An American view of New Zealand contract law

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Professor Mooney offers a visitor's view of New Zealand contract law against the background of the celebrated "Death of Contract".

I have the privilege of speaking to you this afternoon about one of my very favourite subjects, contract law. First, I intend to sketch briefly what most recent scholars agree is the "big picture" in 20th century contract law, at least in our English-speaking world. Then I propose to use that sketch as background for my *advertised* topic, which is an American view of certain recent developments in New Zealand contract law.

In 1974, one of the true giants of American legal literature, Grant Gilmore, published a wonderful little book which captured the essence of much recent scholarship in the field. He called his little book *The Death of Contract*,[1] and virtually overnight it became a classic. One might almost say a sensation. (Not exactly a *Lady Chatterly's Lover*, mind you, but for a law book it did attract a great deal of attention.)

Gilmore wrote, "We are told that Contract, like God, is dead. And so it is. Indeed the point is hardly worth debating any more". By Contract, with a capital C, Gilmore meant of course the relatively formalist system of abstract, interrelated rules that dominated contract theory during the late 19th and early 20th centuries. And by its "death", he meant that English and American courts had gradually abandoned that formalist system in favour of a more flexible, more functional approach to contract adjudication emphasizing attention to the particular merits of individual cases. By 1974, he argued, with his usual flair for the apt overstatement, the classical system and the mindset which created it were dead.

What made Gilmore's little book so provocative was the way he associated the developments he described - the birth, life, and death of classical contract law - with particular celebrities in American legal history. (I should pause here to say that this is by no means simply an American story. In 1979 the great English contract scholar

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1 G Gilmore *The Death of Contract* (1974). See also Gordon "Book Review" (1974) Wis LR 1216; Speidel, Book Review, 27 Stan LR 1161 (1975); Mooney "The Rise and Fall of Classical Contract Law: A Response to Professor Gilmore" (Book Review) 55 Or LR 155 (1976).

Patrick Atiyah published his own brilliant and exhaustive *The Rise and Fall of Freedom of Contract*,[2] describing nearly identical developments in English law over roughly the same time period.)

In any event, for Gilmore, the first person even to conceive of Contract as a unified subject was Christopher Columbus Langdell, the legendary Harvard dean and teacher of Contracts. It was Langdell, of course, who contributed so much to the late 19th century revolution in American legal education when it became dominantly full-time, university, graduate-level education, taught by dialogue rather than lecture. It was also Langdell, according to Gilmore, who in his pathbreaking casebook[3] first unified such conceptually distinct fields as bailments, sales, insurance, and negotiable instruments into the single field of Contract.

It was then Oliver Wendell Holmes - author and legendary jurist - and Samuel Williston - Harvard professor and principal author of the first Contracts Restatement - who, in Gilmore's view, breathed life into Langdell's new theory. Holmes, cleverly disguised as a mere historian in his 1881 classic *The Common Law*,[4] left on the legal world's doorstep a basketful of radically new conceptions which promptly became indisputable truth in the field. Raised to full adulthood by Williston in his treatise,[5] and rendered seemingly immortal by him in the first Restatement,[6] this new "truth" was to dominate American contract law for two generations.

The first principle of the new truth - what today we call classical contract law - was that contract liability should be restricted very narrowly. Or, in Gilmore's more memorable phrase, that "ideally, no one should be liable to anyone for anything". The classicists sought to accomplish this objective primarily through the now familiar "bargain theory of consideration". No matter how great a benefit a promisor received, or how great a detriment a promisee suffered, if not received or suffered as an explicit part of an exchange transaction, it was incapable of supporting a promise.

The classicists then reduced promissory liability even further by extending this "bargain" theory to the entire life history of a contract. Offers stated to be irrevocable, for example, were not, unless supported by separate consideration. Contract modifications also were unenforceable absent fresh consideration, as were agreements solely to compromise a liquidated debt.

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2 P Atiyah *The Rise and Fall of Freedom of Contract* (1979). See also Mensch "Freedom of Contract as Ideology" (Book Review) 33 Stan LR 754 (1981).

3 C Langdell *A Selection of Cases on the Law of Contracts* (1871); see also C Langdell *A Summary of the Law of Contract* (2nd ed 1880).

