N.S.W.) (or its equivalent provision in the Sale of Goods Acts in other jurisdictions) rarely has been litigated. The case involved a contract for the sale of linseed meal where the goods remained with the seller although property had passed to the buyer at the time of making the contract. The seller, in breach of contract, failed to deliver the goods within the time provided, and later the goods were destroyed by fire while still in the seller's store. The Court of Appeal upheld the trial judge's application of the first proviso in section 25, and placed the risk on the seller. The Court also held that the buyer had a cause of action in damages.[135] The seller had failed to discharge its burden of establishing that the goods had not been destroyed as a result of the conditions of their storage, and it was agreed that the contract had not been "frustrated" since there was no supervening event which arose apart from the seller's default. The judgment appears to be a straightforward application of the proviso, though the Court had occasion to distinguish one of the few cases on section 25.[136] The case is, however, noteworthy, because of the dearth of litigation in the area.

7. *Shipping and Navigation*

In *Gamlen Chemical Co. (A'asia) Pty Ltd* v. *Shipping Corporation of India Ltd*,[137] the New South Wales Court of Appeal held that the

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[130] [1978] 2 N.S.W.L.R. 331.
[131] Following *Sturge* v. *Hackett* [1962] 3 All E.R. 166.
[132] Unreported, N.S.W. Court of Appeal, 4 October 1978.
[133] Unreported, N.S.W. Court of Appeal, 9 November 1978—a case more relevant to the question of whether the decision of the arbitrator should have been set aside.
[134] [1978] 2 N.S.W.L.R. 26.
[135] *Per* Hutley J.A., with whom Moffitt P. agreed.
[136] *Demby Hamilton & Co. Ltd* v. *Barden* [1949] 1 All E.R. 435.
[137] [1978] 2 N.S.W.L.R. 12.

statutory exception contained in Article IV, Rule 2 of the Schedule to the Sea-Carriage of Goods Act 1924 (Cth)—implementing the Hague Rules as to Bills of Lading, providing that neither the carrier nor the ship shall be liable for any damage or loss caused by "(c) perils, dangers and accidents of the sea or other navigable waters"—could not operate to exempt a carrier from his own negligence where that negligence was a partial cause of the damage. Gamlen Chemicals had consigned drums containing chemicals aboard one of the respondent's ships from Sydney to Indonesia. Crossing the Great Australian Bight, the ship encountered heavy weather—although not so foul as to be regarded as unforeseeable nor "weather against which it was unnecessary to guard".[138] Yeldham J., at first instance, had held that the weather encountered was a "peril of the sea" even though not so difficult as to be unforeseeable and that it was sufficient that such peril of the sea was one of the causes of the damage in order to enable a carrier to take advantage of the exception. The Court of Appeal reversed the decision of Yeldham J. and held that where negligence of a carrier is a concurrent cause of the loss or damage, it cannot be said that it results from perils of the sea so as to enable the carrier or ship to take advantage of the exception clause in Article IV, Rule 2. The evidence disclosed negligence on the part of the carrier in failing to sufficiently lash and secure the cargo and thus, the shipping company were liable for the damage to the drums.

In a most important decision, *Port Jackson Stevedoring Pty Ltd* v. *Salmond & Spraggon (Australia) Pty Ltd*,[139] the High Court held that a "Himalaya" clause[140] in a bill of lading did not operate to exempt a stevedoring company from their liability to make good a loss caused by their negligence in failing to take proper care of the goods while in their care and in delivering the goods to unauthorised persons. The Court reasoned that the clause in question (identical to that in *The Eurymedon*)[141] would protect a stevedore acting as an agent for the carrier. If, in that capacity, the stevedore had mis-delivered the goods, then the clause would protect him from liability. However, here the servants of the stevedore had been "tricked" into handing over the goods and the Court was of the opinion that the goods were at the relevant time in the possession of the stevedore in his capacity as bailee not as agent for the carrier. It, therefore, followed that the action of the servants of the stevedoring company, in handing the goods over to

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[138] *Per* Yeldham J. at first instance.

[139] (1978) 52 A.L.J.R. 337.

[140] Such a clause usually provides that the shipowner, as the agent for both servants and agents, including independent contractors, employed by the shipowner, agrees with the cargo owner that such servants, agents and independent contractors are protected by the limits of liability and any other defences which arise from the contract of carriage. The expression originated in *Adler* v. *Dickson (The Himalaya)* [1955] 1 Q.B. 158.

[141] *New Zealand Shipping Co. Ltd* v. *A. M. Satterthwaite & Co. Ltd (The Eurymedon)* [1975] A.C. 154.

the thieves, was a separate act of negligence not covered by clause 2 of the Bill of Lading. This decision has been appealed to the Privy Council.

8. *Voluntary Associations*

In the realm of voluntary associations, there have been decisions upholding the requirements to act according to the rules and regulations of the association, and to comply with the rules of natural justice.[142] In *Finlayson* v. *Carr*[143] the action of the Committee of the Australian Jockey Club in establishing a separate class of membership for women was held to be invalid as beyond the power of the Committee under the regulations. Such a separate class of "associate members" could be established only if the rules themselves were altered by a vote of the majority of the members. In *Calvin* v. *Carr*[144] the Privy Council ruled that the domestic tribunals of the Australian Jockey Club must accord natural justice and that any decision reached in breach of natural justice would be void. However, since appeal was by way of a rehearing, any breach of natural justice at the initial hearing could be cured on appeal. In this instance, the appellant had not been denied natural justice before the Committee of the Australian Jockey Club on appeal, and therefore, his appeal to the Privy Council was dismissed.

V CRIMINAL LAW AND PROCEDURE

1. *Abduction and Kidnapping*

Section 90A of the Crimes Act 1900 (N.S.W.)—a relatively new provision, having only been inserted in 1961—provides for penal servitude for "[w]hosoever leads takes or entices away or detains" another with the intent to hold that person for ransom or for "any other advantage". Maxwell J. in R. v. Robson[145] held that the words "any other advantage" ought not to be construed *ejusdem generis* with "ransom", "advantage" having a wider meaning than "ransom". It was also pointed out that the "advantage" may be sought from either the detained person or from some other person.

2. *Rights of an Accused in Custody and Rights of Prisoners*

In *Smith* v. *Commissioner of Corrective Services* two issues concerning the accused in custody arose at two different stages of the conduct of the case. First, Cantor J.[146] decided that the Commissioner was not in breach of section 22 of the Prisons Act 1952 (N.S.W.) which concerned the power to segregate a prisoner. In coming to this decision he held that the Commissioner may, for genuine security reasons, place a

[142] See also the discussion under the heading Administrative Law, *supra.*
[143] [1978] 1 N.S.W.L.R. 657.
[144] Note 52 *supra.*
[145] Unreported, Supreme Court of N.S.W., 10 April 1978.
[146] Unreported, Supreme Court of N.S.W., 3 February 1978.

prisoner who is on remand and who has not been convicted of any offence within New South Wales, in the special security of a prison where all the other prisoners have been convicted. Cantor J. further held that this was within the Commissioner's power notwithstanding that the consequences of such a decision, coupled with section 15 of the Prisons Act, would be to put the prisoner in a place where there are no other prisoners with whom he may associate. The second issue arose in the context of a discussion by the New South Wales Court of Appeal[147] of the right to a fair trial.[148] The Court held that an accused remanded in custody has a right to consult his legal advisers in private, but that no right of action exists against any prison officer to enforce the right. Further reference to this right of private consultation may be found in R. v. Fraser,[149] where it was noted that all visits, other than those with legal advisers, are held within the sight and hearing of prison officers.

In refusing special leave to appeal (*per* Stephen J., in granting special leave but dismissing the appeal) the majority of the High Court, in *Dugan* v. *Mirror Newspapers Ltd*,[150] confirmed that a person who has been convicted of a capital felony and has been sentenced to death cannot sue in civil courts. This was so because the law of England as it stood in 1788 and 1828 disabled a prisoner, serving the type of sentence described, from suing for a wrong claimed to have been done to him (that is, such a person was attainted and could not bring an action while attainder remained). This had become part of the law of New South Wales and still endured as such. In a strong dissenting judgment, Murphy J. considered that the rule ought not to be part of the common law and that the legislature intended that attainder be abolished, this being evidenced by section 418 of the Criminal Law Amendment Act 1883 (N.S.W.). Here, the definition of a felony is contained in section 9 of the Crimes Act, and includes any offence for which the penalty is described as "penal servitude" as opposed to "imprisonment". The death penalty was abolished in New South Wales in 1955, so the rule will not apply to a large number of people. It applied to Darcy Dugan because he had been sentenced to death prior to 1955 and the sentence had been commuted to life imprisonment. However, the Court did not say what the position would be with respect to a person serving a prison term for a felony but who has not been sentenced to death: to this extent the law is unclear.

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147 [1978] 1 N.S.W.L.R. 317.

148 In this context it was noted that the construction of words in an American State Constitution is a dubious source of construction of similar words appearing in a N.S.W. statute.

149 Unreported, District Court of N.S.W. (Torrington J.), 9 March 1978, where it was held that prisoners, in gaols where communications are through glass, who have held written cards up to the glass are not in breach of any regulation.

150 (1978) 22 A.L.R. 439.

3. *Appeals*

The workload of the New South Wales Court of Criminal Appeal is a heavy one as it hears matters from both the Central and District Criminal Courts. In 1978, it heard 187 cases, of which it dismissed 133 and allowed 54, while 29 appeals were lodged but later abandoned. It is interesting to note what happened to the cases dismissed by the Court of Criminal Appeal but in which special leave to appeal to the High Court was granted: again in 1978—eight cases went to the High Court, three appeals were allowed and three dismissed, two were not proceeded with. Though the number of cases overturned is not especially vast, they all involved important questions of law.[151] This goes to suggest that some of the recent criticisms made of the Court of Criminal Appeal may not be groundless. Of course, not all criminal appellate matters of significance involve the High Court, nor are all decisions of the New South Wales Court of Criminal Appeal unsatisfactory.

In *Blacker* v. *Parnall*[152] the Court of Appeal held that where a District Court judge dismisses an appeal under section 122 of the Justices Act 1902 (N.S.W.) and confirms a magistrate's order, there is no subject matter to the proceedings under section 122 and those proceedings are rendered ineffective. The Court also held that where a person is convicted, sentenced and imprisoned, but appeals under section 122, and has been released from prison under section 124 after complying with section 123, though later withdraws the appeal, then the District Court should dismiss the appeal and confirm both the conviction and sentence.

McDonald v. *Cogill*[153] turned on section 5B of the Criminal Appeal Act 1912 (N.S.W.). This section provides that a District Court judge sitting in its special jurisdiction may submit any question of law, arising on any appeal he may hear, to the Court of Criminal Appeal to be determined. Moffitt P. and Samuels J.A. decided that the section does not confer a judicial discretion on a District Court judge to grant or refuse an application to submit a question of law. The application must be granted if the criteria in the section are met. A section 5B question does not arise unless it poses a challenge to a ruling that is necessary to conclusively determine proceedings. Thus, whether the Crown has presented enough evidence to earn a conviction is a question of law, while a ruling of a case to answer does not determine the outcome of the proceedings and is therefore, not within section 5B, while a ruling of no case to answer is in a different category. The Court of Appeal noted the procedural courses open to a trial judge when making a ruling of law in a trial. The whole Court criticised heavily, parallel appeals

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[151] See for example, *Bartho* v. *R.* (1978) 52 A.L.J.R. 520; (1978) 19 A.L.R. 418, considered at note 189 and accompanying text, *infra.*

[152] [1978] 1 N.S.W.L.R. 616.

[153] Unreported, N.S.W. Court of Appeal, 13 October 1978.

and fragmented criminal trials. In this case, because the matter had been or was in the course of being heard in five different courts on separate occasions, the Court exercised its discretion and refused to grant mandamus to state a case to the District Court judge who ruled there was no case to answer.

4. *Bail*

Twice,[154] within a short space of time, the Supreme Court of New South Wales stated that where a person is committed for trial, having been charged with an indictable misdemeanour which is within section 45(1)(A) or is not an offence in paragraph (a) of section 45(1) then the committing magistrate must allow bail. If bail is not allowed and an application for bail is made to the Supreme Court, that Court must allow it.

The jurisdiction of superior courts to grant bail and the possibility of appealing from a bail order made in the Supreme Court were discussed *In the application of Harrod*.[155] The New South Wales Court of Appeal noted that since the power to grant bail is part of the inherent jurisdiction of superior courts and one of the purposes of the bail laws is to ensure the accused attends his or her trial, it is impossible to suggest that the inherent power does not include the power to alter bail. However, an application to alter bail should not be brought to the Court of Appeal. The Court also noted that there is no right of appeal from a bail order fixed by a Supreme Court judge; nor are habeas corpus and certiorari available when the order is made in the Supreme Court.[156] It should further be noted that a Supreme Court judge cannot make an order which is void, though it may be erroneous. Any order will be effective until it is set aside. Consequently, it is not appropriate to seek a declaration as to the validity of an order of the Supreme Court.

In *Cann* v. *Gray*[157] a New South Wales magistrate, in the exercise of federal jurisdiction, committed a person for trial on a charge of conspiracy to commit an offence against the Commonwealth under section 86 of the Crimes Act 1914 (Cth). Yeldham J., in the Supreme Court of New South Wales, found that section 85E of the Commonwealth Crimes Act and section 68(2) of the Judiciary Act 1903 (Cth) do not make applicable the provisions of the Justices Act 1902 (N.S.W.) relating to the accused's entitlement to bail when committed for trial on an indictable misdemeanour. This is because the common law categories of crime—felonies and misdemeanours—cannot be applied to such statutory offences which the Commonwealth, exercising its

[154] R. v. Lockman, unreported, Supreme Court of N.S.W. (Lee J.), 9 November 1978; R. v. Niblett, unreported, Supreme Court of N.S.W. (Maxwell J.), 16 November 1978.

[155] [1978] 1 N.S.W.L.R. 331.

[156] *Cf.* Bill of Rights; 1 Will. and Mary Sess. 2 c. 2

[157] [1978] 2 N.S.W.L.R. 75; (1978) 22 A.L.R. 267.

incidental power, has provided shall be punishable as offences under the Commonwealth Crimes Act, whether summarily or on indictment.

5. *Common Enterprise and Purpose*

A trial judge directed a jury that they could only find a verdict of manslaughter, as an alternative to murder, in respect of one Markby, if the discharge of the shots into the deceased was carried out by the co-accused in the course of and in pursuit of a common purpose to rob but his act did not amount to murder in their views. The Full High Court, in *Markby* v. *R.*[158] held that this amounted to a misdirection since, when two people engage in a common unlawful design, the liability of one for the acts of the other depends on whether what was done was within the range of the unlawful design.

When *R.* v. *Johns*[159] first came before the New South Wales Court of Criminal Appeal the doctrine of common purpose was said (by Street C.J. and Begg J.; Lusher J. dissenting) to be equally applicable to an accessory before the fact and to a principal in the second degree, the accessory being liable for an act within his contemplation as an act which might be done in the course of carrying out the initial criminal intention. When the case returned[160] to the Court of Criminal Appeal on the matter of a sentence, the Court held by a majority of five to two that the liability of an accessory before the fact for murder arises under section 19 of the Crimes Act. This section provides that "[w]hosoever commits the crime of murder shall be liable to penal servitude for life". Thus, a life sentence was mandatory in this situation.

