New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes"
VOL. XXXVII TUESDAY, 5 DECEMBER 1961 No. 22

# PRIVILEGE IN DEFAMATION ACTIONS

HOWEVER regrettable are the circumstances which gave rise to the recent action for libel, *Thompson* v. *Turbott*, and its possible repercussions on the administration of an important State Department, some good has arisen from it. In the course of the trial a number of important questions of law arose and these were disposed of in a lengthy and lucid judgment by Leicester J.

The facts are sufficiently well known to need no recapitulation and for the purposes of this article it is sufficient to recall that, at a meeting at which the evidence of witnesses was being briefed in preparation for the hearing before the Public Service Appeal Board of an appeal by the plaintiff against an appointment which had been made in the Health Department, the defendant admittedly told those present of a statement alleged to have been made to him by a third party, a Professor Mackintosh, regarding certain qualities of the plaintiff. A defence that the words then used were not capable of a defamatory meaning was not pursued at the trial, and the jury found that, when the words complained of were used by the defendant, he did not honestly believe that Professor Mackintosh used the words in question or words to the like effect. At the meeting in question there were present counsel for the Public Service Commission, the defendant as permanent head of the Department affected by the appeal, his deputy, the administrative head of the Department, and a member of the Public Service Commission.

It should also be mentioned that in the early stages of the trial counsel for the plaintiff conceded that the hearing before the Appeal Board was an occasion of absolute privilege, but on the argument of questions of law after verdict he acknowledged that he may well have been mistaken in making this concession, and asked leave to withdraw it.

From these facts his Honour stated the questions requiring his consideration as follows:

(a) Whether the hearing before the Board of Appeal was on an occasion of absolute privilege;

(b) Whether, in view of the concession made, it is now open to the plaintiff to contend that the occasion was one other than of absolute privilege;

(c) Whether, in the circumstances of the case, the defendant is entitled to rely upon absolute privilege in respect of what was said by him at the Briefing Meeting; and

(d) Whether, if the defendant is otherwise entitled to rely upon absolute privilege, his right is denied or destroyed by the presence of persons other than solicitor or counsel at the Briefing Meeting.

In dealing with question (a) his Honour referred to passages from *24 Halsbury's Laws of England*, 3rd ed., 50 and *Gatley on Libel and Slander*, 5th ed., 178, in support of the proposition that the doctrine of absolute privilege does not extend to tribunals that merely discharge administrative functions and has been limited to Courts of Justice and tribunals acting in a manner similar to that in which such Courts act. He went on to refer to certain other authorities and quoted the following passage from the judgment of Lord Atkin in *O'Connor* v. *Waldron* [1935] A.C. 76; [1934] All E.R. Rep. 281:

> The question therefore in every case is whether the tribunal in question has similar attributes to a Court of Justice or acts in a manner similar to that in which such Courts act? This is of necessity a *differentia* which is not capable of very precise limitation. It is clear that the functions of some tribunals bring them near the line on one side or the other; and the final decision must be content with determining on which side of the line the tribunal stands (*ibid.*, 81; 283).

His Honour then set out the statutory provisions setting up the Appeal Board, declaring its composition and setting forth its duties and powers, and pointed out that although the endowment of a body with the "trappings of a Court" tends to support the view that it has been invested with judicial power, this is not necessarily conclusive. Reference was made to the negative propositions laid down by Lord Sankey L.C. in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* [1931] A.C. 275, 297; [1930] All E.R. Rep. 671, 680, but Leicester J. referred to the fact that the "trappings" test was applied in *Jackson (F. E.) & Co.* v. *Price Tribunal (No. 2)* [1950] N.Z.L.R. 433, 448 and in *N.Z. Licensed Victuallers' Association of Employers* v. *Price Tribunal* [1957] N.Z.L.R. 167, 203, 207. He then continued:

> In my view the relevant legislative provisions and a consideration of the conditions under which the jurisdiction of the Board of Appeal is to be exercised demonstrate the intention that the Board is to act judicially in dealing with Public Service appeals brought under s. 17 (1) (b). The closer the resemblance of a statutory body to a Court *stricto sensu*, the more likely that such body will be held to act in a judicial capacity—S. A. de Smith: *Judicial Review of Administrative Action*, p. 36.

After a consideration of a number of further authorities he held that the hearing before the Appeal Board was an occasion of absolute privilege.

The decision on this point is one of the utmost importance. Not only does it define the status of the Public Service Board of Appeal but it may also be

applicable to, or at least will assist in defining the status of similar Boards set up under the Post Office Act, the Government Railways Act, the Police Act and possibly other appellate authorities under other Statutes which affect local-body employees, e.g. s. 45 of the Harbours Act 1950. The review of authorities and statements of principle will also be of great value when the status of other quasi-judicial bodies is under review.

His Honour then went on to reinforce his view by reference to the concession of counsel for the plaintiff that the hearing before the Appeal Board was an occasion of absolute privilege, and expressed the opinion that it would not be just to permit the plaintiff to withdraw that concession. In dealing with that question he drew on certain authorities concerning the raising of new points in an Appellate Court and the extent to which the parties to an action are bound by their pleadings.

With respect, it is suggested that on this point his Honour is not on the soundest of grounds. He affirmed that questions of privilege are matters of law for the trial Judge, and it is submitted that counsel conducting an action cannot bind the Court by a concession on a point of law. If he is of opinion that the law on any point is against his case, he may make a submission to that effect but, like any other submission, it may later be withdrawn.

This is a point on which authority is difficult to find. However, in *Attorney-General for Ceylon* v. *A. D. Silva* [1953] A.C. 461, 481, the Judicial Committee dealt with an alleged admission on a point of law in the following terms :

> The judgment of the Supreme Court proceeded largely on the basis of an admission said to have been made by the Solicitor-General to the effect that s. 17 of the Customs Ordinance applies to the Crown. Before the Board there was some discussion as to the extent of the Solicitor-General's admission. Assuming, however, that the Supreme Court rightly understood the admission, their Lordships cannot be bound by an admission which, in their opinion, would involve an erroneous construction of the Ordinance.

It is therefore submitted that counsel for the plaintiff was entitled to withdraw his concession without the leave of the Court. The result would apparently have been the same, since his Honour found against him on the point in question as a pure matter of law and without resort to the concession.

Admittedly the attempted withdrawal of the concession placed his Honour in a difficult position. The trial had proceeded on the basis that the concession had been made and, as the judgment points out, had it not been made a good deal more evidence might have been led by the defendant. If the view expressed above as to the plaintiff's right to withdraw the concession is correct, then presumably on its being withdrawn the defendant would have been entitled to an adjournment and the right to call such additional evidence, on the ground that he was taken by surprise.

Question (c) next arose for consideration. It was quite clear that once the proceedings before the Appeal Board were held to be an occasion of absolute privilege, no action for slander would lie against the defendant for anything said in the course of the proceedings, whether he was actuated by malice or not. His Honour had no difficulty in deciding that the same degree of privilege extended to the occasion when the defendant's evidence to be given before the Board of Appeal was being briefed, basing his decision on *Watson* v. *McEwan* [1905] A.C. 480, 486. He added :

> It is to be noted that the principle laid down by Lord Halsbury (in *Watson's* case) is not subject to qualification if in fact the witness whose evidence has been taken is not called to give such evidence before the Court.

However, the plaintiff contended that the publication at the briefing meeting was wider than that in any of the decided cases because of the additional persons who were present. His Honour dealt with this submission in the following terms :

> To my mind there would be a grave risk of injustice in allowing a principle that has been applied for the past 50 years to be whittled away by such refinements as Mr O'Flynn seeks to impose upon it. Should a solicitor elect to brief the evidence of a number of witnesses or prospective witnesses together, is the privilege to be lost because of some defamatory remark during the briefing that is not anticipated by the solicitor and who in consequence has not sent others out of the room in order to preserve the privilege of the witness who makes the remark ? Is the privilege lost if the proof of the witness is taken in the presence of a stenographer or in that of a sickroom attendant or of a solicitor's clerk ? It is the occasion which gives rise to the privilege. The public interest involved in the incentive to the witness to come forward and speak freely is the overwhelming consideration and the manner in which the briefing takes place is a subsidiary one. So long as the defamatory remark is relevant to the discussion at the briefing between solicitor and witness, it should not be held to fall outside the orbit of protection.

He then discussed the capacities in which the various persons present other than counsel and the defendant attended the meeting, and held that the privilege was not lost on account of their presence.

Counsel for the plaintiff laid stress upon an expression of Lord Halsbury in *Watson's* case (*supra*) to the effect that if the witness whose evidence is being briefed does not give evidence in the Court, the record of what he has said to the solicitor " slumbers . . . in the office of the solicitor, and nobody hears or cares about it ". In relation to this submission, Leicester J. said :

> While the concept of slumbering in a solicitor's office is neither startling nor unthinkable, the observation of Lord Halsbury in his judgment is simply *obiter* and not intended by him to be promoted to the status of a principle. The picture drawn by counsel for the plaintiff of the defamatory words " slumbering " in the mind of Mr Winkel but " festering " in the minds of Messrs Rodda, Hunn and Lewis, is more clinical than real.

His Honour concluded this portion of the judgment by summing up his decision in the following terms :

> If the occasion is one where the evidence of a witness is being briefed by a solicitor and on the face of it one of absolute privilege, then in my view *a fortiori* the witness does not lose such privilege when there are present, in addition to the solicitor, individuals who are parties to the proposed litigation or have a legitimate interest in such litigation or the preliminary steps thereto.

In the result judgment was entered for the defendant.

The judgment is notable not only for the points decided which were not covered by direct authority, but also for the full review of the authorities touching on such points. It is predicted that it will long be of the greatest value to practitioners not only in the field of defamation but also in regard to the status of quasi-judicial bodies in relation to the availability of writs of *certiorari* and *mandamus*. It will of course appear in the *New Zealand Law Reports* in due course.

EDITOR

# SUMMARY OF RECENT LAW

## ADMINISTRATIVE LAW

Judicial Review of Administrative Authorities in Canada. (*1961*) *39 Canadian Bar Review* 351.

## ARBITRATION

Awards. (*1961*) *111 L.J.* 591.

