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EXPECTATIONS IN THE FORMATION OF A CONTRACT

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It is not possible to proceed far in the Law of Contract without being confronted with propositions based upon or derived from the intentions of one or other, or even of both, of the parties. To take some examples:

1. In order to be binding as a contract, an agreement requires an intention to create legal relations.
2. The test of whether a statement is an offer or an invitation to treat is one of intention: did the person making the statement intend that it should be converted into a contract by an act of acceptance?
3. Whether a statement made by a party to a contract constitutes a term in that contract depends upon whether that party intended it to be.
4. In a situation where the terms of the contract appear to be ambiguous, the court should interpret them in order to give effect to the intentions of the parties.

It will not be controverted that, as soon as the attempt is made to analyse such statements, it will be apparent that, to a greater or lesser extent, their application depends upon a fictional rather than an actual intention. In situations 1 and 2 the courts will be greatly influenced by a number of suppositions which will often have little to do with any actual intention (or at least not an intention that is shared or of which the other party is aware). For instance, in a commercial transaction the courts will act on the basis that, however unclear the terms in which the intention is expressed, the parties did intend to create legally enforceable obligations. In the domestic situation, on the other hand, a degree of certainty will be necessary to persuade the court that such an intention was present.

Similarly, when dealing with the distinction between offers and invitations to treat, the legal profession has for long accepted certain

axioms with little regard for their lack of logical justification. It may be reasonable to start from an assumption that advertisements in circulars do not constitute offers capable of being accepted by "all the world" (otherwise the merchant would be open to demands far exceeding the supply of goods available to him), but the same factor can hardly be relevant to sales of goods in shop windows or on supermarket shelves. Nevertheless the dogma that such displays amount only to invitations to treat is based upon an intention attributed to the trader, and which, presumably, is supposed to be apparent to, or perhaps even shared by, the would-be customer.

When it comes to cases in category 3, the courts are less coy about admitting that their reliance upon intention is based upon appearances rather than reality. As Gillard J said in Blakney v J J Savage & Sons Pty Ltd [1973] VR 385 at 391, citing Denning LJ's judgment in Oscar Chess Ltd v Williams [1957] 1 All ER 325 at 328:

> "To find a warranty exists, the court must be satisfied on the whole of the evidence that the parties intended that any statement made should constitute the giving of a warranty to impose contractual responsibility on the person making the statement. Since such intentions must be determined objectively, ... the court is not bound to discover what was actually in the mind of either party when the statement was made."

In situation 4 a court will, domestic situations apart, usually make the underlying assumption that the parties intended legal relations, so that it is prepared to go to considerable lengths to ascertain the contractual intent of the parties. As Lord Wright said in Scammell v Ouston [1941] AC 251 at 268:

> "The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at

> the substance and not mere form. It will not be deterred by mere difficulties of interpretation."

The objective test of intention requires the situation to be judged by the words and conduct of the parties, an approach that is but another manifestation of that most self-righteous of beings, the reasonable man. In ascertaining the parties' intention recourse may be had to various tools. Was there an offer and how was it accepted? In answering these questions a variety of assumptions are made about what the law should require and how individuals should conduct themselves in relation to its rules. In writing on the jurisprudential foundation of the law Salmond wrote that the law was the law because it was the law and for no other reaon known to the law. In relation to the law of contract one is tempted to say that it is the law because lawyers, and more particularly judges, believe it is the law and because it conforms to a certain view of society and the way in which individuals operate within it.

Without wishing to belabour an obvious point, certain periods have seen the emergence to an influential position of particular interest groups. In the nineteenth century successive Factors Acts in England were the attempt of the commercial community to protect transactions at the expense of property. The need for the later of those Acts was in part brought about by the attitude of the judiciary who sought to protect property by interpreting such legislation restrictively. Indeed the courts continue to show considerable hesitation in applying the concept of ostensible ownership or authority to protect an innocent party to a transaction at the expense of the rights of the original owner: see Moorgate Mercantile Co Ltd v Twitchings [1977] AC 890.

Nevertheless, in the present century it is probably true to say that the courts have made a more conscious effort to satisfy some of the demands of the mercantile community. As far as the position in England is concerned, 1932 probably marks something of a dividing line. The previous year W N Hillas

and Co Ltd v Arcos Ltd had been heard in the Court of Appeal (36 Com Cas 353). Having found himself in a minority in May and Butcher Ltd v The King (the Court of Appeal judgments were not reported; the House of Lords decision (1929) appeared later in [1934] 2 KB 17n), Scrutton LJ expressed his continuing disapproval of that decision (36 Com Cas 367-8):

> "I am afraid I remain quite impenitent. I think I was right and that nine out of ten business men would agree with me. But of course I recognize that I am bound as a Judge to follow the principles laid down by the House of Lords. But I regret that in many commercial matters the English law and the practice of commercial men are getting wider apart, with the result that commercial business is leaving the Courts and being decided by commercial arbitrators with infrequent reference to the Courts."

Perhaps because of this warning, Lord Tomlin (with whom Lords Warrington and Macmillan concurred (1932) 38 Com Cas 23 at 33) made his famous statement (at 29) that "the problem for a court of construction must always be so to balance matters, that without violation of essential principle the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains"; as for May and Butcher Ltd v The King, that case did not "afford any assistance in determining the present case" (at 32). Or as Lord Wright put it (at 36-7):

> "The document ... cannot be regarded as other than artistic, and may appear repellant to the trained sense of an equity draftsman. But it is clear that the parties both intended to make a contract and thought they had done so. Business men often record the most important agreements in crude and summary fashion: modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects".

While this was a change of attitude and a welcome one at that, it was nevertheless a patronising attempt to bridge some of the gulf between the legal world and the world of commerce.

It is in many ways an uneasy relationship as will be demonstrated shortly, but before pursuing that issue, it is worth returning to the question of the influence of Parliament, or more accurately those interests which have exercised influence over the legislature. Whatever may have been the conflict between the courts and Parliament over the protection of property or of transactions, the law (or at least the lawyers who created it) made common cause with the commercial community over relations between merchants and their customers. The doctrine of caveat emptor was a long time dying and, in the more specific matter of the negotiation of contracts, vestiges of the doctrine still survive.

The question of who is the offeror in relation to goods advertised for sale in a shop provides a fascinating illustration of the way the legal mind operates in a manner which the layman often finds totally unreal. For example, the origin of the rule that goods marked with a price-tag do not constitute an offer seems to have been the exchange between counsel for the plaintiff and the trial judge, Baron Parke, in Timothy v Simpson (1834) 6 Car & P 499. The plaintiff and his clerk saw some items of linen in the defendant's shop window, including a dress priced at 5s 11d. The plaintiff sent his clerk into the shop to purchase the item. The clerk asked for the dress and gave the shop assistant a sovereign, out of which to take the 5s 11d. However, the assistant said that the dress was 7s 6d. The plaintiff then entered the shop and said that raising the price was an imposition. One of the assistants said "I suppose we must let him have it," but another said, "Don't let him have it; he is only a Jew; turn him out." In the struggle that followed to evict the plaintiff several blows were struck, a policeman was

called and the plaintiff was taken into custody. This was an action for assault and false imprisonment, but, in the course of his address to the court on the plaintiff's behalf, counsel said (at 500): "If a man advertises goods at a certain price, I have a right to go into his shop and demand the article at the price marked", to which Parke B replied: "No; if you do, he has a right to turn you out. The plaintiff was a trespasser in continuing in the house."

This "leading" authority was cited by Pollock, Principles of Contract 12th ed (1946), p 14, fn 14, and by Cheshire and Fifoot, Law of Contract 3rd ed (1952), pp 26-7, the former refraining from mentioning the then recent case of Wiles v Maddison [1943] 1 All ER 315, the latter relegating it to a brief footnote reference. Chitty Law of Contracts 20th ed (1947), p 19, needed no direct authority other than Grainger v Gough [1896] AC 325, a case dealing with liability to taxation and only incidentally raising a question concerned with price lists sent out by a wine merchant, for the statement: "A price list is in fact merely an invitation to do business, like the price tickets exhibited on goods displayed in shop windows." A similar statement appeared in Sutton and Shannon On Contracts 4th ed (1949), p 24.

In contrast, Wiles v Maddison was a prosecution for breach of a wartime regulation - the Meat (Maximum Retail Prices) Order, 1940, art. 4 - that no person "shall sell or offer or expose for sale ... any meat at a price exceeding the price applicable under this Order". The appellant had cut, wrapped and put an invoice on a number of pieces of meat to be delivered the next day to various customers. An inspector discovered that the price marked on each piece exceeded the maximum permitted under the Order. The Divisional Court held that the appellant could not be convicted of an offence because he had yet to offer a package to the customer concerned. However, in the course of giving judgment, Viscount Caldecote LCJ observed ([1943] 1 All ER at 317) that a person might "be convicted of making an offer of an article

of food at too high a price by putting it in his shop window to be sold at an excessive price", and Tucker J expressed his general agreement.

Although Wiles v Maddison was cited in Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd, its significance was totally ignored. The reason is not hard to understand. For the defendants to be convicted of an offence under s 18 of the Pharmacy and Poisons Act, 1933, it had to be shown that a sale of a proprietory medicine, which contained two substances included in a Poison List in the Act, had not been "effected by, or under the supervision of, a registered pharmacist" as required by the Act. The defendants' premises were laid-out as a self-service store and the duty pharmacist was positioned by the two cash desks. In order to argue that an offence had been committed, therefore, the prosecutor had to argue not only that the goods on display constituted an offer, but that an acceptance had taken place before the customer reached the cash desk. It was the absurdity of the latter proposition which greatly re-inforced the view of Lord Goddard CJ ([1952] 2 QB 795 at 802) and of the Court of Appeal ([1953] 1 QB 401 at 406, 408) that the display did not constitute an offer. In the opinion of the Chief Justice ([1952] 2 QB at 801), it was "a well-established principle that the mere exposure of goods for sale by a shop-keeper indicates to the public that he is willing to treat but does not amount to an offer to sell." This view of the law was endorsed by the Court of Appeal.

It has already been suggested that there was a dearth of authority on the point. Hence the fact that the principle was "well-established" appeared to depend more upon legal mythology. That its logic would not necessarily appeal to laymen was ignored, though Lord Parker CJ did at least acknowledge the discrepancy between the law and normal expectations in Fisher v Bell [1961] 1 QB 394. The defendant had been prosecuted under s 1 of the Restriction of Offensive Weapons Act, 1959 (UK), it being alleged that he had

offered for sale a "flick knife". A knife which satisfied the statutory description of such a weapon had been displayed by the defendant in his shop window alongside a notice: "Ejector knife - 4s". The Divisional Court held that no offence had been committed. In the words of Lord Parker CJ (at 399):

> "I confess that I think most lay people and, indeed, I myself when I first read the papers, would be inclined to the view that to say that if a knife was displayed in a window like that with a price attached to it was not offering it for sale was just nonsense. In ordinary language it is there inviting people to buy it, and it is for sale; but any statute must of course be looked at in the light of the general law of the country. Parliament in its wisdom in passing an Act must be taken to know the general law. It is perfectly clear that according to the ordinary law of contract the display of an article with a price on it in a shop window is merely an invitation to treat."

Two points need to be made about this line of authority. First, it was an extremely tenuous one until Lord Goddard CJ accepted the principle as already "well-established". On the facts of the Boots case the same conclusion could have been reached in the defendants' favour even if the display had been regarded as an offer. The placing of the goods into the basket she was carrying by the customer could hardly constitute an act of acceptance because an acceptance normally has to be communicated. The appropriate person to receive notice of acceptance on behalf of the defendants was the person on the cash desk. It was open to the registered pharmacist to intervene, if necessary, to revoke the offer before the moment the customer presented the goods for payment. Certainly there would be no doubt that conclusion of the contract would be under the pharmacist's supervision.

Secondly, it is not an adequate answer that this particular rule is the law because lawyers think that it is if the law is out of harmony with

normal expectations. The normal reaction of a person who, seeing goods displayed at a particular price in a shop window, enters the shop to buy them at the price given, but is then told that the price is now so much higher, is that he has been cheated. That this reaction is not at all unreasonable and that society has an interest in traders abiding by their apparent promises are demonstrated by legislative intervention on behalf of the would-be customer. In Britain the position is governed by s 11 of the Trade Descriptions Act 1968. In Australia, s 53 of the Trade Practices Act provides:

> "A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services -
>
> (e) make a false or misleading statement with respect to the price of goods or services;"

and s 56(2) provides:

> "A corporation that has, in trade or commerce, advertised goods or services for supply at a special price shall offer such goods or services for supply at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the corporation carries on business and the nature of the advertisement."

Expectations rather than intentions

It is perhaps time that some comment was made about the use of "expectations" in the title of this paper. It has already been suggested that "intention" is often a legal fiction which in certain situations can lead to a totally unsatisfactory view of the law. In relation to the distinction just considered between an offer and an invitation to treat, the distinction is said to be based upon the intention of the person issuing the offer/invitation: is it intended that it should be converted into a contract by a simple act of acceptance? Such a test is, however, unreal. If one asks oneself what are the expectations of the parties, the majority of customers would believe that they were entitled to buy goods at the advertised or marked price. In the case of the shop-keeper (in the days before legislative interference) he might well have been aware of his probable contractual position of being able to refuse to supply the displayed goods, but he would also have expected a fairly hostile reaction from a good many of his customers. Why should the courts not recognise the

expectations of the community in an appropriate rule of contract law that displayed goods with prices marked can constitute offers which a customer can accept?

The reference in particular decisions to the "intentions of the parties" is sometimes a useful tool. However, followed slavishly it can lead to absurdity. A genuine attempt to understand the expectations of the parties would not suffer from the same inflexibility. In Esso Petroleum Ltd v Commissioners of Customs and Excise [1976] 1 All ER 117, the House of Lords was called upon to consider the legal nature of a series of transactions whereby motorists purchasing petrol from theappellants' garages received coins bearing the features of a member of the English squad of players being sent to the world soccer cup finals in Mexico in 1970. A variety of advertisements appeared in the Press and on television: "Going free at your Esso Action Station now"; "We are giving you a coin with every four gallons of Esso petrol you buy"; and large posters containing similar wording were displayed at some 4900 petrol stations. The respondents claimed that purchase tax was payable on the transactions in respect of the coins on the ground that they had been "produced in quantity for general sale" under the Purchase Tax Act 1963 (UK). A majority of their Lordships held that, even if the transactions constituted binding contracts, they were not sales because the consideration for each transfer of a coin was not the payment of a price, but the entering into by a customer of a collateral contract to purchase a quantity of Esso petrol. However, there was a sharp divergence of opinion on the question of whether there was a contract (ie a legally binding agreement) to acquire the coins. Viscount Dilhorne and Lord Russell agreed with the Court of Appeal that there had been no intention to create legal relations. In the words of the former (at 120):

> "True it is that Esso are engaged in business. True it is that they hope to promote the sale of their petrol, but it does not

> seem to me necessarily to follow or to be inferred that there was any intention on their part that their dealers should enter into legally binding contracts with regard to the coins; or any intention on the part of the dealers to enter into any such contract or any intention on the part of the purchaser of four gallons of petrol to do so."

The fact that the coins were of negligible intrinsic value was obviously influential in the minds of those who could not imagine legal proceedings being brought if a garage failed to make a "gift" of a coin as promised.

To a majority of the House of Lords, however, there was a contractual obligation created by the arrangement. This view is well expressed in the judgment of Lord Simon (at 121):

> "I am, however, ... not prepared to accept that the promotion material put out by Esso was not envisaged by them as creating legal relations between the garage proprietors who adopted it and the motorists who yielded to its blandishments. In the first place, Esso and the garage proprietors put the material out for their commercial advantage, and designed it to attract the custom of motorists. The whole transaction took place in a setting of business relations. In the second place, it seems to me in general undesirable to allow a commercial promoter to claim that what he has done is a mere puff, not intended to create legal relations. The coins may have been themselves of little intrinsic value; but all the evidence suggests that Esso contemplated that they would be attractive to motorists and that there would be a large commercial advantage to themselves from the scheme, an advantage in which the garage proprietors also would share. Thirdly, I think that authority supports the view that legal relations were envisaged."

Then, having cited with approval Rose and Frank Co v J R Crompton & Bros Ltd [1923] 2 KB 261 at 288, 293, and Edwards v Skyways Ltd [1964] 1 All ER 494 at 500, his Lordship continued (at 122):

> "I would venture to add that it begs the question to assert that no motorist who bought petrol in consequence of seeing the promotion material prominently displayed in the garage

> forecourt would be likely to bring an action in the county court if he were refused a coin. He might be a suburb Hampden who was not prepared to forego what he conceived to be his rights or to allow a tradesman to go back on his word."

The difficulty with either view is that it ascribes a specific intention to both sides of an enormous number of contracts entered into in quite different circumstances. Lord Denning MR's judgment in the Court of Appeal at least had the merit of recognising that different situations might have arisen. He said ([1975] 1 WLR 406 at 408-9):

> "If it be thought necessary to go through a legal analysis I should have thought it was this: when a motorist drives up to a garage, he is met with an invitation to treat. The garage stands there open for business with its pumps ready and all these notices or posters stuck about the forecourt. Many a motorist does not read them. He drives up to a pump and asks the attendant for four gallons of petrol. That is an offer to buy four gallons of petrol at the stated price. The attendant works the pump and delivers four gallons. That is an acceptance of the offer. The contract is complete. The motorist is bound to pay the price of the petrol and does so. The motorist does not ask for one of the World Cup coins. He knows nothing of them. But the attendant hands him one. That is a pure gift unalloyed by any taint of sale.
>
> Next take the motorist who has seen the poster and read all about the coins beforehand. His children have pressed him to stop at the garage and buy petrol there. The posters then were clearly an inducement which led him to buy petrol. In law it was a representation inducing the contract of purchase. But it was no part of the contract itself. It was a representation inducing it. The petrol was the same price in any case with or without inducement. The representation was not a representation of existing fact so as to come within the Misrepresentation Act 1967. It was a representation as to the future, saying 'One coin (will be) given away with every four gallons of petrol.'

> That representation would, in law, be binding if both parties intended that it should create legal relations between them. Their intention is to be ascertained by looking at it objectively, as a bystander would do. The test is: would it be reasonably understood by reasonable people that it was a promise binding in law?
>
> I must say I do not think reasonable people would regard the representation as a promise binding in law. It was just an advertising stunt to induce people to buy petrol and to buy it at the current price. It gave the motorist the hope and expectation that he would receive a coin with every four gallons of petrol, but it did not give him the contractual right to a coin. If the proprietor ran out of coins and, when asked for one, said 'I am sorry, I have no more left,' the motorist would not have a cause for action for damages."

While placing too great an emphasis upon the question of intention and thus reaching the less satisfactory of the two possible conclusions, Lord Denning was at least attempting a more realistic approach. Some of the expressions of opinion in which it was pointed out that the value of the coins was so small that there had been no increase of price to cover their cost seem to disregard altogether the motives and expectations of the appellants and of their client garages. It was at least recognised that the appellants intended the scheme to promote sales. For various reasons it was seen as a preferable alternative to that of cutting petrol prices or of offering trading stamps (which would have had a calculable monetary value). Given the expectation of the appellants that motorists would change their petrol buying habits in order to obtain the coins, and the expectation certainly of those persuaded to change their habits that they would receive a coin for each four gallons of petrol purchased, the conclusion that there was no intention to create legal relations is unacceptable.

Problems in relation to contracts in, or required to be evidenced by, writing

A fruitful area (if that is the right expression!) for thwarted expectations is in cases where a written agreement or memorandum of an oral agreement is signed although it contains terminology which enables one of the parties later to challenge the efficacy of the document.

The classic statement of the law from an Australian point of view is that of Dixon CJ, McTiernan and Kitto JJ in Masters v Cameron (1954) 91 CLR 353 at 360 (numbering supplied):

> "Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes.
>
> 1. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.
>
> 2. Or ... it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document.
>
> 3. Or ... the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

While contracts in categories 1 and 2 were enforceable, those in category 3 were not because "the terms of agreement are not intended to have, and therefore do not have any binding effect of their own" (at 361).

But how is a selection to be made of the appropriate category? According to the High Court, the "question depends upon the intention disclosed by the language the parties have employed, and no special form of words is essential to be used in order that there shall be no contract binding upon the parties before the execution of their agreement in its ultimate shape."

Nor is any formula, such as 'subject to contract', so intractable as always and necessarily to produce that result" (at 362). Nevertheless, the use of such an expression prima facie creates an overriding condition, "so that what has been agreed upon must be regarded as the intended basis for a future contract and not as constituting a contract" (at 363).

It must be admitted that the variety of phrases used which, it is alleged by one party, render the bargain as yet incomplete does not make it an easy matter for a court to identify the intentions of the parties in the context of the three categories suggested in Masters v Cameron. In Godecke v Kirwan (1973) 129 CLR for example, a document headed "Offer and Acceptance" had been signed by the appellant purchaser and by the respondent vendor's agents. Amongst the terms set out in the document were the following clauses:

> "3. Possession shall be given and taken on settlement upon signing and execution of a formal contract of sale within 28 days of acceptance of this offer.
>
> 6. If required by the Vendor/s I/we shall execute a further agreement to be prepared at my costs by his appointed Solicitors containing the foregoing and such other covenants and conditions as they may reasonably require.

Virtue J of the Supreme Court of Western Australia held that, as it was contemplated that there should be a subsequent formal contract and that fresh terms could be incorporated in such a contract at the behest of the vendor's solicitors, the situation fell within the third category in Masters v Cameron so that there was no concluded bargain.

The High Court reversed this decision. There was no doubt that the subsequent execution of a formal contract was not, on the terms of the document, regarded as a condition precedent to the obligation to give and take possession or to pay the purchase price. For example, not only was the document headed "Offer and Acceptance" but also it required immediate payment of $8000

and referred to the fact that the appellant had "this day purchased" the property in question. The agreement was, therefore, more appropriately classified under category 2 in line with the decision in Niesmann v Collingridge (1921) 29 CLR 177.

As far as clause 6 was concerned, the fact that the formal agreement might contain additional terms was not destructive of the enforceability of the existing arrangement. While the negotiation of further terms might suggest that the contract had not yet been finalised (May and Butcher Ltd v R [1934] 2 KB 17n; Rossiter v Miller (1878) 3 App Cas 1124), where the stipulation of the terms was at the discretion of a nominated (even one of the parties), it was possible to regard the contract as binding. The crucial question appeared to be whether the discretion was subject to reasonable restraint. In this case the discretion was limited by express reference to the test of what was reasonable by virtue of clause 6 itself (see Sweet and Maxwell Ltd v Universal News Services Ltd [1964] 2 QB 699), and also by the fact that any new terms must be consistent with the existing arrangements between the parties set out in the "Offer and Acceptance". Even if the discretion was not expressly limited, however, it might be possible to view it in terms of what was reasonable (see Powell & Berry v Jones & Jones [1968] 5 SASR 394).

While this decision may be justified on the basis that it was the intention of the parties to contract or that it was their expectation that they were entering into a binding arrangement, there are situations in which the reference to presumed intention might well defeat the parties' expectations. The existence of the Statute of Frauds gives rise to obvious problems in striking a balance between the need to apply the letter of the legislation and the objective of preventing it being used as a vehicle for the avoidance of bargains.

One can only suppose from the reluctance of the Australian

States to repeal the various equivalent statutory provisions (only the ACT and Queensland have dared dispense with the section of the sale of goods legislation reuqiring a written note or memorandum of a contract with respect to goods to the value of $20 or more in order to enable a party to enforce that contract as long as it remains executory) that they are seen as providing protection against fraud or other unconscionable conduct. A number of obvious arguments can be presented against the continued existence of the remaining vestiges of the Statute of Frauds:

1. The Sale of Goods provision has been abolished in a number of jurisdictions with no apparent disadvantage; indeed, the step was taken in England nearly a quarter of a century ago;

2. Even in relation to sales or other dispositions of land, the absence of a requirement of writing to evidence the contract has not been especially disadvantageous to parties negotiating such contracts in Scotland;

3. Although it has been accepted that a contract that needs to be evidenced in writing may be terminated by verbal agreement, there has been a reluctance to allow a verbal arrangement to modify the terms of the contract. The reason for this hesitation is logical enough. If the written note or memorandum should incorporate expressly or by implication all the terms of the contract, the Statute would no longer be satisfied if additional terms could be orally arranged later to add to the pre-existing, properly evidenced contract. Given that such verbal understandings are commonplace, however, the reasonable expectations of the parties might well be disappointed.

4. As far as the direct application of the Statute is concerned (ie, in relation to the original formation of the contract), the law has attempted in a number of ways to limit its operation. The doctrine of part performance was equity's means of circumventing the Statute if a party had acted in a manner explicable only on the basis that some such contract already existed between the parties.

(i) The doctrine of part performance

The scope of this rule is dependent upon three factors in particular:

(i) the nature of the acts;
(ii) the degree of likelihood required that a contract exists; and
(iii) whether it is just the existence of a contract, or whether the contract to which the activities point must be one relating to land.

Some cherished beliefs may need to be reconsidered in the light of the judgments of the House of Lords in Steadman v Steadman [1976] AC 536. Outside the magistrates' court just prior to the hearing of one of the parties' disputes over maintenance, H and W orally entered into what was referred to as a "package deal", the terms of which were as follows: (a) W would transfer her interest in the matrimonial home, in which H was still living, to H for £1500; (b) that the existing maintenance order of £2 weekly in W's favour would be discharged; (c) that the £2.50 order in their child's favour would continue; (d) that the arrears of maintenance (amounting to £194) would be remitted save as to £100 which H undertook to pay by the end of the month. Before the magistrates the parties acknowledged the existence of this arrangement, but the magistrates only had jurisdiction to make orders with respect to maintenance, which they did in relation to (b) and (d). H paid the £100 and his solicitors sent W's solicitors a conveyance for her to execute transfering her interest to him. This she refused to do.

The first issue ((i) above) necessarily raised on these facts is the nature of the acts relied upon by the party seeking to enforce the arrangement. In his dissenting judgment in the Court of Appeal Edmund Davies LJ refused to accept that the payment of the £100 could constitute such an act, relying upon the following passage from Cheshire and Fifoot, The Law of Contract (8th Ed 1972) (cited [1973] 3 All ER 977 at 986):

> "The first point to notice is that payment, even of the full purchase price, is not sufficient. The mere payment of money may be explained on a number of grounds, and there is certainly nothing in it to connect it inevitably with a contract for the sale of land by the payee to the payer."

(This passage is reproduced in the 3rd Australian ed p 209 .)

