Gabrielle Meech

The Privy Council: Will it be Missed?

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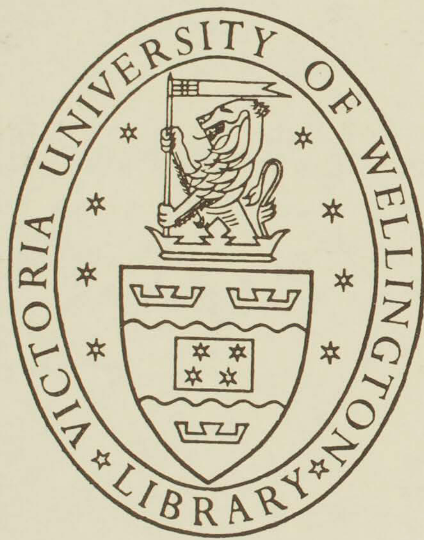
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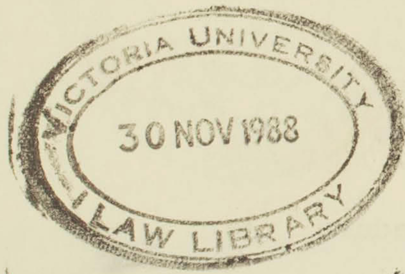
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INTRODUCTION

New Zealand has enjoyed the right of appeal to the Judicial Committee of the Privy Council since 1841.(1) Initially, the opportunity to appeal to a judicial body of such standing was recognised as a means to ensure an independent judiciary as well as to provide a check on the quality of judgments given by New Zealand courts. While the appropriateness of the Board has often been questioned throughout its era of interaction with New Zealand,(2) in recent years the reliance placed on the Judicial Committee has come to be a source of increasing controversy. However, it appears that the role of the Privy Council is a matter which New Zealand will not have to grapple with for much longer as the Government has announced that it intends to abolish the right of appeal within this term.(3)

Given that the future of the Board has thus been decided, the question remains as to what effect the Judicial Committee has had on the development of law within this country. This paper aims to answer this question: firstly by outlining the structure within which the right of appeal is available; then by considering ways in which our law has been influenced by the Privy Council other than through the straightforward application of the doctrine of precedent; and finally by analysing the New Zealand Privy Council appeal cases in order to determine the Judicial Committees's direct effect on different areas of the law. The results of such an analysis suggest that subject to three exceptions, the Board

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has generally not played such a significant part in the development of New Zealand law as one would expect of a final appellate court. The exceptions are found in the areas of constitutional law, contract and taxation.

BACKGROUND

The Judicial Committee was created by statute in 1833.(4) It replaced the "old Appeals Committee" which had heard all appeals to the King in Council from 1696. The theory lying behind such appeals was that the King was the source and dispenser of justice throughout his dominions and was therefore the authority to be resorted to in any case of grievance by error, delay or obstruction in the ordinary courts.(5) The King always exercised jurisdiction in his Council which acted in an advisory basis. As Parliament developed out of the Council, the House of Lords became entrusted with the power of declaring the law in England, leaving the King in Council with appellate jurisdiction in the overseas dominions.(6)

The Judicial Committee of the Privy Council differed from the previous advisory bodies in that councillors who were not lawyers by profession were excluded from membership. Today, the Judicial Committee consists of the Lord President of the Council, the Lord Chancellor, ex Lord Presidents, the Lords of Appeal in Ordinary, such other members of the Privy

Council who hold or have held high judicial office and two other Privy Councillors who may be appointed by the Sovereign by sign manual. Membership has also been extended to include Councillors who are or have been Chief Justice or a Justice of the Superior Courts of the Dominions.(7)

Initially,from the time of its establishment in 1841, appeal to the Judicial Committee lay by virtue of prerogative power from the Supreme Court.
The first specific provision for such appeals was made by an Imperial Order in Council in 1860. In 1871 regular provision was made for appeals from the Court of Appeal,(8) with provisions for appeals direct from the Supreme Court retained.(9) The grounds for appeal have remained substantially unaltered to the present day.

New Zealand appeals to the Privy Council are now regulated by the Privy Council (Judicial Committee) Rules Notice 1973.

In short, an appeal lies:

i) as of right, from a final judgment of the Court of Appeal where the matter or claim is of the value of, at least, $5,000;(10)

ii) at the discretion of the Court of Appeal, from any judgment - final or interlocutory - of that Court if that Court considers the issue to be of great general or public importance;(11)

iii) at the discretion of the High Court, from any final judgment of that Court if that Court considers the issue to be one of great general or public importance

such that it ought to be submitted to His (sic) Majesty in Council for decision;(12)

iv) at the discretion of the Privy Council.(13)

The Judicial Committee will only grant special leave to appeal in civil cases.(14)

> .... where the case is of gravity involving matters of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.

The conditions that must be satisfied before leave to appeal will be granted in criminal cases are even stricter as was clearly stated in Re Abraham Malby Dillet:(15)

> The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

The Board has applied this test to hopeful New Zealand applications, denying a number of petitions for special leave to appeal.(16)

In fact, the Board has only heard five prosecutions from New Zealand, one of which, Annie Brown v Attorney-General for New Zealand(17) was only granted because their Lordships were under a misapprehension of facts. In Crown Milling Co. Ltd. v The King(18)the Judicial Committee overturned the Court of Appeal on the ground that the Crown had failed to prove a monopoly which was contrary to the public interest. While it does seem peculiar that the Board

should overturn a New Zealand court on the basis that the latter did not understand the public interest of New Zealand, the Board made a point of noting the discrepancy between the local judges on the question, then holding that the Crown had failed to discharge its burden of proof.It is interesting to note that the three other criminal appeals(19) have all been heard since 1975, inviting the question of whether criminal appeals are now more readily entertained by the Judicial Committee. However, Nakhla v R(20) was appealed with leave of the Court of Appeal, the appeal then being allowed by the Board after a consideration of English cases which the Court of Appeal had not allowed to influence the case,apparently feeling itself bound by an earlier decision of its own.(21) Nakhla is thus an illustration of the importance of allowing a court of last resort (in this instance the Court of Appeal may be such a court as regards criminal appeals) to depart from an earlier decision of that court. The issue of stare decisis in the Court of Appeal will be returned to later. The other two criminal appeals were dismissed; McDonald(22) highlighting the importance of the Court of Appeal in criminal cases by expressing that extraordinary circumstances would be necessary before the Board would interfere with a judge's determination on admissibility of evidence which the Court of Appeal had approved; and Kaitamaki(23) reaffirming the Court of Appeal's construction of the rape provisions in the Crimes Act 1961. It can thus be seen that the area of criminal law is one into which the Judicial Committee is

reluctant to interfere, and into which the Board has consequently not had a great effect.

THE CHALLENGE TO SOVEREIGNTY

The Privy Council has undoubtedly served a useful and important role in New Zealand's history. In the early days of the colony, appeal to an external English body was seen as maintaining a high, independent standard of law which, it was believed, local courts could not have attained alone. British subjects were reassured by the appeal to His(sic) Majesty in Council.

Such a satisfied colonial perspective no longer surrounds the Judicial Committee's relations with members of the Commonwealth. Instead, its memory is perhaps the basis for one of the most widely heard arguments for abolition of the final appeal to the Board: that such an appeal is demeaning of our national sovereignty. New Zealand attained legislative independence in 1947(24) and today any thought of subordination to the United Kingdom parliament is inconceivable. Yet the same cannot be said for the judicial branch of power which remains subject to a colonial relation of 148 years. However, the mere fact of appeal does not of itself represent an imposition upon our sovereignty as it is New Zealand that has the power to determine the value of an appeal to the Board. It is due to New Zealand's choice (although admittedly the decision to date has been passive) that the right of appeal has been retained. Prima facie,

therefore, appeal to the Judicial Committee is not demeaning of New Zealand's sovereignty unless there is no actual validity in the retention of the appeal and the substantive effects of their Lordships' opinions detracts from New Zealand's autonomy.

<u>Should the Appeal to the Board be retained?</u>

The New Zealand Law Society presented to the Royal Commission on the Courts the basic arguments for and against Privy Council appeals from a Unitary state.(25) The following arguments for retaining the appeal were advanced:(26)

1. Having a right of appeal to the Judicial Committee means that the highest calibre of legal expertise is available to litigants at no extra cost to the New Zealand taxpayer.
2. The Privy Council acts as a check on the New Zealand Court of Appeal. The existence of a right of further appeal has a significant effect on the quality of the judgments of that Court.
3. The physical separation of the Privy Council from New Zealand gives it a greater measure of detachment than a local court. As New Zealand is a small nation with a small population it is impossible for its judges to be divorced from local influences.
4. The United Kingdom by reason of its population has a larger reservoir of judicial talent.
5. The appeal to the Privy Council is essential to maintain

a two-tier appeal system. A second right of appeal is necessary to ensure that, following the determinations of fact in the High Court, the legal argument has the opportunity to develop and mature. This facilitates the process by which legal argument is crystallised and refined to the essential issues.

The first argument may be criticised on the basis that, while it considers the cost saving made by the New Zealand taxpayer, it ignores the considerable expense involved to the litigant. Such expense goes beyond that which must necessarily be incurred in a second appeal as it must also take account of airfare, accommodation and agency costs in London. The cost of an appeal prices most New Zealanders out of the market, leaving only the Crown, substantial corporations or wealthy litigants able to sustain an appeal. Moreover, it has been suggested that there are specific instances where litigants have been forced to compromise due to the threat of an appeal to the Judicial Committee.(27)

The second argument put forward for retention of the appeal to the Judicial Committee is a more difficult matter to assess. With an appeal rate of 1.18 per year (175 appeals have been heard since 1840) it seems unlikely that the fear of having a judgment overturned on appeal is a significant factor in ensuring the quality of judgment the Court of Appeal gives. Further, a "success" rate of one-in-three appeals(33.3%) occurs in a high proportion of appellate systems.(28) New Zealand statistics accord with this figure:

of the 175 appeals to the Judicial Committee, 60 were allowed (34.3%), 102 dismissed (58.3%), and 13 varied (7%).(29) As these figures merely indicate the normal workings of an appellate court it is difficult to assess the comparative merit of Court of Appeal judgments with decisions of the Judicial Committee. Also, many cases which reach the apex of our appellate level involve interpretations of law which are arrived at by an evaluation of policy considerations. These cases reflect areas of the law which are uncertain and where there is no strictly "right" or "wrong" answer. The fact that the final appellate court makes a different determination of the law does not mean that the former court was wrong as both views are often legitimate interpretations.

This point is illustrated by the words of Justice Jackson of the United States Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final".(30) The Board's jurisdiction can therefore be questioned in that firstly, a second appellate tier is simply not necessary and secondly, that where policy considerations are at issue, it is inappropriate that a body external to New Zealand should be involved: i.e. the New Zealand courts are in a better position to evaluate the effect of various policy matters than are the members of the Judicial Committee.

Inherent in the above criticisms is that the objective of the judicial system must not be seen solely as a means of obtaining the "right" answer but as a means of bringing about a final determination of disputes.(31) The system should

ensure that this is done equitably and expeditiously - a test more easily satisfied by a final court in New Zealand than in London.

The third argument in effect suggests that the New Zealand judiciary is not independent and probably never will be due to the size of our country. This is greatly contested by many commentators, Robson(32) contending that not only are our judges sufficiently independent today but that they have been so since the turn of the century. It is interesting to note, however, that the independence of the Court of Appeal was questioned by some following Re Erebus Royal Commission; Air New Zealand Ltd. v Mahon.(33) The Judicial Committee's subsequent dismissal of the appeal(34) thus provided an external assessment of the Court of Appeal's decision and was able to impliedly refute the allegation that the New Zealand court was biased in favour of Air New Zealand. Despite the Erebus case, it cannot seriously be suggested in New Zealand today that the judiciary are anything but independent.

In fact, the more concerning side to this argument is its opposite implication - i.e. rather than the Court of Appeal being too involved with local influences, the Judicial Committee is too removed from them. The Board lacks sufficient knowledge and expertise of local conditions and legislation peculiar to New Zealand. This situation is becoming more obvious as English jurisprudence is influenced by the United Kingdom's membership of the European Economic Community.

The Board has at times made it clear that it will not interfere with a finding of facts of the local courts. For instance in Reid v Reid the Judicial Committee said of the concurrent findings by the trial Judge and the Court of Appeal that the contribution of the husband to the marriage partnership had clearly been greater than that of the wife:(35)

> This is essentially the sort of issue which the Courts of the society to which the spouses belong are in a position far superior to that of their Lordships in forming a judgement.

However, other decisions of the Board make it apparent that its understanding of New Zealand circumstances is not as clear as one would expect and that the situations where the Board does defer to the local courts opinion are relatively rare.

There is also some controversy between the Board and the New Zealand Courts as to when it is appropriate for the local courts to develop their own doctrine in a particular sphere of law. This will be discussed later in the paper but is mentioned now as an indication that the existence of the right of appeal has inhibited the growth of New Zealand law. (36) The Judicial Committee thus lacks the sensitivity to know when local conditions necessarily negate the value of its interference. It appears that until the Court of Appeal is free to act in a completely autonomous manner, it cannot effectively develop New Zealand law for New Zealand conditions.(37)

There appears to be little merit in the fourth argument

for retention of the appeal; that New Zealand does not have the depth of judicial talent necessary for a final appellate court. In many ways the Court of Appeal already is the final appellate court given the infrequent appeals its decisions are subject to. Even when the appeals are allowed the rate is within that expected of an appellate court(38) which suggests that the judgments given by the New Zealand courts are of the required standard. Indeed, the low number of appeals from the Court of Appeal may in fact reflect general confidence in that court.(39)

The fifth argument; that a second right of appeal is necessary to allow legal argument to be refined to the essential issues somewhat ignores the fact that the vast majority of appeals today do not get such a second chance and generally do not seem the worse for having missed it. Nonetheless, even if a second right of appeal should be considered desirable,(40) it is clear from the foregoing legal arguments as well as the current political climate that the Judicial Committee should not be that second appellate body.