## CRIMINAL LAW

*Automatism—Alternative defences of automatism and insanity—Evidence—No defence of automatism when only cause alleged for unconscious state is disease of the mind within the McNaghten rules—Evidence forming a proper foundation for automatism necessary before issue can be left to jury—Burden of proof—No other pathological cause than psychomotor epilepsy put forward—Psychomotor epilepsy a disease of the mind—Issue of automatism not left to jury.* Where the only cause alleged for an unconscious or involuntary act is defect of reason from disease of the mind within the McNaghten rules and the jury reject a defence of insanity there is no room for the alternative defence of automatism; the fact, however, that a plea of insanity is rejected by the jury does not of itself always prevent the accused from raising the alternative defence of automatism. If such a defence is to be left to the jury, a proper foundation must be laid for it by evidence emanating from the defence or prosecution from which the jury can reasonably infer that the accused acted in a state of automatism, such evidence not being evidence attributing the automatism solely to a disease of the mind. Whether there is such evidence proper to be left to the jury, is a question of law for the Judge. Once a proper foundation for a defence of automatism is laid by evidence the proper direction to the jury is that, if the evidence leaves them in a state of real doubt whether the accused did or did not act in a state of automatism, they should acquit. (Dicta of Devlin J., in *Hill* v. *Baxter* [1958] 1 All E.R. 196, followed; Dicta of North J., in *R.* v. *Cottle* [1958] N.Z.L.R. 1029, considered and explained; *Mancini* v. *Director of Public Prosecutions* [1941] 3 All E.R. 272 and *Woolmington* v. *Director of Public Prosecutions* [1935] All E.R. Rep. 1, applied.) *Bratty* v. *Attorney-General for Northern Ireland.* (House of Lords. Viscount Kilmuir L.C. Lord Tucker. Lord Denning. Lord Morris of Borth-y-Gest and Lord Hodson. 1961. 4, 5, 6 September; 3 October.) [1961] 3 All E.R. 523.

*Evidence—Accused acting in concert with others—Evidence of wife of accomplice admitted to corroborate accomplice—Evidence of acts and statements of persons in furtherance of criminal purpose led in proof of substantive charge—False denials as corroborative evidence against accused.* The rule that upon a charge of conspiracy evidence may be adduced of what was done and said, not in the presence of the accused, by another party to the combination in furtherance of the conspiracy, is not a special rule limited to charges of conspiracy. Where the case for the prosecution is that in the commission of a crime a number of people acted in concert and there is evidence of such concert, evidence of acts and words of one of the parties in furtherance of the common purpose may be given against the accused though he may not have been present when such acts were done or words spoken. As a matter of principle, the evidence of the wife of an accomplice may afford corroboration of the evidence of the accomplice. (*R.* v. *Neal and Taylor* (1835) 7 C. & P. 168; 173 E.R. 74; *Attorney-General* v. *Durnan* [1934] Ir. R. 308, disapproved.) *Tripodi* v. *R.* (High Court of Australia. Dixon C.J. Fullagar and Windeyer JJ. 16, 17 March. 1961—Melbourne. 5 May. 1961—Sydney.) [1961] A.L.R. 780.

## DIVORCE AND MATRIMONIAL CAUSES

*Alimony and Maintenance—Order for permanent maintenance—Husband released from liability by agreement on payment of lump sum—Whether ground for cancellation of Order.* A marriage between the appellant and the respondent was dissolved by decree absolute and an order for permanent maintenance was made in favour of the respondent. Subsequently the parties entered into an agreement whereby the respondent agreed to accept £700 in full satisfaction of all claims for her future maintenance and support. Some years later the respondent registered the order for permanent maintenance in the Magistrates' Court in New Zealand and later in New South Wales where she was resident. The appellant applied to the Magistrates' Court for cancellation of the original order on the ground that the respondent had surrendered her right to maintenance but it was there held that the execution of the agreement and the acceptance of a lump sum was not in itself a ground for cancellation of the order. The appellant appealed to the Supreme Court. *Held*, That if the agreement were shown to have been entered into deliberately by the respondent, under no undue influence, and for adequate consideration, the agreement and the payment under it could in themselves constitute a ground for cancellation of the maintenance order. (*Mann* v. *Mann* [1936] 1 All E.R. 952, referred to; *Watkins* v. *Watkins* [1896] P. 222, distinguished.) *Gilman* v. *Gilman.* (S.C. Auckland. 1961. 25 July; 30 August. Turner J.)

## EVIDENCE

*Admissibility—Stock firm's ledger account and carbon copies of invoices—Not proved by witness having personal knowledge of transactions recorded—Hearsay—Inadmissible on prosecution for making false returns of income.* On the hearing of charges of wilfully making false returns of income brought against a farmer, the production of the taxpayer's ledger account with a stock firm and of carbon copies of invoices recording transactions alleged to have taken place on his account were produced by officers of the stock firm. Such officers gave evidence of the firm's practice of posting to the taxpayer the originals of the invoices and copies of the ledger account, and that the ledger account correctly recorded the various transactions of the appellant. They conceded that they had no personal knowledge of the transactions recorded and had not personally prepared the invoices or made the entries in the ledger sheets. They relied on their office system and audited records to produce true and correct accounts of the transactions recorded. *Held*, by the Court of Appeal (Gresson P., North and Cleary JJ.), that the evidence so tendered was hearsay and inadmissible. Appeal from the judgment of McGregor J. [1961] N.Z.L.R. 46 (*sub. nom. Buckley* v. *Macken*) allowed. *Buckley* v. *Commissioner of Inland Revenue.* (C.A. Wellington. 1961. 6, 7 July; 25 August. Gresson P. North J. Cleary J.)

## HUSBAND AND WIFE

*Order for permanent maintenance—Husband released from liability by agreement on payment of lump sum—Whether ground for cancellation of order.* *See* DIVORCE AND MATRIMONIAL CAUSES (*supra*).

## LAW REFORM

*Contribution by tortfeasor—Action settled as between plaintiff and defendant—Defendant's right to contribution not lost—Mode of trial of contribution issue—Law Reform Act 1936, s. 17 (1) (c).* The word "liable" as used in s. 17 (1) (c) of the Law Reform Act 1936 means "responsible in law"; and a defendant who has settled a claim before judgment has still a right of action for contribution against any other person who is liable in repsect of the same damage. In such event the person claiming contribution will have to prove that he was a tortfeasor and that he was liable at the time he paid. Any defence which would have been open to him will also be open to the person from whom he claims contribution. (*Littlewood* v. *Geo. Wimpey and Co. Ltd.* [1953] 2 Q.B. 501; [1953] 2 All E.R. 915, followed.) Where a third party has been joined in an action at the instance of the defendant the settlement of the action as between the plaintiff and the defendant does not bring the action to an end. Although the issues arising between the plaintiff and the defendant have been decided otherwise than by trial, if there is still an issue between the defendant and the third party the Court is empowered to make such further order under R. 99J as the nature of the case may require. The issue of the liability of the third party for contribution may therefore be tried without a new action being brought. *Baylis* v. *Waugh and Another.* (S.C. Palmerston North. 1961. 14 July; 5 September. McGregor J.)

## MUNICIPAL CORPORATION

*Meeting—Vacation of mayoral chair by mayor and an alderman chosen to preside—Vote by mayor—Mayor's vote counted, making equality of votes—Presiding alderman gave casting vote for candidates for whom mayor had voted and declared them duly elected—Whether mayor was entitled to be present and vote at meeting of council over which he did not preside—Local Government Act 1933 (23 & 24 Geo. 5 c. 51), Sch. 3, Part 2, para. 3 (Municipal Corporations Act 1954, ss. 70, 73 (2).)* A council of a borough consisted of a mayor, 15 aldermen and 45 elected councillors. An annual meeting of the council was held for the purposes, *inter alia*, of electing a mayor and seven aldermen. An outgoing alderman was elected to be mayor and he immediately submitted a declaration of acceptance of office and took the chair and presided over the meeting. The next item on the agenda was the election of seven aldermen and the mayor announced that being a candidate for election as alderman he was precluded from presiding, whereupon Alderman M. was elected to preside and the mayor took a seat beside the other alderman. The council then proceeded to elect seven aldermen from 14 candidates divided into two sets of seven. Voting papers were signed by the 45 councillors and the mayor and delivered to Alderman M. who ascertained and stated that 23 votes had been given to each of the 14 candidates. The mayor signed and delivered a voting paper for the candidates (who included himself and six others) who, apart from the mayor's vote, had only 22 votes. On the footing that there was an equality of votes Alderman M. gave a casting vote (under s. 22 (5) of the Local Government Act 1933) in favour of the candidates for whom the mayor had voted and declared them to be duly elected. If the mayor had not voted, the other set of seven candidates would have had a majority of votes. *Held*, If a mayor were present at a meeting of a borough council, he must preside, for para. 3 (1) of Sch. 3 to the Local Government Act 1933, which so provided, was mandatory, and, moreover, the statutory casting vote of the person presiding at the meeting only arose on the assumption that the mayor was not present at the meeting; therefore, the seven aldermen declared elected had not been duly elected and the other seven candidates should have been declared to have been elected. Per Glyn-Jones J.: a mayor's office is one and indivisible; at a meeting of councillors the mayor, seated in the mayoral chair, can exercise all his one and indivisible functions, but, if not in the mayoral chair, and thus not performing his function as mayor of presiding at the meeting, he has lost the right to exercise any other of his functions, so far as taking part at that meeting is concerned. *Re Wolverhampton Borough Council's Aldermanic Election.* (Queen's Bench Division. Glyn-Jones and Thesiger JJ. 27, 28 July. 1961. [1961] 3 All E.R. 446.)

*Roads and Streets—Land taken for benefit of private person and not of corporation*—Ultra vires—*Taking of land for widening or extension of proposed street—Not authorised by statute—Municipal Corporations Act 1954, s. 191.* It is *ultra vires* a local authority to take land under the Public Works Act from a private person to provide another private person with sufficient road access to enable him to subdivide his land if such taking is not done in good faith for the purposes of the Municipal Corporations Act 1954 but instead of promoting the public benefit (except in an indirect manner) is promoting the interest of the subdividing owner. (*J. L. Denman and Co. Ltd.* v. *Westminster Corporation* [1906] 1 Ch. 464, followed; *Rolls* v. *School Board for London* (1884) 27 Ch. D. 639 and *Parry* v. *Metropolitan Borough of Hammersmith* (1904) 92 L.T. 161, distinguished.) The power of taking land conferred on a municipal corporation by s. 191 of the Municipal Corporations Act 1954 does not extend to taking land for the purpose of widening or extending a proposed street. *Bartrum* v. *Manurewa Borough.* (S.C. Auckland. 1961. 9, 10 August. Hardie Boys J.)

## NUISANCE

*Irrigation area—Using irrigation waters supplied by public authority for irrigation purposes—Overflow of surplus rain and/or irrigation waters after rain—Non-adoption of accepted practice of disposal of surplus waters—Common or ordinary use of land—Convenience—Reasonableness—"Live and let live"—Whether nuisance—Question of fact—Form of injunction. Bayliss* v. *T. J. Lea*: *Bayliss* v. *H. C. Lea.* (Supreme Court of New South Wales. Owen, Ferguson and Manning JJ. 1961. 1, 5 May; 5 June.) [1961] N.S.W.R. 1002.

