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## DISCHARGE OF JURY

Briefly reported in newspapers here have been the bare facts of the abrupt conclusion, after six days of hearing, of the Arms Conspiracy trial in Dublin, which ended when the trial Judge, Mr Justice O'Keefe, discharged the jury after counsel for one of the accused had criticised the manner in which the trial Judge had conducted the proceedings to date.

One of the accused, Mr Albert Luykx, an Irish citizen and a former national of Belgium, had wished to revisit Belgium some 18 months earlier but had experienced difficulty as he had been declared *persona non grata* there. Mr Luykx had received a letter from Belgium which made a number of allegations against him and which he had shown to Mr Peter Berry, Secretary of the Department of Justice in Dublin. Mr Berry had given Mr Luykx a certificate to the effect that Mr Luykx's record in Eire was wholly blameless in so far as criminal or subversive activities were concerned. Mr Berry was called by the prosecution and, with the consent of Luykx's counsel, the certificate was produced in evidence and subsequently the witness started to read a copy of the letter from the Belgian authorities which Mr Luykx had given him. Counsel for Mr Luykx objected, saying that although he did not know what was in the letter he felt it concerned his client's personal affairs and so its contents should not be revealed in Court "more than was necessary". The trial Judge ruled that the certificate had been introduced in evidence and that the jury were "entitled to know how it came to be given". He directed that the letter should be read.

Counsel for Mr Luykx renewed his objection and added that he suspected that the trial Judge wanted the letter read as it might hurt his client and that this was "illustrative of the rather un-

fair tone in which his Lordship at times has been conducting the trial".

Mr Justice O'Keefe at that stage did not reply but adjourned the hearing for lunch, and when it was resumed he referred to "the very serious allegations made by counsel for Mr Luykx" and added that "in a case of the importance at issue, I do not see how a Judge of whom such an accusation is made in open Court can properly continue to carry on the trial". He then discharged the jury—an action for which in the circumstances there appears to have been no precedent—and despite the fact that counsel for all four defendants in turn urged the trial Judge not to take such a course in view of the hardship their clients would suffer, not if the trial continued but if it did *not*.

All concerned, including the trial Judge, considered that the ultimate verdict of the jury would be unlikely to be affected if the trial proceeded. It may well be that the trial Judge was concerned with public reaction to newspaper reports of the allegations which had been made. However newspaper reports would undoubtedly have also carried reports that all accused had argued that the trial should continue and, further, that counsel responsible for the allegations had offered to withdraw from the case altogether in order that it might proceed. To mitigate hardship to the other defendants if they were to "lose the benefit of . . . the very considerable fees which had been paid to counsel, to solicitors, and perhaps witnesses", the trial Judge ordered Mr Luykx to pay the costs of all parties to date—if in fact they made application for their costs (which in fact they did not).

Such an order seems to have contemplated a severe penalty for a defendant simply because his counsel had criticised the trial Judge—even

though his counsel had stated in Court that he had done so on his own initiative, that he did not express his client's views and that his action had been in no way instigated by his client. It seems quite unrealistic that a client should be held personally responsible for actions taken by counsel or solicitors acting entirely on their own initiative.

However the action of the trial Judge can be contrasted with that of his counterpart in the trial of the Manson family in Los Angeles. Readers will recall seeing for themselves televised excerpts from that extraordinary press conference given by President Nixon—himself a lawyer—when, in front of the best part of the entire American nation, he stated unequivocally

that the defendants were guilty of the charges brought against them. In that case, as we understand it, the trial Judge refused to ascertain for himself whether the jury had learned of their President's remarks and refused all applications for a mistrial even after counsel for one of the defendants had shown a newspaper to the jury which prominently featured the President's unfortunate remarks—an action taken, presumably, to nullify the trial Judge's hopeful belief that the jury had not learnt of Nixon's statement.

If the trial Judge in Dublin appears to have gone to one extreme, his counterpart in Los Angeles has certainly gone to the other.

JEREMY POPE.