6. *Conspiracy*

Sankey v. *Whitlam*[161] is most often discussed with respect to questions of privilege and public interest.[162] However, it is useful to recall how the case arose. A private individual laid informations, under the New South Wales Justices Act, against a former Prime Minister and three of his Ministers. The informations alleged an offence, against section 86(1)(a) of the Commonwealth Crimes Act, of conspiring to effect a purpose unlawful under the laws of the Commonwealth—that is, to effect borrowing by the Commonwealth from sources overseas of money in contravention of the Financial Agreement Act 1944 (Cth), Constitution Alteration (State Debts) Act 1928 (Cth) and the Financial Agreement 1927. A further information alleged the offence of conspiring to deceive the Governor-General, because the accused as members of the Federal Executive Council, at a meeting of the Council, agreed to recommend to the Governor-General that one of the accused be authorised to

158 (1978) 52 A.L.J.R. 620; (1978) 21 A.L.R. 448.
159 [1978] 1 N.S.W.L.R. 282.
160 [1978] 2 N.S.W.L.R. 259.
161 (1978) 21 A.L.R. 505.
162 See the discussion under the heading Practice and Procedure, *infra*.

borrow temporarily a sum of money, despite the fact that at the time of the agreement the proposed borrowing was not intended to be solely for temporary purposes and it contravened the Agreement and Acts listed in the first information.

All members of the Full Bench of the High Court found that the information which alleged an offence under section 86(1)(c) was bad in law. The conduct said to be unlawful under Commonwealth law was a breach of a clause of the Financial Agreement and such an Agreement is not a law of the Commonwealth nor is the Constitution. Thus, even if the alleged breach was in contravention of section 105A of the Constitution it would still not be an offence under section 86(1)(c). The Court also found that the alleged breach of the clause in the Agreement was not unlawful under section 105A of the Constitution or under the Financial Agreement Acts of 1927 and 1944 or under the Constitution Alteration (State Debts) Act. Aickin J., alone, expressed the opinion that a measure to amend the Constitution is a Commonwealth law within section 86(1)(c).

The New South Wales Court of Appeal was able to give statutory conspiracy a more detailed consideration in *R.* v. *Cahill and Others.*[163]

7. *Corporate Crime*

Reference has already been made to *Corporate Affairs Commission* v. *Drysdale.*[164] Section 19B of the Crimes Act provides that a court of summary jurisdiction which is satisfied that a charge is proved, may, without proceeding to conviction, dismiss the charge or conditionally discharge the person charged. In *Sheen* v. *Geo. Cornish Pty Ltd*[165] the Supreme Court of New South Wales held that the section applies to a corporation so far as is appropriate; that it applies where there is a pecuniary penalty only for the offence charged; and where the offender is a corporation, the recognisance should be given by a properly authorised agent, and it should bind the company and not the agent.

8. *Defences*

Hafez Malas was found guilty of possessing cannabis resin in contravention of section 233B(1)(c) of the Customs Act 1901 (Cth). At no stage during the trial or after the summing-up was the question of lack of knowledge, that the goods were imported in breach of Act, raised. Nor did the trial judge refer to the fact that lack of knowledge was available as a defence under section 233B(1A), and Malas' notices of his grounds of appeal did not include this issue. The New South Wales Supreme Court found[166] that the trial judge's directions to the jury did not depart from the elements of section 233(1)(c) as seen by the Court

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[163] (1978) 22 A.L.R. 361.
[164] Note 98 *supra*, and accompanying text.
[165] [1978] 2 N.S.W.L.R. 162; (1978) 22 A.L.R. 155.
[166] *R.* v. *Malas* (1978) 21 A.L.R. 255.

and that a ground of appeal relating to the failure of the trial judge to put the available defence to the jury was not viable, either in reality or by virtue of rule 4 of the Criminal Appeal Rules (N.S.W.). The Court pointed out that it is not the obligation of the trial judge to canvass the whole range of issues advanced in any one case, despite the conduct of the case by the respective counsel. The Court also found that while Malas was previously of good character, he had become involved in a major crime and the sentence must be relative to this.

No digest of New South Wales cases which consider defences would be complete without a reference *Viro* v. *R.*[167] *Viro* has more generally been noted for its review of the law of precedent as it applies to the High Court of Australia. However, this watershed decision, which ended the supremacy of Privy Council precedents, was taken in the context of a trial for murder where the issue of self-defence was raised. Thus, the effect of the case is that, in a murder trial where self-defence is raised, the trial judge should give a direction based on a decision of the High Court[168] and not in accordance with a contrary Privy Council decision.[169] Three members of the majority (Stephen, Mason and Aickin JJ.) so found because they preferred the Australian approach; while the remainder of the majority (Gibbs, Jacobs and Murphy JJ.) decided contrary to their opinions of the principles which applied but in the belief that trial courts should be sure as to the law which applied. (Barwick C.J. provided a dissenting judgment. He openly broke with the Australian decision.) Six instructive points were made by Stephen, Mason and Aickin JJ. as to the role of the jury where the accused is threatened with death or grievous bodily harm. First, they said the jury should consider whether when the accused killed the deceased he "reasonably believed" that an attack of the type described was being or about to be made on him—"reasonably believed" meaning what the accused himself might reasonably believe in all the circumstances he found himself in. Secondly, if the jury is satisfied beyond reasonable doubt that the accused lacked this reasonable belief, then the question of self-defence does not arise. Thirdly, if the jury is not satisfied beyond reasonable doubt that the accused lacked this reason-

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[167] (1978) 52 A.L.J.R. 418; (1978) 18 A.L.R. 257.

[168] *Per R.* v. *Howe* (1958) 100 C.L.R. 448. There, the High Court had agreed unanimously that if a plea of self-defence failed only because the accused had resorted to excessive force the verdict should be manslaughter not murder. However, the Court divided three-two as to the formula that should be applied to decide necessity for the purposes of the plea and on the tests which determine whether the force was excessive so that manslaughter may be found.

[169] *Palmer* v. *R.* [1971] A.C. 814. There is some debate as to the interpretation of this case (see D. Kovacs, "Excessive Self-defence in Homicide Cases" [1978] *A.C.L.D.* 141, 143-145). However, the traditional view is that the Privy Council maintained the established self-defence analysis, with its elements of necessity and force proportionate to the danger in which the accused stood, and that excessive force meant the accused would be guilty of murder.

able belief, then it must look to whether the force used by the accused was reasonably proportionate to the danger he believed he faced. Fourthly, where the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate, then it should acquit. Fifthly, where the jury is satisfied beyond reasonable doubt that more force was used, then the verdict must be murder or manslaughter. Which verdict depends upon the answer given to the final question put to the jury—did the accused believe the force he used was reasonably proportionate to the danger he faced? Where the jury is satisfied beyond reasonable doubt that the accused lacked such a belief, the verdict will be murder; if it is not satisfied of this beyond reasonable doubt, the verdict must be manslaughter.

9. *Evidence*

The principles in this area are many and varied, and the cases reflect this variety. In *R.* v. *Motric*[170] the New South Wales Court of Criminal Appeal stated a principle as to evidence fit for consideration by the jury. It is the duty of a judge presiding at a criminal trial to rule as to whether there is any evidence fit to be considered by a jury on any issue which might arise during the trial. Should he find that there is no such evidence, he must inform the jury, and his view as to this matter must be given considerable weight by appellate bodies who may be brought into the dispute.

In *Barrom* v. *Valdmanis*[171] Meares J. noted that where it is necessary to prove material found in the possession of the accused is identical with the material analysed, there are two logical methods by which this may be done. First, the material may be traced from hand to hand, to which end it is usually necessary to call everyone who had custody of it from the beginning to the end of its journey. The second method is to identify that which was found in the possession of the accused by its physical characteristics and show it to be the same as that which was analysed.

The Court of Criminal Appeal in *R.* v. *Aquilina*[172] paid regard to the fact that the newly inserted section 81C of the Child Welfare Act 1939 (N.S.W.), which excluded certain statements made by people under 18 years, was applicable to all courts and operated retrospectively.

In *R.* v. *Williams*[173] the Court of Criminal Appeal noted that while, by statute, a certificate by a member of the police force is *prima facie* evidence of the matters certified therein, countervailing evidence destroys the *prima facie* effect of the certificate with regard to the matter certified, though the certificate is admissible and is *prima facie*

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[170] Unreported, N.S.W. Court of Criminal Appeal, 15 June 1978.
[171] Unreported, Supreme Court of N.S.W., 2 May 1978.
[172] [1978] 1 N.S.W.L.R. 358.
[173] [1978] 1 N.S.W.L.R. 674.

evidence of the other matters certified. This case arose in the context of a breath analysis test and section 4E of the Motor Traffic Act 1909 (N.S.W.).

10. *Jurisdiction*

The jurisdiction of superior courts to grant bail was discussed *In the application of Harrod.*[174] Section 66 of the Supreme Court Act 1970 (N.S.W.) allows that Court, at any point in the proceedings, to restrain any threatened or apprehended injury or breach of conduct by interlocutory or some other form of injunction when it appears to the Court to be just and convenient to do so. In *Smith* v. *All Radio Stations, Newspapers and Television Stations in N.S.W.*[175] the plaintiff sought an injunction to restrain the defendants from publishing his name or anything which would reasonably allow him to be identified in respect of charges of murder, assault and robbery brought against him by the police. The plaintiff claimed the publication would deprive him of a fair trial. Maxwell J. doubted the Court had the alleged jurisdiction, but even if it should have the jurisdiction, it would arguably not be just and convenient that such an order be made as it is in the public interest that those charged should be identified; nor were the defendants specified with sufficient precision.

11. *Misdemeanours and the Dismissal of the Charge*

The Court of Criminal Appeal, in *R.* v. *Reinsch*,[176] held that where a jury has decided on a verdict of guilty but the trial judge believes the case is one that calls for the exercise of the power to permit the release of offenders under section 556A of the Crimes Act, the correct procedure is for the trial judge to direct that the verdict be recorded but that no conviction upon that verdict be recorded, and then to make an order under the section. A trial judge hearing a charge of indecent exposure, a common law misdemeanour, believed that this charge should be dismissed before conviction. However, he also believed he lacked the relevant jurisdiction and so deferred sentence on the entry into a recognisance. Effectively, the appeal was, under section 5(1)(a) of the Criminal Appeal Act 1912 (N.S.W.), against the conviction; the Court finding it had the power to make a section 556A(1)(a) order, dismissing the charge.

12. *Prosecution Duties*

Section 17 of the Police Regulation Act 1899 (N.S.W.) provides that "[a]ny person who, not being a member of the police force, . . . (d) gives or offers, or promises to give, any bribe . . . to . . . a member of the police force for the purposes of inducing him to neglect his duty" is

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[174] See note 155 *supra*, and accompanying text.
[175] Unreported, Supreme Court of N.S.W., 27 April 1978.
[176] [1978] 1 N.S.W.L.R. 483.

guilty of an offence. In *Francis* v. *Flood*[177] it was held, not only with regard to the offences noted in paragraphs (a), (b), (c) and (e) of section 17 (which deal with punishing those who pretend to be members of the police force or so conduct themselves so as to give the impression they are), but also with respect to the offence created by paragraph (d), the words of the section "not being a member of the police force" are not an exception within the meaning of section 145(2)[178] of the Justices Act. The words are a key element of the offence created by section 17(d), consequently the prosecution must prove beyond reasonable doubt that the accused was not a member of the police force.

In *Ringstaad* v. *Butler*[179] Cantor J. considered the significance of an exception to the statutory definition of "Indian hemp" in the Poisons Act 1966 (N.S.W.) and found that it is the duty of the prosecution to negative this exception.

13. *Searches and Warrants*

Taylor C.J. at Common Law, in *Selbeck* v. *McDonald*,[180] considered and distinguished *R.* v. *Tillett; Ex parte Newton*[181] while discussing the provision of a search warrant to enter and search a suspected brothel. Taylor C.J. made five points with respect to warrants. First, section 33 of the Summary Offences Act 1970 (N.S.W.) recognises that a stipendiary magistrate may, by his special warrant, authorise or require any member of the police force to enter and search. Secondly, the section also recognises that the receiver of the warrant may be assisted. Thirdly, the complainant, who seeks a warrant, need not specify the particular offence or section he suspects or believes is being contravened. It is enough that he is suspicious or believes all or part of sections 29, 30 and 32 of the Act are being contravened. Fourthly, section 33 does not state that the complaint should be in writing; it is enough to comply with the section if the magistrate is satisfied by the complainant's sworn testimony that he has reason to suspect and does believe that a section of the Act has been contravened by the use of premises. Finally, Taylor C.J. points out that a warrant which requires the person to whom it is issued to enter and search premises, similarly authorises him to so do.

14. *Selection of Charges*

The Court of Criminal Appeal in *R.* v. *Carter*[182] noted that it is the role of the Crown law authorities to select an appropriate charge in a

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[177] Unreported, Supreme Court of N.S.W., 26 April 1978.
[178] Noted in the discussion of "Bail", *supra.*
[179] [1978] 1 N.S.W.L.R. 754.
[180] Unreported, Supreme Court of N.S.W., 1 February 1978.
[181] (1969) 14 F.L.R. 101.
[182] Unreported, N.S.W. Court of Criminal Appeal, 9 March 1978.

criminal prosecution. The Court here advised that courts should be hesitant before they interfere, for policy reasons, with the way in which this selection is administered.

15. *Sentencing*

A number of relevant cases in 1978 discussed the principles to be applied when imposing sentences. It has been noted that the Supreme Court of New South Wales has said the sentence must be relative to the scale of criminality involved.[183] The New South Wales Court of Criminal Appeal added to this in the course of a discussion on statutory maximum sentences. In *R.* v. *McMahon*[184] it was held *per curiam* that the penalty for conviction of a statutory offence must be determined by reference to the section of the legislation which creates the offence. The penalty should not be imposed by reference to a broader concept of criminality which may be found in other sections of the legislation. This holding occurred in the context of a reference to the wrong statutory provision —the appellant had pleaded guilty to six charges of imposition under section 29B of the Commonwealth Crimes Act, with the Crown Prosecutor advising the sentencing judge that the plea was to charges under section 29A. The judge, in response, did not indicate that he considered the maximum sentence should apply but imposed aggregate sentences of six years, being three cumulative periods of concurrent terms of two years in respect of the six charges.

R. v. *McDonald*[185] concerned an appeal from a sentence of eight years imprisonment with a non-parole period of four years, the accused having pleaded guilty to rape. The victim was a 19 year old teacher who had been hitch-hiking when the accused picked her up and drove her into the bush. In terror, the victim had submitted and partially co-operated in the act. The trial judge thought the offence demanded a minimum custodial sentence of no more than one year until he had heard the prisoner's record. The record was quite comprehensive: it included a three year sentence with a minimum of six months for carnal knowledge when he was 19 in 1963; in 1972, $60.00 fine for wilful and obscene exposure; and also in 1972, a five year good behaviour bond and a minimum fine for, among other things, abduction and indecent assault on a male. The accused was not psychiatrically disturbed though he was of a low mentality. The judge found that he showed no genuine contrition for this most recent offence. The New South Wales Court of Criminal Appeal found the trial judge had erred by attaching too much weight to the record, and that this had increased the sentence. Nor could the accused's statements of contrition to the police, in addition to the positive action of a guilty plea, be ignored as evidence

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183 Note 166 *supra*, and accompanying text.

184 (1978) 19 A.L.R. 448.

185 Unreported, N.S.W. Court of Criminal Appeal, 31 March 1978.

of contrition; thus, the trial judge was also in error for failing to give due weight to this. The Court further held that the appropriate sentence for such a crime was eight years, and that having regard to the accused's domestic and personal situation the non-parole period should be three years.

A case which should be noted, if only because it received much publicity, was R. v. Mitchell.[186] The reaction to the sentence in this case saw a petition presented to the Attorney-General; it sought to have the sentence lessened or abandoned.

16. *Summing-up and Misdirections*

Misdirection in a case of common enterprise and purpose has been discussed.[187] *Viro* v. *R.*,[188] among other matters, looked to what the jury should be told in instances of a "special intent" coupled with evidence of intoxication. The Full High Court of Australia considered that when an intention to cause a particular result (that is, a special intent) is a factor in a crime—for example, as in a charge of murder based on an intention to cause grievous bodily harm—and if there is evidence, that the accused was intoxicated as a result of taking either drugs or drink or a combination, fit for consideration by the jury, then it is not sufficient to tell them the Crown must prove beyond reasonable doubt that the accused had formed the requisite special intent. They should be told that the fact that the accused was intoxicated may be noted for the purpose of determining whether the special intent existed. It should be explained that evidence of intoxication will not entitle an accused to an acquittal—a person who has formed the intent when intoxicated will not escape responsibility simply because intoxication diminished his power to resist the temptation to carry it out. However, the jury should be told that if, because of the evidence of intoxication or otherwise, they are not satisfied that the accused did have the necessary intent, they must acquit of the crime which requires that intent.

