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MALICE IN DEFAMATION PROCEEDINGS

The recent judgment of Mr Justice Haslam in the case of *Brooks* v. *Muldoon* (Wellington, 17 May) raises important questions of principle relating to the duties and functions of a trial Judge in a libel action where the defences of fair comment or privilege or both are met by an allegation by the plaintiff that the defendant was actuated by express malice. Such allegations in the past used to be the exception rather than the rule, but lately the trend has been reversed and it has become almost standard practice for plaintiffs to allege malice even when the defendants are newspaper companies against whom it has been traditionally difficult to establish malice.

The facts of the case are notorious. Late in 1970 in the midst of industrial unrest, Parliament passed an amendment to the Industrial Conciliation and Arbitration Act 1954. The amendment provided for the creation of an industrial mediation service to consist of mediators whose general functions were to be to assist employers, unions and workers to carry out their responsibilities to establish and maintain harmonious industrial relations. Mediators were to be appointed on the recommendation of the Minister of Labour after consultation with the national organisations of employers and workers. In April 1971, the Minister of Labour created a committee to consider the appointment of Chief Industrial Mediator. The committee's task was to recommend a suitable appointee for the post of Chief Mediator. Numerous applications were received and considered but none of the applicants commended himself to the Committee which then through one of its members invited the plaintiff Brooks to apply for the position. This he did, with the result that the committee unanimously recommended the plaintiff to the acting Minister of Labour as a person suitable to fill the position. This recommendation was rejected by both the Cabinet and the Government Caucus, but before their decisions were made public, the question of the appointment was mentioned in the House by an Opposition member, and the Minister of Finance, the defendant in the action, in reply "briefly alluded to the plaintiff's application without naming him". A few days after this debate the defendant was questioned by a reporter and a report of the resulting interview was published in the *Sunday News* on 5 September. Two days later the *Auckland Star* published a further interview and, on the same day, the defendant appeared on the television programme "Gallery" on which he permitted himself to be interviewed further concerning the appointment. Yet another interview was reported in the *Auckland Star* on the following day.

The imputations against the plaintiff made in the course of these interviews were that he was a way-out militant, that he was a way-out left-winger when involved with the National Union of Teachers, and that on a previous occasion his approach to industrial relations was entirely unorthodox and outside the scope of the Industrial Conciliation and Arbitration Act. In addition the defendant on one occasion misquoted the plaintiff as having said "I am going to lead these people out on strike if they don't get their demands."

The plaintiff alleged that in their natural and ordinary meaning, these words were understood to mean that the plaintiff could not be trusted to act in an impartial and fairminded way as an industrial relations manager or as a mediator; that he was in favour of strike action by workers

to get their demands as a stated and accepted policy; that as an industrial relations manager he was likely to encourage his employer to buy industrial peace by yielding too freely to the demands of its workers or their unions in the knowledge that the costs could be passed on to the consumers of its products to the detriment of the total economy of the country; and that he would be likely to adopt the same attitude if appointed Chief Industrial Mediator.

The defendant did not plead justification but relied on the defences of qualified privilege and fair comment. The plaintiff countered these defences with an allegation of express malice and he gave particulars of malice as required by the rules.

After a lengthy trial, issues which had been settled by Counsel and presumably approved by the learned trial Judge, were put to the jury. These issues were complicated by the fact that there were four separate publications and therefore four causes of action for the jury to consider. If one denudes the issues of that complication it becomes apparent that four questions were put to the jury:

1. Were the words spoken by the defendant defamatory of the plaintiff in their natural and ordinary meaning?
2. Were the words so far as they consisted of statements of fact true in substance and in fact and so far as they consisted of expressions of opinion were they fair comment upon such facts?
3. Was the defendant actuated by malice against the plaintiff?
4. Assess the damages.

It will be seen then that the Judge left to the jury the questions of libel or no libel, fair comment and malice. The jury found by its verdict that three of the publications were defamatory of the plaintiff and rejected the defence of fair comment in respect of all three. They went on to find that the defendant was not actuated by malice in making the statements reported in the *Sunday News* and the first *Auckland Star* article, but that he was actuated by malice in the statements he made on the "Gallery" programme. Damages were assessed at $1,500 in respect of the two newspaper articles and $3,500 in respect of the television programme.

It should be mentioned that before putting the issues to the jury the trial Judge had provisionally ruled that all the occasions were privileged; otherwise it would have been unnecessary to take the jury's verdict on the question of malice once the defence of fair comment had been rejected.

This verdict found its sequel in a motion by the defendant for judgment notwithstanding the verdict, on the grounds that all three statements held to have been defamatory were made on a privileged occasion and that there was no evidence or no sufficient evidence to support the finding of malice made by the jury.

It does not appear from the judgment whether the defence of privilege relied upon was qualified privilege at common law or the statutory defence attaching to any fair and accurate report or summary of a statement notice or other matter issued for the information of the public by or on behalf of the Government or any department or officer thereof (Defamation Act 1954, First Schedule, Part 2 para. 13). However, as no mention is made of the statutory defence it must be assumed that the defendant relied on the common law defence that he was under a duty to make the statements which he made and that the public had a corresponding interest to receive them. The learned Judge disposed of this defence by holding:

> (1) That there was "no authority to support a duty on the part of the defendant as a Minister to publicise, even in answer to persistent questions, the particular reasons why the plaintiff was deemed unworthy".
>
> (2) That "the public had no interest, apart from perhaps curiosity on the part of some persons in learning why the plaintiff had fallen behind in the contest for selection."

Both the necessary elements of duty and interest being absent, the common law defence of qualified privilege necessarily failed. Having disposed of this defence all that it remained for the Judge to do was to enter judgment for the plaintiff for the total of the three amounts awarded by the jury, namely $5,000.

However his Honour did not stop there, and went on to deal with the question of malice which as he pointed out "becomes relevant only if I am incorrect in my conclusions on qualified privilege," To undertake this inquiry, the Judge had to assume contrary to his previous finding, that the statements made by the defendant in the "Gallery" programme were entitled to the protection of qualified privilege: "in order to discuss the malice I must illogically now assume that the plaintiff (sic) had a public duty to publicise at large the material in the "Gallery" programme and that the community had a corresponding interest beyond the attraction of mere gossip or curiosity in receiving it."

The outcome of the matter was that after reviewing the particulars of malice the Judge concluded that if the defendant had succeeded on

the question of privilege, he should have held that there was no evidence of malice as pleaded to defeat the defence in respect of the "Gallery" programme.

The consequence as far as the parties are concerned is that the jury has convicted the defendant of malice but the Judge has ruled after the verdict that there was no evidence on which they could have done so. This result is as unsatisfactory for the plaintiff as it is for the defendant. To paraphrase the words of Lord Hailsham in *Cassell & Co. Ltd.* v. *Broome* [1972] 1 All E.R. 801, the plaintiff can, if the libel driven underground, emerges from its lurking place at some future date, point to the jury's verdict on malice to convince a by-stander of the baselessness of the charge. By the same token the defendant will be able to say that he was cleared by the trial Judge of any suggestion of malice.

For these reasons I would submit that it is the plain duty of a trial Judge to withdraw a question of malice from a jury, if there is no evidence sufficient to support the charge, and that this duty should even be exercised by the Court of its own motion in those rare cases in which the defendant does not ask the trial Judge to withdraw the issue from the jury. It appears that Mr Justice Haslam was in fact not asked to rule on this question and he says in his judgment that there appears to be room for difference of view in England about the correct course to adopt in that respect. He goes on to say "for my part I was glad to take the jury's decision and in recording my appreciation for their conscientious approach to their heavy responsibilities I reject with respect the derogatory remarks on the capacities of jurors expressed by two Lords Justices in *Boston* v. *W. S. Bagshaw & Sons* [1966] 1 W.L.R. 1226 where approval was pronounced to the trial Judge having left the question of malice at large to the jury".

It is an elementary proposition that the question whether the defendant was actuated by malice is one for the jury provided there is evidence from which malice can be reasonably inferred; the question whether there is any such evidence is a question of law for the Judge: *Adam* v. *Ward* [1917] A.C. 309, 318. The correct approach, it is submitted, is that spelled out by Lord Dunedin in the same case at p. 329: "the next question he [the Judge] has to put to himself is whether the defamatory words complained of are capable of affording from their own nature alone evidence of express malice. If he holds them incapable and there is not other evidence extrinsic of the document then the plaintiff's case is gone and the jury has not to be called upon, but if the Judge thinks that the words are so capable, then he must leave it to the jury to say whether from the words alone or in conjunction with extrinsic evidence if there by any, such express malice has been proved."

It is undesirable unless the evidence raises a probability of malice and is more consistent with its existence than with its non-existence (*Sommerville* v. *Hawkins* (1851) 10 C.B. 583, cited with approval by the House of Lords in *Turner* v. *M.G.M. Pictures Ltd.* [1950] 1 All E.R. 449) that the question of malice should be submitted to the jury because "there is hardly any case of privilege in which there is not some circumstance which is consistent with malice and which a jury not sufficiently directed and desiring to find against the defendant, may use to found a verdict of express malice: but which yet is equally consistent with no improper motive and which cannot therefore properly be treated as evidence of either"; *Lionel Barber* v. *Deutschebank*, cited in *Gatley* paragraph 791 footnote 30.

It seems clear that in his Honour's view, there was no probability of malice adduced by the plaintiff as appears from the strong terms in which the learned Judge ultimately rejected the allegation of malice ("I am unable to treat this item as material to support a finding of malice . . . quite untenable").

The learned Judge referred to *Boston* v. *W. S. Bagshaw & Sons* (*supra*) as a case in which approval was pronounced to the trial Judge having left the question of malice at large to the jury. That is indeed what the case decides, but the operative words are "at large", the question for the Court of Appeal being whether the trial Judge in that case should have put to the jury each particular instance of alleged malice instead of leaving the question of malice generally to the jury. On the facts of *Boston's* case it could not seriously be suggested that there was no evidence of malice if the plaintiff's evidence were accepted. The learned Judge relied also on a passage in *Gatley* supported by only one authority which appears to be to the effect that the Judge has given their verdict. Such a course is said to be often convenient, for if the Court of Appeal should think that the Judge's ruling was erroneous, the advantage is gained that it is unnecessary to send the case back for trial before another jury. However, a new trial can result equally well where the jury is permitted to consider as evidence of malice matters which do not amount to such evidence, as indeed happened in *Broadway Approvals* v. *Odhams Press* [1965] 1 W.L.R. 805, where a new trial on the issues of fair comment and damages was ordered for this very reason.

The sole authority cited in *Gatley* in the passage referred to by the Judge is *Skeate* v. *Slaters Ltd.* [1914] 2 K.B. 429. Far from dealing with malice this case was not even a libel action, but a case of negligence in which the Court of Appeal refused to enter judgment for the defendant after the jury had disagreed, but maintained its right to do so in an appropriate case. It is difficult to see how this case can be authority for the proposition contained in *Gatley*.

On both principle and authority therefore, the Judge's duty on the issue of malice is exactly parallel to his similar duty on the issue whether the words are capable of a defamatory meaning. One of the most illuminating statements of this latter duty, is to be found in Lord Porter's speech in *Turner* v. *M.G.M. Pictures Ltd.* (*supra* at p. 454) where he says: "some argument was presented to your Lordships as to the attitude which the Judge should adopt where in his view the only inference which can be drawn from the words complained of, is that they lie on the border line and it is impossible to say whether when properly considered they are capable of a libellous meaning or not. It is of course, the duty of a Judge in the first instance to put an accurate interpretation on the words used and having done so, to make up his mind whether they are capable of a defamatory meaning or not. Theoretically, if he is left in doubt, he should rule them incapable of a defamatory meaning, but this I think is a theoretical and not a practical difficulty. It is the Judge's duty to make up his mind and save in very exceptional cases he can decide on which side of the line the words complained of are to be placed." Exactly the same considerations apply to the question of malice or no malice, with the exception that to decide whether to leave this question to the jury the Judge must also have regard to the plaintiff's evidence, as well as to the words of the libel.