Having considered the arguments for retention of the appeal to the Judicial Committee it becomes apparent that they have very little legitimate backing. It was stated earlier(41) that as New Zealand had elected to retain the services of the Judicial Committee they were not per se an infringement on our effective sovereignty unless there was no validity in the retention of the appeal or the effect of the

decisions themselves was demeaning to New Zealand's autonomy. As the first of these conditions has now been fulfilled it is appropriate to consider whether the hearing of appeals by the Judicial Committee is more than a theoretical infringement of sovereignty. Hughes(42) believes it is in two ways:

1. The Judicial Committee is constituted and regulated largely by only one of the members of the Commonwealth over which the others have no control.(43)

2. The existence of the Judicial Committee interferes with the powers of the Dominions to regulate their own jurisdiction in their territories.(44)

Given that New Zealand's sovereignty is thus diminished by the right of appeal which cannot be justifiably retained, it is easy to see at least one of the major reasons why other Commonwealth countries have disposed of the right of appeal.

Reaction within the Commonwealth to the Privy Council's Jurisdiction

Few members of the Commonwealth other than New Zealand have achieved independence and retained the Judicial Committee's services. Of those which have, New Zealand is distinctive due to its political stability. Attempts to explain this often focus on our small population and/or sentimental ties with the United Kingdom.(45) Indeed, it is often New Zealand commentators who are the most offended by our traditional link with the Board:(46)

> Of the old Commonwealth only New Zealand hesitates; cultural sentiment and colonial mind-sets are still powerful forces here. But the result is inevitable; only

> the political will is lacking, and until the day the Court of Appeal of this country is finally recognised as the ultimate court of this land, that remaining vestige of colonialism will continue to frustrate the creation of a truly New Zealand culture.

Comparing the relatively small population size of New Zealand to many states which have abolished the appeal, the pattern is not entirely consistent as Sierra Leone is a state which had a population of approximately 2.8 million when it abolished appeals to the Privy Council in 1972.(47)

Before a state can successfully abolish the appeal to the Privy Council, the judiciary must be willing to take over from the Judicial Committee. Such an attitude was apparent in both Canada and Australia for quite some time before the appeal was finally disposed of.(48)

In contrast, it appears to be only recently that New Zealand judges have felt confident enough to make the same stand in 1976, Sir Thaddeus McCarthy spoke of it only being a matter of time before the link with the Privy Council would go, but intimated that it would not necessarily be in the immediate future.(49) Sir Robin Cooke accepted as recently as 1987 that the point of no return has come:(50)

> We must accept responsibility for our own national legal destiny and recognise that the Privy Council appeal has outlived its time. Not to take the obvious decision now would be to renounce part of our nationhood.

The existence of such an attitude is to some extent necessary if the judiciary are to take on an existence independent of the United Kingdom. If such a mentality is not prevalent then the effect of abolishing appeals to the

Privy Council will be limited by the retention of colonial attitudes, resulting in a dependence beyond that which is desirable upon House of Lords judgments as well as Privy Council decisions pertaining to different jurisdictions.

An indication of why many Commonwealth nations have abolished the right of appeal to the Privy Council may be gained from an examination of the reversal rates of different states:(51)

Table 1: Affirmative/Reversal (1829 to 1971)

Canada	390	312	(44.4%)
Australia	278	212	(43.2%)
India-Burma-Ceylon	1471	1068	(42.0%)
West Indies	83	107	(56.3%)
New Zealand	65	42	(39.2%)

The reversal rate reflected here is somewhat higher than one normally expects from an appellate court.(52) This suggests that the Privy Council was, to some extent, forcing legal development in the directions which it desired rather than following the jurisdiction from which the cases emanate. If it can be said that the relatively high rate of reversals was a factor which has influenced Canada's and Australia's decision to abolish the appeals, although the quality of reversals is of course more important than the quantity, then New Zealand's slightly lower rate may explain somewhat both why our legislature and our courts have been more content to remain subject to the Judicial Committee. The fact that so few appeals have been heard is possibly another reason why New Zealand has remained with the status quo as the Board's

interference with New Zealand law is, in terms of quantity, small.

Some of the countries which have retained the appeal have nonetheless placed certain limits on its use. Hong Kong for example only has an appeal as of right where the sum is $HK500,000 or more.(53) The existence of such a limitation is at least proof that some thought has been given to the suitability of the Board as the final appellate court. The sum required in New Zealand before an appeal may be heard as of right, $5,000,(54) reflects the fact that it is some time since the regulations dealing with the appeals have been reviewed. In fact, even the introduction of the new sum in 1972 was criticised for its lack of consideration and the method by which it was introduced.(55)

There is no doubt that the trend throughout the Commonwealth has been to disengage the services of the Judicial Committee once both political independence and a sufficient level of judicial strength have been reached. It is well recognised that the abolition of the appeal is not necessarily a slight to the United Kingdom but merely a positive step in the growth of the dominion. As one English judge, Lord Normand, has said:(56)

> There is also the question whether the loss of dominion appeals is to be deplored, or whether we may not even regard it as a sign of the fulfilment of the purpose for which the appeal jurisdiction has always existed.

INDIRECT EFFECT OF THE PRIVY COUNCIL ON "NEW ZEALAND LAW"

There are two underlying assumptions behind this section

of the paper. The first is that there has in fact been the development of a distinct "New Zealand law" in some areas, promulgated both by the legislature and the Court of Appeal. The second is that this is good. The latter assumption recognises that different social and political considerations call for divergences within the law throughout the Commonwealth. It recognises that there must be a uniform common law approach but that the focus of such an approach should be intra-state rather than international.

I. Stare Decisis in the Court of Appeal

Part of the Privy Council's influence on New Zealand law can be determined by the effect it has on the Court of Appeal. Prima facie, the latter is bound by rulings of the former where the appeal came from New Zealand. Is it, however, bound by its own decisions? If the Court does not consider itself bound by its own earlier decisions, it may be encroaching upon the traditional role of a final appellate court. It may be causing unwanted inconsistency and uncertainty in the law and it may be undermining the authority of the Judicial Committee.

Alternatively, if there is a distinct New Zealand common law emerging, it must arise from within New Zealand courts.(57) Thus there will be occasions when, because of changing social and economic factors, the N.Z.C.A. will not want to follow an earlier decision of

its own but rather to develop the law in a manner consistent with current conditions. Secondly, given the infrequent rate of appeals to the Privy Council,it must be recognised that in the vast majority of cases the Court of Appeal is in reality the final appellate court for New Zealand.

Of course, it is accepted that there should be some situations in which the Court is not bound by its own decisions. Orchard suggests two main ways in which the Court's power to overrule its own decisions may be fettered.(58) The first occurs where the Court adopts a rule that it is bound by its previous decisions, subject to a limited number of specified exceptions. In the second situation the Court declares that it will normally follow its earlier decisions, but will reject them in exceptional cases where it appears right to do so. Orchard advocates that the N.Z.C.A. should adopt the latter.

However, in Attorney-General of St. Christopher, Nevis and Anguilla v Reynolds(59) the Privy Council made it clear that an intermediate appellate court should fall within the former category(60). The statement in that case was obiter. It has since been heavily criticised as ill-considered.(61)

Reynolds is particularly odd when compared with the Board's opinion in Geelong Harbour Trust Commissioners v Gibbs Bright (A Firm).(62) In the latter case, a mere

five years before Reynolds, the Judicial Committee accepted that the High Court of Australia has always possessed the power to refuse to follow its own previous decision if it should think fit. Despite this, Australia was not excluded from the ambit of the statement in Reynolds.

It is submitted that the N.Z.C.A. is justified in not following their Lordship's advice on this issue as the statement in Reynolds was obiter, it was ill-considered and clearly inconsistent with Gibbs Bright. This appears to be a course the Court of Appeal has chosen to follow. In Howley v Lawrence Publishing Co. Ltd.(63) a majority of the full bench of the Court rejected the restrictions imposed by the Young(64) case. While the outcome in Howley was a majority decision, it is clear that in a "proper"(65) case the whole court would be prepared to adopt a more flexible approach to the principle of stare decisis than is available to the English Court of Appeal. Richardson J appears to advocate an approach similar to that used by the House of Lords:(66)

> This Court has the final responsibility within New Zealand for the administration of the laws of New Zealand and while its decisions are subject to review by the Privy Council few litigants, less than one percent of those unsuccessful in this Court, feel able to follow that path. It is I think unwise to formulate any absolute rule. I tend to the view that we should go no further than to indicate that this Court will ordinarily follow its earlier decisions but will be prepared to review and affirm, modify or overrule an earlier decision where it is satisfied it will do so, but without attempting to categorise in advance the class of cases in which it will intervene.

It thus appears that despite the Judicial Committee's opinion in Reynolds, the N.Z.C.A. will not adhere to the rule in Young. This means that when the appeal to the Privy Council is lost, the Court is ready if necessary, to take over as the final appellate court without having to reassess its position on the issue of stare decisis. Also, the ability to reconsider its own decisions places the Court in a better position to develop a distinctly New Zealand common law. However, it is clear that this is not a state of affairs which the Privy Council has sought to encourage, rather it has actively tried to restrict such development. This can be seen not only from the Judicial Committee's treatment of the stare decisis question for intermediate appellate courts but also in the Board's insistence upon uniformity.

II. The Desirability of Consistent and Uniform Development of the Law throughout the Commonwealth

> The Judicial Committee has this enormous responsibility that it is the only agency for securing any measure of uniformity in legal development over the whole of this vast Empire. It exercises a jurisdiction which involves knowledge of some four or five, or more, completely different kinds of jurisprudence, dating from the unknown past.(67)

Statements such as this suggest that there should be a field of law to which the whole Commonwealth is subject, and that it is the place of the Privy Council to ensure such consistency. While such uniformity clearly does not exist today(68) the Board still seems to consider that it must repress individualistic tendencies from countries subject to

its jurisdiction.(69) Such an attitude raises many issues for the New Zealand courts, including:

1. Which pronouncements, if any, of the Judicial Committee, House of Lords and the English Court of Appeal should be binding? and
2. Should a rearguard attempt be made to promote the unity of the common law, or should the courts, while treating English decisions as persuasive, feel free to develop the law in response to peculiarly local conditions and needs?

Considering first the nature of Privy Council appeals which are binding on the New Zealand Court of Appeal the prima facie assumption is that only cases proceeding from that court can have such effect as appeals from other jurisdictions are, despite the uniform Commonwealth approach, from a different court hierarchy. Nonetheless, there is support for such a proposition emanating from cases such as _Trimble_ v _Hill_(70) and _Fatuma_ _Bakhshuwen_ v _Bakhshuwen_.(71) Such a view sees the Privy Council as the decisive judicial body throughout the Commonwealth, its decisions in one sphere necessarily affecting the whole sub-structure which is subject to it:(72)

> The traditional view, following naturally from the aim of uniformity expressed in _Trimble_ v _Hall_, seems to be that judgments of the Privy Council apply to all territories of which it is the superior court regardless of the origin of the action.

The multiple effect view of the Board's decisions may cause enormous difficulties where different legal rules have

developed in different territories. Such difficulties will be increased if the law throughout the Commonwealth is not addressed in each case so that the effect on territories who will be indirectly affected is not considered. If this does not happen, the multiple effect theory is likely to lead to fundamental changes of doctrine without due consideration of the authorities which form the basis of such a doctrine. The New Zealand case of Frazer v Walker(73) is an example of where the Board has seemingly ignored the effect a decision in one jurisdiction may have on another. In that case the Judicial Committee referred only to decisions dealing specifically with the law of New Zealand with the single exception of its own decision in Gibbs v Messer.(74) This was despite the strong similarities between the legislation in question and that of Australia. The Australian case was distinguished and a new point of law settled.(75) The danger represented by the Judicial Committee giving a decision concerning the interpretations of provisions very similar to an Australian statute without a discussion of Australian authorities and without an indication as to the width of its binding effect can be illustrated by Mayer v Coe.(76) In this case, Street J. held in 1968 that he was bound, in the light of the Bakhshuwen(77) principle and the acceptance by the High Court of the application to Australia of Privy Council decisions on statutory provisions similar to those of an Australian state, to follow Frazer v Walker. This is herein referred to as a danger because it means accepting a

change in Australian law without considering whether such a change is desirable or specifically appropriate for Australian conditions, the case having been decided in the New Zealand context.

It may, however, still be legitimate not to follow Privy Council decisions of other territories. Such a position is the logical extension of Australian Consolidated Press v Uren (78) where it was recognised that Australia could develop its law differently from that of England. Thus Judicial Committee determinations of appeals from other places are not necessarily the result of applying the common law of England and therefore may not be binding as they represent an exception to the uniform and consistent approach. A more recent and far-reaching affirmation of the point in Uren is found in Jamil Bin Harun v Yang Kamsiah(79) where Lord Scarman recognised that it was for the Malaysian courts to decide whether to follow English case law:(80)

> On appeal the Judicial Committee would ordinarily accept the view of the Federal Court as to the persuasiveness of modern English case law in the circumstances of the States of Malaysia, unless it could be demonstrated that the Federal Court had overlooked or misconstrued some statutory provision or had committed some error of legal principle recognised and accepted in Malaysia.