Edmund Davies LJ continued by commenting (at 987) that, if payment by H of the entire price of £1500 would not of itself suffice, it "surely cannot be the law that payment of £100 under another term serves to render enforceable this oral contract."

However, both Roskill and Scarman LJJ were prepared to accept that the payment of the £100 was in the circumstances a sufficient act of part performance. The latter distinguished it from a payment of part or all of the purchase money on the ground that the purchase money would be repayable if the contract could not be enforced, whereas the £100 was a sum which W could keep.

On appeal their Lordships (Lord Morris dissenting) held that the payment of the £100 was, taken in conjunction with the other circumstances, sufficient. In the words of Lord Simon ([1976] AC at 564):

> "the payment of £100 would, standing by itself, have been equivocal: it would not even marginally have been more suggestive of performance of a contractual term than otherwise. But taken together with the other acts and forbearances of the husband in relation to the summary matrimonial proceedings it becomes strongly indicative of a bargain."

However, there were a number of suggestions that it was about time that a more fundamental look was taken at one of the law's (or should one say, more correctly, one of equity's) unthinking beliefs. Lord Reid had this to say (at 541):

> "Normally the consideration for the purchase of land is a sum of money and there are statements that a sum of money can never be treated as part performance. Such statements would be reasonable if the person pleading the statute tendered repayment of any part of the price which he had received and was able thus to make restitutio in integrum. That would remove any 'fraud' or any equity on which the purchaser could properly rely. But to make a general rule that payment of money can never be part performance would seem to me to defeat the whole purpose of the doctrine and I do not think that we are compelled by authority to do that."

Lord Dilhorne expressed doubts on the doctrine (at 555):

> "If he paid the £1,500, there is well-established authority for saying that that could not be part performance. We have not in this case to consider whether that is right, though I find it difficult to discern on what principle that conclusion has been reached."

As did Lord Simon (at 565):

> "It has sometimes been said that payment of money can never be a sufficient act of part performance to raise the required equity in favour of the plaintiff - or, more narrowly, that payment of part or even the whole of the purchase price for an interest in land is not a sufficient act of part performance. But neither of the reasons put forward for the rule justifies it as framed so absolutely. The first was that a plaintiff seeking to enforce an oral agreement to which the statute relates needs the aid of Equity; and Equity would not lend its aid if there was an adequate remedy at law. It was argued that a payment could be recovered at law, so there was no call for the intervention of Equity. But the payee might not be able to repay the money (he might have gone bankrupt), or the land might have a particular significance for the plaintiff (cf. the equitable order for specific delivery of a chattel of particular value to the owner: Duke of Somerset v Cookson (1735) 3 P Wms 390), or it might have greatly risen in value since the payment, or money may have lost some of its

> value. So it was sought to justify the rule, alternatively, on the ground that payment of money is always an equivocal act: it need not imply a pre-existing contract, but is equally consistent with many other hypotheses. This may be so in many cases, but it is not so in all cases. Oral testimony may not be given to connect the payment with a contract; but circumstances established by admissible evidence (other acts of part performance, for example) may make a nexus with a contract the probable hypothesis. In the instant case, for example, what was said (ie, done) in the magistrates' court in part performance of the agreement makes it plain that the payment of the £100 was also in part performance of the agreement and not a spontaneous act of generosity or discharge of a legal obligation or attributable to any other hypothesis."

Lord Salmon gave a number of examples where it would be quite unconscionable for a contract not to be enforced following payment of the purchase price but no (other) act of part performance. He then continued (at 571-2):

> "If the proposition that payment in part or even in full can never be part performance is correct, which, in my view, it is not, then the circumstances surrounding the payment must be irrelevant. I think, however, that the Court of Appeal were bound to accept this proposition by the authorities referred to with approval by the Earl of Selbourne in Maddison v Alderson, 8 App Cas 467, 479. On this basis, the reasons given by Edmund Davies LJ for reluctantly dismissing the appeal appear to me to be impeccable. The proposition has, however, never yet been debated before this House. In Maddison v Alderson it was assumed, without argument, to be correct: in any event it was wholly unnecessary for the decision of that appeal. This House is, therefore, not bound to accept the proposition and, for my part, I am unable to do so. I believe that the analysis of the proposition which I have attempted demonstrates that the proposition is fundamentally unsound and would lead to grave injustice."

As Walton J has stated more recently of Steadman v Steadman in Re Gonin [1977] 2 All ER 720 at 731:

> "The ratio decidendi of that case I take to be a clear affirmation, overruling many existing statements in the books to the contrary effect, that payment of money may in special circumstances amount to a sufficient act of part performance to call the equitable doctrine into play. If one may respectfully say so, from this point of view it is a very salutary decision."

If one tests the conclusion of the majority of the Court of Appeal and of the House of Lords against the expectations of the parties, there would seem to be no basis for contesting the judges' refusal to be bound by existing dogma. The approach shows a refreshing respect for such expectations. To quote the words of Roskill LJ ([1973] 3 All ER at 992):

> "I confess that I arrive at this conclusion without reluctance, for it seems to me to accord with good sense and to avoid technicality. If a layman were asked, 'Why did the husband pay the £100 to the wife?' the reply would be, 'As a first step to the performance of the oral agreement of 2nd March 1972 of which one term was that he should make that payment in addition to paying the £1,500 for his wife's interest in the house.' If a layman would give that answer, I do not think the court should return a different answer unless compelled by authority to do so, and for my part I do not think that authority does so compel."

It is less easy to identify separately factors (ii) and (iii) (above p 20). In relation to both, the opinions expressed in Steadman v Steadman are more equivocal. Partly this is due to the fact that statements made by members of the House of Lords in the leading authority of Maddison v Alderson (1883) 8 App Cas 467 were themselves not entirely consistent; partly to some shift in emphasis that had already taken place between 1883 and 1974; and partly to some difference of opinion amongst their Lordships.

However, to take as far as possible the issue first of the degree of likelihood that a contract does exist (ie factor (ii)), one of the more frequently quoted pronouncements from Lord Selborne's judgment in Maddison v Alderson is the passage where he said (at 479) that all "the authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature,

referable to some such agreement as that alleged". The difficulty with interpreting this passage is to decide what degree of emphasis to give to the word "unequivocally". For example, it would not be unreasonable in purely semantic terms to regard it as synonymous with "referable to the alleged contract and no other". Indeed, at one time it was so regarded. In Lord Simon's words ([1976] AC at 563):

> "The first view was apparently held at one time - in logical consistency with the principle that the doctrine of part performance should not be allowed to undermine the statutory insistence that the contract must not be proved by oral testimony. It would seem, indeed, to be a reflection of the tendency to regard the doctrine of part performance as a rule of evidence. But it must often have led to a failure of justice, to Equity helplessly standing by while the statute was used as an engine of fraud; since, as Snell puts it (p 587): 'Few acts of part performance are so eloquent as to point to one particular contract alone.' This idea is therefore now to be regarded as 'long exploded', to use Upjohn LJ's expression in Kingswood Estate Co Ltd v Anderson [1963] 2 QB 169, 189.

To be fair to Lord Selborne, the Lord Chancellor himself may not have been going as far as his words might suggest. In an earlier passage (8 App Cas at 475-6), having pointed out that the defendant, in proceedings where an act of part performance is alleged, was "really 'charged' upon the equities resulting from acts done in execution of the contract, and not ... upon the contract itself" went on:

> "it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from res gestae subsequent to and arising out of the contract. So long as the connection of those res gestae with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the res gestae themselves, justice seems to require some such limitation of the scope of the statute..."

In Steadman v Steadman, Lords Reid and Simon made clear their acceptance of a lesser standard of proof. The latter, after remarking that "the general standard of proof in civil proceedings is proof on a balance of probabilities" (at 563-4), went on to cite Wakeham v Mackenzie [1968] 2 All ER 783 as correctly based upon the proposition that "the facts relied on to prove acts of part performance must be established merely on a balance of probability" ([1976] AC at 564). Similarly, in Lord Reid's view, "unless the law is to be divorced from reason and principle, the rule must be that you take the whole circumstance, leaving aside evidence about the oral contract, to see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shown to be more probable than not" (at 541-2). Viscount Dilhorne's position is less clear, although his reference to Kingswood Estate Co Ltd v Anderson [1963] 2 QB 169, in which "Upjohn LJ rejected the contention that the acts of part performance had to be referable to no other title than that alleged" ([1976] AC at 553), suggests his general agreement with Lords Reid and Simon. His later comment (at 556, see below p 27) used the ambivalent expression "point to" as the equivalent of "unequivocal".

On the other hand Lord Morris in his dissenting judgment seemed anxious to resurrect the former, stricter interpretation of "unequivocally": "The acts of part performance must be such that they point unmistakeably and can only point to the existence of some contract such as the oral contract alleged" (at 546). Similarly, Lord Salmon preferred to accept the principles laid down in Maddison v Alderson which he regarded as "highly persuasive authority" which he was not prepared to reject (at 568). As for Kingswood Estate Co Ltd v Anderson, that decision "exploded only the idea which had been expressed in some of the older authorities that, in order to take a case out of the statute, the act of part performance had to show not only the existence of a contract concerning land but also the very terms of the contract upon which the party seeking to

enforce it relied" (at 569).

When it came to factor (iii) there was a similar divergence of views. However, whether the act of part performance points to some such contract or to the actual agreement and whether it must also point to that aspect of the contract which concerns a disposition in land are matters which are both in general, and specifically in the context of the facts of Steadman's case, more important.

On the theoretical level, the significance of the use of a word like "unequivocally" would be greatly reduced if the reference is to some such contract as that alleged, irrespective of whether the act itself provided the necessary nexus with a disposition of land. This seems to have been Viscount Dilhorne's approach. He rejected the contention that in all cases the act of part performance must be referable to a disposition of an interest in land. Most of the reported cases related to what his Lordship referred to as "single term contracts for the disposition of land", so it was not surprising that they contained dicta requiring a nexus between the act and the nature of such a contract. But, in this case, the contract contained a number of elements. Although the transfer of the interest in the house was clearly an essential element, provided there was part performance of an aspect of the agreement, it was not necessary that there should be a direct connection between the act of part performance and the transfer of title. As to the emphasis to be placed on the word unequivocal, his Lordship thought that "it does not mean any more than that the acts of part performance which are alleged to have taken place must point to the existence of some such contract as alleged" (at 556). In other words, the reference had to be to a contract such as that alleged and not necessarily to one relating to a disposition of land.

Lord Reid expressed the position similarly (at 541):

> "You must first look at the alleged acts of part performance and see whether they prove that there must have been a contract

> and it is only if they do so prove that you can bring in the oral contract."

He justified this approach as follows (at 541):

> "The argument for the wife, for which there is a good deal of authority, is that no act can be relied on as an act of part performance unless it relates to the land to be acquired and can only be explained by the existence of a contract relating to the land. But let me suppose a case of an oral contract where the consideration for the transfer of the land was not money but the transfer of some personal property or the performance of some obligation. The personal property is then transferred or the obligation is performed to the knowledge of the owner of the land in circumstances where there can be no restitutio in integrum. On what rational principle could it be said that the doctrine of part performance is not to apply? And we were not referred to any case of that kind where the court had refused to apply it. The transfer of the personal property or the performance of the obligation would indicate the existence of a contract but it would not indicate that that contract related to that or any other land."

Lord Simon was also in agreementwith this view of the law. Having pointed out that "where, as so often, the only term to be performed by the defendant is the transfer of the interest in land, the fulfilment of the other conditions stipulated by equity will generally involve that the effective act of part performance indicates the land concerned", his Lordship continued (at 562):

> "In Wakeham v Mackenzie [1968] 1 WLR 1175, a woman agreed to surrender her rent-restricted flat and keep house for an eldery widower in consideration of his oral promise to leave her his house by will: her action was held to be sufficient part performance to make the widower's oral promise binding on his personal representative. The case must be compared with Maddison v Alderson, 8 App Cas 467, where the only material distinction was that the woman had no house of her own to give up. This distinction might be sufficient to justify the inference in the later case that the housekeeper's actions implied a quid pro quo, a bargain, which had not been a justifiable inference in the earlier case (see Lord

> Blackburn in Maddison v Alderson at p 487); but they could hardly be said to have indicated a bargain a term of which related to the widower's house."

It is true that he did regard it as unnecessary to decide the point in the present case because of the existence of factors which did identify the land in question (eg, "procuring his solicitor to carry out the obligation which, under the bargain, the husband had assumed of drafting the conveyance and sending it to the wife"). However, his Lordship's sympathies were apparent in the following passage (at 563):

> "Other acts of part performance by the husband proved that there had been some contract with the wife, though without specifically indicating those terms which concerned the house. The consent to the justices' orders and the payment of £100 are, in my view, only reasonably intelligible on the hypothesis that the issues raised by the cross-summonses in the magistrates' court had been settled by agreement. As for the other limb of Upjohn LJ's formulation of the rule, the husband's acts were consistent with the contract alleged by him."

There would appear to be little doubt, therefore, that the majority of the House of Lords were in substantial agreement with Roskill LJ ([1973] 3 All ER at 992) and Scarman LJ (at 994) in the Court of Appeal. On the other hand, Lord Salmon in the House of Lords was not prepared to overthrow the authority of Maddison v Alderson on this issue, agreeing with Edmund Davies LJ in the Court of Appeal and with Lord Morris. Nevertheless, the fact remains that the majority opinion, which formed part of the ratio of the decision of the Court of Appeal and of the judgments of two of their Lordships, was in favour of this further narrowing of the operation of the Statute of Frauds in the interests of serving the expectations of the parties.

The question whether such departures from established dogma will strike a responsive chord in Australia could probably be answered without reference to recent authority. However, the issue was first raised in Millett v Regent [1975] 1 NSWLR 62. The defendants were the parents of one of the plaintiffs; the other plaintiff was their son-in-law. The defendants had purchased for $4,500 a small house in poor condition. Theyhad contributed $1,000 themselves and had raised $3,500 from a Bank. They then proposed that the plaintiffs should live in the house and pay off the loan. It was later agreed that if the plaintiffs did so and also repaid the defendants' contribution of $1,000, the defendants would transfer title into their names. During the ensuing two or three years, various renovations were made with the father's assistance, and, when it was decided by the plaintiffs that they would like to extend the house, the Bank proposed making a larger loan to the plaintiffs to allow them to pay off the earlier mortgage to the parents as well. The father helped with the extensions by cash contributions and by providing second hand materials. About this time the plaintiffs learnt that the defendants had changed their mind about transferring title in the house to the plaintiffs.

On factor (i), the nature of the acts amounting to part performance, there was no reference to the payment of money discussions in Steadman v Steadman. However, the NSW Appeal Court did become involved in an issue which their Lordships would almost certainly have regarded as having an obvious solution. The present Court was called upon to consider the argument, advanced on behalf of the defendants, that acts related to the contract and its performance were not sufficient to constitute part performance unless they were required to be performed under the contract. While this argument was rejected by all three members of the Court, differing views were expressed on the relationship required between the acts and the contract itself. Mahoney JA expressed the dilemma as follows (at 75):

> "In the context of a contract for the sale of land, an act may be done either to discharge a positive obligation under the contract that the act be done; or pursuant to a term in the contract that the act may, but need not, be done; or without reference to any particular term of the contract."

Only Hutley JA was prepared to hold that acts in the third category were sufficient. He said (at 66):

> "If, in reliance upon an oral contract, acts are done which unequivocally point ot a contract, even though those acts are neither required by the contract nor are expressly authorized by the contract, if other conditions are fulfilled, the doctrine should be applicable. For example, in the case of a simple absolute oral contract to sell a block of land, followed by entry into possession by the purchaser, who thereupon, to the knowledge of the vendor, improves the land in a manner unequivocally pointing to ownership, the doctrine should apply, if the vendor is to be charged upon the equities rather than the contract, otherwise the statute would indeed be made an engine of fraud."

The other members of the Court were more cautious though seemed prepared to admit that matters in the second category would be acceptable. In the words of Glass JA (at 71):

> "In my opinion, the manner in which the doctrine has been consistently expounded demands that acts done in consequence of the unwritten agreement, but not in execution of it, are excluded from consideration. But whether acts done in execution of the agreement are confined to those required by it or extend to those authorized by it is less clear. ... But the wider view seems to be more consonant with principle and I propose to follow judicial pronouncements to that effect."

Whatever approach was adopted, however, there were sufficient acts in this case required or authorised under the oral contract to allow a decree of specific performance to be granted. What is unsatisfactory is of course that various acts that will undoubtedly add to a purchaser's expectations would be excluded from consideration as part performance if the narrower view is to prevail. Only

Hutley JA would be prepared to accept that alterations effected at the purchaser's cost but outside the terms of any contract between the parties could amount to a sufficient act of part performance.

On factor (ii), the degree of likelihood that a contract exists, there was a reluctance to become involved in a detailed examination of the significance of Lord Selbourne's "unequivocal" test. For example, Hutley JA was prepared to say no more than (at 65):

> "I do not consider it necessary to decide whether the acts of part performance relied on have to point unequivocally to the kind of contract alleged. If 'unequivocal' is given its ordinary meaning, it is hard to see how any acts would suffice, as any set of acts can have multiple references to ingenious minds. 'Unequivocal' is used in a special sense. Judged by what has appeared to other judges to be unequivocal reference, the facts proved here are sufficient. It is, therefore, unnecessary to consider whether Steadman v Steadman can be squared with Australian authority."

Similarly, Mahoney JA, having mentioned McBride v Sandland (1918) 25 CLR 69, and Cooney v Burns (1922) 30 CLR 216, commented (at 73):

> "Whether the principles enunciated by the House of Lords in Steadman v Steadman are inconsistent with the principles as enunciated by the High Court of Australia, it is not necessary, for the purposes of this case, to determine."

However, his Honour did go on to express the view (at 74) that:

> "The requirement that they be 'unequivocally ... referable' to the kind of contract alleged indicates that, so viewed, they must be not merely consistent with the existence of such a contract, but satisfy the Court of the existence of such a contract. The term 'unequivocally', and the similar terms which have been used in this regard in other cases, do no more than indicate that, in being satisfied that such a contract was made, the Court will require evidence of the appropriate degree of cogency to establish that, eg, the appropriate basis for the intervention of equity against the statute requiring the contract to be in writing is made out."

In contrast, Glass JA did admit that Steadman v Steadman was a new departure and one that the NSW Appeal Court was not at liberty to follow (at 71-2):

> "According to the classic formulation the degree of proof required was such that the acts 'must be unequivocally and of their own nature referable to some such agreement as that alleged' : Maddison v Alderson. The High Court has indorsed this description of the test in McBride v Sandland, Cooney v Burns. I can discern no difference in sense when the requirement is described as 'acts consistent only with some such contract subsisting' : J C Williamson Ltd v Lukey and Mulholland [(1931) 45 CLR 282 at 297] or 'acts not being reasonably explicable except upon the footing' of some such agreement: Pejovic v Malinic [(1960) 60 SR (NSW) 184 at 190]. I do not think that we are at liberty to apply the revised statement of principle promulgated by the House of Lords in Steadman v Steadman to the effect that it is sufficient if the explanation of the acts by a contract of the kind alleged is more probable than not. I propose to measure the sufficiency of the evidence by asking whether the acts of part performance admit of any other reasonable explanation, except that the defendants agreed to transfer to the plaintiffs an interest in the premises."

Issue (iii), whether the act of part performance need identify a contract relating specifically to land, was not dealt with directly. However, from the tenor of the judgments and from the importance attributed to earlier formulations of the law in Maddison v Alderson and in two High Court decisions, McBride v Sandland and Cooney v Burns, it seems unlikely that there was any disposition to adopt such heresy.

When this case went on appeal (Regent v Millett (1976) 10 ALR 496), the High Court was content to affirm the Appeal Court's decision with the minimum of comment. In the only judgment, Gibbs J prefaced his conclusions by the following observation (at 499):

> "It may be said immediately that if the reasoning of their Lordships in the recent case of Steadman v Steadman ... is accepted, the appellants' arguments must fail. However, it is unnecessary for the present decision to consider the questions

that are raised by that case."

On the issues of substance, the High Court approach was deliberately cautious. No guidance at all was given on the difference of opinion in the Court of Appeal over the relationship between the acts and whether they had to be in pursuance of the contract or only related to its performance. In Gibbs J's words (at 499-500):

> "in the present case the circumstances under which possession was given indicate contract, to echo the words in McBride v Sandland, and the possession was unequivocally referable to some such contract as that alleged. The taking of possession was pursuant to the contract. It is true that the contract did not require the respondents to take possession, but if it were necessary that the acts of part performance should have been done in compliance with a requirement of the contract, the utility of the equitable doctrine would be reduced to vanishing point, and many cases which have proceeded on the opposite view would have been wrongly decided. The Judicial Committee, in White v Neaylon (1886) 11 App Cas 171, indeed appears to have held that the effecting of improvements on property which were neither required nor permitted by the contract may be acts of part performance; but however that may be, it is clear that if a vendor permits a purchaser to take the possession to which a contract of sale entitles him, the giving and taking of that possession will amount to part performance; notwithstanding that under the contract the purchaser was entitled rather than bound to take possession."

Such coyness in the face of Hutley JA's judgment and of White v Neaylon, which was an appeal from South Australia, is perverse.

On factor (ii), the Lord Selbourne test was accepted, presumably on the basis that it did not affect the outcome of the present decision (at 499):

> "It is enough that the acts are unequivocally and in their own nature referable to some contract of the general nature of that alleged".

In answering the question, where does this leave the law, one must

acknowledge that the prospects do not look bright for anyone who is not of a pedantic disposition. Maddison v Alderson has been revisited recently in both England and Australia.

In Re Gonin [1977] 2 All ER 720, the plaintiff had left home in 1940 to work for the Air Ministry. However, in 1944, at her parents' request, she returned home to look after them. She carried out this task until her mother's death in 1968. She alleged that she had done all this on the basis of the parents' promise that the house was to be hers. There were obvious difficulties arising from the uncertainties of the arrangement, including the fact that part of the house was sold during the mother's lifetime. However, the conclusion reached by Walton J was that, even if there had been an oral contract, there had not been any act of part performance to render it enforceable. This conclusion he supported by the following explanation of Steadman v Steadman (at 731):

> "Two of their Lordships, Lord Reid and Viscount Dilhorne, ... held that, contrary to long established equitable jurisprudence, the act of part performance did not, in itself, have to be referable to some contract concerning land. Two of their Lordships, Lords Morris (who dissented in the result) and Salmon, thought the traditional equitable view was correct, whilst Lord Simon thought that it was unnecessary to determine that point in the case before them. In these circumstances I think I am free to follow the traditional equitable jurisprudence, which I find admirably stated in the speech of Lord Salmon. After all, the doctrine of part performance is one which enables the court to disregard the express provisions of an Act of Parliament and it would appear that it ought to be a somewhat narrow doctrine accordingly. There is so far as I am aware no prior trace of any wider scope for the doctrine unless it be in Wakeham v Mackenzie, which purported to follow Kingswood Estate Co Ltd v Anderson, which I venture to think the learned judge misunderstood. This latter case is fully explained by Lord Salmon in his speech to which I have already alluded and is indeed fully in the mainstream of settled equitable jurisprudence.

> Anyway, I do not think that there can be any doubt whatsoever but that the learned judge's alternative ground in Wakeham v Mackenzie, namely that the conduct of a stranger in giving up a council tenancy and moving into the house of somebody else pointed irresistibly to the fact that there was some contract in relation to the secured occupation of that house by the stranger so moving in, is undeniably correct.

This pronoucement is scarcely an honest interpretation of a decision in which two members of the House of Lords were of a contrary view to the deduction made by Walton J; moreover, as has already been explained, Lord Simon went further than a bald statement that there was no need to decide the point. In short, a judge of the Chancery Division was not going to relinquish a cardinal tenet of his legal upbringing if he could possibly avoid doing so.

In Ogilvie v Ryan [1976] 2 NSWLR 505, the defendant was being sued for possession of a house. She had lived in a cottage with her mother from 1939 until 1970. She had worked as a cleaner in an adjoining cinema and in the house of O, a director of the company which owned both the cinema and the cottage. In 1955, after his wife's death, O came to live in the cottage, paying for his board. From 1962, when the mother died, the defendant and O lived as man and wife. In 1969 the company contracted to sell the cinema and cottage for redevelopment. O proposed that he should purchase a house. If she would live with him and look after him for the rest of his life, she would have the house for as long as she lived. When O died in 1972 he made no mention of the defendant in his will. When the executor of O's estate sought to recover possession of the house, Holland J held that there was a constructive trust in the defendant's favour entitling her to occupy the house for the rest of her life. This possibility has since been reinforced by the NSW Court of Appeal in Allen v Snyder [1977] 2 NSWLR 685. While such an interest does not suffer from the difficulties raised in relation to the enforcement of a contract by the Statute of Frauds, it does need to be supported by clear evidence of a common intention (actual or to be implied) to create such an interest.

However, in Ogilvie v Ryan, it had also been argued that the defendant had a contractual right to remain in possession of the house. Enforcement of this oral arrangement depended upon there being a sufficient act of part performance. Holland J explained that, as trial judge in Millett v Regent, he had applied Kingswood Estate Co Ltd v Anderson and Wakeham v Mackenzie even before the House of Lords decision in Steadman v Steadman. Indeed, if Wakeham v Mackenzie represented the law in New South Wales it would be conclusive on the present facts. In that case, it will be recalled, a woman gave up her rent-restricted flat in which she had a protected tenancy to keep house for an elderly widower in consideration for his verbal promise to leave her the house in his will: Stamp J held that her action was a sufficient act of part performance. If it was necessary to distinguish Maddison v Alderson, the giving up of an interest in her previous accommodation was sufficient (see Steadman v Steadman [1976] AC at 562 per Lord Simon, above p 26).

However, in Holland J's view, the opinions expressed in the NSW Court of Appeal and by the High Court were inconsistent with the application of the English authorities. The effect of the hearings on appeal in Millett's case was to affirm that the narrow test of requiring an unequivocal reference was authoritative. Hence, in his Honour's words ([1976] 2 NSWLR at 524):

> "it cannot be postulated of the defendant's acts that they were unequivocally referable to or indicative of a promise to give her an interest in the deceased's property. Her change of residence is not of the same significance as an owner letting another into possession of his land. It is as consistent with her voluntarily continuing her existing association with the deceased as it is with his having promised her continuing rights of occupation of the property after his death. Her performance of services for him without pay are explicable on the grounds of love and affection, and an expectation on her part that she would be rewarded in some way on his death; but not necessarily by receiving an interest in his property which, though an appropriate reward, could not be said more probably to be anticipated than a monetary reward."