It is hoped that our Court of Appeal will have an early opportunity to make it clear that in New Zealand, just as in England, Judges will not shrink from withdrawing the issue of malice from the jury when there is no evidence to support it. The Courts will be saved much time and the litigants much expense once the practice of alleging malice almost as a matter of course against a defendant who has pleaded privilege is shown to be one which the Court will not countenance.

T. G. GODDARD.

SUMMARY OF RECENT LAW

COMPANY—DIRECTOR

Duty—Fiduciary duty to company—Breach of duty—Secret profit—Liability to account—Duty to pass on information relevant for company to know—Director using information for own benefit—Defendant an architect of distinction and managing director of company providing comprehensive construction services—Defendant appointed managing director in order to use contacts in gas industry to secure contracts from public undertakings—Company failing to obtain contracts from gas board for building depots—Gas board offering contract in respect of depots to defendant in private capacity as architect—Defendant failing to inform company of offer—Defendant securing release from company's service by misrepresenting state of health—Real purpose to secure gas board contract for himself—Defendant liable to account to company for benefit of contract with gas board. The plaintiffs were one of a group of companies which offered to large industrial enterprises, both in the public and private sector, comprehensive construction services which included the services of architects, engineers, project managers, construction analysts and others involved in such work. The defendant was an architect of considerable distinction and attainment in his own sphere; he had worked in the gas industry for some 17 years, and prior to his appointment as managing director of the plaintiffs had been the chief architect for the West Midlands Gas Board. The success which the plaintiffs had attained was largely in the private sector and they were anxious to enter the public sector. Because of the defendant's connections and contacts in the gas industry the chairman of the group offered the defendant the post of managing director of the plaintiffs. The defendant accepted and the appointment took effect from 5 February 1968. No service agreement was signed however with the result that whilst the defendant was with the plaintiffs there was no express provision as to notice and no covenants of any kind restrictive or otherwise. Within days of joining the plaintiffs the defendant embarked on negotiations with the Eastern Gas Board in an effort to discharge his duty to the plaintiffs. In 1968 the Eastern Gas Board were contemplating building four depots and had not decided whether to farm out the work to other architects or do it themselves. The plaintiffs were interested in this work and with the aid of the defendant they attempted to get at least one of the depots. That attempt failed. It became evident that the Eastern Gas Board disliked the set up of the plaintiff's organisation and were not prepared to deal with the plaintiffs in any capacity. In May 1969 the Eastern Gas Board finally decided on the location of their four depots. In addition they decided to build a central store to support the four depots. At that time a new deputy chairman of the Eastern Gas Board was appointed and during discussions with his colleagues at the board about the projects the defendant's name was mentioned. The deputy chairman was of the opinion that the defendant was

the right man for the job and so he telephoned him at his home and arranged a meeting. At the meeting the defendant soon realised that he had a good chance of getting the work from the Eastern Gas Board for himself. The board made it clear that they were only interested in employing the defendant privately and that they did not want any trouble with his employers. They were also in a hurry to proceed with the projects. The defendant realised that if he was to get this work he had to free himself from the plaintiffs as soon as possible. He therefore made an appointment to see the group chairman and at the interview told him that he wanted to resign on account of his health. Because of the defendant's representations as to the state of his health the group chairman got the impression that the defendant was on the verge of a breakdown and so agreed to release him quickly. The representations made by the defendant about his health were to his knowledge untrue. The defendant ceased to be managing director of the plaintiffs from 1 August. On 6 August the Eastern Gas Board wrote to the defendant offering him employment as project manager for four projects, the defendant to be totally responsible for the design and supervision of the four projects. This work was in substance the same work which the plaintiffs had unsuccessfully attempted to obtain in 1968. In an action by the plaintiffs for an account for breach of fiduciary duty, the defendant denied that there was any fiduciary duty or any breach of such duty, contending that if there were a remedy it lay in damages but that the plaintiffs had suffered no damage since they would not have obtained the work for themselves in any case. *Held*, 1. While the defendant was managing director of the plaintiffs a fiduciary relationship existed between him and the plaintiffs; accordingly information which came to him while he was managing director and was of concern to the plaintiffs, was information which it was his duty to disclose to the plaintiffs. He was under a duty therefore to disclose all information which he received in the course of his dealings with the gas board. Instead he had embarked on a deliberate course of conduct which had put his personal interests as a potential contracting party with the gas board in direct conflict with his pre-existing and continuing duty as managing director to the plaintiffs. He was therefore in breach of his fiduciary duty to the plaintiffs in failing to pass on to them all the relevant information received in the course of his dealings with the gas board and in guarding it for his own personal purposes and profit. 2. Because of his breach of duty the defendant was liable to account to the plaintiffs for all the benefit he had received or would receive under the contract with the gas board. The question whether the benefit of the contract would have been obtained for the plaintiffs but for the defendant's breach of fiduciary duty was irrelevant. It was therefore irrelevant that, as a result of the order to account, the plaintiffs would receive a benefit which they would not otherwise have received. *Keech* v. *Sandford* (1726) [1558-1774] All E.R. Rep. 230, and *dicta* of Lord Cranworth L.C. in *Aberdeen Railway Co.* v. *Blaikie Brothers* [1843-60] All E.R. Rep. at 252, and Lord Upjohn in *Boardman* v. *Phipps* [1966] 3 All E.R. at 756, 757, applied. *Bell* v. *Lever Bros. Ltd.* [1931] All E.R. Rep. 1 and *Regal (Hastings) Ltd.* v. *Gulliver* [1942] 1 All E.R. 378, considered. Statement in *Buckley on the Companies Acts* (13th Edn.) pp. 876, 877, approved. *Industrial Development Consultants Ltd.* v. *Cooley* [1972] 2 All E.R. 162.

PATENTS AND INVENTION—INFRINGEMENT

What constitutes infringement—Plaintiff exclusive licensee but not registered under an agreement granted defendant an exclusive licence within defined area—Plaintiff claimed by going outside the area the defendant was in breach of his agreement—Defendant unsuccessfully raised as a defence the Patents Act 1953, s. 85. The plaintiff was the exclusive licensee of a valid patent of the Kerbmaker machine for the southern part of the North Island. The plaintiff's interest was capable of being registered with the Commissioner of Patents in terms of the Patents Act 1953 but had not been so registered. The plaintiff under an agreement with the defendant granted to him an exclusive licence in respect of the use of a Kerbmaker machine within Hawke's Bay. The plaintiff alleged the defendant had used a Kerbmaker machine outside Hawke's Bay and sought an injunction and damages for loss of profit. The plaintiff also alleged non-payment of royalties by the defendant and that it was entitled to cancel the agreement and retake possession of the machines. The defendant raised as a defence s. 85 of the Patents Act 1953 and the plaintiff contended that its action lay on contract and not by way of infringement. The question of law was argued before trial. *Held*, 1. As a general proposition a licensee cannot challenge his licensor's title to a patent interest or its validity in proceedings founded upon the licence. (*Fuel Economy Co. Ltd.* v. *Murray* (1930) 47 R.P.C. 346, 353 and *Wilson* v. *Union Oil Mills Co. Ltd.* (1891) 9 R.P.C. 57, 63, referred to. *Chanter* v. *Leese* (1838) 4 M. & W. 295, distinguished.) 2. The plaintiff did not bring proceedings in the words of s. 85—"in respect of any interest to which he may be entitled as . . . licensee . . . in a patent" but in respect of his rights under an agreement. *Kerbing Consolidated Limited* v. *Dick* (Supreme Court, Napier. 8, 27 March 1972. Roper J.).

PRACTICE—APPEALS TO PRIVY COUNCIL

Leave to appeal—Leave granted conditionally—Application final leave to appeal—Respondent opposing contended conditions not fulfilled and sought rescission of leave—No application by respondent under R. 17—Privy Council Appeal Rules, R. 17. This was an application for final leave to appeal to the Privy Council by the respondent wife which was opposed by the appellant husband. Conditional leave was granted to the respondent on 13 September 1971. The conditions were that the respondent should within three months of the grant of leave furnish security for costs and "take all necessary steps for the purpose of procuring the preparation of the record and the dispatch thereof to England". Security for costs was duly furnished. On 9 December 1971 a conference took place for settlement of the form of the record. On 10 December 1971 the papers as arranged by the legal advisers were delivered by the respondent's solicitors to the printers pursuant to a contract for printing which had been previously arranged. At the date of hearing on 10 March 1972 the proofs were expected to be available on 27 March 1972. The appellant contended that the respondent had not complied with the condition concerning the preparation of the record by 13 December 1971 and that the respondent had failed to apply for final leave with due diligence, and that under R. 17 of the Privy Council Rules the order granting conditional leave should be rescinded. *Held*, 1. The condition as to the preparation of the record was fulfilled as the record had been delivered to a reputable printing firm within the time prescribed in the condition. (*Miller* v. *Minister*

of Mines [1962] N.Z.L.R. 275 and *Gisborne Harbour Board* v. *Lysnar* [1923] N.Z.L.R. 345, 352, applied.) 2. The Court of Appeal would not lightly reverse its decision on the construction of a rule of practice when that has been and may be being relied upon by litigants. It was better that the law should be certain. (*Jones* v. *Secretary of State for Social Services* [1972] 1 All E.R. 145, 149; [1972] 2 W.L.R. 210, 215, referred to.) 3. Rule 17 of the Privy Council Rules enables an application to be made by the respondent for rescission of the order granting conditional leave to appeal on the ground that the appellant has failed to apply with due diligence for a final order. 4. The appellant (as respondent to the wife's application for final leave to appeal) had not made an applicatiin pursuant to R. 17. *E.* v. *E.* (Court of Appeal, Wellington. 10, 29 March 1972. Turner P. Richmond and Macarthur JJ.).

SALE OF LAND—THE CONTRACT OF SALE

Consensus between parties about description of property by wrong street number and correct lot number—Position of parties after completion—Settlement made but transfer not registered—Remedies of parties—Rescission available to purchaser—Land Transfer Act 1952, ss. 41 (1), 42 (1). This case raises the question as to when there has been a conveyance of land under the Land Transfer Act 1952. The plaintiff was the purchaser of a small property from the defendant and the sale had been made through the third party as agent for the vendor defendant.The defendant was the registered owner of No. 29 McElvie Street and desired to sell it. By mistake the defendant's employee in appointing the third party agent for the sale referred to the property as being No. 23 McElvie Street. An agreement for sale and purchase was executed and the property was described as No. 23 but the legal description was appropriate to No. 29 and inappropriate to No. 23. Settlement was made and the purchaser received a memorandum of transfer but before registration thereof the mistake was discovered. *Held,* 1. The agreement was ambiguous for the street number related to one property and the lot number related to another, and there was no consensus *ad idem.* (*Raffles* v. *Wichelhaus* (1864) 2 H. & C. 906 and *Scriven Bros. & Co.* v. *Hindley & Co.* [1913] 3 K.B. 564, referred to.) 2. The parties to the agreement could not be deemed to have assented to its terms by conduct. (*Smith* v. *Hughes* (1871) L.R. 6 Q.B. 597, referred to.) 3. Purchases of land are not set aside after conveyance except for fraud or total failure of consideration. (*Allen* v. *Richardson* (1879) 13 Ch. D. 524, 539; *Re Tyrell, Tyrell* v. *Woodhouse* (1900) 82 L.T. 675 and *Knight Sugar Co. Ltd.* v. *Alberta Railway & Irrigation Co.* [1938] 1 All E.R. 266, 269, applied.) 4. It has been held that there was total failure of consideration where there was no subject-matter available to be the subject of the conveyance. (*Bingham* v. *Bingham* (1748) 1 Ves. Sen. 126; *Hitchcock* v. *Giddings* (1817) 4 Price 134 and *Svanosio* v. *McNamara* (1956) 96 C.L.R. 186, 198, referred to.) 5. It was doubtful whether there had been "total failure of consideration" having regard to the memorandum of transfer. 6. Under the Land Transfer Act 1952, s. 41 (1) the vesting of the legal estate does not occur until registration. Registration is completion and not the payment of money and delivery of documents at any time prior. (*West* v. *Read* (1913) 13 S.R. (N.S.W.) 575, 579, 582 and *Knight Sugar Co. Ltd.* v. *Alberta Railway & Irrigation Co.* (*supra*), referred to.) 7. The commonly described practice of "settlement" does not amount to completion of the transaction or conveyance and the contract of sale still governs the relationship of the parties until registration. The plaintiffs were entitled to rescission of the agreement and an order for refund of the purchase money paid under it. *Montgomery and Rennie* v. *Continental Bags (N.Z.) Limited and Another* (Supreme Court, Auckland. 18, 19 October 1971; 24 March 1972. Speight J.).

