a clear and unambiguous stand against all forms of racial discrimination.

Secondly, the majority in *Charter*'s case expressed concern that the Court of Appeal decision would render unlawful all clubs and associations that confined themselves to one race even if they were cultural clubs. Lord Cross of Chelsea found it necessary to point to the extraordinary consequences which acceptance of the arguments of the Race Relations Board would entail with regard to clubs, membership of which was confined to racial groups. In New Zealand it would not be necessary to take this approach as s. 9 New Zealand Race Relations Act creates a specific exception to s. 4 which exception is wide enough to include such organisations.

Legislation

The only recent innovation in this field has been the Constution Amendment Act 1973. Section 53 (1) declares that the General Assembly has full powers to make laws having effect in or in respect of New Zealand or any part thereof and having effect outside New Zealand. This newly constituted s. 53 (1) gives Parliament the sovereign power to decide what laws it will make and means that now laws can no longer be challenged on the basis that they are extraterritorial or that they are not for the peace, order and good government of New Zealand.

G. A. Fraser.

CONTRACT

Mistake

An interesting case decided last year relates to issues of mistake and the position of a bank which has failed to carry out the instructions of its customer to countermand a cheque. *Southland Savings Bank* v. *Anderson* [1974] N.Z.L.R. 118 was a decision of Quilliam J. on an appeal from the Magistrate's Court in which the magistrate had held that the plaintiff bank could not recover its loss. The facts were that a depositor at the appellant bank drew a cheque, had it marked by the ledgers department, and paid it to the respondent for the purchase of a van. The respondent handed over the change of ownership papers and the van. The next day, a Saturday, the van broke down and on the Monday the depositor rang the appellant and stopped payment of his cheque at 8.45 a.m. At about 10.10 a.m. the same day the respondent, who suspected that the cheque might be stopped, but not knowing that it had been, had the cheque presented by his wife, who was paid cash as the teller had not been notified of the stoppage. The magistrate, on the basis of unilateral mistake, held that the appellant could not recover. The argument on appeal was based on mutual mistake.

In his judgment Quilliam J. stated (id., 120) "Whether or not the case was argued before the magistrate on the alternative

basis of mutual mistake is not clear." This seems to indicate that both judge and counsel have disregarded the doctrine of common mistake or perhaps confused that doctrine with the doctrine of mutual mistake. It is clear that there are, in fact, three kinds of mistake and it is proposed to look at these three doctrines in relation to the case.

Common mistake can be described as a mistake where each party is mistaken about an underlying and fundamental fact — the fundamental assumption upon which the very being of the agreement is based has proved to be false. In this case it could be argued that the payer and the payee made a mistake that the cheque was a good and valid order for payment. It was a mistake, of course, because the cheque had already been countermanded. Lord Chorley in his book *Law of Banking,* 92, says "even if the cheque presented for payment is in all respects in order the banker must not pay it if the customer has countermanded his mandate, or as it is usually expressed, ' has stopped ' the cheque." The judge found that the countermand was effective in this case and thus what had been a good mandate to the bank was now revoked. The Bills of Exchange Amendment Act 1971 s. 2 (1) states "the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by (a.) countermand of payment." Given that the cheque was effectively countermanded the question is whether this mistake of paying out on a countermanded cheque was sufficiently fundamental to rank as common mistake. A leading case on this is *Bell* v. *Lever Brothers Ltd.* [1932] A.C. 161 from which, it seems, any number of propositions might well be taken. This does not make it any easier to say with certainty exactly what the law is relating to this particular form of mistake. However, one proposition which can be taken from this case is that the only false assumption sufficiently fundamental to rank as operative common mistake is that the very subject matter of the contract is in existence. Lord Atkin in this case said "when the new state of facts makes the contract something different in kind from the contract in the original state of facts", and as between the parties in the *Southland Savings Bank* case the new state of facts was that the cheque was worthless whereas originally, as a negotiable instrument, it had been worth $400.00. The argument would not hold that the mistake was just as to the quality of the subject matter as in *Leaf* v. *International Galleries* [1950] 2 K.B. 86 (where the plaintiff bought from the defendants a picture that they both mistakenly believed had been painted by Constable). It can, therefore, be reasonably argued that as a general principle the doctrine of common mistake applies in this case but it must further be pointed out that this will not immediately nullify the contract at common law. However, the contract might be rendered voidable, i.e., it might be set aside on some equitable ground. In this case the court could have ordered that the contract between the payer and the payee be set aside, with the payee returning the money paid out by the bank and also giving the payee a lien over the van until the original contract for sale and purchase of it was ratified.

Mutual mistake is not the same as common mistake. Mutual mistake is where the parties misunderstand each other — where they are at cross purposes. The judge held that this case involved mutual mistake, i.e., by the banker and the payee that the cheque was valid when it was not. Assuming, however, that the Judge is referring to the *doctrine* of mutual mistake it is difficult to see where the parties actually misunderstood each other or where they were at cross purposes. It would seem, rather, that the mistake was about the same thing, i.e. the validity of the cheque and that the judge might have meant that it was common mistake where the fundamental assumption on which the agreement was based was proved to be false.

Unilateral mistake is where only one of the parties is mistaken. This argument was not presented in the Supreme Court. The mistake on the part of the bank was when it did not notify the teller that the cheque had been countermanded and then proceeded to pay out on the cheque as if it was valid. The judge found that " notice to the bank was notice to all its employees" and this is the same type of situation as in *Curtice* v. *London City and Midland Bank* [1908] 1 K.B. 293 where it was owing to the negligence of the bank officials that notice of the customer's desire to stop the cheque was not received in time. There is no question that payment by the bank in this case was a mistake. What, then, was the position of the defendant, the payee? The magistrate did not find fraud on the part of the payee and the judge accepted this. However, it is suggested that the payee's actions were as close to fraud as they were to mistake. He knew that the drawer of the cheque did not want him to cash the cheque; he knew that it was going to be stopped and he still attempted to have the cheque cashed as soon as the bank opened. It was only due to negligence on the part of the bank that the cheque was, in fact, cashed. In short, the actions of the payee cannot be seen in the light of any moral rectitude and the "reasonable person" in the full knowledge of the circumstances might well have complied with the wishes of the drawer of the cheque and not presented it until the question of the broken-down van was settled.

There are three separate kinds of mistake in contract law which must be distinguished from each other. Should *Anderson* v. *Southland Savings Bank* go to the Court of Appeal it should be instructive to see the way in which they approach the whole question.

M. J. B. Arthur.

CRIMINAL LAW

Crimes — attempts

The decision of the Court of Appeal in *R.* v. *Donnelly* [1970] N.Z.L.R. 980 has been the subject of much discussion. Donnelly was acquitted of attempting to receive stolen goods, when the