Without wishing to belabour the point further, it is worth mentioning that, though Holland J is probably correct in his interpretation of the views of the superior courts in Millett's case, both the Court of Appeal and the High Court left open whether they might nevertheless be prepared to be persuaded by Steadman v Steadman. While the latter decision certainly gives a good deal more room to manoeuvre in curtailing unconscionable reliance upon the Statute of Frauds, it does open up the possibility of a variety of activities rendering oral agreements enforceable. Although some of their Lordships, even amongst the majority, would probably deny that such was their intention, it is conceivable that the following situation would be covered by some of the expressions of opinion in Steadman: P and V agree terms for the purchase of V's house. As part of their agreement P pays a sizeable sum by cheque to V himself. V gives P a receipt which refers to the purchase of the house, but is not a sufficient note or memorandum to satisfy the Statute. Is the contract enforceable? Lord Salmon certainly believed that such an arrangement would be enforceable if V was unable to repay the purchase money ([1976] AC at 571), but is there any good reason for limiting the principle to cases where V is unable to repay the money to P?

(ii) Written memorandum "subject to contract"

It may be that solicitors would not worry unduly about this situation because they would be unlikely to pay monies to the vendor himself, but could the same principle not be applied to payments made between agents? Of course, solicitors are usually careful enough to avoid committing themselves by the use of such expressions as "subject to contract". But even this precaution has its pitfalls because often the solicitor will be employed after the parties have reached some sort of agreement.

In Griffiths v Young [1970] Ch 675, the defendant, V, asked P, the plaintiff, to guarantee the former's bank overdraft. This P was prepared to do if V would agree to sell him a certain piece of land so that, if P was called upon to honour the guarantee, he would be able to set off the sum involved against the unpaid purchase price. After they reached agreement, they instructed their respective solicitors. P's solicitors wrote a letter to V's solicitors in which they set out the terms of the agreement in full, but expressed the price to be "subject to contract". That letter was acknowledged by return by V's solicitors. V contacted P in an attempt to expedite matters. P's solicitors telephoned V's solicitors who wrote a letter confirming the terms of the contract. The guarantee was given by P, but V refused to take any steps towards completing the contract of sale. The Court of Appeal held that the two initial letters between the solicitors constituted a sufficient note or memorandum of the contract. The words "subject to contract" amounted to no more than a suspensive condition which had been waived by the later telephone conversation. It would seem to follow from this decision that the parties themselves, unaware of the niceties of legal phraseology, could equally well have waived the "subject to contract" clause, by, for example, reaffirming their existing commitments.

Certainly Griffiths v Young gives warning that, to be effective, it might be necessary to repeat the suspensive words in every communication whether verbal or written. Despite the adverse reaction to Law v Jones [1974] Ch 112, it appears to be an inevitable result of Griffiths v Young. In Law v Jones, on 17 February, the defendant, V, agreed to sell a cottage to P for £6,500. The next day V's solicitors wrote a letter as follows:

> "We understand you act for Mr J Law ... in connection with his proposed purchase of the above property ... for 6,500 subject to contract. We have been instructed on behalf of the vendor and we are obtaining his title deeds and shall submit a contract to you as soon as possible."

A week later they sent a draft contract setting out the terms "for your approval". On 7 March this letter was acknowledged and preliminary enquiries were enclosed.

This letter was itself acknowledged. At this stage V requested a further £1,000 for the property and, on 13 March, P and V agreed a new price of £7,000. V assured P that, on this occasion, his word was his bond. V's solicitors accordingly wrote as follows to P's solicitors:

> "Further to our letter of March 10 we herewith enclose our replies to your preliminary inquiries. We understand that an increase in the consideration has been mutually agreed and we shall therefore be obliged if you would amend the contract in your possession to read a purchase price of £7,000."

Matters proceeded between the solicitors and a completion date was agreed, but contracts were never exchanged. V wrote to P saying that, because of the increase in house prices, he had decided to put the cottage up for auction. A majority of the Court of Appeal held that P was entitled to a decree of specific performance.

The basis of this decision appears to depend upon these propositions:

1. that the written text of a contract (as yet unexecuted, but setting out the terms agreed by the parties), that is later amended by agreement between the parties and in its amended form is then acknowledged by the agent of the party against which it is sought to enforce the agreement, can constitute a sufficient note or memorandum of the contract;
2. that the effect of making the initial written communications "subject to contract" could have no effect upon the binding nature of the original verbal agreement; and
3. that the intervening firm commitment to perform the modified contract by the parties themselves operated to eliminate any qualifying effect which the words "subject to contract" may have had;
4. so that the defendant's solicitors' letter of 17 March, in referring to the amended price having been mutually agreed and to the contract

already being in existence, was sufficient to constitute the draft contract a sufficient memorandum to satisfy the Statute of Frauds.

The above decision was handed down on 10 April 1973; on 20 November of the same year, in Tiverton Estates Ltd v Wearwell Ltd [1975] Ch 146, a differently constituted Court of Appeal in effect held that Law v Jones had not been correctly decided by refusing to follow it on the basis that it was inconsistent with earlier decisions of the Court. V (the plaintiff company) was seeking to have a caution removed from its leasehold title at the Land Registry. The caution had been entered by P, the defendant company, which claimed to have an enforceable contract for the purchase of V's interest. P alleged that an oral agreement had been made for the purchase of the leasehold, and that the following later correspondence amounted to the necessary memorandum of that transaction:

(1) From P's solicitors to V's solicitors:

"We understand that you act for the vendor in respect of the proposed sale of the above-mentioned property to our clients Wearwell Ltd at £190,000 leasehold subject to contract. We look forward to receiving the draft contract for approval together with copy of the lease at an early date."

(2) From V to P:

"This is to confirm my telephone conversation with you this morning when you agreed that the completion of the purchase of the property can take place as soon as possible."

(3) From V's solicitors to P's solicitors:

"We refer to your letter dated the July 4, upon which we have taken our clients' instructions. We now send you draft contract for approval, together with a spare copy for your use, together with a copy of the lease dated October 30, 1934, and photocopy entries on our client's land certificate. We await hearing from you."

Ten days later V decided not to proceed with the sale. P's solicitors claimed that there was ample evidence that a contract had been concluded, and therefore lodged a caution against V's title. In their view letter (3) and the accompanying draft formal contract constituted the necessary memorandum.

According to Lord Denning MR there were two lines of authority.

(i) "in order to satisfy the Statute, the writing must contain, not only the terms of the contract, but also an express or implied recognition that a contract was entered into" (at 156-7) (relying principally upon Thirkell v Cambi [1919] 2 KB 590)

(ii) "it is not necessary that the writing should acknowledge the existence of a contract. It is sufficient if the contract is by word of mouth and that the terms can be found set out in writing without any recognition whatsoever that any contract was ever made" (at 157)

(a proposition supported by Law v Jones (above)).

Lord Denning's concern for the profession may at long last justify his position as Master of the Rolls. His sympathies were expressed with characteristic eloquence (at 153-4):

> "On April 10, 1973, this court decided Law v Jones [1974] Ch 112. It caused consternation amongst the solicitors in this country. They had always understood that, on a sale of land, they could protect their clients by writing their letters 'subject to contract.' Law v Jones shattered this belief. To the minds of solicitors, it virtually repealed the Statute of Frauds."

And then again (at 159-60):

> "Law v Jones has sounded an alarm bell in the offices of every solicitor in the land. And no wonder. It is everyday practice for a solicitor, who is instructed in a sale of land, to start the correspondence with a letter 'subject to contract' setting out the terms or enclosing a draft. He does it in the confidence that it protects his client. It means that the client is not bound by what has taken place in conversation. The reason is that, for over a hundred years, the courts have held that the effect of the words 'subject to contract' is that the matter remains in negotiation until a formal contract is executed: see Eccles v Bryant and Pollock [1948] Ch 93. But Law v Jones has taken away all protection from the client. The plaintiff can now assert an oral contract in conversation with the defendant before the solicitor wrote the letter and then rely on the letter as a writing to satisfy the statute, even though it was expressly 'subject to contract': or, alternatively, the plaintiff can assert that after the solicitor wrote the letter, he met the defendant and in conversation orally agreed to waive the

> words 'subject to contract'. If this is right, it means that the client is exposed to the full blast of 'frauds and perjuries' attendant on oral testimony. Even without fraud and perjury, he is exposed to honest difference of recollections leading to law suits, from which it was the very object of the statute to save him."

Before considering what implications these decisions might have in an Australian context, the summary of the case law would not be complete without a reference to the recent refusal by Buckley and Orr LJJ in Daulia Ltd v Four Millbank Nominees Ltd [1978] 2 All ER 557 to recant their (alleged) heresy. The plaintiff company, P, was anxious to buy certain properties from V, the defendant company. On 21 December 1976, the parties agreed terms and also agreed to exchange contracts the next day. When P arrived to do so at the appointed time, its representatives discovered that V had found an alternative purchaser. P alleged that V had promised that if P obtained a banker's draft for the deposit, came as arranged to V's office and there tendered the draft together with P's part of the contract duly executed, V would complete the written contract for the sale of the properties. By failing to carry out its side of the bargain, P further alleged, V had been in breach of the oral contract. In an action for damages, the Court of Appeal held that the action had rightly been struck out on the ground that the contract was in effect one for the disposition of an interest in land for which there was no note or memorandum in writing.

A number of points of interest are raised by this case:

1. It provides one of those rare examples of that academics' delight - a unilateral contract. The Court had no doubt that, if the facts alleged were proved, V would have been under an obligation to enter into the written contract for the sale of the properties.

2. It throws a side-light on that still uncertain area of law, the question whether a person who advertises a sale without reserve may be liable in damages to the highest bidder if the property is withdrawn or bought in on behalf of the seller. The general tenor of the judgments was that, though an action may be maintainable against an auctioneer (ie, an agent) on a collateral undertaking on the basis of Warlow v Harrison (1859) 1 E & E 295, the suggestion in Johnston v

Boyes [1899] 2 Ch 73 at 77 that the vendor (ie, the principal) might similarly be liable was disapproved. While Warlow v Harrison might provide some support for P's case, it was clearly distinguishable.

3. The Court supported its instinctive reaction that to enforce such a contract as the oral agreement in this case would certainly allow a new and major exception to the Statute by reference to a number of persuasive American authorities (McLachlan v Village of Whitehall 99 NYS 72 (1906); Sarkisian v Teale 88 NE 333 (1909); Union Car Advertising Co v Boston Elevated Rly Co 26 F 2d 755 (1928)). In the words of the American Jurist, 2nd ed (1974), Vol 72 p 568:

> "The general rule is that an oral agreement to reduce to writing a contract which is within the scope of the operation of the Statute of Frauds or to sign an agreement which the Statute of Frauds requires to be in writing is ... unenforceable."

4. Nor could it be claimed that there was an act of part performance, because the acts bringing into being the obligations under the unilateral contract appeared to be in contemplation, rather than in performance, of a contract. The acts certainly did not "prove that there must have been a contract" to quote Lord Reid's words in Steadman v Steadman [1976] AC 536 at 541.

However, to turn to the references in Buckley LJ's judgment (Orr LJ agreed) to Law v Jones and Tiverton Estates Ltd v Wearwell Ltd , one of the arguments which had appealed to the members of the Court in the latter case was that the Statute required a note or memorandum "thereof", a fact which strongly suggested that there must be some "recognition" of the contract in that written document. However, in the opinion of Buckley LJ, this approach could not be reconciled with the "written offer" cases in which the principal memorandum was patently a pre-contractual document. In his own words ([1978] 2 All ER at 570): "I am unable to understand how, outside of the world of the White Queen, a document written at a time when ex hypothesi no contract exists can acknowledge the existence of a contract made at a later date." In general, he saw no reason to differ from what

Lord Denning MR had said in the Tiverton case, but he could not accept the latter's view of Law v Jones:

> "Law v Jones did not decide that a letter written 'subject to contract' or forming part of a correspondence conducted subject to a 'subject to contract' stipulation can constitute a note or memorandum of an oral agreement to which it relates sufficient to satisfy the Statute of Frauds, at any rate so long as the 'subject to contract' stipulation remains operative. What it did decide was that, if the parties subsequently enter into a new and distinct oral agreement, the facts may be such that the earlier letter may form part of a sufficient note or memorandum of the later oral agreement notwithstanding that it was 'subject to contract' in relation to the earlier bargain. It also, of course, decided the quite different point that a written note or memorandum to satisfy the statute need not acknowledge the existence of the contract, although it must record all its essential terms. In that respect Law v Jones and Tiverton Estates Ltd v Wearwell Ltd are undoubtedly in conflict."

It is not the intention of this paper to seek to reconcile these various pronouncements. For the purposes of the general thesis here presented it is worth attempting to identify the expectations of the parties involved. The solicitors' position would appear to be straightforward enough. The use of "subject to contract" was designed to prevent their communications creating a legally binding contract. It is now the practice in the ACT to use phrases which attempt to prevent legal relations arising until exchange of contracts, eg, "it is intended that no legal obligations will arise until contracts are exchanged". Of course, much depends upon the words used, but it is doubtful whether such phraseology provides much added protection. True, either of the solicitors involved could claim that their subsequent correspondence was covered by the initial statement. However, if there is already an existing contract between their clients or a subsequent commitment is entered into between the clients to perform the contract, it would be safer to employ a specific disavowal with each communication containing or referring to the terms of the contract.

Lord Denning MR made great play in Tiverton Estates of the difficulties facing solicitors and lamented that Law v Jones had taken away all protection

from the client. However, if one looks at the position from the stand-point of the clients, their expectations may be rather different from those of their legal advisers. In a substantial commercial transaction such as that in the Tiverton case, it is likely that the oral arrangement was no more than an agreement to enter into a contract in more substantial terms. In Clifton v Palumbo [1944] 2 All ER 497, the parties had been negotiating for the sale of an estate. It was held that, because of the size and diversity of the estate, a letter in which the vendor stated that he was "prepared to offer" the estate to the purchaser for £600,000 did not constitute an offer, but was only a further step in the negotiations. As Lord Greene pointed out (at 498) when parties

> "are beginning to negotiate a transaction of this magnitude it is common experience - and indeed, it is only business - to find that the first thing they begin to think about, is the price, because it is quite useless making elaborate investigations and conducting complicated negotiations if it is going to turn out in the end that their views as to price do not agree."

Once agreement was reached on price, however, what was the position? Lord Greene continued (at 498-9):

> "There is nothing in the world to prevent an owner ... contracting to sell ... to a purchaser, who is prepared to spend so large a sum of money, on terms, written out on a half sheet of note-paper, of the most informal description, and even, if he likes, on unfavourable conditions; but I think it is legitimate, in approaching the construction of a document of this kind ... to bear in mind that the probability of parties entering into so large a transaction, and finally binding themselves to a contract of this description ... is remote."

On the other hand, in ordinary transactions, the major matters can easily be covered by the initial agreement between the principals. Where there is evidence of a deliberate decision by the parties to proceed with the contract, is there any reason why that should not be respected? In Griffiths v Young,

there was held to be a waiver of the "subject to contract" limitation by the solicitors acting on their client's instructions to hasten the transaction. In Law v Jones, the client had given the purchaser his solemn assurance that no further attempt would be made to increase the price and that he would keep his word to go through with the transaction. Would not the disinterested lay bystander agree with Buckley LJ's observation in Law v Jones [1974] Ch at 127 that the purpose of the statute "is to avoid parties being held to contracts the terms of which they have not agreed, not to facilitate the escape of a party from a contract the terms of which he has agreed"?

Business Contracts and Conflicting Contractual Documents

The final area selected for discussion concerns the business relations that are created where both parties employ their own and largely inconsistent documents in negotiating their contract.

It is apparent from the small amount of research which has been conducted in recent years (notably by Macaulay 'Non-contractual relations in Business' (1963) 28 Am Soc Rev 45, reprinted in abridged form in Aubert, Sociology of Law (1969) pp 195-209; and by Beale and Dugdale, 'Contracts between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2 Brit Jo of Law and Soc 45) that in a number of respects the business community does not tie up the loose ends of its contractual arrangements. Apart from the particular issue at present under discussion, the following examples are worth noting:

1. The use of forms does mean that the basic features of an agreement do appear in writing, ie, the goods, the price and the time of delivery. It seems likely that, if the research has general validity, most businessmen's agreements would satisfy the requirements of the Statute of Frauds in those jurisdictions where it still operates in relation to sales of goods. This

tentative conclusion is strongly supported by the more specific, though earlier, findings in 'The Statute of Frauds and the Business Community: A Re-Appraisal in Light of Prevailing Practices', (1957) 66 Yale LJ 1038-71.

2. The lack of definition of various 'secondary' terms, eg, those which might in a professionally drafted contract deal with consequences of a failure to perform may be ascribed to two factors in particular:

(i) In the English sample taken from engineering manufacturers in the Bristol district, there was a good deal of personal contact between the representatives of the parties so that there was a feeling that any matters arising at a later stage could be dealt with informally. It is worth remarking that informal amendments unsupported by consideration create difficulties which the Courts have not found easy to resolve. One only needs to mention the High Trees doctrine in this context. Denning J made it clear in Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130 at 134 that he was dealing with situations where a promise is held to be binding on the party making it even though it might be difficult to find any consideration for it. Hence the generally unreceptive reactions of the Australian courts might leave a gap in dealing with businessmen's arrangements where allowances are made for difficulties that would not justify non-performance of the contract according to its terms. Similarly, it has already been pointed out that the Statute of Frauds also raises difficulties in relation to amendments to contracts required to be evidenced in writing. Both Macaulay and Beale and Duggan comment that, though the contracts they surveyed were usually evidenced by a printed document, the same was not the case with subsequent variations which were often arranged by telephone. In such circumstances,

therefore, the probably consequence is that the original contract remains enforceable: see McKay v Gillespie (1885) 11 VLR 835.

(ii) The Bristol research revealed that, among the manufacturers surveyed and their clients, there were a number of understandings as to what should happen in certain eventualities. One particular example was that, though compensation might be claimable it would rarely be regarded as appropriate to include consequential losses. Also the form of compensation was largely on an ad hoc basis. A defaulting seller would be prepared to arrange the speedier carriage of replacement goods or might not enforce a price escalation clause on later consignments. These "unwritten laws" would probably not be precise enough to incorporate into the contract under the normal legal rules for establishing a trade usage, or a prior course of dealings, but they obviously were an important feature of the parties' arrangements.

In practice, of course, business dealings tend to involve a series of independent transactions, and the parties would not normally wish to jeopardise their future working relationship by talking about their contractual rights and obligations, let alone by having recourse to arbitration or the courts to enforce them. Nevertheless it is not satisfactory that the law should be out of touch with the practices of business communities.

Before dealing with the legal consequences of conflicting order and supply forms and similar documents, it is worth quoting from the Bristol findings. Beale and Dugdale wrote (2 Brit Jo of Law and Soc at 49-50):

> "More usually each party attempted to get its 'back of order' conditions accepted by the other. Under commercial pressure this system might break down - salesmen trying to meet targets might enter informal contracts without bothering with their terms or engineers more concerned about production than purchasing arrangements might unthinkingly accept the other party's terms. The

significance of what was being done was not always appreciated by the officer concerned despite occasional lectures complete with instructive cartoons provided by purchasing officers. Firms seemed to consider that it was difficult to prevent this sort of breakdown but the majority of contracts were made by each party using his 'back of order' conditions.

This meant that in many cases one party's conditions would not be fully accepted by the other, but the parties would instead exchange conditions. Typically the seller would issue to the purchaser a quotation form backed with his standard conditions, the buyer would reply with an order form with his conditions, and the seller would then acknowledge the order and in doing so refer again to his conditions. This stage would normally complete the exchange. Inevitably the seller's and buyer's conditions would conflict and indeed this was contemplated for most forms contained a condition to the effect that in the case of a conflict that set of conditions would override the other.

The legal effect of such an exchange of conflicting forms is not entirely clear, but is seems most likely that no enforceable contract results: each communication, providing it refers clearly to the standard conditions, is an offer which is refused and replaced by another on different terms, the last one (the seller's 'acknowledgment') remaining an unaccepted offer. If however the other party later does something recognizing the existence of a contract, such as telephoning the seller to press for delivery, he may be held to have accepted that offer, so that the last set of conditions sent may win the day.

There was considerable awareness of the fact that in many cases an exchange of conditions would not necessarily lead to an enforceable contract, and some that the last set of conditions might prevail: one legal adviser had prepared a 'confirmation of order' form to be used to 'get his firm's conditions in last' when buying as well as when selling. But most firms seemed unconcerned about the failure to make a contract. They usually tried to ensure that they referred to their conditions in any written communications, which would prevent the letter "accepting" the other party's terms, but no more, and some were not even concerned with that."

In so far as it is possible to talk in terms of the expectations of the parties in such circumstances it would seem to be possible to draw four main inferences:

1. There are obviously some firms that will be organised sufficiently to try to impose their contractual terms on the other party whatever the circumstances, eg, by rejecting other terms on receipt or/and by continuing to insist upon the operation of their own terms even up to the time of performance.
2. There are probably those who operate in ignorance of, or without paying any regard to, their legal position.
3. Some will be aware that there is a danger that the other parties' terms might prevail and simply "hope for the best".
4. Some may even realise that there is a degree of uncertainty and hope that their good relations with the other party will lead to the satisfactory resolution of any difficulties. Only as a last resort would they regard the invocation of legal technicalities as a means of settling any subsequent disagreement.

There would seem to be two possible ways of dealing with conflicting documents. In the first place it could be argued that the later in time should prevail unless the party which introduced the earlier document continues to insist upon it. If the 'later' party also continues to insist upon his document, a court might be forced ultimately to conclude that there was in fact no contract. However, the 'later in time' approach is certainly justifiable in categories 1 and 3 above, and it might be argued that those in category 2 deserve no better! On the other hand, the same may not be true of category 4, nor, as has been explained, if both parties are in category 1; nor is it necessarily fair in category 2 if the courts are genuinely trying to ascertain the contractual intentions of the parties.

The other possibility is that the courts should take a broader view

and attempt to ascertain the "shared expectations" of the parties. This approach would require that both documents should be taken into account and the attempt made to read them together. Support for it may be found in Anson's Law of Contracts 24th ed (1975) pp 37-8. It would be an appropriate means of resolving those cases mentioned above in which the other approach is unsuitable.

Hitherto the English courts have adopted the first approach, relying upon traditional notions of offer and acceptance, ie, if the "acceptance" is in a form which contains terms different from those on the offeror's form, then it operates as a counter-offer which terminates the original offer. Any further activity in relation to the contract by the original offeror, if it does not expressly revive the original form (when the activity would amount to a new counter-offer), will amount to a tacit acceptance of the terms contained in the counter-offer.

In British Road Services Ltd v A V Crutchley & Co Ltd [1968] 1 All ER 811, BRS brought a consignment of whiskey,worth £9,126, to the defendants' warehouse in Liverpool pending its transhipment by the defendants to the docks. It was unloaded onto a trailer that was left, attached to a tractor unit, in the warehouse for the night. During the night thieves broke in and drove off with the whiskey. BRS indemnified the consignors and then sought to recover that amount from the defendants. The defendants sought to rely upon their conditions which limited their liability. The BRS delivery note contained a clause that all goods were to be carried on the BRS conditions of carriage. This note was then handed to the defendants who would stamp it "Received under AVC conditions". The consequence of this practice was explained by Lord Pearson in the Court of Appeal as follows (at 816-7):

> "The delivery note, thus converted into a receipt note, would be handed back to the plaintiffs' driver and he would bring his load

into the warehouse as instructed by the warehouse foreman. If this had only happened once, there would have been a doubt whether the plaintiffs' driver was their agent to accept the defendants' special contractual terms. This, however, happened frequently and regularly over many years at this and other warehouses of the defendants. Also the defendants' invoices contained the words: 'All goods are handled subject to conditions of carriage copies of which can be obtained on application.' It may perhaps be material to add that the defendants' conditions of carriage were not peculiar to them, but were the conditions of carriage of Road Haulage Association, Ltd. At any rate, I agree with the decision of the judge that the plaintiffs' conditions were not, and the defendants' conditions were, incorporated into the contract between these parties."

In A Davies & Co (Shopfitters) Ltd v William Old Ltd (1969) 47 Knights' LGR 395, the defendant was a building contractor. Certain work on the erection of a new store was to be done by sub-contractors nominated by the architect. The architect instructed the contractors to accept the plaintiffs' tender. The contractors issued the instructions accepting this tender on a form which stated on its face that the order was subject to the terms and conditions overleaf. One of these terms stated that the contractor was only to pay for work done by the sub-contractor once he had received payment from the employer. The judge (Blair J) held that the latter document amounted to a counter-offer which the sub-contractor accepted by commencing to do the work specified. The terms contained in the original tender were therefore inapplicable.

The most recent decision is much stronger authority for the first alternative mentioned above p52 , because it contains an express rejection of the second alternative suggested in Anson. Unfortunately, the case has only appeared in a brief note in the Solicitors' Journal. The facts of Butler Machine Tool Co Ltd v Ex-cell-o Corpn (England) Ltd (1977) 121 So Jo 406 were that S quoted a price of £75,535 for machinery, subject to terms, including a price variation clause, which the document stated were to prevail over any conditions in the buyer's order B subsequently ordered the machine on his own terms and conditions which contained no price variation clause.

S acknowledged this order on the part of B's form provided for this purpose. However, S also included a covering letter relating the form to their earlier quotation. After delivery of the machine S claimed an extra £2,892 on the basis of the price escalation clause. Thesiger J's decision in S's favour was reversed on appeal. Lord Denning MR is reported as saying:

> "the judge had been influenced by the passage, 'battle of forms', in Anson's Law of Contracts, 24th ed (1975) pp 37-8, which suggested that the old view of offer and counter offer should be discarded. Thesiger J had accepted that suggestion, so that the terms of the offer with the price variation clause continued. The passage in Anson went much too far; .... The buyers' order of 27 May 1969 was not an acceptance of the offer of 23 May but a counter offer which was tantamount to a rejection: Hyde v Wrench (1840) 3 Beav 334; the 'counter-offer kills the original offer', per Megaw J in Trollope & Colls Ltd v Atomic Power Constructions Ltd [1963] 1 WLR 333, 337. The contract had been concluded by the acknowledgment on the buyers' terms and conditions. The passage in Anson did not accurately state the law or correspond to commercial reality."

The report is too brief to be quite sure why Lord Denning was so hostile to the suggestion advanced by A G Guest, the current editor of Anson. The criticism that it did not accurately state the law was not altogether certain at the time when the 1975 edition was prepared. The BRS case was based upon the 'cancellation' of the offer by the defendants' receipt stamp. There was no subsequent event upon which the plaintiffs could rely. Nor was Blair J faced with a subsequent event which might have resurrected the original tender (the tenderer's later letter referred to work as already having commenced, ie, the counter-offer had already been accepted). It was the Butler Machine Tool case which took the principle a stage further and suggested that, once the original offer had been rejected by the counter-offer, the later letter from the original offeror could not revivify the terms of that offer.

