THE STATUTES STATUTE

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INTRODUCTION

It has sometimes been supposed that, section 5(j) apart, the interpretation paragraphs of the Acts Interpretation Act 1924 have been seldom used by the Courts. Research, however, shows that this is not the case. The present article reports preliminary findings towards a longer work and deals with paragraphs (a) to (g) of section 5. A general survey of case law has been undertaken and, where appropriate, suggestions for reform have been made.

SECTION 5(a):

Every Act shall be deemed to be a public Act unless by express provision it is declared to be a private Act:

This provision has its origins in section 7 of Lord Brougham's Act 1850, which stated:

> ...every Act made after the commencement of this Act shall be deemed and taken to be a public Act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such Act.

Notwithstanding that it had appeared in the U.K. Interpretation Act 1889, it did not make its debut in New Zealand legislation until 1908. At that time, surprisingly, it appeared almost simultaneously in two separate statutes. The Acts Interpretation Act 1908 enacted, in section 6(a), a provision identical to the present section 5(a); and the Evidence Act 1908, in section 28(1), made the following provision:

> Every Act shall, unless it is expressly declared to be a private Act, be deemed to be a public Act, and judicial notice shall be taken thereof by all Courts and all persons acting judicially.

It will be noted that the only significant difference between the two provisions is that the Evidence Act includes the stricture originally contained in Lord Brougham's Act concerning judicial notice, while this feature is omitted from the version in the Acts Interpretation Act. Why this should be so, and why the reduplication occurs is not clear. Possibly it was thought that, since the Courts had sometimes experienced difficulty with the proof of statutes, any provision relating to judicial notice might more properly be located in the Evidence Act[1]. Even if this is so, however, it does not explain why it was thought necessary to reiterate a substantial part of the provision in the Acts Interpretation Act unless there are thought to be significant differences in the rules of interpretation which are applied to public and private Acts respectively.

Traditionally, private Acts have been construed more strictly than other

[1] Problems had been known to occur in showing that the document before the Court corresponded exactly with the Act duly passed by Parliament.

statutes because they constitute a kind of exception to the general law of the land. Lord Esher remarked:

> In the case of a private Act which is obtained by persons for their own benefit you construe more strictly provisions which they allege to be for their benefit, because the persons who obtain a private Act ought to take care that it is so worded that that which they desire to obtain for themselves is plainly stated in it[2].

And Scrutton LJ has stated that, so far as strangers to a private Act are concerned, it is to be interpreted *contra proferentem*[3]. Indeed, this approach was adopted by the Privy Council in a case from New Zealand, *Barton v Moorehouse*[4]. In delivering the recommendation of the Judicial Committee, Lord Tomlin observed

> that this is a private Act of Parliament passed with a strictly limited purpose, as indicated in the preamble, and accordingly it would be contrary to accepted canons of construction to give to the Act, unless compelled by unambiguous language, an effect which would alter unnecessarily the rights of the parties if the language employed is capable of any other construction.

The Privy Council held that the New Zealand Court of Appeal had put an interpretation upon the relevant section which did "not seem to their Lordships to be clearly demanded by the language used."

It is at least questionable however, despite this judgment of the Privy Council, whether any distinction in interpretation between private and public Acts in New Zealand can be upheld. This is so because section 2 of the Acts Interpretation Act provides that the statute shall apply to "every Act of the General Assembly of New Zealand... except insofar as any provision hereof is inconsistent with the intent and object of any such Act..." This means that, potentially, private Acts as well as public are to be subjected to the rule of "fair, large and liberal" interpretation laid down in section 5(j). It is true that that paragraph also refers to the "public good", but that is probably not enough in itself to prevent what Burrows has called the "cardinal rule of statutory interpretation in New Zealand"[5] from applying to the construction of private Acts. This view is reinforced by the fact that section 28 ensures that section 5(j) must, itself, be given a fair, large and liberal interpretation.

Thus, if the foregoing analysis is correct, there is no obvious reason for embodying this provision in both the Acts Interpretation Act and the Evidence Act.

[2] *Altrincham Union Assessment Committee v Cheshire Lines Committee* (1885) 15 QBD 597, 603

[3] *Harper v Hedges* (1924) 93 LJ KB 116, 117; see also *Langham v Mayor etc. of the City of London* [1949] 1 KB 208

[4] [1935] AC 300, 306-7. The case concerned the Rhodes Trust Act 1901, s5.