## SUMMARY OF RECENT LAW

### CRIMINAL LAW—PUBLIC OFFENCES

*Offences against decency—Exhibiting indecent document—Picture on page of book—Whether a "document" or part of a "book"—Reference to Tribunal—Importance of context—Indecent Publications Act 1963, ss. 2, 12, 21 (1) (e).* A bookseller placed in his shop window three books standing vertically against a shelf, each having its dust cover turned back to reveal a picture of nude men and women on the first page. He was charged with exhibiting indecent documents. The case stated for the opinion of the Supreme Court asks: (1) Whether the Magistrate was correct in holding that what was exhibited in each case fell within the meaning of the word "book" as defined in the Indecent Publications Act 1963; and (2) Whether the Magistrate should have referred what was exhibited to the Indecent Publications Tribunal for its determination. *Held*, In considering the question of indecency, full regard must be had for the context in which the picture appears. Just because a book meets with the approval of the Indecent Publications Tribunal cannot mean that, regardless of circumstances, a picture from that book can never be displayed in an indecent manner. On the facts of this case each of the pictures exhibited must be viewed as "a document" and it will be for the learned Magistrate to decide whether in all the circumstances, the exhibition was indecent. Both questions answered in the negative. *Police v. Brien* (Supreme Court, Auckland, 1970. 10, 26 June. Roper J.).

*Offences against decency—Posting indecent brochure—Determination of indecency—Matters for consideration—Importance of context—Post Office Act 1959, s. 48 (b).* The appellant appealed against conviction and sentence on two charges of posting an indecent brochure contrary to s. 48 (b) of the Post Office Act 1959. In the course of his mail order business he posted an unsolicited brochure of which the front page was entirely taken up by nude photographs reproduced from pictures in nature magazines, some, and probably all of which had been passed by the Indecent Publications Tribunal. *Held*, The whole question of indecency falls to be con-

sidered to a large extent by reference to the context in which photographs appear. Although photographs of completely nude men and women may be acceptable according to the common standards of the community if taken by themselves or if they appear as part of a nature magazine, they may be unacceptable and injurious to the public in a different context and arrangement. Having regard in the present case to the way these photographs have been arranged, to their context of lists of publications dealing with sex and to the fact that they were mailed without solicitation through the post, the front page of the brochure taken as a whole and with particular reference to the centre figure of a completely nude male is an indecent document. Appeal dismissed. *Powell v. Police* (Supreme Court, Auckland, 1970. 10, 20 March. Richmond J.).

### INCOME TAX—TAX PAYABLE

*Trustees' income—Annuities charged upon both capital and income by Court order under the Family Protection Act—Surplus income—Whether surplus income held for annuitants or on residuary charitable trusts—Land and Income Tax Act 1954, s. 86 (1) (n), 155 (b).* On the true construction of the will as varied by the Family Protection order the trustee in each year must pay the annuities to the testator's children out of that year's income if it is sufficient and if not, out of capital. In any year where the trustee has surplus income that surplus is held for the residuary charitable purposes prescribed by the testator. The whole of the balance of income for the year ended 30 June 1965 was derived in trust for charitable purposes and by virtue of the provisions of s. 86 (1) (n) of the Land and Income Tax Act 1954 was exempt from taxation. (*Re Collier's Deed Trusts* [1939] Ch. 277; [1937] 3 All E.R. 292; *Re Berkeley* [1968] Ch. 744; [1968] 3 All E.R. 364; *Re Croxon* [1915] 2 Ch. 290; [1914-15] All E.R. Rep. 816; *Re Platt* [1916] 2 Ch. 563; [1916-17] All E.R. Rep. 570 and *Re Lord Westbury's Settlement* [1944] Ch. 4; [1943] 2 All E.R. 463, considered. *Bathurst v. Burke* [1946] I.R. 214; *Re Rose* (1915) 113 L.T. 142; *Re Cameron* [1954] 1 W.L.R. 1375; [1954] 3 All E.R. 329; and, on

appeal [1955] 1 W.L.R. 140; [1955] 1 All E.R. 424, and *Re Chance* [1962] Ch. 593; [1962] 1 All E.R. 942, referred to.) Appeal from the judgment of Wild C.J. [1969] N.Z.L.R. 270, allowed. *Public Trustee v. Commissioner of Inland Revenue* (Court of Appeal. Wellington. 1970. 1 May; 30 June. North P. Turner J. Haslam J.).