In an application for special leave to appeal, the High Court discussed the use of the words "guilt or innocence".[189] The Court made two points. First, in some instances the jury may not be satisfied of the innocence of the accused, indeed, they may have a strong suspicion of his guilt, and yet they properly give a verdict of not guilty. However, it should be observed that the issue that arises is naturally spoken of as one of guilt or innocence. If the use of the word "innocent" leads the jury to think that an acquittal must be based on a belief that the accused was guiltless or was required to prove his innocence, there would be a significant and serious misdirection. The second point made

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[186] Noted (1978) 52 *A.L.J.* 699.
[187] Note 158 *supra*, and accompanying text.
[188] Note 167 *supra*, and accompanying text.
[189] *Bartho* v. *R.* (1978) 52 A.L.J.R. 520; (1978) 19 A.L.R. 418; also note 151 *supra*.

by the Court was that a judge may, in the course of his summing-up, give directions which, if taken alone, would be both correct and sufficient; but it may be concluded that there has been a misdirection when the summing-up is looked at as a whole, because other passages might be understood by the jury as explaining or qualifying the passages which were correct, in a manner which distorted the meaning.

R. v. *Penberthy*,[190] like *Markby* v. *R.*,[191] was an appeal concerning the trial of five people where the prosecution had alleged a common purpose among the accused of inflicting grievous bodily harm. None of accused was identified as the one who struck the blow which caused the death. Each of the accused had made an unsworn statement. The summing-up of the trial judge contained a direction that each of these statements was not evidence against anybody but the maker, but he also said that the cumulative effect of the accuseds' statements was that the victim was alive and well when they left the premises and that the evidence showed he was not then alive and well. The Court of Criminal Appeal held that this summing-up was defective to the extent that the jury had been directed that they could take into account the cumulative effect of the unsworn statements. The directions that should have been given were that there was no evidence as to who struck the fatal blow and that the Crown case was based on common purpose. The Court also considered the differences in the summing-up of a case based on common purpose from one based on aid and abet.

During a trial, as a result of which one Maric was tried and convicted on a number of charges relating to a bomb explosion, evidence was elicited by the trial judge of a conversation between two other people during which two separate statements were made which were prejudicial to Maric. There was no evidence that Maric had heard one of these statements though he may have heard the other. His counsel applied unsuccessfully to have the jury discharged. The trial judge, in summing-up, did not refer to this unheard statement. The conviction was confirmed by the New South Wales Court of Criminal Appeal, who found that no substantial miscarriage of justice had occurred. When this came before the High Court as an application for special leave to appeal,[192] the Crown conceded that evidence of the statement that Maric had not heard was inadmissible, but nevertheless special leave should be refused. The High Court did not accept the Crown's arguments, finding that the evidence was wrongfully admitted and was so prejudicial that it was not possible to conclude anything other than that a substantial miscarriage of justice had occurred. The application was granted, the appeal allowed, the conviction set aside and a new trial ordered. Gibbs, Mason and Jacobs JJ. said that where an accused

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[190] Unreported, N.S.W. Court of Criminal Appeal, 26 October 1978.

[191] See notes 158 and 187 *supra*, and accompanying text.

[192] *Maric* v. *R.* (1978) 20 A.L.R. 513.

has been convicted after an unsuccessful application for discharge, the appeal is against the conviction and not the refusal to discharge; the issue on appeal is similar to the inquiry whether a substantial miscarriage of justice had occurred. These three judges also said the test for determining whether the wrongful admission has caused a miscarriage of justice is whether the Court of Criminal Appeal can be satisfied that the irregularity has not affected the verdict and the jury could have returned the same verdict if the error had not occurred. Aickin J. joined Gibbs, Mason and Jacobs JJ. in finding that not only were the directions, given by the trial judge after the evidence had wrongfully been admitted, insufficient to undo the damage caused, but the evidence was so damaging that no directions could have repaired the detrimental effect; thus, the only action the trial judge could have taken was to discharge the jury.

Murphy J. dissented to the extent that he found a new trial should not be ordered. He believed a balance was necessary between societal interests in prosecuting charges, and societal and individual interests in avoiding criminal trials. He pointed out the prosecution also has a responsibility to ensure miscarriages of justice do not occur, and therefore, in this case should have supported the application for discharge. He concluded that where the prosecution fails in this responsibility and there is a successful appeal, a new trial may be refused.

VI FAMILY AND FAMILIAL MATTERS

Cases in this area of the law, determined in 1978 by the Supreme Court of New South Wales, involved either questions as to whether or not a proceeding was a matrimonial cause—this question going to the jurisdiction of the Court—or involved children and New South Wales legislation. The Court is limited to these areas by the Family Law Act 1975 (Cth). However, some cases determined during the year involved matrimonial causes instituted before June 1976, the date on which the Court was divested of jurisdiction under the Family Law Act 1975 (Cth).

1. *Jurisdiction*

Decisions of 1978 indicate that some confusion exists as to when the Supreme Court will have jurisdiction in a familial matter. This confusion can only mean delays and inconveniences for the litigants—a particularly undesirable state of affairs when children are involved. In any familial matter the welfare of children involved will be of paramount importance; indeed, in some situations the need to protect the interests of the child will prevail over parental rights. This was illustrated in *McMahon-Winter* v. *Larcombe*.[193] The plaintiff-father

[193] [1978] 2 N.S.W.L.R. 155.

sought to prevent the defendant-magistrate from continuing the hearing of a complaint in which it was alleged that the plaintiff's son was a neglected child. One of the bases for this complaint was an indecent assault upon the child by the father for which the father had been committed for trial. The father argued that the hearing in the Children's Court would prejudice his own trial. Yeldham J. dismissed the summons on the ground that the father would be entitled to the protection of section 9 of the Evidence Act 1898 (N.S.W.), which makes incriminating questions non-compellable. His Honour was, no doubt, influenced by the policy of the Child Welfare Act 1939 (N.S.W.)—matters concerning neglected children should be dealt with expeditiously[194]—in that he went so far as to say that "even if some detriment may possibly result to the plaintiff if no adjournment is granted"[195] this is outweighed by the need to ensure the welfare of the child.

When considering the approach taken to jurisdiction by the Court, it is important to keep this aspect of familial cases in mind. For jurisdiction to exist in the Supreme Court, it is necessary that the matter does not fall within the definition of a "matrimonial cause" in section 4(1) of the Family Law Act 1975 (Cth), as is revealed in some of the cases decided in 1978. First, *Meyer* v. *Meyer*[196] concerned a situation which Powell J. described as "ludicrous". It would now appear that there is a lack of jurisdiction in any court to make a child brought to Australia a ward of a court. The son in this case was a ward of a court in England, and was allowed to be brought here on the condition that he would be made a ward of a court in Australia. The Family Court held that it did not have jurisdiction to make such an order.[197] An application to the Supreme Court was similarly refused. Powell J. held that the Family Law Act exhibited an intention to cover the field of guardianship and custody of children of a marriage. For this reason, and because the jurisdiction to make a child a ward of a court is one by virtue of which such a court can supersede the natural guardianship of a parent and can place a child in such custody as seems most calculated to promote its welfare, his Honour held the matter to be a "matrimonial cause" within paragraph (c)(ii) of section 4(1). If one accepts the reasoning of the Supreme Court, it is difficult to see how the Family Court reached the conclusion that it did. Powell J. drew support for his view from Professor P. E. Nygh's *Guide to the Family Law Act 1975*.[198] However, as Professor Nygh points out, section 10 of the Act preserves state and territorial child welfare laws and prohibits a court, exercising jurisdiction under the Act, from making an order for maintenance, custody or guardianship of a child who has the status of

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[194] *Id.*, 161.
[195] *Ibid.*
[196] [1978] 2 N.S.W.L.R. 36.
[197] Goldstein J., unreported, Family Court of Australia, 16 August 1978.
[198] P. Nygh, *Guide to the Family Law Act 1975* (2nd ed. 1978) 11.

a ward of a court where it is satisfied that there are special circumstances justifying the making of such an order. Powell J. made no mention of section 10, and it would seem that that section does not operate in circumstanecs such as existed in *Meyer*. The doubt that seems to exist as to the jurisdiction of the Supreme Court clearly requires a remedy. That such a doubt exists cannot be said to be in the best interests of the children involved.

Helsham J. drew attention to another unsatisfactory aspect of jurisdiction in *Clarke* v. *McInnes*.[199] This aspect is that when a parent in whose favour a custody order has been made dies, the other parent must seek an order for custody from the Family Court while the party who has actual care and control of the child must apply to another court. (The relevant provision of the Family Law Act is section 64.) The High Court of Australia acknowledged the inconvenience of this situation in *Dowal* v. *Murray*.[200] In *Clarke* v. *McInnes* the plaintiff (father) sought a writ of habeus corpus directed to the defendants (grandparents) who had care and control of the children, their daughter (the plaintiff's former wife) having custody before her death. The defendants had begun custody proceedings before a magistrate. It was held that the nexus with the divorce and its custody order was present, thus, making the proceedings a matrimonial cause within paragraph (f) of section 4(1), and since section 64(1) was validly enacted the Supreme Court did not have jurisdiction. Furthermore, the magistrate did not have jurisdiction either, as section 64(1) does not give a stranger to the marriage any custody rights. This case further supports the view that the paramount consideration, that is, the welfare of the children, is being impaired whilst such jurisdictional confusion exists.

Issues involving jurisdiction also arose in *Ellinas* v. *Ellinas*[201] and *McLean* v. *McLean*.[202] In both cases specific performance of a maintenance agreement was sought. In *Ellinas* the agreement had been approved by the Family Court, while in *McLean* the agreement had been made in Alabama, U.S.A. The proceedings in *Ellinas* were held to be a matrimonial cause; Ash J. had no doubt that the proceedings were proceedings with respect to the enforcement of a decree. His Honour held that they were in relation to proceedings for the approval, by a court, of a maintenance agreement within the meaning of paragraph (d) of section 4(1). Therefore, the Supreme Court had no jurisdiction. The opposite conclusion was reached in *McLean*. It was held there that the proceedings were not a matrimonial cause within section 4(1). They did not fall within paragraph (c) because the rights of the

[199] [1978] 1 N.S.W.L.R. 598.
[200] (1978) 53 A.L.J.R. 134, 135 *per* Gibbs J.
[201] [1978] 1 N.S.W.L.R. 237.
[202] (1978) 4 Fam. L.R. 181.

parties had been fixed by the Alabama court, so they were not proceedings with respect to the maintenance of one of the parties. Nor did they fall within paragraph (e), because they were not sufficiently connected with the marital relationship. As to paragraphs (ca) and (f) —the proceedings were not in relation to concurrent, pending or completed proceedings as the definition of proceedings excludes those in a court not exercising jurisdiction under the Family Law Act.[203] Thus, the Supreme Court had jurisdiction to order specific performance of the agreement.

There were a number of New South Wales cases during 1978 involving matrimonial causes instituted before the Supreme Court was divested of its jurisdiction to deal with them. Without exception, the cases concerned property settlements: *Wardman* v. *Wardman;*[204] *Skilton* v. *Skilton;*[205] *Sharp* v. *Sharp*[206] and *Debs* v. *Debs.*[207] All cases involved claims by wives for property. In two, a chose in action was treated as property, to allow, in effect, money to be recovered by one of the parties. This was the case in *Sharp* v. *Sharp* where the husband owed the wife $15,000 and in *Debs* v. *Debs* where the husband recovered $300,000 in accident compensation.

2. *Adoption*

The New South Wales Supreme Court has jurisdiction in this area by virtue of the Adoption of Children Act 1965 (N.S.W.). In exercising this jurisdiction the welfare of the child will be the paramount consideration and this was evident in *Re an Infant, A, and the Adoption of Children Act.*[208] Section 32 of the Act provides that the consent of the natural parents to adoption can be dispensed with. Section 32(1)(e) specifically provides that this may be done where the interests of the child will be promoted. In *Re an Infant, A, and the Adoption of Children Act* the applicants sought to adopt their foster child but the natural parents objected and their consent was dispensed with. Waddell J. held that the making of the adoption order would complete the psychological relationship of parent and child that already existed between the child and his foster parents. This approach achieves, without the amendment of the Act, recommendation 15 of the Legislative Review Committee reviewing the Adoption of Children Act.[209] The Committee recommended that section 32 be widened to allow the consent of the parents to be dispensed with where the child had established a stable relationship with the foster parents.

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[203] Family Law Act 1975 (Cth) s. 4(1).
[204] (1978) 3 Fam. L.N. 69.
[205] (1978) 4 Fam. L.N. 33.
[206] (1978) 4 Fam. L.N. 38.
[207] (1978) 4 Fam. L.N. 48.
[208] (1978) 4 Fam. L.N. 40.
[209] Legislative Review Committee: Review of the Adoption of Children Act (1976).

In some ways it is difficult to reconcile the decision in *Re A and A and the Adoption of Children Act*[210] with the paramountcy of the child's welfare. The applicants in this case had no prospect of adopting a child in Australia because of their age. They found a suitable child in Sri Lanka but adoption was not permitted because of the applicants' age and difficulties with cross-cultural adoptions. The Court upheld this decision of the Department of Youth and Community Affairs, and stated that whether or not the child would be better-off in Australia rather than in Sri Lanka was not a matter for the Court to take into account. While the Court was no doubt concerned to prevent the regular occurence of action such as that taken by the applicants, with its attendant disruption of procedure, it seems to have allowed this factor to outweigh the paramount consideration of the child's welfare—unless this consideration is applied only to children already in Australia.

The adoption of children is a difficult jurisdiction, especially at present where there are more prospective adoptive parents than there are children available. The Supreme Court has been flexible in its approach and mindful of the need to protect the interests of the child.

Before leaving the area of child welfare it is worthwhile to note proposals contained in *A Report Issued by the Hon. R. F. Jackson, M.P., Minister for Youth and Community Services on Proposed Child and Community Welfare Legislation.*[211] Chapter Twelve proposes the establishment of Juvenile Aid Panels empowered to counsel certain juvenile offenders and not record a conviction against them. This procedure would involve the community, avoid the stigma of a court appearance and allow young offenders to be dealt with by tribunals more suited, and with more time to devote, to such cases than a court. Chapter Thirteen proposes the establishment of a new system of Childrens Courts. The Bench would be made up of five magistrates appointed from the general Bench for three year terms. The suggested advantage in this system is that juvenile offenders will be dealt with by persons sitting exclusively in the juvenile jurisdiction. It is also proposed that reports, which do not identify the parties, be allowed so that the public can see how justice is administered in the juvenile court system.

3. *Ex Nuptial Children*

The Supreme Court clearly retains jurisdiction in respect of ex nuptial children, the Commonwealth only having power to legislate in respect of children of a marriage. The New South Wales Court of Appeal, in *Gorey* v. *Griffin*,[212] considered the effect of the Children (Equality of Status) Act 1976 (N.S.W.). The Court held that, so far as the new Act is concerned, a child born out of wedlock is no longer

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[210] (1978) 4 Fam. L.N. 41.
[211] Department of Youth and Community Affairs (1978).
[212] [1978] 1 N.S.W.L.R. 739.

nullius fillius, but is, in the eyes of the law, the child of its natural parents. It is suggested that the effect of this Act and this case for New South Wales courts is that they now have an area relating to custody, access and guardianship of children in which their jurisdiction is exclusive. The Act also applies the paramount consideration of the welfare of the child or children to illegitimate as well as legitimate children.

