F. W. GUEST MEMORIAL LECTURE: SOME ASPECTS OF THE REFORM OF CIVIL PROCEDURE

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The F. W. Guest Memorial Trust was established to honour the memory of Francis William Guest, M.A., LL.M., who was the first Professor of Law and the first full-time Dean of the Faculty of Law at the University of Otago, serving from 1959 until his death in November 1967.

It was felt that the most fitting memorial to Professor Guest was a public address upon some aspect of law or some related topic which would be of interest to the practitioners and the students of law alike.

It is a privilege to have been asked to deliver this, the third, public address in the series of F. W. Guest Memorial Lectures, as a tribute to the memory of the first Professorial Dean of the Faculty of Law in this University. Of his breadth of vision, his philosophical and questioning mind, his attainments at the Bar, and his contribution to legal educaton not only in this University but throughout New Zealand, the previous two speakers in this series have spoken with fitting eloquence. It was his incisiveness of mind, his deep concern that the law should meet the needs of society, and his impatience with those who resisted any attempt to re-examine the basis of ancient rules and principles—these were the qualities which many of his friends will remember. And these were the qualities which motivated his decision as Convener of the Sub-Committee on Papers at the Dunedin Conference of the New Zealand Law Society in 1966 to place the main emphasis on law reform. It was because of his keenness to bring about basic reforms in the law of civil procedure that I have considered it appropriate this evening to honour his work as lawyer and law teacher by inviting you to consider some aspects of procedural reform in New Zealand with special reference to the Supreme Court.

Any discussion must begin with our existing rules, which for the most part are contained in the Code of Civil Procedure to be found in the Second Schedule to the Judicature Act 1908. The Code is an amazing collection. Although it has been overhauled and refurbished from time to time since it was originally enacted in its present form in 1882, it still retains many relics of the past. The inquisitive legal historian will light upon provisions which trace their ancestry back to the formative years of the common law. In that category may be placed R.557, which denies costs to a successful plaintiff who recovers

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less than forty shillings (now $4.00) unless the judge certifies that costs should be allowed or that the action was brought to try a right other than the mere right to recover damages. That pedestrian rule evokes memories of the days when the royal courts at Westminster were asserting their hegemony over the common law and the jurisdiction of the county required legislative bolstering. Occasionally, old writs, whose very existence would surprise the modern practitioner, are mentioned in rules of almost total incomprehensibility. Thus, R.481 speaks of the relief which might heretofore have been obtained by means of a writ of *scire facias*: it is not surprising that the annotation in Sim's *Practice and Procedure* (10th ed., 1966), 312 is confined to a mere citation of a case which, surprisingly, is said to deal with the procedure under the rule: *Marsh* v. *Taranaki Education Board* [1818] (sic) G.L.R. 122. Disabilities long since removed are still hinted at in the Code; as, for example, in R.455, dealing with the effect of marriage on the procedural position of a female litigant. The old device of taking acknowledgments from married women to ensure their free consent to the alienation by their husbands of freehold land is referred to by implication in R.439, where it is treated as being a task beyond the powers of Registrars on the taking of accounts.

In view of the comprehensiveness of the Code—it contains well over 600 separate rules—it is surprising to discover that it contains no rules whatever relating to important aspects of procedure, and occasionally, as with R.272 (relating to nonsuits), it deals elliptically with a topic which for the guidance of the Courts and the profession requires more detailed treatment. The total silence of the Code in the important sphere of settlements has been a substantial cause of uncertainty among New Zealand practitioners about the ways and means of effecting and enforcing the compromise of actions. A measure of uncertainty has been removed by a series of decisions of the Supreme Court: *Burfitt* v. *Johansen* [1958] N.Z.L.R. 506; *Kontvanis* v. *O'Brien* [1958] N.Z.L.R. 502; and *Eyre* v. *Wilson & Horton Ltd.* [1967] N.Z.L.R. 769, but most practitioners would probably prefer to rely on a specific rule rather than to extract the *ratio decidendi* from several decisions of the Supreme Court.