## PATENT

*Revocation—Date from which order of revocation takes effect—Effect on earlier judgment in infringement action—Whether Solicitor-General to be notified of defence to infringement action based on order of revocation—Patents Act 1953, s. 76 (2).* An order of revocation of a patent made for a cause affecting its validity *ad initio* operates *in rem* to revoke the patent retrospectively as well as *in futuro*. Its effect will not be to disturb an estoppel created by a judgment previously perfected and based on the validity of the patent but from and after the making of the order of revocation that order may be resorted to in proceedings for infringement as proof that the patent no longer exists as a basis for a claim for infringements alleged to have been committed either after or prior to the making of the order. Proof of the existence of the order of revocation is proof of the non-existence of the patent and not a questioning of the validity of the patent within the meaning of s. 76 (2) of the Patents Act 1953. Accordingly no notice to the Solicitor-General of the intention to rely on such order of revocation is required by s. 76. *Vigilant Automatic Fire Alarm Co. Ltd.* v. *Automatic Alarms Ltd.* (S.C. Christchurch. 1961. 30 June; 22 August. Richmond J.)

## PLEADING

*Particulars—Whether particulars of traverse should be ordered.* *See* PRACTICE, *infra.*

## PRACTICE

*Third party procedure—Action settled as between plaintiff and defendant—Defendant's rights against third party not affected—Whether issues arising between defendant and third party to be tried in same action—Code of Civil Procedure R. 99J.* *See* LAW REFORM (*supra*).

## PUBLIC REVENUE

*Income tax—Offences—Charges of wilfully making false returns of income—Stock firms ledger account and carbon copies of invoices—Not proved by witness having personal knowledge of transactions recorded—Hearsay—Inadmissible.* *See* EVIDENCE (*supra*).

*Income Tax—Offences—Misapplication of tax deducted by employer—Meaning of "duly paid"—Form of direction to jury—Income Tax Assessment Act 1957, ss. 31 (3), 33 (1) (b).* The words "duly paid" used in the last line of subs. (3) of s. 31 of the Income Tax Assessment Act 1957 mean "paid on the date when it was required by the Act to be paid". A payment which is required by the Act to be made not later than the 20th day of a particular month is not "duly" made if it is made later than that 20th day. Observations as to the form of the direction to the jury in a prosecution under s. 33 (1) (b) of the Income Tax Assessment Act. *R.* v. *Lambert.* (S.C. Wellington. 1961. 22, 23 August. Barrowclough C.J.)

## STATUTORY REGULATIONS

THE DISTILLATION REGULATIONS 1961 (S.R. 1961/110)—Consolidating and amending the regulations made under the Distillation Act 1908.

THE GEOTHERMAL ENERGY REGULATIONS 1961 (S.R. 1961/124)—Prescribing the conditions on which licences under the Geothermal Energy Act 1953 may be applied for and granted, and incidental matters.

THE PARLIAMENTARY SALARIES AND ALLOWANCES ORDER 1961 (S.R. 1961/133)—Giving effect to the recommendations of the Royal Commission on Parliamentary salaries and allowances.

## ULTRA VIRES

*Land taken by municipal corporation for benefit of private person and not corporation.* *See* MUNICIPAL CORPORATION (*supra*).

## WATER AND WATERCOURSES

*Irrigation area—Disposal of surplus rain and/or irrigation waters—Liability.* *See* NUISANCE (*supra*).

*Natural flow of surface waters—Rights and liabilities of owners of upper and lower lands.* *See* NUISANCE (*supra*).

# CASE AND COMMENT

*Contributed by Faculty of Law of the University of Auckland*

## Aut Nunc Aut Nunquam

Section 23 (1) of the Limitation Act 1950 requires that a person who wishes to bring an action against the Crown or a public or local authority shall as soon as practicable give written notice to the intended defendant giving particulars of his claim and certain other information, and then commence his action within 12 months of the date on which the cause of action arose. However, an intending litigant who fails to comply with either or both of these requirements is given by subs. (2) the right to apply to the Court for leave to bring his action at any time within six years and this is so whether or not he has given the notice required under subs. (1).

Where the intending litigant has failed to give any notice at all, or has allowed more than a year to elapse, it may be clear enough in the ordinary case that he should make his application under subs. (2) *before* he commences his action, and this seems *prima facie* to be confirmed by the wording of the subsection which refers throughout to " the intended defendant ". In such cases the plaintiff will usually be in no doubt that the leave of the Court will be necessary if he is to succeed. But the position is surely somewhat different where the plaintiff has given a notice but the question arises whether it fully complies with the requirements of subs. (1) whether because it was not given as soon as practicable or for some other reason. If the inquiry were whether a notice had been given " as soon as practicable " the plaintiff's position would be particularly difficult if he had to obtain leave before issuing his proceedings, since determination whether a notice complies with the subsection necessarily involves a decision on questions of fact. More than this, the plaintiff would frequently not know whether the point would be taken by the other side until the defence had been delivered. It would, at its lowest, be somewhat inconvenient if the plaintiff, having reached that stage, were forced to withdraw his proceedings, seek leave, and having obtained it, have to commence a fresh action.

This was the problem which arose in *Auckland Harbour Board* v. *Kaihe* (25 August 1961). The plaintiff, an illiterate and a Maori, had suffered a serious injury in the course of his employment with the defendant Board. While he was lying in hospital he received a visit from responsible officials of the Board and was told : " You will be all right when you come out. There is some money waiting for you and if you want money we will give you some now. Don't worry about it. We will look after it for you ".

Six weeks after his accident, the plaintiff told his own solicitor that someone else was handling his claim for him and it was not until a further six weeks had passed that the solicitor discovered that that someone else was in fact the plaintiff's employer. The solicitor forthwith took instructions, investigated the claim, and duly gave a notice of claim which, so far as its contents were concerned, sufficiently complied with the provisions of para. (a) of s. 23 (1) of the Limitation Act. A writ was issued, and in its defence the defendant Board pleaded that notice had not been given " as soon as practicable ". Immediately before the hearing the trial Judge ruled that it was then too late for him to grant leave under subs. (2). The trial went forward nevertheless, and judgment was eventually entered for the plaintiff for a substantial sum, including £4,000 general damages, the matter of notice being met by a finding that the defendant was estopped from taking the point by the representations made to the plaintiff while in hospital.

On the subsequent appeal, all members of the Court agreed that on the facts no question of estoppel arose. As to whether leave might be given *nunc pro tunc* after an action had been commenced, the Court was divided.

Gresson P. took the view that leave could be granted only on application before the action was commenced. He was not impressed by any argument from convenience. In the ordinary case counsel should have no difficulty in deciding whether notice had been given as soon as practicable. In cases of doubt he could see no objection to the relevant questions of fact being decided by a Judge on a preliminary application for leave. Equally, there was nothing to stop a plaintiff going to trial in order to have such questions of fact submitted to the jury. If his confidence should prove unwarranted so that in consequence his action was dismissed, there was nothing unreasonable or unjust in that.

On the other hand, North and Cleary JJ. in a joint judgment, started from similar premises, but reached an opposite result. If there were no right to obtain leave *nunc pro tunc* the present case sufficiently illustrated the difficulties which would arise. The defendant's objection that the notice was late was made not when the notice was given, but only after proceedings had been commenced. The plaintiff had some grounds for expecting he could establish that notice had been given as soon as practicable. In the event he had failed to do so but in the meantime the case had been heard and determined against the defendant on the merits by findings not now called in question. Unless they found its language intractable the majority would not hold that the subsection compelled a nonsuit and required the plaintiff to commence a fresh action after obtaining leave. In the event they concluded that so far as concerned compliance with para. (a) of s. 23 (1) (i.e. the paragraph relating to notice), the section should be read as directory only, so that if it should appear during or at the end of the trial that the provisions of that paragraph had not been fully complied with the Court might then, if it thought fit to do so, excuse non-compliance by granting leave to proceed with the action. Since it was clear that the trial Judge would have granted the plaintiff leave had he thought he had power to do so, the Court should and would now do so.

The judgment raises at least two queries.

1. Can leave be given *nunc pro tunc* where no notice

has been delivered at all ? The reasoning which led the majority to their conclusion that so far as concerned compliance with s. 23 (1) (a) the section should be read as directory, was built around cases where there was or could be a genuine dispute as to whether notice complied with para. (a). Moreover, having held that the section should be read as directory they immediately went on to say " so that if it should appear . . . that the provisions of that paragraph have not been *fully* complied with . . ." (italics supplied). Nevertheless it is submitted that the jurisdiction to grant leave *nunc pro tunc* must be taken to extend to *all* cases of non-compliance with para. (a). If the jurisdiction were qualified by the degree of non-compliance the consequent uncertainty would leave the cure as bad as the disease.

2. Can leave *nunc pro tunc* be given in cases of non-compliance with para. (b) (i.e. that the action be commenced within one year) ? In referring to the phrases in subss. (1) and (2) " no action shall be brought ", " leave to bring such action " and " the intended defendant " the majority said :

> These expressions contemplate, clearly enough, that leave is to be applied for before the action is commenced. Moreover, they are, we think, quite appropriate to the case of a plaintiff who is commencing his action out of time and to whom the need to obtain leave is neither a matter of doubt nor inconvenience.

But, it might be asked, what of cases where there is doubt as to when the cause of action arose ? Would not the same arguments from convenience apply just as strongly as they do to cases of non-compliance with para. (a) ? And if to some cases of non-compliance with para. (b), ought these arguments not to apply to *all* cases of non-compliance if the uncertainty of degrees of compliance is to be avoided ?

Perhaps this is a case where an amendment to the Act would be justified.

B.C.

## Statutory Corporations and the Ultra Vires Doctrine

The decision in *Huntly Borough* v. *South Auckland Education Board* (judgment 21 September 1961), involved the application of the doctrine of *ultra vires* to a contract made between two statutory bodies. The Board had applied for sewerage connections to two schools and had agreed to pay the annual charges levied by the Borough. After paying them for three years, the Board refused to make further payments on the ground that the contract, insofar as it involved payment of an annual charge, was *ultra vires* the Borough. The powers of the Borough are derived from the Municipal Corporations Act 1954 and the Huntly Borough Empowering Act 1950, but neither of these Acts expressly empowers the Borough to make an annual charge for sewerage services except by way of a rate. It was necessary for Barrowclough C.J. to decide whether the Borough possessed the incidental or implied power to make an annual charge for services which it was authorised to provide, there being no statutory prohibition of such an arrangement, or whether the proper construction of the Borough's powers was that what was not authorised by statute was by implication prohibited.