[5] See J.F. Burrows, [1969] 3 NZULR 253

SECTION 5(b):

Every Act shall be divided into sections if there are more enactments than one, which sections shall be deemed to be substantive enactments, without any introductory words:

This provision is almost word-for-word that of section 2 of Lord Brougham's

Act, 1850. It appeared first in New Zealand in the Interpretation Act 1888, section 5(1) and has remained unchanged ever since.

Until Lord Brougham's Act, each separate portion of an act was generally preceded by words of enactment such as *Be it enacted...* and the division into numbered sections was a drafting convenience which had no legislative authority[1]. Thus the paragraph was intended to further Lord Brougham's desire to "shorten the language used in Acts of Parliament".

The paragraph has received scant judicial consideration in New Zealand. It was mentioned somewhat opaquely in *Ngahuia Ripeka v The King*[2], but was not subjected to any firm interpretation until 1967. In *Munro v Auckland City*[3] Henry J adopted authority[4] to the effect that the word "enactment" has a narrower scope than "act". " 'Act' means the whole Act, whereas a section or part of a section in an Act may be an enactment". His Honour held that this distinction was recognised by section 5(b).

This interpretation was cited with apparent approval by Barker J in *Elston v State Services Commission No.3*[5].

[1] See *Craies on Statute Law, 7th ed.* pp216-7
[2] [1940] GLR 553, 557.
[3] [1967] NZLR 873, 874.
[4] *Wakefield Light Railways Co. v Wakefield Corporation* [1906] 2 KB 140, 145, 146 per Ridley J; and *Rathbone v Bundock* [1962] 2 All ER 257, 259 per Ashworth J..
[5] [1979] 1 NZLR 218, 227

SECTION 5(c):

Every Act passed in amendment or extension of a former Act shall be read or construed according to the definitions and interpretations contained in such former Act; and the provisions of the said former Act (except so far as the same are altered by or inconsistent with the amending Act or Acts) shall extend and apply to the cases provided for by the amending Act or Acts, in the same way as if the amending Act or Acts had been incorporated with and formed part of the former Act:

This wording first appeared in the Interpretation Act 1888 and remained in its original form through subsequent enactments.

The first limb of the paragraph falls into two parts. First, amending Acts will be subject to the definitions and interpretations contained in their principal Acts. It would not be sensible to have to re-enact all the definitions of the main Act with each subsequent amendment. Secondly, Acts which extend a former Act will be similarly treated. It is not clear, however, exactly what is meant by "extension". Where a new section is inserted into an older Act without otherwise changing the original Act, it is usually done by way of formal amendment[1]. Therefore, if the word "extension" is not to be seen as redundant, it must have a wider meaning than "amendment". The question then arises as to whether the paragraph is sufficiently broad in scope to contemplate applying definitions and interpretations from earlier statutes *in pari materia* to later Acts.

[1] See, for example, the Acts Interpretation Amendment Acts of 1960 and 1962

Lord Mansfield stated the common law rule that such statutes "shall be taken and construed together, as one system, and as explanatory of each other"[2]. But according to Lord Russell of Killowen CJ reference to earlier Acts *in pari materia* may only be made where there is ambiguity[3].

This is of little assistance in the present context, however. In the absence of judicial comment on this part of section 5(c), it is suggested that the word "extension" may safely be taken as referring to statutes *in pari materia* only where the link is a very cogent one. Of course, the Court will always have a broader general discretion to interpret under the rule expressed in section 5(j). The rule in this first limb of section 5(c) is quite specific and should be seen as mandatory with regard to amendment Acts. However, where an Act is not an amendment Act, but still has some link with another, earlier Act, it is submitted that the Court would not wish to, and should not, restrict itself to antecedent definitions unless they were wholly appropriate.

The second limb of section 5(c) also contains a potential problem, but has been considered by the Courts. In *Re Parekaiura Parekura and others*[4] it was suggested by counsel that the effect of this part of the paragraph is to make retrospective the effect of any amending Act. This was rejected by Cooper J:

> All that is meant by this provision is that from the time the amending Act comes into operation the original Act and the Amending Act are to be read as one Act, but this is subject to the well-established principle that vested rights cannot be destroyed by subsequent legislation unless it can be clearly shown from the language of the Amending Act that the amendment of the law is to have a retro-active effect.

This passage was approved by Barrowclough CJ in *Rodgers v Public Trustee*[5].