#### GIFTS—INCOMPLETE GIFT

*Purported gift of part of debt—Effective gift of balance—Whether second deed released whole debt—Estoppel by deed—Estoppel by representation—Promissory estoppel. Held, Per totam curiam.* In respect of estoppel: 1. The defence of estoppel by deed cannot lie for here the claim of the executors against the son is made not under the deed but under the agreement for sale and purchase. (*Carpenter v. Buller* (1841) 8 M. & W. 209; 151 E.R. 1013; *Ex parte Morgan, Re Simpson* (1876) 2 Ch. D. 72 and *Dabbs v. Seaman* (1925) 36 C.L.R. 538, considered.) 2. A mistake of fact common to both parties to the deed of 1958, not induced in the case of either party by a representation of the other, cannot found an estoppel; nor is there any evidence of any conduct of the father sufficient to found such a representation. (*Square v. Square* [1935] P. 120; [1935] All E.R. Rep. 781, applied. *Fung Kai Sun v. Chan Fui Hing* [1951] A.C. 489, referred to.) 3. The submission of promissory estoppel fails because: (a) It has not been shown that this father and son were already finally bound by their contractual obligations under the agreement for sale and purchase before the assurance said to have been given by the father was given to the son. (*Emmanuel Avodaji Ajayi v. Briscoe* [1964] 1 W.L.R. 1326; [1964] 3 All E.R. 556; *Hughes v. Metropolitan Railway Co.* (1877) 2 App. Cas. 439; [1874-80] All E.R. Rep. 187 and *Birmingham and District Land Co. v. London and North-Western Railway Co.* (1888) 40 Ch. D. 268; [1886-90] All E.R. Rep. 620, applied.) (b) There cannot be found in the facts so far as they are satisfactorily established, anything in the nature of a detriment sufficient to support a plea of promissory estoppel. (*Commissioner of Inland Revenue v. Morris* [1958] N.Z.L.R. 1126, followed.) Per Turner and Haslam JJ., North P. dissenting. The plain operative words of the deed of 1958 amount to no more than a discharge from liability amounting to £3,962; and the immediately succeeding words which then follow "being the balance of the aforesaid sum of £7,462" cannot be given any more effect than they already had by reason of their inclusion in a recital in the introductory parts of the same deed. Appeal dismissed. (*Strong v. Bird* (1874) 18 L.R. Eq. 315; *Ruddenklau v. Charlesworth* [1925] N.Z.L.R. 161 and *Davidson v. Martin* [1969] 1 N.S.W. 544, referred to.) *McCathie v. McCathie and Another* (Court of Appeal. Wellington. 1970. 23, 24 March; 30 June. North P. Turner J. Haslam J.).

#### RAILWAYS—LEVEL CROSSINGS

*Offences—Driving motor car across a level crossing when there is risk of collision—Whether proof of mens rea essential—Government Railways Act 1949, s. 64.* In this case Henry J. granted leave to appeal on a point of law and formulated the first question as follows: 1. Do subss. (1) and (4) of s. 64 of the Government Railways Act 1949 require proof of some mental element comprehended by the general term *mens rea*? *Held*, Subject to reservations concerning the proof of the *actus reus* and that the ingredient of driving the vehicle must arise from free, deliberate and conscious choice by the driver, s. 64 (1) and (4) of the Government Railways Act 1949, both in content and in purpose,

impose strict liability upon anyone who attempts to drive a vehicle across a level crossing when there is a risk of a collision as defined in the latter subsection. Appeal dismissed. Judgment of Henry J. [1969] N.Z.L.R. 847, affirmed. *McCone v. Police*. Court of Appeal. Wellington. North P., Haslam and Roper JJ. 10, 29 July 1970.