It is true that in the absence of particular rules the Court is exhorted by R.604 to dispose of cases by analogy with rules in similar matters or, if there are no such rules, in such manner as is deemed best calculated to promote the ends of justice. Our admiration for the sentiment expressed in that rule is, however, somewhat dampened by the discovery that the Court has confined its operation to cases in which no form of procedure has been provided where there is an existing right: see *Fieldhouse* v. *Oppenheimer & Co.* (1914) 17 G.L.R. 793. A similar rule used to exist for supplying lacunae in probate procedure, but there the touchstone provided for the Court was the non-contentious probate practice of the Probate Divorce and Admiralty Division of the English High Court. The rule (R.531Z) was not as helpful as might have been expected, although in *In re Mair* [1955] N.Z.L.R. 1144 it received the rare post mortem treatment of being applied eleven years after it had been revoked.

A recurring theme in the agenda of reformers of civil procedure for well over a hundred years has been the simplification and rationalisation of the various modes of commencing proceedings. Although the movement for reform got under way with a significant start by the enact-

ment of the Uniformity of Process Act 1832 (2 Will. 4 c. 39), the work is still unfinished. In the first place there is no reason why a single uniform procedure should not be available to all litigants wishing to commence proceedings of a contentious kind. The writ of summons is now neither a writ nor a summons. If it is read at all, its most important message is to refer the defendant to the statement of claim annexed thereto. The originating summons has changed its form and is now virtually indistiguishable from a notice of motion. As originating documents, summonses are no longer used and petitions are confined to matrimonial causes and certain categories of insolvency proceedings. The process of uniformity begun so long ago should now receive its final consummation by the introduction of a short, simple, and intelligible document available for any kind of relief which may be sought in civil proceedings.

Such a development would remove the existing anomalies which bedevil the litigant who seeks one or more of the extraordinary remedies referred to in Chapter II of Part VII (Special Procedure) of the Code. Few sections of the Code have come under such sustained criticism. "Exceedingly difficult to understand" was Williams J.'s description of those rules (RR.461 - 475) in *Mansford* v. *Ross* (1886) N.Z.L.R. 4 S.C. 290, 291, a mordant stricture from such a judge notwithstanding his own participation in the work of drafting the rules only a few years previously.

The most striking anomaly relates to the mode of commencing proceedings for an extraordinary remedy. If the only relief sought is one or more of the remedies set out in RR.461 - 465, the applicant must be careful to follow the procedure prescribed by R.466. Woe betide him if he should begin by issuing a writ of summons, because R.466 provides that a person claiming such relief "shall, *without issuing a writ of summons,* file . . . a statement of claim". If however the applicant should wish to include in his claim some relief other than that specified in RR. 461 - 465, even if it be the general prayer which Mr Robins, a very eminent counsel, used to say was "the best prayer next to the Lord's Prayer" (*Cook* v. *Martyn* (1737) 2 Atk. 3), he must make sure that he does begin by issuing a writ of summons: see *Mansford* v. *Ross* (1886) N.Z.L.R. 4 S.C. 290; *Williamson* v. *Dalgleish* (1899) 1 G.L.R. 269, 270; *Kerr* v. *Brown* [1925] G.L.R. 379; *Yewen* v. *Terrill* [1950] G.L.R. 517, 521; and *Martin* v. *Polyplas Manufacturers Ltd.* [1969] N.Z.L.R. 1046, 1051. It is difficult to see how the needs of justice demand such a nice distinction between the two modes of commencing actions, especially when the document whose presence or absence makes all the difference is rarely read.