Three other notable cases in 1978 were concerned with the custody of illegitimate children: *Kelly* v. *Panayioutou*;[213] *Davidson* v. *Davidson*[214] and *Raughley* v. *Raughley*.[215] In each of these cases the mother had consented to the child living away from her, but later sought custody. Custody was granted to the mother in *Kelly* and *Davidson*, the Courts there accepting the view that the interests of the child will usually be best served if it is returned to its natural mother. However, in *Raughley* the mother was denied custody. The Court recognised that a natural mother's claim for custody is a strong one, but held that she would not succeed unless she could establish that she could offer an environment more beneficial for the child than the present one, which provided stability, security, attention and love. The mother in this case had no regular employment or regular residence, while the grandmother, who had care and control of the child, was raising the child alongside other children of her own in a stable environment.

A second issue in *Kelly* v. *Panayioutou* was whether the Supreme Court had jurisdiction to make a custody order in respect of a child not resident in Australia. The child had been taken to Cyprus by her father. Kearney J. held that the child was an Australian by birth because, at the time of her birth, her father was "ordinarily resident" in Australia. Thus, she had the status of a British subject and owed allegiance to the Crown. This enabled the Court to make the custody order in its inherent jurisdiction. His Honour pointed out that this reasoning would not give jurisdiction to any state or territory Supreme Court as the child should be regarded as "ordinarily resident" in New South Wales.

4. *Family Law Division*

When the Family Court commenced operations in 1976 under the Family Law Act 1975 (Cth), it was intended that the new Court would deal with all matters under the Act. However, as a result of the initial difficulties in the operation of the Family Court, the Family Law Division of the Supreme Court was kept open to assist the new Court and to help prevent delays developing. This produced the situation whereby parties could go to either court, the choice depending simply

[213] (1978) 4 Fam. L.N. 45.
[214] (1978) 4 Fam. L.N. 6.
[215] (1978) 4 Fam. L.N. 19.

on which court could hear the matter first. From June 1976 the Supreme Court was divested of its jurisdiction and left to deal with matters pending under the Act only. By September 1977 the work coming into the Division had decreased significantly. At that time the Registrar estimated that there were sufficient matters on hand to occupy three judges for 1977, two judges until June 1978 and one judge after that if the volume of work continued to decline.[216] The work did continue to decline and by May 1979 there were some 15,000 pending matters. As these must have been instituted before June 1976, it is probable that a large number of them are now out of time and will have to be recommenced (if the parties so desire) in the Family Court. Other matters can be transferred to the Family Court if the parties consent. Therefore, it has been decided to close the Family Law Division of the Supreme Court. Jurisdiction under state law is already exercised by the Equity Division and most of the cases dealing with family and familial matters in 1978 were heard in that Division.

While the closure of the Division simply fulfills the original intention at the time of the passing of the Family Law Act, it is to be hoped that this action does not aggravate delays in the Family Court.

VII LABOUR LAW

In recent years one of the greatest areas of expansion in the law in general has been industrial relations, which has its basis in the field of labour law. This development is due, partly, to a growing awareness on the part of both management and unions, and also to a gradual evolution in public attitudes. In 1978 there were several significant cases in the field of labour law in New South Wales.

1. *The Contract of Employment*

The employment agreement differs from other contractual agreements in that courts have been more ready to intervene to prevent harsh and unconscionable contracts from becoming operative. Often the criterion used to nullify such an agreement is that it is not in the public interest. In *Lumby* v. *Yorkshire-General Life Assurance Co. Ltd*[217] clause 22 of the employment contract, designed to discourage trained staff from changing companies, provided that the insurance company could retain commissions not yet due, on the termination of employment. Lumby left the Yorkshire-General Life Assurance Co., which withheld $1,440.27 in deferred commission. Macken J. held first that clause 22 was unfair within section 88F(1)(a) of the Industrial Arbitration Act 1940 (N.S.W.). Although the Company could use its discretion in deciding whether or not to make payment, Macken J. pointed out that a contract which provided for the deferment of payments for work for

[216] [1977] 1 N.S.W.L.R. 600, Practice Note issued by Street C.J.
[217] [1978] 1 N.S.W.L.R. 626.

up to a year following the performance of such work was and is inherently unfair. Secondly, his Honour noted that the clause stood as a severe fetter on the private right of an agent to change his employment freely. Macken J. upheld the principle that

> [c]onsiderations of public policy must be had regard to, and that it is no answer to say that an adult man, as to whom undue pressure is not shown to have been exercised, ought to be allowed to enter into any contract he thinks fit affecting his own liberty of action.[218]

The effect that trade unions may have on employment contracts is demonstrated by *Federated Miscellaneous Workers' Union of Australia, New South Wales Branch* v. *Wilson Parking (N.S.W.) Pty Ltd*,[219] where it was held that a union can make void a contract between a company and an employee even though the union is not a party to the agreement. The Trade Union argued successfully that under section 88F(1) of the Industrial Arbitration Act it was an industrial union with a sufficient interest in the relevant area of industry and was a competent applicant for relief under this section.

2. *Statutory Offences*

In *Brear* v. *British Paints Ltd*[220] section 42(1) of the Factories, Shops and Industries Act 1962 (N.S.W.) was examined. Under this section all practicable steps must be taken to remove all dangerous fumes from a confined space before any person enters it. It was found that the Company had not taken all practicable steps and a fatal accident resulted—an employee dying from the effects of carbon monoxide inhaled while in a pit. The Industrial Commission held that the relevant phrase in the section—"in which dangerous fumes are liable to be present at any time"—means in which there is a serious possibility or real danger that dangerous fumes will be present at any time, and that with respect to this situation, the risk of leakage from the gas line was reasonably foreseeable. The Commission suggested that such steps as periodical testing of the pipeline for leaks could have been undertaken.

3. *Trade Union Amalgamation*

Since the early part of this decade, when legislation was introduced to make trade union amalgamation more difficult (50 per cent of the membership of both unions must vote, and 50 per cent of the vote must affirm the amalgamation), there have been a spate of attempted amalgamations.

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[218] *Id.*, 630, quoting from *Horwood* v. *Millar's Timber & Trading Co. Ltd* [1917] 1 K.B. 305; [1916-1917] All E.R. Rep. 847.

[219] [1978] 1 N.S.W.L.R. 563. This case has been appealed.

[220] [1978] 2 N.S.W.L.R. 253.

A recent example of an unsuccessful trade union amalgamation may be seen in *Australian Workers' Union* v. *Shop Distributive and Allied Employees' Association.*[221] In 1974 the appellant's New South Wales Branch had purported to amalgamate with the Shop Assistants and Warehouse Employees Federation of Australia, New South Wales Branch. In order to achieve that amalgamation the Australian Workers' Union had relied on a set of rules made in 1942. The appellant claimed that these rules were in compliance with the amalgamation provisions of the Trade Union Act 1881 (N.S.W.) and the Industrial Arbitration Act 1940 (N.S.W.). The respondent association urged, however, that the rules that should have been applied were those of 1951-1952 or 1961-1962. There was *prima facie* evidence, in the frequency of union elections, that the operative rules were those of 1951-1952. The New South Wales Court of Appeal found that the evidence did not show that there was a vote or resolution in 1974 by the Australian Workers' Union in accordance with section 22A of the Trade Union Act—the body purporting to enter the amalgamation not having been proved to be a registered trade union, the rules of which were the set of 1942. Furthermore, section 23 of the Trade Union Act, whereby an invalid amalgamation is validated by registration of the notice of it, was held not to give the Registrar power to validate anything which is void *ab initio.* Thus, section 23 did not assist the situation here, where an entry had been made in the Register. Nor were the registration procedures under the Industrial Arbitration Act of assistance here, since for them to apply there must be amalgamation in fact and law. Even if there had been valid registration under the Industrial Arbitration Act, it would not be sufficient to confer quasi-corporate status on the union enabling it to sue at common law. The impact of this decision is that the Court of Appeal has reiterated that it is entitled to examine the steps used to amalgamate, create and register trade unions.

4. *Workers' Compensation*

It is not possible for an award for partial incapacity and for notional total incapacity to co-exist against the one employer in respect of the one individual—this is the thrust of the decision in *Biegelmann* v. *Elgo Engineering Pty Ltd.*[222] Biegelmann, suffering an injury through work which incapacitated him and still partially does, sought light work but none was available. So he returned to the job which caused the injury (though the heavy lifting was done by fellow workers); he was unable to continue and again no light work was available. The legal position of Biegelmann was that on the day he was first refused light work he acquired, under section 11(2) of the Workers' Compensation Act 1926 (N.S.W.), a right to compensation for total incapacity. Having been

[221] [1978] 1 N.S.W.L.R. 387.
[222] Unreported, N.S.W. Court of Appeal, 18 October 1978.

deemed totally incapable, a supervening total actual incapacity could not support two awards against the one employer.

Sustaining an injury during recess from work was considered in *Thompson* v. *Lewisham Hospital*.[223] The appellant, a domestic maid, was struck and injured by a truck at 3.45 p.m. while temporarily absent from her place of work, Lewisham Hospital. The evidence indicated that she had taken a 26 minute recess. The respondent argued that this recess could not be regarded as an absence during an ordinary recess under section 71(e) of the Workers' Compensation legislation, as the afternoon break was between 3.45 and 4.00 p.m. However, evidence given by the appellant showed the usual practice to be that there was an extended time rest between 3.00 and 4.00 p.m. and, on this evidence, the Court of Appeal was able to find that *prima facie* there was consent by the employer to the break and, therefore, the employee was entitled to workers' compensation.

Attempts to disguise questions of fact as questions of law, to provide the basis of an appeal, are common in cases involving workers' compensation. For example, in *Pascoe* v. *Barrier Crash Repairs Pty Ltd*,[224] in dismissing the appeal in the New South Wales Court of Appeal, Moffitt J. stated: "[T]his appeal is but another example of a litigant, apparently dissatisfied with factual findings, to dress up what really is a complaint on questions of fact as an appeal on a question of law".[225]

VIII PRACTICE AND PROCEDURE

1. *Service of a Statement of Claim Outside New South Wales*

Where an order for service of an originating process outside this state is sought under Part 10 rule 2 of the Supreme Court Rules 1970 (N.S.W.) (hereinafter, "the Rules"), it has been the practice to grant the order on the basis of evidence of a purely general and formal kind as to the facts on which the jurisdiction of the Court to make an order according to the terms of rule 1, is based. However, in *Stanley Kerr Holdings Pty Ltd* v. *Gibor Textile Enterprises Ltd*[226] Sheppard J. held that although the jurisdiction of the Court to make such orders is inherent, and not limited to the grounds set out in rule 1, it can only be exercised when the judicial officer is possessed of all the facts. He defined the appropriate evidence as that from people who can speak directly of the facts, and evidence which discloses in a little detail what the facts are. The judicial officer must be able to come to a conclusion that the facts support the ground relied upon in seeking the order for service outside the jurisdiction. In the instant case Sheppard J. had a serious doubt as to whether the ground relied upon could be made out

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[223] Unreported, N.S.W. Court of Appeal, 14 July 1978.
[224] Unreported, N.S.W. Court of Appeal, 25 October 1978.
[225] *Ibid.*
[226] [1978] 2 N.S.W.L.R. 372.

and therefore, following a decision of Megarry J.,[227] decided in favour of the foreigner and held the service to be bad.

2. *Joinder of Parties*

Needham J. in *Re Great Eastern Cleaning Services Pty Ltd and the Companies Act*[228] took a broad approach to the addition of parties under Part 8 rule 8(1) of the Rules. In an application for restoration of a company to the register, the Commissioner of Taxation applied to be joined as a respondent on the basis that if the application for restoration was sucessful the Commissioner's claim for unpaid group tax against the promoter of the Company would fail. Even though in the application for restoration there were, technically speaking, "no matters in dispute", his Honour took the view that the presence of the Commissioner, as a party, was necessary to ensure effectual and complete determination. His Honour interpreted this necessity in the broad sense adopted by the House of Lords in 1971,[229] rejecting the restrictive interpretation of the principles for the addition of parties derived from an earlier decision of Devlin J.[230]

3. *Pleadings*

In *Maloney* v. *Commissioner for Railways (N.S.W.)*[231] the High Court held that it was not open to the plaintiff on appeal to raise a new allegation, of breach of duty of care based on a failure to take steps to ensure the plaintiff's safety, from those alleged in the statement of claim and litigated at the trial. In so deciding, *Leotta* v. *Public Transport Commission (N.S.W.)*[232] was distinguished. Barwick C.J. took the opportunity in both *Maloney* and *Da Costa* v. *Australian Iron & Steel Pty Ltd*[233] to emphasise the need for specific particulars of negligence, including the form of breach relied upon, and the need to confine parties to their pleadings or to amend where they seek to make a new or different case.

4. *Interrogatories*

In *Boyle* v. *Downs*[234] Master Allen held that in personal injury cases exceptional circumstances were not required for the Court to make an order, under Part 24 rule 5 of the Rules, for an answer to interrogatories. Although often the circumstances will be such as to disentitle the plaintiff to answers to interrogatories in these cases, the same considerations apply under rule 5 as under rule 3.

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[227] *G.A.F. Corporation* v. *Amchem Products Inc.* [1975] 1 Ll. R. 601.
[228] [1978] 2 N.S.W.L.R. 278.
[229] *Vandervell Trustees Ltd* v. *White* [1971] A.C. 912.
[230] *Amon* v. *Raphael Tuck & Sons Ltd* [1956] 1 Q.B. 357.
[231] (1978) 52 A.L.J.R. 292; (1978) 18 A.L.R. 147; also note 41 *supra.*
[232] (1976) 50 A.L.J.R. 666.
[233] (1978) 20 A.L.R. 257.
[234] [1978] 3 N.S.W.L.R. 381.

5. *Inspection and Subpoenas*

In a common law action for damages by an employee against his employer, the defendant subpoened all documents handled by an insurance company relating to the employee's claim for workers' compensation, in respect of which there was no litigation in contemplation. The insurance company produced without objection one file of documents, but in relation to another file which had been brought into Court in obedience with the subpoena, it objected to production on the grounds of professional privilege: *National Employers' Mutual General Association Ltd* v. *Waind and Hill.*[235] The New South Wales Court of Appeal unanimously rejected this objection, and applied the principle[236] that because the sole purpose of the documents being brought into existence was not that of submitting them to legal advisers for use in legal proceedings, they were not privileged.

Heard jointly with that appeal was an appeal by the plaintiff-employee against the order made for inspection of the documents brought into Court pursuant to the subpoena. The objection was that to allow the defendant access to documents produced by these means by a third party, merely for the purposes of deciding whether or not to use any of the documents or their contents for purposes other than the tendering of the documents in evidence, was a misuse of the subpoena amounting to discovery against strangers or "fishing". On the basis that the judge is invested with jurisdiction to take all steps necessary for the proper trial of the issues before him, and that the concept of what is necessary for these purposes has developed since the last century, the Court refused to uphold the employee's objection.[237] The Court delineated three discrete steps in the process of production and use of documents belonging to a third party, pointing out that at each step the rights of the stranger and parties differ and the functions of the judge are different.

6. *Payments into Court and Recovery of Costs*

Although in New South Wales there is no rule as to the entitlement to costs, of a successful defendant, where an amount has been paid into court greater than that recovered, this has always been borne in mind when judicial discretion as to costs has been exercised. The pressure that this practice exerts upon plaintiffs has been alleviated in the Australian Capital Territory[238] but not in New South Wales. However, in *Laguillo* v. *Haden Engineering Pty Ltd*[239] the New South Wales

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[235] [1978] 1 N.S.W.L.R. 372.

[236] *Grant* v. *Downs* (1976) 51 A.L.J.R. 198.

[237] In so deciding, the Court declined to follow *McAuliffe* v. *McAuliffe* (1974) 4 A.C.T.R. 9 and defined the limits of the use of the obiter dictum in *Burchard* v. *McFarlane* (1891) 2 Q.B. 241, 247-248.

[238] *Mangan* v. *Mendum* (1974) 4 A.C.T.R. 44; *Tanner* v. *Marquis Jackson, Cahill & Associates* (1975) 6 A.C.T.R. 9.

[239] [1978] 1 N.S.W.L.R. 306.