TOWN AND COUNTRY PLANNING—GENERAL

Interrelation between regional planning schemes and district planning schemes—Provisions in district scheme conflicting with recommendations in regional scheme—Town and Country Planning Act 1953, ss. 4 (1), 10A, 28 (2A), 33 (1). The plaintiff had publicly notified the review No. 1 of the Makara section of its district scheme and had completed the hearing of objections. The defendant, the Regional Planning Authority, objected to the plaintiff's scheme on the ground that the comprehensive development area shown in the scheme had not been first approved by the defendant pursuant to ord. II cl. 1 (4) of the defendant's code of ordinances. This objection was disallowed by the plaintiff. The defendant appealed to the Town and Country Planning Appeal Board upon the ground that the plaintiff had no jurisdiction to hear objections lodged in respect of any land within the comprehensive development area which had been designated by the defendant to remain zoned "rural" until comprehensive proposals for urban development had been approved by the defendant. The plaintiff had also independently of the review granted a specific departure in respect of 8½ acres of land within the comprehensive development area permitting it to be used for residential A purposes. The defendant had lodged an objection against the specific departure and subsequently appealed to the Town and Country Appeal Board. Neither appeal had been heard by the Board when this originating summons came before the Court seeking declarations by the plaintiff to the effect that it was not bound by the defendant's code of ordinances. *Held,* 1. Sections 10A and 28 (2A) of the Town and Country Planning Act 1953 have no greater effect than to determine finally that all procedures and other steps are to be regarded as having been taken and not that schemes have the force of a statute. 2. Section 33 (1) of the Act gives to the provisions of district schemes the force of a regulation but regional schemes are given no similar status. 3. Section 4 (1) of the Act intends that public and local authorities are not to include in their district schemes provisions which conflict with the broad recommendations of a regional planning scheme. Whether the recommendations are proper or whether the provisions of the district scheme conflict with the recommendations of the regional scheme are both matters for determination by the Appeal Board. 4. The fact that the district planning authority had not appealed against the mandatory provisions of the regional scheme before it became operative could not confer a power on the regional planning authority which it did not possess. *Hutt County* v. *Wellington Regional Planning Authority* (Supreme Court, Wellington. 20 March; 13 April 1972, Quilliam J.).

TRAFFIC—CARELESS DRIVING

Inference from marks on road—Explanation out of Court by defendant—Absence of evidence in Court rebutting explanation—Whether Magistrate able to make positive finding that explanation untrue. Evidence—Inferences—Marks upon road—Inference as to behaviour of vehicle as distinct from behaviour of driver. The defendant's vehicle left a bitumen road and overturned. He gave out of Court the explanation that an animal had been the cause of the accident. He did not give

evidence in Court and no other evidence was given to rebut the explanation. The Magistrate did not believe the explanation and made a positive finding that the explanation was untrue. The only other evidence against the defendant was an admission by the defendant that he was the driver of the vehicle and the existence of certain marks upon the road. The defendant was convicted of careless driving. *Held*, In the absence of any evidence in Court that the defendant's explanation was untrue the Magistrate should not have made a positive finding that the explanation was untrue although he may not have been persuaded that it was true. Whilst the marks on the road may by legitimate inference lead to a conclusion about the behaviour of the vehicle they did not in the circumstances enable any legitimate inference to be drawn as to the quality of the behaviour of the driver as a driver so as to sustain the conclusion that the driver had been guilty of careless driving within the meaning of the section. The conviction should be set aside. As there was insufficient evidence upon which the defendant could be convicted the matter should not be retried. *Butler* v. *Livett* [1970] Q.W.N. 43, referred to. *Duckvell* v. *Lee* [1972] W.A.R. 48.

TRANSPORT AND TRANSPORT LICENSING—OFFENCE

Driving in excess of speed limit—Driver willing to accept traffic offence notice in lieu of speeding infringement notice—Speeding infringement notice issued—Subsequent charge of failing to pay speeding infringement fee—Magistrate pursuant to Summary Proceedings Act 1957, s. 43 substituting charge—Traffic Regulations 1956, Reg. 26 (1) (Reprint S.R. 1968 32)—Transport Act 1962, s. 42 (2), (9), (12) (Transport Amendment Act 1970, s. 2). This case concerns two appeals by the Crown against a decision of a Magistrate. The respondent passed the appellant, a traffic officer, who was travelling at 50 m.p.h. in a 55 m.p.h. zone. The traffic officer pursued the respondent and recorded his speed at 75 m.p.h. The traffic officer having stopped the respondent informed him of his speed and that he intended to issue a speeding infringement notice. The respondent said that he did not want a speeding infringement notice but would accept a traffic offence notice. The appellant served the respondent with a speeding infringement notice recording the speed as 71 m.p.h. in accordance with a direction that a reduction of 4 m.p.h. should be made in respect of speeds recorded on a patrol car's speedometer. The fee in the notice was shown as $40. Later in the day the appellant discovered the fee should have been $34 and tried unsuccessfully to notify the respondent. The next day the appellant called upon the respondent to amend the notice but the respondent did not have the notice with him. The appellant amended his own copy and the respondent agreed to amend his copy but said that he had no intention of paying the speeding infringement fee. The fee was not paid within the prescribed 21 days and the respondent was charged with failing to pay the fee. He appeared in person and the Magistrate purported pursuant to s. 43 of the Summary Proceedings Act 1957 to amend the information by substitution of a charge under Reg. 26 (1) of the Traffic Regulations 1956 of exceeding 55 m.p.h. The respondent then pleaded guilty and was fined $14. *Held*, 1. The power conferred by s. 43 of the Summary Proceedings Act 1957 is a very wide one and the Court has a duty to act judicially in the exercise of its discretion. (*R.* v. *Bodmin Justices ex p. McEwen* [1947] K.B. 321, 325; [1947] 1 All E.R. 109, 111; *Westminster Bank Ltd.* v. *Beverley Borough Council* [1969] 1 Q.B. 499, 533; [1968] 2 All E.R. 1199, 1208 and *Sharp* v. *Wakefield* [1891] A.C. 173, 179, 181, applied.) 2. The Magistrate had allowed his personal feelings to intrude into the exercise by him of his discretion and this was a wrongful exercise of his discretion. 3. Section 42 (2) of the Transport Act 1962 confers a right of selection on the informant as to whether the defendant is proceeded against summarily for the offence or served with a speeding infringement notice. 4. The Court is required to start the determination of the appropriate fine to be imposed pursuant to a speeding infringement notice by reference to the prescribed scale of speeding infringement fees and then take into account all such considerations as are properly to be taken into account in every case. 5. Despite the fact that initially the wrong fee was put in the speeding infringement notice and subsequently corrected, in the circumstances of this case the notice was not defective. 6. As regards failure to pay the speeding infringement fee the Court is entitled to have regard to all matters that would after any conviction be properly taken into consideration; these would include matters relating to the failure to pay or to the defendant personally. *Ministry of Transport* v. *Froggatt* (Supreme Court, Wellington. 17, 23 March 1972. Quilliam J.).

VICARIOUS LIABILITY—PRINCIPAL AND AGENT

Driving of motor vehicle—Liability of principal for negligent driving of agent—Husband and wife—Husband using wife's car to travel to work—Car regarded by husband and wife as belonging to them both—Promise by husband to wife that if unfit to drive through drink he would ask friend to drive—Husband using car to visit public house after work—Husband unfit to drive—Husband asking third party to drive car—Third party offering friends lift in car—Accident caused by negligent driving of third party—Passengers injured—Whether third party driving car as wife's agent—Whether wife liable to passenger as owner of car. On their marriage the husband and wife each owned a car but after a year they decided that it was unnecessary to have two cars. The husband therefore sold his and the wife kept hers. However, although the wife was the owner of the car, it was regarded as being the family car, belonging to them both. Both spouses went out to work but the husband's place of work was some miles from their home and he regularly used the car to drive to and from work. Occasionally, after work, the husband would stay out late to have a drink with friends before returning home. The wife was worried about that but the husband promised her that, if he was unfit to drive, he would get a friend to drive him home. One evening the husband decided to go out drinking. He telephoned the wife to say that he would not be returning home for his evening meal but was going out with friends. He visited a number of public houses and had drinks. At some stage, realising that it would be unsafe for him to drive, he asked a friend, C., to drive and gave C. the ignition key. At the last public house which they visited C. offered the three respondents, one of whom was a friend of his, a lift in the car. Soon after, the husband, who was heavily intoxicated, got into the back of the car and fell asleep. C. drove off, not in the direction of the husband's home, but in the opposite direction, suggesting a meal before he finally drove the passengers home. Shortly after, as a result of C.'s negligent driving, the car collided with a bus and the respondents were injured. There was no question of the wife knowing that C. would drive, or might drive, the car that evening, and to her he was merely an acquaintance. The respondents brought an action against the

wife, the appellant, claiming that, as owner of the car, she was vicariously liable for C.'s negligence. *Held*, 1. In order to fix liability on the owner of a car for the negligence of its driver, it was necessary to show either that the driver was the owner's servant or that, at the material time, the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship it was necessary to show that the driver was using the car at the owner's request, express or implied, or on his instructions, and was doing so in performance of the task or duty thereby delegated to him by the owner. The fact that the driver was using the car with the owner's permission and that the purpose for which the car was being used was one in which the owner had an interest or concern, was not sufficient to establish vicarious liability. Nor was there any special test of liability in relation to a "family car" which was owned by one spouse and driven by the other. 2. It followed that the wife was not vicariously liable for the negligent driving of C. There was no evidence to show that when the husband drove the car to his place of work and when he drove it home again he was driving the car as the wife's agent, still less so when he chose, on the day in question, to visit a number of public houses before returning home. When the husband asked C. to drive that did not suffice to make C. the wife's agent. The understanding between the husband and wife that, when he had had too much to drink, the husband would ask someone else to drive the car was nothing more than the kind of assurance that any responsible husband would give his wife and fell far short of any authority by the wife to drive on her behalf, or any delegation by her of the task of driving. In any event, at the time when the accident occurred, C. was not driving the car for the purpose of returning the car to the wife's home but away from her home for some fresh purpose. *Hewitt* v. *Bonvin* [1940] 1 K.B., 188, applied. *Ormrod* v. *Crosville Motor Services Ltd.* [1953] 2 All E.R. 753, distinguished. Decision of the Court of Appeal sub nom *Launchbury* v. *Morgans* [1971] 1 All E.R. 642, reversed. *Morgans* v. *Launchbury* [1972] 2 All E.R. (H.L.).