But what would be the situation if the letter had stated: "While we accept your order, we do so only on the terms set out in our quotation of [whatever the date may have been]"? Would this be sufficient to put the proverbial ball back in the buyer's court?

As far as the other branch of Lord Denning's criticism that Guest's view did not "correspond to commercial reality", one might reasonably retort that the learned Master of the Rolls was ignoring available evidence of that reality. There could come a situation where the parties' insistence on their own terms might lead to the conclusion that no contract had been reached. But what if the (or should one say some such) contract had actually been performed by the parties? Lord Denning's view apparently is that there is no difficulty in deciding which terms governed the agreement carried out. Yet it is worth recalling an earlier case before the Court of Appeal, Mack and Edwards (Sales) Ltd v McPhail Bros, also reported only in the Solicitors' Journal ((1968) 112 So Jo 211). The parties continued their dispute as to whose price should prevail long after the goods had been purchased by the defendant retailer and resold to its customers. In this case, Lord Denning had said, if "the contract had been wholly executory and the goods not delivered, there would be no contract. But when the goods had been delivered, there was in law a necessary implication from the conduct of the parties that a reasonable price was to be paid". One may well ask how this case differs so markedly from Butler v Ex-cell-o where the Court and Lord Denning abritrarily imposed one party's view of the price on the other party.

Conclusions

An admonition that the law and the lawyers who practise it should take more account of the expectations of those who become involved in the operation of its rules may seem trite. Nevertheless we are all guilty of seeing legal rules as self-justifying; the judge, the practitioner, even academics tend to regard some principles from a particular perspective. When the layman asks the question why our answer is framed in terms that have

been learnt rather than thought out for ourselves. The fact that a display in a shop constitutes an invitation to treat, not an offer which the customer can accept, is a typical illustration where the layman may not find our answer convincing.

Where a decision does challenge the axioms of the past, there is bound to be a reaction from those to whom change is unwelcome. Steadman v Steadman is an attempt to bring the legal concept of part performance closer to the layman's conception of what is involved in partially performing his contract. It would seem amazing to our inquisitive acquaintance that the payment of the purchase price in full would not constitute part performance nor would a variety of other acts that did not satisfy the traditional test of identifying a contract concerning a disposition of land.

In the case of "subject to contract" or other similar phrases, is it really the role of the courts to protect a person from having to perform a contract which he has patently entered into and in respect of which sufficient writing exists to render the arrangement enforceable? How can it be said that negotiations are "subject to contract" or "there is no intention to enter into legal obligations" when there is already a contract in existence?

Finally the conflicting documents cases did present the courts with a novel situation. With a characteristic lack of imagination the answer to theproblem was sought in the elementary principles of offer and acceptance. That the variation in possible expectations might make the solution thus provided appropriate in some cases and unsuitable in others is conveniently ignored.

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"To the timorous souls I would say in the words of William Cowper:

'Ye fearful saints fresh courage take,
The clouds ye so much dread
Are big with mercy, and shall break
In blessings on your head.'

Instead of 'saints', read 'judges'. Instead of 'mercy', read 'justice'. And you will find a good way to law reform!"

The Siskina (1977) 3 All E.R. 803 at p.815 per Lord Denning M.R.

"--- I am clearly of opinion that we should not allow the urgent merits of particular plaintiffs to tempt us to assume the mantle of legislators. The clouds in my Lord's adaptation of William Cowper may be big with justice but we are neither midwives nor rainmakers."

The Siskina (supra) at p.821 per Bridge L.J.

CONTRASTING ATTITUDES

In the 21st Edition (1959) of Anson's Law of Contract, Professor Guest stated at p.163 that "The older theory of freedom of contract presupposed that any party to a contract was free to choose whether or not he would enter into it. If, therefore, he chose to enter into a contract which was onerous to him he had only himself to blame. The Courts would not interfere. But the emergence of standard form contracts has quickly dispelled this idea of contractual freedom, and it is now seen that the bargaining powers of the parties may be so unequal that one can virtually dictate terms to the other." He went on to say, quoting Bramwell L.J. that, "there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document (the contract) and not insisting on its being read - no condition not relevant to the matter in hand." He quoted further the opinion of Denning L.J. (as he then was) "that an unreasonably onerous term in a standard

form contract would not be enforced by the Courts, for 'there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused'."

In the 24th Edition (1975) of the work, Professor Guest said at p.157, "Assuming that reasonably sufficient notice of a standard form contract has been given to the person who receives the printed document, we must now consider the way in which the terms of the document are to be construed. Such is the disparity between the bargaining power of industrial monopolistic concerns and the individual that terms are often imposed upon him which are onerous or unfair in their application and which exempt the deliverer of the document, either wholly or in part, from his just liability under the contract. Yet a strict adherence to the doctrine of 'the sanctity of contracts' has constrained the Courts to give effect to these terms. --- Nevertheless, in construing exemption clauses, the judges have been conscious of the social considerations involved and have made use of certain canons of construction which normally work in favour of the individual and against the person seeking to claim the benefit of the exemption."

The struggle between the concept of freedom of contract and the desire of Courts to ensure that what seemed to them to be unfair conditions in a contract did not operate adversely against the party to the contract in the weaker position led to the evolution of the doctrine of fundamental breach. The doctrine has been invoked primarily in relation to clauses in a contract which exempt from liability the party in the stronger position who fails to perform his contract for whatever reason.

GENESIS OF THE DOCTRINE

The doctrine appears to have been stated first in precise terms by Devlin J. in Smeaton Hanscomb & Co., Ltd. v. Sassoon I. Setty Son & Co. (1953) 2 All E.R. 1471 (Setty's case). At p.1473, when dealing with an

exception clause, his Lordship said, "It is, no doubt, a principle of construction that exceptions are to be construed as not being applicable for the protection of those for whose benefit they are inserted if the beneficiary has committed a breach of a fundamental term of the contract, ---".

His Lordship naturally sought to establish its impeccable pedigree and, following immediately upon the passage just quoted, said that "a clause requiring the claim to be brought within a specified period is to be regarded as an exception for this purpose: see Atlantic Shipping & Trading Co. v. Louis Dreyfus & Co. (1922) 2 A.C. 250. In that case, the fundamental term was the implied condition of seaworthiness, which is treated, as Lord Sumner said as 'underlying the whole contract of affreightment'. The same principle has been applied to cases of deviation and other fundamental terms. I do not think that what is a fundamental term has ever been closely defined. It must be something, I think, narrower than a condition of the contract, for it would be limiting the exceptions too much to say that they applied only to breaches of warranty. It is, I think, something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates."

The origin of the term "fundamental breach" may perhaps be found in the whole sentence from the speech of Lord Sumner of which part is quoted above. It read "Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability - namely, that the shipowners shall have provided a seaworthy ship." Lord Sumner's underlying implied condition has much at least in common with a fundamental term. The close relationship between the two is seen when the next sentence in the speech of Lord Sumner is taken into account. "If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case."

Of the principle of construction referred to by Devlin J. (supra), Lord Reid said in Suisse Atlantique Societe d'Armenent Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale (1967) A.C. 361 (Suisse Atlantique), "It is true that Lord Devlin says that he is applying a principle of construction but I think that he is really applying a substantive rule of law. He does not reach his conclusion by construing the clause in its context: there is no statement of any reason why the apparently general terms of this particular clause must be cut down or limited so as to make it only applicable to claims in respect of breaches which do not go to the root of the contract or which are not breaches of fundamental terms." at p.400. In fact Lord Devlin had found that there had been no breach of a fundamental term or fundamental breach in Setty's case and it seems, therefore, possible that he at least impliedly used the principle he enunciated as a method of construction although the reasons for judgment do not set out the steps by which he applied the principle.

The deviation cases referred to by Lord Devlin are referred to by Lord Atkin in Hain Steamship Co. v. Tate & Lyle, Ltd. (1936) 2 All E.R. 597 at p.600 in the following terms. "In other cases where the effect of deviation upon the exceptions in the contract had to be considered language is used which (it is) argued shows that the sole effect is as it were to expunge the exceptions clause, as no longer applying to a voyage which from the beginning of the deviation has ceased to be the contract voyage. I venture to think that the true view is that the departure from the voyage contracted to be made is a breach by the shipowner of his contract, but a breach of such a serious character that however slight the deviation the other party to the contract is entitlted to treat it as going to the root of the contract, and to declare himself as no longer bound by any of its terms. I wish to confine myself to contracts of carriage by sea: and in the circumstances of such a carriage I am satisfied that by a long series of decisions any deviation constitutes a breach of contract of this serious

nature. The same view is taken in contracts of marine insurance where there is implied an absolute condition not to deviate. No doubt the extreme gravity attached to a deviation in contracts of carriage is justified by the fact that the insured cargo owner when the ship has deviated has become uninsured. It appears to me inevitable that a breach of contract which results in such momentous consequences well known to all concerned in commerce by sea should entitle the other party to refuse to be bound."

Another of the forebears of the doctrine was the rule in bailment cases that if a bailee elects to deal with the property entrusted to him in a way not authorised by the bailor, he takes upon himself the risks of so soing. Lilley v. Doubleday (1881) 7 Q.B.D. 510.

FLAWS IN THE PEDIGREE?

Although undoubtedly Courts in England have set their face against exemption clauses, yet they have not until the advent of the doctrine of fundamental breach regarded such clauses as incapable of exempting a contractor from liability however it might have arisen under the contract. As far back as 1910 in Wallace, Son & Wells v. Pratt & Haynes (1910) 2 K.B. 1003, Fletcher Moulton L.J. said at p.1016 in a judgment which was approved by the House of Lords (1911) A.C., "It would require express language in any contract to indicate any intention of negativing a right to damages for the breach of an obligation imposed by it, and I can find in the present contract no trace of any such language." In a passage which clearly represented the view of the House, Lord Loreburn L.C. said at p.396 of the report, "But if it is desired by a seller to throw the risk of any honest mistake onto the buyer, then he must use apt language, and I should have thought the clearer he tries to make the language the better."

The same view as to the possibility of an exemption clause operating to free one of the contracting parties completely from liability for damage is expressed in Tozer Kemsley & Millbourn (A'Asia) Pty. Ltd. v. Collier's Interstate Transport Service Limited, 94 C.L.R. 384. At p.394 Dixon C.J. said, "--- exemption clauses of this sort are construed strictly and in the absence of express words or necessary intendment it would be going too far to construe the clause as excusing loss by misdelivery or delivery to an unauthorized person."

It is true that the clauses where a bailee's liability were construed in his favour seem to have been almost universally those where negligence against him was found. Indeed this was the case in J. Spurling, Ltd. v. Bradshaw (1956) 2 All E.R. 121 where Denning L.J., adopting enthusiastically the doctrine of fundamental breach when he said at p.124, "All these exempting clauses are held nowadays to be subject to the overriding proviso that they avail to exempt a party only when he is carrying out his contract, not when he is deviating from it or is guilty of a breach which goes to the root of it", was constrained, as were the other members of the Court of Appeal, to find in favour of the bailee on the ground that the exemption clause operated to exclude its liability for negligence. Deviation on the voyage cases were clearly in a class of their own with special circumstances obtaining. See the dictum from Lord Atkin's speech in the Hain Steamship Co. case where he confines himself to contract of carriage by sea. It must be conceded, however, that "deviation" has come to be used to describe a departure by a carrier from his geographical route and also other radical breaches of his contract and the warehouse cases have developed along parallel lines. Suisse Atlantique per Lord Upjohn at p.424. See also Thomas National Transport (Melbourne) Pty. Ltd. v. May & Baker (Australia) Pty. Ltd., 115 C.L.R. 353 (T.N.T.) per Windeyer J. at p.381. Even the unseaworthiness cases do not, it is submitted, mean necessarily that an unseaworthy ship is ground for repudiation on the basis of

fundamental breach. See HongKong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. (1962) 2 Q.B. 26. In that case a ship proved unseaworthy for a substantial time because of the inadequacy at the relevant time of its machinery and the inefficiency of its engine room staff particularly of its chief engineer who was addicted to drink. Nevertheless its unseaworthiness was not found to constitute a ground for repudiation on the basis that it breached a fundamental term.

AUSTRALIAN CASES

In Davis v. Pearce Parking Station Pty. Ltd. 91 C.L.R. 642 the High Court gave the protection of an exemption clause which although in terms not precisely excluding liability for negligence was found sufficient to do so. The Court took the view that it has never been doubted that a bailee may exempt himself by express contract from the consequences of negligence on the part of himself or his servant but that it has been repeatedly said that an exemption clause must be construed strictly, and that clear words are necessary to exclude liability for negligence. At p.649. The Court did go on to say at p.653, "It is clear that there may be in a contract of bailment special and essential terms, express or implied, breach of which will not be covered by an exemption clause in general terms:" The inference seems plain that the contracting parties might include in the contract an exemption clause in special terms to relieve from liability breaches for special or essential terms.

Then, in West v. Sydney City Council, 82 W.N. (N.S.W.) 139 the Full Court of the Supreme Court of New South Wales decided, following Davis v. Pearce Parking Station Pty. Ltd. (supra) that the exclusion clause on the parking ticket given the car owner plaintiff was effective to absolve the Council defendant, the parking station owner, from liability for negligence but that in permitting an unauthorized stranger to take the plaintiff's car from its custody and in permitting the thief to leave with

nothing but an authority to take possession of some other vehicle, the Council had committed a fundamental breach of the contract and, accordingly, could not rely on the exclusion clause. The Court followed both Setty's case and J. Spurling Ltd. v. Bradshaw (supra). It is not altogether clear from the reasons for judgment that the Full Court was following the dictum of Lord Devlin on the basis that it was a rule of law or on the basis that it was a rule of construction but it is submitted that the better view is that it was following it as a rule of law. Certainly in the circumstances it applied the dictum. When the case came before the High Court, sub. nom. The Council of the City of Sydney v. West, 114 C.L.R. 481, Barwick C.J. and Taylor J. found difficulties in solving the problem in the way in which it was solved by the Full Court and in understanding precisely what was meant by the expression "fundamental term". Kitto J. said at p.493, "The protective clause applies in terms to the loss of or damage to the vehicle however caused. If it be taken literally it saves the appellant from responsibility on any ground at all for loss of or damage to the vehicle. But it cannot possibly be taken literally, for no one would suppose that the parties as reasonable persons could have meant thereby to give the appellant carte blanche to destroy or damage the vehicle deliberately. The problem is to determine the extent of protection it gives, bearing in mind two things. One is that stipulations of this character, being framed as a rule by the party to be protected and in any case being inserted in his favour, are to be construed strictly. The other is that on established principles of interpretation an unexpressed qualification is not to be implied unless the implication is necessary, in the sense that it introduces only what is 'so obvious that it goes without saying'." It is clear that the High Court in West's case was treating the question of fundamental breach as a matter of construction rather than as a rule of law.

"FUNDAMENTAL BREACH" and 'FUNDAMENTAL TERM"

In Suisse Atlantique at pp.421 and 422, Lord Upjohn defined 'fundamental breach' as "a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case. The innocent party may accept that breach or those breaches as a repudiation and treat the whole contract at an end and sue for damages generally or he may at his option prefer to affirm the contract and treat it as continuing on foot in which case he can sue only for damages for breach or breaches of the particular stipulation or stipulations in the contract which has or have been broken."

He defined 'fundamental term' as "a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that any breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a fundamental breach and thus is conferred on him the alternative remedies at his option that I have just mentioned."

The distinction is fine but it seems clear that a fundamental term is by Lord Upjohn equated to a condition in a contract using the word 'condition' in its technical sense. Depending upon the terms in which the parties have chosen to contract, such a breach of condition or breach of a fundamental term may not really affect the whole substance of the contract so as, for example, to destroy its subject matter. Simplistically, fundamental breach may, it would seem, be described as that sort of a breach which in fact does go to the root of the contract so that in a real sense it may be said to destroy the subject matter of the contract whether in fact actual

destruction takes place or not. The propositions just set forth are intended as illustrative only and do not purport to comprehend the complete range of matters which might be held to come within the connotation of the two terms as defined by Lord Upjohn.

It is submitted that the discussion on fundamental breach in Suisse Atlantique is obiter having regard to the circumstances of the case but the propositions set out therein would, it is submitted, necessarily be adopted by the High Court consistently with the views expressed by it in West's case (supra), T.N.T. (supra) and H. & E. Van Der Sterren v. Cibernetics (Holdings) Pty. Ltd. 44 A.L.R.J. 157, with one exception.

In T.N.T., Windeyer J. summarised the effect of Suisse Atlantique in the following terms:-

"(The) judgments (of their Lordships) all confirm me in the view that a question such as we have in this case is to be resolved by construing the language that the parties used, read in its context and with any necessary implications based upon their presumed intention. It is not to be resolved by putting exemption clauses into a position of peculiar vulnerability. There are, however, certain established rules of law that must govern their interpretation."

"The first is that an 'exemption clause' -- is ordinarily construed strictly against the proferens, the party for whose benefit it is inserted."

"Secondly, it is not construed as relieving him against liability for the negligence of himself or his servants, unless it expressly or by implication covers such liability."

"Thirdly, there is a rule or guide to construction which has in recent writings sometimes been treated as absorbed within the generalised modern term 'fundamental breach', but which is itself far from new. It is that a condition absolving a party from liability, in particular exonerating a bailee from liability for the loss of goods in his care, is construed as

referring only to a loss which occurs when the party is dealing with the goods in a way that can be regarded as in intended performance of his contractual obligation. He is not relieved of liability if, having obtained possession of the goods, he deals with them in a way that is quite alien to his contract. This doctrine --- was referred to by Scrutton L.J. in the well-known passage in Gibaud v. Great Eastern Railway Co. ((1921) 2 K.B. 426 at p.435):

> 'The principle is well known --- that if you undertake to do a thing in a certain way, or to keep a think in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it.'

The last words, 'in the way in which you had contracted to do it' are critical."

Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co. Ltd.

In this case reported (1970) 1 Q.B. 447 the defendants contracted to design and install equipment in the plaintiffs' factory for storing and dispensing a heavy wax which had to be liquefied under heat for the manufacturing process. The contract incorporated printed conditions one of which provided that the defendants would indemnify the plaintiffs against direct damage "to your property ... caused by the negligence of ourselves or of our servants ... but not otherwise, provided always that our total liability for loss damage or injury shall not exceed the total value (£2,330) of the contract. As a result of the defendants' negligence the plaintiffs' factory burnt down. There was a clause fixing the time for taking over and the indemnification clause just referred to was to operate until the takeover (as it was found). There

was a further clause which in substance provided that in lieu of any warranty condition or liability implied by law the liability of the defendants in respect of any defect in or failure of the goods supplied or for any loss injury or damage attributable thereto was limited to making good by replacement or repair defects which, under proper use, appeared therein and arose solely through faulty design, materials, workmanship within a period of twelve calendar months after the takeover.

The defendants left solid stearine in plastic pipes. To ensure that the stearine would be liquid at the appropriate time a heating tape wrapped round the plastic pipes was turned on late in the afternoon and left overnight. The plastic pipe became distorted under heat, the thermostat did not work, the pipe sagged, cracks appeared and the stearine escaped and became ignited.

In his reasons for judgment, Lord Denning M.R. dealt with fundamental breach under two headings. The first was where the contract was still open to be performed. In those circumstances he held that a fundamental breach gave the innocent party when he got to know of it an option either to affirm the contract or to disaffirm it. If affirmed, it remained in being for the future on both sides with each having a right to sue for damages for past or future breaches. If disaffirmed then the contract was at an end from that moment, there being no right to sue for future although there was for past. This analysis seems, it is submitted, to be equivalent to the analysis by Lord Upjohn of a fundamental term. He classed the second group as that which brings the contracts to an end, there being no room for any option in the innocent parties. At p.465 he, referring to the first group (which it is submitted ought to be equated to cases where breach of a fundamental term is found), said that it is settled that once the innocent party accepts the fundamental breach the guilty party cannot rely on the exclusion or limitation clause. In support of this statement he quoted dicta from the speeches of Lord Reid and Lord Upjohn in

Suisse Atlantique. It is not, it is submitted, possible to say of those dicta that they do not support the proposition put by Lord Denning. However, Viscount Dilhorne said at p.392, "In my view, it is not right to say that the law prohibits and nullifies a clause exempting or limiting liability for a fundamental breach or breach of a fundamental term. Such a rule of law would involve a restriction on freedom of contract and in the older cases I can find no trace of it.

At p.399 Lord Reid said, "It cannot be said as a matter of law that the resources of the English language are so limited that it is impossible to devise an exclusion clause which will apply to at least some cases of fundamental breach without being so widely drawn that it can be cut down on any ground by applying ordinary principles of construction. So, if there is to be a universal rule that, no matter how the exclusion clause is expressed, it will not apply to protect a party in fundamental breach, any such rule must be a substantive rule of law nullifying any agreement to the contrary and to that extent restricting the general principle of English law that parties are free to contract as they may see fit. There is recent authority for the existence of such a rule of law but I cannot find support for it in the older authorities." This passage must, it is submitted, take precedence over the view Lord Reid expressed at p.398 of the report and which was referred to by Lord Denning in Harbutt's case at p.465.

Lord Upjohn does not really seem to dissent from the views just quoted but points out at p.426 that "In very many of the cases which were cited to your Lordships there was no question of any election by the innocent party either to affirm or disaffirm the contract when the other party had committed a fundamental breach."

It is submitted, therefore, that on a proper view of Suisse

Atlantique, there is no support for the view, despite what Lord Denning said in Harbutt's case, that once an innocent party discovered a case of fundamental breach which does not automatically bring the contract to an end the guilty party cannot rely on the exclusion or limitation clause. Such a clause would have to be drawn with great precision to meet the circumstances which would have arisen when the matter came to be litigated but it must surely be possible to draft a clause which would, for example, say that notwithstanding that it might be hereinafter found that the, e.g., bailee had committed a fundamental breach of the contract or was guilty of breach of a fundamental term of the contract he was nonetheless exempt from liability. Into this general category of exemption clauses comes the clause requiring claims to be made within a particular period as in Van Der Sterren's case (supra).

If the proposition laid down by Lord Denning that the guilty party cannot rely on the exclusion or limitation clause be correct, it is submitted tentatively that there may be some difficulty in reconciling the proposition with the unanimous decision of the House of Lords in Heyman v. Darwins Ltd. (1942) A.C. 356. However, Atlantic Shipping & Trading Co. v. Louis Dreyfus & Co. (supra) should be noted in this context because there a shipowner was held not entitled to the benefit of a clause in the following terms, "Any claim must be made in writing and claimants' arbitrator appointed within three months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred.". Speaking for the majority of the House of Lords, Lord Sumner said, however, "If this clause had been a mere reference to arbitration and had stopped there, I do not think it would have been hit." Although the case just cited does not appear to have been mentioned in Heyman v. Darwins Ltd., it appears not to be, therefore, inconsistent with it.

Photoproduction Ltd. v. Securicor Transport Ltd.

Photoproduction Ltd. v. Securicor Transport Ltd. (1978) 1 W.L.R. 856

was concerned with the destruction of a factory caused by a fire set deliberately by a patrolman employed by the defendants, a night patrol security service, who purported to relieve themselves from liability for damages to the extent set out in the following clause of the contract between the parties:

"Under no circumstances shall the company be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer; nor, in any event, shall the company be held responsible for: (a) Any loss suffered by the customer through ... fire or any other cause, except insofar as such loss is solely attributable to the negligence of the company's employees acting within the course of their employment."

Lord Denning at p.865 after consideration of the two methods of approach (whether by rule of law or by construction of the contract) reached the conclusion that the Courts were now in a position to say that there was a principle which lay behind all the striving (cases). The principle is this. "the court will not allow a party to rely on an exemption or limitation clause in circumstances in which it would not be fair or reasonable to allow reliance on it: and, in considering whether it is fair and reasonable, the court will consider whether it was in a standard form, whether there was equality of bargaining power, the nature of the breach, and so forth." He posed the question at p.866, "Is it fair or reasonable to allow Securicor to rely on this exemption or limitation clause when it was their own patrolman who deliberately burned down the factory?" He went on to say, "I do not think it is fair and reasonable. I would, therefore, allow the appeal and enter judgment for the plaintiffs."

Shaw L.J. took the view at p.867 that where there is not merely a simple failure in performance but a breach repugnant to and destructive of the whole object and purpose of a contract, recourse can

not be had by the party at fault to any contractual provision which provides for exemption from or limitation of liability. With respect, the view would appear, it is submitted, to be inapplicable in Australia if, indeed, following Suisse Atlantique, it is properly applicable in England.

Waller L.J. at p.871 considered that the argument advanced in Harbutt's case, that the exceptions clause did not apply because on fundamental breach the guilty party could not rely on an exception or limitation clause was not following the House of Lords, was unacceptable.

It is conceded that the final result in Photoproduction Ltd. v. Securicor Ltd. would probably be the same in Australia on the basis that the deliberate destruction of the factory to be guarded could not be thought to be within the contemplation of the parties at the time they entered into their contract. But that is to give effect to the construction rule rather than to the rule of law rule and it is submitted is the appropriate way.

Leave to appeal to the House of Lords has been given and, having regard to the amount in issue, no doubt the House will consider the matter. It is to be hoped that the House of Lords, which now has the chance to consider directly, and not under the shadow of obiter, the question of fundamental breach will resolve finally the situation.

THIRD PARTIES TO A CONTRACT

The topic which I had initially chosen for this paper was a consideration of the recent High Court decision in Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Aust.) Pty Ltd (1978) 18 A.L.R. 333, a case concerned with the ability of a stevedore to take the benefit of an exclusion clause contained in a bill of lading, which had been concluded between a shipping company and the consignors of goods on the ship. I quickly realized, however, that too detailed a discussion of the rights and obligations of stevedores and shipping companies is not entirely apposite in an inland city like Canberra. It is, however, relevant, I think, to consider the case in a somewhat broader context. A majority of the High Court said, in that case, that a stevedore is, in principle, able to rely on an exclusion clause which is contained in a contract to which he is not, apparently, a party, and it was this point which led to my more general consideration, which is whether the Salmond & Spraggon case has any effect on the doctrine of privity, and whether the decision heralds another means by which a person may seek enforcement of a contract to which he is not a party.