Court of Appeal recognised that in exercising this discretion, a distinction could properly be drawn between success on the issue of liability and on the issue of quantum of damages. Although the most appropriate order to have made where the plaintiff succeeded on the former and not the latter, might have been for each party to pay the costs of the other in respect of the issue on which each had failed, from the date of payment into court, the alternative form of order made by the trial judge in this case could not be said to be an improper use of his discretion. The order made was that the defendant pay the plaintiff's costs up to the date of payment into court and that thereafter each party was to bear his or its own costs.

7. *Privilege, Freedom of Information and Freedom of the Press*

In the course of protracted committal proceedings in *Sankey* v. *Whitlam and Others*[240] the plaintiff issued a number of subpoenas for the production of documents, addressed to the Secretary of the Executive Council, the Secretary of the Department of Minerals and Energy, the Secretary and Deputy Secretary of the Treasury, and another senior Treasury official. A further subpoena was addressed to the Secretary of the Treasury on behalf of the defendant, Mr Whitlam. The Commonwealth intervened to object to the production of some, but not all, of the documents covered by the subpoenas, on the ground that they belonged to a class of documents which the public interest required should not be disclosed. The magistrate upheld this claim and, in addition, refused to act on those documents in respect of which privilege had not been claimed since they had previously been tabled in Parliament: in the magistrate's opinion this did not distinguish them sufficiently from the rest of the documents. Mr Sankey then applied to the Supreme Court of New South Wales for declarations that the documents should be produced and could be used if otherwise admissible in the committal proceedings, and for orders for the production of the documents. Mr Whitlam lodged a cross-claim for, *inter alia*, a declaration that the documents for which the Commonwealth had not claimed privilege were nevertheless the subject of a parliamentary privilege. These proceedings were then removed to the High Court from New South Wales pursuant to section 40 of the Judiciary Act 1903 (Cth).

On the question of parliamentary privilege in *Sankey* v. *Whitlam*, the High Court held that this did not extend to documents tabled in parliament since these must be "considered public". Moreover, in this case there were specific resolutions passed by each House of Parliament allowing inspection of these documents by Mr Sankey. On the question of Crown privilege or the public interest in preventing disclosure of documents of a certain class, the High Court applied *Conway* v.

[240] (1978) 21 A.L.R. 505.

Rimmer,[241] holding that it was the role of a court to determine whether such documents should be disclosed. The Court emphasised the need to balance the prejudice to the public interest against the prejudice to justice in the particular case. The fact that here there were criminal charges relating to the conduct in office of senior ministers, including the Prime Minister, weighed heavily against a conclusion that the documents in question be considered privileged. Stephen J. pointed out that the customary rationale for a claim to Crown privilege, and that relied on in this case, was the need to safeguard the proper functioning of the executive and the public service; this, however, was inappropriate when the claim was to prevent the successful prosecution of charges of grossly improper functioning. The Court rejected the idea that the mere fact that the documents belonged to a class which the public interest required should not be disclosed was sufficient to attract the privilege. The public interest was not to be confined to strict and static classes. (The High Court also considered the availability of declaratory relief, in view of the right of the accused not to be exposed to proceedings that have no legal substance and the right of the Commonwealth to prevent disclosure of documents.)

Privilege based on public interest was considered by Holland J. in *Maloney* v. *N.S.W. National Coursing Association Ltd*,[242] and it was applied in to context of investigations by the Corporate Affairs Commission. In applying a principle stated by the House of Lords,[243] his Honour held that there was an undoubted public interest in a court declining to require disclosure of information obtained for the purpose of a public prosecution, such as that of the Corporate Affairs Commission. He pointed out that the nature of investigations under the Companies Act 1960 (N.S.W.) required an assurance of confidentiality for informants, in order to encourage them to come forward with evidence of dealings which would otherwise be very difficult to obtain.

However, in *Finnane* v. *Australian Consolidated Press Ltd*[244] an attempt by the Corporate Affairs Commission investigator to prevent one of his informants from divulging confidential information to third parties, that is, the defendant publishers and journalists of the *Bulletin* and *National Times*, failed. Needham J. distinguished the House of Lords decision, from which the principle referred to above derives,[245] and refused to accept the notion, on which the argument for the plaintiff was founded, that the privilege based on the public interest in non-disclosure was a reciprocal one. Any obligation of confidentiality arising from Corporate Affairs Commission investigations was said to

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[241] [1968] A.C. 910.
[242] [1978] 1 N.S.W.L.R. 60; see also note 61 *supra*.
[243] *D.* v. *National Society for the Prevention of Cruelty to Children* [1977] 1 All E.R. 589.
[244] [1978] 2 N.S.W.L.R. 435.
[245] Note 243 *supra*.

be owed to the persons giving evidence and is capable of being waived by them. Moreover, any right to prohibit publication of evidence given in the course of an investigation would be a public right enforceable only by the Attorney-General. *Finnane* also raised the issue of parliamentary privilege. Counsel for the plaintiff sought to bring evidence of what had been said in the Federal Parliament about the publications in question and sought to tender newspaper reports referring to Parliamentary Debates on the matter. The defendants objected that admission of this material into evidence would be a breach of parliamentary privilege in the absence of the consent of Parliament. Although inclined to the view that parliamentary privilege extended only to preventing a member of parliament from being made liable at law for things said in the House, Needham J. was prepared to follow the broader interpretation that has been given to this privilege.[246] However, he was not prepared to allow the objection to evidence from newspaper extracts, since as a matter of history he found that parliaments must be said to have given a general permission to newspapers to publish reports of their debates because no action had ever been taken over this practice, and therefore, evidence of such newspaper reports should be inadmissible.

Two relevant decisions considered the current position regarding the long recognised practice in defamation cases of freedom of the press from the obligation of revealing their sources of information in answers to interrogatories or inspection of documents. In *Andrews* v. *John Fairfax & Sons Ltd*[247] Begg J. affirmed and applied the decision of Master Allen in a case heard earlier in the year—Skalkos v. Service Press Pty Ltd, unreported but reproduced as a note to *Andrews*. In both cases the argument had been put that the established practice referred to above had been displaced by Part 67 rule 20 of the Rules. However, the argument failed on two grounds. In the first place, rule 20 only applies to an interrogatory on an issue which arises from an allegation made or a matter of disfeasance relied on in reply according to rule 19. These cases did not involve a matter of reply but a defence under section 22 of the Defamation Act 1974 (N.S.W.). Furthermore, Master Allen distinguished the purpose of the practice from the purpose of rule 20.

8. *Amended Defamation Procedures*

The Rules governing the proceedings for defamation were amended to provide a more expeditious, effective means of dealing with these matters. Although the amendments do not represent an implementation of the uniform code for defamation proposed by the Australian Law Reform Commission,[248] they are in line with the objectives identified

[246] *Church of Scientology of California* v. *Johnson-Smith* [1972] 1 Q.B. 522.
[247] [1978] 2 N.S.W.L.R. 300.
[248] Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (A.L.R.C. Report No. 11, 1979).

by that body. Clarification of the changes has been provided in Practice Notes by Street C.J. (21 April 1978) and Begg J. (29 April 1978). These indicate that it is intended that the new procedures will avoid the situation in which the plaintiff is in effect denied a remedy by the length of delay in resolving the matter. At the same time it will be possible to avoid the abuses of the "stop writ" procedure, which allowed the plaintiff the unfair advantage of restricting publication without a full consideration of the case.

The amendments also provide for the establishment of a Defamation list for hearing before Begg J. The plaintiff is required to file a notice of motion for directions at the time of filing the statement of claim. The hearing of the motion is to occur within a short period provided for in the Rules and at this hearing the defendant is required to state the defences relied on. The Court may, at that point, approve an apology or statement and may help in the drafting of such statements. These hearings for directions[249] will, it is hoped, determine the significant issues at an early stage and facilitate pre-trial settlements.

9. *Evidence for Interlocutory Injunctions*

The uncertainty surrounding the basis on which interlocutory injunctions should be granted was considered by the New South Wales Court of Appeal in *Shercliffe* v. *Engadine Acceptance Corporation Pty Ltd.*[250] The case concerned an appeal from a decision to grant interlocutory relief where the plaintiffs could be said to have "a fair prospect of success" at the trial, although they had not established a *prima facie* case. Interlocutory injunctions to preserve property (here, in a mortgage) *in statu quo* have been said to be available where there appeared to be a "substantial" or "fairly open" question to be decided.[251] In *Shercliffe* the Court of Appeal unanimously rejected these formulae in favour of a test laid down by the High Court[252] that the plaintiff must make out a *prima facie* case, in the sense that if the evidence remains unchanged there is a probability that at the trial the plaintiff will be found entitled to relief. Mahoney J.A., in the leading judgment, stated that "probability" meant merely "likelihood" and not necessarily more than a 50 per cent chance; in fact it could be "considerably less than an even chance". As noted by the High Court,[253] the degree of probability required would depend on the nature of rights sought to be preserved

[249] The results of a trial introduction of the routine use of hearings for directions in the Supreme Court have been described in "Experiment in the Supreme Court with Standard Hearings for Directions: A Research Evaluation" (1979) 53 *A.L.J.* 142.

[250] [1978] 1 N.S.W.L.R. 729.

[251] *Great Western Railway Co.* v. *Birmingham & Oxford Junction Railway Co.* (1848) 2 Ph. 597, 602; *De Mestre* v. *A. D. Hunter Pty Ltd* (1952) 77 W.N. (N.S.W.) 143.

[252] *Beecham Broke Ltd* v. *Bristol Laboratories Pty Ltd* (1968) 118 C.L.R. 618.

[253] *Ibid.*

and the practical consequences likely to flow from the order if made. Without deciding finally whether the High Court was inconsistent with the approach taken by Lord Diplock,[254] Mahoney J.A. stated that if there was a difference it lay in the emphasis by the High Court on the need to establish an "appropriate case", whatever the balance of convenience.

10. *Listening Devices Act 1969 (N.S.W.)*

In an appeal on an evidentiary point to the High Court from the Family Court, section 7 of the Listening Devices Act was found to be consistent with section 4 of the Telephonic Communications (Interception) Act 1960 (Cth): *Miller* v. *Miller*.[255] Section 7 of the New South Wales Act purported to render inadmissible, as evidence in criminal or civil proceedings, information gained as a result of the direct or indirect use of a listening device in contravention of section 4 of the Commonwealth Act, to intercept a private conversation. The Commonwealth provision, on the other hand, made an exception to a general prohibition on interception of private communications for persons who were lawfully on the premises and listening on a telephone extension within the house in which the conversation was taking place. The New South Wales provision was, therefore, held to be invalid to the extent of this inconsistency.

Also relevant in this area is *R.* v. *Coster*,[256] where it was held that an authority to instal such a device under section 4(2) of the Act imported an authority to use it, and that the authorisation extended to officers acting in the course of duty and consequent upon the authorisation to use the device for the purposes put to the Minister in the oral application made to him by the Permanent Head and Secretary of the relevant Commonwealth Department.

11. *Hearsay Evidence*

In 1978 the New South Wales Law Reform Commission handed down a report on the rule against hearsay evidence. They recommended major modifications to the rule.

The principle recommendations of this Report include the regulation on a general statutory basis of the law relating to out-of-court statements, and the placement of a discretion in the court to admit reliable evidence which is not otherwise admissible or which is not reasonably practicable to tender under any other specific provision; as well as the retention of certain common law exceptions, though in a modified form. The Report also recommends the addition to the Evidence Act 1898 (N.S.W.) of provisions for the reception of published compilations;

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[254] *American Cynamid Co.* v. *Ethicon Ltd* [1975] A.C. 396.
[255] (1978) 53 A.L.J.R. 59.
[256] [1978] 1 N.S.W.L.R. 515; (1978) 21 A.L.R. 699.

statements made on goods in the course of their manufacture, packaging or distribution; statements displayed, in the course of business, on land and on or in buildings or vehicles (as against a person carrying on the business); and postal and like marks. The Report further recommends that certain kinds of hearsay statements made by an expert, on which he has relied in forming his opinion, be admissible; and that certain statements admissible for some purpose other than to prove the truth of the matters asserted in it, should be admissible for that purpose as well. The Report is rounded-off by the recommendation of a number of provisions which would regulate the reception of the evidence made admissible by the new legislation.

12. *Appeals*

The New South Wales Court of Appeal considered, in *Lall* v. *53-55 Hall Street Pty Ltd*,[257] whether an appellant's lack of means could amount to a "special circumstance", under Part 51 rule 11(1) of the Rules, sufficient to set aside an application for security for the costs of the appeal. The Rules recognise that different considerations must apply in the case of an appeal—when the rights of the parties have already been adjudicated upon and the reasons for judgment are readily available —and in the case of proceedings at first instance. The Court believed that the power to order security for costs is intended to provide a protection for a litigant from unreasonable and harassing appeals. Although impecuniosity is a relevant consideration, the rights of the litigant in person must be balanced against those of his/her opponent. In *Lall* the "pursuit of the rights of the litigant in person [would have been] the instrument of grave injustice to his opponent"[258] if no security for costs had been ordered. The Court, therefore, exercised its discretion and ordered security for costs.

13. *Jurisdiction*

The question as to the circumstances in which the Supreme Court of New South Wales has power to review the decision of an arbitrator, appointed under section 15 of the Arbitration Act 1902 (N.S.W.) arose in *Buckley* v. *Bennell Design and Construction Pty Ltd*.[259] The High Court held that the Supreme Court is entitled to set aside the award of an arbitrator only when it is demonstrated that he has erred in law, or has made his award against the weight of the evidence, or has otherwise misconducted himself. Such awards are not completely reviewable as the arbitrator is not an officer of the Court, nor should it be considered that his award is the equivalent to the verdict of a jury.

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[257] [1978] 1 N.S.W.L.R. 310.
[258] *Id.*, 314.
[259] (1978) 19 A.L.R. 257.

14. *Stare Decisis*

The High Court in *Buckley*[260] and the New South Wales Court of Criminal Appeal in *R.* v. *Johns*[261] reaffirmed that, notwithstanding the doctrine of *stare decisis*, Australian courts will be prepared to overrule their own longstanding decisions when such decisions were wrongly concluded, or that a closer approximation to justice would be achieved by the removal of the fetter of a precedent than by its being sustained in the interests of certainty.

15. *Precedent*

In recent years the twin issues of appeals to the Privy Council and the status of decisions of that Court in Australia, have been widely debated. However, in 1978 many of the questions left open by *Kitano* v. *Commonwealth*[262] were concluded, and decisive statements concerning the position of the Privy Council in the Australian judicial hierarchy were made by both the High Court and the New South Wales Court of Appeal.

Some commentators have expressed the fear that a case, on appeal from the Supreme Court of a state, could end up in both the High Court and the Privy Council.[263] Such a situation almost arose. There was a dispute over the construction of a rise and fall clause in a building contract. The decision of the New South Wales Supreme Court was appealed and cross-appealed to the High Court, which dismissed the latter.[264] A petition was then filed; it sought leave to appeal to the Privy Council from the decision of the High Court. In *Attorney-General of the Commonwealth and Anor* v. *T. and G. Mutual Life Society and Anor*[265] a declaration, that the provisions of the Privy Council (Appeals from the High Court) Act 1975 (Cth) did not allow such an action was sought. The High Court held that this Act was a valid exercise of the power of the Commonwealth Parliament under section 74 of the Constitution, for the word "limiting" did not require that some matters be left within the "limit", nor was it confined to the "matters" mentioned in section 75 and 76 of the Constitution. The result of this Act being held to be valid, is that any application for special leave to appeal to the Privy Council from the High Court is now rendered incompetent.

Prior to that decision, the High Court had already assumed the validity of the 1975 Act in the decision of *Viro* v. *R.*[266] an appeal from

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[260] *Ibid.*

[261] [1978] 2 N.S.W.L.R. 259.

[262] [1976] A.C. 99; (1976) 5 A.L.R. 40, which upheld the validity of the Privy Council (Limitation of Appeals) Act 1968 (Cth).

[263] *E.g.*, J. Crawford, "The New Structure of the Australian Courts" (1977-1978) 6 *Adel. L. Rev.* 201, 202.