Such a view is a far-cry from the uniform and consistent claim referred to earlier by Lord Atkin. Nonetheless, it should be accepted for it will lead to a more uniform system of law within a country than will the adoption of the multiple effect theory. Unfortunately the question still remains as to whether all countries are as free to choose

when English law is applicable.

If the Privy Council considers that English law is applicable to the case in issue, the position of the House of Lords' decisions must be considered. Lord Scarman's recent remarks in the Privy Council opinion, on appeal from Hong Kong, in Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd. are illuminating on this point:(81)

> Once it is accepted, as in this case it is, that the applicable law is English, their Lordships of the Judicial Committee will follow a House of Lords' decision which covers the point in issue. The Judicial Committee is not the final judicial authority for the determination of English law. That is the responsibility of the House of Lords in its judicial capacity. Though the Judicial Committee enjoys a greater freedom from the binding effect of precedent than does the House of Lords, it is in no position on a question of English law to invoke the Practice Statement (Judicial Precedent)[1966] I W.L.R. 1234 of July 1966 pursuant to which the House has assumed the power to depart in certain circumstances from a previous decision of the House.... It is, of course, open to the Judicial Committee to depart from a House of Lords' decision in a case where, by reason of custom, statute, or for other reasons peculiar to the jurisdiction where the matter in dispute arose, the Judicial Committee is required to determine whether English law should or should not apply. Only if it be decided or accepted (as in this case) that English law is the law to be applied will the Judicial Committee consider itself bound to follow a House of Lords' decision.

It thus appears that where a matter of English law is before the Privy Council, it will be bound by the House of Lords. Therefore, on such a matter the local courts should also be bound by the House of Lords.

Consequently, the distinction between English and "non-English(?)" law is crucial to determine the extent to which the New Zealand courts are bound to follow cases from other jurisdictions. Where the Privy

Council gives an opinion which is based on English law, this appears to be binding on New Zealand courts regardless of the origin of the decision unless the existence of "local circumstances" can distinguish the case in issue. Similarly, the New Zealand courts are effectively bound by a decision of the House of Lords where the appropriate law is English.

Therefore, if Tai Hing Cotton Mill Ltd(82) is to be given the wide effect their Lordships apparently intended, the New Zealand Court of Appeal must deny the applicability of English law before departing from the authority of House of Lords or Privy Council decisions. As the Judicial Committee has not expressly stated that the New Zealand courts have the power to determine the issue, as they did regarding the Malaysian Federal Court,(83) reliance must be placed on the doctrine of "local circumstances". Where local circumstances are found to exist, the presumption in favour of the application of English law is rebutted, thus leaving the local courts with an opportunity to develop the law more appropriately in line with the needs of their country.

However, precisely where local circumstances begin and end is not clear. Some of the difficulties an appeal court may face in an attempt to assert its own view of the law when it is contrary to that accepted by the Privy Council are evident in O'Connor v Hart.(84)

This case concerns the criteria for which a contract may be set aside on the basis of mental incapacity. The New Zealand Court of Appeal held that a contract entered into by

a person of unsound mind is voidable at that person's option if it is proved that the contract was unfair to the person of unsound mind. The Court gave a strong decision affirming its earlier decision <u>Archer</u> v <u>Cutler</u>(85), and stating that "this principle should be adopted for New Zealand".(86) The Court thus recognised that it was not strictly following English law but believed that the departure was warranted. It is apparent that the Court of Appeal is receptive to such departures from English law as evidenced by the recent speech of the Right Honourable Sir Robin Cooke at the 1987 New Zealand Law Conference:(87)

> Direct debate of policy considerations, and with an eye to interests transcending those of the immediate parties, has become commonplace. Without exaggeration it may be said to be regular fare in the Court of Appeal.

However, whether this should be so liberally encouraged in light of the developments in <u>Hart</u> v <u>O'Connor</u> is questionnable. The appeal to the Judicial Committee was allowed, the Board being of the opinion that the case was not dependent on local circumstances and that therefore English law should apply. Lord Brightman stated the opinion of the Board:(88)

> If <u>Archer</u> v <u>Cutler</u> is properly to be regarded as a decision based on considerations peculiar to New Zealand, it is highly improbable that their Lordships would think it right to impose their own interpretation of the law, thereby contradicting the unanimous conclusions of the High Court and the Court of appeal of New Zealand on a matter of local significance. If, however, the principle of <u>Archer</u> v <u>Cutler</u>, if it be correct, must be regarded as having general application throughout all jurisdictions based on the common law, because it does not depend on local considerations, their Lordships could not properly treat the unanimous view of the Courts of New Zealand as being necessarily decisive. In their Lordships' opinion

the latter is the correct view of the decision.

It would thus appear that unless local circumstances are present the New Zealand courts must follow English law. In fact, the Board seems to implicitly say that all common law jurisdictions must, in the absence of local circumstances, apply the same common law. While this principle undeniably fetters the development of a distinct New Zealand law, without it the law of New Zealand would be whatever the New Zealand courts said it was, which would leave the Judicial Committee with little or no role as an appellate tribunal.(89)

Therefore, if New Zealand courts wish to pursue a different line of reasoning from English courts but cannot find any local circumstances to justify such a departure, it appears that their decisions may be set aside on appeal as contrary to English law. Such restrictions on the Court of Appeal represent a strong argument for abolition of the right of appeal. For if the Court of Appeal continues to act in the way condemned in Hart, as Sir Robin Cooke's speech suggests it will in fact do, then a body of law distinct to New Zealand may well develop only to be overturned on a sporadic appeal. Such a situation must not continue.

Interestingly, it is at least arguable that earlier authority did not preclude the view of the law taken by McMullin J in Archer v Cutler.(90) Such a view is put forward by Mr Cato who alleges that the Judicial Committee

misread English authority and displayed a questionnable appreciation of Commonwealth authority.(91) If Mr Cato is correct then credence is given to the argument that the reversal of Hart v O'Connor(92) was due to the conflicting communitarianism values which the NZCA holds and the liberal approach taken by the Privy Council:(93)

> The New Zealand Court of Appeal is motivated by compassion and paternalism, both of which are virtues of communitarianism. While the Privy Council, in insisting upon the promisee's knowledge of the promiser's mental incompetence before intervening to void the transaction, perpetuates a liberal view of contract which is preoccupied with consent, and fault, the equivalent in contract law being advantage taking.

Such divergence in methods of approaching a case can have an important effect on the development of the law. Yet because it is implicit in a judgment, rather than directly identifiable, the importance of different approaches often remains undetected. Where an appeal is allowed on the basis of a legal method it is clear that the courts should at least be applying the same method. Thus if the New Zealand courts wish to continue with a method of reasoning not shared by the Judicial Committee, as appears to be the case, conflict will necessarily be the result. This is clearly unsatisfactory.

Despite the Board's "leniency" towards other jurisdictions (for example in allowing Malaysian courts the discretion to determine whether English law is applicable), it appears that the full independence of New Zealand common law really only commences where "local circumstances" begin. A contrary view has been argued by

McHugh,(94) based on the English Laws Act 1908, that the only non-local cases which have obligatory effect, as opposed to being merely persuasive, are those handed down before 1840 which are applicable to New Zealand's circumstances. However, unless (or until) this is accepted, the Privy Council will only allow a distinct "New Zealand common law" in those matters where our local circumstances set us apart from other common law jurisdictions.

Consequently, it is clear that the Privy Council has had quite a major impact on the law of New Zealand by the indirect means of the promotion of a uniform and consistent law, i.e. English law, in conjunction with the multiple effect of the Board's decisions. While it is difficult to quantify the degree of influence these have resulted in, it is obviously significant. However, much of this influence is due to the importance of English doctrine generally rather than the specific effect of the Privy Council.

ANALYSIS OF PRIVY COUNCIL DECISIONS ON APPEAL FROM NEW ZEALAND

In the 147 years in which an appeal to the Judicial Committee has been available from New Zealand, only 175 such cases have been heard by the Board. This means that the Board hears an average of just over one (1.2) case on appeal from New Zealand each year. Such an infrequent rate gives credence to the theory that our Court of Appeal is the de facto if not de jure final appellate court. It also raises the question as to the direct effect the Judicial Committee has had on New Zealand law when it has had such a limited chance to intervene. This issue will now be considered.

For the Board to have exerted a major influence on New Zealand law through its direct link in the New Zealand hierarchy it must have either done so by the direct effect of their Lordships' opinions or by inducing a trepidation in the Court of Appeal that their decisions would be be overturned on appeal, thereby ensuring that it gave judgments of which the Board would approve. The latter seems unlikely, particularly in the judicial climate which is prevalent today as evidenced by the encouragement given by the current Court of Appeal to counsel to pursue policy arguments,(95) proof that that Court is willing to consider deviating from the law as it is currently stated. It is also historically unlikely that fear of being overturned was a strong motivation behind the Court of Appeal as the conservative attitude many Judges tend to have provides a greater impunction to follow the traditional "English"(or uniform?) law than recourse to the

threat of appeal. Moreover, the frequency of appeals is so limited that the possibility of an appeal proceeding, let alone being allowed, is hardly likely to be a motivating force in a judgment. Thus, as the fear of having a judgment overturned by the Judicial Committee has not influenced New Zealand law, any such influence must be a direct result of their Lordships' opinions.

An interesting feature of the way in which the Privy Council decisions were traditionally determined is the fact that they were unanimous. There is some conflict in opinion as to the effect that such lack of power to dissent has had on the development of the law throughout the Commonwealth. Gower(96) has argued that the current practice of allowing dissents(97) has destroyed the major purpose of the Judicial Committee as he sees it: to provide a limited unity of substantive law across the legal systems. In contrast, Lord Reid is clearly of the opinion that the ability to dissent has greatly improved the quality of Privy Council judgments:(98)

> If you compare the quality of Privy Council judgments with speeches in the House of Lords for a long time back, I think you will agree that from the point of view of developing the law Privy Council judgments have been much inferior... The reason is that a single judgment must get the agreement of at least all in the majority so it tends to be no more than the highest common factor in their views.

Lord Reid must surely be right, as in finding consensus valuable insights into the law held by individual members of the court will be lost. Also, dissenting opinions sometimes provide the state in question with a viable alternative to

follow in a case where there is difficulty in applying the majority decision. Interestingly, the dissenting judgment given by Lord Oliver in <u>Commissioner of Inland Revenue</u> v <u>Challenge Corporation Ltd</u>(99) has received wide support in New Zealand while the majority decision has been both widely criticised by academics and avoided in the courts.(100) It is therefore submitted that the Privy Council's influence on New Zealand law has been limited by its traditional practice of only giving unanimous judgments.

When considering the decisions given by the Judicial Committee, it is evident that most appeals which are allowed will necessarily influence the development of New Zealand whereas most cases which are affirmed will not. However, some cases in which the appeal is dismissed will have a bearing on the development of the law as they are decided by the Board on different grounds to those preferred by the Court of Appeal. Nonetheless, such cases are a minority and the extent of the influence which the Privy Council has directly exerted on New Zealand law can best be determined by an examination of the cases in which the appeal to the Board was allowed.

The following figures show the reversal rate and frequency of appeals in ten year periods since the introduction of the appeal:

Table 2.(101)

	Appeals Allowed	Appeals Dismissed	Other*	Total	Percentage of appeals allowed
1840-1899	8	15	2	25	32%(allowed)
1900-1909	12	14	3	29	41.38%
1910-1919	2	16	0	18	11.11%
1920-1929	10	9	1	20	50%
1930-1939	6	11	0	17	35.29%
1940-1949	5	2	0	7	71.43%
1950-1959	0	7	0	7	0%
1960-1969	5	7	0	12	41.56%
1970-1979	7	13	5	25	28%
1980-	5	8	2	15	33.33%
	60	102	13	175	34.29%

* appeal withdrawn by consent, judgment varied, petition for special leave to appeal refused.

Note - where several appeals are dealt with in the same judgment, these are treated as one appeal for statistical purposes.

An examination of the reversal rate indicates that, while there has been some considerable variation in the rate (ranging from 0%-71.43%), the overall percentage is equivalent to the one-in-three "success" rate found in a

large number of appellate systems. Interestingly, when the success rates of final appellate courts between the years 1960 and 1983 is considered, the statistics indicate that judgments on appeal from New Zealand were less likely to be reversed than were judgments on appeal from the English Court of Appeal to the House of Lords, and that the rate was less than the overall success rate on appeal to the Privy Council from all jurisdictions.

Table 3: Success Rates of Final Appellate Courts, 1960-1983.(102)

	Allowed	Dismissed	Success Rate
House of Lords	460	649	41%
Privy Council - all jurisdictions	299	491	38%
Privy Council - New Zealand	13	31	30%

While this does not clarify the extent to which the Judicial Committee has influenced the law of New Zealand, it does indicate that the Board's influence here has not been significant when compared with other jurisdictions over which the Board presides. This conclusion is reached both by comparing the reversal rate of New Zealand (30%) to that of all jurisdictions (38%), and by considering the small number of appeals which the Board hears deriving from New Zealand (6%).

It is notable when considering the statistics that there has not been a recent decline in the use of the appeal to the Board. Such a decline may have been anticipated if it was

accepted that the Board was an inappropriate institution to preside over New Zealand appeals. However, when the nature of appeals themselves is considered, it is evident that a party who is determined to get the result which is most favourable to his or her position will use every legal step available to do so. Thus, where a party is unhappy with a result in the Court of Appeal, the chance of "success" in the Judicial Committee and the cost and delay in getting judgment in that court may well determine whether an appeal is followed through but the appropriateness of the forum itself will not be a consideration. It is therefore difficult to imply anything from the fact that there have been quite large variations in the number of appeals heard in different decades.