BILLS BEFORE PARLIAMENT

Appropriation
Carter Observatory Amendment
Children's Health Camps
Coal Mines Amendment
Customs Amendment
Electoral Amendment
Finance
Fire Services
Fire Services Amendment
Hydatids Amendment (No. 2)
Mental Health Amendment
Minister of Local Government
Ministry of Energy Resources
National Art Gallery, Museum, and War Memorial
Occupational Therapy Amendment
Public Revenues Amendment
Shipping and Seamen Amendment
Tobacco Growing Industry Amendment
Wool Marketing Corporation

STATUTES ENACTED

Imprest Supply
Land and Income Tax Amendment

REGULATIONS

Regulations Gazetted from 6 to 20 July 1972 are as follows:

Agricultural Chemicals (Fensulfothian) Notice 1971, Amendment No. 1 (S.R. 1972/152)
Agricultural Workers (Orchards and Vineyards) Order 1971, Amendment No. 1 (S.R. 1972/140)
Agricultural Workers (Tobacco Growers) Order 1969, Amendment No. 2 (S.R. 1972/145)
Building Societies (Trustees' Deposits) Order 1970, Amendment No. 2 (S.R. 1972/141)
Customs Tariff Amendment Order (No. 12) 1972 (S.R. 1972/154)
Education (Assessment, Classification, and Appointment) Regulations 1965, Amendment No. 6 (S.R. 1972/155)
Government Life Insurance Regulations 1954, Amendment No. 7 (S.R. 1972/142)
Industrial Design Regulations 1969, Amendment No. 2 (S.R. 1972/146)
New Zealand-Australia Free Trade Agreement Order (No. 4) 1972 (S.R. 1972/147)
Niue (New Zealand Laws) Regulations 1972 (S.R. 1972/143)
Periodic Detention Order (No. 4) 1972 (S.R. 1972/144)
Seat Belts Exemption Notice 1972, Amendment No. 1 (S.R. 1972/153)
Shipping (Closing of Openings in Hulls and in Watertight Bulkheads) Rules 1972 (S.R. 1972/148)
Shipping (Passenger Ship) Construction and Survey Rules 1972 (S.R. 1972/149)
State Services Salary Order (No. 4) 1972 (S.R. 1972/150)
Work Centre (Palmerston North) Notice 1972 (S.R. 1972/151)
Work Centre (Palmerston North) Notice (No. 2) 1972 (S.R. 1972/156)

CATCHLINES OF RECENT JUDGMENTS

Arbitration—Application for leave to enforce award—When appropriate procedure—Whether award reasonably clear. *Mackintosh and Ewart* v. *Castle Land Co. Ltd. and Stubbs* (Supreme Court, Wanganui. 1972 4 July, Quilliam J.).

Real Property—Application for cancellation of charging order—Equitable interest of purchaser under agreement for sale and purchase held to prevail over charging order registered by judgment creditor of vendor of land subsequent to execution of agreement for sale and purchase. *Firth Concrete Industries Ltd.* v. *Duncan* (Supreme Court, Hamilton, 1972. 6 July, McMullin J.).

SOME RECENT CASES

Lotteries

Atkinson v. *Murrell* [1972] 2 All E.R. 31. dealt with a get-rich-quick scheme which hinged around the familiar, and notorious "chain letter".

A party devised a system whereunder a participant bought an envelope for £1. put his name at the bottom of the list which it contained, and sent £1 to the person whose name appeared at the head of the list. The envelope and list were then sent to the original party with £1 for management expenses. This party would then delete the top name, and send the participant 3 lists with his name at the bottom. The participant then sold his three lists for £1 each, and then waited for his name to reach the top position. It was theoretically possible for a person whose name did thus appear to win £729.

It was contended that this constituted a lottery and was thus in breach of the equivalent to s. 42 of the New Zealand Gaming Act 1908. But to be a lottery, the distribution of prizes is to be entirely by chance.

It was said by Griffiths J., in whose judgment Ashworth J. and Widgery C.J. concurred, that this was a game of chance since "any payment was dependent on the chance that the chain will not break before his name reaches the top of the list. Once he has set the machinery in motion by entering the scheme, he has no further control over events and can exert no skill or influence over the ultimate outcome."; (*ibid.*, at p. 35).

This is true, but the difficulty in accepting this decision unreservedly is that it posits an imperfect state of affairs, that is, that each participant will not play his role as he is meant. Yet if the game is played as intended, there is no chance involved: and the participant who reaches the top must win £729. The chance that participants might not play as intended should not, of itself, convert the game into a game of chance. No doubt the Court's verdict is valid according to the tenor of the Act, but it must otherwise be accepted with some hesitation.

There is no such doubt about the Court's further, important, finding that the presence of a prize fund was not essential to the nature of a lottery. It was agreed that participants must either make a payment or contribution for the purchase of their chance. But there was no limit to the variety of schemes which constitute lotteries, said Griffiths J., and "provided the scheme achieves the overall object of the distribution of money by chance". an actual prize fund is inessential (*ibid.*, at p. 38).

Detention for Repairs

In the "*Naxos*" [1972] 1 Lloyd's Rep. 149 a vessel had been damaged due to the negligence of the "*Naxos*." Five days were spent in effecting repairs. A claim was made for the profit lost over that period. Brandon J. dismissed the actual claim since the plaintiffs would have earned an exceptionally high rate of profit over the relevant period. Instead, his Lordship awarded the plaintiffs the average rate of profit they were accustomed to earn.

No reference was made in this case to the "*Edison*" [1933] A.C. 449 (H.L.). In this case, where (to abbreviate the story somewhat) a vessel had been delayed by the negligence of another in the execution of a dredging contract, the House of Lords had stressed the correct measure of damages to be the value of the vessel to the owners at the time of the accident. In that regard, Lord Wright had said, "regard must naturally be had to her pending engagements, either profitable or the reverse . . .[its value is to be assessed] not in the abstract but in view of the actual circumstances" (*ibid.*, p. 464).

In the light of this judgment, the best that can be said of the "*Naxos*" is that it modifies the "*Edison*", so that, henceforth, loss of profit is certainly recoverable, but only at an average rate. This seems not wholly consistent with the "thin skull" principle, that is, a wrongdoer takes his victim as he finds him.

The alternative, and perhaps better view is to take the "*Naxos*" as inconsistent with the "*Edison*", and hence a decision not to be followed.

R. G. LAWSON

Clement Freud on Australia—"Scenically, it is a beautiful country. Gastronomically, it is virgin land. Viniculturally, it is catering to a huge and unsophisticated demand—which may account for 1969 imports of over a ton of oenomyacin, which I reckon is enough to turn 1.5 million bottles of white wine into red."

HOMOSEXUAL LAW REFORM—A REPLY TO MR O'NEILL

Mr O'Neill's article in [1972] N.Z.L.J.241 demonstrates the strength of his own beliefs but scarcely responds to my challenge to produce "a single rational and coherent argument" against changing the law (in [1972] N.Z.L.J. 1).

I was unable, in a brief article, to discuss the little scientific knowledge that exists about the causes of the homosexual condition. But nothing that I did say could reasonably be read as implying that homosexuals "have been cast in this mould since birth." On the contrary, I accept that environmental factors are probably decisive in many cases. So there is no conflict between my position and the evidence of the experts who appeared before the Wolfenden Committee which, let it be remembered, thoroughly examined a number of arguments in favour of retaining the then-existing English Law but nevertheless recommended that it should be changed.

The bare assertion that many an individual homosexual has been "assisted" by the existence of a criminal sanction is unconvincing. Some credible evidence of the way in which the law assists him should be adduced. Moreover, unless we know what Mr O'Neill would count as "assistance" his argument is incoherent. If the word "assist" is understood in any ordinary sense we are driven to the conclusion that the criminal law does *not* assist homosexuals. Homosexuality is a condition which does not disappear under police investigation; it is insensitive to stern judicial disapproval; and it persists while a man is serving a prison sentence. It is a simple fact that those homosexuals who are sent to prison are unlikely to be more heterosexually orientated when they re-emerge into society. Does Mr O'Neill know that very little in the way of treatment is possible?

It is untrue and unfair to assert that the first argument in favour of reform, the humanitarian argument, "takes no regard of the suffering which may already be experienced." Anyone who has read a few case histories is well aware of the extent of that suffering. What the argument maintains is that society should not add more through the legal process and the fear of it.

I wonder what "reason for the discrimination" between male and female homosexual acts Mr O'Neill has discovered from his historical researches. He implies that there is an obvious reason but does not state what it is. I wish he had because I could then study it and he would have thrown light on what has always been regarded as a matter for speculation by historians of the criminal law.

Let us assume that there are good reasons justifying our practice of publicising convictions, and that publicity is a legitimate part of the punishment. One cannot appeal to those reasons, whatever they may be, when the question is whether a particular act should be punished at all. That *is* the question in regard to male homosexual acts of a consensual character in private. Mr O'Neill, in responding to my fourth argument, unfortunately both distorts my argument by over-simplifying it *and* begs the question.

Mr O'Neill foresees "a flood of undesirable immigrants." I suppose that we would agree that the less adultery is committed in New Zealand the better. Mr O'Neill ought to support the enactment of a criminal sanction against adultery on the ground that would-be adulterers will thereby be induced to flock somewhere else. I foresee, however, that he is likely to be howled down.

What appears to be Mr O'Neill's main point is that it is unproven that "the typical homosexual act does not cause any kind of harm to anyone else". That statement admittedly needs elaboration. For one thing the notion of "harm" contains some ambiguity. What I intended to convey was the proposition that the typical homosexual act does not cause any physical or mental or any other kind of harm, either to the other participant or to any third person. I concede that a few homosexual acts (between consenting adults in private) may cause harm of *some* kind but I claim that they are not typical. Some non-criminal acts of heterosexual intercourse between unmarried adults cause physical damage but again they are not typical. This comparison can be taken one step further. If we are prepared to count a women's unwanted pregnancy as a "harm" suffered by her then ordinary sexual intercourse is more often fraught with the possibility of harmful consequences than is a homosexual act. But we rightly do not ask Parliament to enact a law against fornication: and we have long ceased to think that adultery should be a crime. Why should we, why *do* we, single out homosexual acts and employ an argument for punishing them which applies with greater force to these other immoral sexual practices?

The only plausible form of the thesis that homosexual acts harm other people is the statement that they sometimes have a bad effect on the marriage or the family of one of the participants. Mr O'Neill misleadingly quotes only one sentence from paragraph 55 of the Wolfenden Report in this regard. He should have quoted the whole paragraph, which offers several reasons for rejecting the possible effect on a marriage as an argument for retaining the criminal law. There are two other reasons why I reject it. Many homosexual men are unmarried and have no wives or families to be harmed; and even when a family does exist it is typically not the single homosexual *act* which may cause harm, but the homosexual *association* and the alienation of affection to which that leads. For Mr O'Neill's "family" argument to have any validity it should at least justify the law's intervention to the point where it actually intervenes.

D. L. MATHIESON.

NO MORE SUPPLEMENTAL PETITIONS

Welcome is the judgment of Wilson J. in *Edge* v. *Edge* D. 169/70 Christchurch (reasons for judgment given 1 February 1972); yet its only recognition to this time is a passing reference in this Journal amongst "Catchlines of Recent Judgments."

The facts in, and the result of, the cause are immaterial; but what is of value is its giving quietus to the practice of supplemental petitions —a practice impossible to justify at any stage.

Rule 31 of the Matrimonial Proceedings Rules 1964 reads:

> "(1) Any party desiring to alter or amend any pleading must apply to the Court or a Judge thereof for leave to do so."

One would expect that that is ample justification for any amendment, whether adding new ground for divorce or not. Fortunately, Wilson J. is of that mind. At the end of his judgment he states:

> "Before parting with this matter I desire to point out that this affords a good example of the inconvenience attending supplemental petitions, which are not authorised either by the Act or by the Rules and which, in consequence, are subject to special problems in matters of procedure. In my opinion R. 31 is expressed in terms wide enough to embrace any alteration to a petition, whether or not the alteration introduces a fresh ground and whether or not such fresh ground became available before the date of filing the petition and the practice of supplemental petitions is unauthorised, unnecessary and undesirable. If the alteration be made in the manner provided in the Rules the respondent and the Court have before them a single pleading in which the petitioner's whole case is set out rather than two separate documents. In the interests of simplicity and convenience the practice of issuing supplemental petitions should be abandoned and they should be allowed to take their place, with other obsolete pleadings, in that section of textbooks devoted to interesting developments in divorce procedure which have no significance in current practice."

It is to be hoped the value of this direction will not be lost to Registrars in all Registries.

W. V. GAZLEY.

MAGISTRATE APPOINTED

Mr P. J. Trapski of Mt Maunganui was recently appointed a Stipendiary Magistrate.

Mr Trapski, who graduated LL.B in 1958, since he was admitted to the Bar, practised with the firm of Messrs Trapski, Dowd, Thomason and Strachan, a firm founded by his father with a wide practice in the district. He was a member of the Tauranga Hospital Board, the Chamber of Commerce, and has been prominent in the Junior Chamber of Commerce. He was also a member of the local Legal Aid Committee, and active in church affairs.

Mr Trapski has taken up his appointment at Wellington.