The decision in *Sutton's Hospital* case (1613) 10 Co. Rep. 1a, 23a, is taken as establishing the common-law rule that a chartered corporation has the powers of a natural person. Whether this rule also applied to other corporations, and particularly those created by statute, was not finally determined until the closing years of the last century. For instance, in *Taylor* v. *Chichester & Midhurst Railway Co.* (1867) L.R. 2 Ex. 356, Willis and Blackburn JJ. in the Exchequer Chamber held that the company, incorporated under the Chichester and Midhurst Railway Act 1864, was entitled to make all contracts connected with the purposes of its incorporation not expressly or by necessary implication prohibited, and that it was for the party seeking to invalidate the contract to show that the contract was prohibited. Blackburn J. adhered to this view when the Exchequer Chamber decided *Riche* v. *Ashbury Railway & Iron Co. Ltd.* (1874) L.R. 9 Ex. 224. There he stated at pp. 262,263 that the common-law principle (applied in the *Sutton's Hospital* case) would apply unless it was excluded by the statute.

However, when that case reached the House of Lords, the principle that a company incorporated under the Companies Act had only such powers as were conferred by its memorandum of association was finally and firmly established. But it was not then certain whether companies created in terms of other statutes fell within the common-law principle or the principle set out in the *Ashbury Railway* case. It fell to Lord Blackburn himself in *Attorney-General* v. *Great Eastern Co.* (1880) 5 App. Cas. 473, to apply the company-law rule to other statutory corporations. At p. 481 he stated :

> That case (*Ashbury Railway Co.*) appears to me to decide at all events this, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorise is to be taken to be prohibited ; and, consequently, that the *Great Eastern Co.*, created by Act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose.

Thus all corporations other than chartered companies are subject to the *ultra vires* doctrine ; but whereas a company's memorandum is interpreted to authorise not only those acts expressly or impliedly within the memorandum but also activities which are reasonably incidental or consequential upon those included in the objects clause, the powers of a statutory corporation are interpreted somewhat more narrowly in that those activities not expressly or impliedly authorised are treated as prohibited. It was this rule of construction that Barrowclough C.J. applied in the *Huntly Borough* case. Because there was no express or implied authority to make the charges in the manner proposed such a method was treated as prohibited and the contracts made on those terms were *ultra vires*. The Board was thereby released from an obligation which it had freely assumed and which for some years it had honoured.

The implications of the decision will not be lost on the commercial community. Those who deal with statutory corporations run the risk of discovering that the corporation itself will set up want of power to invalidate contracts that have become burdensome or have served their purpose.

J.F.N.

## LEGAL ANNOUNCEMENTS

*Concluded from p. i.*

Mr V. G. SPILLER, Barrister and Solicitor, 118 Hereford Street, Christchurch, has admitted to partnership Mr R. G. BLUNT, Barrister and Solicitor. The practice will be carried on at the same address under the name of SPILLER & BLUNT, Barristers and Solicitors.

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# ARBITRATION

## Pre-knowledge of Possible Bias

The decision of Richmond J. in *Canterbury Pipe Lines Ltd.* v. *Attorney-General* [1961] N.Z.L.R. 785 draws attention to a perplexing aspect of the problem of bias in an arbitrator.

Professor Davis in "Case and Comment" (*ante*, 278) welcomes the decision. These notes deal with the matter from a different angle and reach a different conclusion.

There was nothing unusual in the facts. The plaintiff had entered into a contract with the Crown for the construction of certain works. The contract provided that certain types of dispute which might arise were to be referred to the decision of the Director of Housing Construction, who, it was accepted, was a representative of the Crown, a party to the dispute.

A dispute did arise and the plaintiff commenced civil proceedings whereupon the defendant moved for stay thereof. The onus was then upon the plaintiff to show the dispute should not be referred to the arbitration for which the contract provided. He was successful.

Prior to the passing of our Arbitration Amendment Act of 1938 the plaintiff must have failed. In the pungent wording of Bowen L.J. in *Jackson* v. *Barry Railway Co.* [1893] 1 Ch. 238, 247 (quoted in the instant case):

> It is no part of our duty to approach such curiously coloured contracts with a desire to upset them or to emancipate the contractor from the burden of a stipulation which, however onerous, it was worth his while to agree to bear. To do so would be to attempt to dictate to the commercial world the conditions under which it should carry on its business.

Similarly in *Redman's Law of Arbitration*, 5th ed. (1932), 59:

> "The engineer could not be expected nor was it intended that he should come with a mind free from preconceived opinion. The perfectly open judgment, the absence of all previously formed or pronounced views, which in an ordinary arbitrator are natural and to be looked for, neither party proposed to extract from the arbitrator of their choice. They know well that he probably must be committed to a prior view and that he might not be impartial in the ordinary sense. What they relied on was his professional honour, his position, his intelligence and for his part there is a very high duty imposed upon him to maintain his judicial position. It must, therefore, be shown that there is a reasonable probability that the arbitrator will be biased towards one of the parties to disqualify him from acting in the matter."

The learned author proceeds to instance how an unseemly personal dispute between the contractor and the arbitrator could disqualify the latter.

Richmond J. at p. 791 in dealing with the position prior to 1938 provides three simple rules, the effect of which is:

(a) *Prima facie* such an arbitrator is disqualified by presumed bias;
(b) But if the parties have contracted to appoint him they are bound by their contract;
(c) Unless "extra" bias can be shown beyond what must have been assumed to exist at contract date.

His Honour then had to consider the effect of s. 16 of the 1938 Amendment on the position. In short, this says:

> Where a contract provides for reference of disputes to a named arbitrator and after a dispute has arisen any party applies to revoke the submission because the arbitrator is not impartial, it *shall not be a ground for refusing the application* that the applicant knew of the possibility of partiality when he entered into the contract.

The italics, of course, are mine.

As the judgment states, this s. 16 is based on s. 14 of the Arbitration Act 1934 (U.K.) (now s. 24 of the 1950 Act: 29 *Halsbury's Statutes of England*, 2nd ed., 110). "Neither counsel", his Honour observes, "was able to refer me to any decision bearing on the purpose of and the effect to be given to either the English or the New Zealand section".

The Court found that s. 16 in effect enjoined it to revoke or restrain the arbitration proceedings unless some ground existed, over and above the knowledge of the kind eliminated by the section, which would make it proper for the arbitration to continue. No such overriding circumstances were suggested in the case.

Hence the "pre-knowledge" as to the arbitrator was put aside and the normal rule was left to apply; there was a possibility of bias in him and arbitration should not proceed.

The absence of reported case law on this section is indeed surprising. If the Canterbury decision is right the section interferes substantially with the sanctity of contract—a matter which nearly 30 years ago was regarded in a more serious light than now. It would be reasonable to have expected reported litigation especially because of the prevalence of arbitration clauses of this type in construction contracts as indicated, e.g. in England, in the extract from *Russell on Arbitration*, quoted in the judgment.

There being no case law on the section, we may find it interesting to examine its political history. Indeed in the writer's opinion there is room for modification of our impregnable rule that Hansard may not be consulted by the Courts in interpreting a statute. Such qualms are not felt in Continental systems; it is there thought to be transparent that the observations of the legislators when passing the Act are highly relevant to its interpretation. Perhaps we could blend the good points of both systems.

At second reading debate on our 1938 Bill, the Attorney-General spoke in praise of the report of the Committee on the Law of Arbitration which sat in England in 1927 under the Chairmanship of Mr Justice MacKinnon. The United Kingdom legislation was passed with the report of this Committee in view. Various aspects of arbitration were examined by this Committee and recommendations were made to the Government. The following material is relevant to our purpose (Cmd. 2817, Imperial Reports (Commissioners) 7 Session, 1927).

33. A good many of those who have submitted memoranda to us have suggested that there should be statutory power given to the Courts to relieve people from various kinds of hardships imposed on them by the terms of submissions to which they have unwittingly or unwillingly agreed. To interfere with, and alter, the contracts people have made may seem a doubtful policy but it should be remembered that the vast majority of submissions to arbitration are contained in the printed arbitration clause in printed forms of contract which cannot be carefully examined in the transaction of business and alteration of which would be difficult for most people to secure. We should certainly be averse to any proposal to give relief to anyone who had entered into a submission of a dispute after it had arisen but we suggest that, as regards the common forms of submission in printed forms, it might be sound policy to create a power to modify unconscionable provisions.

The report then listed a number of items including:

(c) Several of our correspondents have referred to the common practice by which in building and engineering contracts contractors are required to tender upon, and agree to, a form of printed contract by which all disputes are to be decided by an architect or engineer who is in the employ of the other party, and very often of one whose own acts or requirements on behalf of his employer may create the dispute which must be referred to his decision.

The report recommended as to this:

That where a particular person has been named or designated in a submission as arbitrator, either party may apply to a Judge, and if he satisfies the Judge that such person by reason of his relation towards the other party or his connection with the subject-matter of the dispute may not be capable of complete impartiality, the Judge, if he thinks fit, may make an order removing such arbitrator and appointing another in his place.

It is interesting to see that this recommendation is that the Court is to be given a discretion to remove the arbitrator. But the provision which Parliament eventually made in 1934 did not go as far. Apprehensive no doubt of the charge of interference with contracts the section was expressed negatively to say (in effect) "in considering the contractor's application for relief from the arbitration his pre-knowledge of the possible bias is not a ground for refusing his application". Our section was copied from this section.

It is submitted that the statute tends more to preservation of *status quo* than the proposal of the MacKinnon Committee and that the Legislature after due consideration modified the ambit of that proposal.

To return to the Canterbury case, the facts show no "extra" bias in the arbitrator. He had "been at considerable pains to remain aloof from the dispute" and had deliberately avoided all personal knowledge of it. The applicant made no attack on the personal integrity of the arbitrator. No ground for refusal to arbitrate was alleged beyond the fact that the arbitrator was closely associated with a party to the dispute.

Now if the contractor is not bound to arbitrate in those circumstances one wonders in what circumstances he is bound. He has freely entered into a contract providing for arbitration of disputes in a specified manner. Merely by showing possible bias in the arbitrator he is relieved from that arbitration. This is a ground which is open to any party to any agreement to arbitrate. Any party who has not signed an "Architect" type contract can allege bias in the arbitrator and, subject to proof of the allegation, may be relieved as the Court thinks fit. In the Canterbury case the party who had pre-knowledge of possible bias and had agreed to accept that possibility was relieved just as readily as a party who had not entered into such a contract could expect relief.