One must, therefore, spend some time considering the Salmond & Spraggon case, but it is best, perhaps, to start by putting it in context. The attempts by persons not parties to shipping contracts to obtain the benefit of exclusion clauses in these contracts first surfaced before the courts in Adler v. Dickson [1955] 1 Q.B. 158. Mrs Adler, a passenger on board the Himalaya, was successful in her action against the master and boatswain of the ship, because, the Court of Appeal held, the company was not sufficiently explicit in drafting its exclusion clause to include its servants and agents. Similarly in Wilson v. Darling Island Stevedoring Co. Ltd (1955) 95 C.L.R. 43 before the High Court and in Scruttons Ltd v. Midland Silicones Ltd [1962] A.C. 446 before the House of Lords, stevedores were held unable to rely on shipping companies' exclusion clauses because, inter alia, the clauses were expressed as giving protection only to the "carrier", and not to its servants, agents or independent contractors.

However, in the Midland Silicones case Lord Reid suggested a possible way of assisting such persons, by so drafting the exclusion

clause that it creates in effect a second contract directly between the stevedore (or other "outsider") and the consignee or passenger. A clause that attempted to do this was the subject of the next landmark decision, New Zealand Shipping Co. Ltd v. A.M. Satterthwaite & Co. Ltd [1975] A.C. 154 before the Privy Council. The clause had apparently been drafted before the Midland Silicones case was decided (see Lord Simon, [1975] A.C. at p. 183A), and therefore without the benefit of Lord Reid's advice. Nevertheless, Beattie J. in the Supreme Court of New Zealand, and a majority of the Privy Council, held that the wordin of the clause was sufficient to create such a second contract between the stevedore and the consignee. The former could thus rely on the time-limitation clause set out in the bill of lading, incorporated by reference into this separate contract.

The Privy Council analysed the creation of this contract (per Lord Wilberforce, [1975] A.C. at pp. 167-168) by saying that

> "the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between [the consignee] and [the stevedore], made through the [shipping company] as agent. This became a full contract when the [stevedore] performed services by discharging the goods. The performance of these services for the benefit of [the consignee] was the consideration for the agreement by [the consignee] that [the stevedore] should have the benefit of the exemptions and limitations contained in the bill of lading."

. . . . . .

The dissenting members of the Privy Council, Viscount Dilhorne and Lord Simon of Glaisdale, were unable to agree with the majority principally because they did not see the wording of the bill of lading as apt to create such a second contract. It appears that both would have been prepared to hold in favour of the stevedore, if the clauses of the bill of lading had been more carefully drawn (see Viscount Dilhorne [1975] A.C. at p. 170 H and Lord Simon, ibid., at p. 183A-B).

In two subsequent cases at first instance, stevedores attempted to rely on this decision, but without success. In the Supreme Court of New Zealand (Herrick v. Leonard & Dingley Ltd [197 2 N.Z.L.R. 566) McMullin J. held that the document equivalent to the bill of lading did not refer to, nor attempt to include,

independent contractors such as the defendant stevedore; in the Supreme Court of British Columbia (Calkins & Burke Ltd v. Empire Stevedoring Co. Ltd [1976] 2 Lloyd's Rep. 609) Schultz J. held that the shipping company had not been given the necessary authority by the stevedore to make any contract of exemption on its behalf.

It was in the context of these decisions, and especially of the Privy Council decision, that the Salmond & Spraggon case was argued. At first instance in the New South Wales Supreme Court, Sheppard J. considered himself bound by the Privy Council decision, and regarded the bill of lading before him as being indistinguishable from that before the Privy Council (see transcript of judgment, p. 11). He therefore came to the conclusion that the stevedores were able, in principle, to take the benefit of the exclusionary clauses in the bill of lading, and that these clauses applied to the particular loss complained of. The N.S.W. Court of Appeal reversed this decision, on the ground that the stevedores had not discharged the burden of proving that they had provided consideration for their separate contract with the consignee ([1977] 1 Lloyd's Rep. 445). Their Honours held that the stevedores were bound, under their contract with the shipping company, to unload the goods, and had not shown that they knew of, or relied on, any offer of exemption made to them by the consignee. An appeal by the stevedores to the High Court was unsuccessful ((1978) 18 A.L.R. 333), but the reasoning of the Justices was far from unanimous.

The two major arguments before the High Court were, first, whether the stevedores could ever, in principle, rely on an exclusion clause contained in a contract to which they were not apparently a party and, secondly, whether the particular clause in this case still operated even though the loss occurred after the goods had been unloaded and while they were stored on the wharf. Barwick C.J. answered both questions in favour of the stevedores and would have allowed the appeal. Mason and Jacobs JJ., in a joint judgment, concluded that there was a separate contract between the stevedores and the consignees, and thus decided the first question in favour of the stevedores (18 A.L.R. at p. 367). Their ultimate decision, however, was against the stevedores because they considered that the loss occurred after the contract of carriage

was at an end. Stephen J. concurred with the views of the minority in the Privy Council case (18 A.L.R. at p. 355) that the clause before him was not capable of creating a separate contract between stevedore and consignee, and he went on (ibid., at pp. 355-357) to indicate policy reasons for limiting such a device of construction in the particular field of the carriage of goods by sea. Murphy J. likewise felt that for policy reasons related specifically to the overseas carriage of goods and the stevedoring industry "a contract should not be conjured up out of the circumstances in order to extend the exemptions and immunities under the bill of lading to the stevedore." (18 A.L.R. at p. 376). However, it will be realised that despite the actual decision of the High Court, a majority comprising Barwick C.J., Mason and Jacobs JJ. were of the view that a third party may take the benefit of a contract to which he is not apparently a party, and that the minority's objections to such a result were based almost exclusively on the facts that the third party was a stevedo and that the benefits it was taking were those contained in exclusion clauses.

It could thus be said that the High Court's decision, together with that of the Privy Council, herald a new means of creating a contract which is enforceable by the third party. The particular device used, of finding a separate contract between the third party and the promisor, is one that has already found academic favour in relation to another apparent exception to the privity rule, that of banker's commercial credits. Without going into the details of these arrangements, they are a means whereby a buyer of goods contracts with a bank for the latter to provide payment for the goods to the seller and the seller, though not a party to that contract, is able to enforce it against the bank. In the 3rd Australian edition of Cheshire & Fifoot (pp. 519 522, and especially at p. 521) it is suggested that this may be an exception to the rule of privity based on commercial convenienc and custom. In the 9th edition of the parent work, however, (p. 5 the topic is dealt with solely as an illustration of a unilateral contract of the type made famous by Carlill v. Carbolic Smoke Ball Co. [1893] 1 Q.B. 256. The seller's ability to sue the bank is seen, in other words, as resting on a basis to all intents the same as the ability of a stevedore to rely on a shipping company's

exclusion clauses.

Another, and more direct, means of enabling a third party to sue on a contract made in his favour is contained in the legislation of Western Australia and Queensland. Section 11(2) of the Property Law Act 1969-1973 (W.A.) provides, in brief substance, that

> "... where a contract expressly in its terms purports to confer a benefit directly on a person who is not named as a party to the contract, the contract is, subject to sub-section (3) of this section, enforceable by that person in his name...."

Subsection (3) goes on to state that such a contract may be cancelled or modified by the parties thereto at any time before the third party has adopted it either expressly or by conduct. Section 55 of the Property Law Act 1974-1975 (Qld) is to a similar effect, although expressed more fully, in that it requires a promise

> "to do or to refrain from doing an act or acts for the benefit of a [third party] beneficiary"

and that such a promise is enforceable by the beneficiary only upon the latter's acceptance by words or conduct communicated to the promisor.

Both of these legislative provisions, it is suggested, are very similar in result to the views of the High Court in the Salmond & Spraggon case; the Justices there stress the need for an express conferral of a benefit on the third party and some members of the Court, as we have seen, refused to imply any third party promise from the words used. Likewise, the legislative requirement of "adoption" or "acceptance" is very similar to the judicial requirement of acceptance of the separate offer to the third party.

But in this very similarity one can see a strong argument for saying that neither the High Court decision nor the W.A. legislation, at least, have any real effect on the doctrine of privity, in that both require the benefit to the third party to be granted by express terms. As Myers J., writing extra-judicially ("Third Party Contracts" (1953) 27 A.L.J. 175, at p. 177) has already pointed out, it is likely only to be persons who are

professionally advised who would ensure that their contract fulfilled this requirement. But such persons could in any event achieve their desired end by expressly constituting the promisee under the contract a trustee of the promise contained therein, or by following the suggestion of Barwick C.J. and Windeyer J. (in Coulls v. Bagot's Executor & Trustee Co. Ltd (1967) 119 C.L.R. 480, at pp. 478-479 and 492-493 respectively) and ensuring that the so-called "third party" is a joint promisee in the contract.

If the doctrine of privity is truly to be subverted, the conferral of an enforceable benefit on the third party must be capable of being implied into a contract rather than be stated expressly. To this end the Queensland legislation, in s. 55(6)(c)(ii), includes as enforceable third-party promises, any promise which

> "appears to be intended to create a duty enforceable by a beneficiary."

The Queensland Law Reform Commission, in their Report on the Bill which became the Property Law Act (see Q.L.R.C. 16, at pp. 39-40) considered this addition to be advisable, since it felt that not every contract which ought quite properly to be enforceable by a third party may necessarily spell that intention out, in the express words used, with sufficient clarity.

To indulge in a little crystal-ball gazing, one might ask whether the courts, developing from the Salmond & Spraggon case, might in future be prepared to imply into other and different kinds of bilateral contracts a separate contract which provides a third party with a means of enforcement. In Salmond & Spraggon itself, as I have already mentioned, Murphy J. said (18 A.L.R., at p. 376) that

> "a contract should not be conjured up out of the circumstances in order to extend the exemptions and immunities under the bill of lading to the stevedore."

But would he, and his brethren, be willing to "conjure up" a contract in order to allow a man to enforce against his father-in-law a promise made to the man's father to pay him £200 (cf. Tweddle v. Atkinson (1861) 1 B. & S. 393)?

The pessimists would be likely to respond in the negative, and point to the example of the use of the trust to subvert the

doctrine of privity. Starting with Tomlinson v. Gill (1756) Amb. 330 and going through to Les Affréteurs Réunis S.A. v. Leopold Walford (London) Ltd [1919] A.C. 801, the courts were quite ready, as occasion demanded, to imply into a contract a trust of the major contractual promise and thus enable the third party, as cestui que trust, directly to enforce its terms against the promisor. But since the Walford case the popularity of this device has waned and as long ago as 1944, in Re Schebsman [1944] Ch. 83, at p. 104, du Parq L.J. commented;

> "It is true that, by the use possibly of unguarded language, a person may create a trust, as M. Jourdain talked prose, without knowing it, but unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention."

In the light of that development, it is quite fair to suppose that any other judicial attempts to outflank the doctrine of privity by means of implications are unlikely to succeed.

To this the optimists might respond by taking a broader view, and a comparative approach - by suggesting that Salmond & Spraggon is but one step in a progression towards complete recognition and enforcement of third party contracts. In this, they would no doubt point to the Queensland legislation as being the simple solution to the problem. But they might also point to the process of judicial development in the United States as an indication of the way in which our law might develop. Starting last century from a position similar to that in Tweddle v. Atkinson, the courts in most States have now readily accepted that not only a contract which is expressly for the benefit of a third party may be enforced by him, but also one that is impliedly for his benefit is equally capable of enforcement. The jurisprudence on this topic is understandably of considerable volume, and I have chosen one, admittedly very extreme, example to indicate the development that has taken place in that jurisdiction. In Olzman v. Lake Hills Swim Club Inc. (495 F 2d. 1333 (1974)), the plaintiff alleged that the defendant had operated its swimming club in a racially discriminatory way. The Federal Court of Appeals for the Second Circuit upheld this claim, partly on the basis that the defendant's actions were

prohibited by the Civil Rights Act of 1866. But it also went on to say that the club permitted its members to bring guests to the pool; this contract between club and member, it was said, was impliedly made for the benefit of such guests, who would be able to enforce a contractual right of entry to the pool. I suggest that a court applying the Queensland legislation could arrive at a similar result, and that other courts in this country, if they are prepared to continue the development and expansion of third-party contracts by whatever means, could also in time reach a similar position.

PRODUCT LIABILITY, MOTOR VEHICLES AND CONSUMER CREDIT LAW REFORMS

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The three subjects discussed in this paper are separate, and are linked only because they form part of a general pattern of consumer protection law within the Territory, and because they have been recently, or are about to be, affected or developed by new legislation.

A. PRODUCT LIABILITY AND MANUFACTURERS' WARRANTIES

The Law Reform (Manufacturers Warranties) Ordinance 1977 came into operation on May 10, 1977. It follows generally the pattern of the South Australian Manufacturers Warranties Act 1974. Its provisions were considered in detail by the Senate Standing Committee on Legal and Constitutional Affairs in 1976, and it is therefore not surprising that the provisions of Part V, Division 2A, which is proposed to be introduced into the Trade Practices Act 1974 by an amending Bill currently before the Parliament, are similar to those of the ACT Ordinance. When the amendments to the Trade Practices Act come into effect, they will, for many purposes, displace the operation of the Ordinance, but there are some differences, and because of the operation of s.75 of the Trade Practices Act, as interpreted in Re Credit Tribunal; Ex parte General Motors Acceptance Corporation Australia (1977) 14 ALR 257, the provisions of the Ordinance may still be important where they differ from those of the Act.

The scheme of both the Ordinance and the measures to be introduced into the Trade Practices Act is to create a notional contractual relationship between the consumer of goods and the manufacturer of those goods as defined in the legislation. Into this relationship the law implies certain obligations on the part of the manufacturer, and these relate to the quality of the goods and the availability of spare parts and facilities for repair.

The effect of such legislation is to create a system of "product liability", which makes the manufacturer liable to the consumer of goods which are defective in specified ways, without proof

of negligence or other fault. Under the Ordinance all that a plaintiff must prove is that he is a "consumer" (for which purpose he may call in aid s.3(2) of the Ordinance), that the goods were sold in the Territory or were delivered in the Territory following a sale in any other place (s.4(1)(a) and (b)) and that there is a breach of an implied warranty (s.4) or an "express warranty", (defined in s.3(1) to include statements made in advertisements and promotional literature by or on behalf of the manufacturer;) (s.5).

1. Application of the Legislation

Each of the sections of the proposed Act (and for convenience the proposed amendments to the Trade Practices Act will be referred to as "the Act" and the Law Reform (Manufacturers Warranties) Ordinance will be referred to as "the Ordinance") provides for liability of the manufacturer to the consumer if and only if:

(i) a corporation (as defined in s.4(1) of the Act; this definition is dealt with at length elsewhere, and will not be further discussed in this paper, except to emphasise the extended definition given to the term "corporation" by s.5, and, in respect to the Capital Territory, s.6 of the Act, so that the term may apply to individual persons) must supply (also defined in s.4) goods manufactured by that corporation, in trade or commerce (another expression dealt with at length in other works on the Trade Practices Act and on consumer protection) to another person who acquires the goods for re-supply (an expression expanded by reference to s.4C);

(ii) a person, whether or not the person who acquired the goods from the manufacturer supplies the goods to the consumer, other than by way of sale by auction;

(iii) there is a breach of the implied warranty; and

(iv) the consumer suffers damage by reason of the breach.

This system of liability is much more complicated than that provided by the Ordinance.

Basically, however, both pieces of legislation seek to erect a system of product liability, (perhaps more accurately described as a system of producers' liability). Both do this, though the system constructed by the Act, by its complexity, may be less effective in a number of ways.

One, for example, is the fact that a large number of retailers (e.g. chain department stores and supermarkets) may be liable as manufacturers under the legislation, because they sell 'house brands', i.e. brands manufactured either wihin or outside Australia, which bear only the brand of the retailer (Act s.74A(3), (5); Ordinance ss 3(1)9,(3)). In such a case, conditions (i) and (ii) above are not complied with, which has the result that if there is liability under the Trade Practices Act, it will be under terms implied by Part V Division 2, rather than Division 2A. This can have an adverse effect on consumers outside the A.C.T. and South Australia, because under Division 2 there are no implied warranties as to repair facilities or spare parts. However, s.6 of the Ordinance expressly provides that the provisions of the Ordinance apply to manufactured goods which are sold directly by the manufacturer to the consumer. Thus a consumer in the ACT who finds a defect in 'house-brand' goods supplied to him may be better advised to frame his action under the Ordinanace than under the Act. There are other differences which may influence the way in which an action by a consumer is framed; some of these will appear later.

The definition of "manufacturer" in the Ordinance (s3(1)) and "manufacture" in s.74A(1) of the Act are important. The relevant provision of the Ordinance reads:

> "manufacturer", in relation to manufactured goods, means -
>
> (a) a person by whom, or on whose behalf, the goods are manufactured or assembled;
>
> (b) a person who holds himself out to the public as the manufacturer of the goods;
>
> (c) a person who causes or permits his name, the name in which he carries on business, or his brand, to be attached to or endorsed on the goods or on any package or other material accompanying the goods in a manner or form that leads reasonably to the inference that

he is the manufacturer of the goods; or

(d) where the goods are imported into Australia and the manufacturer does not have a place of business in Australia - the importer of the goods;

2. Who Benefits from the Legislation?

The class of persons who may be enabled to sue under the Ordinance may be wider than that under the amended Act, for the provisions of the Ordinance relating to the definition of "consumer" were not amended in the same way as similar provisions of the Trade Practices Act: two 1977 amending Acts may have had the effect of significantly lessening the class of persons who may be"consumers" for the purposes of the Act. In addition, the amendments to the Trade Practices Act contain nothing which corresponds to s.3(3)(b) of the Ordinance, which includes within the term "consumer" any person who acquires title through an original purchaser. Both pieces of legislation are, it is submitted, defective, in that the class of potential plaintiffs is unduly restricted. Only those who are at some time purchasers of the goods may take advantage of the legislation, and others who may suffer, usually by way of physical damage, by reason of defects in the goods, are forced to rely on the possibility of a remedy in tort. Because of the evidentiary burden which rests on a plaintiff who seeks to establish either negligence of a manufacturer or some other type of fault, such actions are unlikely to be brought. It would have been desirable, it is suggested, that the legislation would give a right of action, at least in a certain number of cases, to members of the consumer's household, or, preferably, to the public at large. These solutions have been adopted by s.2-318 of the U.S. Uniform Commercial Code, (where they also apply to breaches of contracts for the supply of goods or services) and in the Starsbourg Convention on product Liability in Europe. This question is discussed further in J. Goldring and M. Richardson, "Liability of Manufacturers for Defective Goods" (1977) 51 ALJ 127, 144. The notional contractual relationships created by the new

legislation carries with it the doctrine of privity of contract.

3. Implied Warranties

The terms which are implied into this notional contract are familiar; they are basically similar to those implied under the Trade Practices Act, Part V, Division 2, and the Sale of Goods Ordinance 1954, ss.17-20. There are some changes. The warranties which are implied under the Ordinance, and which will be implied under the amendments to the Trade Practices Act are;

(i) That the goods are of merchantable quality (defined in s.4(2) of the Ordinance and s.74D(3) of the Act; the definition is for all purposes the same as that in s.66(2) of the Act at present. This definition has received some judicial approval in England: see p20 below.

(ii) Where the consumer makes known the purpose for which the goods are required, either directly to the manufacturer or indirectly through the seller, the manufacturer warrants that the goods will be fit for that purpose. Under s.4(1)(d) of the Ordinance the purpose must be made known expressly, but it is irrelevant that the purpose is one for which the goods are normally used. Under the s.74B(1)(c) of the Act the purpose, as in s.71(2) of the Act, may be known either expressly or by implication.

(iii) where the sale or supply of the goods is by description, that the goods will comply with that description (Ordinance s.4(1)(f); Act s.74C).

(iv) where goods are sold by reference to a sample (the sale need not be by sample, as is required under the sale of goods legislation), that the bulk will comply with the sample and will be free from any defect which would not be discoverable upon a reasonable inspection of the sample (Ordinance s.4(1)(e);Act s.74E).

(v) If the goods are of a type likely to require repairs, maintenance, or spare parts, that the spare parts and facilities for repair will be reasonably available (Ordinance s.4(1)(g); Act s.74F).

The defences available to a manufacturer are somewhat wider than those available to a supplier of goods under Part V Division 2 of the Trade Practices Act, especially in relation to the warranty regarding availability of spare parts and facilities for repair. Subject to these defences, contracting out of the implied warranties is prohibited. The Ordinance makes it an offence, punishable by a fine of $1000, to purport to exclude or limit a right or liability and states that 'it is not competent' for a manufacturer so to do. This provision (s.7(1)) is unclear, as it does not clearly state the civil consequences of an attempt to exclude liability under the Ordinance. It would seem that the intention is to render ineffective any attempt to contract out of the liabilities imposed by the Ordinance. Section 74K of the Act, on the other hand does not impose any criminal sanction, but does adopt the relatively clear language of s.68 of the Act which provides that any term of a contract which excludes, restricts or modifies implied term, or purports to or has the effect of so doing is void.

Both the Act and the Ordinance provide that where a seller becomes liable to a consumer for breach of a term implied by law into a contract between them, the seller may recover an indemnity from the manufacturer. Section 8 of the Ordinance provides, quite simply that the manufacturer must indemnify the seller in the amount which the consumer could have recovered against the manufacturer under the ordinance. Sections 74H and 74L of the Act limit significantly the scope of the indemnity that may be recovered. Under s.74H the manufacturer is made liable to the supplier of goods only where the supplier is liable to the consumer under Part V Division 2 of the Act, (and unlike provisions of the ordinance, does not extend to liability under terms implied by any other statute or by the common law,) and only to the extent that the manufacturer himself would be liable in an action under

Division 2A. Section 74L permits the manufacturer to limit his liability to indemnify the seller to replacement of goods, repair of goods, or the payment of the cost of repair or replacement, if such a provision is considered "fair and reasonable" according to the criteria set out in s.74L. These criteria are similar to those provided in s.68A of the Act, inserted late in 1977 in a particularly regressive step. Even if such a provision could be justified in the case of supply of goods or services, e.g. computer software, there is no place for such a provision in legislation which is designed to ensure that both the consumer and the middleman are not saddled with liability as a result of something over which, in most cases under modern marketing conditions, they have no control, namely, the quality of goods, which is usually solely within the control of the manufacturer. The goods generally reach the consumer in the same condition, and in the same, often elaborate packaging, as when they left the factory. The policy of product liability legislation is that manufacturers should bear the liability for defects over which they have control. It is a vital part of the policy that the manufacturer should also bear the burden of insurance, as in theory, the consumer should benefit from cost savings caused by economies of scale in the insurance industry resulting from their being a single liability policy for each manufacturer, rather than a series of such policies held by each supplier, regardless of the size of that supplier.

Another difference in the indemnity provisions is that the Ordinance is silent as to limitation periods in indemnity actions. Presumably the liability to indemnify arises only when the seller becomes liable to the consumer and is governed by the ordinary limitation periods. However, s.74J of the Act provides that actions under Part V Division 2A shall be commenced within 3 years of the date upon which the cause of action accrued; indemnity actions under s.74H are to be commenced within 6 years of the date upon which the cause of action accrued. This provision is ambiguous. A consumer's cause of action presumably arises when the defect becomes reasonably apparent; but a seller's right of indemnity is a cause of action which does not accrue until he is adjudged liable to compensate the consumer, or admits such liability. It would seem that

s.74J(a) is intended to require that indemnity actions should be commenced within 6 years of the defect becoming known to the consumer, but it is strongly arguable that it does not have this effect. Limitation periods are important in product liability law, because it is common that a manufacturer will supply goods to a retailer, and the retailer may retain the goods in his stock for a considerable period before selling them to the consumer. During this period the goods may deteriorate, and manufacturers may argue that it is unreasonable that they should be liable for defects due to such deterioration (for such a case under the sale of goods legislation see George Wills & Co. Ltd. v Davids Pty Ltd (1957) 98 C.L.R. 77).

In addition to the implied warranties, both the Act and the Ordinance create a contractual obligation upon the manufacturer, for the benefit of the consumer, where an 'express warranty' (defined in similar terms in s.3(1) of the Ordinance and s.74A(1) of the Act) has been made by a manufacturer to induce consumers to purchase the goods, to stand by the truth of all statements made in advertisements or promotional material. Section 5 of the Ordinance and s.74G of the Act give a right of action to a consumer if the "express warranty" is not complied with.

Both the Ordinance and the Act (ss9(1) and 74G(2) respectively raise a presumption that where an advertisement, statement in a brochure etc., which would have been an express warranty if made by the manufacturer, was made by the manufacturer; or by his agent. An action by a consumer will succeed on this point unless the manufacturer proves that the statement etc. was not made by him. These provisions must be seen in the context of the criminal and civil liability imposed on all "corporations" as defined in the Act by Part V Division 1, especially in relation to deceptive and misleading conduct.

4. Damages

The system of product liability which has been chosen in Australia is that of contractual liability. This is unusual. In the United States, product liability, though often using expressions like "warrant", is regarded very much as an area

of tort law even though liability is strict; it can be regarded as if the principle res ipsa loquitur had become an irrebuttable presumption of fault of a manufacturer in every case where a product is shown to contain specified defects (see Fleming on Torts, 5th ed., ch.23). French law has a similar concept, and it seems that the law in the German Federal Republic is also moving in this direction. However, some common law jurisdictions in Canada (Saskatchewan also introduced manufacturers' warranties legislation in 1974, and the original idea flows from the report of the Law Reform Commission in Ontario) have chosen to place manufacturers' liability within the area of contract rather than tort. The reason is not difficult to follow. The measure of damages in tort is appropriate for compensation in cases of physical injury. In most cases it is not appropriate in cases where the loss is merely economic; even the decision of the High Court in The Willemstad (1976) 11 ALR 22) limits the area where damages in tort will be awarded for "pure economic loss". However, the contractual rules governing the measure of damages are appropriate to cases of product liability, as, presumably, the damage suffered will not differ markedly from that suffered by a plaintiff in an action for breach of an implied term in a contract of sale of goods. The common law rules as stated in Hadley v Baxendale (1854) 9 Ex 34) are, of course, enshrined in ss.54-56 of the Sale of Goods Ordinance 1954. Thus section 5(1) of the Ordinance provides that the damages recovered under the Ordinance shall be "damages for breach of warranty in all respects as if the action were for breach of warranty under a contract between the manufacturer and the consumer".

The proposed amendments to the Trade Practices Act contain no such provision. In actions for contract, liability is strict, not only in the sense that the plaintiff need not prove fault on the part of the defendant, but also in the sense that he need not prove that he has suffered damage in the same way as a plaintiff in an action of tort must prove damage. Yet each of the sections contained in the proposed Division 2A which imposes liability upon a manufacturer requires the consumer to prove that he has suffered loss or damage by reason of the breach of the implied warranty. No such proof is required in the case of breaches of warranties implied by reason of Part V

Division 2 of the Act, though it is necessary, where a plaintiff claims damages under s.82 of the Act as the result of a contravention of Part V Division 1 (i.e. one of the types of deceptive conduct prohibited by that part) that he must prove loss or damage, which, by virtue of s.4K of the Act. includes physical injury.