[2] *R v Loxdale* (1758) 1 Burr. 445, 447

[3] *R v Titterton* [1895] 2 QB 61, 67

[4] (1912) 31 NZLR 1074; 14 GLR 829

[5] [1956] NZLR 914, 917-8. Section 5(c) was applied also in *Hardy v Te Aka Pairama* [1918] NZLR 492, 503; and referred to in *Oliphant v Corporation of the City of Auckland* (1912) 7 DC & MCR 139, 140 per Kettle SM; and in *Hempton v Rattenbury* (1913) 33 NZLR 522, 525 per Edwards J.

SECTION 5(d):

The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof according to its spirit, true intent, and meaning:

This difficult paragraph was enacted in the Interpretation Act of 1888 and has not been changed since. At first sight it would appear to be saying simply that, when a statute uses the present tense, its words should be applied to whatever subsequent situations may seem to fall within those words. That is, the law should not be interpreted in a strict or technical way which would freeze it in time and thereby prevent it from covering future circumstances which could not have been foreseen by the Legislature at the time of its enactment.

The problem in asserting that such is the true interpretation of section 5(d) is that the New Zealand Courts have not been consistent in their use of the paragraph.

The question which arises involves a comparison of the historical and ambulatory approaches to statutory interpretation. The former approach finds its expression in the maxim *contemporanea expositio est fortissima in lege*. The rule, first laid down by Coke[1], takes its modern form from Lord Esher in *Sharpe v Wakefield*[2]:

> The words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent Act has declared that some other construction is to be adopted or has altered the previous statute.

There are numerous cases which confirm the respectability of this rule[3], but there is also strong recent authority that the doctrine is only applicable to ancient statutes and is of no value in construing a modern Act, particularly where the language is unambiguous[4]. This is the ambulatory approach, which holds that the words of a statute are capable of bearing any meaning which can reasonably be attributed to them, regardless of what those words may have meant on the day after they were enacted.

The question that arises in the New Zealand context is: Which of these two lines of authority does section 5(d) represent?

The paragraph appears to have been applied for the first time in 1909. In *McKenzie v Jones*[5] Williams ACJ, with the concurrence of four other Judges, held that section 6(d) of the Acts Interpretation Act 1908 gave the Native Appellate Court jurisdiction not only in matters in which the Native Land Court had jurisdiction at the time of the passing of the Native Land Court Act 1894, but also in all matters which may come within the jurisdiction of the Native Land Court in the future[6]. This is a clear instance of the ambulatory approach.

In 1913, in *Hempton v Rattenbury*[7], it was held that a regulation made by the Minister of Marine under an Act of 1903 and continued by an Act of 1908 attached, upon the coming into force of the 1908 Act, to ships that were previously exempt from its scope.

Both these cases were noted by the Court of Appeal in *R v Tailou* in 1944[8]. Fair J had to decide whether section 5(d) could be used to extend the meaning of certain statutory provisions relating to customs and excise duties. After weighing a number of factors, His Honour said:

> ...I am of opinion that they provide no sufficient reason for holding that the Legislature at any time contemplated an extension of the meaning of the word "Customs" in s.3 of the Justices of the Peace Act to Excise Acts - *or is to be deemed to have done so* (emphasis added)[9].

[1] 2 Inst., ed. Thomas, p2, n.(1)
[2] (1889) 22 QBD 239, 241.
[3] See *Maxwell on Interpretation of Statutes*, 12th ed., pp 264-8 and *Craies on Statutes*, 7th ed. pp 79-81
[4] *Campbell College, Belfast (Governors) v Commissioner of Valuation for Northern Ireland [1964] 1 WLR 912. See also Maxwell*, op. cit. pp 268-70 and *Craies* op. cit. pp 81-2
[5] (1909) 12 GLR 215
[6] Ibid, 217
[7] (1913) 33 NZLR 522; 16 GLR 147
[8] [1944] NZLR 643
[9] Ibid, 660

This, then, appears to be a rejection of the ambulatory approach. It should be noted that there were reasons relating to the rights of an accused involved in this case and the Court stated that although there may have been a *casus omissus* in the law, the Court had no power to remedy it.