Ostracism of racism—"The presence of South African non-white players at Ellis Park is another hopeful sign of the acceptance of the firm fact that if we want to take part in world sport we have to provide the fair deal that the world requires." (editorial comment in the *Johannesburg Star.*)

ABORTION—THE EMBRYOLOGICAL FACTS AND THE CRIMINOLOGICAL PROBLEM

In his article "The Anthropological Problem of Abortion" ([1972] N.Z.L.J. 188), Mr Coen van Tricht has argued that it is incorrect to regard the human foetus as a human being and a mistake on the part of the legislature to make abortion a crime.

In support of his contention that the foetus is not a human being, Mr van Tricht brings forward two positive arguments and supplements these with some ill-informed adverse comment on the anthropology of Aristotle and the Scholastics.

The first argument is based on a particular evolutionary view of the development of the foetus, a view which the writer regards as an established fact. His conclusion is that "it is a negation of evolution to call the foetus a human being."

Winwood Read—not the most scholarly authority—is quoted as saying that for a long time many liked to see themselves as fallen angels rather than enlightened apes. For Aristotle and the Scholastics, man is neither; he is a rational animal, and although he is not so very different anatomically from the higher apes, when we take a broader biological view and consider man's impact on the rest of the living world, there are good grounds for placing him in a kingdom by himself.

Relying on Haeckel's long-exploded "Law" that ontogeny recapitulates phylogeny, Mr van Tricht maintains that "it is a gross inconsistency when on the one hand man's ancestors are considered to be animals, whilst on the other hand the foetus, which has gone through the same stages of development as those of our animal ancestors, is now called a human being. . . . If it is not correct to apply the abstraction of man to our ancestor the fish, there is no reason why this abstraction should be applied to a three-weeks-old foetus."

Von Baer long ago pointed out that ontogeny —the development of the individual—is not a repetition of the past but a preparation for future stages by the aid of preceding ones, and Sir Gavin de Beer has commented on the regrettable influence Haeckel's so-called "Law" has had on the course of embryology. It used to be argued that the presence of "gill-slits" in the human embryo pointed to our descent from the fish, but as de Beer has pointed out, these structures are not gill-slits at all, but pharyngeal pouches, and that one has only to look at them to see that they do not resemble the gill-slits of fish."

The statement that "the human foetus and the ape foetus are as alike as two peas in a pod" is quite false. Mr van Tricht adopts the idealistic morphology which he erroneously attributes to Aristotle and judges creatures only by their shape. From the subsequent development of the two foetuses it is clear that there is a radical difference between them; moreover, the human foetus is morphologically identifiable as human very early. In his article "Human Embryology" in the Encyclopaedia Britannica (14th edn.) G. W. Corner says that "the external features of the human embryo are established before the embryo is an inch long."

Mr van Tricht's second argument is based on Hertwig's distinction between the physiological individual and the morphological individual. From this distinction he infers, quite wrongly, that the foetus is only a "dependent part of the higher physiological individual", "only an anatomical part of the real individual." This equiparation of the foetus to a lung or a kidney implies a totally false conception of the relation of the foetus to the parent, for it is certain that parent and foetus are each a distinct human individual. Each has its own chromosomal pattern and lives its own life. The foetus indeed depends on the mother for the maintenance of its life, but so does the baby after it is born.

Mr van Tricht misrepresents the views of Aristotle as if he were an Idealist and held that "the form is the only reality." This may be true of Plato, but as any historian of philosophy knows, it was a point on which Aristotle vigorously disagreed with Plato. Nor did that great biologist hold that "physiology and morphology are completely separate", or "judge creatures only by their shape, while their vital functions were ignored." May I quote Sir W. D. Ross: "Many of Aristotle's observations have moved the admiration of later investigators. He recognised, for example, the mammalian character of cetaceans—a fact which was overlooked by all other writers until the sixteenth century. He distinguished the cartilaginous from the bony fishes, and described them with marvellous accuracy. He describes carefully the develop-

ment of the embryo chicken. . . . He detected a remarkable feature in the copulation of the cephalopods, which was not rediscovered until the nineteenth century. . . ." No wonder Darwin could say that "compared with Aristotle, we moderns are only boys."

Mr van Tricht's contention that Aristotle's concept of the soul "is no longer defendable scientifically" is wide of the mark, for the question whether the organism is animated by a soul is not a scientific question, but a philosophical one. Moreover, Hans Driesch has offered solid scientific evidence for the view that Aristotle's theory of the "entelechy" is in full harmony with the scientific facts.

Abortion as a criminal problem:

The arguments on which Mr van Tricht relies to establish his thesis that abortion should no longer be considered a crime are all based on a positivist theory of jurisprudence. As he puts it, "the present-day attitude of jurisprudence does not in any way justify the punishment of abortion." It is true that the positivist theory, according to which law derives its validity wholly from the will of the legislator, is still held by many jurists. But recent history has underlined the weaknesses of this theory, and we find men like Kaufmann, professor of legal philosophy in the University of Saarbrucken, maintaining that it is impossible to elaborate a coherent theory of law without appealing to "the nature of things."

"The duty of criminal law", we read, "is to protect legal rights." But the question is: What is the basis of those legal rights? If they are based only on positive law, positive law can annul them. Thus an innocent human being could be deprived by the legislator of his right to life—as happened in Nazi Germany. But if the adult human being has a right to his life from the nature of things, why not the foetus also? And if it is one of the functions of the criminal law to vindicate this right for the adult, why not for the foetus also? Unless, of course, ignoring all the biological evidence, we maintain that the human foetus is at one time a fish or an ape.

Mr van Tricht argues that, because the opponents of abortion have not always agreed on the grounds for prohibiting it, all the arguments they adduce are unsound. This does not follow. It will suffice it one argument is valid, e.g. that abortion is to be prohibited because it is a violation of a human being's right to life.

To the argument that "a penal law is only effective if it is up-to-date", we reply that a penal law is effective in the long run only if it is in accord with the demands of justice; and up-to-dateness is no criterion for determining whether a law is just or unjust. The Nazi laws against the Jews were quite up-to-date in the 30s.

At one place in the argument it seems to be implied that civil law should have no coercive power. We read: "As a nation is lost whose existence depends on the sword, so a legal order is lost which does not look for inner strength, but for the means of power." Employing the same comparison, we may reply that, as the nation is lost which is incapable of defending itself, so a legal order that is not backed up by coercive power will rapidly collapse into anarchy.

It is curious to find Cicero quoted in this context, for Cicero was a great champion in antiquity of the doctrine of natural law. I have not his *De Legibus* to hand, and so I cannot check the context of the eternal truth quoted by Mr van Tricht: "Laws achieve nothing without moral support." But I suspect that the meaning of the text is that positive laws are nugatory or harmful if they are not in accord with the natural law. For Cicero wrote in *De Republica*: "True law is right reason in agreement with nature: it is of universal application, unchanging and everlasting . . . It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it." And in another work, he wrote: "If the principles of Justice were founded on the decrees of peoples, the edicts of princes, or the decisions of Judges, then Justice would sanction robbery and adultery and the forgery of wills, in case these acts were approved by the votes or decrees of the populace."

This disposes of the objection that "the supernatural should not play a predominant role in penal law, because it cannot be scientifically established . . ." It is question, not of the supernatural, but of the natural moral law—that which obliges a man by the fact that he is a human being. This law cannot be established scientifically, for the simple reason that the moral order is beyond the purview of science: we cannot for example, prove by scientific argument that murder is morally wrong.

Finally, the concluding paragraph disposes in cavalier fashion of any objections which the medical profession might raise: "What the medical profession thinks about it is not important, and has nothing to do with justice. We cannot maintain injustice because the medical profession has been educated wrongly in this respect."

This is question-begging with a vengeance, for the argument calmly assumes that the objections of the medical profession are not based on justice, that the pregnant woman has the right to an abortion, and that medical education has been on the wrong track since the time of Hippocrates.

If a great many doctors are opposed to a change in the present abortion law, this is surely because they realise that it is no mere statute based on nothing more than the will of Parliament, but a true law, which vindicates the natural right of the foetus to its life, and that to repeal it would not only involve them in work which they would find repugnant but would imply the toleration of injustice towards the unborn child. Nor would their lack of experience in the ante-natal care of apes lead them to admit for a moment that there is any plausibility in the contention that "if one wants to call the foetus a human being, there is not much ground to refuse to call the ape foetus a human being." However wrongly they may have been educated, they know too much biology for that.

G. H. DUGGAN

CHIEF JUSTICE SITS ON THE PRIVY COUNCIL

We have received a transcript of comments made in the Privy Council on Wednesday, 31 May last, when the Privy Council then presiding comprised Lord Morris of Borth-y-Gest, Viscount Dilhorne, Lord Simon of Glaisdale, Lord Salmon, Sir Edward McTiernan and Sir Richard Wild.

It may strike practitioners as somewhat strange that the Chief Justice should be actively engaged in judicial activity such as this during his period of sabbatical leave, but as we understand the position not only are those of our judiciary who are entitled to sit as members of the Privy Council required to do so in their own time, but the Government further requires that they do so without its financial assistance. Plainly a review of Government policy is called for, as it is obviously in the country's best interests that our Judges actively, regularly and frequently participate in the deliberations of what is, after all, the highest Court in our land.

LORD MORRIS: Mr Wheeler and Mr LeQuesne. the Lord Chancellor, who is unable to be present today, has asked me, both on his behalf and also on behalf of all of us, to express our real sense of pleasure that there should be present at the Board today two distinguished Judges from the Commonwealth. We cordially welcome Sir Edward McTiernan and Sir Richard Wild. Sir Edward McTiernan, as we all know, is a senior member of the High Court of Australia. Sir Richard Wild, as we all know, is Chief Justice of New Zealand.

This Board gains strength and advantage from the circumstance that as a Court of the Commonwealth it is international in character. The three independent countries, Australia, New Zealand and the United Kingdom, from which those of us who today will be sitting are drawn, all administer systems of law which are based upon principles which were evolved in these islands. In the changed and changing conditions of the century new problems of the development and application of those principles constantly arise. If a new problem has received consideration in the Courts of a country within the Commonwealth other Courts in other countries within the Commonwealth derive the greatest help in studying the judgments which have been given.

Certainly I can say in the presence of Sir Edward McTiernan and Sir Richard Wild that the Courts in this country study with gratitude and with respect any judgments relevant to the particular point in issue which has been delivered in Australia or New Zealand, or in the Courts of other countries within the Commonwealth. In this respect I am sure that there is cordiality.

These circumstances give enhanced value to the presence at this Board whenever it proves possible of such eminent Judges as those whom it is our happiness to welcome today.

MR M. M. WHEELER Q.C: My Lords, may I offer a very brief word of welcome on behalf of the Bar, and it is no formality that I do so, although I can but echo what your Lordship has said, if I may say so, so attractively and so rightly.

Those of us who practise in England can be in no doubt as to the value which we get from judgments in countries such as Australia and New Zealand. Only recently, in a field of which I have a little knowledge, that of company law, the House of Lords looked with gratitude at a number of eyebrows that had been raised in various parts of the antipodes at one or two

English decisions of lower order in the past, and the House of Lords gratefully set the record straight, and in doing so it took advantage of all the care and reasoning which emerged from the reports in the countries in question.

I am particularly happy to be speaking just briefly on behalf of the Bar because today it includes as one of my juniors, in one of the cases that your Lordships have to hear, the Crown counsel for Hong Kong who is himself a New Zealander. All I would wish to say is that we are very happy to see you here. We hope you will enjoy your sojourn in the Privy Council and it is our good fortune that you should be sitting.

SIR EDWARD MCTIERNAN: I would wish to very sincerely thank Lord Morris for his very generous and kind words and also learned counsel. Feeling, as I was bound to feel, some trepidation in coming here to sit on this Board, I have been very much encouraged by what your Lordship has said.

SIR RICHARD WILD: I too would like to thank you my Lord and counsel for what has been said. It so happens that in another capacity before my present appointment I had some part in my own country in trying to promote the practice of regular participation by Commonwealth Judges in the work of the Judicial Committee. I myself think that a great opportunity was lost when more was not done about this in the years immediately following the end of the War. Much has been said about the bonds of Commonwealth, but in my view it is the common law and the Parliamentary system of enacting law which, as you have said, my Lord, we all derive from England, rather than the political associations or trade or defence alignments that give real substance and not just sentiment to Commonwealth links.