#### SHIPPING AND NAVIGATION—HARBOURS, DOCKS AND WHARVES

*Damage to wharf—Sand unloaded on to wharf specially built for purpose—Wharf subsequently collapsing through defective construction—Extent of shipowners' liability—Relevance of inquiry into cause—Meaning of "material"—Harbours Act 1950, s. 209.* The respondent was the owner of a tug and a barge from which 610 tons of sand was unloaded in Whangarei harbour on to a wharf specially built by the appellant Board for that purpose. After unloading about 610 tons of sand the tug withdrew to deeper water because of the falling tide and the respondent's employees all went into Whangarei. About an hour later it was observed that the breast-work and piles of the wharf were subsiding into the sea and this continued progressively for about another hour until the wharf was in a state of complete collapse. The Board claimed under s. 209 of the Harbours Act 1950 the cost of construction of the wharf and of the removal of the wreckage totalling £12,265. It was conceded by the Board that the 610 tons of sand were discharged without fault by the respondent's employees and that the wharf was so defective in its construction because of poor welding of its ties that it became overloaded and collapsed. The jury answered "No" to the question "Did any persons employed about the tug or the barge do any injury to the wharf?" On 27 March 1969 Perry J. dismissed a motion filed on behalf of the Board seeking judgment notwithstanding the verdict of the jury or, alternatively, a new trial. The Board appeals from that judgment. *Held, Per totam curiam*, Dismissing the appeal and affirming the judgment of Perry J.: 1. On a claim made in New Zealand under s. 209 of the Harbours Act 1950 for damage done to a wharf, an inquiry into causation is relevant in principle and at least in the circumstances of the present case where the damage did not happen immediately, was not done by the vessel itself and was not directly caused by any persons employed about the vessel, it is necessary to determine what was the real cause of the injury. (*Dennis v. Tovell* (1872) L.R. 8 Q.B. 10; *The Merle* (1874) 2 Asp. M.L.C. (N.S.) 402; *River Wear Commissioners v. Adamson* (1877) 2 App. Cas. 743; [1874-80] All E.R. Rep. 1; *Great Western Railway Co. v. Owners of S.S. Mostyn* [1928] A.C. 57; [1927] All E.R. Rep. 113 and *Workington Harbour and Dock Board v. Towerfield (Owners)* [1951] A.C. 112; [1950] 2 All E.R. 414, distinguished. *Postmaster-General v. Corporation of Liverpool* [1923] A.C. 587; *Leyland Shipping Co. v. Norwich Union Fire Insurance Society Ltd.* [1918] A.C. 350; [1918-19] All E.R. Rep. 443; *Smith, Hogg and Co. Ltd. v. Black Sea and Baltic General Insurance Co. Ltd.* [1940] A.C. 997; [1940] 3 All E.R. 405 and *Canada Rice Mills Ltd. v. Union Marine and General Insurance Co. Ltd.* [1941] A.C. 55; [1940] 4 All E.R. 169, considered.) 2. The question whether under the statute the facts justify the conclusion that the injury done to the wharf was caused by persons employed by the owner of the vessel in unloading the sand on to the wharf is a question of fact for the jury to determine. Perry J. correctly directed the jury on an issue properly posing this question which the jury answered in the negative. No reason has been shown why that verdict

should be disturbed and there was ample evidence to justify the jury's conclusion that the effective or dominant cause of the wharf's collapse was the defective tie rods. Per North P. and Turner J.: (a) The substitution in the New Zealand Act of the word "injury" for the word "damage" used in s. 74 of the English Harbours Docks and Piers Clauses Act 1847 is of no significance. (b) The insertion in s. 209 of the words "or material" was merely intended to extend the scope of our Act to include the owners of floating material other than timber or, at most, material in the water. *Northland Harbour Board v. Auckland Water Transport Limited*. (Court of Appeal. Wellington. 8, 9 June; 10 July 1970. North P., Turner and Haslam JJ.).