It is respectfully submitted that the Court should have exercised its discretion in favour of the defendant and not virtually have equated such an applicant with a party who has not signed a contract of this type. It is suggested that there is room for exercise of the Court's discretion where the applicant can show "extra" bias, as before 1938, and that the 1938 Amendment, if it intended to ameliorate a possible injustice, has not effectively done so.

The position is unsatisfactory. Contracts of the type in question are not uncommon in this country. If the Legislature intended that parties to such a contract should *ipso facto* be relieved from them it should say so in simple language, not confuse the position with a negatively worded section which is difficult to administer and interpret.

It is an instance, too, of a New Zealand tendency to follow United Kingdom legislation without adequate consideration of its desirability. The fact that no reported case can be traced on the U.K. section or our own for some 30 years raises the doubt as to whether any provision was necessary in the first place and whether, if the MacKinnon Committee's suggestion was not adopted in its entirety, it would not have been better to leave the law as it was, and so avoid the complication which the doubtful legislation causes.

The effect of the Canterbury case is that arbitrations of this type cannot now take place where the contractor prefers a civil action, for it is difficult to conceive of circumstances more favourable to the arbitration than were present here. The contractor who has entered into such a contract can, therefore, snap his fingers at the arbitration to which he has agreed, although other tenderers competing with him for the contract may have been prepared to honour it.

The test, it is submitted, should still be proof of "extra" bias, and the legislation should be amended to clarify this. If on the other hand it is thought preferable that contracts providing for this type of arbitrator should not be upheld, the Act should be altered to say so in clear terms.

G. CAIN

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**Ex parte A Barrister. Practice Note.**—Lord Parker C.J., Salmon and Winn JJ. 17 January 1961.

A junior member of the Bar, robed, rose from his place in counsel's row to make an application to the Divisional Court on his own behalf in a criminal matter.

Lord Parker C.J., said that it was not the practice for the Court to hear a member of the Bar as counsel on his own behalf in such a matter. The application should be made as by an applicant in person and unrobed.

The barrister later returned to Court unrobed and made his application from the well of the Court. (1961) *105*, S.J. 111.

# THE PARKER-HULME, LEOPOLD-LOEB CASES AND THE CONCEPT OF OMNIPOTENCE

## Introduction

I have linked the Leopold-Loeb case with the Parker-Hulme, not merely because of the renewed interest in it in recent years, but because of the extraordinary similarity of the two cases.

In 1924, Leopold and Loeb, two outstandingly intelligent adolescent sons of Chicago multi-millionaires, became so grossly involved in each other's phantasy life and so megalomanic that they planned and murdered for ransom a young boy. Thirty years later two adolescent girls, Parker and Hulme, similarly became involved in each other's phantasy life and their liaison culminated in the senseless murder of the mother of the older girl. Hulme was also credited with outstanding intelligence and came from a prominent family background.

I have stressed the concept of omnipotence as the unique theme linking the two cases. I will accept that you are all familiar with the details of the histories. The Parker-Hulme case was well covered in the newspapers; I (Medlicott, 1955) have a paper on it, and there are reports (Furneaux (1955) and Gurr and Cox (1957)) and a popular novel (Gurr and Cox, 1958), on the trial. The Leopold-Loeb case has been the most written about trial of the century. There are numerous published reports (Urstein (1924), Stone (1949) and McKernan (1957)). Levin's novel, *Compulsion* (1956), has been widely read. The dramatisation had a long run on Broadway. It was also a successful film. Leopold's autobiography (1958) *Life Plus 99 Years* screens out at least two important aspects of his life, but does give a follow-up report. In the first part of this paper I will sketch briefly their early histories, the events leading up to their crimes, the diagnostic formulations, their trials, the question of their responsibility and their subsequent histories.

In the second part of the article I will discuss the concept of infantile omnipotence and the consequence of fixation at, or regression to, this level.

## Their Histories Prior to their Meeting

Both pairs grew up under the influence of world wars and came from satisfactory family backgrounds. There was little unusual about their siblings. As to their personalities all four were highly imaginative but were all wilful, self-contained children and none of them had firm lasting relationships with others of their own age. They wore out their friends rapidly. Although basically there was a feeling that no one cared for them, unlike most youngsters without friends, they did not appear lonely. They were all keenly aware of their outstanding intelligence. Their childhood personalities could be described as narcissistic.

## The Events Leading to their Crimes

As to their influence, one on the other, both pairs some time after their meeting formed a self-bolstering society of their own, becoming increasingly independent of the opinion and support of their families and the community. Parker wrote a diary which shows clearly that their degree of abnormality was proportional to the time spent in one another's company. They obviously acted as resonators one on the other. Of Leopold and Loeb, "their coming together", said Clarence Darrow, "was the means of their undoing. They had a weird and almost impossible relationship".

As to their emotional and sexual development, in spite of a veneer of sophistication, all four were grossly immature emotionally, and unable to show the positive emotions; they deprecated all tender feelings. Social responsibility and guilt were absent. Sexually all four were homosexual.

As to their interest and philosophy all four enjoyed a rich phantasy life with play-acting, and, in the girls' cases, the creation of fictional kingdoms and characters. Their mutual interaction led to increasing arrogance, self-inflation or omnipotence, contempt for others and they totally embraced the superman philosophy. It is clearly revealed in Parker's diary over the 18 months before the murder that this inflation was accompanied by an increasing preoccupation with violence and crime generally. In fact both pairs sometime before the murders were experimenting in crime.

The two girls expressed ideas that not only were they geniuses but that they possessed an extra part of their brains which could appreciate a "Fourth World" or paradise which was limited to them and a few other chosen people.

## Their Crimes

On the day before the murder the extracts from Parker's diary read:

> Afterwards we discussed our plans for moidering Mother and made them a little clearer. Peculiarly enough I have no (qualms of) conscience (or is it peculiar, we are so mad). Next day I rose late and helped Mother vigorously this morning. Deborah rang and we decided to use a rock in a stocking rather than a sand-bag. We discussed the moider fully. I feel very keyed up as though I were planning a Surprise party. Mother has fallen in with everything beautifully and the happy event is to take place tomororw afternoon. So next time I write in this diary Mother will be dead. How odd yet how pleasing.

The entry in Parker's diary on the day their plan to murder her mother was carried out is entitled "The day of the Happy Event"—and reads:

> I am writing this up in the morning for the death. I felt very excited and "the night before Christmassy" last night.

There is evidence that the boys were in an excitable state before their murder. Both pairs certainly showed gross exaltation which continued after their murders and this was continued during their trials. In spite of their intelligence and lack of scruples the girls' murder was particularly stupidly planned. The boys' murder, although better planned, had several gross defects not at all in keeping with genius.

## The Diagnostic Formulation

In the Leopold and Loeb case the preliminary psychiatric team for the defence, Dr Hulbert and Dr

Carl Bowman, as well as the extraordinarily distinguished team of William Alanson White, William Healey, and Bernard Glueck who examined Leopold and Loeb all agreed that they were profoundly disturbed personalities. They described the *folie-a-deux* element, the infantile emotional development, in Leopold's case the delusional development of notions about himself, the gross split between emotion and thought, and their manic tendencies. The terms "split personality" and "paranoia" were used, but there was no clear diagnostic formulation.

As to the girls I was satisfied that in the period leading to the crime and immediately following it they were disturbed in mood, activity and thought patterns to a degree consistent only with the diagnosis of psychosis. Their psychoses were identical and the term *folie-a-deux* applicable. There was no real question of inducer and inducee. It was a *folie simultanee*—a disturbance occurring in predisposed associated individuals. As Darrow pointed out with the boys, "Their coming together was the means of their undoing".

As to the nature of their psychosis I rejected the idea of schizophrenia even though many people who read my paper later wanted to apply it. I do not like the diagnosis "*exalted paranoia*". *Paranoia* ordinarily is a variety of schizophrenia occurring in middle age, and the girls' grandiosity was in no way similar to the later gradiose phase occurring in deteriorating paranoiacs. The presence of persistent, organised delusions, the preservation of clear and orderly thinking, and absence of hallucinations made the term to some extent applicable.

On reflection I am satisfied that both Leopold and Loeb and Parker and Hulme were exceptional, and that a diagnostic formulation apart from the classical terms is not unreasonable. I would now use the formulation "adolescent megalomania". Such a diagnosis, however, though rare, should reflect a process of wider nature. I think it does. Exaltation is *common enough in* adolescence. In discussing adolescent girls, Helene Deutsch points out that at puberty the emotions turn away from childhood objects on to the ego itself in the shape of intensified narcissism. The adolescent, she says, becomes aware of "I" as "I". There is an emotional vacuum between the world that is disappearing and another that has not yet come into being. "Who shall I love now?". The girl chooses herself, and this leads to greater self-confidence, but one effect, she says, of this increased narcissism is "the common arrogant megalomania of adolescence". It might be said that both pairs went into adolescence already strongly narcissistic and each individual acted on the other as a resonator increasing the pitch of their narcissism.

## The Trial

In both cases there were full confessions and the facts of the crime were uncontested. The Leopold-Loeb case was fought under circumstances of unusual public arousal. For the defence, Clarence Darrow felt a jury would be so prejudiced that they would not listen to an insanity plea. He pleaded "guilty" before a Judge so as to present evidence as to mitigation and avoid the death penalty which Darrow naturally abhorred. The defence psychiatrists presented an extremely careful case study and analysis. In spite of the vicious personal attacks of the State Attorneys these psychiatrists were men of great integrity. White, Healey, Glueck were already the outstanding American psychiatrists at that time. Bowman subsequently became a leader.

In discussing the case with Bernard Glueck some years back it was obvious that the years had not changed his opinion about Leopold and Loeb's gross abnormality. As to responsibility, there could be no question about intellectual knowledge of right and wrong. White however felt that there was no adequate feeling attitude towards the wrongfulness of the act. Basically they all felt that the crime was the result of diseased motivation.

The prosecution sought to show the boys were perfectly normal, simply "young egotistical smart-alecks" and that the need for the ransom money was the sole reason for their actions. Four psychiatrists whose names I have never heard of testified as to their complete normality and in spite of the boys having large untouched banking accounts the State Attorney attempted to show that this was just another murder for money.