Only four years later, however, the same Judge had an opportunity to reconsider section 5(d). In *Co-operative Transport Association Tauranga Ltd. v Tauranga Co-operative Dairy Association Ltd.*[10], Fair J said:

> ...the original regulation, by virtue of s5(d) of the Acts Interpretation Act 1924 is considered as always speaking, and applies to circumstances as they arise. To consider them restricted or limited in their application by the scope which they had when they were originally enacted would be to ignore the fact that the amendment contemplates that they should extend to the new circumstances which may require to be dealt with as a result of its passing[11].

This is a clear statement of the ambulatory approach.

The ambulatory approach was also used by Cooke J, as he then was, in *Peerless Bakery Ltd. v Clinkard (No.3)*[12], where it was held that the expression "no regulations made" in the Statutes Amendment Act 1936, s14(1), included regulations made thereafter, and was therefore not confined to regulations already in existence in 1936.

In *Kawakawa Town v Davis*[13] the question was whether a fisherman was in breach of s29 of the Auctioneers Act 1928 by reason of his selling fish from a motorised van. The Act permitted sale by auction, by hawking to private houses or by "any other manner customary in the fish trade". The prosecution alleged that, in 1928, when the Act was passed, "there was no such thing as a mobile or travelling shop used for selling fish", so that the use of a van in 1968 was not "customary in the fish trade". Rather, the customary manner had to be considered as at the time when the Act was passed. This contention was firmly rejected by Grant SM, who ruled that a statute is not to be limited in interpretation to the time of its enactment only: "it speaks throughout the entire period of its existence..." The Magistrate cited section 5(d) and added:

> This Court is unable therefore to accept the proposition that this Act must be interpreted only in respect to methods of selling at the date of its enactment: progress changes methods of merchandising and the Courts must be prepared to interpret statutes in the light of conditions applying at varying times.[14]

In *Public Trustee v McKay* both the Chief Justice, in the Supreme Court[15], and the Court of Appeal[16] seemed to have some doubts as to the exact scope of section 5(d). The case turned on the interpretation of the Social Security Act 1964, s88(4), which reads:

> The decision of the Minister that any person is or is not a hospital patient or that any treatment afforded in or at a hospital is or is not hospital treatment for the purposes of this part of this Act shall be final and conclusive.

[10] [1948] NZLR 724
[11] Ibid, 729
[12] [1953] NZLR 797, 802
[13] (1968) 12 MCD 252
[14] Ibid, 253
[15] [1969] NZLR 214
[16] [1969] NZLR 995

The Minister made a decision after the deceased had died and the validity of this was contested by the plaintiff. Wild CJ rejected this on the grounds that it would reduce the Minister's decision-making power to the point of being practically useless. He added: "Even if this is not the kind of case covered by s5(d)..." it was clearly a situation in which the words of the Act must be construed so as to give them a sensible meaning[17]. In the Court of Appeal Turner J also said that a common sense approach was required and added that, although he did not rely on it for the conclusion he reached, the provisions of s5(d) of the Acts Interpretation Act 1924 "may assist" towards the construction he favoured[18]. Both North P and McCarthy J agreed with his interpretation, but neither mentioned s5(d). However, McCarthy J did say:

> Nevertheless, when one reads the subsection in the context of this part of the Act as a whole, it was plain that the Legislature was speaking in an ever-present sense, posing the question of the character of the patient's care as being always in the present. This is by no means an uncommon use of the present tense of the verb to be.[19]

Although it cannot be said to be a strong authority, then, this case leans towards the ambulatory approach.

Turner J used a similar approach *Stewart v Police*[20] where he used s5(d) to buttress his view that, where a statute creates a presumption without saying anything as to defeasance, that presumption is "always speaking" and is therefore irrebuttable.

In *Attorney-General ex relatione Graham Maiden Ltd. v Northcote Borough*[21] Wild CJ traced certain legislation back to 1900 and then commented that

> ...while times change and new sentiments and tastes emerge "the law shall be considered as always speaking". In my opinion, then, the statutory power must be read in the light of modern ideas.[22]

The weight of authority, then, up until 1972, clearly favours the ambulatory approach where section 5(d) is concerned. However some doubt seems to have been cast on this in 1978 by Chilwell J in *McClenaghan v BNZ*[23]. His Honour first cited Lord Patrick in *Duncan v Motherwell Bridge and Engineering Co.*[24], where His Lordship endorsed the ambulatory approach. Chilwell J then continued:

> That is the effect of s5(d) of the Acts Interpretation Act 1924 relied upon by Mr Greig...The section does not say that statute law is always thinking...It is one thing to have Parliament continually speaking; quite another continually thinking. Thinking involves changes in the thought processes. The only way in which the law can be changed is by Parliament rethinking and changing its speech.
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> The spoken word to which s5(d) refers carries the meaning it had the day after the statute was passed (*Sharpe v Wakefield* (1888) 22 QBD 239,241 affirmed [1891] AC 173) but there

[17] [1969] NZLR at 217
[18] [1969] NZLR at 1005
[19] Ibid at 1002. This case was also referred to in *Ian Croad Autos Ltd. v Retail Motor Trade Association Inc.* [1979] 2 NZLR 80, 88 per McMullin J
[20] [1970] NZLR 560, 576 (NZCA)
[21] [1972] NZLR 510, 515
[22] Wild CJ also commented on s5(d) in *Victoria University of Wellington Students' Association Inc. v Shearer (Government Printer)* [1973 2 NZLR 21, 24
[23] [1978] 2 NZLR 528, 532-3
[24] 1952 SC 131, 158-9

is no detectable change in the meaning of the material words since 1964 in the present case (*Assheton Smith v Owen [1906] 1 Ch 179, 213).*

Exactly what is meant by the Judge is not clear. If he is rejecting counsel's contention that s5(d) represents the ambulatory approach, he is doing so against the weight of New Zealand authority. It seems that he may well be endorsing the historical approach of *Sharpe v Wakefield*, while holding that, in any event, it has no relevance in this case because the meaning of the words in question has not in fact changed. If this is the correct interpretation of the judgment, it is respectfully submitted that Chilwell J is wrong. As has already been pointed out, a substantial line of New Zealand authority exists favouring the ambulatory approach, and it is submitted that this authority represents the more sensible view for this jurisdiction. The historical approach is undoubtedly useful when a very old statute has to be considered, but this will rarely be the case in a country whose legislative history spans less than a century and a half. Section 5(d) is comparable to section 5(j) in that it is instructing the Courts to think about what Parliament would have done if it had contemplated the conditions which have subsequently come into being. Indeed, the provisions of s5(j) can be applied to s5(d)[25] and when this is done the remedial aspect of s5(d) becomes apparent. It is therefore suggested that Chilwell J's approach is too far out of line with previous cases to be authoritative.

It should be noted that South Australia has a provision very similar to s5(d)[26]. In two recent cases the Courts have held that the section should be applied in a remedial way[27], and that an ambulatory approach should be taken[28].

[25] See Acts Interpretation Act 1924, s28

[26] South Australian Acts Interpretation Act 1915-72, s21:
Every Act shall be considered as speaking at all times, and every enactment, whether expressed in the present or the future tense, shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof, according to its spirit, true intent and meaning.

[27] *Hinton v Young* (1973) 6 SASR 129, 139 per Walters J

[28] *In the Estate of Kolodnicky* (1981) 27 SASR 374, 380 per Legoe J

SECTION 5(e):

The preamble of every Act shall be deemed to be part thereof, intended to assist in explaining the purport and object of the Act:

The traditional wisdom of the Courts as regards preambles has been that they may only be consulted when the wording of an enactment within a statute is ambiguous. A strong statement of this rule is to be found in *Attorney-General v H.R.H. Prince Ernest Augustus of Hanover*[1], and there are numerous other cases which support this[2]. However, it is not proposed in the present context to discuss these authorities for two reasons. First, preambles are nowadays only infrequently used in New Zealand Acts; and secondly, whatever the common law may be, the position in this country

[1] [1957] AC 436. See Lord Normand at 467-8.

[2] See *Craies on Statute Law* 7th ed. pp 199-207; and *Maxwell on Statutes* 12th ed. pp 6-9.

appears to be unambiguous because the wording of section 5(e) of the Acts Interpretation Act 1924 plainly intends to permit recourse to the preamble in all cases.

Notwithstanding this, there two Magistrate's Court decisions which do appear to preserve the requirement of ambiguity[3]. In both cases, however, the Bench relied on the combined effect of the paragraph and the relevant passage in *Maxwell*, which states the common law without reference to the New Zealand Act. It is therefore submitted that these decisions are wrong and that the correct interpretation is that given by Stringer J in *Mason v Borough of Pukekohe*[4]. In that case counsel contended for the common law rule but the Judge rejected it, citing section 6(e) of the Acts Interpretation Act 1908 and adding:

> I think, therefore, that I am justified in reading the preamble to the section as a key to the intention of the Legislature as expressed in the enacting words.