There is also a notable difference in reversal rates throughout the years. Although it is difficult to give a reason for this (each case being decided on its merits), it has been suggested that the composition of the Judicial Committee, particularly in the years just after the turn of the century, may have had something to do with the rate of reversals.(103) This is of course possible due to the different interpretations which may be placed on facts. Of course, while the Board may dispute the Court of Appeal's interpretation of the law to the facts making its judgment, strictly speaking "incorrect", that does not necessarily mean that it cannot be legitimately justified. In other words there is always some discretion in a case for their Lordships

to differ with the Court of Appeal and the fact that some of their Lordships may be more willing to do so than others may be reflected in the differing reversal rates for different periods.

Due to the small number of appeals the Board has heard from New Zealand, the reversal rate may easily be swayed. This is because in a decade when comparatively few appeals are heard, a relatively constant number of appeals allowed (as opposed to the appeal rate), may give a very high "success" rate despite the fact that the number of appeals allowed has remained constant. For instance, compare the figures for the periods of the 1940's and the 1960's. Such an analysis does not attempt to deny the validity of percentages but merely to warn against taking them out of the context they are found in: i.e. a small data base.

While much discussion has ensued regarding the question of whether the appeal to the Board should be retained, there has been very little empirical research into the effect the Board's decisions have had. Similarly, while some cases have provoked discussion on an individual basis there has been no attempt to consider the overall effect the Judicial Committee has had in particular areas of the law. It is this gap in research that the following part of the paper seeks to fill.

Table 4 provides a breakdown of the subject matter of the reported appeals referred to in Table 1. Of the 175 decisions, nine(104) have been categorised as involving more than one issue. Where several appeals are dealt with in the

same judgment, they have been treated as one case.

<u>Table 4.</u> Breakdown of Subject-Matter of Cases Appealed(105)

Subject-Matter	Appeals Allowed	Appeals Dismissed	Other	Total
Commercial	20	26	1	47
Trusts and Wills	7	7	1	15
Public	10	8		18
Criminal	2	3		5
Torts	4	12		16
Taxation	8	15		23
Land & lease	6	20		26
Family	3	3		6
Practice & Procedure	1	3	11	15
Other	3	10		13
	64	107	13	184

It is thus clear that there is a considerable disparity between the various subject-matter groups as to the number of appeals allowed. Noteworthy for their high "success" rate are the areas of Commercial law, Trusts and Wills, Public law and Family law. Much lower rates are found in the areas of Criminal law, Torts, Land and Lease, Practice and Procedure and "Other". The area of Taxation takes the middle ground with the "desired" success rate of one-in-three.

Areas of law in which the appeal rate is over the "norm" (i.e.33%) are the areas in which it is most likely that the Privy Council has directly influenced New Zealand law. They will therefore be considered in detail.

<u>Commercial Law</u>

This area had the high "success" rate of 42.5%. It is

also notable in that it constituted such a high proportion of the New Zealand cases before the Board. The commercial cases follow the general pattern (see Table 2) as to frequency of appeals during the decades: most cases being heard between 1900-1940 and 1960-1980. Interestingly, only two of the fifteen cases the Board has heard from New Zealand this decade have involved commercial law. Both appeals were allowed.(106)

The period to the turn of the century was very quiet, with the only appeal allowed: Union Bank of Australia Ltd. v Murray-Aynsley and Another,(107) being overturned on the basis that there was no evidence to support the conclusion that the bank knew a particular account was for trust funds.

From 1900-1910 three out of six appeals were allowed. These cases had the effect of bringing New Zealand law into line with English law on an agent's authority and the consideration necessary to validate a contract,(108) legalising a seizure of goods made by the Commissioner of Trade and Customs,(109) and the finding that upon particular facts no fiduciary relation existed, nor was fraud proved.(110)

The only appeal allowed between 1910 and 1920 was Hamilton Gas Co Ltd. v Hamilton Borough(111) in which the Board held that a statutory reference to the price of the "gasworks and plants" should mean the commercial value thereof as a going concern. The decision was reached by an examination of other New Zealand statutes, their principles then being applied by

analogy.

The 1920's, however, saw four out of five appeals concerning commercial law allowed. The Court of Appeal's judgment in Smallfield(112) was overturned on the basis that there were no grounds for differing from the trial judge's assessment of the truth of statements which formed the life insurance contract. Bisset(113) was an important case as it clarified the test as to whether a statement is of fact or of opinion. The Court of Appeal was criticised in Maunder(114) for confusing results flowing from an invention with the invention itself: the appeal was allowed as the patentee in fact took no inventive step. A new question, without previous authority arose in Burnard v Lysnar(115) where the Board, in allowing the appeal, held that an arrangement made on behalf of a surety by an agent whose purported authority is afterwards ratified is binding upon the surety as if the arrangement had initially been made in that way.

Only two commercial appeals were allowed in the 1930's: Lysnar (116) considered the issue of when the contract was formed; and De Buager(117) holding that an agreement made in London referring to "sterling" meant English currency rather than that of New Zealand.

The only appeal in the 1940s, Australasian Provincial Assurance Association Ltd v E.T. Taylor and Co. Ltd.(118) was allowed on the basis that in determining the terms of the contract the Court of Appeal should have considered the parties' correspondence prior to the meeting but not their

subsequent actions.

No appeals were allowed between 1950 and 1960. In contrast, the sixties saw four out of five appeals allowed. Lee v Lee's Air Farming Ltd.(119) reinforced the separate corporate personality of a company, holding that a governing director and major shareholder could become an employee of the company. In Farrier-Waimak Ltd(120) the Judicial Committee considered the respective priority positions of a mortgage and a lien. Previous New Zealand cases were approved, the Board then holding that the registered interest must take priority. In J.M.Construction Ltd.(121) the Judicial Committee differed from the Court of Appeal as to the inference to be drawn from the facts and held that the appellants had acquired the right to rebate as creditors when they placed their order. In Boots the Chemists(NZ) Ltd.(122) the Board found that the United Kingdom company was not within the bounds of certain New Zealand statutory limitations on persons owning or controlling their own business.

The seventies enjoyed a relatively low reversal rate; only two out of seven commercial cases being allowed on appeal. In N.Z. Shipping Co. Ltd. v A.M. Satterthwaite and Co. Ltd (123) the Board allowed the appeal, following the English cases on the privity of contract rule. Interestingly, two dissenting judgments were given, indicating that the question was far from one-sided; nonetheless the Judicial Committee felt justified in allowing the appeal. This area of the law

has since been the subject of legislative amendment in New Zealand - the Contracts (Privity) Act 1982 now allowing third parties to a contract to enforce it. In Hannaford and Burton Ltd v Polaroid Corporation(124) the Board differed from the Court of Appeal as to the confusion likely to arise between the trademarks "Polaroid" and "Solavoid", the Judicial Committee concluded that confusion was not, and is not in the future, likely to occur and therefore ordered the rectification of the register. The case is interesting as one would have thought the New Zealand court would be better placed to determine the validity and extent of such confusion, yet the Board was willing to allow the appeal largely on the basis of some linguistic comparisons between the words.(125)

The two commercial cases on appeal before the Board were both allowed in 1985. The first of these was O'Connor v Hart(126) in which a decision by the Court of Appeal to depart from the established "English" law was promptly quashed by the Judicial Committee. The Board disallowed the Court of Appeal's attempt to set a contract aside for incapacity and unfairness. The most recent commercial case before the Board was Scancarriers A/S v Aotearoa International Ltd(127) in which the Board differed from the Court of Appeal as to the effect on the formation of a contract of two meetings and a telex. The Judicial Committee held that the telex was a"quote" and no more.

Clearly, the significance of many of these cases is

limited to the particular statute or fact situation arising again. Nonetheless, the Judicial Committee has had an impact in the area of contract law as reflected in the decisions as to when the contract is formed, how the terms of the contract may be established and in determining the grounds on which a contract may be set aside. The Privy Council's influence in these matters is strengthened by the fact that they are primarily areas governed by the common law so that the highest judicial authority has considerable power to determine the way the law will develop.

It may well be that the Judicial Committee's influence on the law of contract stems from a divergence in approach between the Board and the New Zealand courts. Berryman argues that the New Zealand courts place priority upon communitarianism values as opposed to the liberal values of the Privy Council,(128) thus suggesting that the Court of Appeal is more willing to interfere with a contract in order to achieve a "just" result. Similarly, Stevens has argued with respect to the House of Lords that it regarded itself as less involved in developing contract than other areas of the law:(129)

> That much in the area of contract and commercial law was conservative, in the sense of restating the basic doctrines that had been laid down in the nineteenth century, must be readily admitted.

Given that the Judicial Committee and the House of Lords are constituted by the same members, the methods of one will obviously reflect the methods of the other, thus Stevens observations also relate to the Judicial Committee.

Consequently, the Board's influence on the law of contract is due more to different approaches rather than being strictly based on an abstract concept of "law" in which there is no room for discretion.

Apart from the area of contract, few of the Judicial Committee's opinions concerning commercial law have wide application. Exceptions to this are Bisset,(130) which helps define the test for misrepresentation; Lee(131), giving credence to the separate legal identity of a company from its directors; and Farrier-Waimak,(132) in clarifying the priority position between a mortgage and a lien.

The effect of the Privy Council on the development of New Zealand commercial law can therefore be seen to be limited. It has not had a pervasive effect but rather has, while influencing the law of contract, only had a minor and sporadic effect in other areas. Such a conclusion is particularly important when assessing the impact the Privy Council has had on New Zealand law generally as so many of the appeals to the Board have involved an issue of commercial law (38.4%). Therefore, as the Board has not had a great effect on the development of law in the commercial area, its influence upon New Zealand law generally will also be small.

Trusts and Wills

This area of the law has also had a very high reversal rate: 47%. Probably its most distinguishing characteristic is that, while appeals were heard regularly, if not

frequently, until the middle of this century - two or three appeals were heard by the Board in this area of law each decade - there has only been one appeal since 1944.(133) Thus, any conclusions made as to the effect of the Judicial Committee in this area of the law will reflect on its past influence rather than its current effect. The only exception to this lies with cases in which the appeal was allowed many years ago but the decision is still relied upon today.

The Privy Council has heard four cases on appeal from New Zealand which are concerned with trusts. The judgment which is the most far-reaching,both in this area and that of public law is that of Wallis v Solicitor-General(134). While aspects of the case will be dealt with later(135), the case is of some importance to the law of trusts in the way it explains how to recognise a charitable trust and the obligations the Solicitor-General is placed under by the doctrine of cy-pres. While the New Zealand Court of Appeal had to be corrected on these matters, this was not so much because it did not understand them but rather because the Court's whole attitude to the case appears to have been rather biased in favour of the Crown. Consequently, the general effect this decision had on the law of trusts in New Zealand is limited.

In Wright v Morgan(136) the Judicial Committee affirmed the Court of Appeal's decision in the main, but varied it both with respect to the classification of stock on the grounds that it represented not the sale of a business but of

individual sheep and cattle, and in that part of the land which the Court of Appeal had treated in the same way as the rest of the land, was excluded from the inquiry. The case of Barton v Moorhouse(137) involved the interpretation of a private Act designed to give effect to a trust stipulated in a will concerning dispositions of land. The Judicial Committee differed from the Court of Appeal and the judgment was varied accordingly. However, the judgment involved tenants in tail which are no longer a part of New Zealand law and so the influence this decision may have had is negligible.

The Privy Council's effect on the law relating to trusts in New Zealand can thus be seen to be minimal both in quantity and applicable substantive law.

Four of the eleven appeals dealing with wills were allowed by the Board. Rhodes v Rhodes(138) laid down some of the basic principles for construing the terms of a will. In this case, their Lordships applied the leading English cases with the result that the will was interpreted to avoid absurdity and incongruity even though this may have been the plain ordinary meaning of the words used. It was also made clear that the Court must, in construing the will, take the words as it finds them, without considering any difference between the words intended to be used by the testator and those which are bona fide used by the person who draws up the will.

The case of Tarbutt v Nicholson and Long(139) was dependent upon the construction of a particular clause in the

will. Their Lordships differed from the Court of Appeal in that they were unable to find any reason for giving the statement a restrictive meaning. Instead a literal interpretation was placed upon the clause.

The case of in re Macleay(deceased), Macleay v Treadwell (140) turned on the identity of the testator's "heir-at-law". The decision of the Judicial Committee differed from that of the Court of Appeal in the effect that was attributed to the Administration Act 1879, i.e the old "heir-at-law was found to remain as an existing personage in New Zealand law. In finding thus, the Board criticised Australian judgments on the effect of similar legislation.

Dillon v Public Trustee(141) had the potential to be a major influence on New Zealand law: the Judicial Committee held that a disposition of property authorised by the Family Protection Act 1908 would override a contract which was for valuable consideration to make a will in stipulated terms. While this case appears to be wide-reaching in its effect, it has not in fact been so. This is due to a conflicting Privy Council decision on the same issue: Schaeffer v Schuhmann(142) in which the Board, in considering an appeal from New South Wales, impliedly reversed Dillon. In 1982 the New Zealand Court of Appeal in Breuer v Wright(143) was faced directly with the problem of whether to follow Dillon - on appeal from New Zealand - or Schuhmann - the more recent case. The Court decided to follow Schuhmann. Thus, while Dillon had great potential to influence New Zealand law, it

did not live up to its expectations.