[264] (1977) 18 A.L.R. 431.

[265] (1978) 19 A.L.R. 385.

[266] (1978) 52 A.L.J.R. 418; (1978) 18 A.L.R. 257; also note 167 *supra.*

the New South Wales Court of Criminal Appeal. There, the trial judge had followed the principles contained in a decision of the Privy Council, which had come on appeal from Jamaica, in preference to a conflicting decision of the High Court. When *Viro* came before the High Court the issues were whether the High Court was bound to follow Privy Council decisions, and if not, which of the judgments in the conflicting decision best represented the law in New South Wales? The High Court quite clearly stated that the Privy Council (Appeals from the High Court) Act rendered the High Court the final Court of Appeal in the Australian judicial hierarchy. The Court went on to declare that it no longer regarded itself to be bound by any past or future decision of the Judicial Committee of the Privy Council.[267]

The state courts now have two equal superior courts by whose decisions they are bound.[268] When faced by manifestly conflicting authorities from those two courts, the states previously would have been expected to follow the judgments of the Privy Council, but in *Viro* the High Court thought otherwise.[269] Moffitt P., in *National Employers' Mutual General Association Ltd* v. *Waind*,[270] took umbrage at the directions of the High Court that a state court should disregard the decisions of another superior court. He nonetheless saw that in the interest of certainty, the New South Wales Court of Appeal should lay down a rule to govern the operation of precedent in the event of conflict between authorities coming from the two ultimate courts in the state hierarchy. The New South Wales Court of Appeal agreed that, except when the High Court decision was of some antiquity while the Privy Council decision was relatively recent, High Court decisions ought to be followed.[271]

Waind involved an application for leave to appeal to the Privy Council from a decision of the New South Wales Court of Appeal. It was claimed that the case "ought" to be submitted to the Privy Council as the issue involved was "of great general and public importance", as required by Rule 2(b) of the Imperial Order in Council (1909 No.

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[267] Nonetheless, it was generally considered that Privy Council decisions should be accorded the same respect as is granted to judgments of the House of Lords or English Court of Appeal.

[268] In *Viro*, note 266 *supra*, the members of the High Court were in agreement that, except in the case of clear conflict, the judgments of both superior courts were to have a binding effect on state courts.

[269] Barwick C.J., Murphy and Jacobs JJ. considered that unless a Privy Council decision was on appeal from Australia, and had expressly overruled or refused to follow a High Court decision, the latter's decision should be preferred. Gibbs and Mason JJ. took the view that, except when specific historical circumstances determined otherwise, High Court decisions should be preferred to those of the Privy Council. Stephen and Aickin JJ. selected the more cautious path of suggesting that the formulation of a rule concerning precedent should be avoided until such time as appeals to the Privy Council cease completely.

[270] Note 235 *supra*.

[271] This is basically the view that Mason J. took in *Viro*, note 266 *supra*.

1521) which governs appeals from New South Wales courts. The basic question was whether leave should be granted when the intention was to seek review of a recent High Court decision, and thus, create a conflict of precedent for the New South Wales courts. The New South Wales Court of Appeal considered that as a conflicting decision may be brought down by the Privy Council, and this would potentially produce confusion and uncertainty in state courts, leave "ought" not be granted. Further, Rule 2(b) suggested that the reason that questions should be submitted directly to the Privy Council was that their importance required the immediate bypassing of appellate courts. Since the Privy Council is now only one of two ultimate courts of appeal, leave "ought" not be granted. The Court felt that the combined effect of section 73(ii) of the Constitution, which makes the High Court the appellate tribunal from state courts, and recent federal legislation, concerning appeals to the Privy Council, was to make the High Court the ultimate court of appeal for the states as provided by the Constitution. Furthermore, as the High Court is in a far better position than the Privy Council to judge what is appropriate law for New South Wales, leave to appeal should be granted to the High Court only.

The combined effect of these decisions is that in the case of conflict arising between decisions of the High Court and the Privy Council the former should be considered authoritative and, to ensure that such conflict does not arise, leave to appeal to the Privy Council will not be allowed from New South Wales courts, except in cases where appeal exists as of right under Rule 2(a) of the Order in Council.

IX PROPERTY MATTERS

1. *Charities*

That most nebulous class of charitable trusts, namely trusts for purposes otherwise beneficial to the community,[272] was considered in *Attorney-General (N.S.W.)* v. *Sawtell*.[273] Difficult to define, this class of charitable trusts is extremely elastic. In *Sawtell*, a gift by will to trustees of the balance of the testatrix's estate for the preservation of native wildlife (both flora and fauna) was held to be a good charitable trust.[274] That is, such a purpose was held to be first, a purpose beneficial to the community and secondly, within the spirit and intendment of the Statute of Charitable Uses.[275]

The first holding, that of public benefit, was based on evidence of contemporary knowledge and circumstance. This evidence established

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[272] See *Commissioners for Special Purposes of Income Tax* v. *Pemsel* [1891] A.C. 531.

[273] [1978] 2 N.S.W.L.R. 200.

[274] A similar conclusion was apparently reached by Waddell J. in Perpetual Trustee v. Salesian Society, unreported, Supreme Court of N.S.W., 31 July 1978.

[275] 43 Eliz. 1, c. 4 (1601).

that the preservation of native wildlife was, today, of great benefit to educators, students and researchers and, given current intensification of public interest, beneficial to the community as a whole.[276] The second holding flowed naturally from the first since "[t]he aspects of public benefit shown by the evidence to be incidental to . . . the preservation of native wild life have characteristics which match in spirit purposes stated in the preamble".[277] It is this holding that emphasises the elasticity of this particular type of charitable trust—whether a stated purpose is within the "spirit and intendment" of the preamble of the Statute of Charitable Uses is hardly a concrete question.

A charitable trust for the advancement of education was considered in *McGrath* v. *Cohen*.[278] A testamentary gift to the Hebrew University of Jerusalem "for the purpose of . . . the establishment in the grounds of the said University of a Rose Garden"[279] was held to be a good charitable trust. The correlation between the advancement of education and the establishment of rose gardens within academic institutions would seem perhaps a little tenuous. However, the gift, which had the effect of beautifying the grounds of a University, satisfied the test that it should be open to a sufficient class of the public. Further, the garden as an integral part of the University "must of its very nature be conducive to the inspiration in all but the most blasé of students of a state of mind better attuned to the academic tasks ahead".[280]

Presbyterian Church v. *Ryde Municipal Council*, considered earlier,[281] is notable for its exhaustive review of charitable trusts for the advancement of religion.[282]

Uniting Church Property Trust v. *Monsen*[283] contains a valuable analysis as to when the Attorney-General is a necessary party to litigation concerning trust property devoted to charitable purposes. It is, of course, the duty of the Crown (represented by the Attorney-General) to protect property devoted to charitable purposes.[284] The plaintiff Property Trust had claimed it was entitled to have certain names vested in it, in which the Presbyterian Church (represented by the defendant) had property rights. The primary submission for the defendant was that as the proceedings related to the administration of a charity the Attorney-General was the only proper plaintiff. This submission was rejected. The actual claim of right asserted by the

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[276] Note 273 *supra*, 214.
[277] *Ibid.*
[278] [1978] 1 N.S.W.L.R. 621.
[279] *Id.*, 622.
[280] *Id.*, 625.
[281] [1978] 2 N.S.W.L.R. 387; note 85 *supra.*
[282] *Id.*, 402-411 *per* Mahoney J.A.
[283] [1978] 1 N.S.W.L.R. 575.
[284] R. Meagher and W. Gummow, *Jacobs Law of Trusts in Australia* (4th ed., 1977) 192.

plaintiff was complex. It was held, for the purposes of the proceedings at hand, that it was at least arguable that the alleged right may have vested in the plaintiff or in the Uniting Church in Australia; or it might be held in trust absolutely or contingently for the plaintiff or the Uniting Church in Australia.[285] In this light, it was ultimately held that the Attorney-General is not a necessary party where an existing charity is seeking either to recover property to which it claims entitlement or to protect property in which it claims an actual or contingent interest.[286]

In considering whether a will evinces a general or particular charitable intention the question is primarily one of construction.[287] The significance of the distinction was illustrated by two decisions of the Supreme Court in 1978. In *McCormack* v. *Stevens*[288] a disposition in a will to an institution that did not exist had been prefaced by the general phrase "the following charities".[289] An intestacy as to that part of the estate was avoided and a *cy-près* scheme effected since the testator, it was held, had clearly indicated a general charitable intention.[290]

On the other hand, in *Harris* v. *Skevington*[291] a bequest to an unincorporated voluntary association was held not to evince a general charitable intention. Particularity in fact being the essence of the legacy in question, the settlement of a *cy-près* scheme was inappropriate. The Court (Hutley J.A.; Glass and Samuels JJ.A. concurring) considered then, whether the implementation of the testatrix's desired object, that is the conversion of a house (held on trust by the association) so as to become suitable for aged persons, was practical. It was held that an absence of power in the donee unincorporated association (due to its constitution) to apply the legacy in the manner disclosed caused the gift to fail.[292] Alternatively, the initial impracticability of itself not rendering the gift void, it was concluded even if the constitution of the donee could be amended so as to effect the purpose of the gift, such amendments could not have been foreseen by a hypothetical reasonable man looking into the future, and was another ground for the failure of the gift.[293]

2. *Compulsory Acquisition*

The interpretation of section 124 of the Public Works Act 1921

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[285] Note 283 *supra*, 586.
[286] *Id.*, 591.
[287] *Attorney-General (N.S.W.)* v. *Perpetual Trustee Co. (Ltd)* (1940) 63 C.L.R. 209, 227.
[288] [1978] 2 N.S.W.L.R. 517.
[289] *Id.*, 519.
[290] *Ibid.*
[291] [1978] 1 N.S.W.L.R. 176.
[292] *Id.*, 185-186 citing *Attorney-General* v. *Whorwood* (1756) 1 Ves. Sen. Supp. 236; 28 E.R. 511.
[293] *Id.*, 188.

(N.S.W.) was clarified in *Housing Commission of New South Wales* v. *San Sebastian Pty Ltd.*[294] It was held in the assessment of market value under section 124 the public purpose of the resumption may be taken into account insofar as is necessary to establish whether the market price has been altered. The effect of zoning or restriction on the use of land may only be taken into account in assessing market value where it is independent from resumption for a public purpose.[295]

Section 4A of the Public Instruction Act 1880 (N.S.W.) was considered in Hanrahan v. Minister for Education.[296] The plaintiff had been awarded compensation under section 4A(4) on the basis of the difference in the value of the land at the date of resumption (under the Public Works Act 1912 (N.S.W.)) and its value at the date of rescission of the notification of resumption. The Court of Appeal (Moffitt P., Glass and Samuels JJ.A.) affirmed this calculation, pointing out that the effect of the proviso in section 4A(4) ("other than compensation in respect of the value of the land") was to forbid compensation which would have been due if there had been no rescission.

Compensation payable to the dispossessed owner upon resumption was considered in Kerswell v. Commissioner for Main Roads.[297] Since the land use (a hobby farm) in this case was unique, it was correctly found that the resumed land had a special value to the owner above the market value. The test adopted as to compensation payable was "that the owner was entitled to that which a prudent man would have been willing to give for the land sooner than fail to obtain it".[298]

3. *Crown Lands*

A form of Crown Land tenure, the conditional purchase, was considered in *Rodwell* v. *G.R. Evans & Co. Pty Ltd.*[299] The Court of Appeal (Reynolds, Hutley and Samuels JJ.A.) held that the fact that the Crown has the right to exercise forfeiture does not take away the rights of the holder of the conditional purchase to bind the land, by the grant of an easement, until such time as the forfeiture is exercised. Of course, the interest granted by the easement cannot be greater than the grantor's estate in the servient tenement.[300] Thus, *Hari* v. *Trotter*,[301] insofar as it suggested the holder of a conditional purchase cannot grant an easement, was formally overruled.[302]

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[294] (1978) 20 A.L.R. 385.

[295] This case was subsequently applied in *Housing Commission of New South Wales* v. *Brougham Investments Pty Ltd* (1978) 52 A.L.J.R. 611.

[296] Unreported, N.S.W. Court of Appeal, 25 July 1978.

[297] Unreported, N.S.W. Court of Appeal, 13 July 1978.

[298] *Pastoral Association Ltd* v. *The Minister* [1914] A.C. 1083, 1088.

[299] [1978] 1 N.S.W.L.R. 448.

[300] *Booth* v. *Alcock* [1873] 8 Ch. App. 663.

[301] (1959) 76 W.N. (N.S.W.) 112.

[302] Note 28 *supra*, 453.

4. *Land Tax*

Section 10(1)(g)(iii) of the Land Tax Management Act 1956 (N.S.W.) provides that land upon which buildings are "owned are solely occupied by a society, club or association not carried on for a pecuniary profit" is exempt from land tax. In *Crows Nest Club Ltd* v. *Commissioner of Land Tax*[303] it was agreed that "pecuniary profit" should be construed as pecuniary profit to individuals. It had been found as a fact, at first instance,[304] that although the memorandum of association authorised the Crows Nest Club to conduct its business for the pecuniary profit of individuals, it did not do so by virtue of a rule enacted pursuant to its articles of association. According to Hutley J.A. (Moffitt P. and Glass J.A. concurring) the predominant consideration under the exempting provision was the character of the club concerned, divined from the objects of the club as disclosed in its memorandum of association. The rule could not cut down the rights of the members under the memorandum or articles, and thus, exemption was denied.

5. *Landlord and Tenant*

Rights of re-entry under a lease were considered in *McDonald Multiple Pty Ltd* v. *Presto Smallgoods (N.S.W.) Pty Ltd.*[305] In this case a landlord followed up his expressed intention to re-enter premises a day before, entry was permitted under the terms of the lease. The landlord, relying on *London County Ltd* v. *Wilfred Sportsman Ltd*,[306] argued that the early entrance, at the first moment of the next day constituted a valid forfeiture. This case was distinguished by Needham J. on the basis that there the landlord intended (by imputation) not to exercise his rights of re-entry until after the date specified in the lease, whereas in the present case the landlord's expressed intention was otherwise.

In *Karapanagiotidis* v. *Karagiannis*[307] it was affirmed that a provision in a lease providing that in the event of a breach of covenant the landlord has the option to convert the tenancy into a week to week tenancy is a right of forfeiture within section 129(1) of the Conveyancing Act 1919 (N.S.W.). Accordingly, such a conversion is not enforceable unless section 129(1) is strictly complied with.

The Landlord and Tenant Act (N.S.W.) was significantly amended in 1978. Under section 2(5) of the Landlord and Tenant (Amendment) Act 1978 (N.S.W.) the remedy of self-help is no longer available to the landlord of a dwelling house without the sanction of a court. This section is restricted to tenancy agreements and thus, no protection is afforded to those living in premises under licence. Further exceptions

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[303] [1978] 1 N.S.W.L.R. 523.
[304] Unreported, Supreme Court of N.S.W., 22 July 1977.
[305] [1978] 1 N.S.W.L.R. 337.
[306] [1971] Ch. 764.
[307] Unreported, N.S.W. Court of Appeal, 17 May 1978.

to section 2(5) are set down in section 2(1); these include hotels, motels, boarding houses, shop and living premises let together, premises occupied by an employee, mining leases, holiday premises (subject to section 2(2)), and dwellings declared to be exceptions by the Governor-in-Council (subject to section 2(5)). A breach of section 2(5) is punishable by fine. Section 2(4) stipulates that a landlord-tenant relationship continues until the tenant is lawfully deprived of possession. By section 2(7), a prosecution under section 2(5) can be successfully defended if the landlord can prove that at the time he took possession he had reasonable grounds to believe that the tenant had ceased absolutely to reside on the land.