It is submitted that this is the correct interpretation.[5]

[3] *Police v Ryan* (1911) 6 DC & MCR 41, 42 per Rawson SM; and *Police v Ingram* (1941) 2 MCD 91, 92 per Lawry SM.

[4] [1923] NZLR 521, 523.

[5] The provision was invoked in this way in *Re Honey* (1922) 17 MCR 86, where it was used to read the Preamble to the Forest Act 1921-22 and to apply it to the interpretation of a specific section of that Act.

SECTION 5(f):

The division of any Act into parts, titles, divisions, or subdivisions, and the headings of any such parts, titles, divisions, or subdivisions, shall be deemed for the purpose of reference to be part of the Act, but the said headings shall not affect the interpretation of the Act:

On its face,the meaning of this paragraph seems clear. Indeed, a number of cases have taken it at face value[1].

There is, however, a second line of cases which, while not taking an opposite view, involves a less rigid judicial approach. It seems to have its origins in the judgment of Lord Reid in *Director of Public Prosecutions v Schildkamp*[2]. After remarking that no one disputed that words in a statute must be considered in the context of the whole Act, His Lordship said:

> The question which has arisen in this case is whether and to what extent it is permissible to give weight to punctuation, cross-headings and side-notes to sections in the Act. Taking a strict view, one can say that these should be disregarded because they are not the product of anything done in Parliament. I have never heard of an attempt to move that any of them should be altered or amended, and between the introduction of a Bill and the Royal Assent they can be and often are altered by officials of Parliament acting in conjunction with the draftsman.

[1] See:*Police v Cuthbert* (1955) 8 MCD 391, 392; *Maintenance Officer v Mitioti Teitinga* (1959) 10 MCD 9, 10; *New Zealand Port Employers Association v Wellington Amalgamated Watersiders' Industrial Union of Workers* (1960) 10 MCD 108, 111; *In re Sullivan (deceased)* [1954] NZLR 6, 7; *Billens v Long* [1944] NZLR 710, 720; *Albert v Nicholson* [1976] 2 NZLR 624, 628; *Auckland Medical Aid Trust v Commissioner of Police* [1976] 1 NZLR 485, 489; *Hoffmann-La Roche & Co. AG v W.M. Bamford & Co. Ltd. (No.2)* [1976] 1 NZLR 371, 373; *Matthews v Department of Labour* (1984) 1 CRNZ 416, 419.

[2] [1969] 3 All ER 1640

> But it may be more realistic to accept the Act as printed as being the product of the whole legislative process, and to give due weight to everything found in the printed Act. I say more realistic because in very many cases the provision before the Court was never even mentioned in debate in either House, and it may be that its wording was never closely scrutinised by any member of either House. In such a case it is not very meaningful to say that the words of the Act represent the intention of Parliament but that punctuation, cross-headings and side-notes do not.
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> ...I would not object to taking all these matters into account provided that we realise that they cannot have equal weight with the words of the Act.

This judgment was adverted to by Turner J in *Northland Harbour Board v Auckland Water Transport Ltd.*[3]. His Honour said that, notwithstanding Lord Reid's observations, s5(f) forbade him to seek aid from cross-headings of statutes. However, the Court could still have regard to the general context and, he added, "s5(f) expressly countenances this." With respect, it is hard to see how His Honour arrived at this latter conclusion since the paragraph does not appear to say anything of the sort. But there can be no argument with the general acceptability of reading sections in their context. Indeed, that view was echoed by Cooke J in *Police v Carter*[4] and by Vautier J in *Re Darian Fashions Ltd*[5].

Thus it seems that New Zealand judges will not allow themselves to go as far as Lord Reid because of the existence in this jurisdiction of s5(f). But they will nevertheless submit Acts to scrutiny with a view to determining as an aid to construction the context in which a section or group of sections lies. This, it is submitted, is not very different from Lord Reid's approach. Where His Lordship would have regard to cross-headings but would exercise discretion as to their weight, the New Zealand judges will disregard them, but will form their own notional groupings of sections within the Act. It is submitted that Lord Reid's approach, unhampered by s5(f), is the better one in that it more accurately reflects the realities of the passage of most legislation through Parliament. It would clearly be wrong to require judges to have regard to every mark in a printed Act. It seems equally wrong to refuse them the right to examine such marks and give each the weight that they think it deserves. A repeal of s5(f) in any future Acts Interpretation Act might therefore be appropriate.