#### WATER CONTROL—POLLUTION

*Discharge of sewage waste into sea—Natural water—Water Allocation Council granting right subject to terms—Whether ultra vires the Council—Res judicata—Water and Soil Conservation Act 1967, ss. 2, 8, 20, 21, 24—Waters Pollution Act 1953—Waters Pollution Regulations 1963 (S.R. 1963/30) Regs. 9 (b), 11. Administrative law—Jurisdiction of Tribunal—Water Allocation Council acting as Regional Water Board—Pollution—Discharge of sewage waste into natural water—Right granted subject to terms—Whether certain terms ultra vires—Water and Soil Conservation Act 1967, ss. 2, 8, 20, 21, 24—Waters Pollution Act 1953—Waters Pollution Regulations 1963 (S.R. 1963/30) Regs. 9 (b), 11.* These proceedings relate to the discharge of sewage waste from the Porirua basin main outfall sewer into the sea about 2,500 feet south-west of Titahi Bay. The sewer was purchased from the Crown in 1964 by Hutt County, Porirua and Tawa Boroughs. The Pollution Advisory Council then classified as SD the waters along the coast from Titahi Bay for some 2,700 yards to the south-west covering the sewer outfall and extending beyond Old Man Point, but the Appeal Tribunal cancelled that classification in respect of waters beyond 100 yards of the sewer outfall. A temporary permit was granted in respect of the sewer outfall. By the Water and Soil Conservation Act 1967 which came into force on 1 April 1968, the sole right to discharge waste into any natural water (including sea water) was vested in the Crown. Any Regional Water Board however was empowered to grant such a right "on such terms as it may specify". On 30 October 1969 the Water Allocation Council acting as the Regional Water Board for the region granted to the Hutt County the right to discharge sewage waste on the south side of Old Man Point about 5,000 feet south-west of Titahi Bay. The grant was for 10 years or until such earlier date as the receiving waters were classified by the Pollution Advisory Council and was made subject to 14 conditions. On appeal by the County, the Town and Country Planning Appeal Board took the view that the inclusion of the conditions was not objectionable. The question referred to the Supreme Court is "Whether the Water Allocation Council in granting the right . . . could as a matter of law validly impose conditions (j) to (n) inclusive or any of them?" *Held*, 1. The cancellation by the Appeal Tribunal of the Pollution Advisory Council's classification as SD of the waters beyond a point 100 yards south-west of the existing sewer outfall left the waters off Old Man Point as if they had never been classified under the Waters Pollution Act 1963. 2. In terms of the Water and Soil Conservation Act 1967, which came into force on 1 April 1968, the sea water off Old Man Point is natural water and the Water Allocation Council acting as the Regional Water Board under s. 21 (3) of that Act was competent to

grant the Hutt County the right to discharge waste into that water "on such terms as it may specify". 3. Although s. 259 of the Counties Act 1964 and s. 232 of the Municipal Corporations Act 1954 both contemplate sanitary drainage into the sea neither section gives express authority for that and each is now subject to the provisions of s. 21 (1) of the Waters and Soil Conservation Act 1967. 4. In imposing the conditions of the grant the Water Allocation Council did not purport to bind any other person than the Hutt County or to use the powers of the Pollution Advisory Council to classify the waters concerned. Having regard to the provisions of s. 20 (5) (c) and (6) of the Water and Soil Conservation Act and in the absence of anything in that Act to restrict the meaning of the phrase "on such terms as it may specify" The Water Allocation Council had power to impose the conditions in question. Appeal dismissed. *Hutt County v. Water Allocation Council* (Supreme Court (Administrative Division) Wellington. Wild C.J. 14, 23 July 1970).