Be that as it may, I am delighted to be the New Zealand Judge sitting here today, I think for the first time with a brother Judge from Australia and with your Lordships.

VISCOUNT DILHORNE: I would like, if I may, to add one word. I agree that it would have been very much better had the present practice been instituted many years ago but I must say it gives me personally very much pleasure to think that a practice which has benefited the administration of the law so much was instituted during the time that I held office as Lord Chancellor.

LANDSLIP ESSOIN

An hour or so after starting work at its last meeting the Criminal Law Reform Committee received an urgent telegram from one of its members Professor Bernard Brown, raising a plea of "landslip essoin." At first a little nonplussed the Committee gathered its resources and later resolved to allow the plea. Professor Brown was accordingly excused his failure to appear on the summons he had received to attend the meeting.

For those of you less well informed in this branch of the law than you might wish, a plea of essoin covered the excuses allowed in the King's Court for failure to appear and answer to an action or to perform suit to a court-baron by reason of sickness or infirmity or other just cause (*Wharton's Law Lexicon*).

It was an apt plea, for a landlsip near Raetihi had held up the Auckland-Wellington express and Professor Brown had sent his telegram from there. While it seems improbable that the local postmaster was familiar with the plea it is likely that after this unusual communication the principles of essoin will become as well known in Raetihi as was supposedly the doctrine of *volenti non fit injuria* to the inhabitants of Ballygullion.

Laughter in Court—A number of subscribers have inquired as to whether we would accept legal anecdotes for use in the JOURNAL in the odd corners which from time to time present themselves for filling.

The answer is a most emphatic "yes"! In this way perhaps some of the entertaining stories of this and of yesteryear can be preserved in a mode somewhat more reliable than memory.

We would welcome legal anecdotes, quotable quotes, clippings and snippets, which should be posted to us at C.P.O. Box 472, Wellington. When so doing, please indicate whether you wish the anecdote/s to appear with an acknowledgement.

THE DRINKING DRIVER—THE PROBLEM STATED

Alcohol and intoxication have long been considered a major factor in road accident causation. The problem of the intoxicated driver has become increasingly acute until today it has come to be evaluated as the most important single-cause element in road traffic deaths.

Whilst statistics do not disclose the full part played by alcohol, the evidence would appear to indicate that its contribution to road accidents is significantly greater than the reported cases show. Indeed, out of a road toll of 570 persons killed and 17,409 injured in 1967, the reports from which the statistics were compiled indicated alcohol as being a causative factor in only 14 percent of the cases. However, many authorities would place the figure at well over 40 percent, and it is significant to note that Mr W. Sealy Wood, who was the Senior Police Surgeon in the Auckland Metropolitan district for nearly ten years has stated,

> ". . . Various studies have given the rate as anything from 15-50 percent, with a greater involvement of alcohol in the more serious and the fatal accidents: but from my reading and from my personal observations as a public hospital surgeon, I am inclined to think that something like one third of the road traffic accidents admitted to hospital are affected by alcohol . . ." (*a*)

However, the problem does not lie with the obviously intoxicated driver, the inebriate who staggers to his car and dodges in and out of the traffic. His problem is relatively minor and one which is readily brought to light by even the most unsophisticated clinical tests. By focusing attention on this sphere in the past, we have tended to divert valuable research from the realisation that at blood alcohol concentrations below those which are necessary to produce pronounced symptoms of intoxication, there may be sufficient impairment to create a potentially perilous driving situation.

The real problem lies with the moderate drinker, in whom a combination of tiredness, inexperience, impatience, and lack of skill, will react with alcohol to produce a very dangerous level of impairment.

Scientific studies show that impairment may begin with the first intake of alcohol and that considerable loss of skill and driving ability may result at blood alcohol levels as low as 35 milligrammes of alcohol per 100 millilitres of blood. It is these "social" drinkers that constitute the biggest problem, because their incapacity is not revealed until they are faced with the hazardous or emergency situation with which they are unable to contend. This latent impairment is difficult to detect by ordinary clinical examination, owing to the ability of many people to "pull themselves together" upon the initial shock of apprehension. Indeed, unless the examining doctor has seen the suspected driver on a number of previous occasions, he is often unable to decide with any degree of accuracy, whether anomalies in behaviour are merely idiosyncratic or consequent upon alcoholic intoxication.

Therefore, there has long been the need for a more reliable and scientific determinant of the degree of impairment due to the presence of alcohol, than is facilitated by clinical observation and examination. It is at this point necessary to examine the passage of alcohol through the human body, in order to appreciate its subsequent effect on driving skills.

This is the first of a series of articles on The Drinking Driver *by R. R. Ladd.*

The Passage of Alcohol through the Human Body

Alcohol is absorbed into the blood stream from the stomach and intestines. This absorption begins to take place relatively quickly from the time of drinking, and the rate with which it occurs depends upon several factors:

- —concentration and quantity of the alcohol
- —time taken to consume the alcohol
- —presence of any neutralising or diluting foods already in the stomach
- —body weight and state of health
- —habituation to alcohol

The rate of absorption increases during its passage through the small intestine, producing a large increase in the blood concentration. The blood distributes the alcohol all over the body and it is absorbed by the tissues proportionately to their water content, with the result that the alcohol concentration in the brain is rapidly in equilibrium with that present in the blood. Approximately 60 percent of the alcohol imbibed

(*a*) "*The Police Surgeon Looks at Alcohol*". Paper presented to the Second School of Alcohol Studies, conducted at Massey University, by the National Society on Alcoholism of N.Z. Inc. (January 1966).

is absorbed in one hour, approximately 90 percent in two hours, and usually all within three hours. After absorption alcohol is "eliminated" from the blood stream by a process of oxidation and by excretion by means of expired air, perspiration, and urine produced by the kidneys. About 90 percent of all alcohol consumed is oxidised within the body, whilst only 10 percent is eliminated unchanged.

Thus by these natural processes, alcohol is metabolised from the body resulting in a decrease in the blood alcohol concentration by about 15 mg./100 ml. per hour, providing that no more alcohol is ingested. However, should more alcohol be consumed, these processes will not be able to "keep pace" with ingestion and the excess will remain in the blood stream.

Following the blood's passage from the heart it circulates through the arteries, capillaries and veins. After returning to the heart it is passed through the lungs where alcohol is passed into lung air. Thus there are two means of measuring alcohol concentrations—indirectly by analysis of a sample of breath or urine, and directly by chemical testing of blood specimens.

Professor G. C. Drew in his experiment "Effect of Small Doses of Alcohol on a Skill Resembling Driving" states that:

> ". . . From about fifteen minutes after drinking, measurement of the concentration of alcohol in the blood gives a very close approximation to that in the brain. The fact that the bodily fluids do rapidly reach an equilibrium with one another in terms of alcohol content is why it is possible to use measurements of the alcohol concentration in blood or urine or breath, and why such measurements relate closely to changes in behaviour. . . ." (*b*)

The Effect of Alcohol on Driving Skills

In examining the behavioural effects of alcohol in the human body, it is evident that there is no constant relation between blood alcohol concentration and the quantity of alcohol imbibed, or between amount consumed and impairment of driving skill. However, it is apparent that there is a constant relation between blood alcohol concentration and degree of impairment of driving skill, owing to the effect of alcohol on both the brain and the central nervous system.

To understand such effects of alcohol it is necessary to state briefly its action with respect to the brain. Brain cells function by means of the energy produced by the chemical action of sugars and glucose. Alcohol restricts this process by reason of its function as a depressant and not as a stimulant. Thus it has the effect of depressing the "higher" centres of judgment and reason and this "dulling" also extends to nerve tissues. As drinking continues, all parts of the nervous system are affected, resulting in lengthening of reaction times, weakening restraints and inhibitions, and deterioration in perception, muscular co-ordination and ability to assess risk and to react in emergency situations.

As was stated in the Report of the Special Committee of the British Medical Association on "Relation to Alcohol to Road Accidents,"

> ". . . Alcohol, like the general anaesthetics, is a drug which depresses the central nervous system and affects first the brain and higher centres and later the spinal cord. The apparent stimulant effect is explained by the release of the lower centres from the control of the higher centres, so that the higher mental processes are dulled and inhibitions are removed. Alcohol leads to a feeling of well-being, and the individual usually overestimates the mistakes which he makes during their performance. Alcohol makes a person less sensitive to and less aware of sensory stimuli . . ." (*c*)

In an address on "Alcohol and the Driver", delivered to the Christchurch Medico-Legal Society in 1966, W. J. Pryor reported that the impairment in driving skills caused by alcohol:

> ". . . varies between individuals, due to ordinary biological variations, including tolerances arising from habitual use of alcohol and perhaps to driving experience. These variations operate in such a way, not as to make certain individuals immune from its effects but simply to hasten or delay effects of alcohol on these skills. For any individual the degree of impairment varies directly with the level of blood alcohol concentration . . ." (*d*)

It is, therefore, possible to assess ability to drive in terms of concentration of alcohol in the blood stream, and many experimental tests and surveys have been carried out both in New Zealand and overseas in order to establish relative probability of accident corresponding with identifiable levels of blood alcohol concentration.

(*b*) *Effect of Small Doses of Alcohol on a Skill Resembling Driving*, Professor G. C. Drew. Privy Council, Medical Research Council. Memorandum No. 38. (1959).

(*c*) *Relation of Alcohol to Road Accidents*, Report of a Special Committee of the British Medical Association (1960).

(*d*) *Alcohol and the Driver*, address delivered to the Christchurch Medico-Legal Society. W. J. Pryor (1966).

AUTOMATIC CRYSTALLISATION OF A FLOATING CHARGE

Can the crystallisation of a floating charge be self-generated or automatic, or must there be actual intervention by the debenture holder, such as the appointment of a receiver, before crystallisation can occur? This problem, upon which divergent views have been expressed in the past, was the subject of the decision of Speight J. in the recent case of *Re Manurewa Transport Ltd.* (*a*). A discussion of the legal background to this decision will reveal its importance for company and commercial lawyers.

The debenture secured by a floating charge is a security device commonly used for business financing both in New Zealand and the United Kingdom where the trader is a company. The essence of the charge is that it hovers over all the assets of the company owned at the date of execution of the charge or subsequently acquired and does not attach to particular assets until an event occurs which causes the charge to crystallise. "Crystallisation" does not usually take place until the company goes into liquidation or the debenture holders take steps to enforce their security, as by appointing a receiver. Once the charge crystallises it becomes a fixed charge and thenceforth the company may only dispose of its assets subject to the charge.

The floating charge is a particularly useful security device when the company carries a valuable stock-in-trade. Not only does the charge enable the dealer to dispose of his stock in the ordinary course of business, but also the security provided by the charge will include all future stock whether purchased with the proceeds of sale of existing stock or by means of new advances.

Although, in practice, surprisingly few difficulties seem to have arisen with floating charges, the major disadvantage of the charge as a security device, from the lenders' point of view, is that it does not attach to specific assets until crystallisation occurs. The charge may continue to float and not become fixed until the company is in a very precarious financial state and the claim of the debenture holder is endangered. As particular assets are not affected by the charge until it has crystallised, the dealer is free either to sell his assets and fritter away the proceeds or to create further charges against them which will rank in priority to the floating charge. Moreover, judgment creditors who have completed execution before crystallisation will take priority (*b*) and the end result is that the lender's security may well be considerably depleted before he can enforce it against particular assets or assert it against other claimants.

The dealer's power to create further charges ranking in priority to the floating charge is restricted to some extent in New Zealand by the combined effect of s. 102 (12) of the Companies Act 1955 and s. 4 (2) of the Chattels Transfer Act 1924. Section 102 (12) provides that, subject to s. 4 (2) of the Chattels Transfer Act 1924, registration of the charge shall not in itself constitute notice to any person of the contents of the charge. Section 4 (2) provides that all persons are deemed to have notice of a security granted wholly or partly upon chattels by a company and of the contents of such security, *in so far as it relates to chattels*, immediately upon registration in the manner provided by the Companies Act 1955. Therefore, in so far as *chattels* are concerned, if the charge contains a provision prohibiting the creation of subsequent charges ranking in priority to or *pari passu* with it, then all persons are deemed to have notice of this. It was held in *Dempsey* v. *Traders' Finance Corporation* (*c*) that since subsequent charge holders are fixed with notice of such prohibition, their charges are subordinated to the floating charge. The position is otherwise in England where there is no similar provision to s. 4 (2). Registration at the Companies Registry is not sufficient to give constructive notice of the contents of the charge (*d*).