It remains to mention a recent and interesting case concerning s5(f). In *R v Clarke*[6] a defendant facing four very serious charges was refused bail before the preliminary hearing by both a District Court and a High Court judge. He sought leave to appeal the decision of the High Court judge to the Court of Appeal. The Judicature Act 1908, s66, enables appeals to the Court of Appeal against orders of the High Court. The section has been interpreted in a long line of cases, commencing with *Ex parte Bouvy (No.3)*[7] in 1900, as not applying to appeals in criminal matters. Clarke's counsel produced a somewhat technical argument to the effect that, in *Bouvy*, weight was placed on the fact that the section appeared, then as now, in a part of the Act headed Civil Jurisdiction. At that time, however, it was possible to argue about whether internal headings affected

[3] [1971] NZLR 39, 53
[4] [1978] 2 NZLR 29, 31
[5] [1981] 2 NZLR 47, 51
[6] [1985] 2 NZLR 212
[7] (1900) 18 NZLR 608

the interpretation of statutes because it was not until the passing of the Acts Interpretation Amendment Act 1908, s4, that their use as an aid to interpretation was prohibited. The new section applied only to Acts passed after the commencement of the 1908 Amendment Act. The Judicature Act 1908 was passed shortly before the Amendment Act, so was not covered by it. However, in 1924, the present Acts Interpretation Act both reproduced the provision in the form of s5(f) and broadened its scope to make it cover every Act of the General Assembly except where the contrary is specifically provided. Clarke's counsel argued, therefore, that although *Bouvy* may have been rightly decided in its day, s66 of the Judicature Act has had a wider meaning since 1924 and includes rights of appeal in some criminal matters.

In the Court of Appeal, Cooke J was not impressed by the ingenuity of this argument, which he described as "plainly untenable" and "altogether inconsistent with statutory patterns and New Zealand legal history"[8]. His Honour made the point that the civil and criminal appellate jurisdictions of superior Courts in New Zealand have always been separate, and continued:

> While the headings Civil Jurisdiction and Criminal Jurisdiction were one of the reasons for the *Bouvy* decision, all three judgments delivered in that case...relied also on the scheme of the [Court of Appeal Act 1882] as a whole and the subsequent enactment of the Criminal Code Act 1893. They pointed out that the special provisions in the 1882 and 1893 Acts for criminal appeals were directly opposed to the view that section 15 of the 1882 Act was intended to apply to criminal cases. That part of the reasoning in *Bouvy* is unaffected by any change in the Acts Interpretation Act. It remains as sufficient and convincing as ever, illustrating the elementary principle that every section must be interpreted in its own context and against its own background.
>
> So the change in the Acts Interpretation Act, on which the argument for the appellant entirely depends, cannot undermine the *Bouvy* decision and need not be discussed further.[9]

It is suggested that this case reinforces the comments made above as to the undesirability of s5(f) as it presently stands. Without it, counsel would not have been forced into a technical argument which did not recommend itself to the Court of Appeal. On the other hand, if Lord Reid's approach had been applied to this case it would probably never have been litigated.

[8] [1985] 2 NZLR 214
[9] Ibid, 214-5

SECTION 5(g):

Marginal notes to an Act shall not be deemed to be part of such Act:

Like the paragraph which precedes it, paragraph (g) of s5 seems quite clear at first sight: marginal notes are not part of the Act. It does not, however, follow as a necessary consequence that they cannot be employed as an aid to interpretation, since the paragraph does not expressly forbid this and other extrinsic factors are permitted in statutory interpretation.

Nevertheless, there are dangers involved in the use of marginal notes, some of which were adverted to in New Zealand as early as 1916 in a judgment of Stout C.J.:[1]

[1] *Wellington City Corporation v Compton* [1916] NZLR 779, 784-6

It was said that some Judges have held that marginal notes may be looked at. The Master of the Rolls, Sir George Jessel, did so in *In re Venour's Settled Estates*[2], saying, "This view is borne out by the marginal note; and I may mention that marginal notes of Acts of Parliament now appear on the rolls of Parliament, and consequently form part of the Acts; and in fact are so clearly so that I have known them to be the subject of motion and amendment in Parliament." Afterwards, however, the same learned Judge found he was wrong, and in *Sutton v Sutton*[3] he said, "The dictum in that case...is not strictly correct. I have since ascertained that the practice is so uncertain as to the marginal notes that it cannot be laid down that they are always on the roll."