**Route March**—Three Czechs were stopped one day by a Fairy Godmother who offered them each a wish with a guarantee that it would come true. Said the first Czech, "I wish that the Chinese Army would march into Prague, stay for a day, and then march out again." And the second Czech? "Yes, I should like the Chinese Army to march into Prague, stay for a day, then march out again." Fairy Godmother, by now slightly bemused, soldiered on. Third Czech? "I too, should like to see the Chinese Army march into Prague, stay for a day, then march out again." "Well," said the Fairy, "I suppose that can be arranged. But why do you all want the same things when there is so much else to choose from?" "Ah", said the first Czech. "But who could want anything more than the Chinese Army marching through the Soviet Union six times in a single week?"

**Questionable**—We know a Court of trial is not an inquisition, But often probing questions improve the Court's position. The advocate should do it, but the very sober fact is Such a "nice" solution does not occur in practice.

If some examination is forbidden to the Clerk The Court will be, on cojnet points, quite often in the dark.

Can we wonder why it's said the law is made for fools—

With helpful, proper evidence excluded by the rules?

J.B.L. in *Justice of the Peace and Local Government Review*.

## BILLS BEFORE PARLIAMENT

Age of Majority  
 Agriculture (Emergency Regulations Confirmation)  
 Apple and Pear Marketing  
 Appropriation  
 Appropriation (No. 2)  
 Appropriation (No. 3)  
 Bills of Exchange Amendment  
 Building Societies Amendment  
 Civil List Amendment (No. 1)  
 Co-operative Dairy Companies Amendment  
 Criminal Justice Amendment  
 Customs Amendment  
 Customs Orders Confirmation  
 Education Amendment  
 Electric Linemen Amendment  
 Equal Pay for Equal Work  
 Fuel and Energy  
 Gas Supply Amendment  
 Hire Purchase  
 Hospital Employment (Transitional and Miscellaneous Provisions)  
 Illegal Contracts  
 Kapuni Petroleum  
 Local Authorities (Petroleum Tax)  
 Local Legislation  
 Machinery Amendment  
 Maori Purposes  
 Marine Farming  
 Marine Reserves  
 Meat Export Control Amendment  
 Medical Practitioners Amendment  
 Monopolies and Mergers  
 National Roads Amendment  
 Noise Abatement  
 Pharmacy  
 Plants  
 Police Offences  
 Public Order  
 Public Works Amendment  
 Queen Elizabeth the Second Technicians' Study Award  
 Rating Amendment  
 Reserves and Other Lands Disposal  
 Sale of Liquor Amendment (No. 2)  
 Shipping and Seamen Amendment (No. 2)  
 Social Security Amendment (No. 2)  
 Social Security Amendment (No. 3)  
 Social Security Amendment (No. 4)  
 Statutes Amendment  
 Superannuation Amendment  
 Timaru Airport Development and Improved Air Service  
 Town and Country Planning Amendment  
 Trade Practices Amendment  
 Transport Amendment  
 Universities Amendment  
 Valuation of Land Amendment  
 Valuation of Land Amendment (No. 2)  
 War Pensions Amendment (No. 2)  
 War Pensions Amendment (No. 3)  
 Water and Soil Conservation Amendment  
 Western Samoa Amendment

## STATUTES ENACTED

Antarctica Amendment  
 Apprentices Amendment  
 Berryfruit Levy Amendment  
 Chattels Transfer Amendment  
 Civil List Amendment  
 Coal Mines Amendment  
 Construction Amendment  
 Customs Acts Amendment  
 Development Finance Corporation Amendment  
 Estate and Gift Duties Amendment  
 Fisheries Amendment  
 Hospitals Amendment  
 Imprest Supply  
 Imprest Supply (No. 2)  
 Imprest Supply (No. 3)  
 Industrial Conciliation and Arbitration Amendment  
 Industrial Research and Development Grants  
 Land and Income Tax Amendment  
 Land and Income Tax (Annual)  
 Land Valuation Proceedings Amendment  
 Local Elections and Polls Amendment  
 Narcotics Amendment  
 Niue Amendment  
 Payroll Tax  
 Post Office Amendment  
 Post Office Amendment (No. 2)  
 Private Savings Banks Amendment  
 Public Revenues Amendment  
 Republic of The Gambia  
 Republic of Guyana  
 Reserve Bank of New Zealand Amendment  
 Sale of Liquor Amendment  
 Shipping and Seamen Amendment  
 Shops and Offices Amendment  
 Social Security Amendment  
 Soil Conservation and Rivers Control Amendment  
 State Advances Corporation Amendment  
 State Services Remuneration and Conditions of Employment Amendment  
 Tariff and Development Board Amendment  
 Tokelau Islands Amendment  
 Tonga  
 Trustee Savings Banks Amendment  
 War Pensions Amendment