In the case of Sidney v Perpetual Trustees, Estate and Agency Co of New Zealand Ltd.(144) the issue was as to the correct division of the estate upon the construction of the will. The appeal was allowed, the Judicial Committee believing that there was only one viable interpretation of the will.

The case of the widest applicability is Rhodes.(145) The other cases are too specifically related to the terms of the will they seek to interpret to have much general influence on the law of succession. However, while Rhodes was no doubt influential in the years immediately following it, it has little effect on New Zealand law today. Consequently, one can say that the Judicial Committee has had a very limited effect on the law of succession in the past but that it currently has no such influence in this area.

Public Law

It should be noted that the term "public" law has been used in this paper to include constitutional and administrative law. Surprisingly, public law has the highest reversal rate of all - out of eighteen appeals in this area, ten were allowed, giving a "success" rate of 56%. It is interesting to compare such a figure with a statement by Beth after she had separated the Canadian and Australian Privy Council appeal cases into various subject group headings:(146)

> While the reversal rate is surprisingly high in each category, it is lower in the two areas of constitutional and public law, in which one would expect British courts to defer to the judgment of legislatures, and it is highest for those in which the Committee exercises a supervisory function over the lower courts.

It appears that the Board has not been as reticent in interfering with the area of public law in New Zealand as one would expect from a study such as Beth's of other jurisdictions which are also subject to the Privy Council. Interestingly, the flow of appeals to the Judicial Committee has by no means been regular. Instead, most cases were heard before their Lordships in the periods 1890-1905 and 1980-1986. The rest of the time appeals before the Board have averaged at a rate of approximately one each decade. The two periods when appeals have been frequent both lead to controversy as to the proper place in New Zealand for the Judicial Committee. In the early period the outlet of pressure was the Protest of Bench and Bar(147) delivered by the court of Appeal in response to the Board's decision in Wallis and Others v Solicitor-General.(148) In the eighties the controversy has sparked off much academic writing concerning both specific decisions of the Judicial Committee and the place of such an institution in New Zealand's future. It is in such periods that some of the most wide-reaching decisions have been given.

A country's constitutional independence and its claim to sovereignty are inextricably linked. Therefore, when the Judicial Committee allows an appeal of a constitutional issue, the effect on New Zealand's sovereignty is immediate.

Consequently, the link between the appeals which have been allowed in the public law area this decade, and the fact that the appeal to the Privy Council is about to be abolished cannot be underestimated. Prima facie, the greatest influence the Judicial Committee has had on New Zealand law appears to be in the public law field.

An important aspect of the Privy Council's effect on New Zealand law is the way it has been able to protect Maori rights. At times the local courts have seemingly been willing to construe the law in a manner which fails to recognise such rights and it has taken the interference of an independent body such as the Judicial Committee to rectify the situation. Interestingly, it has been argued that the Board's protection of minority rights has also been notable in respect of Catholics in Quebec and Protestants in Northern Ireland.(149) While the protection of minorities has clearly been a role of constitutional safeguard which the Board was able to perform in the early days of the colony, it has not done so for many years. Nonetheless its absence in this area has not been missed now that the New Zealand courts appear to be sufficiently independent to give judgments which are not biased against the minority interest. Given the Board's historical protection of native rights, there may currently be some who favour retention of the appeal until the Treaty of Waitangi issues are resolved.

The first appeal of a public law issue which the Judicial Committee heard and allowed from New Zealand was The Queen v

Clarke(150) in which a grant of land made by the Governor General was declared void as it was contrary to the terms of the Ordinance upon which it was claimed to be founded. While this decision is obviously limited in its application to the particular Ordinance in question, the issue of Crown grants of land, and their subsequent validity, was an important issue at the time, therefore the effect of this decision should not be underestimated.

The case of Buckley v Edwards(151) held that the governor can only appoint Supreme Court judges when an ascertainable salary is payable by law. This was on the assumption that unless the legislature had made such provisions the position did not really exist: the appointment in question was subsequently declared invalid.

In Nireaha Tamaki v Baker(152) the Judicial Committee affirmed the customary title to land of the Maori. The Board pointed to legislative recognition of such title and held that the New Zealand courts were bound to take account of it. The earlier Court of Appeal decision of Wi Parata v Bishop of Wellington(153) was criticised for its dicta that there is no customary law of the Maoris of which the Courts of law can take cognizance. Nireaha Tamaki was thus a sharp reminder to the Courts of New Zealand that they must recognise Maori customary title. However, it was a "reminder" which was largely ignored until relatively recently. This case thus illustrates the limitations upon the Judicial Committee's ability to protect rights or have a significant impact on the

development of the law within a country subject to its jurisdiction, as while it may make an important decision in a particular case, where the local courts avoid the implications of the case by distinguishing it, the Board can have no further influence on the matter until an appeal on the same issue is once again before it. Given the infrequent rate of appeals this often means that the impact of a decision of the Board's is limited to the interpretation the local courts are prepared to allow it. Consequently, due to the attitude of the New Zealand courts, the decision of Nireaha Tamaki(154) did not have such a significant impact as one would expect it to have had.

Wallis v Solicitor-General(155) was another case in which the Judicial Committee expressed considerable concern at the treatment by the Crown of the Maori and the subsequent support given to the Crown by the local courts. The Board found that there was no evidence whatsoever pointing to any cession to the Crown. On the relationship between the Executive, Legislature and Courts the Board commented:(156)

> The proposition advanced on behalf of the Crown is certainly not flattering to the dignity or independence of the highest Court in New Zealand or even to the intelligence of the Parliament. What has the Court to do with the Executive? Where there is a suit properly constituted and ripe for decision, why should justice be denied or delayed at the bidding of the Executive?....Surely it is for the Court, not for the Executive, to determine what is a breach of trust... why should it be suggested that Parliament will act better if it acts in the dark and without allowing the Court to declare and define the rights with which it may be asked to deal?

Such statements in Wallis were not taken lightly by

members of the New Zealand judiciary who shortly thereafter expressed their concern as to the future appropriateness of the Judicial Committee as the final appellate court for New Zealand:(157)

> That Court, by its imputations in the present case, by the ignorance it has shown in this and other cases of our history, of our legislation, and of our practice, and by its long-delayed judgments, has displayed every characteristic of an alien tribunal.

A contrary interpretation has been argued for by McHugh,(158) who claims that in Wallis the Privy Council was better attuned to the local circumstances and the Imperial ideal than the colonial bar. Wallis is clearly an important case for New Zealand's constitutional development, if not because of the decision itself, then because of the reaction it provoked.

The next few appeals allowed by the Board in the public law area are of significantly less importance. In Smith v McArthur(159) the Board applied section 5(7) of the New Zealand Interpretation Act 1898 and consequently a liberal interpretation was given to the Alcoholic Liquors Sale Control Act Amendment Act 1895 in order to give effect to the object of the legislature. The Licensing Committee was thereby given jurisdiction to hear the appellant's application for renewal. Graham v Callaghan (160) held that following the repeal of the Magistrates' Courts Act 1893, every Magistrate was a Magistrate throughout New Zealand and that subsequently all separate local jurisdiction had been abolished in the Magistrates' Court.

The following two cases were dismissed on appeal to the Privy Council. They are mentioned because of their importance to New Zealand's constitutional law rather than as indicative of the effect the Board has had. In Auckland Harbour Board v The King(161) the Judicial Committee held that the New Zealand Constitution inherits the British constitutional principle that public moneys cannot officially be spent without a "distinct authorisation" from the New Zealand Parliament. In the case of Te Heuheu Tukino v Aotea District Maori Land Board(162) a law changing the status of Maori lands which were protected by the Treaty of Waitangi was upheld. The Board held that the courts cannot enforce treaty rights and that despite the Treaty, the New Zealand legislature had the same power to change native land law as the British parliament would have had.

The appeal in Auckland Electric Power Board v Public Trustee(163) was allowed, the Judicial Committee finding that the regulations in question were ultra vires. In Jeffs v NZ Dairy Production and Marketing Board(164) the Judicial Committee differed from the Court of Appeal majority, instead holding that the Dairy Board had failed to discharge its duty to hear interested parties before deciding on zoning applications. The decision has been the subject of some criticism(165) in that it failed to indicate what rules it was applying, thereby severely limiting its future precedent value.

The 1980s have been a period of turmoil with respect to

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the Privy Council's influence upon New Zealand public law. In the case of Lesa v Attorney General(166) the Judicial Committee came to the surprising conclusion that the plaintiff, a Western Samoan woman born in 1946, was a New Zealand citizen. This decision caused considerable controversy in academic spheres as well as providing an administrative dilemma for both the New Zealand and the Western Samoan governments. The practical solution reached is found in the Citizenship (Western Samoa) Act 1982 which was arrived at after consultation between the governments. The absurdity of Western Samoans suddenly being declared New Zealand citizens as the result of an Act passed in 1928(167) does not need further elucidation. The case was not given detailed examination by the Court of Appeal as it had fully considered the issue as recently as 1979 in Levave (168) and was content to follow that case. The Board, however, was convinced by an argument advanced before it which had been considered in Levave. In light of the apparently little emphasis placed upon the argument by counsel for the appellant one must wonder as to the way in which the Privy Council approached the case:(169)

> This argument, of which the appellant's written case to this Board gave no forewarning, emerged for the first time in the closing stages of the appellant's counsel's opening speech.

However, their Lordships were convinced of the argument, leaving New Zealand in a rather odd predicament. Despite the Board's view of the inescapability of its conclusion, many others have found it highly questionnable. The primary

objective to the decision is that it was disposed of on a narrow point of construction without regard to the considerable constitutional and legal ramifications to which it lead.(170) The Judicial Committee's decision in Lesa v Attorney-General has been responsible for much of the current discussion as to the appropriateness of the Board as the final appellate court for New Zealand. However, the decision's effect on New Zealand law was limited by the intervention of the legislature as it was an effect which was neither welcome nor accepted.

The case of Re Erebus Royal Commission; Air New Zealand Ltd. v Mahon(171) is interesting as a reflection of the Privy Council's attitude. The Judicial Committee sought to avoid the impression that it was interfering in an area of law which was the domain of the New Zealand courts:(172)

> Their Lordship's consideration of the reports of cases from New Zealand, England and other Commonwealth jurisdictions that have been helpfully included in the documents provided for them by the parties to this appeal does not leave them in any doubt that the principles underlying the exercise of judicial review in New Zealand and in England, at any rate, are the same. But the machinery and practices by which governmental power, central or local, is exercised to control or otherwise to affect the activities of private citizens in the two countries are not identical; and the detailed application in New Zealand of the principles of judicial review to particular indigenous kinds of administrative action is, in their Lordships' view, best left to the New Zealand Courts without obtrusion by this Board where such a course is not essential to enable an appeal to be disposed of by her Majesty in Council.

Such a view is, however, inconsistent with the approach that the Board must intervene in order to keep the law in a uniform state throughout the Commonwealth. This alternative

approach is evidenced, for example, by Hart v O'Connor.(173) Such discrepancy in approaches has been one of the more frustrating aspects of the right of appeal in recent years as in some cases the Board has deliberately avoided altering the decision of the Court of Appeal, while in others it has not hesitated to allow the appeal by realigning the law of New Zealand with that of England. The frustration stems not only from such action by the Board but from the seemingly random methods the Board appears to use when intervening or refraining from such activity.

While the appeal in Re Erebus Royal Commission was dismissed, the case is still significant for the general development of the law of judicial control because of the emphasis the Judicial Committee gave to what it saw as a lack of probative evidence underlying the Royal Commission's finding. The Board's categorisation of probative evidence as a ground for review is potentially a major new development for the rules of natural justice.(174) This case is thus illustrative of the fact that the Board's influence is not limited to cases in which the appeal is allowed.

The dismissal of the appeal is also interesting in that it gave credence to the impartiality of the New Zealand Court of Appeal. Cases involving areas of such widespread national interest are rare, as are cases in which the independence of the Court of Appeal is challenged by the public. Nonetheless, Air New Zealand Ltd. v Mahon(175) had both these elements within it and the New Zealand judicial system

benefited from the Judicial Committee's affirmation of the local court's decision.

The most recent case the Board has considered, and in which the appeal was allowed, is Rowling and the Attorney-General v Takaro Properties Ltd.(176) The Court of Appeal had held that the Minister owed a duty of care to Takaro Properties which he had breached by taking insufficient care in deciding upon the company's application to invest within New Zealand.(177) However, the Judicial Committee agreed with little that the Court of Appeal had decided. Instead they held that the Minister was not negligent on the facts and, while not deciding the issue conclusively, they had real doubts as to whether a duty existed at all. The approach taken by the Court of Appeal was highly criticised by the Judicial Committee, particularly in the course of the argument. Such criticism has not been taken lightly by the Court of Appeal who have speculated as to the underlying reasons for the Board's attitude. The President of that Court has suggested that the Judicial Committee reached its decision as a result of their Lordships' background rather than through an evaluation of the merits of the case:(178)

> The inference is hard to resist that the idea that a Cabinet Minister may be under a duty of care to persons with whose applications he has to deal, with liability in damages for failure to exercise reasonable care, has nil attractions for some lawyers, even very eminent lawyers, of a certain background or cast of mind. It seems to be an idea provocative enough to lead to departures from ordinary judicial standards.

Such allegations demonstrate the widening gap between the Judicial Committee and the local courts. While different

perspectives of cases are to be expected from appellate courts, speculation that this is due in part to the ranking in society of the judiciary (ie. their class) is obviously a sign of deep discontent with the final appellate body.