4 O Holmes Jr *The Common Law* (1881). For a quite different view of Holmes, see Mooney, above n1, at 167-72. See generally M Howe *Justice Oliver Wendell Holmes: The Proving Years 1870-1882* (1963).

5 S Williston *The Law of Contracts* (1920).

6 Restatement of Contracts (1932).

So bargained-for consideration was, in Gilmore's words, the "balance-wheel of the great machine". Classical contract theory did, however, have two other basic principles. One was that liability, though narrowly restricted, was to be virtually absolute: once within the clutches of Contract, there was little chance of escape. Thus, Holmes in his chapter on "Void and Voidable Contracts" narrowed beyond recognition such defences as fraud, duress, mistake, and impossibility. Thereafter, the existence of such a defence was to be a question of law rather than of fact, for the court rather than the jury, with the intended result that a contractual obligation once incurred be "never discharged though the heavens fall".[7]

If I may digress here once again, this is likely the best place to emphasise that classical contract theorists were certainly doing more than simply articulating a set of result-oriented principles. Indeed, they would have denied that their principles were result-oriented at all in the way some modern critics suggest. What they were trying to do, in their own view at least, was make law more rational, more general, more deductive in nature, so that courts could apply it to new cases in relatively mechanical, value-neutral, predictable ways - without the need for extensive fact enquiries.[8] As usual, it was Holmes who expressed this mindset most memorably, by exclaiming in a letter to Sir Frederick Pollock, "I hate facts!"[9]

In any case, the third and final major principle of classical contract law (remember the first two were that liability should be restricted narrowly but should be virtually absolute) was that contract remedies should be as ineffective as possible. Specific performance was to be granted only rarely; damages were to be "compensatory" rather than punitive; and only certain kinds of losses were to be compensated at all. Most classicists even assailed the "foreseeability" principle of *Hadley* v *Baxendale*, which today we regard as essentially a *limitation* on damages, as an unwise step much too far in the direction of allowing *recovery*.

The classical system, then, was one of clear, logical, tightly defined, highly abstract rules. Many of those rules, in Gilmore's view and I must say in mine, made little practical sense even in their own era, and most make even less sense today.

We can also now see, with the advantage of hindsight, that classical contract law was but a small part of two larger agendas of its time, one intellectual and one political. The intellectual agenda was the effort then dominating a great many humanities and social science disciplines - philosophy, history, anthropology, and economics, for example, as well as law - to formulate and perfect certain fundamental, immutable

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7 G Gilmore, above n 1, at 48.

8 See, generally, Kennedy "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1970" in 3 Research in Law and Sociology (S Spitzer ed 1980); Gordon "Legal Thought and Legal Practice in the Age of American Enterprise 1870-1920" in *Professions and Professional Ideologies in America* (G Geisan ed 1983).

9 Letter from Holmes to Pollock (May 26, 1919) in 2 Holmes-Pollock Letters 13 (M Howe ed 1941).

principles. The best short book about this is Morton White's *Social Thought in America*, subtitled *The Revolt Against Formalism*, in which White describes how the late 19th century was the culmination of an era of formalist system-building in many fields of human thought, including law.[10] The parallels between law and such other fields are really quite striking, particularly to many of us brought up to believe that law is somehow different, somehow largely immune from more general intellectual or political agendas.

The larger *political* agenda which resonated through classical contract law is, of course, more controversial, though I believe no less real. Permit me to quote another of Gilmore's telling sentences describing it:

> It seems apparent to the 20th century mind, as perhaps it did not to the nineteenth, that a system in which everyone is invited to do his own thing, at whatever cost to his neighbour, must ultimately work to the benefit of the rich and powerful.

In other words, classical contract law was *not* politically neutral, as its theorists contended and likely believed. For evidence I invite you to open any English or American or New Zealand case reporter of the classical era and see, by and large, who was bringing and who was defending claims for promissory estoppel, or restitution, or emotional harm; and who was alleging and who was denying an oral assurance outside a written agreement or a defence like duress or misrepresentation.