The psychiatric defence in the Parker-Hulme trial again based its defence upon careful case study, which was greatly aided by the diary Parker had written over the preceding 18 months. It traced for the Court the development of the accused personalities, the extraordinary effects of their association and the development of a psychiatric illness—exalted paranoia. It attempted to show that their crime was the inevitable result of their diseased state, not simply the result of the alleged motive. It was never denied that the girls knew intellectually that their murder was wrong according to the law of the country. It was contended that they were sufficiently disturbed by reason of mental disease to be unable to pass a rational judgment on the moral nature of their act. This defence is, of course, the possible broadest interpretation of the McNaghten rules. Smith (1956) quotes Stephens J.: "Speaking of right and wrong", he says, "I think anyone would fall into that description (inability to know the quality of his act) who was deprived by disease affecting the mind of the power of passing rational judgment on the moral character of the act he means to do".

In spite of the fact that the McNaghten Rules are written into the New Zealand law, juries will frequently ignore legalistic rules and apply the moral rule that if it can be shown that an act arises out of a person's sickness (disease of the mind) he is not responsible.

The prosecution in the Parker-Hulme trial were obviously afraid of this and spent relatively little time with the cross-examination over the McNaghten Rules but, as in the Leopold-Loeb trial, they tried to represent the girls as normal criminals. The Crown Prosecutor described them as "two ordinary dirty-minded girls" and the prosecution rallied round the title "not mad but bad". The State's psychiatrists denied that the girls were insane, in fact tried to show that none of their acts was grossly abnormal, that their acts were all things you could expect from adolescent children. The Crown Prosecutor maintained there was an adequate motive for their murder. Comments from throughout New Zealand and overseas almost unanimously found

the normalising of two very abnormal girls tragic if not ridiculous. An Australian paper referring to the designation applied to the girls by the Crown Prosecutor as being incurably bad, wondered if girls of 15 and 16 who are incurably bad could be anything but insane. Even Mr Justice Adams, in his summing up, suggested that the girls appeared to be suffering from some degree of mental disorder. He, of course, pointed out that disease of the mind is not in itself a sufficient defence. He stated: "The law does not relieve persons of criminal responsibility merely because they are insane".

### Their Subsequent Histories

Leopold and Loeb studied and learnt to speak many languages in prison and ran classes for prisoners. After Loeb's death by stabbing by a prisoner who pleaded homosexual assault, Leopold continued his educational work and later became a medical technician. It seems he was never popular and he remained basically arrogant. His law-suit for $1,500,000 shortly after his parole in 1958 is typical.

As to the girls I have no official knowledge except the newspaper report of their release. From what I have heard from various sources neither girl was a serious problem in prison but I suspect the basic core of their arrogance persisted.

The natural history of adolescent megalomania is unknown. The chances are that without the continual stimulus of their mutual reaction and with increasing age it loses its grossly psychotic nature and subsides.

### Omnipotence

If we study the development of the personality psycho-analytically we find that at the earliest infantile level libido is centred on the infant itself—primary narcissism. At this stage the infant has not yet differentiated itself from its environment—the world and it are one, with, you might say, its ego in the centre. In this state of primary narcissistic oneness the ego appears to control everything and it feels itself omnipotent—primary omnipotence. There is every reason to believe that this omnipotence is accompanied by a sense of knowing everything—primary omniscience. As the ego develops at least part of the narcissistic libido is transformed into object love and with the differentiation of the object world the infant is forced to relinquish his belief in his omnipotence. As with all infantile processes the earlier phases are never completely obliterated and deep down the individual nurses his illusions of omnipotence. At the same time libido has the capacity to regress to the earlier levels. In Parker, Hulme and Leopold and to some extent Loeb, the long periods of attention during their childhood illnesses may have increased their narcissism. The normal adolescent increase in narcissism naturally presented more than usual danger in these four already narcissistic persons. They acted on one another as resonators increasing the pitch of their narcissism and consequently their illusions of omnipotence. It has, in fact, been shown with the girls their abnormality varied with the amount of time spent in each other's company.

If we accept that omnipotence is the central feature in these cases and that omnipotence stems from an early narcissistic state we must expect to find other remnants of the infantile personality prominent. These remnants are reflected in their demands for immediate gratification of wishes and poor reality testing indicating domination by the pleasure rather than the reality principle and by their typical outbursts of aggression. With so strong a fixation at the pregenital level it is not surprising that none of the four established satisfactory heterosexual relationships and that they remained homosexual. As the super-ego is rudimentary in this early phase we are not surprised that guilt was largely absent.

### The Role Played by Omnipotence in Adult Life

Commonly omnipotence is projected on to an omnipotent and omniscient deity. On the socially accepted side it may increase a sense of invulnerability that leads to courage, and the phenomenon of "regression and return" is undoubtedly the mainspring of much creative ability in religion and art. Mysticism requires a cultivation of regression and a return to the primeval oneness of the primary narcissistic position. Careful initiation and ritual in mysticism prevents the acting out of morbid infantile regressive phenomena such as illusions of omnipotence. The residuals of the sense of omnipotence and omniscience form the basis of magical thinking whether in the field of mythology or in the sphere of the occult. Occultism *par excellence* attempts to deny man's finite restrictions and promises power and knowledge beyond the limitation of reality-rooted science.

As to the morbid aspects of illusions of omnipotence, gambling owes much to this phenomenon. In the criminal, however, we have to deal commonly with an omnipotence preserved in an adult mentality. Many criminals are self-judging egocentrics, who, like these two pairs of murderers, place themselves apart from the law. Psychotics reveal elements of omnipotence and there seems a special connection between infantile omnipotence and the inexorability of the paranoiac.

Finally, I will review the grossly developed omnipotence or megalomania as shown in these pairs of murderers and as portrayed by some of the superman philosophies. Megalomania involves "ego-inflation". Mood is exalted and attitude is one of extreme arrogance. Sometimes the exaltation is punctuated by brief depressions with self-destructive thoughts. Drive is grossly increased, the need for sleep lessened and there may be considerable output. Parker and Hulme, for example, wrote voluminously during their exalted period. The phantasy life is exaggerated with day-dreaming and play-acting. The phantasy world *par excellence* is a world you can control. The content of the phantasy is largely aggressive and destructive and there are always dangers of its being acted out in real life. Murder is, in particular, the crime in which power over another is shown. The thought pattern reflects the self-inflation, and in all developed cases partakes of the superman philosophy. In this philosophy the relation to the deity is altered. The girls reduced their God from an omnipotent stature and exalted themselves. Nietzsche shouted "God is dead!". Adler describes the fiction of "Gottähnlichkeit" or similarity to God. At the same time relationship to their fellows is radically altered towards profound contempt for the multitude and worship of the superman. Moral values subserve the

privileges of the few and in fact it becomes the duty of the superman to forward his end irrespective of the rights of others. As Nietzsche says " All great action partakes of criminality ". Sometimes there is a reversal of moral values. The characters in the Parker-Hulme books clearly showed this reversal.

Nietzsche's megalomania pushed to its ultimate conclusion led to insanity. Dostoevsky's student Raskolnikov's megalomania led him to murder in the same way as the adolescent megalomania of Leopold and Loeb, and Parker and Hulme led to their senseless murders.

R. W. MEDLICOTT

(Dr Medlicott is Medical Superintendent of Ashburn Hall, Dunedin. The foregoing article is a reprint of an address given by him to the Auckland Medico-Legal Society earlier this year.)

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# INTERNATIONAL COMMISSION OF JURISTS

## Inaugural Meeting of New Zealand Section

On Wednesday 8 November, the Right Hon. Sir Harold Barrowclough, Chief Justice, presided over a meeting held at the Supreme Court Wellington to consider the formation of a New Zealand section of the International Commission of Jurists. There was an attendance of 20 who had applied for membership, but many apologies were received from those unable to attend.

The acting secretary, Mr D. R. Wood, reported that he had received 73 applications for individual full membership, nine for corporate full membership, two for individual student membership and three for individual associate membership.

Mr D. Perry, President of the New Zealand Law Society, outlined the objects of the organisation. He said that we in New Zealand were inclined to take the Rule of Law for granted but questioned whether we were justified in so doing, quoting instances where there had been a tendency to depart from it. He therefore moved:

> That this meeting having taken note of the memorandum sent to all the persons invited thereto outlining the objects of the proposed New Zealand section of the International Commission of Jurists, those present form themselves into a society or association to be called by a name hereafter to be determined having for its objects those set out in the memorandum referred to with such rules as may be settled by this or a later meeting.

The motion was seconded by Mr J. C. White and carried unanimously.

There was some discussion as to the name to be adopted for the new organisation, the majority being of the opinion that the name should identify it as the New Zealand Section of the Commission. On the motion of Dr McElroy of Auckland seconded by Mr R. C. Burton it was resolved to refer the question of name to the committee to be set up to draft the constitution and rules of the new society.

Mr Perry then moved that a drafting committee of four be appointed to draft such rules. This was seconded by Judge Dalglish and carried. The committee appointed comprised Dr G. B. Barton, Mr C. H. Arndt, Mr D. R. Wood and Dr McElroy (Auckland). Other officers appointed to act in the meantime were Dr Barton as secretary and Mr Arndt as treasurer.

The chairman pointed out that the new society had no funds, and there would be expense incurred before it could be put in running order. He therefore suggested that all who had registered for membership should pay the amount of their subscription according to the draft rules already circulated, such payment to be credited on account of the subscription finally decided upon. This suggestion was approved.

On the subject of answering the questionnaire contained in the Commission's Newsletter No. 8 of February 1960, it was decided to ask Messrs. J. N. Wilson Q.C., and B. Littlewood, and Dr McElroy, all of Auckland, to draft replies, after considering certain suggestions which had been made by the students of the Law Faculty at Victoria University of Wellington.

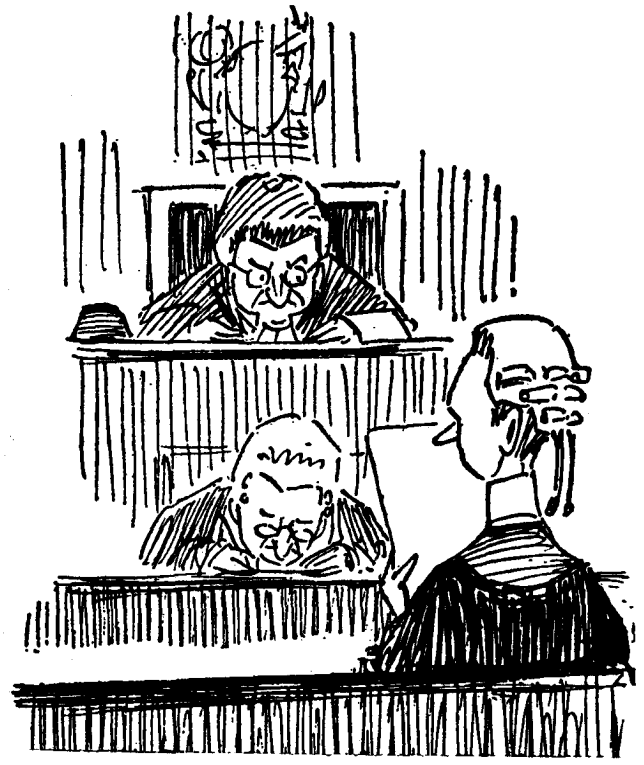
The meeting closed with a vote of thanks, carried by acclamation, to Mr Wood for his services in connection with the formation of the section, and to his Honour the Chief Justice for his chairmanship of the meeting.