The area of public law has seen some of the most controversial appeals allowed by the Board. In the early years of the Board's jurisdiction to New Zealand some of its decisions were of primary importance in their recognition of Maori customary title. However, the effect of such decisions was limited by their treatment within the New Zealand legal system. The Judicial Committee's role as "protector" of the Native interest is no longer a major one - a question in this area not having arisen before the Board since 1941. Presumably this is because cases are now being heard by a Court of Appeal which has not pre-determined the issue in a manner contrary to the Maori interest. As the New Zealand courts have developed their independence, appeals to the Judicial Committtee have become unnecessary as a means to protect minorities. Subsequently, it can be stated that the Board played a role in the early days of the colony in protecting Maori rights but that its influence in this area has neither been sought nor missed in more recent years.

The case of Lesa v Attorney-General(179) obviously had the potential to be a major effect on public law in New Zealand although because of the way the government of the day chose to deal with the decision - by negotiating with the Western Samoan Government and the subsequent enactment of

legislation-the effect was shortlived. Nonetheless, it was a particularly significant case both in its legal and political effect. Similarly, Takaro Properties Ltd.(180) is also a recent decision with wide ramifications. The scope of a duty placed upon a Minister is of considerable importance in the day-to-day running of a nation, the Judicial Committee's interpretation of such a duty and the standard it required giving members of the Executive a wider discretion than the Court of Appeal was prepared to.

It is thus clear that while some individual decisions of the Board have had a major influence on the development of New Zealand public law, the majority have not been of widespread application. Nonetheless, it is in this area that the Judicial Committee has had the greatest effect. Public law is not an area in which the Board appears to have had less effect as time has passed as evidenced by the decisions of consequence in the past ten years. It is in this area that the Judicial Committee's influence has the greatest potential to allow appeals of a nature which are derogatory to New Zealand's sovereignty. Indeed, this has already happened. Furthermore, the current "trend" displayed by the Board indicates that the area of public law will continue to be one in which the Board's influence will be strongly felt.

Criminal Law

The appeals before the Board on matters of a criminal nature have already been substantially discussed.(181) Suffice it to say that the appeal rate is low (25%) and that

while most of the cases in the area are recent, the Board has also of late turned down a relatively large number of applications for leave to appeal thereby indicating that rather than being more willing to hear criminal cases it is instead being asked to do so more regularly. Therefore it may still be hearing the same small proportion of cases in which leave is requested. The Judicial Committee has not had a great effect in this area upon New Zealand law. Of the two appeals that were allowed,(182) one was decided by the Court of Appeal on the footing that it was bound by an earlier decision of its own. As the Court appears to have reassessed its position on the matter of stare decisis(183) the need for a further appeal to escape the limitations of an earlier decision no longer appears to be necessary. Nonetheless, even that decision was based upon a very limited area of the law (the meaning of "frequents" in the Police Offences Act 1927). The only other appeal which was allowed was done so on the basis that the Crown had failed to prove a monopoly which was contrary to the public interest.

Consequently the direct influence the Judicial Committee has had on the development of New Zealand's criminal law is negligible.

The Law of Torts

The area of tort law has a surprisingly low reversal rate of 25%. This is surprising because of the extent to which this area is dominated by the common law which it is, of

course, the duty of the courts to declare. The number of appeals heard by the Judicial Committee in this area is also surprisingly low for the same reason: one would have expected a larger number of appeals in an area dependent upon the common law.

A possible reason for this may have been a consistency in approach shared by both the Judicial Committee and the New Zealand Court of Appeal. Stevens indicates that the House of Lords was willing to assume a far greater responsibility for remolding doctrine in the law of tort compared to that of contract.(184) That the New Zealand courts have been similarly inclined to develop rather than restrict development of the law in this area is indicated by their acceptance of the test to establish a duty found in Anns. (184) Thus the fact that both the Board and the Court of Appeal were intent on developing the law may account for the low reversal rate in this area.

The frequency of appeals is regularly spread throughout the period in which appeals have been available.

Of the appeals which were allowed in this area of law, few are of any general significance. In Black v Christchurch Finance Co. Ltd.(186) their Lordships differed with the Court of Appeal on the interpretation to be placed upon the terms of a contract between an owner of land and an independent contractor. The owner was held to be vicariously liable for the burning of bush upon his land by the latter even though the independent contractor had violated the terms of his

contract.

In Lyttleton Times Company Ltd v Warners Ltd(187) the Board held that as neither party had done anything not contemplated by an agreement between the parties and as negligent construction of the building had not been established, an action did not lie in nuisance for the construction of a building which resulted in a noise level unsatisfactory to the respondent.

In Stewart v Hancock(188) the Board allowed the appeal, holding that the jury could reasonably have come to their conclusion that the defendent had been negligent. The case is heavily dependent upon its facts.

The only case of general importance to the law of torts is therefore Rowling v Takoro Properties Ltd(189). While this has already been discussed to some extent in connection with its impact on public law, not all relevant points have been made. One of the concerning aspects of the case is its retreat from the more general test for when a duty lies as found in Anns(190). Placing limitations upon the founding of a duty is indicative of a policy reversal by the English courts in the area of negligence. Such a backward step is of great consequence to the law of torts especially when it is a step that the New Zealand courts are reluctant to take. More specifically, the dicta as to the duty owed by Ministers of the Crown and their Lordships' observations as to damage: the only consequence of the Minister's actions in this case

reputedly being delay, will have a direct effect on the level of accountability which can be placed on a Minister. The case represents an area of law in which the New Zealand courts sought to continue the developing role of the common law whereas the Board was intent on retracing its steps from the wider definition of duty which it had previously espoused.

In summary, the Judicial Committee's influence on the law of torts is confined to the effects resulting from the Takaro (191) case as the other appeals which the Board allowed are not of general applicability due to the extent to which they are dependent upon the facts at issue. While Takaro Properties Ltd. was itself decided upon its facts in that the Minister was found not to have breached a duty, if he did in fact owe one; it is nevertheless signficant due to the obiter as to the application of Anns. Clearly the Privy Council has had an extremely limited effect on the development of the law of torts in New Zealand.

The Law of Taxation

The Judicial Committee's effect on the law of taxation in New Zealand has been surprisingly widespread. It is surprising as the reversal rate in this area is relatively "normal"(35%). The reason for this result can be attributed to the fact that, of the appeals which the Board has allowed, a number have concerned matters of general importance to the assessment of taxation.

Appeals in this area of law have traditionally been

relatively infrequent, though regular. An exception to this is the period of the 1970's when a comparatively large number of cases were heard by the Board (seven out of a total of twenty-three).

The earliest appeal allowed by the Judicial Committee was Dilworth v Commissioner of Stamps(192) in which the issue revolved around whether a bequest to a public school was for charity: their Lordships held that it was and there was therefore no tax imposed. Lovell and Christmas Ltd.(193) concerned the question of whether profits arising from arrangements made in New Zealand to sell goods on commission in London were "derived from" New Zealand so that they were taxable as source income. Their Lordships held that there was not a sufficient nexus between the source of the arrangements and the profits. In commenting on the English and New Zealand Income Tax Acts the Board noted that they were not identical but believed there was sufficient similarity to make English decisions authoritative. Such consideration of English cases has been a common means of deciding whether to allow an appeal in this area of law.

The case of Doughty v Commissioner of Taxes(194) held that upon the reconstitution of a partnership into a company a notional book profit that resulted was not taxable. Their Lordships advised that the company could not increase the value of the assets merely by overestimating them. Attention was also given to the distinction between capital sales and sales producing income: this is an area of some

complexity in which the Board's obiter would have a long-term effect.

In Finch v Commissioner of Stamp Duties(195) the Judicial Committee held that a husband's monetary contributions to repairs for a house owned by his wife were not a "gift" and therefore caught by the provisions of the Death Duties Act 1921.

The next appeal which the Board allowed was the first of the controversial Europa(196) cases. In this case, the Board held that section 111 of the Land and Income Tax Act 1954 required the court not merely to tax the respondent on the economic business character of the transactions but to ascertain for what the expenditure was really incurred. It was therefore held that the advantage gained from the profits derived through Pan-Eastern were taxable despite Europa's claim that they were merely an incidental, uncovenanted advantage for which it had not given consideration. The majority of their Lordships' thus based their test on the practical effect of the transactions rather than the legal form they took. Interestingly, a dissenting judgment was given by two members of the Judicial Committee agreeing with the conclusions of the New Zealand Court of Appeal. If this were the end of the matter the case could be dismissed merely as an example in which the Board had come to a different conclusion to the local court on a matter of some importance. However, in 1976 Europa again brought an appeal before the Judicial Committee.(197) The appeal was argued on the same

facts although contracts which had been considered insignificant in the earlier case were now relied upon to distinguish it. The appeal concerned a new liability arising from different tax years. The Court of Appeal, not surprisingly, followed Europa No. 1, and held that as the real effect of the agreement had a collateral advantage then the profits of such an advantage were taxable. However, the Judicial Committee allowed the appeal. Interestingly, Lord Wilberforce, who had given their Lordships' opinion in Europa No. 1 dissented from the majority judgment in Europa No. 2. His dissent is perhaps the only element of consistency between the cases. His opinion was clear:(198)

> ....the present case ought to be decided on the basis of the interpretation adopted by the Board in the 1970 appeal, as the Courts in New Zealand have considered.

It was not, however, shared by the majority of the Board. Instead, the earlier decision was "explained":(199)

> Read in this context it becomes clear that the reference to "reality" was directed only to the legal character of the payment and not to its economic consequences.

Despite the Board's claim that the test has always been that it is the legal rights enforceable by the taxpayer that he or she acquires in return for the expenditure which is determinative of whether the expenditure is deductible or not, this is certainly not clear from Europa No.1.(200) Ignoring the rights and wrongs of the test to be applied, the Judicial Committee's treatment of these two cases was somewhat disturbing. Whatever may be said about the merits of allowing the first appeal, to also allow the second when the

Court of Appeal had reached their conclusion by following the Privy Council's decision of a mere five years earlier was insulting and frustrating to the local Courts. As Sir Thaddeus McCarthy put it:(201)

> Then, in Europa, I would think that there can be little doubt that the Board came to a somewhat belated view that we were right on the first, the earlier, appeal, though for obvious reasons they did not find it necessary to say so.

As to the tests the cases considered, the grounds for determining whether expenditure is deductible clearly constitutes an important area of the law. Consequently, the effect of the Board's decisions as to the applicable test has had a considerable bearing on New Zealand tax law.

Between the two Europa cases, another appeal of significance was allowed. In Holden v Commissioner of Inland Revenue(202), which was heard concurrently with Menneer,(203) the Board held, affirming the Court of Appeal, that in determining whether property was acquired for the purpose of sale within S88(1)(C)of the Land and Income Tax Act 1954 the test is for what purpose was the property acquired, and, if there was more than one purpose, what was the dominant purpose. The appeal was allowed on the basis that no profit had been made on the sale of the securities even though they may have been sold for another, lesser, value.

The most recent appeal allowed by the Board is Commissioner of Inland Revenue v Challenge Corporation Ltd. (204). This case concerned the distinction between tax

avoidance and mitigation. An examination of sections 99, 188 and 191 of the Income Tax Act 1976 lead the Board to the conclusion that the agreement into which Challenge had entered was one of tax avoidance which was void against the Commissioner. The Court of Appeal had held to the contrary and were supported by a dissenting judgment of Lord Oliver of Aylmerton:(205)

> For my part, I am driven to the same conclusion as that reached by the majority of the Court of Appeal, namely that the only possible reconciliation of sections 99 and 191 is to treat the latter as providing the code for group taxation and one which contains its own exhaustive anti-avoidance provisions, so that section 99 falls to be read as subject to a limitation that it does not avoid a transaction authorised in terms by Section 191.

The different implications from the differing interpretations of the statute are of central importance to the law of taxation. Much argument was raised both in the Court of Appeal and before the Board as to the disturbing consequences which would arise if the statute was read in the way the appellant advocated. However, the Judicial Committee put aside such concerns and gave effect to those very arguments. The Board's distinction between the mitigation and the avoidance of income tax is difficult to follow. Its application to Challenge Corporation Ltd. meant that the company could not deduct a loss of $5.8 million which had been sustained by an expenditure of $10,000 in purchasing the shares of Perth. However, the Judicial Committee did not consider that the expenditure was incurred in circumstances in which the taxing statute afforded a reduction in tax liability because of their conclusion that section 191

should be read subject to section 99. This is an important case as the distinction between tax avoidance and tax mitigation is essential for successful taxation planning. The Judicial Committee's decision has been criticised both on the grounds that its interpretation of the Income Tax Act 1956 is not what Parliament intended and that its decision has lead to uncertainty as to the appropriate and legitimate means of tax mitigation.

Stevens argues that the area of tax law demonstrated the most extreme example of the House of Lords' retreat from substantive formalism:(207)

> By the mid 1960's the situation had changed noticeably. Led by Reid, whose own views apparently had been modified, the House had come to read tax legislation like other legislation and while still chary of taxing by analogy, the law lords sought the meaning of the tax provisions by looking to the whole purpose of the section or the act, rather than at the actual words used.

Following this approach the House has become particularly prominent in the development of the law of taxation, especially as there is not a general anti-avoidance provision in the English legislation. However appropriate such a method may be for England, the New Zealand legislation is clearly different and as such requires a different method of interpretation. The New Zealand legislature had addressed the question of a general anti-avoidance provision so that the courts' role should have been limited to applying the normal principles of statutory interpretation rather than interfering to achieve a result which the court considered just. However, in Challenge(208) the majority were so

determined to prevent what they perceived as the exploitation of the group loss relief provisions of section 191 that they were prepared to disregard the general principle of statutory interpretation which allows a general rule to overrule a specific rule of direct applicability to the facts. As Professor Willoughby puts it:(209)

> ...the Challenge case emphasises the need to return to basic principles of interpretation of taxing statutes and to the primary responsibility of the legislature to get the law right ... One might add that it is also inappropriate for the courts to treat tax avoidance as a moral issue and to seek to repair the mistakes of parliament.