However, such a prohibition will obviously not give protection against the dealer's unsecured creditors who may levy execution against items of stock prior to crystallisation.

(*a*) [1971] N.Z.L.R. 909.

(*b*) See *Davey & Co.* v. *Williamson & Sons Ltd.* [1898] 2 Q.B. 194; *Evans* v. *Rival Granite Quarries Ltd.* [1910] 2 K.B. 979.

(*c*) [1933] N.Z.L.R. 1258.

(*d*) *In re Standard Rotary Machine Co.* (1906) 95 L.T. 829; *Wilson* v. *Kelland* [1910] 2 Ch. 306. It is doubtful whether the practice in England of including a note of the restriction on the creation of subsequent charges in the filed particulars of the charge is effective to give constructive notice of that restriction: see Pennington, *Company Law* (2nd ed. 1967) 349, note (p).

If the problem of crystallisation could be overcome, the floating charge would be a more satisfactory security device. It might be argued that this could lead to undesirable lending monopolies in that debtors would be precluded from obtaining finance from other sources. However, the law already recognises that a chattels mortgage which secures a loan with which goods are purchased takes priority over a floating charge, whether the mortgage is to the vendor (*e*) or to a third party supplying the purchase money (*f*). This is because an after-acquired property clause in a floating charge can only catch the debtor's interest in such property. If chattels are acquired subject to a mortgage in favour of the vendor or a third party, then all the debtor effectively obtains is the equity of redemption in those chattels. It would also appear that a provision in the floating charge restricting the company's power to create later charges, of which all persons are deemed to have notice by virtue of s. 4 (2) of the Chattels Transfer Act 1924, cannot affect this priority. One English commentator has observed that "the reason why the Courts have refused to give effect to the restriction in these cases appears to be that the debenture holders would not benefit if it were applied. If the mortgagee did not have priority over the floating charge, he would undoubtedly refuse to lend the purchase price and the company would not be able to buy the property; the debenture holders would then have no security over the property at all." (*g*) Although there is no New Zealand authority directly in point, it is suggested that such a prohibition can only relate to the creation of specific charges over assets which have already become subject to the floating charge.

It is generally thought that crystallisation can only occur when either winding up commences, or default is made *and* the debenture holders take steps to enforce their security, as by appointing a receiver. However, in principle, is actual intervention by the debenture holders to enforce their security strictly necessary in every case or can the instrument creating the charge provide for *automatic* crystallisation? In other words, can the debenture provide that the charge will attach in certain specified events without any further action by the debenture holders; e.g., if execution or other process is carried out against the company? If this was possible, then the vulnerability of the floating charge to the claims of unsecured creditors could be avoided for, by virtue of s. 4 of the Chattels Transfer Act 1924, creditors would be deemed to have notice of any such provision for automatic crystallisation.

It has in recent years become more common for a lending institution to insert in its debentures a clause providing that the floating charge will crystallise automatically upon the occurence of specified events. The validity of such clauses was upheld in *Re Manurewa Transport Ltd.* (*h*). The essential facts of the case were as follows. The company, Manurewa Transport Ltd., which operated a carrying business, had given a debenture secured by a floating charge to one Labrum as security for a loan. Condition 1 of the debenture contained the usual prohibition against the creation of any additional mortgage or charge without the debenture holder's consent. Condition 13 provided that:

> "The moneys hereby secured shall immediately become due and payable and the charge hereby created shall immediately attach and become affixed:
>
> . . .
>
> (i) If the company mortgages charges or encumbers or attempts to mortgage charge or encumber any of its property or assets contrary to the provisions hereof without the prior written consent of the lender".

Subsequently, the company owed a substantial amount of money to a motor garage firm that used to repair its vehicles. The firm refused to release a truck which had been placed in their hands for repair unless they obtained security for their current account. An instrument by way of security over the truck was duly executed and registered in accordance with the provisions of the Chattels Transfer Act 1924. The consent of the debenture holder to the creation of the instrument was never obtained. The company became insolvent and the question arose as to whether the debenture holder was entitled to priority over the firm in respect of the proceeds of the truck covered by the instrument.

Speight J. ruled in favour of the debenture holder. His first ground for reaching this conclusion was that the firm was deemed to have notice of the prohibition against the creation of further charges by virtue of s. 102 (12) of the Companies Act 1955 and s. 4 (2) of the Chattels Transfer Act 1924. As a result, the instrument was subordinate to the floating charge. The second ground was that the floating charge had crystallised when the company attempted to create a charge in breach of conditions 1 and 13 of the debenture. Before noting the reasoning

(*e*) *Wilson* v. *Kelland* [1910] 2 Ch. 306.
(*f*) *Re Connolly Brothers Ltd.* (No. 2) [1912] 2 Ch. 25.
(*g*) Pennington, *op. cit.* note (d), 349.
(*h*) *Supra*, note (*a*).

adopted by Speight J. in support of the latter ground, it will be useful to examine in some detail the authorities as they existed at the time of his decision.

The first case in point is *Davey & Co. v. Willimason & Sons Ltd.* (*i*) decided in 1898. In this case a trust deed had provided that the floating charge was to become "enforceable", *inter alia*, "if any execution, sequestration, extent or other process of any Court or authority is sued out against the property of the company for any sum whatsoever". Execution had been attempted by a third party and Lord Russell C.J. and Mathew J. held that this crystallised the charge so that the debenture holder had priority over the execution creditor.

Despite the decision in this case, textbook writers have differed as to whether a provision for automatic crystallisation is effective. Professor Gower (*j*) takes the view that "default alone will not suffice to crystallise the charge; the debenture holders must intervene to determine the licence to the company to deal with the property, normally by appointing a receiver or by applying to the Court to do so. But if the company is wound up, no intervention by the debenture holders is necessary." These words imply that it is only when a company is being wound up that a floating charge will automatically crystallise. On the other hand, Pennington (*k*) considers that a floating charge may crystallise "if an event occurs upon which, by the terms of the debenture, the lender's security is to attach specifically to the company's assets. The occurrence of that event effects crystallisation without the lender or the Court appointing a receiver or taking any other steps to realise the security . . .".

Oddly enough, both writers cite *Evans v. Rival Granite Quarries Ltd.* (*l*) as authority for their conflicting views. In this case the defendant company had executed a floating charge over "its undertaking including . . . all its property and assets whatsoever and wheresoever both present and future." Later the plaintiff brought an action to recover the rent of a cottage leased by him to the defendant. Upon hearing of this the debenture holder demanded repayment of the loan, but took no further steps to enforce his security. The plaintiff had judgment entered for the amount of the rent and obtained a garnishee order *nisi* against the defendant's bank account. Spurred back into action the debenture holder gave notice to the bank that he contested the plaintiff's right to attach the bank balance, demanded payment to himself and later opposed an application by the plaintiff to make the garnishee order absolute on the ground that, as holder of the debenture, he had priority over the plaintiff as judgment creditor.

The Court of Appeal held that the mere demand for repayment of the loan or a notice to the company's bankers claiming payment of the bank balance which had been attached by a judgment creditor, were not in the circumstances of the case sufficient to crystallise the charge. The agreement between the parties was that the charge would only crystallise on the appointment of a receiver.

Evans' case cannot be regarded as authority for the proposition that the debenture holder must *always* personally intervene before a floating charge can crystallise. Although some statements are to be found in the judgments of Vaughan Williams and Fletcher Moulton L.JJ. to the effect that the debenture holder must intervene, these observations must be read in light of the fact that the only event specified in the debenture which was to crystallise the charge involved actual intervention, viz., the appointment of a receiver. Also, Fletcher Moulton L.J. apparently approved the statement by Lord Macnaghten in *Illingworth v. Houldsworth* (*m*) that the charge remains floating "until *some event occurs* or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp." (*n*)

The only member of the Court to discuss the problem in any detail was Buckley L.J. He stated a floating charge is:

> "a mortgage presently affecting all the items expressed to be included in it, but not specifically affecting any item till the happening of the event which causes the security to crystallise as regards all the items. This crystallisation may be brought about in various ways. A receiver may be appointed, or the company may go into liquidation and a liquidator be appointed, *or any event may happen which is defined as bringing to an end the licence to the company to carry on business.*" (*o*)

A mere demand for payment could not crystallise the charge in this case, for "such a contention would be inconsistent with the true relation between the parties." (*p*)

(*i*) [1898] 2 Q.B. 194.
(*j*) *Modern Company Law* (3rd ed. 1969) 421.
(*k*) *Op. cit.* note (*d*), 343.
(*l*) [1910] 2 K.B. 979.
(*m*) [1904] A.C. 355, 358.
(*n*) Emphasis added.
(*o*) [1910] 2 K.B. 979, 1000; Emphasis added.
(*p*) *Ibid.*

That the whole question of when a floating charge will crystallise depends on a construction of the relevant provisions of the charge is illustrated by Buckley L.J.'s explanation of *Davey & Co.* v. *Williamson & Sons Ltd.* (*q*):

> "In that case the debentures were a security for money payable at a date which had not arrived, and the trust deed contained an authority to the company to carry on its business until the happening of one of more of certain events upon which the security became enforceable; one of those events was the suing out of an execution against the property of the company, and that event had happened. . . . The floating charge had become a specific security on all the assets of the company; it was specific as between the execution creditor and the debenture holders, and the latter succeeded in their claim to the goods." (*r*)

In other words, the trust deed in *Davey's* case did not provide for the appointment of a receiver upon "the suing out of execution against the property of the company", but rather that *on the occurrence of that event* the floating charge was to crystallise into a specific security.

Therefore *Evans'* case is not authority for the proposition that there must always be actual intervention by the debenture holder before a floating charge can crystallise. Neither is the case of *Governments Stock and Other Securities Investment Co. Ltd.* v. *Manila Railway Ltd.* (*s*) which has occasionally been cited in support of the same proposition. The decision in this case again turned upon a construction of the relevant provision of the debenture alleged to automatically crystallise the charge. The debenture provided that "the company shall be at liberty in the course and for the purpose of its business to . . . deal with any part of its property until default shall be made in payment of any interest hereby secured for the period of three months." It was held, upon a construction of this provision, that mere default without actual intervention by the debenture holders did not convert the floating charge into a fixed security. The effect of this provision was "to secure that the company for three months after default in any case should have the power to go on with the business, unless, of course, there was a receiver appointed in the meantime. The deed gives the company that power of going on, but it does not say that at the expiration of three months after default they shall not go on with the business." (*t*)

Nothing in this case would prevent a *clearly* expressed provision from effecting automatic crystallisation. What perhaps distinguishes it from *Davey's* case is that, in the latter, the debenture added that, upon the specified event, "the security became enforceable".

In view of the foregoing discussion it would appear that the cases support the view of Pennington not that of Gower. It is true that mere default for a certain period, *by itself*, will not suffice to crystallise a floating charge. However, it will suffice where the debenture deed clearly expresses that *upon that very event* the charge is to attach specifically to the company's assets.

The writer does not overlook the opinions of other learned writers in this field. Professors Sher and Allan have suggested that "the best view is that the occurrence of the crystallising event calls for a decision by debenture holders whether their interest requires that they should take some steps to protect their security or that they should allow the company to carry on business in the normal way." (*u*) More recently, Professor Allan has taken the view that "something more than a provision for automatic crystallisation . . . is required. The mortgagee must take positive action to cancel publicly the company's licence to deal, and unless this is done the charge must still float." (*v*)

No authorities for these propositions were cited and it is suggested that the only cases in point, discussed above, appear to lead to the contrary conclusion. Moreover, these views seem to be based on the now discredited *licence to deal* theory as to the nature of the floating charge. The proponents of this theory, which is based on a number of early cases (*w*), state that the essence of the floating charge is that it constitutes a present continuing charge on the property comprised in it and explains the company's power to dispose of this property in the ordinary course of business, despite the charge, by implying that the lender gives it a *licence* to do so. If this was the correct theory as to the nature of the floating charge, then there might be much to be said for the view that there must be public notification of the revocation of the licence before the lender can assert priority over subsequent claimants (*x*).