# FORENSIC FABLE

By "O"

**The Aged Judge Who Remembered the Past and Changed His Mind**

One Hot Afternoon an Aged Judge Found Himself Growing More and More Irritable as a Tedious Case Dragged On. The Youthful Counsel who Represented the Plaintiff was Nervous and Incoherent. Also he Entirely Declined to Shorten the Proceedings by Adopting the Various Hints Offered by the Aged Judge. Stung to Madness, the Aged Judge was About to Let Himself Go and Tell the Youthful Counsel Exactly what he Thought about him, when he Suddenly Remembered an Incident of the Past. The Aged



Judge Recalled the Occasion, Fifty Years Ago, when he Held his First Brief; the Savage Appearance of the Judge; his own Terror; his Rage and Humiliation when the Judge Informed him that he didn't Know his Business; the Sleepless Night which Followed; and the Misery of the Lady of his Choice when he Told her all about It. Therefore the Aged Judge Restrained himself; and when, at Long Last, the Case Came to an End, he Declared (Quite Untruly) that he had been Greatly Assisted by the Arguments of the Youthful Counsel, and that the Plaintiff had been Fortunate to Secure his Services. What was the Result? The Youthful Counsel Left the Court in Wild Elation; the Father of his True Love was So Impressed by the Report of the Case in the Papers that he Withdrew his Opposition to the Engagement; and the Youthful Counsel and his Future Bride Invested the Fee (Five and One) in a Lunch at the Savoy, an Arm-Chair, and a Coal-Scuttle. And when the Aged Judge Heard how Fruitful his Kindness had been, he Burst into Tears and Sent the Young People a Handsome Gift.

Moral—*Remember the Past.*

# STATUTES RECENTLY ENACTED

Owing to the Parliamentary Session ending so shortly before our date of publication it has not been possible to have ready a complete list of the statutes enacted during the Session. We provide as complete a list as possible of the Statutes enacted since our last issue, and will publish in our next issue a complete list of sessional legislation along with a list of Bills not proceeded with.

Agriculture Emergency Regulations Confirmation
Appropriation
Broadcasting Corporation
Chiropractors Amendment
Cinematograph Films
Counties Amendment
Criminal Justice Amendment
Emergency Regulations Amendment
Engineering Associates
Factories Amendment
Finance
Imprest Supply No. 6
Industrial Conciliation and Arbitration Amendment
Inland Revenue Department Amendment
Juries Amendment
Land Agents Amendment
Licensing Amendment
Licensing Trusts Amendment
Local Authorities Loans Amendment
Local Government Commission
Local Legislation
Machinery Amendment
Maori Purposes
Meat Amendment
Municipal Corporations Amendment
National Military Service
Primary Products Marketing Regulations Confirmation
Quarries Amendment
Reserves and Other Lands Disposal
Stock Amendment
Summary Proceedings Amendment
Taranaki Scholarships Trust Board Amendment
Tariff and Development Board
Tenancy Amendment
Town and Country Planning Amendment
Trade Practices Amendment
Wages Protection and Contractors' Liens Amendment
Western Samoa
Wool Industry Amendment

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**A difference in Outlook**—" On those occasions where an adult plaintiff appears for any reason, it is usually noticeable how different his attitude is from that of the majority of infants. The latter are generally at pains to minimise any after-effects that they may suffer, maintaining cheerfully that they are entirely back to normal. Not so their fathers and mothers, however. Almost invariably they suffer from aches and pains which they assure you can be excruciating, even if their cause remains undetectable. They seldom get a wink of sleep, they say, and when they do they indulge in X-certificate nightmares. All in all, they are proper poorly.

It would perhaps be unkind to suggest that their *malaises* are in any way connected with the hope of squeezing a bit more out of the insurance company, but it is quite noticeable that many adult plaintiffs are very reluctant to accept counsel's advice about quantum. It is also remarkable, doctors say, how these post-accident troubles tend to disappear after the action is settled. They class them as 'compensation neuroses', and this must surely be the occupational disease of the legally aided ".—(1961) 105 S.J. 480.

# TOWN AND COUNTRY PLANNING APPEALS

## Macallan and Others *v.* New Plymouth City Council

Town and Country Planning Appeal Board. New Plymouth. 1960. 13 December. 1961. 30 January.

*Proposed district scheme—Service lane—Provision of service lanes in accordance with Town Planning principles—Desirability of service lanes being straight—Right of review of proposal within 5 years—Town and Country Planning Act 1953, ss. 26, 30, 35.*

Appeals come under s. 26 of the Town and Country Planning Act 1953. As they both related to the same proposal and the properties affected adjoined one another, they were, at the request of counsel, heard together. The first-named appellants were the owners of a property having frontages to Devon and Courtnay Streets, being those pieces of land containing 2 roods 2.6 perches, being Sections 1446 and 1472 of the Town of New Plymouth. The second-named appellants were the owners of a property having similar frontages. The property fronting Devon Street contained 1 rood 1.34 perches, being the land shown on Deposited Plan No. 8055 and being Section 1447 of the Town of New Plymouth. The property fronting Courtnay Street contained 20.67 perches, being Lot 1 on Deposited Plan No. 4504 and being part Section 1473, Town of New Plymouth. The respondent Council's proposed District Scheme, as publicly notified, made provision for a proposed service lane 20 feet in width running from Eliot to Gover Streets. This proposed service lane would virtually have bisected the appellants' properties. They lodged objections to the proposal and when their objections were disallowed, the appeals followed.

*Ewart*, for the first appellant.
*Grayling*, for the second appellant.
*J. P. Quilliam*, for the respondent.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence adduced and the submissions of counsel, the Board finds as follows:

1. Both the appellants' properties constitute, in existing use and occupancy, complete blocks. The proposed service lane would pass through the centre of a house erected on the property of the first-named appellants and would have the effect of severing the second-named appellant's property into two blocks. One would have a frontage to Devon Street and the other to Courtnay Street.
2. Both properties are situated in a block bounded by Devon Street-Eliot Street-Courtnay Street and Gover Street. The area fronting on to Devon Street is zoned commercial and part of the area fronting Courtnay Street is also zoned as commercial, the balance being residential. The properties owned by the appellants are zoned as commercial as to the Devon Street portion and residential as to the Courtnay Street portion.
3. It is a well established Town Planning principle that service lanes should be provided in commercial areas. In general, these service lanes should, wherever possible, run in a straight line from street to street not only to facilitate the flow of traffic using the service lanes, but also to provide fire fighting facilities and also some measure of protection to property owners because a straight line can be more adequately policed. In this particular case, having regard to the long frontages to Devon and Courtnay Streets of the area under consideration, and to the fact that Devon Street is an important traffic route and that Courtnay Street also now carries a considerable volume of traffic which can be expected to increase in the future, the provision of a service lane here is in accord with sound Town Planning principles and practice.
4. Certain alternative suggestions were put forward on behalf of the appellants for eliminating the service lane in so far as it relates to the appellants' properties and providing the other properties affected with a service lane having "legs-in" from Courtnay Street and turning points. This is not a very satisfactory type of service lane and should be avoided if possible.
5. The evidence of the respondent Council is that it is unlikely that this service lane will be constructed for some years, so there is no early prospect of any physical interference with the appellants' properties. It appears evident that commercial development in the city of New Plymouth is tending towards the east, but it is difficult to say at the present time how intense the commercial development in the area under consideration will become in the future. The respondent Council's scheme will be due for review pursuant to s. 30, within five years of its becoming operative. The Board considers that the siting of this service lane should be reviewed again when the plan is being reviewed in the light of the commercial development that has then taken place in this locality. If the present circumstances should change before the time for review arrives, the appellants would have a right to apply under s. 35. In the meantime the Board considers the proposal for a service lane to be a sound one and it is not prepared at this stage to amend it. Both appeals are disallowed.

*Appeals disallowed.*

## In re an Application by the Taranaki Harbour Board

Town and Country Planning Appeal Board. New Plymouth. 1961. 7 August.

*Proposed District Scheme—Specific departures—Departures allowed—Town and Country Planning Act 1953, s. 35.*

UPON READING the application of the Taranaki Harbour Board filed herein and the affidavit of Ronald Henry Quilliam sworn and filed in support thereof and BEING SATISFIED:

1. That the provisions of Reg. 32 of the Town and Country Planning Regulations 1960 have been duly complied with.
2. That there have been no objections to the application.
3. That the Combined Committee of the City of New Plymouth and the County of Taranaki unconditionally supports the application.

THE BOARD HEREBY CONSENTS to the following specific departures from the provisions of the proposed District Scheme of the City of New Plymouth and Taranaki County Combined Area.

(1) The rezoning as industrial D of the area of land bounded on the north by Lot three shown on Deposited Plan 8465, on the east by the proposed Paritutu Road shown on the attached plan, on the west by Paritutu Crescent shown on the said Deposited Plan 8465, and on the south by a line parallel to the said northern boundary and drawn from a point on the said Paritutu Road situated approximately nine and one-half chains from such northern boundary, the said area having an area of approximately 12 acres, three roods and being at present zoned industrial B.

(2) The rezoning as industrial B of the area of land bounded on the south by the proposed Eden Street shown on the plan produced, on the east by the said Paritutu Road, on the west by the said Paritutu Crescent, and on the north by a line parallel to the southern boundary and drawn from a point on the said Paritutu Road situated approximately three and one-half chains from such southern boundary, the said area having an area of approximately five acres, three roods and being at present zoned as partly industrial B, partly residential and partly commercial A.

(3) The rezoning as commercial A of the area of land bounded on the north by the said Eden Street for a distance of approximately two and one-half chains from the said Paritutu Road, on the east by the said Paritutu Road for a distance of approximately two chains, and on the south and west by lines drawn parallel to Eden and Paritutu Road aforesaid respectively, the said area having an area of approximately two roods, and being at present zoned as residential.