So much then for a sketch of classical contract law and a suggestion or two about its broader intellectual and political implications. Beginning about 1930 that classical construct and the optimistic mindset which created it began to weaken and, ultimately, to die. Gilmore identified two thinkers as contributing most significantly to the death: Arthur Corbin of Yale, whose multi-volume Contracts treatise was, in Gilmore's words, the "best law book on any subject";[11] and Benjamin Cardozo, another of America's greatest judges.

It was Corbin's monumental scholarship - his attention to *all* reported decisions, not just those which fit a particular theory - which taught us that the law contained in classical accounts was not the only law of the land. There were, for example, scores of cases in which courts had quietly enforced promises solely on the ground of detrimental reliance; or had granted restitution to a deserving plaintiff; or had managed to avoid applying the parol evidence rule or Statute of Frauds. Corbin also taught us that many such results were *preferable* to those which seemed to follow more logically from classical first principles. If the life of contract law was truly to be experience and not

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10 M White *Social Thought in America: The Revolt Against Formalism* (3rd ed 1976); see also V Parrington *Main Currents in American Thought* (1930).

11 A Corbin *Corbin on Contracts* (1950). Though not published until 1950, when the "reforms which Corbin argued for were no longer particularly novel", the eight-volume treatise had been "conceived in 1910 or thereabouts", with many of its ideas appearing in Corbin's early articles. G Gilmore, above n 1, at 57-58.

logic, Corbin seemed to say, courts must pay closer attention to reasonable parties' just intentions than to any set of abstract "first principles".

Judge Cardozo may have contributed even more than Professor Corbin to the death of Contract. In landmark decisions like *DeCicco* v *Schweizer*; *Wood* v *Lucy, Lady Duff-Gordon*; *Jacob & Youngs Inc* v *Kent*; and *Allegheny College* v *National Chautauqua County Bank*,[12] Cardozo repeatedly challenged the sanctity of classical conceptions and pointed the way toward, particularly, a more expansive theory of contract obligation. (As yet another aside, I should like to report how very much I have enjoyed the opportunity at Victoria this year to introduce Cardozo and his work to my students, who have given him a wonderfully generous, inquiring reception.)

Gradually, then, the new "Corbin-Cardozo construct" replaced its predecessor, the "Holmes-Williston construct". The resulting "death" of the latter has meant, first, that bargained-for consideration is no longer the sole basis for promissory liability: today we are fast approaching the point where, to prevent unjust enrichment, any benefit received must be paid for unless clearly intended as a gift; and any detriment reasonably incurred in reliance on another's promise must be restored. The death of Contract also has resulted, of course, in greater judicial hostility to other formalist doctrines like the pre-existing duty rule, the parol evidence rule, and the Statute of Frauds; in more expansive doctrines of mistake, misrepresentation, and unconscionability; and in more flexible, realistic remedies.[13]

One final word to complete this "background sketch". Just as the *growth* of classical contract law paralleled similar developments in other fields, its *decline* has done so as well. The connections, both with broader intellectual patterns and with contemporary political movements, could hardly be plainer. Recall, for example, in philosophy, John Dewey and William James and their very anti-classical, reality-based pragmatism early this century; or in economics, Thorstein Veblen and his anti-classical, empirically-grounded institutionalism; or in history, the fundamentally new agendas of Charles Beard, Frederick Jackson Turner, and Vernon Parrington.[14] Those of you familiar with 20th century anthropology, psychology, or some say even the natural sciences can likely extend the parallels to those fields as well. Finally, the links with contemporary politics are again apparent as well. It is by no means a coincidence that the politics of equality, which many Americans associate with Franklin Roosevelt's presidency, also appeared about the same time.

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12 Respectively, 221 NY 431, 117 NE 807 (1917); 222 NY 88, 118 NE 214 (1917); 230 NY 239, 129 NE 889 (1921); 246 NY 369, 159 NE 173 (1927).

13 For an insightful survey of all these developments, drawing particularly on the English and American experiences, see P Atiyah *An Introduction to the Law of Contract* (4th ed 1989).

14 See, for example, J Dewey *The Study of Ethics* (1894); T Veblen *The Theory of The Leisure Class* (1899); C Beard *An Economic Interpretation of the Constitution of the United States* (1913); F Turner *The Frontier in American History* (1893).