A basic fact of great importance in considering the ends to be served by a procedural code is that the vast majority of actions never come to trial. Equally important is the fact that to many actions no genuine defence can be maintained. A system of procedure which fails to take those factors into account is subordinating facts to theory. In one relatively restricted class of cases the Code recognises the actualities of the controversy. This is in the field of actions brought on negotiable paper. Not only is there a statutory device to assist the plaintiff suing on a lost negotiable instrument (s.88 of the Judicature Act 1908), but there is also a group of rules (RR. 490 - 501) devoted to the special procedure available in actions on bills of exchange and on promissory notes. The assumption upon which that procedure rests is that the

plaintiff is entitled to judgment. The defendant is given a short period to act. But his field of manoeuvre is limited. Before he may defend, he must obtain leave. If he pays into Court the amount claimed or otherwise gives security for it, he is entitled (R.494) to leave to defend: on the other hand, if he shows that he has a good defence, a defendant in such an action may be given (R.495) leave to defend. That procedure could usefully be extended to cover a variety of actions, such as for payment for goods sold and delivered or for services rendered, where there is no genuine dispute either about liability or about quantum. The English procedure under Order 14 furnishes an example of the extension that would be useful. The Order applies to all actions begun by writ in the Chancery Division or the Queen's Bench Division other than claims based on an allegation of fraud or a claim for defamation, false imprisonment, seduction, or breach of promise of marriage. It provides that, after a defendant has entered an appearance, a plaintiff may apply for judgment against that defendant on the ground that there is no defence to the action. There are obvious theoretical dangers in giving such free rein to a plaintiff who may well have some difficulty in appreciating how there could possibly be a defence to his claim. But the English practice supports the view that those defendants who consider that they have a defence will either deliver a timely statement of defence or seek leave to defend or, if judgment has supervened, apply to have the default judgment set aside.

Conceptual distinctions drawn in any procedural code ought to be capable of being applied without undue difficulty. There ought to be no penumbra of uncertainty between one category and another. In this respect there is ample room for reform. Take the case of liquidated demands. Rule 226 of the Code provides that in default of pleading a plaintiff claiming payment of a liquidated demand in money may at once sign final judgment. The rule helpfully sets out a catalogue of instances of claims for a liquidated demand in money which would seem to cover most cases; most but not all. Even with the benefit of such examples difficulties can arise. Thus, in *Wing* v. *Leeder* [1961] N.Z.L.R. 30 Barrowclough C.J. held that a claim for damages in tort could be a claim for payment of a liquidated demand in money. "There are," he said (at 32), "some claims in tort which are clearly liquidated and within the scope of R.226". Such a claim was "liquidated" when it is made clear or plain or when it is settled or determined. In *Wing* v. *Leeder* the claim was for damages for a fraudulent misrepresentation alleged to have induced the plaintiff to enter into an agreement for the purchase of a leasehold farm property. The damages claimed included the rent paid by the plaintiff to the owner of the land under the lease which he had taken over from the defendant; the rates which had been paid to the local rating authorities; and the return of the amount paid by him to the defendant in part payment of the purchase price. Those were the sums which the plaintiff contended, successfully, were liquidated in the sense that, if he was entitled to succeed at all, the amounts in question could not be the subject of any dispute. Such a conclusion bristles with difficulties which cannot be explored here beyond pointing out, what every law student knows, that a tort is a civil wrong for which the remedy is (inter alia) a common law action for *unliquidated* damages. Five years later Barrowclough C.J. was again called on to consider the scope of the phrase "liquidated demand in money" in R.226. In *Paterson* v. *Wellington Free Kindergarten Association, Inc.*