6. *Mortgages*

A decision of some note in this area was that of the High Court (Stephen, Jacobs and Aickin JJ.) in *A.N.Z. Banking Group Ltd* v. *Bangadilly Pastoral Co. Pty Ltd.*[308] In that case the first mortgagee exercising a power of sale and the subsequent purchaser at the auction sale were companies controlled by the same people. The auction price insufficiently discharged the first mortgage, leaving no funds for the second mortgagee—the A.N.Z. Bank. The appellant Bank ultimately succeeded in setting aside the sale. To Jacobs J. the exercise of the power of sale exposed a conflict of interest. That is, a conflict between the desire that an associate of the first mortgagee should obtain the best possible bargain and the desire that the best possible price should be obtained to realise the security of the first mortgagee. The latter desire should always be given absolute preference. To Aickin J. there was no independent bargain in the auction sale.

In *Commercial Banking Co. of Sydney Ltd* v. *Gaty*[309] the mortgagors claimed the prohibition in section 203B(1) of the Companies Act 1961 (N.S.W.) meant a guarantee given by a company to the mortgagee bank was unenforceable whilst that company was under official management (pursuant to section 201(1) of the Companies Act). The Court (Lee J.) held that though the company was immune to action (without the leave of the Court), this did not obviate the liability of the guarantors under the guarantee, nor did it prevent the mortgage from being enforced:

> When there is default giving rise to a power of sale, [the interest under a statutory charge] is changed, in that there is added to the existing bundle of rights another right which carries with it, in the case of a fixed mortgage, the right to terminate the deferment of the repayment by the mortgagor of the principal moneys secured.[310]

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[308] (1978) 19 A.L.R. 519.

[309] [1978] 2 N.S.W.L.R. 271.

[310] *Per* Hutley J.A. (Reynolds J.A. concurring) in *Morrisey* v. *Bright* [1978] 2 N.S.W.L.R. 1, 4.

This right to exercise a power of sale was held, in *Morrisey* v. *Bright*,[311] to be an accrued right, and there was nothing in the amended scheme in sections 57, 58 and 58A of the Real Property Act 1900 (N.S.W.) to take that right away. In *Morrisey* the right to exercise the power of sale had come into existence before the amendments to the scheme of the Real Property Act, dealing with mortgagees' rights, operated.

7. *Stamp Duties*

By the Stamp Duties (Further Amendment) Act 1974 (N.S.W.), the Stamp Duties Act 1920 (N.S.W.) was amended rendering loan securities liable to *ad valorem* duty. Section 84B(2) provides that a collateral loan security would be liable to duty as if it were the primary loan security, unless the primary loan security is "duty stamped". If it is "duty stamped" then the exempting provision, section 84B(1) operates. The amendment provisions took effect from 1 January 1975.

In *Wilcox* v. *Commissioner of Stamp Duties*[312] an equitable mortgage had been executed in December 1974 as security for certain moneys and stamped with nominal fixed duty. Subsequently, in 1975, a legal mortgage was executed as collateral security for the same moneys. The Commissioner had assessed the collateral security to duty on the basis that the primary security (the equitable mortgage) had not been "duty stamped" within section 84B(2). That is, since a "mortgage" is exempt under the General Exemptions, the equitable mortgage had not been stamped in accordance with section 3(1) of the Act. It was ultimately held that the primary loan security was not exempt from duty under the Second Schedule, and thus had been "duty stamped" as required by section 84B(2); hence the exempting provision, section 84B(1), operated. This was because, as the Act stood before 1975, Meares J. was able to circumscribe the definition of "mortgage" (in section 83(1)) to that of a classical legal mortgage. The rigour of this definition was supported by the fact that the Act is a taxing Act and should be construed strictly, and also by the fact that "mortgage" was given a wider definition in the 1974 amending legislation.[313]

In *Baystone Investments Pty Ltd* v. *Commissioner of Stamp Duties*,[314] it was contended by the Commissioner that for the purposes of a fixed loan, as defined by section 82A(1) of the Act, the amount actually lent is the sum actually received by the borrower. To the Court of Appeal, the provision defining "principal" as the amount "actually lent" necessarily meant "that constructive or fictitious lending should be excluded in the computation of what is lent".[315] Thus, in this case where the obligation to pay simple interest annually in advance arose at the very

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[311] [1978] 2 N.S.W.L.R. 1.
[312] [1978] 1 N.S.W.L.R. 341. Noted (1978) 52 *A.L.J.* 642.
[313] *Id.*, 350.
[314] [1978] 1 N.S.W.L.R. 441.
[315] *Id.*, 444.

instant the loan was made, the amount lent was not that actually received by the borrower, but that expressed in the agreement.

The Second Schedule, under the heading "Declaration of Trust" paragraph (2) provides that "[a]ny instrument declaring that any property vested *or to be vested* in the person executing the same is . . . held in trust for the . . . persons mentioned therein" shall be dutiable *ad valorem*. The italicised words were considered in *Nev Ham Nominees* v. *Commissioner of Stamp Duties*[316] where the contentious instrument (a deed of acknowledgement) recited a trustee's intention of purchasing some real estate that would, when title was obtained, be held by the trustee under the family property trust. The Commissioner contended *ad valorem* duty was payable on the whole purchase price of the land since "or to be vested" meant "intended to be vested" or "expected to be vested". At the time the deed of acknowledgement was executed contracts had not been exchanged; in this light Sheppard J. accepted the plaintiff's submission that "or to be vested" applies only to a situation where there is a legal obligation upon a third person to vest property in the trustee, or a legally enforceable right in the trustee to have property vested in him.[317] Contracts not having been exchanged, the provision abstracted above accordingly did not apply.

In *D.K.L.R. Holding* v. *Commissioner of Stamp Duties*[318] it was the clear intention of the parties that upon the execution of a transfer for nominal consideration of a parcel of land, the transferee should only receive the bare legal title, the beneficial interest to remain vested in the transferor. Although the primary issue between the parties was the value of what was transferred, some preliminary points need to be looked at. First, a declaration of trust executed by the transferee antecedently to the transfer was held not to be a conveyance as defined in section 65 since it did not operate to effect any change in the ownership of the property.[319] The property was not then vested in the transferee, nor was the transferee entitled to call for a transfer of the property. Accordingly, it was not liable to duty within paragraph (2) of that part of the Second Schedule dealing with declarations of trust and discussed in *Nev Ham Nominees Pty Ltd* v. *Commissioner of Stamp Duties*.[320] Dealing then with the transfer, the Commissioner successfully contended it was liable to *ad valorem* duty upon the full value of the property pursuant to section 66(3) of the Act. Sheppard J. held, and it is submitted correctly held, that there is not at all times a co-existence of two kinds of estate (the equitable and legal) in property: "Equity in fact calls into existence and protects equitable rights and interests in

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[316] [1978] 1 N.S.W.L.R. 259.
[317] *Id.*, 264.
[318] [1978] 1 N.S.W.L.R. 268.
[319] *Id.*, 280.
[320] Note 316 *supra*.

property only where their recognition has been found to be required in order to give effect to its doctrines".[321] The only way the transferee might hold the beneficial interest on trust for the transferor in the circumstances of this case, is if the transfer vested the entire "bundle of rights" constituting title to the property in the transferee.

8. *Torrens System*

An application to the Supreme Court for an order that a caveat be removed pursuant to section 97(2) of the Real Property Act 1900 (N.S.W.) was considered in *Kerabee Park Pty Ltd* v. *Daley*.[322] The plaintiff was the registered first mortgagee and the defendants were subsequent unregistered equitable mortgagees, who had lodged caveats in respect of their interests. The plaintiff sought removal of the caveats in the valid exercise of a power of sale. Both caveats were held to be bad in form on the basis of the decision in *Easton* v. *Ardizzone*,[323] because neither stated "the amount or nature of the charge for which security was claimed by the caveator".[324] The second caveat was held to be bad on the further ground that the instrument by which the mortgage was claimed to be created was not identified. It was also held that the provisions of section 72(2) of the Act are mandatory, and whilst non-compliance with this section would be sufficient for an order to remove a caveat, it would not be sufficient by itself to award costs in favour of the plaintiff.

9. *Vendor and Purchaser*

With reference to Clause 1 of the Law Society of New South Wales and Real Estate Institute of New South Wales approved standard form contract for the sale of land, it has been noted[325] that it would seem inconceivable that such a long-standing provision, declaring the obligations of a purchaser to pay the deposit, should be veiled in uncertainty. The matter has now been dealt with by the High Court in *Brien* v. *Dwyer*,[326] and thus authoritatively settled, but perhaps not with the degree of unanimity conveyancers would expect. Affirming the New South Wales Court of Appeal,[327] the requirement of Clause 1 that the deposit be paid by the purchaser "upon the signing" of the agreement was held to mean upon the signing of the form for transmission to the vendor,[328] or at least before exchange of contracts or the signing of one

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[321] *Per* Viscount Radcliffe in *Commissioner of Stamp Duties (Qld)* v. *Livingston* [1965] A.C. 694, 712. See generally R. Meagher, W. Gummow and J. Lehane, *Equity: Doctrines and Remedies* (1975) 89.

[322] [1978] 2 N.S.W.L.R. 222.

[323] [1978] 2 N.S.W.L.R. 233. (*Editor's Note*: Bowen C.J. in Eq. unreported, Supreme Court of N.S.W., 9 August 1974.)

[324] Note 322 *supra*, 232.

[325] Conveyancing Note (1977) 51 *A.L.J.* 840.

[326] (1978) 22 A.L.R. 485.

[327] [1976] 2 N.S.W.L.R. 420.

[328] Note 329 *supra*, 489 *per* Barwick C.J.

contract by both parties,[329] or alternatively, at the earliest practicable time after exchange of contracts.[330] It was held by the whole Court that the failure of the purchaser to pay a deposit in accordance with the provision would entitle the vendor to rescind (*in futuro*) without notice, and hence the payment of a deposit is not a condition precedent to the formation of the contract.

D.T.R. Nominees Pty Ltd v. *Mona Homes Pty Ltd*[331] was a case where the parties were regarded as having conducted themselves so as to abandon or abrogate the contract. In such a situation, where neither party intends the contract to be performed, the High Court held the deposit to be returnable.[332]

Clause 17(a) of the standard form contract provides that the purchaser is entitled to rescind (*ab initio*), if at the date of the contract the property sold is affected by "any provision of any planning scheme" in any manner other than disclosed in the Fourth Schedule. The disclosure of the effect of a planning scheme is accomplished by means of a certificate under section 342AS of the Local Government Act 1919 (N.S.W.). In *Beverly Manufacturing Co. Pty Ltd* v. *ANS Nominees Pty Ltd*[333] the High Court held (Barwick C.J., Stephen and Jacobs JJ.; Gibbs and Aickin JJ. dissenting) it was a sufficient disclosure to nominate the zoning of the land under an identified planning scheme. Thus, a failure to disclose any special provision under the planning scheme applying to the land sold does not entitle the purchaser to rescind under Clause 17: "To know the zone and the identity of the planning scheme is to be in a position to be fully informed of the consequences of that zoning".[334]

In the absence of contrary provisions in the contract, it was held in *Francombe* v. *Foster Investments Pty Ltd*[335] that the obligations of each party upon completion "are dependent and concurrent, that is, a party failing on his part to perform is not in breach unless the other party has tendered performance of his obligations . . .".[336] In *Francombe* the failure of the purchaser to tender the balance of the purchase money upon completion meant the vendor was not in breach of his assumed obligation to tender, at the same time, a title free of a charge for land tax. The vendor's failure to do so in such circumstances was thus not a ground the purchaser could rely upon to terminate the contract.

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[329] *Id.*, 496 *per* Gibbs J.; *id.*, 507 *per* Aickin J.

[330] *Id.*, 503 *per* Jacobs J. (Stephen J. concurring).

[331] (1978) 19 A.L.R. 223.

[332] Following the decision of Isaacs J. in *Summers* v. *The Commonwealth* (1918) 25 C.L.R. 144.

[333] (1978) 22 A.L.R. 237.

[334] *Id.*, 242 *per* Barwick C.J.

[335] [1978] 2 N.S.W.L.R. 41.

[336] *Id.*, 48.

X TAXATION

The most pronounced change in the sphere of taxation during 1978 was the reaction of the legislature against tax avoidance schemes which had been operating successfully as a result of technical loopholes in the Income Tax Assessment Act 1936 (Cth) (hereinafter, "the Act"). The areas most affected by these changes were trusts and "schemes" involving artificial inter-company transactions such as the Curran Scheme. Apart from these legislative changes (considered in a number of recent New South Wales decisions, and appeals therefrom) there were important relevant decisions affecting the law relating to residence and source, alienation of income, allowable deductions, prior year losses, trading stock valuation and determination, and the judiciary's interpretation of section 260 of the Act.

1. *Income*

Courts have tended to look toward the substance and reality of any particular transaction rather than being constrained by the taxpayer's arrangements which make up that transaction. In *Thiess Toyota Pty Ltd* v. *Comm. of Taxation*[337] the taxpayer company imported commercial vehicles from Japan, payment for the vehicles being made to a London branch (from which the finance was arranged). As a result of a sterling devaluation, the Australian taxpayer had to spend fewer Australian dollars to discharge its liabilities. It was held that the Commissioner's inclusion of the exchange gain in the taxpayer's assessable income was proper. Meares J., in the Administrative Law Division of the Supreme Court, found it tenuous to treat the acquisition of the vehicles and the taxpayer's dealings with the Bank as involving two separate and discrete transactions. The arrangements with the Bank could not be separated from the purchase of the vehicles and therefore, the exchange gains were correctly treated by the Commissioner as income rather than capital.

2. *Deductions*

In *Total Holdings (Aust.) Pty Ltd* v. *F.C. of T.*[338] Meares J. held that in deciding whether a particular loss is incurred in gaining assessable income, the determining factor is the essential character of the expenditure itself, and not the taxpayer's motive behind, or purpose for, making that expenditure. In that case the taxpayer company received loans from its holding company—the loans bearing an interest rate of three per cent per annum. The taxpayer company used some of those loans to make further loans to another company in the group. However, these loans were interest-free. The taxpayer company sought to claim deductions for losses made as a result of its interest-free loans.

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[337] [1978] 1 N.S.W.L.R. 723.
[338] (1978) 20 A.L.R. 152.

On appeal, it was held that such losses were deductible. They were incurred as a result of funding a trading subsidiary and came within the second limb of section 51(1). Just as losses resulting from borrowing money to inject capital into a subsidiary are deductible, so too are losses incurred in advancing subsidiaries by way of loans made from borrowed monies. The motive behind making such interest-free loans is irrelevant in determining the taxpayer's entitlement to a deduction under section 51(1).

The interpretation of section 51(1) was further influenced by the High Court decision in *F.C. of T.* v. *South Australian Battery Makers Pty Ltd*,[339] determining the applicability of the section involved looking at the nature of the advantage sought by the taxpayer in making the payments. Associated Battery Makers of Australia Pty Ltd assigned its interest in a lease to one of its subsidiaries. However, that lease also contained an option to purchase. The option was granted to another related company. The Commissioner only allowed deductions of the lease payments to the extent that they represented the right to possession under the lease. The remainder, in his opinion, was not deductible because it represented amortisation of the price of the land and buildings; such being equivalent to the diminution in the cost of the option if it were exercised. Both the majority and the minority judgments, when the case came on appeal to the High Court from the New South Wales Supreme Court, focused upon the nature of the advantage sought by the taxpayer. Gibbs A-C.J., Stephen and Aickin JJ. held that the advantage sought by the payments was the right to occupation of the premises and therefore, the payments were of a revenue nature. Murphy J. did not feel constrained by the separate legal entity of each company and looked to the interrelationships of the group as a whole. He was of the opinion that the granting of the option to one subsidiary and the assigning of the interest in the lease to another should not operate so as to enable the taxpayer to escape liability. Therefore, he treated the situation as if both the lease and the option to purchase were granted to the one company, thereby agreeing with the Commissioner that part of the outgoings of the taxpayer were of a capital nature. (It is suggested that such reasoning should probably more correctly be confined to assessing the possible application of section 260 of the Act.) Jacobs J. dissented on the grounds that the taxpayer had failed to discharge his onus of proof under section 190(b) and that, in any case, there was strong evidence to support the contention that the taxpayer was seeking an advantage accruing after expiry of the lease. Assuming that the majority view will be favoured in future decisions, it would appear that where a benefit of a capital nature is given by the taxpayer to another related company this will not detract from the ability of the taxpayer to obtain a full deduction, as long as the outgoing

[339] (1978) 21 A.L.R. 59.

could be considered to be solely of a revenue nature when looking from the taxpayer's point of view.