Now let me turn to my *advertised* topic. More specifically, what I propose to do is describe and comment on a few notable recent developments in New Zealand contract law against the background - both descriptive and normative - of the life and death of classical contract law. I shall first recall for you a handful of recent decisions as exemplars of my overall reaction to the work of your courts; I shall then offer a few remarks about your very interesting recent series of contract statutes; and finally I shall conclude with brief homage to two particular New Zealanders whose work in this area seems especially commendable to me.

I am very pleased to report to you that, in my view at least, New Zealand contract law is generally in very good shape at the moment. My overall reaction is that in the last decade and a half, it has received appropriate and intelligent attention from your courts, from your Parliament, and from your academics. I certainly do not say this simply to be polite. Were I to speak to you about your *commercial* law, for example, my report would be quite different. With respect, much of New Zealand commercial law is in disarray, is a generation if not a century out of date, and needs rather urgent attention. But happily, that is not my topic today; I get to speak instead about your quite wonderful contract law.

Last February I began my Contracts course by considering with my students what promises the law enforces, and why, and in what ways we might improve upon our various enforceability doctrines. In other words, we began with consideration. The first New Zealand case I included in my materials was a 1980 Court of Appeal decision, *Couch* v *Branch Investments Ltd*,[15] in which Cooke, Richardson, and McMullin JJ thoughtfully examined the question: when does relinquishing an invalid claim constitute consideration for a promise? The defendant's argument in such cases, of course, is that she received no benefit from the mere release of an invalid claim, nor did the promisee incur any detriment by such release.

Your Court of Appeal, however, adopted what I have always thought is the most sensible position on this issue, that so long as the relinquishing party *believes* that its claim is (or likely is) valid, the relinquishment does constitute consideration for a return promise. As Richardson J aptly wrote, "honest belief ... is the touchstone" of enforceability in this area.

There were two slightly more subtle features of the *Couch* judgments which I found praiseworthy as well. First was the quite obvious undercurrent of post-classicism, or Death of Contract. By that I mean, as you now know, an approach to questions of enforceability which de-emphasises past conceptual categories, and emphasises instead a somewhat closer look at particular fact situations and the equities and policy concerns which they raise. I certainly do not mean to say that past categories or precedents are unimportant; rather, I mean simply to say (and I believe your Court of Appeal would agree) that courts today should root such categories and precedents deeply in contemporary human experience as well as human logic.

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15 [1980] 2 NZLR 314.

Secondly, and somewhat parochially I suppose, I would commend to you the Court of Appeal's use in *Couch* of American as well as English and New Zealand authority. Indeed, the closest one can come to a single-sentence "rule" in *Couch* is Richardson J's quotation from that "best law book on any subject", *Corbin on Contracts*. Parochialism aside, though, it is surely impressive to any foreign observer to encounter a court which seems fluent in the contract law of all major English-speaking jurisdictions. (And for a teacher who has included sizable numbers of non-New Zealand decisions in his class materials, such fluency is quite essential.)

A second New Zealand "enforceability" decision I might mention, more briefly, is a 1988 High Court judgment of, as he then was, Mr Justice Eichelbaum: *Dickson Elliott Lonergan Ltd* v *Plumbing World Ltd.*[16] It again was a quite modern, and in my view most appropriate, judgment, protecting a contractor's restitution interest in circumstances where the parties ultimately failed to conclude an express contract. Once again, it was a result which both Corbin and Cardozo would applaud; a helpful discussion of the circumstances which separated the case from others denying restitutionary relief; and, more subjectively perhaps, a sense once again that a New Zealand court had the "big picture" well in mind - that is, a sense of where the law has been and where it should be, in England and Australia this time as well as in New Zealand.

I could easily describe for you a great many other notable examples. *Markholm Construction Co* v *City of Wellington*[17] on formation; *Attorney-General* v *Barker Bros Ltd*[18] on the definiteness requirement; *A M Bisley & Co* v *Thompson*[19] on the parol evidence rule; *Hunt* v *Wilson*[20] on conditions; and *Nicholas* v *Jessup*[21] on unconscionability are only a few of the many modern, sensible judgments which appear in recent volumes of the New Zealand Law Reports. Happily, I shall spare you any extended praise of them, for I hope by now my first and most important point about New Zealand contract law is clear: that I find much of it *very* impressive. Not *all* of it, of course. I could name three or four quite forgettable recent judgments - and, if I were very indiscreet, at least one judge who might benefit from a refresher course in the subject. But, of course, I shall spare you any such indiscretion as well.