The Act does not speak of damages by reference to damages in contract; it is careful to avoid a provision such as s.5 of the Ordinance, using instead the formula "the corporation is liable to compensate the consumer for the loss or damage and the consumer may recover the amount of the loss or damage by action against the corporation in a court of competent jursidiction". However, it is difficult to see what measure of damages could be applied by a court other than the contractual measure of damages.

5. Defences

Both the Act and the Ordinance provide for defences to claims based upon the various warranties deemed to have been made by manufacturers. In the Ordinance, these defences are contained in subsections (3) to (7) of section 4, and, in respect of a manufacturer who gives notice at the time of the sale that certain spare parts or facilities for repair will or may not be available, in s.7(2) and (3). The defences are basically the same. Those in the Act, are, if anything, more comprehensive than those in the Ordinance. For example, it is a defence to a claim for breach of the implied warranty of fitness for purpose under both the Act and the Ordinance if the manufacturer proves that the consumer did not rely, or that it would be unreasonable for him to rely, on the skill and judgement of the seller or manufacturer (ss 74B(2)(b) and 4(1)(d) respectively); it is a defence under the Act, but not under the Ordinance, for the manufacturer to show that the lack of fitness is due to the act of a third person or "a cause independent of human control" after the goods have left the control of the manufacturer (s.74B(2)(a). Indeed, under the Ordinance, the only cases in which the intervention of a third party or another novus actus interveniens will provide a specific defence is in relation to the claim for breach of the warranty of merchantable quality (s.4(3)(a)). By contrast,

such a defence is available under the Act in respect of correspondence with description (s.74C(2)) and of correspondence with samples (s.74E(2)(c)(i)) as well as in respect of fitness for purpose.

Both Act (s.74D(2)(b) and (c))and the Ordinance (s.4(3)(b) and (c) provide that no warrantyof merchantable quality shall be implied if defects are specifically drawn to the consumer's attention before the contract is made, or if the consumer examines the goods before sale, as regards defects which that examination should have revealed.

Section 74E(2)(a),(b) and (c)(ii), of the Act, and s.4(7) of the Ordinance provide a defence in the case of failure of bulk to comply with sample where the sample is not supplied by the manufacturer, or is supplied without his express or implied concurrence or are due to factors beyond his control or which he could not reasonably have foreseen.

In addition to the provisions, already mentioned, which permit a manufacturer to give reasonable notice of the likelihood that spare parts and repair facilities will not be available, (Act s.74F(2) and (3);Ordinance s.7(2) and (3)), s.74F(4) of the Act allows a court to take account of the circumstances which prevented the manufacturer from complying with the warranty if those circumstances are beyond the control of the manufacturer. The effect of s.4(4) and (5) of the Ordinance are of similar effect, except that they provide a clear defence if the circumstances are shown to be beyond the manufacturer's control, and specifically include industrial disputes as a valid reason why the manufacturer should not be held to his warranty.

6. Evaluation

Both the Act and the Ordinance represent a considerable advance in the law, and bring the law to a position where it reflects the true responsibilities of those who engage in the supply of goods in trade or commerce. It is at least arguable that in so doing, the Ordinance is more effective, because it does not permit any restriction or limitation of the manufacturer's

right to indemnify the seller of goods, who, in commercial reality, has no control over the quality, condition, or packaging of most goods offered for sale in modern commerce, and does not limit the seller's right to indemnity to claims under warranties implied by the Trade Practices Act. Because of this, the ultimate burden of insurance will fall on the manufacturer, and should result in a reduced cost to the consumer, because the component of the sale price representing the cost of liability insurance will be smaller. Under the scheme of producers' liability to be created by the Act, it seems that it will be necessary for retail sellers to maintain adequate insurance cover, and this cost will be reflected in the prices paid by the consumer. The Ordinance also gives better protection to consumers of 'house-brand products by giving them a non-excludable warranty of the availability of spare parts and repair facilities.

Because the terms, though not, in most cases, the effect of the warranties implied under the Ordinance differ from those implied under the Act in much the same way as the provisions of the South Australian legislation were found by the High Court in the GMAC case (1977) 14 ALR 257; to differ from the Trade Practices Act. For reasons similar to those found in the GMAC case, it would seem that there is no inconsistency between the provisions of the Ordinance and those of the Act, so that both are available to a consumer, and all ACT consumers should be advised to frame their claims in the alternative.

B. SALE OF MOTOR VEHICLES

In past years, complaints against motor vehicle dealers have formed a large proportion of the work of consumer affairs agencies, no less in the ACT than elsewhere. Until 1977, there was no specific control on the activities of motor vehicle dealers, though NSW and other States have had controls for some time; recent tightening of the controls on the sale of motor vehicles in NSW meant that ACT purchasers who were prepared to go to Goulburn, Yass or Queanbeyan were protected to a greater degree than purchasers who bought motor vehicles in the ACT. The Sale of Motor Vehicles Ordinance 1977 now imposes controls on motor dealers in the ACT which are similar in principle, though different in detail, from those imposed upon dealers in NSW. The scheme of the Ordinance is to require that every motor vehicle dealer be licensed; that dealings in motor vehicles be regulated, and that certain terms and rights be implied into contracts for the sale of motor vehicles, for the benefit of the consumer; that certain information be required to be disclosed by licensed dealers; that certain deceptive conduct by dealers be prohibited; that an informal dispute-settlement procedure be established, and that a fund be established to compensate purchasers who do not receive a clear title to a motor vehicle.

1. LICENSING

Any person who carries on the business of a dealer in motor vehicles in the Territory and who does not hold a licence, is guilty of an offence and liable to a fine of $2000; (s.7). "Dealer" is defined in s.3 as "a person who, either alone or in partnership with another person or other persons, buys, sells or exchanges motor vehicles as a business". Excluded from the definition are car wreckers, "financiers" (defined to include finance companies, and those who let cars on hire to the public) and "exempt traders", who are defined as those who deal in motor vehicles but do not sell directly to, or buy directly from, the public. "Motor vehicle" is also defined in s.3 to include motor cycles and also vehicles powered by steam, electricity or gas.

Unlike the legislation in some other States, the Ordinance applies equally to dealers in new as well as second-hand vehicles.

Either an individual or a corporation is eligible for the grant of a licence. The licensing authority is the Registrar, whose office is established by s.5. To be eligible for the grant of a licence, an individual must be at least 18 years old, be of good fame and character and have sufficient financial resources to carry on business as a dealer, and have not sought relief under a law relating to bankruptcy or insolvency (s.8). A corporation may be granted a licence if each of the directors is of good fame and character, and the company has sufficient financial resources (s.9). Applications for licences must be made to the Registrar in the prescribed form, and must be accompanied by certain particulars prescribed in the Ordinance or Regulations (ss.10, 11). A copy of the application is to be forwarded to the Commissioner of Police who may object to the granting of the licence on the ground that the applicant (or, in the case of a corporation, a director) is not of good fame and character (s.12). No other person is given any statutory right to object to the granting of a licence. Section 13 requires that the Registrar must grant a licence unless there is a failure to comply with the provisions of the Ordinance or the applicant fails to establish his or its eligibility; the Registrar is, however, entitled to require applicants (or directors of applicant corporations) to attend before him or to furnish information. Reasons for the refusal of a licence must be recorded in writing and served on the unsuccessful applicant. Once issued, a licence continues for 12 months; it may be renewed each 12 months, on payment of the prescribed fee (s.14). Section 57 provides for an appeal to the Administrative Appeals Tribunal against the refusal of the Registrar to grant a licence.

The licensing provisions are not unusual. Licences must be granted unless cause is shown. Some might regard the lack of a right of any person to object to the grant of a licence as a defect in the Ordinance, but in cases where a dealer can be

shown to have acted in some improper way, the Registrar may, after holding the inquiry required by s 47, revoke a dealer's licence on any of the grounds specified in s.45, which are:

(a) the licence was obtained by means of misrepresentation;

(b) the dealer is convicted in Australia of an offence punishable by imprisonment for one year or longer;

(c) the dealer is convicted of an offence against this Ordinance;

(d) the dealer is of unsound mind;

(e) the material and financial resources of the dealer are such that, having regard to the scope of his business operations and the liabilities he may incur in the course of carrying on business as a dealer, it would not be in the public interest for him to continue to carry on business as a dealer;

(f) the dealer has failed to comply with sub-section 46(1); or

(g) in a case in which a corporation is a dealer, a person who becomes a director of the corporation is not a person of good fame and character.

Section 46(1) requires the Registrar to be notified of changes in the membership of the Board of Directors of a company which holds a licence; that section also allows the Commissioner of Police to object to the Registrar to the continued licensing of the corporation on the grounds that a person appointed as a director is not of good fame and character). Notwithstanding that the Registrar finds that one of the grounds set out in s.45 has been established, he is permitted not to revoke the licence if revocation would be unreasonable (s.47(2)). Where he does revoke a licence, s.48(2) provides that he may specify a period during which the dealer is ineligible to apply for the grant of another licence.

Where a licence is revoked, the Registrar must notify the dealer, and also inform him of his right to apply for appeal to the Administrative Appeals Tribunal under s.57; (s.48(1)).

In revoking licences, the Registrar acts of his own motion, but he may also act on advice received from the Registrar's

Advisory Committee established by Part X of the Ordinance. This Committee, comprising 4 members, one of whom represents licensed dealers and one of whom is nominated by the Consumer Affairs Council, is appointed by the Minister for the Capital Territory, and has the function of furnishing the Registrar with information, either on its own initiative or at the request of the Registrar. In cases where, for example, improper conduct by a dealer comes to the attention of a consumer group, the consumer representative may raise the matter in the Committee, and the Committee may inform the Registrar of the conduct, though it may not compel the Registrar to take steps aimed at the revocation of the dealer's licence.

The Registrar is required to maintain a register of licensed dealers (s.6) and to publish each July a list of licensed dealers (s.80).

Licensed dealers must display a notice to the effect that they are licensed in each place where they do business (s.74). Each dealer shall also state that he is licensed (and his place of business) in any advertisement published by him (s.79(1).

2. DIRECT PROTECTION OF THE CONSUMER

Although s.84 of the Ordinance expressly preserves all rights which any person might have had, but for the Ordinance, it does introduce some specific protective provisions for purchasers of motor vehicles over and above those conferred under such enactments as the Trade Practices Act 1974, and (to the extent that the protection under these Ordinances is not superseded by the Trade Practices Act) the Sale of Goods Ordinance 1954 and the Hire-Purchase Ordinance 1962 and the Law Reform (Misrepresentation) Ordinance 1929. However, the terms implied under those Ordinances and under the common law continue to apply for the protection of the consumer. It may well be that they are now of considerably less importance because of the rights and remedies conferred under the Sale of Motor Vehicles Ordinance.

a. Provision of Information

Section 20 requires that a dealer shall not display or offer

for sale any second-hand motor vehicle unless there is attached to the vehicle a notice of the prescribed size, colour and type size containing certain particulars; these particulars relate to the make, registered number and age of the vehicle, and the odometer reading. If the vehicle has been repossessed and acquired by the dealer from a financier, that fact must be stated. If the vehicle is sold as a demonstrator, that must also be stated. If there is included in the notice any false or misleading information, the dealer is guilty of an offence punishable by a fine of $500, in addition to any other liability he may have under the Trade Practices Act or any other Statute or rule of law, either criminal or civil. There is no requirement that the name of the previous private owner be displayed, but s.20(6) requires that this information must be provided upon request to a prospective purchaser.

When a vehicle is sold, other than to a trade dealer, the dealer is required by s.2 to sign two copies of the notice after endorsing the date of sale and of delivery and the name and address of the purchaser. One such copy is to be sent to the purchaser, and one to be retained by the dealer for 5 years. If the cash price of the vehicle is $1000 or less ($300 or less in the case of a motor cycle), the endorsement must also state that the dealer is not obliged to repair the vehicle. Section 26 provides for the dealer to give similar information where a vehicle is sold to a trade dealer.

The meaning of 'second-hand' has been a matter of some controversy, especially in relation to vehicles which have been used as demonstration models; see John McGrath Motors (Canberra) Pty Ltd v. Applebee (1964) 110 CLR 656; R. v. Ford Motor Co. Ltd [1974] 3 All ER 489, and most recently, Trade Practices Commission v. Annand & Thompson Pty Ltd (1978) 19 ALR, 734-5. The latest case suggests that though in the vehicle trade a car which is the current model and which has not been disposed of by the dealer may be referred to as 'new' even though the vehicle has been used as a demonstration model and may have been driven a considerable distance, it will be

'second-hand' for other purposes, including the application of s.53 of the Trade Practices Act. Perhaps the best discussion of whether or not a vehicle is 'second-hand' is found in the judgment of Head DCJ in Traders Finance Corporation Ltd v. Rourke (1967) 85 W.N. (Pt. 1) (N.S.W.) 739, 747 where His Honour said:

> A second-hand vehicle includes, I think, a vehicle which has been put to substantial use before coming to the hands of the hirer, whether that use be by the owner or by some other person. The words 'second-hand' are synonymous, I think, with 'used' in relation to a motor vehicle, not in the narrow sense of being used in the sense of being used by being driven to a showroom or used in the course of delivery to a purchaser or hirer, but used in the sense of being operated as a motor vehicle for the purposes for which the vehicle is designed. Its use for demonstration purposes would, in my opinion, make it 'second-hand' to the purchaser or hirer, even though it had not left the possession or control of the original manufacturer, owner, or distributor.

It would appear, therefore, that where the Ordinance refers to second-hand vehicles, it refers to all vehicles other than those which have been driven to the showroom or in the course of delivery to the consumer. The specific reference to 'demonstrators' in s.20(4) reinforces this view.

The Ordinance imposes certain obligations on a dealer in respect of defects in vehicles sold by him. However, the dealer may escape liability if he affixes to the vehicle a notice (in accordance with Form 1 of the Ordinance) which specifies the defect with reasonable particularity and is attached to the vehicle at such time and in such circumstances as are likely to draw the attention of the prospective purchaser to those defects (s.24).

Section 79 requires a dealer, when advertising vehicles which he offers for sale, not only to state that he is licensed, and the place at which he carries on business, but also prohibits reference to any vehicle that does not include a reference to its registration or engine number; that is inconsistent in any way with the information required to be disclosed under s.20 or recorded in his Dealings Register; which does not

specify the cash price of the vehicle in addition to the deposit; or which is false or misleading. 'Cash price' is defined in s.3 to mean the price at which the dealer is willing to sell the vehicle for cash while it is on offer for sale: or, where there has been a sale, the price at which the vehicle is sold. If the sale occurs in the context of a 'trade-in', the cash price is to take account of the value ascribed by the parties to the article traded in, or to its market value if no value has been so described.

b. Implied Terms and the Obligation to Repair

The purchaser of a motor vehicle, whether new or second-hand, is a 'consumer' (or 'buyer' or 'hirer') of goods and is thus entitled to protection of terms implied into contracts by Part V, Division 2 of the Trade Practices Act, by the Sale of Goods Ordinance, and by the Hire-Purchase Ordinance. These rights are expressly preserved by s.84 of the Ordinance. In addition, however, s.23 of the Ordinance makes it a term of, or obligation of the dealer, under the contract of sale relating to the vehicle, that the dealer is obliged to "at his own expense, repair or make good, or cause to be repaired or made good" any defect in the vehicle. The extent of the dealer's obligation to repair depends on whether the vehicle is new or second-hand, and, in the case of second-hand vehicles, on the amount paid. If the vehicle is new, or is, or is represented to be, a demonstrator, the dealer is obliged to repair defects which occur within 12 months of the sale or before the vehicle has been driven 20,000 km after the sale, whichever occurs first. In the case of second-hand vehicles, the obligation arises if a defect occurs, or is noticed by the purchaser, within 3 months of the sale or before the vehicle has been driven 5000 km and the cash price of the vehicle is $600 or more in the case of a motor cycle, or $1500 or more in the case of any other vehicle. If a motor cycle is sold for between $300 and $600, or any other vehicle is sold for between $1000 and $1500, the dealer is required to repair defects which occur or become noticeable by the purchaser within 2 months of the sale or before the vehicle has been driven 3000 km, whichever is the earlier. Unless the parties to a contract for the sale of a vehicle are a licensed dealer and

a corporation, any term of the agreement which purports to exclude or limit the operation of the Ordinance or any right arising out of the Ordinance is void because of the provisions of s.83. The obligation exists whether or not the defect had arisen at the time of sale or delivery of the vehicle.

If the vehicle is returned to the dealer for repair after delivery to a purchaser, the period during which it is in the possession of the dealer is not included for the purpose of calculating the duration of the terms implied under s.23(1). Section 23(5) provides, in effect, that the rights of a purchaser to have the vehicle repaired under s.23 are assigned to a person other than the original purchaser when that person becomes the owner of the vehicle.

The dealer is not liable to repair defects in vehicles if, before the vehicle was offered for sale, he attached to it a notice of defects in accordance with Form 1 of the Ordinance, so that such notice would be apparent to prospective purchasers and provided that it draws the specific defects to the attention of the purchaser (s.24(1)). Such a notice must give an estimate of the reasonable cost of repairing the defect, and if the cost of repairs is greater than the estimate in the notice, the purchaser may recover the difference from the dealer, under s.24(2). This provision overcomes the difficulty which arose in the case of Bartlett v. Sidney Marcus Ltd [1965] 2 All ER 753. Nor is the dealer liable to repair defects which arise in consequence of an accident to the vehicle after delivery, from misuse by the purchaser (including racing or rallying of the vehicle) or which consists of damage to tyres and accessories or of superficial damage to paintwork or upholstery, which should have been reasonably apparent on inspection of the vehicle on delivery or sale, whichever was earlier (s.23(6). The last exception is interesting because "defect" is not defined in the Ordinance. Some guidance on what constitutes a "defect" may be gained from decisions relating to what constitutes "merchantable quality" and from the definition of that term now contained in s.66(2) of the Trade Practices Act, which was approved by the English Court of Appeal in Cehave NV v. Bremer Handelgesellschaft m.b.H

[1975] 3 W.L.R. 447. However, unless the defect in the goods would substantially affect the price at which the goods were sold, it is at least arguable that the defect does not render the goods unmerchantable; see B. S. Brown & Sons Ltd v Craiks Ltd [1970] 1 All ER 823. It would appear that the defects which, under the Ordinance, a buyer is required to repair would include such matters as faulty switches or light bulbs, which, though not apparent upon a reasonable inspection of the vehicle, are not so serious that they would justify a substantial diminution of the price or that a buyer would be taken to have acted reasonably if he rejected the vehicle. Such defects would possibly not render the vehicle 'unmerchantable or 'unfit for purpose' within the tests developed in relation to the terms implied into contracts of sale under the Sale of Goods legislation and the Trade Practices Act.

Section 23 (7) also exempts the dealer from liability to repair defects to vehicles where the vehicle is of a class of commercial vehicle prescribed by notice in the Gazette, where the purchaser has been in possession of the vehicle for three months or more preceding the sale; where it is sold at auction, or sold to a trade owner (defined in s.3 to include a dealer, a financier or an exempt trader.)

Although the provisions of ss 23 and 83 of the Ordinance do not in terms refer to transactions other than sales, s.3(2) deems that where there is a hire-purchase agreement or a lease there shall be taken to be a sale by the owner to the hirer, and that the dealer shall be deemed to be the agent of a financier for the purposes of such a sale. This cumbersome arrangement appears to be designed to ensure that the dealer will be under an obligation to the hirer as if there had been a direct cash sale to the hirer as purchaser. While s.31 prohibits a dealer from selling, or from soliciting offers for motor vehicles on behalf of another person without the written authority of that other person, in the form prescribed by s.31, it is not clear whether s.23, imposing liability on the dealer to repair, applies to transactions other than those where the dealer sells vehicles on his own account. It is suggested that the section (23) should be read as if the words "whether on his own account or on account of any other person" appeared after the word "dealer" where first occurring. However, it is conceded that

it is arguable that the section applies only to transactions where the dealer sells on his own account, and if this argument suceeds, it is likely that a person who acquires a motor vehicle from a dealer by means of a hire-purchase agreement will be deprived of the dealer's obligation to repair and also his right to the dispute-settlement procedures established by the Ordinance; he will thus be left to his right of action for damages against the dealer under the terms implied by the Trade Practices Act or against the owner under the Hire-Purchase Ordinance. If the suggested construction is not accepted, there would seem to be a serious defect in the Ordinance. A simpler, and more effective means of solving the problem would seem to be to have provided that an arrangement whereby a dealer sells to a financier in the expectation that a hire-purchase contract will be entered into between the financier and the dealer's customer, that there should be deemed to be a sale from the dealer to the customer. In any event, this appears to be the intention of the Ordinance, as, except in s.3(2), there are no specific provisions relating to hirers under hire-purchase agreements except those relating to the calculation of cash price, which in certain cases is required to be made in accordance with the provisions of the Hire-Purchase Ordinance. Section 29(10), which provides that orders for succession of Contracts may also affect obligations under hire-purchase and other credit contracts, also supports the preferred view.

c. Protection in respect of titles

No specific provision is made in the Ordinance in respect of implied terms that the dealer shall pass a good title to vehicles sold by him. Such terms are, of course, implied under s.69 of the Trade Practices Act and s.17 of the Sales of Goods Ordinance. However, s.15 requires that every licensed dealer shall maintain a "Dealings Register", in which he is required to enter certain particulars upon the acquisition or disposition of any vehicle. The details which must be recorded include and name and address of the person from whom the vehicle was acquired, and if that person was a trade dealer, the last owner who was not a trade dealer the date of acquisition, the consideration for the vehicle, and its make, model type, registered number and engine number.

If the vehicle is sold, the dealer must record the name and address of the purchaser, the date of sale, and, if the car was not in working condition at the date of disposition, details of its condition. An appropriate entry must be made when the car is wrecked. (s.16) Sections 17 and 18 provide that a dealer shall inform any person who furnished information to him of the requirements of the Ordinance, and makes it an offence to furnish false information of the type required to be recorded in the dealings register. Section 19 prohibits a licensed dealer from buying from or selling to a person under the age of 18 any motor vehicle unless he has the written consent of that person's parent or guardian. This should prevent attempts to set aside contracts on the ground of lack of capacity of one of the parties.

These provisions are designed to make it more difficult to deal in vehicles which are stolen, which are the subject of hire-purchase or other security agreements, or which otherwise are not the property of the person selling the vehicle to the licensed dealer. There is not, in Australia, any system of registration of hire-purchase agreements similar to that in the U.K., which was considered in Moorgate Mercantile Co Ltd v Twitchings [1976] 2 All 641. It is thus necessary to impose some penalty on persons who seek to dispose of property which is subject to a hire-purchase agreement, even though such conduct is almost certainly also an offence under s.181 of the Crimes Act 1900 (NSW). Section 31, requiring a dealer who sells or offers vehicles for sale on behalf of any other person to do so only when authorised in writing and in a form which contains certain particulars, is designed to overcome the situation which arose in Sutton's Motors (Temora) Pty Ltd v Hollywood Motors Pty Ltd[1971] VR 684, where a dealer entrusted a vehicle to solicit offers to purchase, but lacking authority to sell, fraudently disposed of it.

If the dealer fails to comply with an obligation imposed upon him by the Ordinance or fails to give a good title to a vehicle sold by him, and a purchaser who has suffered "pecuniary loss" is unable to recover that loss after seeking to enforce all available remedies against the dealer, that purchaser may be able to obtain compensation from the Motor Vehicle Dealers Compensation fund established under Part IX of the Ordinance

Payments from this Fund must be ordered by the Registrar, and if a payment is made, the Commonwealth becomes subrogated to any rights which may vest in the person compensated.

d. Odometer Readings

A constant source of complaint in all parts of Australia is that odometers of vehicles are interfered with so that they do not accurately reflect the distance covered by the vehicle. A number of provisions of the Ordinance (e.g. ss 20(2)(e)(f) and (g) and 26(3)(g)(h) and 1)) relate to disclosure of replacement of or alteration of odometers. Section 22 prohibits a dealer from offering or displaying for sale any vehicle where the odometer has been replaced or the distance recorded by the odometer has been altered without the written consent of the Registrar.

3. RECEIPT OF MONEY BY LICENCED DEALERS

Part V of the Ordinance requires that where a licenced dealer sells a vehicle on behalf of any other person, the money received by him shall be paid into a trust account opened in the name of the dealer (s.33). If part of the consideration for the sale consists of a trade-in, the dealer is required to pay into the trust account an amount equal to the value ascribed to the property traded in (s.34). Trust account receipts must be issued, and money may be paid out of the trust account only by way of a cheque that is crossed, marked 'not negotiable', and payable to a specified person (s.35). Trust moneys are not available for the payment of the dealer's debts , except debts owing to persons on whose behalf he has sold vehicles (s.36). Proper accounting records must be kept, (s.38), and are subject to audit by a person who is a registered company auditor within the meaning of the Companies Ordinance 19 2, and who is neither a licensed dealer an employee or relative of a licensed dealer (s.42). The audit must be completed within 3 months of the close of the financial year, and the auditors report must be delivered to the licensed dealer and to the Registrar (s.40).

These provisions are not dissimilar to the trust account requirements upon others, such as real estate agents and

solicitors, who deal with their clients' money.

4. SETTLEMENT OF DISPUTES

Legislation dealing with motor vehicle dealers in other States provides for informal dispute-settlement procedures by public officials or committees. The Sale of Motor Vehicles Ordinance follows this pattern. Section 27(1) provides that if a dispute arises between a purchaser and a licensed dealer, and either of them makes a written request to the Registrar to determine the dispute, the Registrar shall hold an inquiry into the dispute and determine it. The Registrar is precluded from determining the dispute if the dispute is or has been the subject of court proceedings; (s. 27(2); and where either the dealer or the purchaser requests the Registrar to determine the dispute, both of them are precluded from taking proceedings in any court in respect of the same subject-matter, except by way of appeal from the Registrar's determination (s.27(10)).

No procedure is prescribed for the inquiry to be held by the registrar; the rules of natural justice would seem to require that both parties shall have at least the opportunity to present written submissions. It appears to be within the discretion of the Registrar whether or not he should allow parties to be legally represented; and there appears to be no reason why he should be bound to extent by the strict rules of evidence.