Where there are such schemes involving benefits to different but interrelated parties, it is of vital importance that the expenditure made is of a commercially realistic nature. This was emphasised by the Federal Court of Australia in *F.C. of T.* v. *Phillips*,[340] which was heard on appeal from the Administrative Law Division of the Supreme Court. Not only might lack of commercial realism deny the taxpayer the right to a deduction, but it may invoke the operation of section 260. In *Phillips* a trust was set up to supply a firm of accountants with certain non-professional services in return for remuneration at commercially realistic rates. The unit entitlements in the trust were taken up by wives of the partners along with family trusts and companies of the partners. The Commissioner refused to allow deductions for the payment of these services by the partnership.

The judgment of the Federal Court was heavily influenced by the fact that the rates charged by the service trust were of a commercially realistic nature. This led them to the conclusion that the expenditure was "necessarily incurred" by the partnership in carrying on its business. If the partnership had in fact paid rates out of proportion to the benefit the business received the Court would not have hesitated in finding otherwise. Fisher J. stated that if the expenditure was grossly excessive, it would raise the presumption that it was not entirely for the services provided, but was for some purpose other than for "gaining or producing assessable income". Such a presumption would be difficult to rebut.

3. *Trading Stock*

The width of the definition of "trading stock" was considered in *F.C. of T.* v. *St. Hubert's Island Pty Ltd.*[341] Such a determination was necessary in order to assess the possible applicability of section 36 of the Act. The issue in question was whether land could be classified as "trading stock". The taxpayer company went into voluntary liquidation and the liquidator transferred the title in land owned by that company to the beneficial holder of its issued capital. The Commissioner treated this transfer as a disposal of its trading stock within section 36(1) and thereby included the amount representing the value of the land transferred in the taxpayer's assessable income. By a majority of the High Court the Commissioner was held to have properly assessed the taxpayer. Mason J. stated that "[j]ust as raw materials and partly manufactured goods form part of the trading stock of a manufacturer, so also virgin land which has been acquired by a land developer for the purpose of improvement, subdivision and sale in the form of allotments

[340] (1978) 20 A.L.R. 607.
[341] (1978) 19 A.L.R. 1.

will form part of his trading stock".[342] He held that the definition of "trading stock" in section 6(1) does not exclude such an assertion and that the three conditions of section 36(1) were fulfilled. The fact that the land was unsold at the relevant time did not alter the character of the land held or the character of the business. This decision not only recognises that land can be "trading stock" but acknowledges that section 36(1) is wide enough to cover the situations where land is transferred by a liquidator on behalf of the company in the course of voluntary winding up, even where such a distribution may also be regarded as a dividend within the definition of section 6(1). It is also important to observe the possible application of section 26(1) in such circumstances. In fact, Aickin J. in dissent, found that this part of the taxpayer's activity was a profit-making scheme within the second limb of section 26(a) and therefore that section 36(1) was not applicable. However, the decision of the majority does extend the definition of "trading stock" wider than the Act might have otherwise suggested. Even property on which it is intended that further work be done before sale was held to come within the ambit of the "trading stock" definition.

4. *Alienation of Income*

The Federal Court of Australia held in *F.C. of T.* v. *Everett*[343] that a partner may effectively alienate a portion of his partnership interest. The solicitor taxpayer assigned by deed a six-thirteenth share of his partnership interest to his wife together with the right to receive an appropriate share of the profits of the partnership. The assignment was made in return for consideration of some $4,000. It had already been held[344] that a partner may effect an equitable assignment of his share for value either in whole or in part. However, the deed in the present case did not make the taxpayer's wife a partner as such. She could interfere with the management or administration of the business or require an account of the partnership transactions. As a result of this, the taxpayer became in effect a trustee of his wife's interest. The majority here held that at no time did the beneficial interest in the six-thirteenth share of profits vest in the taxpayer, and that as soon as it was ascertainable it vested in his wife. In addition, it was held that the wife's share of income was a share of the net income of a trust estate and therefore Division 6 should apply to tax the beneficiary and not the trustee. This case would seem to stand for the proposition that there may be an effective alienation where the income produced flows from personal exertion as well as from personal capital assets. It was admitted that it is difficult to draw the line between the situation where the income flows solely from personal exertion and where it flows solely

[342] *Id.*, 14.
[343] (1978) 21 A.L.R. 625.
[344] *Norman* v. *Federal Commissioner of Taxation* (1963) 109 C.L.R. 9.

from income-producing assets. Where the income does flow from personal exertion there is the danger that section 19 may deem the income to be derived by the taxpayer. However, the dicta of Bowen C.J. suggested that even income purely from personal exertion may be effectively alienated where the taxpayer "has executed an assignment of income in advance for valuable consideration and either the character of the income is such that it is capable of immediate assignment or its character is such that the assignee becomes the immediate beneficial owner of it the instant it is ascertainable".[345] Even the dissenting judgment of Deane J. acknowledged that in some circumstances it may be possible to effectively alienate the whole or part of what are actually earnings from personal activities.

5. *Residence and Source*

The meaning of "permanent place of abode" under the definition of a "resident" was discussed by the Supreme Court (Sheppard J.) in *Applegate* v. *F.C. of T.*[346] In that case the taxpayer was given the task of establishing a branch of his employer's firm in the New Hebrides. After some 18 months he returned to Sydney because of his ill-health. The Commissioner assessed his income earned in Vila because he was of the view that section 23(r) of the Act did not apply to exempt him. The Commissioner agreed that the income was derived from sources wholly outside Australia but was of the opinion that he could not be regarded as a "non-resident" during his stay in Vila. The relevant issue then was whether the taxpayer had established a "permanent place of abode" outside Australia within the meaning of the section 6(1) definition of "resident". Sheppard J. held that the question is one of fact and degree. He accepted the appellant's submission that the term "permanent" is used in the sense of something which is to be contrasted with that which is "temporary or transitory" and that it should not be contrived to mean "everlasting". The facts in the present case led Sheppard J. to the conclusion that the Commissioner ought to have been satisfied that during the relevant period the taxpayer did have a "permanent place of abode" outside Australia. Even though the taxpayer had intended to return to Sydney after an indefinite time, he had anticipated that his stay in Vila would be of substantial length. The fact that his wife returned to Australia for the birth of their child; that they had holidays in Sydney; that he was treated in Sydney for his illness; and that he had continued to pay premium on his life policy were factors considered by Sheppard J. as having no significance. That his wife was receiving child endowment and that he maintained membership of his medical fund were considered to be relevant but did not carry enough weight to influence the conclusion at which his Honour

[345] Note 343 *supra*, 631-632.
[346] 78 A.T.C. 4054.

arrived. The determination of the issue as to whether a "permanent place of abode" outside Australia has been established is then an objective one which is influenced to some extent by the intention of the taxpayer as to his length of stay. The case is important because it emphasises the distinction between "domicile" and "permanent place of abode"—a distinction which was not recognised by the Board of Review.

6. *"Schemes"*

Since the decision in *Curran* v. *F.C. of T.*[347] many taxpayers have sought the tax advantages offered by partaking in artificial schemes similar to the "Curran Scheme". However, 1978 saw the Legislature's reaction against such schemes; this reaction was in terms of retrospective legislation.

The Federal Government, by Act No. 57 of 1978, attempted to overcome the effective use of such schemes by inserting in the Act section 6BA. That new section provides that non-assessable bonus shares have no cost to the recipient and that the cost of the original shares is to be spread over the original and bonus shares in order to determine the cost price of those shares. This amendment obviously covers a very narrow range of situations and it did not take long for new modified Curran Schemes to emerge and operate effectively. As a consequence, new legislation is proposed and can be found under clause 3 of the Income Tax Assessment Amendment Bill (No. 4) 1979. However, it seems apparent that there are presently operating schemes which will not be caught even by the proposed amendments.

Popular schemes which arose as a result of the Curran legislation include prepaid interest and prepaid rent schemes. The Treasurer, Mr John Howard, has said that he will be pressing amending legislation to counter such schemes in the near future.

An interesting scheme attempting to distribute tax free bonus shares was considered by the Full High Court in *F.C. of T.* v. *Lutovi Investments Pty Ltd.*[348] The decision centred on the issue of whether the bonus shares were "redeemable" within the meaning of section 44(2D)(b) and were therefore, assessable under section 44(1) of the Act. The scheme involved three elements: first, the consolidation of 10 cent shares into 50 cent shares; secondly, the return of 49 cents for every 50 cent share held to the shareholders, by way of a court approved reduction of capital; and finally, the making of a bonus issue to increase the par value of the shares back to 50 cents. The Commissioner was of the opinion that the bonus shares were "redeemable" within the meaning of section 44(2D)(b) because (in the words of the section) they were issued "in pursuance of, an . . . arrangement . . . that had

[347] 74 A.T.C. 4296.
[348] (1978) 22 A.L.R. 519.

the purpose . . of enabling the company, by means of a . . . reduction in the paid-up value, of that share" to pay money to the person [to whom the shares were issued]. The High Court decided the appeal in the Commissioner's favour by holding that the bonus shares were redeemable within the meaning of section 44(2D)(b). The majority found that for there to be such an "arrangement" it need not be shown that the parties were bound to support it—it is only necessary that the parties had adopted it. Such an arrangement need not be formal and the parties may be free to decide not to continue with it. In addition, they held that the word "enable" need only mean "make able or possible" and in this case the arrangement did make possible the payment to the shareholders of the 49 cents per share. Stephen and Aickin JJ., dissenting, were of the opinion that for section 44(2D)(b) to apply there must be an element of obligation to comply with the arrangement. In addition, they held that the nature of the payments reducing the capital in this case escaped the wording of the section. It is interesting to note that the majority decision of the High Court in this case conformed with the increasing trend of the legislature to attack artificial schemes for tax avoidance—a trend which generally has not been followed by the High Court in recent years.

7. *Trusts and Taxation*

Two important 1978 legislative amendments in the areas of trusts and taxation will effect cases arising in New South Wales and appeals therefrom, as well as decisions in other jurisdictions.

The first amendment was made to ensure that resident beneficiaries are taxed on foreign source income as it is derived, rather than when it is actually received. In order to effect the change, the relevant legislation has been amended so as to treat the trustee as a resident taxpayer. This will mean that foreign source trust income will be included in the assessable income of the beneficiary from the time at which the beneficiary becomes "presently entitled" to it.

Another important legislative amendment is that aimed at countering trust-stripping schemes. Those schemes operate by choosing a beneficiary to be presently entitled to some of the income, such beneficiary having an exempt tax status or being another trust having sufficient deductible losses to absorb the income. In turn, the beneficiary will ensure that the intended beneficiary will enjoy the benefit of the income in a tax-free form; for example, by settling the income as a capital sum in another trust for the benefit of that person. Section 100A has now been inserted into the Act so as to make such arrangements ineffective. The section aims at treating the income so dealt with as if it had never been made "presently entitled" to any beneficiary; thereby attracting a very high tax rate under section 99A. This section affects income applied after 11 June 1978.

8. *Prior Year Losses*

Section 80B(5) gives the Commissioner power to disregard the beneficial ownership of shares in a company in certain circumstances, thereby disqualifying the taxpayer of the right to a deduction in respect of prior year losses. In *F.C. of T.* v. *Students World (Australia) Pty Ltd*[349] the issue arose before the High Court as to whether section 80B(5) was applicable. In that case the taxpayer acquired a 60 per cent interest in a company which had accumulated losses. The remaining 40 per cent was held by one of the original shareholders. She and her husband together originally owned all the shares in the company and had authorised a trustee under a scheme of arrangement to arrange the sale of up to 60 per cent of their shares. The Commissioner rejected the taxpayer's claim for deductions of its past losses. The High Court rejected the contention that section 80B(5) should operate to deny the deduction. The majority held that the continuing shareholder should be regarded as the beneficial owner of her shares. Even though the arrangement was able to affect the beneficial interest in her shares at that time, it was not enough to bring it within section 80B(5) because the arrangement was incapable of affecting shares that continued to be held by the original shareholder. Aickin J. agreed with the trial judge who said that "there was no provision [in the arrangement] once the 'forty-sixty ratio' had been set up by the scheme trustee, that . . . [the original shareholder] would or would not exercise any rights in relation to her retained shareholding".[350] He was of the opinion that, even if the arrangement did fall within paragraph (b) of the section, it was not entered into for the purpose (under paragraph (c)) of enabling the company to take advantage of the prior year losses. It is important to note that the necessary "purpose" under paragraph (c) was considered by the Court to refer to a subjective purpose, rather than an objective effect.

9. *Section 260*

The fact that section 260 of the Act is an annihilating provision, and does not have any constructive effect was emphasised in the Supreme Court decision of *Kareena Hospital Pty Ltd* v. *F.C. of T.*[351] The decision is also noteworthy because it gave an unusual interpretation to the words "contract, agreement, or arrangement". The taxpayer company was a hospital carrying on a very profitable business. For the purpose of avoiding tax, the hospital was taken over by a loss company which was able to off-set the profit from its substantial losses. The arrangement was effected by the payment of an annual rental together with a premium equal to the amount of the accumulated losses (such being the con-

[349] 78 A.T.C. 4040.
[350] Mahoney J.A. cited at *id.*, 4053.
[351] (1978) 21 A.L.R. 489.

sideration for the grant of the lease). The advantages accruing to the taxpayer from such an arrangement were that the premium received was of a capital nature (and therefore, non-assessable) and the profits made by the business could be off-set against the accumulated losses of the company. Soon after the losses were off-set the business reverted to the taxpayer company. Sheppard J. found that there was an arrangement which fell within section 260. However, he also found that the transactions enabling the loss company to carry on the business could not be regarded as shams. Therefore, if the arrangement was avoided under section 260 the taxpayer company could still escape assessment because the premium received by it on the lease was a capital sum. The case demonstrates the fact that while section 260 is an annihilating provision it can sometimes operate in the taxpayer's favour. However, in finding that section 260 applied in such a situation, Sheppard J. had to distinguish an earlier decision.[352] To do so, he drew a distinction between "transaction" cases and "arrangement" cases. In his opinion a "contract or agreement" can be referred to as a "transaction", and that if a taxpayer entered into a "transaction" designed to bring himself within a provision of the Act, thereby enabling him to avoid tax, section 260 could not operate.[353] If, however, this was done by means of "arrangement", section 260 may be applicable in some cases. In arriving at this conclusion, Sheppard J. appears to have taken the comments of Barwick C.J. in an earlier case[354] too literally. It is suggested that Barwick C.J. really appears to have used the word "transaction" to cover the expression "contract, agreement or arrangement", and not in the narrower sense suggested by Sheppard J. This case is now on appeal to the Federal Court. It will be interesting to see whether or not they are in agreement with the views expressed by Sheppard J.

XI CONCLUSION

In all the fields of law considered here, legislative and judicial developments in 1978, emanating from New South Wales within the terms of this Survey, have been numerous and varied. They range from decisions which free the High Court from its bond with the Privy Council and the decisions of that Court, and effect the position of state courts with respect to the Privy Council, through to decisions which traverse more established principles and sections of legislation and in some instances offer a new emphasis on those matters. As has been noted at appropriate places in the Survey, these developments have not always occurred without difficulty, and in some areas elements of uncertainty remain to be determined in 1979 and later years.

It has also been observed that some developments have led to

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[352] *Mullens* v. *F.C. of T.* (1976) 135 C.L.R. 290.
[353] Such was the finding in *Mullens, ibid.*
[354] *Ibid.*

organisational changes, within the legal system, that relate to a particular field of law. However, it has also been noted, for example in the field of family law, that such changes should not be made to the detriment of the goal of the development. Despite these words of caution, it is impossible to deny that 1978 was an active and significant year for New South Wales in many fields of the law.