So far as New Zealand is concerned I have never heard of a marginal note being dealt with in Parliament, or of an amendment or a new section or paragraph being added to a Bill having a marginal note. Illustrations may be given of marginal notes which do not state what is in the statute. There are some marginal notes to be found in our statutes which state the very opposiwe of what the statute declares. Such a marginal note is to be found opposite s341 of the Municipal Corporations Act, 1886.

The Chief Justice continued by citing a number of cases in which judges have held that marginal notes cannot be referred to in the interpretation of an Act and then mentions a case in which Collins M.R. may have said that marginal notes can be of assistance although they form no part of the Act[4]. Overall, the clear inference emerging from the judgment of Stout C.J. is that marginal notes may not be used as an aid to statutory interpretation.

The paragraph has seldom been quoted in reported New Zealand cases, but in most of the instances when it has been used the assumption seems to have been that it operates to exclude the use of marginal notes[5]. In such cases it has never been asked whether the actual wording of s5(g) is conclusive that marginal notes may not be used, nor has any attempt been made to apply s5(j) to s5(g) as authorised by s28 of the Acts Interpretation Act 1924.

There are, however, three cases which take a slightly different line. In *Styles & Matheson Ltd. v Community Stores Ltd.*[6] the Magistrate, while not referring explicitly to s5(g), cites *Maxwell on Interpretation of Statutes*[7] to support his opinion that marginal notes need not be completely excluded. *Maxwell* was also cited[8] in *Hawera Hospital Board v Cameron*[9] to support the magistrate's view that the rule regarding the rejection of marginal notes "is now of imperfect obligation". These two older cases, at Magistrate's Court level, could be dismissed as aberrations were it not for the comments of Cooke J. in the Court of Appeal as recently as 1980[10]. After adverting to the existence of s5(g) His Honour said:

2 [1876] 2 Ch.D. 522, 525

3 [1882] 22 Ch.D. 511, 513

4 The case, *Bushell v Hammond*, is reported in at least five different reports, each time in differing terms. The judgment seems to have been an oral one and all that can be said with certainty is that His Lordship did refer to the marginal note. The references to the reports are given in [1916] NZLR at 785-6

5 See *Police v Ingram* (1941) 2 MCD 91, 92; *Smith v Rees* (1941) 2 MCD 193, 194; *In re Strong's Lease* (1950) 7 MCD 131, 134; *Samson v AA Mutual Insurance Co.* [1974] 1 NZLR 334, 336

6 (1935) 30 DC & MCR 105, 107

7 7th edition at p.37

8 8th edition at p.39

9 (1945) 4 MCD 247, 249-50

10 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 142

It is necessary to be on guard against allowing a marginal note to control the interpretation of a section: *Wellington City Corporation v Compton...;Chandler v Director of Public Prosecutions...*At best it can be some indication of the main subject with which the section deals: *R v Schildkamp...;Stephens v Cuckfield Rural District Council...*Here, however, there is no reason to treat the note with suspicion. It is a wholly appropriate description of the subject of the section, a description which would naturally occur to a reader without the aid of any marginal note.

It seems reasonably clear that Cooke J., while respecting the terms of s5(g), did not feel himself quite unable to comment on marginal notes if to do so would serve any purpose. His citation of *Stephens v Cuckfield Rural District Council*[11] is significant. In that case Upjohn L.J. said:

While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind.

Cooke J. apparently approved of this approach which, as has already been pointed out, is not in contravention of the terms of paragraph (g).

It is the view of the present writer that s5(g), like s5(f), serves little purpose. There appears to be no good reason to say, and, indeed the paragraph does not say, that judges may not look at marginal notes. As a matter of common sense, it is virtually impossible to read a modern printed statute in New Zealand without being aware of the marginal notes, since not only are they printed at the start of each section, but they are also collected at the beginning of each Act in the analysis. It may be stated with safety that no judge would allow an inaccurate or incomplete marginal note to cause him to interpret a section in an oblique way. As with s5(f), therefore, it is submitted that judges should be permitted to have regard to marginal notes and to give them the weight that they deserve in each case.

[11] [1960] 2 QB 373, 383; 2 All ER 716, 720