[1966] N.Z.L.R. 468 the plaintiff had entered judgment by default for moneys alleged by him to be due under the provisions of a contract to erect a building for the defendant society. Finding that the claim was for an amount alleged to be due for variations and extras which involved measurement and valuation by an architect, the learned Chief Justice held that there could not be the slightest doubt that the relief claimed by the plaintiff was *not* payment of a liquidated demand in money, but was a claim for an unliquidated balance still to be quantified or liquidated. Rule 226 of the Code of Civil Procedure is somewhat unusual in that it includes, as an integral part of the text, a catalogue of "instances of claims for a liquidated demand in money" in which a plaintiff might proceed under the rule. The first instance is "claims on simple contract debts". It seems never to have been doubted in *Paterson's* case that the plaintiff's claim, being an action for moneys alleged to be due under the terms of a building contract, was a claim on a simple contract. The result seems to be odd: in *Wing* v. *Leeder* a claim for damages in tort is held to be a claim for a liquidated demand in money; but a claim on a simple contract debt is in *Paterson* v. *Wellington Free Kindergarten Association Inc.* held not to be a claim for a liquidated demand in money. Neither proposition seems to be correct. No opportunity has yet arisen for the first to be re-examined in a higher court, but the second was rejected by the Court of Appeal in *Paterson's* case: [1966] N.Z.L.R. 975, 982. The difficulties raised by *Wing* v. *Leeder* have consequences beyond the jurisdiction of the Supreme Court. The distinction between liquidated and unliquidated demands is of paramount importance in classifying actions in Magistrates' Courts: the former may be brought as default actions; the latter may not: see RR. 71 - 73 of the Magistrates' Courts Rules 1948 (S.R. 1948/197). This is no mere academic problem, but one of real importance in litigation both in superior and in inferior courts of general jurisdiction. If no satisfactory test can be devised for classifying liquidated and unliquidated claims, there is much to be said for replacing it by a more workable concept.

Another, and perhaps even more important, conceptual distinction in the Code has caused difficulty in application ever since it was introduced—the distinction between final and interlocutory judgments or orders. It is in appellate procedure that the distinction is to be found. Under section 71 of the Magistrates' Courts Act 1947 there is a right of appeal to the Supreme Court against "any nonsuit or final determination or direction" of a Magistrate's Court. The classification of judgments and orders of the Supreme Court into final and interlocutory is the basis for calculating the time for appealing to the Court of Appeal: R.27 of the Court of Appeal Rules 1955. There is a remarkable conflict of authority as to what constitutes the difference. The test favoured in the majority of cases both in England and in New Zealand was propounded by Alverstone L.C.J. in *Bozson* v. *Altrincham U.D.C.* [1903] 1 K.B. 547, 548, in the following terms:

> Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

There is a deceptive simplicity about such a test. But, as recognised by counsel in that case, an order may on that test be final if in favour of one party and interlocutory if in favour of the other. Thus, in *Bozson's* case, an order had been made at an early stage of the pro-

ceedings of an action claiming damages for breach of contract that questions of liability and breach of contract only were to be tried and that "the rest of case (if any) [was] to go to the Official Referee". When the first part of the action came on for hearing, the trial judge held that there was no binding contract between the parties and dismissed the action. That order the Court of Appeal (Halsbury L.C., Alverstone L.C.J., and Jeune P.) considered to be final. Certainly, in one sense, it finally disposed of the rights of the parties; but if the trial judge had held that there was a binding contract, clearly it would be unreal to treat his decision then as finally disposing of the rights of the parties since the case would have to go to the Official Referee. While it may be satisfactory in a particular piece of litigation to classify an order as final or interlocutory according as to whether it favours one party or the other, it may not furnish a satisfactory test for general application. And, in spite of its apparent simplicity the test can be a trap, as was found in *William Cable Ltd.* v. *Trainor* [1957] N.Z.L.R. 337, C.A., a nice case of biter bit. If the test causes difficulties of application, as the testimony of the cases shows that it does, it calls for re-examination. But an even more basic question needs to be considered: is the distinction necessary? The answer to that question will depend upon the answers to such questions as whether there should be a right of appeal to the Supreme Court from every determination or direction of a Magistrate's Court and whether there should be a uniform time for appealing to the Court of Appeal against all judgments and orders of the Supreme Court.