Despite the area of taxation being one which is determined by statute, the interpretation of the various provisions has given the courts wide scope for influencing the direction the law has taken. The appeals which the Board has allowed have concerned issues of wide applicability: source income, the treatment of notional book profits, the test as to whether expenditure is deductible, and the basis for distinguishing between tax avoidance and tax mitigation. While the Board has not always assisted the consistent development of the law, as illustrated by the Europa (210) cases, it has nevertheless had an important influence on this area of the law.

Land and Lease

The Judicial Committee's influence on the development of land law and the law pertaining to leases has been minimal. Out of 26 cases in this area, only six(23%) of the appeals were allowed. Most appeals heard by the Board were at the

end of last century and the early years of the 1900s. In fact only one appeal has been allowed since 1926. It thus appears that any immediate effect the Board's decisions may have had is clearly over and that even if their Lordships did influence the early land law of New Zealand they have not had a significant impact in the last fifty years.

The earliest appeal allowed by the Board was Plimmer v Wellington City Corporation(211) in 1884. The Judicial Committee held that the equitable and indefinite right to the jetty which had been acquired was an interest in land for which compensation was payable. The case does not involve principles of general application although it was a source of some frustration to the Court of Appeal as indicated by their comments upon it in the Protest of Bench and Bar.(212)

In Eccles v Mills(213) the Board differed from the Court of Appeal on the effect of a declaration following a lease covenant. It was held that the covenant was qualified by the declaration and that the liability for its breach was to be borne by the testators general estate as it was not incidental to the relationship of landlord and tenant. The case was dependent upon the terms of the agreement in question.

The most important appeal allowed in this area was Assets Co. Ltd. v Mere Roihi(214). This case confirmed that "fraud" within the Land Transfer Act, means actual fraud, requiring dishonesty of some sort and that constructive or equitable fraud were not covered by the statute. The case

distinguished Gibbs v Messer(215): a previous Privy Council case on appeal from Australia, thereby limiting the doctrine as to fraud and forgery which it had been taken as laying down. It was held that the Land Transfer Acts 1890-1895 and the Native Lands Act showed that documents giving title could be assumed to have been properly obtained, and could be safely acted upon by the District Land Registrar and by other persons acting in good faith. This lead the Judicial Committee to the conclusion that as the agents of the appellants had registered documents which according to their purport and effect entitled, and which they bona fide believed did entitle, the appellants to be registered as owners, there was no fraud and the registered title of the appellants was therefore decisive. This case has therefore had important ramifications both with respect to when fraud affects title and in support of the indefeasibility of title concept which is central to the Torrens system of registration.

In Greville v Parker(216) the Board held that the Court of Appeal had misconstrued the extent of its power under Section 94 of the Property Law Act 1908, as it did not enable the Court to give relief against failure to perform a condition precedent to the lessee's right to a renewed lease. The case of Gardner v Hirawanu(217) was allowed due to the differing interpretations of a covenant in a lease that the lessee was to cultivate the land. The Judicial Committee held that this extended beyond the grant of a right and created an

obligation in the lessee to clear the land.

Farrier-Waimak Ltd. v Bank of New Zealand(218) saw the Board examine the respective priorities to be given to a mortgage and a contractor's lien. It was held that whichever was first registered would have priority, thus reinforcing the emphasis of New Zealand land law upon registration.

It is thus clear that the only appeal which was allowed which is of general importance is Assets Co. Ltd(219). However, because of the way in which the decision was given there was some confusion as to the ratio decidendi of the case. Lord Wilberforce, delivering the advice of the Privy Council in Frazer v Walker explained the difficulty in these words:(220)

> In each appeal their Lordships decided that registration was conclusive to confer upon the appellants a title unimpeachable by the respondents. The facts involved in each of the appeals were complicated and not identical one with another, a circumstance which has given rise to some difference of opinion as to the precise ratio decidendi - the main relevant difference being whether the decision established the indefeasibility of title of a registered proprietor who acquired his interest under a void instrument, or whether it is only a bona fide purchaser from such a proprietor whose title is indefeasible.

This confusion was clarified in Frazer v Walker where the Judicial Committee came to the same substantive conclusion as the Court of Appeal though it elected to do so by very different means. Their Lordships pronounced in favour of immediate indefeasibility by declaring that registration of an instrument which is forged, or which is void for any other reason, is effective to vest and to divest title and to protect the registered proprietor against adverse claims.

The two cases of considerable importance to New Zealand land law are therefore Assets Co. Ltd. and Frazer v Walker. While these two have had a substantial impact, the limited number of important cases considered by the Board may be the subject of some speculation. However, this can probably be explained by the similarities between the New Zealand and the Australian Torrens system, which has resulted in decisions in one jurisdiction commonly being applied in the other. The Judicial Committee's direct influence on New Zealand land law is thus limited to two decisions of significance.

Family Law

Six appeals proceeded to the Judicial Committee on issues of family law. Of these, three were allowed(50%). Wasteneys v Wasteneys(221) concerned the validity of a separation deed. The Board took a different view of the evidence from the New Zealand courts and held that as there was no evidence of fraudulent misrepresentation there were no grounds to set the deed aside.

Dillon v Public Trustee(222) was an important case, as it held that the Family Protection Act 1908 took precedence over the interest of a beneficiary under the will even where the interest was backed by a contract for valuable consideration to make the will in that form. While this is a matter of considerable importance, it has subsequently not been given effect to by the courts.(223)

Haldane v Haldane(224) involved the division of

matrimonial property subsequent to the Matrimonial Property Amendment Act 1963. However, this case was one of the last to be heard under that Act as it was replaced by the Matrimonial Property Act 1976 in the same year that Haldane was before the Judicial Committee. Because of the major differences between the enactments, Haldane has not generally affected the division of matrimonial property.

Consequently, it is apparent that despite the high "success" rate, the Judicial Committee has not directly affected the development of family law in New Zealand.

Practice and Procedure

The majority of the cases classified in this category are applications to the Judicial Committee for leave to appeal. Leave was refused in ten cases. Interestingly, six petitions for special leave to appeal from criminal convictions have been declined since 1974. As noted earlier(225) the Board has heard relatively more criminal cases recently than it did in the early days of the right of appeal. However, this appears to be due more to increased demand than a new willingness by their Lordships' to hear such cases.

In Barker v Edger(226) the Board considered whether the plaintiff was entitled to a rehearing before the Native Land Court. Their Lordships believed the language of the Poututu Jurisdiction Act 1889 was clear and that the Court did have jurisdiction to rehear the case. However, the future effect the case may have had was halted by legislative interference.

In Benson v Kwong Chong(227) the Judicial Committee held

that the Court of Appeal was not entitled to set aside the findings of the jury who are the final arbiters of the facts in controversy between the parties. Judgment was therefore restored to the appellants as the jury had indicated.

Obviously, the Board's influence in the area of Practice and Procedure can only be described as minimal.

"Other"

Due to the amorphous nature of this category it is evident that the Judicial Committee cannot have significantly affected "it". However, the appeals which were allowed will nonetheless be considered to measure any individual effect they may have had.

In Clouston and Co. Ltd. v Corry (228) the Judicial Committee held that Rule 5 of the Court of Appeal Rules enabled judgment to be entered according to the evident justice of the case. However, as the appellant had not sought the exercise of such powers in the Court of Appeal they were not exercised: instead a new trial was directed.

In A.Hatrick and Co. Ltd. v The King(229) the Board held that the Minister was not empowered to exact the dues and charges which he claimed under the authority of the Government Railways Act 1908. The other appeal allowed by the Judicial Committee was Brooker v Thomas Borthwick & Sons(Australia) Ltd.(230) in which the Board held that employees who had been working and were injured in the Napier earthquake were entitled to compensation under the provisions of the Workers Compensation Act.

None of the appeals which the Board allowed in this category are of general significance to the law.

The analysis of the appeals which the board has heard and their subsequent effect has largely been limited to the cases which were allowed on appeal. While this does not take account of some of the wide-ranging obiter dicta which were announced, nor some cases in which the appeal was dismissed upon grounds other than those relied upon in the Court of Appeal, it is nonetheless the most effective means of determining the influence the Judicial Committee has wielded on the law of New Zealand. This results from the fact that to assess the Board's effect, recourse must be had to conclusive data. Subsequent explanations of what the Board's obiter dicta was cannot be measured in such a way. Consequently, while recognising that an analysis of appeals which the Board has allowed may not give the most complete epitaph, it does give the most accurate and defensible one.

The foregoing study of the appeals allowed from New Zealand by the Judicial Committee suggests that in reality the Board has not played a large role in the development of the law of New Zealand. The general areas where the Board's effect has been directly felt are the law of contract, the protection of Maori rights and the law of taxation. Apart from these areas the only notable cases are Lesa v Attorney-General,(231) Rowling v Takaro Properties Ltd,(232) and Frazer v Walker.(233) It can therefore be said that the

Judicial Committee has not historically had a large impact upon the law of New Zealand. However, this must be read subject to the Board's influence in this last decade. While it is difficult to assess the future effect cases such as Rowling and O'Connor v Hart(234) will have, because they were decided so recently, they have the potential to constitute a considerable impact upon New Zealand Law.

CONCLUSION

It is evident that New Zealand is soon to abolish the appeal to the Privy Council. Such action is to be welcomed as an analysis of the grounds for keeping the appeal shows that its retention cannot be justified.

An examination of the appeals which the Judicial Committee has allowed leads to the conclusion that the Board has not directly played a large role in the development of the law of New Zealand. However, the Board has had an ongoing influence in the areas of the law of contract and taxation. It also gave important contributions to the protection of Maori rights in the early days of the colony. While the significance of the Board has generally not been notable this is not due to a decline in either its use or effect. Instead it appears that the Board has been reasonably constant and there has not subsequently been any drop off in either the success rate or the influence of its decisions over time.

The Judicial Committee has exerted the greatest influence over New Zealand law through indirect means. This includes

matters such as the ability and the desire of the local courts to develop a distinct New Zealand law. Obviously it is a matter which is affected by many variables such as the extent to which the judiciary retain colonial attitudes, the position of the Court of Appeal on the issue of stare decisis, the emphasis placed upon a uniform Commonwealth law by the Board and differing approaches taken by the judiciary. Unfortunately, these factors do not lend themselves to concrete analysis. There is also a difficulty in distinguishing to what extent they relate directly to the Privy Council's influence as distinguished from the more general English influence which is to be expected. While it is recognised that these factors have played a large part in the Judicial Committee's influence on the development of New Zealand law, it is apparent that because of their nature they have diminished in importance over time. Consequently even the Board's indirect influence can now be seen to be insubstantial.

Theoretically, the loss of the appeal to the Privy Council is of much importance. Realistically, however, the Board's absence will be a matter of little consequence.

FOOTNOTES

1. Appeal to the Judicial Committee by virtue of prerogative power lay from the New Zealand Supreme Court from its establishment in 1841. Supreme Court Ordinance 1841.

2. For an early example see: Willams J. Protest of Bench and Bar, April 25,1903. NZPCC 1840-1932),730. following Wallis v Solicitor-General (1902) NZPCC 23

3. Palmer [1987] NZLJ 314

4. The Judicial Committee Act 1833.This Act and subsequent enactments relating to the Judicial Committee have been expressly declared to be part of the laws of New Zealand by the Imperial Laws Application Act 1988,section 1.

5. Howell, The Judicial Committee of the Privy Council 1833-1876 (1979),3

6. Burns Peter "The Judicial Committee of the Privy Council: Constitutional Bulwark or Colonial Remnant?"(1984) 5 Otago LR 503,504

7. Ibid, 505. The current judges of the NZ Court of Appeal are all members of the Judicial Committee.

8. The Court of Appeal Act 1862

9. Cameron "Appeals to the Privy Council - New Zealand" (1970) 2 Otago LR 172,174

10. S.R. 1973/181 R.2(a)

11. S.R. 1973/181 R.2(b)

12. S.R. 1973/181 R.2(c) No leave has been granted direct from the Supreme/High Court since 1918: Cameron, "Appeals to the Privy Council - New Zealand" (1970) 2 Otago LR 172

13. S.R. 1973/181 R.28

14. Prince v Gagnon (1882) 8AC 103,105(PC)

15. (1887) 12AC 459,467 (PC)

16. Below, 75

17. (1897) NZPCC 106

18. (1926) NZPCC 37

19. Nakhla v B [1975] 1 NZLR 393; McDonald v R [1983] NZLR

252; R v Kaitamaki [1984] 1 NZLR 385

20.[1975] 1 NZLR 393

21.That a different approach may have been taken is hinted at in McCarthy [1976] NZLJ 376,379

22.[1983] NZLR 252

23.[1984] 1 NZLR 385

24.Statute of Westminster Adoption Act 1947

25.See [1977]NZLJ 130,134-135

26.Idem

27.Idem

28.Lord Elwyn-Jones, C.H., the Lord Chancellor. "The Role and Function of a Final Appeallate Court" (1976) 7 Cambrian L. Rev.31,36

29.NZLC PP4, 93

30.Brown v Allen (1953) 344 US 443,540

31.Above n25

32.J.L. Robson New Zealand: The Development of its Laws and Constitution (2ed,1967),28

33.[1981] 1 NZLR 618

34.Re Erebus Royal Commission; Air New Zealand Ltd v Mahon [1983] NZLR 662

35.Reid v Reid[1982] 1 NZLR 147,152

36.Below, 21

37.Above n6,519

38.Above n28

39.It is probably also a recognition of the considerable cost and delay involved in mounting an appeal to the Judicial Committee.