The Registrar may (under s.27(3) and (4) make such an order in determination of the dispute as seems just, including an order for the payment of compensation, or that a person perform such act as may be specified. The reference to the doing of acts is designed to permit the Registrar to order a dealer to repair a vehicle or to replace parts. However, the Registrar is specifically precluded from ordering the rescission of the contract of sale. Where he considers that it is likely that a Court might order rescission, s.28(1)(a) permits him to refer the matter to the Court of Petty Sessions, which is specifically empowered by s.29(7)(a)(9) and (10) to order rescission, The Registrar may, subject to allowing the manufacturer to be heard in relation to the dispute, make an order requiring that the manufacturer contribute to the

repair or making good of a vehicle which is not second-hand, in such proportion as seems ust to the Registrar. If it were not for the provisions of the Law Reform (Manufacturers Warranties) Ordinance 1977 such a provision would appear revolutionary, but that Ordinance imposes a clear liability upon the manufacturer in cases where the defect amounts to unmerchantability or unfitness for purpose, etc. (ss27(7) and (8)).

The sanction for failure to comply with an order of the Registrar is a fine of $1,000, but liability does not arise until 21 days have elapsed from the making of the order. This, in effect, means that a person ordered to pay money or perform an act by the Registrar has a period of 21 days in which to comply.

The Registrar may refer the dispute to the Court of Petty Sessions not only where he considers that rescission would be a proper order, but also where the facts are complex (s 29 (1)(b)). In such case the Court may make such order as it could make on an appeal.

There is an appeal to the Court of Petty Sessions from order of the Registrar. (s.29(1)). The appeal is to be determined on the basis of evidence before the Registrar, unless leave is granted under s.29(5). The Court is empowered to make orders which the Registrar could make, and, in addition, to order payment of ths costs of the appeal and orders for rescission of the contract (s.29(7)). However, an order for rescission may only be made if the dealer has failed to comply with the requirements of ss 20 or 21, which require notices to be affixed to the vehicle prior to sale, and copies of that notice to be delivered to the purchaser subsequent to the sale, where an order for compensation would not be an adequate remedy, and where the Court has taken into account whether the purchaser is entitled to a refund of any moneys paid, whether, (in cases of the sale of a vehicle by the dealer on behalf of some other person,) that person should be entitled to any indemnity from the dealer, and whether the vehicle should be returned to the dealer (s.29(8) and (9). Section 29(10) provides that where rescission is ordered and

and there is a 'collateral credit agreement' (defined in s.29(13) to include a hire-purchase agreement arranged by the dealer), the court may also make orders relating to the obligations of the parties under that collateral credit agreement, and may make an order rescinding the contract notwithstanding that the parties cannot, because of the credit agreement, be fully restored to the positions in which they were before the sale.

Section 30 provides a further rights of appeal to the Supreme Court against the Order of the Court of Petty Sessions. Because of s.51 of the A.C.T. Supreme Court Act and ss.24 and 33 of the Federal Court of Australia Act, there is a possibility of further appeal to the Full Court of the Federal Court and to the Higher Court.

It must be questioned whether the scheme of appeals provided by the Ordinance is appropriate. It may enable dealers to tie purchasers up in litigation (for which they may be unable to receive legal aid). It may also have the effect of converting what is obviously intended to be an informal system of dispute-settlement into a highly formal and legalistic mould. A right of appeal to the Court of Petty Sessions might have been quite adequate; in any case, in performing his functions under the Ordinance, the Registrar, is subject to supervisory jurisdiction in the same way as any other administrative officer, and this possibility appears sufficient to ensure that the Registrar discharges his duties properly.

5. EVALUATION

The Sale of Motor Vehicles Ordinance 1977, from the consumer's point of view, provides a series of safeguards: it controls entry of undesirables into the business of motor vehicle dealing; it provides a remedy which is more satisfactory than damages, by way of an obligation to repair; remedies are available by an informal procedure which ought, in theory, to be more efficient, cheaper, and quicker than litigation. It ensures the provision of a minimum of accurate information to consumers; and it protects the vendor's money from the claims of other creditors or the bankruptcy of the dealer.

The costs are that dealers must be licensed: they are required to provide accurate information; and they are required to contribute to a compensation fund and to maintain a properly audited trust account. It has been suggested that the result is an increase in the cost of second-hand vehicles sold through dealers.

The success of the legislation depends upon whether the security provided to consumers is worth the extra cost. Judging from the complaints received concerning motor vehicles in the past, it would seem that the legislation goes some way to ensuring a greater likelihood that consumers get what they want. If this is so, the social benefits would appear to outweigh the increased costs.

C. REFORM OF CONSUMER CREDIT LAW

Following deliberations which have continued for some 13 years, a new system of consumer credit laws, to replace legislation dealing with hire-purchase, bills of sale, credit sales, and moneylending has now been approved in principle by the Standing Committee of Commonwealth and State Attorneys-General. The Victorian Government has introduced three Bills (the Credit Bill 1978, the Chattel Securities Bill 1978 and the Goods (Sale and Leases) Bill 1978)which are said to represent the text of the uniform legislation approved by the Standing Committee. There has been some suggestion that though the Law Ministers may have reached agreement in principle, there are disagreements over detail to the extent that the Cabinets in NSW and South Australia, in particular, are unlikely to approve the introduction of legislation identical to that introduced in Victoria. In any event, the legislation which has been introduced in Victoria has been open to public comment, and it is likely that there will be substantial amendments before the Bills are finally enacted. Against this background the best course to adopt with respect to impending changes to the law of consumer credit in the ACT seems to be to introduce the general form of the new legislation, and to reserve comment on specific provisions until the exact form of legislation to be enacted in the Territory becomes available. The following material is largely adopted from an article by the author which appeared in (1978) 3 Legal Service Bulletin 7. It deals not so

much with the specifics of the Bills, because of the likelihood of extensive amendments, but with the general principles, which will be embodied in the uniform legislation, if that ever becomes a reality.

1. Why a New Consumer Credit Law?

To many people, the present system of consumer credit may be quite satisfactory. Hire-purchase, the most common form, is well understood by consumers and by the finance industry except for South Australia, is controlled by uniform legislation. However, the hire purchase legislation does differ from State to State in some important aspects, and it is by no means the only method of consumer credit. Hire-purchase itself is an artificial form, designed by 19th century English lawyers to avoid disadvantages to lenders which arose in other, more straightforward, forms of credit and security, especially the credit sale and the Bill of Sale, both of which were regulated by legislation. Australia led the common-law world in regulating this new form of consumer credit, hire-purchase, and as these controls became tighter in an attempt to redress the inequality of economic strength of lender and borrower, lenders attempted to find new forms which were free of restriction, and which would allow them to exploit their economic dominance. The variety of forms is confusing both to borrowers and to lenders.

The Standing Committee set out to find ways of achieving fair consumer credit laws which would be "fair", and which would restore some simplicity to consumer lending. The laws would allow a consumer credit transaction to be broken into its essential form, that is, a loan of money or an extension of credit, possibly secured by the granting of a property right in goods, or by a guarantee, whether or not it was connected with a contract for the supply of goods or services. The aim of "fairness" would secure to the less powerful borrower certain rights and protection, as well as a degree of freedom of choice between credit providers. The basic scheme of the legislation which has been approved follows the recommendations of the Rogerson Committee and of the Molomby Committee. Committees were aware of similar investigations in the U.S., the U.K. and Canada. The proposals approved by the Law Ministers seem to

fall midway between the provisions of the Uniform Consumer Credit Code, which has been enacted in some parts of the U.S., and the U.K. Consumer Credit Act 1974.

2. Uniform Law or Commonwealth Law?

Traditional legislation in Australia dealing with sale of goods and consumer credit has been State or Territory law as, until recently, these matters were seen as falling within the residual legislative powers of the States rather than the legislative powers of the Commonwealth Parliament enumerated in the Constitution. This tradition ended in 1973 when, no doubt prompted by the failure of State Governments to establish truly effective consumer legislation despite an obvious need, and by the realisation that Australia was a national market for goods and services, the Whitlam Government introduced the Trade Practices Bill, containing the most effective consumer protection yet introduced in Australia (other than South Australia). The application of the Trade Practices Act 1974, as it became, was limited by the constitutional powers available to the Commonwealth Parliament. Thus the Act is expressed to apply to the activities of trading and financial corporations, and to interstate trade or commerce, and such other activities as the Commonwealth's powers may cover.

Most providers of consumer credit are "financial corporations", and, indeed, are subject to the Financial Corporations Act 1973 (Cth.), which requires them to be registered with, and report to, Commonwealth authorities, and maintain certain asset/liability ratios. It seems clear that the Commonwealth Parliament has power to regulate the activities of financial corporations; but it seems that the Whitlam Government was deterred from implementing the recommendations of the Molomby and Rogerson Committees either by Act or by Regulations under the Financial Corporations Act only because of the virtual certainty that it would be rejected by a hostile Senate flourishing the States' Rights banner. Even so, the liability of dealers and credit providers will almost certainly be regulated by the Trade Practices Act rather than by State legislation in several important aspects of transactions. Commonwealth consumer credit legislation would be preferable, as the industry and the market are national. At present this seems politically unlikely.

3. The Form of the New Legislation

Both Molomby and Rogerson Committees recommended that the legal form of consumer credit transactions should correspond with their commercial substance. The documents should embody a loan and,where applicable, a transfer of ownership of goods (including protection by implied, non-excludable, terms) and a security interest by way of mortgage or guarantee. Thus the new legislation will involve, in each case, three Acts: a dealing with licensing and regulation of credit providers and advertising, "truth-in-lending", and relief of debtors as well as the form and contents of the loan contract; a Chattel Securities Act, dealing with "goods mortgages", to be the sole form of security and replacing the Bill of Sale; and a Goods (Consumer Sales and Leases) Act.

(1) The Goods (Sales and Leases) Bill is probably the simplest of the three Bills. Much of its language is familiar, being the language of the Sale of Goods Acts, and like that legislation, it operates to imply terms as to title and quality of goods into transactions. The transactions to which it applies are a much wider range than those covered by the Sale of Goods Act. It applies to "sales" and "leases" as defined; the definitions include the basic transactions which will replace hire-purchase. Contracting out of the effect of the implied terms is prohibited. The scheme is familiar, having first been introduced by the Trade Practices Act 1974. It is unfortunate that the Victorian draftsman has departed from the language of the Trade Practices Act in minor ways, for in consumer transactions, it would seem to be simpler for all concerned, that the wording of terms should be the same throughout Australia. It appears that the draftsman has taken the opportunity to introduce some overdue reforms, and has given priority to this rather than to the need for uniformity.

Like the Sale of Goods legislation, the Act provides protection to a bona fide purchaser who buys the goods. When this is linked with the abolition of title retention devices of the hire-purchase type, and the creation of a single form of security interest, the chattel mortgage, one cause of concern for the finance industry becomes obvious. Under the new

legislation a person will buy goods outright, and possibly mortgage it to the credit provider. Though the legislation makes it an offence for the borrower to dispose of the goods without consent, if he does so, the new owner, if bona fide, will be protected. This is in contrast to the present position.

(2) The Chattel Mortgages Bill will provide a single form of security over goods. The single form of security will not need to be registered, despite recommendations by both the Rogerson Committee and initially by the Molomby Committee. The registration of Bills of Sale, though at times inconvenient, does protect leaders, and it seems that the costs might be outweighed by the benefits, especially when electronic data processing would make registration and searching quick and simple; it would avoid the possibility of purchasers, especially of second-hand cars, buying encumbered goods.

In periods of economic stagnation or recession, security is important for lenders, as in such times there are more bankruptcies, and a security interest in goods is the best method of obtaining a sure return on all loans. The Australian Law Reform Commission's recently released report, Insolvency: The Regular Payment of Debts, recommends a new procedure, short of bankruptcy, for dealing with consumer debt problems. If these recommendations are adopted and the procedure becomes widely used, security will become even more important, as it is in England.

Under the U.K. Consumer Credit Act 1974, once a consumer has paid a certain proportion of the instalments under the agreement, the property subject to the security becomes immune from repossession. It is unfortunate that the proposed Act will not prevent repossession of goods after, say, 50% of the instalments have been paid, as by this time the value of the security is usually considerably less than the amount of debt outstanding. In South Australia, it has been suggested that, as in many parts of North America, a lender be forced to choose between enforcing the security or suing the consumer for the outstanding amount, and a similar "sieze or sue" provision seems desirable. It does not seem significantly to increase the lender's costs.

The proposed legislation will require, in ordinary cases, that a lender must give proper notice of his intention to repossess goods, and that he may not enter premises to repossess goods without an order obtained after an application to the tribunal. Post-dated cheques and promissory notes are not to be permitted as security; cheques in payment of instalments must be paid directly into the payee's account and not negotiated. This provision is designed to preclude the situation which has arisen in North America where credit providers negotiate the instrument to a third party for cash at a discount; as a result of the "holder in due course" doctrine the third party takes the instrument free from any obligations which the lender may have under the loan contract with the consumer, including obligations under implied terms. The "holder in due course" doctrine is an important part of the commercial law of negotiable instruments, but is quite inappropriate to consumer affairs.

Security and repossession may no longer be effective or desirable remedies in credit transactions financing the purchase of small chattels. Such goods often have little or no value on the second-hand market, and repossession merely harasses the debtor, at the same time adding to the amount which he becomes liable to pay the lender. In Europe and North America, and probably in Australia also, unsecured personal loans are becoming more significant as a form of consumer credit. Professor David Caplovitz of New York, whose book Consumers in Trouble is a study of the reasons why consumers default on instalment payments, has suggested that the major causes of default are not due to the conscious decision of the consumer, but result from unforeseen circumstances, such as loss of job, sickness or accident, or matrimonial problems. Therefore the most effective means of preventing default may be to require the consumer to insure, for a small additional charge, against these risks; already many lenders insist on life insurance. This suggestion seems worthwhile, but most lenders are committed to security, and the bankruptcy laws may prevent insurance against bankruptcy.

(3) The Credit Bill is probably the most significant of the three Bills. It will replace the money lending and probably the pawnbrokers legislation, as well as the hire-

purchase acts. States and Territories such as N.S.W. and the A.C.T., which have separate legislation dealing with credit and lay-by sales, must consider whether they wish to repeal these laws, which would not be affected.

A central feature is the licensing of credit providers, which will coexist with the requirements of the Financial Corporations Act, but which will apply to a wider range of credit providers, such as retail stores. It will be administered by the Commissioner for Consumer Affairs, with a right of appeal from his decision to a Consumer Credit Tribunal, which also has other important functions under the Bills. Licences will be issued for an indeterminate period, subject to review on the application of the Commissioner. While the provisions of the moneylending acts as to the licensing of money-lenders has not been successful, greater consumer protection would seem to be achieved by making licences valid for a limited period only, and subject to renewal, after application to the tribunal. On renewal applications any person should be entitled to appear as an amicus curiae to present relevant material to the tribunal. As the Bills will provide for reciprocity of licences throughout Australia, such a procedure would certainly prevent the present notorious practices of a well known retail and credit organisation, which on a national basis knowingly and systematically enters into transactions which contravene all the moneylending legislation. As banks, insurance companies and co-operative societies (including building societies and credit unions) are subject to other legislation, they are to be exempt from the Acts. Unfortunately, the Acts do not appear to provide for the licensing of debt collectors or credit reference services, and other "ancillary credit services" such as loan brokers, which is an admirable feature of the U.K. Consumer Credit Act 1974.

The Bills will cover all loans to consumers involving up to $15,000, and other loans involving goods of greater value of a "domestic, personal or household" nature and which are not acquired for resale. It is irrelevant whether or not the loan is secured, or whether it is for a fixed sum or a "revolving credit" arrangement, under which a consumer is entitled to

credit at all times during the period of the agreement up to a specified amount, (such as the accounts operated by large department stores); but it is probable that it will not apply to loans, either by way of overdraft or personal loan by banks, insurance companies or cooperative societies, though there seems no logical reason for this exception.

The Bills will incorporate many of the recommendations of the Molomby and Rogerson Committees relating to "truth in lending", i.e., disclosure in terms both of dollars and effective percentage rates of the charges made for the credit. The purpose of this is to permit consumers to "shop around" for the best credit terms available. Formulae and tables for the calculation of the effective interest rate are provided in the Bill and these matters are to be prominently stated in the agreement, though, as in South Australia, not in advertisements. The agreement must also state in clear terms the liability of the consumer to pay other charges.

Both the Rogerson Committee and Judge White in his 1976 report, Fair Dealing with Consumers, recommended that all consumer credit agreements should be in a statutory prescribed form and style. In view of the high degree of control over the form and content of the agreement which will be a feature of the Bills, a standard form seems logical and desirable, provided that parties might, in certain cases, add to the statutory form in ways that do not conflict with the statutory provisions. However, the Molomby Committee did not accept this suggestion, and the Attorneys agreed not to require standard forms, thought it seems that the various Commissioners will, as a matter of practice, consider standard forms submitted by credit providers, and, if they are satisfactory, approve them as being in compliance with the Bills. The Bills will, like many Australian conveyancing statutes, provide statutory short forms of phrases which can be used in credit agreements.

Except that the Bills will prevent the imposition of an effective interest rate exceeding 48% (the traditional maximum under the moneylending legislation), there will be limits upon neither interest rates nor the amount of deposit

required. This is in accordance with both the Molomby and Rogerson reports, which considered the evidence that minimum deposit provisions were easily evaded, and that interest rate ceilings had the effect of depriving some classes of low-income consumers of credit altogether. The Commission of Inquiry into Poverty accepted these recommendations but State laws are uniform on neither of these points, and there is some disagreement on their desirability.

Liability for Defects: The person primarily responsible for misrepresentation about goods and services, and for defects in the goods and services themselves, is the dealer, whose liability arises under the common law, the Trade Practices Act and the proposed Goods (Sales and Leases) Bill. If a consumer suffers damage from such a cause, and unsuccessfully pursues his remedies against the dealer, the Bill declares that the credit provider will be liable, provided that there is a "commercial connection" between the dealer and the credit provider. This connection, which is also a requirement of the U.K. Consumer Credit Act 1974, is in practice fairly easy to establish. In such cases the credit provider is entitled to an indemnity from the dealer, but if the consumer is unsuccessful in recovering from the dealer, the credit provider will probably also be unsuccessful. This shceme already operates to some extent under s.73 of the Trade Practices Act, and reflects a view that as the credit provider is not responsible in any way for the supply or provision of goods or services, or for marketing them, he should not be responsible for defects or misrepresentations. On the other hand, the credit provider is more likely to be able to obtain liability insurance at a lower rate, because of the larger volume of transactions with which he is concerned; and his interest in ensuring that dealers do not make misrepresentations and do not supply defective goods may be in the interests of the consumer. A credit provider is, in any case, more likely than a dealer to carry liability insurance.

Consumers' Remedies: Perhaps the most desirable feature of the Bills, from the consumer's point of view, is that where a consumer is entitled to repudiate the contract for the supply of goods, because of a breach of condition, he will

also be entitled to repudiate the loan contract to which the supply contract is connected. The consumer's most important right where he is supplied with defective goods is his ability to withhold payment, and under the Bills he will be able to do so without any legal obligation to the contrary.

As under the present hire-purchase legislation, the consumer will have the right to terminate the agreement at any time, but under the Bills he will be entitled to a rebate on interest charges, which is not the case at present. Another addition is to limit the obligation of a guarantor to the amount of the principal debtor's obligation.

Professor Caplovitz's findings on the causes of consumer default are relevant to the relief which, under the Bills, the Tribunal will be able to grant: for sufficient cause, where to continue to meet obligations under the loan agreement would cause hardship to the consumer, the Commissioner may negotiate for an extension of the agreement and if the negotiations are unsuccessful, the Tribunal may do so by binding order. This procedure has worked well in South Australia.

The Tribunal is also empowered to grant relief against provisions in loan contracts which are "harsh or unconscionable". A similar provision appears in the South Australian legislation, where it has been widely availed of, and in the "uniform" hire-purchase acts, where its use appears less common. This may be because under those acts it may only be invoked in the course of formal proceedings before a court, which may involve an inconvenience or cost to the consumer not justified by the amount of hardship. However, where relief against such a provision is available after a simple informal complaint to a Commissioner, who may apply to the tribunal on behalf of the consumer, it is probably more effective. Whether or not terms are "harsh or unconscionable" will be decided on grounds similar to those proposed by Professor Peden in the draft Contract Review Bill appended to his 1976 Report on Harsh and Unconscionable Contracts in N.S.W.

Finally, the Acts will provide penalities for a number of offences, which will be cumulative upon those existing under

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RECENT DEVELOPMENTS IN PART V OF THE TRADE PRACTICES ACT

G. De Q. Walker

In the rapidly evolving area of law that is Part V of the Trade Practices Act, there are perhaps three recent developments that are particularly deserving of mention. They are:

(1) The evolution in the notion of what is "misleading" in relation to the level of audience gullibility that is taken as a datum,

(2) The principles relating to the criminal liability of corporations under Part V and

(3) The relationship between s.52 and the general law of passing-off.

(1) WHAT IS MISLEADING AND WHO MUST BE MISLED?

Underlying any body of law designed to prevent misleading behaviour in trade or commerce are assumptions about the audience to whom the potentially misleading information is being conveyed. A statement which might mislead a woman hurrying through a supermarket with children tugging at her skirts might not mislead senior counsel seeking the true construction of the same wording in the serene solitude of his chambers (or is the reverse nearer the truth?). Initially, the Federal Court seemed minded to assume a very low common denominator of intelligence and concentration in target audiences generally. In Parish v. World Series Cricket ([1977] A.T.P.R. 17417 at 17421), St. John, J. adopted for

the purposes of s.52 of the Trade Practices Act the definition of the term "misleading" given in the New South Wales case of CRW v. Sneddon ([1972] A.R. (NSW) 17 at 28):

> "The advertiser must be assumed to know that the readers will include both the shrewd and the ingenuous, the educated and uneducated and the experienced and inexperienced in commercial transactions. He is not entitled to assume that the reader will be able to supply for himself or (often) herself omitted facts or to resolve ambiguities. An advertisement may be misleading even though it fails to deceive more wary readers".

If this picture is to be taken as the premise for the courts' consideration of whether a statement is misleading, the standard to be met by persons making representations in trade or commerce is a stringent one. But recent developments may have qualified that picture somewhat. Although the definition adopted in Parish v. World Series Cricket is still part of the law relating to Part V, there appears to be emerging a parallel and competing notion which is less strict and more geared to notions of "reasonableness". This trend can be seen in an unreported decision of Smithers J., Ransley v. Black and Decker (Australasia) Pty Ltd (28 July 1977). In this case Black and Decker was charged under s.53(c) of the Act, the provision which among other things prohibits representations that goods have performance characteristics they do not have. The untrue representation in this case was alleged to be that a radial arm saw marketed by Black and Decker for the home handyman had a cross-cut

capacity of sixteen inches, implying thereby a safe cross-cut capacity of sixteen inches. From the evidence it appeared that in the operation of the saw in the sixteen inch cross-cut capacity the blade would overhang the end of the saw fence by one inch, but no part of the blade was exposed to any part of anyone's body. His Honour pointed out that "in order to get in touch with any such part [of the blade] one would have to deliberately push one's fingers either up the guard or across the top of the saw fence and come into contact with the blade.... That of course is quite unthinkable on the part of any reasonable person handling this machine". Other evidence was adduced to the effect that there had been no recorded history of any accidents with this kind of saw, some witnesses saying that they had never seen a saw with quite so good a guard and that they regarded the saw as quite safe to use for making a sixteen-inch cut. His Honour continued:

> "One cannot of course but be conscious of the different approach of the kind of person that Mr Richardson [for the TPC] is and the kind of people that these witnesses for the defendant are. Mr Richardson is a government gentleman, an inspector. It is his business in life to take a strict view of things and to look for the ideal, and that is all very good too. The other gentlemen, however, have had years and years of experience of machines like this. There has as far as one can see never been an accident with one. How one can feel convinced that the machine is dangerous to operate in the face of performance of that kind, I am at a loss to know".

As to the audience to whom such representations must be taken to be directed, His Honour had this to say:

> "It has to be remembered that this representation is not made to all and sundry, to the dwarfs, to the giants, to the blind, to the deaf - it is made by reference to the reasonable conditions which must exist in relation to the operation of any machine of this kind. Obviously it is a dangerous machine - when you approach a safety razor you have to take note that it is sharp and you have to adjust it accordingly. When you come to machines like this which are likely to lop off limbs, anyone knows that great care must be taken. When the representation is made, it is made to people who are going to take reasonable care to acquaint themselves with the reasonable qualities of the machine and normally that they should make some enquiries".

In this case, therefore, Smithers J. appears to be saying two things:

(a) Whether a representation is untrue or misleading or not is a question that must be answered in the context both of the nature of the product and the nature of the audience to whom the representation is addressed. In some cases at least the representation should be taken to be addressed to reasonable and normal people, not to rash or foolish people. In this respect the case may represent a qualification of the CRW v. Sneddon doctrine as adopted in Parish v. World Series Cricket.

(b) Performance characteristics which are in issue in a s.53(c) prosecution are to be judged by reasonable standards, not by ideal standards. The performance and safety history of a product is relevant, and perhaps sometimes decisive, on the question whether the goods or services have the performance characteristics which they are represented to have.

(2) LIABILITY OF CORPORATIONS UNDER PART V

The provisions of the Trade Practices Act dealing with the liability, both criminal and civil, of corporations are for the most part to be found in ss.84 and 85. The decision of the Full Federal Court in Guthrie v. Universal Telecasters Pty Ltd ((1978) 18 ALR 531), points to some important questions presented by these two sections and highlights to some extent a latent conflict between them. On the one hand, s.85 imports into the Act, via the principles enunciated by the House of Lords in Tesco Supermarkets Ltd v. Nattrass ([1972] A.C. 153) the principles of primary corporate criminal liability which are based on Viscount Haldane's "organic" concept of the corporate structure (see Lennard's Carrying Co. Ltd v Asiatic Petroleum Co. Ltd ([1915] A.C. 705)). On this approach, primary liability attaches to corporate defendants in respect of, but only in respect of, the defaults of higher managerial personnel. S.84, on the other hand, imports into the Act a quite different set of principles relating to primary corporate liability. According to s.84, a corporation may be convicted in respect of the defaults not only of its higher managerial personnel, but also of any

of its servants or agents. Consequently it is appropriate to ask which of the two propositions is to take precedence.