It is possible to discern in New Zealand cases an ambivalent attitude towards the Code of Civil Procedure. There are cases in which its rules have been treated as mandatory requirements calling for meticulous compliance. How else can one explain the rigid attitude towards R.399 requiring "at least three clear days" notice of any motion? The requirements of the Rule are said to be imperative and the Court has no power to adjourn the hearing, but must dismiss the application where insufficient notice has been given. The two cases cited in Sim's *Practice and Procedure* (10th ed., 1966), 265 for that draconian proposition are both taken from the nineteenth century: *Anderson* v. *Ziesler* (1888) 7 N.Z.L.R. 116 and *McQueen* v. *William Tell Gold-mining Co. Ltd.* (1890) 8 N.Z.L.R. 478, 479-80. In the earlier of the two cases Ward J. merely said that, as objection to the want of sufficient notice had been insisted on, the application must be dismissed, accepting, by implication, the submission of counsel for the objector that no amendment of the application would be permissible. There was no suggestion in the argument that the application should be adjourned, merely that the Court should exercise its power under the rules to abridge time. In the later case however Williams J. did expressly rule that he had no power to adjourn the hearing, in that respect following the English case of *Daubney* v. *Shuttleworth* (1876) 1 Ex.D. 53. But when that extraordinary case is examined, it will be seen to have said nothing whatever on the question of adjournment. The New Zealand cases are therefore somewhat inadequate as authorities for the proposition that the Court has no power to adjourn the hearing of a motion where less than three clear days notice has been given. And yet judges have up to recent times accepted the proposition without any reported protest against the excessive rigidity of such a course of action. Other examples of this attitude are not wanting, but it will be sufficient to refer to the

line of cases, already discussed, which hold that where a plaintiff follows the special procedure laid down in R.466 of instituting an action for an extraordinary remedy by filing a statement of claim *without issuing a writ of summons* his proceedings are bad if he should claim any relief other than one (or, since R.466B, more) of the special forms of relief contained in RR. 461 - 465. Typical of the judicial insistence upon strict compliance with the special procedure contained in those rules is *Bouzaid* v. *Horowhenua Indoor Bowls Centre Inc.* [1964] N.Z.L.R. 187, where the plaintiff sought an injunction, a mandatory injunction, and declarations. Rather than striking out the declarations as offending prayers for relief the Court might have interpreted the action of the defendant society in counterclaiming—a proceeding which has been held by Edwards J. in *Edmonds* v. *Edmonds* (1903) 6 G.L.R. 262, 264 to be unavailable to a defendant against whom an extraordinary remedy was sought—as amounting to acquiescence in the plaintiff's course of proceeding, especially when the defendant society was itself seeking a declaration, presumably in terms converse to those sought by the plaintiff.

In contrast with the attitude of rigid interpretation is the approach which treats the solution of procedural problems as being primarily or even exclusively a question of practice. Here the quest for interpretation of the rules is overlaid by emphasis upon practice. Thus, in *Kerr* v. *Brown* [1925] G.L.R. 379 (another case dealing with the special procedure for extraordinary remedies) Reed J. (at 380) regarded the question as "entirely one of practice [in which] it would be highly inconvenient to create doubt as to proceedings by adopting a construction based on viewing the matter from the opposite standpoint to that from which it was regarded in the cases mentioned". Adopting that approach the Court considered the inclusion in the prayer for relief of the words "further and other relief" to be objectionable and the offending words were ordered to be struck out. And yet the rules themselves seem to contemplate that an applicant for an extraordinary remedy, though not entitled to what he seeks, may nevertheless obtain some other kind of relief. Rule 467 provides for the filing of a notice of motion in terms of the prayer of the statement of claim filed under R.466, "or for such other order as the Court may consider him entitled to". The same attitude seems to have been evident in the judgment of the Court of Appeal in *Paterson* v. *Wellington Free Kindergarten Association, Inc.* [1966] N.Z.L.R. 975, which, it will be remembered, reversed the judgment of Barrowclough C.J. and held that a claim for variations and extras under a building contract was a claim for a liquidated demand in money within the meaning of R.226. The Court eschewed the task of defining the phrase "liquidated demand" in the abstract, saying (at 982):

> . . . we need not concern ourselves further with the difficulties to which the phrase has given rise in England or elsewhere. Those who are interested in that will find them discussed at considerable length in the scholarly judgment of Sholl J. in *Alexander* v. *Ajax Insurance Co. Ltd.* [1956] V.L.R. 436. *This is a question of practice,* which should be determined primarily on the wording of our own rule . . . (emphasis supplied).