40.The New Zealand Law Commission are currently considering a new structure for the courts, including the question of whether the Privy Council should be replaced by another appellate body of New Zealand origin.

41.Above, 7

42. Hughes, National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations (1931) 7-8

43. While some members of countries other than England occasionally sit on the Privy Council the effect they can have is limited both by the infrequency of the occasions and the fact that their Lordships would always be able to control the majority if so inclined.

44. Above n 42,54

45. See for example: Keith R. Evans & MA Fordham "Singapore Appeals to the Judicial Committee of the Privy Council - An Endangered Species?" (1985) 27 Mal. L.R. 284,295-296

46. Above n6,522

47. Above n45

48. For example in the Australian context, see Blackshield, The Abolition of Privy Council Appeals(1978) Adelaide Law Review Research Paper, No.1,1

49. Above n21

50. Sir Robin Cooke. New Zealand Law Conference Christchurch 1987 Conference papers 268,271

51. Beth "The Judicial Committee...1833-1971"(1977) 7 Georgia JL of Int. & Comp.L 47,54

52. Above n28

53. Hong Kong(Appeal to Privy Council)(Amendment) Order 1985, SI 1985/1635

54. Above n10

55. For some discussion of the 1972 Amendments see "New Zealand (Appeals to the Privy Council)(Amendment) Order 1972" 6 NZULR.82,408

56. Above n42,2

57. For an explanation of the areas in which this distinct law has emerged, see: Mr Justice Cooke "Divergences - England, Australia and New Zealand." [1983] NZLJ 297; P.A. Joseph "Toward Abolition of Privy Council Appeals; the Judicial Committee and the Bill of Rights"(1985) 2 Cant.L.R.273; Sir Ivor Richardson, "The Role of Judges and Policy Makers"(1985) 15 V.U.W.L.Rev.46

58.G.F. Orchard "Stare Decisis in the Court of Appeal"[1980] NZLJ 380

59.[1980] AC 637

60.The specified exceptions were referred to in Young v Bristol Aeroplane Co. Ltd.[1944] KB 718. They are:
1. When there are conflicting decisions of the Court of Appeal it must choose which it will follow.
2. The Court must not follow its earlier decision it, although it has not been expressly overruled, is inconsistent with a decision of the House of Lords.
3. The Court is not obliged to follow its earlier decision if it is satisfied it was given per incuriam.

There is thus no scope for the Court to retract from an earlier decision of its own on the basis of policy considerations or changes in circumstances.

61.Above n58,381

62.[1974] A.C.810

63.(1986-87) 6 NZAR 193

64.Above n60

65.Some members of the Court in Howley did not believe that case presented a good opportunity to depart from an earlier decision of that court but they indicated that they would have been open to the question if there had been more argument presented to them. For a discussion of Howley and its effect, see: David V. Williams "Towards Being the Court of Final Resort" (1986)16 NZULR 205,207

66.Above n63, 204

67.Lord Justice Atkin "Appeal in English Law:"(1927)3 C.L.J.1,7

68.For example in the New Zealand context see above n57. See also D.Jackson "The Judicial Commonwealth"(1970) 28 C.L.J.257

69.For example, O'Connor v Hart[1985] N.Z.L.R.161

70.The aim of uniformity from this case is expressed by Sir Montague E. Smith as: "...in their [Lordship's] view it is of the utmost importance that in all parts of the Empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same." Trimble v Hall (1879) 5 A.C.342,345

71.Fatuma Biati Mohamed Bin Salim Bakhshuwen v Mohamed Bin

Salim Bakhshuwen [1952] A.C.1 which held that decisions on Mohammedan law on appeal from India are applicable to appeals from Kenya.

72.D.Jackson "The Judicial Commonwealth"(1970) 28 CLJ 257,272

73.*Frazer* v *Walker*[1967] NZLR 1069

74.[1891] A.C. 248

75.The Privy Council held that a registered proprietor who acquires his or her interest under an instrument void for any reason whatever obtains an indefeasible title. This can only be challenged if there is a specific basis under the statute, or if the registered proprietor is subject to a personal obligation by which he may be bound in personam to deal with his registered title in some particular manner.

76.(1968) 88W.N. (Pt.1) N.S.W.549

77 Above n71

78.[1969] I A.C.590

79.[1987] I M.L.J.217

80.Ibid,219

81.[1985] 3 W.L.R. 317,331

82 [1986] A.C.80

83.Above n79

84.Above n69

85.[1980] 1 NZLR 386

86.*Hart* v *O'Connor*[1984] 1 NZLR 754,755

87.Above n50,268

88.Above n69,167

89.Nonetheless the Board did seem prepared to take such a position in Malaysia where it was prepared to considerably limit its powers of review. See above n80

90.Above n85

91.C.Cato "*O'Connor* v *Hart*: Mental Incapacity and Unfair Bargains in the Privy Council" (1986) 12 NZULR 87

92.Above n69

93.Prof.J. Berryman "The Law and New Zealand: Influence or Abstractioon" New Zealand Law Conference papers. Christchurch 1987. 261,262

94.P.G. McHugh "The Appeal of "Local Circumstances" to the Privy Council" [1987] NZLJ.24

95.See for example Sir Robin Cooke at n50 and Sir Ivor Richardson at n57

96.Gower,L.C.B "Reflections on Law Reform"(1973) 23 University of Toronto Law Journal 257

97.In 1966 Gardiner held a meeting of the law lords and polled the ex-law lords. The majority decided to allow dissents: the Judicial Committee (Dissenting Opinion) Order in Council. However, the exact effect of this is unclear: see Stevens _Law and Politics_ _The House of Lords as a Judicial Body, 1800-1976_(1978), 417

98.James S.C.Reid "The Judge as Law Maker" 12 Journal of the Society of the Public Teachers of Law 22,29

99.[1987] 2 WLR 24

100.For example, see Richard Green "Tax Avoidance" New Zealand law Conference Papers Christchurch 1987 284,285

101.NZLC PP4,93

102.Loren P.Beth "The Judicial Committee as Constitutional Court for the British Empire, 1833-1971" 7 Ga.J.Int'l & Comp.L 47,54

103.Above n42

104.They are _Hineiti Rirerire Arani_ v _Public Trustee of New Zealand_ (1919) NZPCC 1; _The King_ v _Broad_ (1919) NZPCC658; _Mt Albert Borough_ v _Australasian Temperance and General Mutual Life Assurance Society Ltd_ [1937] NZLR 1124; _Dillon_ v _Public Trustee_ [1941] NZLR 557; _R_ v _Kaitamaki_ [1984] 1 NZLR 385; _Perkowski_ v _WCC_ [1959] NZLR 1; _Wallis_ v _Solicitor-General_ (1902) NZPCC 23; _Farrier-Waimak Ltd._ v _Bank of New Zealand_ [1965] NZLR 4226; _Rowling and Attorney-General_ v _Takaro Properties Ltd._ unrep. PC 61/86

105.This table was compiled from the list of Privy Council Appeal cases found in NZLC PP4,82-93. The division into subject-matter categories is new. It covers the period from 1840-1/1/1988. To the author's knowledge the list is

extensive although it does not include all applications for leave to the Board which were dismissed.

106. O'Connor v Hart [1985] NZLR 159; Scancarriers A/S v Aotearoa International Ltd [1985] 1 NZLR 513

107. (1898) NZPCC 9

108. Fleming v Bank of New Zealand (1900) NZPCC 525

109. Commissioner of Trade and Customs v Bell and Co. Ltd. (1902) NZPCC 146

110. NZ Loan and Mercantile Agency Co. Ltd v Reid (1905) NZPCC 82

111. (1910) NZPCC 357

112. (1923) NZPCC 197

113. Bisset v Wilkinson and Another (1926) NZPCC 93

114. Wanganui Sash and Door Factory and Timber Co. Ltd. v Maunder (1929) NZPCC 484

115. (1929) NZPCC 538

116. Lysnar v National Bank of NZ Ltd. [1935] NZLR 129

117. De Bueger v J. Ballantyne & Co. Ltd [1938] NZLR 142

118. [1947] NZLR 793

119. [1961] NZLR 325

120. Farrier-Waimak Ltd. v Bank of New Zealand [1965] NZLR 426

121. JM Construction Co. Ltd v Hutt Timber and Hardware Co Ltd [1965] 1 WLR 797

122. Boots the Chemists(NZ) Ltd v Chemists Service Guild of NZ (Inc.) [1969] NZLR 78

123. [1974] 1 NZLR 505

124. [1976] 2 NZLR 14

125. Ibid, 19

126. [1985] NZLR 159

127. [1985] NZLR 554

128. J.Berryman "The Law and New Zealand: Influence or Abstraction" New Zealand Law Conference Papers Christchurch 1987 261,262

129. Above n97,591

130. Above n113

131. Above n119

132. Above n120

133. New Zealand Netherlands Society "Oranje" Inc. v Kuys & The Windmill Post Ltd.[1973] 2 NZLR 163

134. (1902) NZPCC 23

135. Below, 48

136. (1926) NZPCC 678

137. [1935] NZLR 152

138. [1882] NZPCC 708

139. [1920] NZPCC 703

140. [1937] NZLR 230

141. [1940] NZLR 847

142. [1972] AC 572

143. [1982] 2 NZLR 77

144. [1944] NZLR. 891

145. Above n138

146. Above n102,55

147. Williams J. Protest of Bench and Bar, April 25, 1903. NZPCC (1840-1932), 730

148. Above n134

149. Above n42,12

150. (1849) NZPCC 516

151. (1892) NZPCC 204

152. (1901) NZPCC 371

153. (1877) 3 N.Z. Jur. 72

154. Above n152

155. Above n134. This case has been categorised as including issues of both public law and the law of trusts.

156. Ibid, 35

157. Above n147,756

158. Above n94

159. (1904) NZPCC. 323

160. (1905) NZPCC 330

161. (1923) NZPCC 68

162. [1941] NZLR 590

163. [1947] NZLR 279

164. [1967] NZLR 1057

165. K.J. Keith "Delegation and the Rules of Natural Justice"(1968) 31 Mod L.Rev 87,92

166. [1982] 1 NZLR 165

167. British Nationality and Status of Aliens (in New Zealand) Act 1928.

168. Lavave v Immigration Department [1979] 2 NZLR 74

169. Above n 160, 170

170. See E.J.Haughey "Lesa v Attorney-General -two views" [1982] NZLJ 315,317

171. [1983] NZLR 662 and D.Heard "Western Samoans as New Zealand citizens" (1984) 14 VUWL Rev 301

172. Ibid, 668

173. Above n84

174. K.J.Keith "The Erebus case in the Privy Council"[1984] NZLJ 35

175. Above n171

176. unrep judgment PC 61/1986

177. [1986] 1 NZLR 51

178. Rt. Hon.Sir Robin Cooke "The New Zealand National Legal Identity" New Zealand Law Conference Papers 1987 268,271

179. Above n166

180. Above n176

181, Above,4

182. Nakhla v R [1975] 1 NZLR 393; Crown Milling Co Ltd v The King (1926) NZPCC 36

183. Above, 17

184. Above n97,592

185. Anns v Merton London Borough Council [1978] AC 728. The NZCA has continued to enlarge the boundaries of liability in accordance with Anns: see S.Todd "Takaro Properties Decision of the Privy Council" [1988] NZLJ 34

186. (1893) NZPCC 36

187. (1907) NZPCC 470

188. [1940] NZLR 424

189. Above n176

190. Above n185

191. Above n176

192. This was heard concurrently with Dilworth v Commissioner for Land and Income Tax: both appeals were allowed (1898) NZPCC 578

193. Lovell and Christmas Ltd. v Commissioner of Taxes (1907) NZPCC 611

194. (1926-27) NZPCC 616

195. (1929) NZPCC 600

196. Commissioner of Inland Revenue v Europa Oil(NZ) Ltd [1971] NZLR 641

197. Europa Oil (NZ) Ltd v Commissioner of Inland Revenue

[1976] 1 NZLR 546

198. Ibid, 559

199. Ibid, 553

200. Above n196

201. McCarthy [1976] NZLJ 376

202. [1974] 2 NZLR 52

203. Idem.

204. [1987] 2 WLR 24

205. Ibid,35

206. Prof. Willoughby "Avoiding Evasion and Evading Avoidance" New Zealand law Conference Christchurch 1987 280; R. Green "Tax Avoidance" New Zealand Law Conference Christchurch 1987 284

207. Above n97,603

208. Above n204

209. Above n206,281

210. Above n196 and n197

211. (1884) NZPCC 250

212. (1840-1932) NZPCC 730

213. (1897-98) NZPCC 240

214. (1904-05) NZPCC 275. A number of appeals were consolidated in this decision.

215. [1891] A.C. 248

216. (1910) NZPCC 262

217. (1926) NZPCC 365

218. [1965] NZLR 426

219. Above n214

220. [1967] NZLR 1069, 1077-1078

221. (1900) NZPCC 184

222. [1941] NZLR 557

223. Above,46

224. [1976] 2 NZLR 715

225. Above, 4

226. (1898) NZPCC 422

227. (1932) NZPCC 456

228. (1905) NZPCC 336

229. (1922) NZPCC 159

230. [1933] NZLR 1118

231. Above n166

232. Above n176

233. Above n220

234. [1985] NZLR 159

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