(4) The rezoning as industrial B of the area of land situated to the east of the said Paritutu Road and marked on

(*Continued on p. 352*)

# IN YOUR ARMCHAIR—AND MINE

By Scorpio

**Crime and Soft Punishment**—In the whole problem of prosecution and punishment we stumble against another strange similarity between Soviet problems and our own. Constantly made conscious of Soviet zeal for the suppression of political non-conformity, we are learning with some astonishment that in the field of simple non-heretical crime there is in Russia precisely the same division of public opinion as to the legitimate limits of leniency which we find in England. Newspapers there, like so many here, bitterly criticise "an acquiescent attitude towards hooliganism," going with the "strawberries and cream" treatment of "hooligans" in prison where confinement has all the compensations of "cultural cells" providing the refining influences of books for reading and dominoes for relaxation. What they call "hooliganism" in Russia is roughly what we would regard as non-political ruffianism, behaviour there, as here, devoutly deplored by the serious-minded and defiantly delighted in by those who practise it. "Occupation: hooliganism" was an answer recently given by a teenage delinquent held up for questioning. And, what is worse, ordinary people in such cases often show signs of siding with the delinquent against the policeman. "What has he done?" they ask. "Let him go his own way". Even in cases of killing they ask: "Why should another life be taken because one has been lost?" Alarm at "bourgeois kindness" and "lop-sided humanism" towards the criminal are not the sort of controversial topics of which one expected to hear the echoes blown to us on the biting east wind. It is almost as if the buried world of Chekov with its endless discussions and philosophisings were breaking surface again after several generations underground. A piece of pure Chekov was recently unearthed by a newspaper investigator in a northern village who discovered a leisurely well-dressed, middle-aged man with all the time in the world to discuss foreign politics and space flights. His official title was "Director of the Local Stadium", an institution which on inspection was revealed to be an unfenced field decorated with a set of goalposts, but actually dedicated to the grazing of a few cows. Questioned about the situation the secretary of the local party committee explained that Mitia was a good fellow who did no one any harm and enjoyed holding an official position. "As for his salary, it is not that big; we won't be much poorer for it". Isn't that pure nineteenth century Russia?

**Scene in Court**—In those far-off days when Judges (we are told) were constantly declaring that "This Court is not a theatre" and ordering the public gallery to be cleared after a burst of unseasonable laughter, the Courts were far closer to the realm of public entertainment than they are now. In the first place, practically all the judges and barristers were tremendous character actors in the tradition of the now defunct Lyceum Theatre. They had to be. With boxes full of jurymen to give a crowd effect to almost every performance, the lawyers in the case had to be ready to play the heavy father, the man of the world, the friend of the people, the defender of the faith and good morals, the dauntless champion of the oppressed or the silver-tongued orator, according as the circumstances demanded. Behind it all was, of course, the Victorian's innate love of drama and self dramatisation. If the cases had been set to music, bench and bar would have produced a race of baritones and tenors. There was virtually an acknowledged prima donna, that princess among litigants in person, Mrs Georgina Weldon. But, since juries dwindled almost to vanishing point in civil litigation and even the criminal courts became drearily businesslike beneath the daunting eye of big brother, the Court of Criminal Appeal, the entertainment value of the courts has steadily declined. The average silk is chatty and conversational to a distressing and depressing degree. With most of them it is a case of "once heard, never remembered". As for the Judges, some of the older ones, after a good chunk of a lifetime sitting brooding aloft with a pulpit immunity from contradiction, develop a certain vintage bouquet, but this is not a generation of those rough, tough sages about whose seat of justice rolled thunder, lightning and all the manifold terrors of the law. It was worth booking a good seat to witness their performances.

**Punctuation**—A headline in *The Times* prefaced the news from Eire with "'M'Lud' will die Hard in Eire's Courts." But surely "M'Lud" belongs rather to English counsel. That elision has none of the music of the Irish brogue. In Eire I think, any deviation from the severe correctness of "My Lord" would be more likely to take the form of something like "Me Lard". It appears that the expectation at the Irish Bar is that the new forms of addresses will take a long time to establish. One cannot alter overnight an ingrained habit of speech of 20 years' standing or more. "My Lord" is a form of punctuation rather than respect. It marks a pause for thought or for breath, or both. It gives cadence to forensic sentences. It is to them what the wig is to its wearer, an ornamental call to dignity of demeanour and expression and a rebuke to vulgar colloquialism. One hopes that "Irish Courts" will do the same work equally mellifluously with its return to the tongue the Irish spoke in those days of legendary greatness "when Malachy wore the collar of gold" and the High King at Tara was the fountain of justice.

**Harmless Error**—"The Court erred in some of the legal propositions announced to the jury; but all the errors were harmless. Wrong directions which do not put the traveller out of his way, furnish no reasons for repeating the journey." This is the succinct conclusion of a Judge of Appeal in New York.

**Trusts**—"Trusts are children of equity; and in a Court of Equity they are at home under the family roof-tree, and around the hearth of their ancestors."

# TOWN AND COUNTRY PLANNING APPEALS

(*Concluded from p. 350.*)

the said plan as "IV—zoning industrial A, proposed industrial B" the said area being the only area shown as zoned industrial A on the plan of the said proposed district scheme (Certified pursuant to Reg. 19 (3) of the Town and Country Planning Regulations 1954 by a certificate dated 18 October 1959 signed by the secretary of the Joint Committee) in that part of the district shown on such plan as bounded by the said Paritutu Road, Paritutu Crescent and Ngamotu Road, and having an area of approximately two acres three roods.

DATED at Wellington this seventh day of August 1961.

F. F. REID,
*Chairman*

## Mason and Porter Ltd. and Another *v.* Mount Wellington Borough.

Town and Country Planning Appeal Board. Auckland. 1960. 2 November.

*Res judicata—Subject-matter of appeal already dealt with by Board in earlier appeal by Auckland Regional Planning Authority—Board following earlier decision—Town and Country Planning Act 1953, s. 26.*

Appeals under s. 26 of the Town and Country Planning Act 1953.

*Dyson*, for the first appellant.
*Boyes*, for the second appellant.
*Pleasants*, for the respondent.

The judgment of the Board was delivered by

REID S.M. (Chairman) The appeals were not actually heard together but as they related to the same provision of the respondent Council's proposed District Scheme and to adjoining properties the Board has deemed it apposite to issue a decision covering both appeals. The respondent Borough Council's proposed District Scheme in compliance with a requirement made by the Auckland Regional Planning Authority makes provision *inter alia* for what is described as the Eastern Motorway. This Eastern Motorway is planned to link up with the Ellerslie-Panmure Highway and the Mt. Wellington Highway opposite the point where the Mt. Wellington Highway debouches on to the Ellerslie-Panmure Highway. The appellants own properties described as follows:

*First Appellant.*

A block of land at the corner of Mt. Wellington Highway and Ellerslie-Panmure Highway containing approximately 15 ac. and a block of land on the Ellerslie-Panmure Highway opposite the northern end of the Mt. Wellington Highway containing approximately 7 ac.

*Second Appellant.*

All that piece of land containing 1 ac. 4.5 pp. more or less being Lot 4 on Deposited Plan 39291 and Lot 8 on Deposited Plan 12992 being part of allotments 1 and 6 of Section 2 of the small lots near Panmure.

These properties secondly and thirdly described adjoin one another and front on to the Ellerslie-Panmure Highway on its northern side opposite to the junction with the Mt. Wellington Highway.

The plan for the proposed District Scheme envisages the construction of a clover-leaf at this point when the Eastern Motorway is constructed. The Eastern Motorway is planned to pass through the seven acre property owned by Mason and Porter Limited and it and the proposed junction will take in virtually all of the second appellant's property. This proposal is an integral part of the Master Transportation Plan for greater Auckland.

This plan, insofar as it relates to the Mt. Wellington Borough was under consideration by the Board in the appeal *Auckland Regional Planning Authority* v. *Mt. Wellington Borough Council*. The Board there held in general terms that the proposals of the Master Transportation Plan, in so far as it related to the Mt. Wellington Borough, were in accordance with town and country planning principles and that they should be supported. These two appeals are irrevocably tied to that decision and nothing that was advanced at the hearing of these appeals would lead the Board to alter its view. It holds that the provision in the plan for the proposed junction and the Eastern Motorway at this particular point is in accordance with town and country planning principles and should stand as part of the plan. Both appeals are disallowed.

*Appeals dismissed.*

## A. W. Bryant Ltd. *v.* Mount Wellington Borough.

Town and Country Planning Appeal Board. Auckland. 1960. 2 November.

*Proposed District Scheme—Land zoned "residential"—Unsuitable for residential development because cost prohibitive and uneconomic—Not in interests of community that it should lie idle—Rezoned industrial B subject to conditions—Town and Country Planning Act 1953, s. 26.*

Appeal under s. 26 of the Town and Country Planning Act 1953.

The appellant company was the owner of a property situate at Penrose comprising 12 ac. 37.5 pp. more or less being Lot 164 on Deposited Plan No. 18309. Under the Council's proposed district scheme as publicly notified pursuant to s. 22 of the Act this land was zoned as "residential A". The appellant company lodged an objection to this zoning claiming that its land should be zoned as a quarry or, alternatively, as industrial or commercial. The objection was disallowed and this appeal followed.

*Wilson Q.C.*, and *Drummond*, for the appellant.
*Pleasants*, for the respondent.

The judgment of the Board was delivered by

REID S.M. (Chairman). Since the appeal was filed certain alterations have been made to the Council's proposed district scheme one of them being that quarries are now a conditional use anywhere within the Borough. Counsel for the appellant agreed that this would meet the company's appeal in so far as it related to a quarry zoning and the appeal proceeded on the basis that the company sought an industrial zoning in lieu of a residential zoning. After hearing the evidence adduced and the submissions of counsel, the Board finds as follows:

1. It was submitted on behalf of the company that the land under consideration by reason of its topography and its rocky nature is unsuitable for residential development because the cost of so developing it would be prohibitive and uneconomic.
2. The land under consideration is in what is known as a "basalt" area and without reviewing the evidence in detail the Board is satisfied that the cost of roading it and making it generally suitable for residential occupancy would be prohibitive and uneconomic.
3. It follows, therefore, that whoever owns this land would not undertake the development of it for residential use and unless some use is made of it it will lie vacant. It is clearly not in the interests of the community that such a position should pertain. Apart from anything else the property as it is at present constitutes at certain times of the year a grave fire hazard.
4. The appeal is allowed in part, that is to say the land under consideration is to be zoned as "industrial B", subject to the following conditions:
   (a) The land is not to be subdivided into more than four industrial sites except with the express consent of the Council.
   (b) Before any part of the land is used for industrial purposes the owner shall set aside a strip of land on the northern, eastern and southern boundaries and plant the same with appropriate trees and maintain the same as a screen to the satisfaction of the Borough Engineer.

*Appeal allowed in part.*