Let me turn now to what is surely the most distinctive feature of New Zealand contract law to a visiting American, your series of recent statutes: the Minors Contract Act 1969; the Illegal Contracts Act 1970; the Contractual Mistakes Act 1977; the Contractual Remedies Act 1979; and the Contracts Privity Act 1982. My reactions to those quite unique legislative interventions into contract law remain rather tentative because I have only begun to study and teach them in the last two months. However, one can hardly omit them altogether when speaking about New Zealand contract law, so

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16 [1988] 2 NZLR 608.
17 [1985] 2 NZLR 520.
18 [1976] 2 NZLR 495.
19 [1982] 2 NZLR 703.
20 [1978] 2 NZLR 261.
21 [1986] 1 NZLR 226.

I intend to share with you a few preliminary conclusions about the two most important among them, the Contractual Mistakes Act and the Contractual Remedies Act.

To me, the most commendable part of both Acts is the authority which Parliament granted for more flexible judicial remedies. Every Contracts teacher, every year, struggles to answer student questions about why a court must allocate an *entire* unexpected gain or loss to one party. And because there exists no very satisfactory answer, all we can do is point out the various ways in which courts occasionally do try to divide a gain or loss by, for example, (1) enforcing one claim but denying a second or (2) ruling that a plaintiff has failed to prove an element of alleged damage with sufficient certainty.

I suspect it was for this very reason that your Parliament, in both section 7 of the Contractual Mistakes Act and section 9 of the Contractual Remedies Act, expressly authorized courts to enter virtually *any* orders they believe just in cases where one of these Acts applies. In several cases at least, New Zealand courts have exercised this quite unprecedented authority in very sensible ways. Let me mention just one. In *Engineering Plastics Ltd* v *J Mercer & Sons Ltd*,[22] a 1984 Auckland High Court judgment under the Contractual Mistakes Act, there was a contract for the sale of 4,000 O-rings for use in certain machinery the buyer manufactured. The quoted price was $645 per hundred, or a total of about $27,000. Unfortunately for everyone, the buyer misread the price and believed it was $645 for all 4,000 rings. There was, as some of you know, a serious question in the case whether that sort of "mistake" is one for which Parliament intended to grant relief at all.[23] However, once past that issue, the *remedy* which the High Court granted was one we all should applaud.

Under traditional contract law, a court would either have to hold the buyer's feet to the fire and make it pay the full $27,000 or, if it found an operative mistake, rescind the contract entirely, leaving the seller without any remedy at all. But section 7 of the Mistakes Act enabled Tompkins J to arrive at a much more sensible, intermediate solution: he granted the mistaken buyer relief to the extent of the seller's anticipated profit (about $11,000), but protected the seller from actual loss on the transaction by awarding it roughly $16,000. Not an entirely happy result for either party, of course, but one which corresponded pretty closely to my students' and my own sense of justice on the facts.

A second thought I have - based primarily on *Mercer* and other decisions under the Contractual Mistakes Act - is that it is no easier for Parliament than for courts to define difficult legal concepts like mistake. Moreover, legislative efforts to do so run the serious risk of being counter-productive, because legislation is considerably more difficult than common law definitions or principles for courts to massage, adapt, ignore or overrule.

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22 [1985] 2 NZLR 72.

23 See, for example, *Conlon* v *Ozolins* [1984] 1 NZLR 489, 506-09 (Somers J dissenting); McLauchlan "Mistakes as to Contractual Terms Under the Contractual Mistakes Act 1977" (1984) 12 NZULR 123.