It is true that the New Zealand rule contains a list of examples of liquidated demands and, with respect, that the Court of Appeal was undoubtedly right in its view that the explanatory note must be given its full value as an aid to interpretation. It is also true that with

the aid of the note the answer to the problem before the Court was clear, although it had not appeared so to Barrowclough C.J. in the Supreme Court. Nevertheless, the examples set out in the note do not exhaust the categories of liquidated demands. As it is, the decision tells us that a claim for variations and extras under a building contract is a claim on simple contract and that such a claim is a claim for a liquidated demand in money. There may have been some argument, though little, on the first point; but none on the second. With a phrase which has proved so intractable it might reasonably be expected that the Court of Appeal would have furnished the profession with guildance on its scope.

Another case typifying the same attitude is the decision of the Court of Appeal in *Rowley* v. *Wilkinson* [1968] N.Z.L.R. 334 relating to the filing of an amended statement of claim before trial. Under R.144 it is provided (inter alia) that at any time before an action has been set down for trial the plaintiff may file an amended statement of claim without obtaining leave. Notwithstanding the apparently unqualified language of the rule, the Supreme Court, not without some judicial restiveness, has held in a series of decisions, that a plaintiff may not file an amended statement of claim setting up a new and different cause of action or introducing an additional cause of action. The effect of those decisions is that a plaintiff is entitled to amend his statement of claim by including an alternative cause of action by not by introducing an *additional* cause of action. Such a restrictive attitude was criticised by Ostler J. in *Norton* v. *Williams* [1939] G.L.R. 434, 435, as "unnecessarily technical and not in the best interest of justice". In *Rowley* v. *Wilkinson* the question came before the Court of Appeal for the first time. Here was an opportunity to interpret the rule in conformity with desirable policy, to seek and to state some rational explanation for the encrustation of decisions in the Supreme Court; or, that failing, to abandon them in favour of a different and rational rule more in accord with the interests of justice. It is a matter for regret that the Court preferred to adhere to the practice of the past. Delivering the judgment of the Court, McCarthy J. said (at 339):

> all [of the New Zealand decisions stating the rule refusing amendments which set up an additional cause of action] are at first instance, and in none of them is to be found any justification in principle for the course of practice which now obtains. But whatever may have been the historical or logical basis of the rule, there can be no doubt at least that it is a firmly established one. We think that little can be gained by setting out now to examine its justification, and propose to dispose of this appeal without embarking upon any such inquiry, simply by applying the test which the cases have established . . .

Until the Court of Appeal can be persuaded in some future case to embark upon the task which it declined to accept in *Rowley* v. *Wilkinson,* we are committed, in the name of adherence to practice, to a rule which has never received any justification in principle by those who formulated it; which seems to involve a substantial restriction upon the scope of the unqualified language of the rule; and which seems to be unnecessarily technical and not in the interests of justice.

In an address of this nature it is not possible to survey the whole field of civil procedure, marking the difficult terrain and pointing to the easy gradients. An impressionistic picture is all that can usefully be attempted. And any advocate of procedural reform, especially one with academic associations, is conscious that in the eyes of many judges and

lawyers he may be guilty of laying his hand on the sacred ark of the covenant. When Samuel Romilly was in Edinburgh in 1793 he wrote "I have been pleased with everything I have seen in Edinburgh and about it except . . . the administration of justice, which I think detestable". That highly unfavourable opinion was formed after he had observed the trial of Thomas Muir who was sentenced to 14 years' transportation for advocating Parliamentary reform. Romilly was profoundly shocked by the way in which the trial was conducted, and by the views expressed by the judge who declared that to speak in favour of reforming the courts of law was "seditious, highly criminal, and betrayed the most hostile disposition towards the constitution". While the New Zealand system of civil procedure would not earn the strictures which Thomas Muir directed at the Scots system, the time has arrived for it to become the object of careful research and study from generous and impartial minds so that the administration of justice at all levels in New Zealand will be efficient, expeditious, and rational.