The Universal Telecasters case arose out of an advertisement transmitted over Channel O in Brisbane which made an incorrect statement about the effect of the scaling-down of certain reductions in the sales tax on motor vehicles. After the advertisement had been telecast once, a viewer telephoned a Mr Garry, the sales manager of the television station (who was on duty at the time) and pointed out the error. Mr Garry undertook to have a look at the matter, but the advertisement was nevertheless rebroadcast again on successive evenings. The question of the liability of corporations arose chiefly in the context of the defence raised under s.85(3) of the Act, which relieves media proprietors of liability for the publication of advertisements in the ordinary course of business where the corporation does not know and has no reason to suspect that publication would amount to a contravention. The issue was whether Mr Garry, for the purposes of that defence, should be treated as being "the corporation", or whether, on the other hand, his knowledge resulting from the telephone complaint was not to be treated as being the knowledge of corporation. If the latter view were adopted, of course, Mr Garry would be regarded as a person separate from the corporation and the defence would succeed.

The Chief Judge and Franki, J., took the view that prima facie the principles enunciated by the House of Lords in the Tesco case were the correct ones. This meant that "what natural persons were to be treated in law as being the corporation were to be found by identifying those natural persons who, by the memorandum and articles of association or as a result of action taken by the directors or by the corporation in general meeting pursuant to its articles, were entrusted with the exercise of the powers of the corporation... In the present case, if this be the principle to the applied, Mr Garry would fall outside the persons who are to be treated as the corporation in the case of Universal Telecasters". Nimmo J., applied the same test but reached the opposite conclusion on the facts, namely that Mr Garry had in fact been delegated by the Board of Directors to exercise the powers of the corporation.

But the next question to consider was whether s.84 altered the principles laid down in the Tesco case. On that point, Bowen C.J. had this to say:

> "S.84 provides that where it is necessary to establish the intention of the corporation, it is sufficient to show that a servant or agent had the particular intention (s.84(1)). It further provides that any conduct engaged in on behalf of the corporation by a director, agent or servant shall be deemed to have been engaged in also by the corporation (s.84(2)). It would seem that s.84 does alter the position as it was discussed in Tesco's

> case, supra, in two respects, first, so far as the intention of a corporation is concerned and, secondly, so far as conduct engaged in on behalf of a corporation is concerned. It does not touch the question of knowledge or reason to suspect, nor does it touch the situation where consideration is to be given not to some act on behalf of the corporation but to failure to act. In other words, in the areas which we have to consider in relation to Mr Garry's knowledge and reason to suspect that the advertisement would amount to a contravention, s.84 has no application. We are left then with the application of the principle discussed in Tesco's case".

The High Court refused special leave to appeal, "while not necessarily endorsing the views expressed in the Federal Court" ([1978] ATPR p.17701, 2 June 1978).

The United Telecasters decision is authority for the proposition that the knowledge of a company's servant, other than a senior manager, is not the knowledge of the company for the purposes of Part V. However, what does it say about the broader question of the relation between ss. 84 and 85?

There are two possible interpretations of this relationship. The first possibility is that s.84 goes only to the prima facie liability of a corporate defendant, while s.85 is concerned with its ultimate liability. S.84 would thus embody a sweeping new test for affixing corporate defendants

with primary liability, but, by virtue of s.85, the narrower organic approach to defining corporate liability is the appropriate test to be adopted when answering the question whether a corporate defendant can avail itself of the defence and thereby rebut its prima facie liability. On this view, a corporation would, under s.84, be prima facie guilty if the contravention were due to the act or default of any of its servants or agents, irrespective of status, within the company. However, it would be a good defence under s.85 if the corporation could establish that the guilty actor was a lower echelon employee (and hence "another person") and that its executive officers had for their part taken reasonable precautions and exercised due diligence to prevent contravention. If this view is correct, there is no conflict between ss.84 and 85.

The other interpretation is that s.84 abolishes altogether the organic approach to defining primary corporate liability, s.85 is to be read subject to 84 and that, as a result, the decision in Tesco has no application to the liability of corporate defendants for Part V offences. Subordinating s.85 to s.84 would preclude resort to Tesco because the mental state and acts of the guilty servant would be directly attributed to the corporation itself. Thus, it would rarely be possible for a corporate defendant to claim that the contravention was due to the act or default of "another person" within the meaning of s.85(1)(c)(i) - the servant would always be assimilated with the corporation. S.84 would have a similarly drastic effect on the scope of paragraph

(ii) - the assimilation of the guilty servant with the corporation would inevitably lead to the attribution of lack of due diligence on the part of the servant to the corporation itself. Thus, subordinating s.85 to s.84 would all but deprive corporate employers of the benefit of the due diligence defence for it would only be in the rare case where the contravention was due to the default of a total stranger (someone outside and unconnected with the corporation) that the defendant would satisfy the requirements of the defence.(1)

The dicta in the Universal Telecasters case together with the earlier dicta in Ballard v. Sperry Rand ((1975) 6 A.L.R. 696), suggest that at this stage the Federal Court, considers that s.84 does prevail over s.85. This is because it assumed that s.84 would change the position in the Tesco case in relation to intention and in relation to conduct. Whether the court would adhere to this view if the conviction of a defendant which had exercised due diligence turned solely on the point and the possible harshness of that view became manifest, is uncertain. Nor can one discount the possibility that the High Court might take an entirely different view and hold that s.85 prevails over s.84 or that s.84 applies only to primary liability and not to the operation of the defences in s.85.

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(1) A. Duggan, "The Criminal Liability of Corporations for Contravention of Part V of the Trade Practices Act", (1977) 5 A. Bus. L. Rev. 221.

(3) RELATIONSHIP BETWEEN S.52 AND PASSING-OFF

The broad language of s.52 inevitably raises questions about whether it overlaps with the common law of passing-off. If there is such an overlap, two sets of consequences flow:

(1) For the first time it will be possible to bring a great number of passing-off actions in the Federal Court rather than in the Supreme Courts.

(2) The substantive and procedural law in the nature of passing-off created by s.52 and by the procedural provisions of ss.80 (injunctions), 80A (remedial advertising) and 82 (actions for damages) may be broader than under the general law. Thus, not only might it be possible to require a defendant to publish remedial advertising at his own expense, but substantial damages may be available even in the case of innocent passing-off. At common law, there is doubt as to whether anything more than nominal damages may be awarded in the absence of evidence of fraud or negligence (see J.D. Heydon, Economic Torts, London 1973, p.77).

The question of the relation between s.52 and the law of passing-off was squarely raised in Hornsby Building Information Centre Pty Ltd v. Sydney Building Information Centre ((1977) 18 A.L.R. 639). The Sydney Building Information Centre in that case had sought an injunction against the carrying on of business by the Hornsby Centre under its corporate name, which was said to be likely to mislead or deceive because its use suggested some affiliation of the newly-established

Hornsby Centre with the long established Sydney Centre. Both centres were commercial profit-making enterprises. The matter came to the High Court on appeal against an interlocutory injunction restraining the appellant in the manner described. The Chief Justice, with whom Aickin J., agreed, said categorically that s.52 did not give the Industrial Court (as it then was) a jurisdiction to entertain passing-off suits. However, a majority for the contrary to that proposition can be found it the judgments of Stephen, Jacobs and Murphy JJ. The leading judgment is that of Stephen J., who pointed out that the conferring on a Federal Court of an extensive jurisdiction in passing-off was "but a consequence of the very direct relationship which necessarily exists between the deception of consumers in the course of trade and the injury caused by the unfair practices of a trade rival... The remedy in such a case will not, as in passing-off, be founded upon any protection of the trader's goodwill but, being directed to preventing that very deception of the public which is injuring his goodwill, it will nevertheless be an effective remedy for that of which he complains".

When s.52 was being applied in a quasi-passing-off situation, the existing law of passing-off would not, his Honour thought, always be a safe guide but it should not be disregarded. Some principles developed in the context of would be particularly appropriate, his Honour thought, notably -

(1) The proposition that literal truth does not prevent a representation from being misleading and deceptive: "To announce an opera as one in which a named and famous prima donna will appear and then to produce an unknown young lady bearing by chance that name will clearly be to mislead and deceive".

(2) A newly incorporated the defendant company may not use, in its newly established business, its true corporate name if it be deceptively similar to that of a plaintiff with an established reputation.

(3) A descriptive trade name is not necessarily distinctive of any particular business and hence its application to other like businesses will not ordinarily mislead the public. A plaintiff which uses descriptive words in its trade name will find that quite small differences in a competitor's trade name will render the latter immune from action. The fact that the Hornsby Centre could benefit from the good repute which the Sydney Centre had, over the years, created for the particular kind of services, unique of their kind, which it had offered as the only building information centre in the Sydney area did not indicate any wrongdoing on the part of the Hornsby Centre: "Neither the concept of such a centre nor its conduct is anything for which a monopoly can be claimed, any more than it could be claimed for, say, an art gallery".

The majority judgments say explicitly that liability under s.52(1) does not require proof of intent. As was pointed out earlier, the effect of this may be that substantial damages may be obtainable in passing-off under s.52 without any evidence of fraud or negligence, by contrast to the uncertain position under the general law.

CONCLUSION

The recent cases on these three topics illustrate the rapid development which is taking place in the law of consumer protection as embodied in Part V of the Trade Practices Act. It now appears settled law that s.52 gives to the Federal Court some jurisdiction in relation to passing-off actions. The position in relation to the audience to which a representation in trade or commerce must be taken to be addressed has become less settled because of the emergence of two competing views: a strict view, that the courts must take the lowest common denominator of intelligence as their standard , and, since the Black and Decker case, a new view applying a standard which in the field of competition law would be described as a "rule of reason". The position in relation to corporate liability under ss.84 and 85, however, appears as unsettled as ever.

SMALL CLAIMS COURT

INTRODUCTION

It is probably of little significance what consumer protection legislation comes onto the statute books unless there is some relatively easy and cheap method for a person to enforce his rights under the legislation. There appears to be some interest in Australia in the development of class actions which may serve to facilitate consumer's access to the law but the average consumer aggrieved by the actions of his vendor is unlikely to fall into a significant "class" even if such a vehicle were readily available to Australian litigants.

More often than not the aggrieved consumer is more concerned about why his iron or washing machine or toaster doesn't work than about the possible implications on environmental development from a factory project in a given area.

There has been a growing realisation in Australia of the need to provide access to the law and to some system of judgment for a consumer with a "small" problem. This is, I suggest, the basis of and the rationale behind the setting up of the Small Claims Court in the Australian Capital Territory. The Court, of course, is not unique in Australia and equivalent tribunals exist in the different states. It does, however, provide an extensive array of jurisdictional options to litigants in the A.C.T.

JURISDICTION

Probably the most significant restriction on the jurisdiction in the Small Claims Court is the ceiling of $1,000.00 imposed on any claim in the Court. (There is provision (Section 8) for an action to be brought

in respect of a dispute involving a larger amount provided that the claimant abandons his claim in excess of $1,000.00).

PROCEDURES

The procedures to be applied in dealing with any claim are (Section 11) those "likely to enable the proceedings to be dealt with expeditiously and with as little formality as possible". In the proceedings the Court "is not bound by the rules of evidence and may inform itself in any manner it thinks fit" (Section 12) and evidence "shall not be given on oath" (Section 13).

The procedure before the Court is to be an "enquiry" but a "judgment" is to be given.

DIFFICULTIES

The Small Claims Ordinance 1974 is sufficiently short to render any detailed exposition by me of its steps, sections and procedures an insult to the intelligence of those listening to my paper. However, I would like to draw to the attention of those here some difficulties arising under the Ordinance and to deduce, if possible, from those difficulties whether the Court is fulfilling its purported function of allowing cheap and easy access to the Court system. In making the comments that follow I concede freely that I look at the Courts as a lawyer and that further I look at the Court as a protagonist of the adversary system.

NO RULES OF EVIDENCE

Possible the most startling thing to a lawyer is that no rules of evidence are to apply. To a lawyer forged in the furnace of Petty Sessions

criminal procedures; tempered in the gentler jurisdiction of the Family Court; and honed to razor edge before the Chief Judge of the Supreme Court such an abandonment of normal principles in Court procedure may well suggest a quaint experiment in naivety. "If there are no rules and no one is sworn to tell the truth, why dont litigants go along and lie their heads off?" There is, I suggest, no real answer to that question. I do not think it would be suggested by anyone associated with the Small Claims Court that there is not a proportion of litigants who do precisely that. However, the administration of the oath has been no guarantee that litigants in other jurisdictions have not followed the paths of unrighteousness, bestrode by their unsworn brothers in the Small Claims Court.

Further, whilst the Court is clearly constituted to decide between people of opposite opinions, the Court is not called upon to arbitrate in the same way that a Court under an adversary system is but is rather directed to make an enquiry into the issue. This inquisitorial function is regularly performed with the assistance of an expert who reports to the Court, of which, more later.

With the assistance of able Court staff and sympathetic magistrates the inquisitorial system appears to work a certain sort of rough justice. I suppose the cynical may remark that that is all that those who are prepared to sue in that jurisdiction deserve.

It would have to be conceded in my submission however, that it is imperative that if access is to be cheap and easy there must be a general doing away with complicated rules of pleading and whilst I hesitate to suggest

it, the abolition of the rules of evidence no doubt restricts the sort of disputes beloved of all lawyers but perhaps designed in many respects to cloud rather than reveal the issue before the Court.

In some ways therefore the Small Claims Court is the yard stick against which we practitioners must measure ourselves. If, by dint of abandonment of the rules of evidence and by the use of an inquisitorial process a Court can provide an answer more expeditiously that we, as servants of the public and the Court can do, it must then point the way to future developments in other jurisdictions and therefore must represent a cause of concern and/or interest to lawyers generally.

INVESTIGATORS

All the books on evidence make great play of the fact that expert witnesses are there to assist the Court and not to usurp its function, and yet, in the Small Claims Court the way in which the Court appointed investigators (See Section 21) appears to be a clear case of judgment by abdication on the part of the magistrates involved. The magistrate seised of the issue, appears to pause on any technical matter long enough only to determine which of the appropriately appointed investigators is to be used on this particular occasion.

The investigator, far from being fed on an insipid diet of hypothetical questions, is given real powers (See Section 21 for example) to summon witnesses and is empowered to petition the Court that a witness, who does not cooperate, be dealt with for contempt, (with a possible penalty of $500.00).

Section 27 (3) says that the Court "shall have regard to the report of the person appointed and shall give to it such weight as the Court sees fit". I do not think it is unfair to say that in the majority of cases where an expert investigator is appointed it is rare that there is any significant dispute as to his "decision" of the matter.

Once again perhaps traditionalists are obliged to look to the future of proceedings in other jurisdictions particularly as the issues being litigated in all areas become increasingly more complex because of the development of scientific knowledge and the mere complexities of our current society.

PROCEDURE DIFFICULTIES

Procedural difficulties that have arisen have been the subject of a report by the Law Society to the Attorney General and in fact the Attorney General has quite recently written to the Society advising that a further review of the Small Claims Ordinance is to be undertaken.

The comments that are made hereunder therefore may well become out of date almost immediately but I shall make them nevertheless to serve perhaps as a measure of the amendments to be introduced in due course.

SERVICE

Section 48 provides that service of a document may be served upon a person (a) "by delivering a document to the person" or (b) "by leaving the document at the last known or usual place of residence or business of the person with some other person apparently living or employed at

that place and apparently not less 16 years of age" (c) in the case of a person other than a body corporate by posting the document by certified mail to the person at his last known or usual place of residence or business or (d) where the person is a body corporate by posting the document by certified mail addressed to the body corporate at its last (seemingly "business") address.

Enquiries of the Court reveal that the procedure of personal service is generally not affected by Court officials (Commonwealth Police) with any degree of expedition and that if speed is desired the claimant ought to take the documents away and serve them himself. This "self help" is encouraged.

The procedure of service by mail is, as I understand it, now followed as a matter of course in all cases other than those where the documents are served by the claimant personally. It should perhaps be noted however that the service must be by certified mail and this does impose a fairly serious financial burden on a Court which deals with 5,000 matters per year. I would respectfully suggest that in most cases service could be equally efficaciously effected by the use of ordinary mail and no doubt that is one matter which the Attorney General will look into in his review of the ordinannce.

It should perhaps be noted that the provisions for service on a company are more stringent in some ways than those applicable under the uniform companies legislation (in that certified mail is required) but the anomaly of service upon the company's place of business rather than upon its registered office can give rise to certain difficulties if the provisions of the Service and Execution of Process Act are required to be complied with.

APPEALS

The section of the Ordinance labelled appeals, (that is, part III) appears to be designed to make appeals from decisions in the Small Claims Court as difficult as they can be.

To begin with the appeal is dependant upon a report being made by the magistrate in terms set out in Section 37. Such a report is, I suppose, essential in view of the fact that in theory no transcript is taken of the proceedings and therefore the factors upon which the magistrate made his findings and the application of law by him are therefore matters of particular interest to the Supreme Court. However, the necessity for such a report for the appeal gives rise to the anomaly set out under Section (2) that where the magistrate who gave the judgment is not available to make the report the Chief Magistrate shall make the report. In the case of a magistrate who either dies or is geographically far removed from Canberra Section 37 (2) appears to place a requirement for clairvoyance on the Chief Magistrate. In practice however a transcript is taken and can be made available.

Moreover, the procedure is not by straight appeal nor even by appeal conditioned by the normal rules that discretions are not to be upset unless it can be shown that a judge in first instance took into account matters which he ought not or alternatively did not take into account matters which he should.

Section 33 provides that appeal is only by leave of the Supreme Court and that leave is not to be granted unless the Supreme Court is satisfied that the decision in the Court on a question of law is wrong or alternatively the conduct of the proceedings in the Court was unfair to the applicant.

The purpose of part III appears to be designed to ensure that there are virtually no appeals from decisions of the Small Claims Court thus ensuring for all practical purposes that the justice originally obtained is permanent justice and not merely the first step in an accelerating series of actions becoming more and more costly.

Such a proposition must, however, carry with it the converse difficulty that if for whatever reason a litigant in the Small Claims Court is aggrieved by the decision, it becomes extraordinarily expensive to reverse this grievance. This may be of little significance if what is an issue is a question of a dog barking next door or a defective toaster. It is of considerably more significance in my submission if what is involved is a second hand car or an expensive washing machine worth perhaps $900.00.

If, in fact, the forthcoming review of the Ordinance produces (as it no doubt would be assumed in these days of inflation) an increase in the jurisdiction of the court a review of the appeal procedures is imperative.

Whilst we speak of costs it should perhaps be mentioned that section 29 of the Ordinance prohibits an order for costs. Such a prohibition extends, it seems, even to cases of vexatious litigants bringing frivolous actions and perhaps the forthcoming review might give consideration to empowering the magistrate to award costs in an appropriate case.

Such a suggestion, however, strikes at the very root of the Small Claims procedure which is designed to enable litigants to oppose a better heeled and substantial company without the fear of being litigated

to economic death. My enquiries reveal that, in fact, the provision in relation to costs generally works no substantial hardship and in some respects serves to discourage those litigants who wish to use lawyers to assist them against litigants who are unable or unwilling to utilise the services of our excellent selves. In passing it should perhaps be noted that an unpaid agent is entitled to appear for a party other than a body corporate, but only with leave of the court. (Section 42). At the moment negotiations are proceeding between the Legal Workshop and the Court with a view to enabling workshop students to attend to in effect give their services as unpaid agents for litigants who experience some difficulty in understanding what the Court is all about. A body corporate is presumed apparently to be better heeled, (see section 42 (2).

SETTING ASIDE JUDGMENTS

Judgments may be set aside (Section 31) upon sufficient cause being shown to the Court. The one exception to orders for costs appears under Section 31 (Section 31 (3)) where the Court may impose terms granting an order that judgment be set aside including terms as to the payment of costs. Presumably such costs would be awarded on the basis of the Court of Petty Sessions Scale.

One anomaly that appears under the ordinance is that under Section 19 a judgment of the Court is final and conclusive and no party to the proceedings shall be entitled to institute or continue other proceedings for the same cause or matter. That section appears to be in direct conflict with Section 31 which stipulates as indicated above that any order or judgment may be set aside in accordance with the terms of that section. In practice this means that no judgment of the Court is in fact final

and conclusive and in my submission some consideration should be given to the amendment of the section to bring it into line with Section 23 of the Court of Petty Sessions Ordinance.

A further anomaly in this general area is the effect of Section 25 of the Ordinance which relates to the discontinuance of proceedings by a litigant. It has apparently been the experience of Court officials where agreement is reached by the parties in conference with the clerk whereby each of the parties agrees to discontinue their action. Sometimes some litigants are not found to be honourable about their agreement and upon the other party discontinuing proceed with their own action. Section 25 (3) precludes the discontinuing party from taking any further proceedings for the same cause or matter and presumably as no order of the Court is involved he cannot utilise the provisions of Section 31 to get the matter back before the Court.

NON APPEARANCE

The sub-committee of the Law Society sometime ago reported on the operation of Section 16 of the Ordinance which permits the Court to proceed to judgment in favour of the claimant where a defendant who has filed a defence does not appear for hearing. However, as a result of one interpretation of Section 15 (2) ("if at the time and place to which an enquiry in proceedings has been adjourned or a party to the proceedings does not appear the Court may continue the enquiry in the absence of that party or if that party is the claimant may give judgment for the defendant") judgment can only be entered in favour of the defendant where the claimant fails to appear at the time and place to which the enquiry in the proceedings has been adjourned. This obliges the counter-claimant defendant to bring all his witnesses to Court on the first occasion. If there is no

appearance of the claimant, the matter is adjourned to another hearing date of which the Court is to inform the claimant. The defendant must again bring his witnesses to Court on the new date in order that he is ready to proceed with his counter-claim in the event of the claimant appearing.

In practice the Court now seems to gloss over the "adjournment" requirement and to hear the evidence on the counter-claim on the first occasion.

The sub-committee recommended that the prudent adviser of such a defendant would file a defence and a separate fresh claim so that in that way he could request the Court to enter judgment in his favour if the claimant should fail to appear on the date it was first fixed for hearing.

ENFORCEMENT

There were some early problems with enforcement of judgments of the Court or even with "deemed judgments" of the Court (see original section 10/7). These appear to have now been resolved in practice, and by amendment though as with so many parts of the Small Claims Ordinance the procedures can only be effectively operated with the goodwill of the staff at the Court.

The procedure for enforcement of course now remains in the hands of the Small Claims Court itself but the procedures available are the same as those available in Petty Sessions. I need hardly remind practitioners that so far as quick and effective ways of getting money are concerned these procedures are grossly inadequate. These are matters which concern quite seriously the staff at the Small Claims Court and any amendments

to the Ordinance should, in my submission, contemplate a fairly extensive and radical review of the standard procedures for enforcement.

It should perhaps be noted that as far as interlocutory judgments are concerned the advice I have received indicates that in the case of unliquidated amounts generally a relatively informal procedure for assessment of damage can be adopted by production of the relevant invoices to the Clerk with the decision being in effect given in Chambers by the magistrate.

GENERAL

There are probably few practitioners who have not, at some stage, referred a client to the Small Claims Court and there are probably few practitioners who do not believe that it is a useful repository for those actions which are uneconomic for a client to run using the services of a solicitor. Equally so however, there is probably a majority of practitioners who have had some sort of unsatisfactory experience in the Small Claims Court when appearing for a client who insists upon legal representation. These unsatisfactory experiences in some cases probably relate to the frustration that a lawyer naturally feels in an area where the rules of evidence are gaily abandoned. Moreover there are occasions where the practitioner is virtually treated with ignore, as being a superfluous part of the proceedings. Indeed, in many cases he may be.

The Small Claims tribunal represents in my opinion a vital part of the chain of legislation in relation to consumer protection. Without it the small claim which cannot be effectively financed by the normal legal channels cannot hope to achieve any viability with the "small" litigant effectively denied his remedy, not because he doesnt have a good case, not because his claim is invalid but merely because he does not have the money to pursue it.

Like all principles in this area there is a countervailing ill so far as a defendant company is concerned. It is possible to have a series of vexatious actions brought, each of which a defendant company may be required to meet, with some degree of legal representation. The company may employ its own "servant" to defend the case but given a multiplicity of actions for say $900.00 such a course of action is unlikely in the present economic climate. As before, when I considered the question of appeals it is my view that any increase in the jurisdiction of the Small Claims Court will create further problems and I believe that the increase is not justified.

Probably some relaxation of the service procedures could be affected in any review as long as a fairly easy power to set aside judgments is retained. Like all reforms it seems that if a claimant is to get the benefit of a more expeditious and easier way of service then he must bear the penalty if in fact that service is ineffective and accordingly a defendant does not find out that he has had judgment entered against him until enforcement proceedings are in train.

Summary

Whilst the Small Claims Court is a tribunal for which most of us are almost by definition excluded it should remain as a matter for consideration by all of us because it represents the paths which reforming Attorneys General may follow in an effort to achieve savings of costs for the public and also ready access to the law by individuals. A crusading Attorney General may find some comfort in the inquisitorial expert system and if we, as I believe, we should oppose such developments, it

is up to us to make our existing court systems work effectively. It is also, I suggest, up to us to ensure that the Small Claims Court works properly as well in those areas to which it is restricted.

It is fashionable nowadays to comment upon the limitations imposed on Court structures by staff ceilings and in this regard it can only be commented that the Small Claims Court has only worked effectively to date owing to the considerable cooperation of the staff in and about the Court and any suggestion that such staff can or should be reduced would have to be strenuously opposed.

As I have indicated earlier the Small Claims Court only works by reason of the dedication and co-operation of the staff of the Court. As most practitioners will be aware the majority of cases that come before the Court for hearing firstly are involved in a procedure of informal compulsory conference. My information is that this conference results in somewhere between 60 to 85% of all cases being effectively settled prior to any dispute in the Court. It is my opinion that this procedure ought to be formalised in the Ordinance and that before a matter is set down such a compulsory conference ought to be held.

Allied with this procedure it would be appropriate that where parties reach agreement they consent judgment can be entered without the necessity for the parties to appear in Court. Moreover, it appears to be advantageous that the Clerk of the Court conducting such a conference should be given the power to appoint an investigator to short circuit the delays that occur where such an investigator can only be appointed by the magistrate hearing the case.

Finally, I wish to bring to the attention of those present a classic illustration of bureaucracy gone mad. A recent directive received in the Small Claims Office informed staff that when an investigator is to be appointed before the appointment is confirmed a request for funds, coupled with an estimate, (impossible to give) of fees involved to be sent to the Head Office of the Attorney General's Department for approval. When that approval is received then the investigator may be appointed but his bill may not be paid until such time as it has been certified by the magistrate to be fair and reasonable and passed to the Head Office again.

This procedure which has no authorisation under the terms of the Ordinance, and which in effect, gives the Attorney General's department the power to appoint an investigator rather than the magistrate is in the estimate of some officials of the court likely to mean that judgment will not be given in a case involving an investigator for anything up to 6 to 7 months.