A third thought, which emerges principally from your experience with the Contractual Remedies Act, is that legislation in common law fields seems to work best when there is a specific doctrinal roadblock which simply needs removing. An example in both New Zealand and the United States might be the infamous parol evidence rule. The roadblock which Parliament sought to remove - and *did* effectively remove - by the Contractual Remedies Act was, of course, the unfortunate distinction between a contract term and a mere misrepresentation. A victim of the latter could occasionally rescind, but could never affirm the contract and recover damages.[24] Section 6 of the Contractual Remedies Act happily abolished that distinction, which had caused far more than its share of uncertainty and injustice in contract law. So, a wave of the legislative wand, removal of the roadblock, and courts may now develop the law of misrepresentation free from its restraint.

All three of these rather specific thoughts lead, I suppose, to a more general one, with which I shall conclude this portion of my remarks. It is that *general* legislative guidelines in contract law are usually preferable to specific legislative rule-making efforts. I understand that your Law Commission is now considering draft legislation in the area of unconscionability. My suggestion, if anyone is listening, is that neither the Commission nor Parliament try to define such an elusive doctrine, but instead do what most American state legislatures have done with section 2-302 of our Uniform Commercial Code: simply express a general public policy against unconscionable contracts, and trust courts both to give piecemeal content to the concept and to fashion appropriate remedies in varying circumstances.

Finally may I say, even more briefly, that in the nine months I have spent studying and teaching New Zealand contract law, the contributions of two individuals to that law have seemed to me especially important and commendable. The first is the President of your Court of Appeal, Sir Robin Cooke, an extremely impressive judge. Sparing you specific examples, I should like simply to assert that in case after case he demonstrates, I believe, both a remarkable command of the principles underlying the relevant authorities and a strong sense of right and wrong.

One of my own heroes in contract law, the great Karl Llewellyn, described in his classic study *The Common Law Tradition*[25] two kinds of judges: Formal Style judges and Grand Style judges. A Formal Style judge, emphasising precedent and the "true rule", writes strongly deductive opinions with an air of "single-line inevitability" about them. For her, public policy is solely a legislative concern, as is change in the common law itself. By contrast, a Grand Style judge consults principle as well as precedent, recognises that no single rule satisfactorily governs widely varying circumstances, and acknowledges the existence of judicial choice. She derives wisdom from her legal heritage, but also accepts responsibility, with the legislature, for

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24 See, for example, F Dawson & D McLauchlan *The Contractual Remedies Act 1979* (1981) 10-25.

25 K Llewellyn *The Common Law Tradition: Deciding Appeals* (1960).

constantly rethinking and contributing to that heritage.[26] You have in New Zealand, in contract law at least, several fine examples of Grand Style judges. However, were Professor Llewellyn alive today, I believe he would particularly commend to you many of the judgments by Sir Robin Cooke.

The second person I simply must mention is my colleague and good friend these past nine months, Professor David McLauchlan. In fact, I nearly subtitled this talk, with apologies to Mark Twain, "An Oregon Yankee in King David's Court". It is hardly an exaggeration to say that every contract issue I have wondered about this year, every topic I have investigated, every conundrum I have tried to solve, McLauchlan has been there before me and written a book or article about it. A *good* book or article.[27] Indeed, with apologies to another author, I would even venture to say that David McLauchlan is to New Zealand contract law what Banquo's ghost is to Macbeth. Certainly in the short time I have been in your country, studying and teaching your quite remarkable contract law, he and his work together have been an inspiration to me.

So that concludes what I came here to tell you today. I hope you have learned a bit about the development and then the decline of classical contract law and the larger intellectual and political agendas of which it was a part; about why New Zealand contract law, both judicial and legislative, is to me so interesting and commendable; and about why the contributions of two New Zealanders to that law merit our particular praise and gratitude.

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26 For descriptions of the more recent but similar categories of "formalist" and "instrumentalist" judging, see, for example, M Horwitz *The Transformation of American Law* (1977); Scheiber "Instrumentalism and Property Rights: A Reconsideration of American 'Styles of Judicial Reasoning' in the 19th Century" (1975) Wis LR 1.

27 In addition to the works cited above in notes 23 and 24, see, for example, D McLauchlan *The Parol Evidence Rule* (1976); McLauchlan "Contract and Commercial Law Reform in New Zealand" (1984) 11 NZULR 36; McLauchlan "Cheques in Full Satisfaction: Accord Despite Discord?" (1987) 12 NZULR 259.