(*q*) *Supra*, note (*i*).
(*r*) [1910] 2 K.B. 1000, 1001.
(*s*) [1897] A.C. 81.
(*t*) *Ibid.*, at p. 88, per Lord Shand.
(*u*) "Financing Dealers' Stock-In-Trade" (1965) 1 N.Z.U.L.R. 371, 418.
(*v*) "Stock-In-Trade Financing" (1967) 2 U. Tas. L.R. 382, 406.
(*w*) *Re Florence Land and Public Works Co., Ex parte Moore* (1878) 10 Ch. D. 530, 541; *Davey & Co.* v. *Williamson & Sons Ltd. supra*, note (*i*), at p. 200.

However, the *licence to deal* theory suffers from a number of objections, and the preponderance of modern judicial opinion favours the *mortgage of future assets* theory, which explains the company's power to dispose of its property by the fact that the charge does not attach specifically to that property until crystallisation. If the essence of the floating charge is that it constitutes a present charge subject only to the company's power to deal with the property, then no execution carried out by judgment creditors against the company's assets prior to crystallisation would be valid. Such execution would clearly not be a dealing with the property in the ordinary course of business Accordingly the charge would remain fixed in so far as the attached goods were concerned. However, the law is clear that judgment creditors who complete execution prior to crystallisation obtain a good title against the debenture holder (*y*).

The *mortgage of future assets* theory is expressed in the following often quoted passage from the judgment of Buckley L.J. in *Evans* v. *Rival Granite Quarries Ltd*:

> "A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but it is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security". (*z*)

It clearly permits the company and the lender to make their own bargain as to the events which shall bring about crystallisation.

The only case which casts doubt on the mortgage of future assets theory is *Re Crompton & Co. Ltd.* (*a*) where it was held that the floating charge crystallised when the company was wound up, despite a provision in the debenture deed that the security was not to crystallise if the winding up was merely for the purpose of reconstruction. The reason given was that since the licence to deal was given on the ground that the company would carry on business, it must terminate once winding up, for any reason, commenced. It is submitted that this case was wrongly decided. The *mortgage of future assets* theory, which had been preferred by the House of Lords in *Illingworth* v. *Houldsworth* (*b*) and Buckley L.J. in *Evans*' case to the licence to deal theory, allows the parties to make their own bargain as to what events shall bring about crystallisation.

The foregoing discussion also leads one to doubt the statement by Sher and Allan that "the notion of automatic crystallisation may be easier to sustain under the *licence to deal* theory than under the *mortgage of future assets* theory." (*c*) Although they were correct in relying upon *Davey & Co.* v. *Williamson & Sons Ltd.* as authority for this proposition, they overlooked that Buckley L.J. in *Evans* v. *Rival Granite Quarries Ltd.* who explained and approved that decision, did so only on the basis of the *mortgage of future assets* theory.

Speight J. in delivering his judgment in *Re Manurewa Transport Ltd.* in favour of the notion of automatic crystallisation relied upon the decisions in *Davey & Co.* v. *Williamson & Sons Ltd.* and *Evans* v. *Rival Granite Quarries Ltd.* His Honour held that "crystallisation may, in certain circumstances, be self-generated or at least debtor generated. . . ." (*d*) He further observed that "a floating charge is not a word of art, it is a description for a type of security contained in a document which may provide a variety of circumstances whereupon crystallisation takes place". (*e*)

Although it is suggested that there was nothing in the authorities which should have led to a contrary conclusion, it remains to be seen whether the views of Speight J. will be upheld if the same point arises for decision at some future date in the Court of Appeal. Although, from the lender's point of view, recognition of the concept of automatic crystallisation would make the floating charge a more satisfactory security device, it does lead to some difficulties.

It must be remembered that once the floating charge crystallises it attaches to the assets owned by the company at the time and becomes a fixed legal charge. As a result, subsequent transactions relating to those assets would be invalid *vis-a-vis* the debenture holder. If a float-

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(*x*) However, even this argument could be doubted since *Davey & Co.* v. *Williamson & Sons Ltd. supra* was decided under the licence to deal theory of the floating charge.

(*y*) See cases cited above in note (*b*).

(*z*) [1910] 2 K.B. 979, 999; see also *Illingworth* v. *Houldsworth* [1904] A.C. 355 (H.L.) where Lord Macnaghten explained at p. 358 that "a floating charge . . . is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect, until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp."

(*a*) [1914] 1 Ch. 954.

(*b*) ante, note (*z*).

(*c*) *Op. cit.*, note (*u*) 417.

(*d*) [1971] N.Z.L.R. 909, 916.

(*e*) *Ibid.*, 917.

ing charge may crystallise by an act of the debtor, such as the creation of a mortgage or charge, or even by an act of a third party, such as the levying of execution pursuant to a judgment, the fact that the charge has crystallised will usually remain unknown to persons dealing with the company and they may be deprived of the goods they have purchased.

Consider the following situation. A company dealing in household appliances has executed a floating charge over all its assets in favour of a bank. Being short of ready cash to pay its bills, the company grants a bill of sale over its stock of washing machines situated in its warehouse. Such an event under the terms of the debenture is to crystallise the charge. The following day an unsuspecting customer purchases a refrigerator for cash. Since the charge has crystallised the purchaser cannot obtain a good title and the debenture holder could, if he so wished, repossess the refrigerator. The purchaser would be an ordinary unsecured creditor who, if the company was insolvent, would have little chance of recovering his money. This would be a most unsatisfactory result indeed.

Another difficulty may also be briefly mentioned. What will be the position if a debenture holder, upon becoming aware of a breach which under the debenture is to crystallise the charge, tacitly waives the breach and permits the company to continue carrying on its business? The breach may have been a mere failure to pay interest on the exact day specified in the debenture. Will the debenture holder be entitled, some time later when the company is insolvent, to set up this event as having crystallised the charge and thus enabling his claim to prevail over those of intervening third parties?

These and other connected problems which might arise in future cases render the present law unsatisfactory. However, this is not to suggest that recognition of the concept of automatic crystallisation, which in a well drafted debenture will in effect give the holder a *fixed* charge over after-acquired assets, is undesirable. It is the ill-defined and occasionally inconvenient consequences which may flow therefrom which causes difficulties. *Bona fide* commercial transactions may be upset. What is required is a legislative provision which accurately defines the rights of third parties, most importantly, purchasers in the ordinary course of business.

D. W. MCLAUCHLAN.

How the lady from Woollongong won the Great Australian Bake-Off—In the course of one day's tastings we were given fillet of snapper (a fish) with pecans; veal with cashews; pork with peanuts; and three kinds of chicken each with almonds.

Then, when all the forms were filled in and the co-ordinator and his secretary were summing up the points, tangy chicken with marmalade, port and Worcester sauce looked a three-to-one winner. Tangy chicken did not win.

Looking carefully at the entry, the administrators of the Bake-Off decided that the author of this, our highest-rated recipe, had given insufficient details of her career to allay that nagging doubt that she might have two heads.

Smoothly did they move on to our second recommendation, chicken and avocado pie. "Oho," said one of the White Wings staff, "surely this is the recipe that won in 1965."

The next in our batting order was discarded because, from her address, there was a distinct chance that she was the proprietress of a Chinese brothel to which they were loath to give money, let alone editorial publicity.

The co-ordinator flipped through the entries and awarded the main dish prize to a lady who worked as second cook in a presbytery for Catholic clergy. The fact that her recipe, lemon chicken with country chutney, did not have a lot going for it was as nothing compared to the correctness of the image.

When telephoned with the news of her success, this Saint Therese-like figure from Woollongong pronounced herself surprised to have been chosen. A sentiment echoed by us judges who remembered the dish principally because the country chutney, which should have been made of strips of green pepper and cucumber in yoghourt, flavoured with paprika, had been assembled with Cayenne pepper instead—CLEMENT FREUD.

Breathalyser?—There were fewer charges than cautions from Sergeant Hodgins, but he upheld the law. Perhaps he looked a little sideways at times when 6 o'clock closing was the law and after-hours trading was not regarded as a crime. His duty took him to an Addington hotel long after 6 p.m. one night, but the bar was empty. He was interested to see a racehorse stabled in the yard behind the hotel—most Addington hotels in those days had stables instead of car-parks—and commented: "Well, he should win his next race. I see he's got 12 legs." *Christchurch Press.*

CORRESPONDENCE

Sir,

O'Neill v. Mathieson

I have just read the leading article by Mr J. S. O'Neill written in reply to Mr D. L. Mathieson's article urging reform of the law relating to homosexuality. Mr O'Neill's sincerity is as evident as was Mr Mathieson's, but in my respectful submission the former does not display Mr Mathieson's clarity of thought. Considering Mr O'Neill's arguments, the following points occur to me:

1. Mr O'Neill says "the onus should be on Mr Mathieson and his supporters to prove this basic premise", (i.e. that homosexual acts cause no harm to anyone else). I believe that Mr O'Neill has got hold of the wrong end of the stick he is beating Mr Mathieson with. Surely the onus is on Mr O'Neill to justify the restriction on private behaviour which he seeks to continue? It is not in my submission the repeal of the law which lacks justification but the law itself.

2. Mr O'Neill is not in any doubt that if the law is repealed "there will be an increase in homosexual behaviour and there will be very strong forces at work to make homosexuality respectable". This is precisely the type of unsupported assertion of which he accuses Mr Mathieson. The present law does not prevent homosexual behaviour and there is no reason to believe that its repeal will increase such behaviour. Whether homosexuality has genetic or environmental causes, the fact remains that it is not immoral because it is not freely willed. People do not choose to become homosexual in the way they choose to become lawyers or tree surgeons. All the law does is make it illegal for them to exist in a condition which they cannot help. This would be just too bad if it really were necessary for Society to proscribe homosexual behaviour. But it is not. (That is my unsupported assertion. I include it so that Mr O'Neill can accuse me of it).

3. Mr O'Neill accuses Mr Mathieson of criticising "the establishment". I don't recall Mr Mathieson doing this and I don't see how the "establishment" get into this particular act. Nor do I assume, as Mr O'Neill apparently does, that the "establishment" are lined up solidly (with their backs to the wall presumably) behind the present law.

4. Mr O'Neill cites the behaviour of motorists during the Traffic Department go-slow to disprove Mr Mathieson's assertion that an enforced morality is an empty morality. I should have thought that this example was a precise proof of Mr Mathieson's point, but I am probably wrong and it is, after all, Mr O'Neill's article.

5. Mr O'Neill says, "Repeal of the law would result in a change of attitude towards homosexual acts which would be detrimental to the interests of society". I suppose we ought to be grateful that somebody knows what the interests of Society are. What worries me is that I too am a member of society and I disagree with Mr O'Neill. Presumably the fact that my definition of society's interests is not the same as Mr O'Neill's means that mine is invalid.

6. Mr O'Neill asserts that it requires little imagination to foresee the flood of undesirable immigrants that a change in the law will bring. Is he having us on? Or does he really believe that down the gangways of ships and the steps of aircraft will come mincing hordes of poofs, perverts and pansies, drawn from every quarter of the globe to practise their unspeakable acts in our green and lovely land? We are not at the moment a lotus-land for lesbians; why therefore should repeal of the present law make us a homosexual sweet home?

7. Mr O'Neill says "It is all very well for persons who *believe* (my italics) themselves to be liberally inclined to campaign for the abolition of restrictions on private behaviour." This is, quite simply, insulting. The implication is that Mr Mathieson and those who support his case only believe themselves to be liberally minded, and in fact are not. Mr O'Neill is not fooled for a moment. The "all very well" bit sounds like a headmaster addressing a scruffy third form and is a rebuke implying an intellectual superiority which Mr O'Neill does not display in his article.

Yours faithfully,

A. K. GRANT.
Christchurch.

Apartheid discarded—For all the recent concessions, South African sport will remain vulnerable to attack until the principle of multiracial sport is applied right down to club level or, on the other front, until the entire apartheid system is discarded." (Editorial comment in the *Johannesburg Star*.)