## REGULATIONS

Regulations Gazetted from 12 to 19 November 1970 are as follows:  
 Customs Duties (Timber) Suspension Order 1970 (S.R. 1970/228)  
 Excise Duty (Cigars and Snuff) Order 1970 (S.R. 1970/216)  
 Fisheries Experimental Waters (Lakes Rotoiti and Rotorua) Regulations 1970 (S.R. 1970/217)  
 Freshwater Fisheries Regulations (Ashburton) Modification Notice 1970 (S.R. 1970/218)  
 Freshwater Fisheries Regulations (Wellington) Modification Notice 1970 (S.R. 1970/224)  
 Freshwater Fisheries Regulations (South Canterbury, and Waitaki Valley) Modification Notice (S.R. 1970/223)  
 Freshwater Fisheries Regulations (Otago) Modification Notice 1970 (S.R. 1970/222)  
 Freshwater Fisheries Regulations (Marlborough and Nelson) Modification Notice 1970 (S.R. 1970/221)  
 Government Life Insurance Regulations 1954, Amendment No. 4 (S.R. 1970/229)  
 New Zealand-Australia Free Trade Agreement Order (No. 8) 1970 (S.R. 1970/225)  
 Price Freeze Regulations 1970 (S.R. 1970/226)  
 Social Security (Rural Area) Notice 1969, Amendment No. 2 (S.R. 1970/227)  
 Transport Amendment Act Commencement Order 1970 (S.R. 1970/230)  
 Transport (Waybill) Regulations 1970 (S.R. 1970/231).

## CASE AND COMMENT

### New Zealand Cases Contributed by the Faculty of Law, University of Auckland

#### Surrender at Law by Reciprocal Estoppel's

As the writer remarked in his article with the late Norman Thomas about "Vesting of Companies shares" [1969] N.Z.L.J. 443, 467, the question goes back as to what is meant by "operation of law" and on this question the authorities are strangely silent.

In the land law field, the silence has proficuously been broken by Wilson J. in *Steve Christenson and Co. Ltd. v. Fur Fashions (N.Z.) Ltd.* (judgment delivered 27 July 1970) which concerned leased premises, part of which were subleased subject to a covenant not to assign without consent. In the Magistrate's Court it was contended that the sublease was determined either by eviction (as in *Hall v. Burgess* (1826) 5 Barn. and Cress. 332) or by re-entry (as in *Walls v. Atcheson* (1826) 3 Bing. 462).

In argument for the other side there was reliance on surrender by operation of law.

The case is noteworthy for its clarification of surrender by "operation of law" as a form of reciprocal estoppels by representation. The tenant represents to the landlord that the leasehold estate is at an end and the landlord represents to the tenant the same thing. The representations may be made by words (oral or written) or by conduct, and the law views the representations objectively, the actual intention of the representor being irrelevant. *Lyon v. Read* (1844) 13 M. & W. 285 per Parke B. at p. 306-307.

His Honour adopted the description of "surrender by operation of law" in cases such as this, where a third person is involved, set out in Spencer, Bower & Turner, *Estoppel by Representation*, (2nd ed., at p. 183, paragraph 190 which reads:

"So far the discussion has had in view the case of transactions between the surrenderor and the surrenderee only. But there is also the rather more complicated type of surrender which involves a transaction between these two and a third person whom the tripartite transaction is designed to substitute for the surrenderor as tenant. Here, if an arrangement between the parties is shown, or a request by the surrenderor to the surrenderee to let the premises to some specified person, or to anyone, in place of himself, or a consent by the surrenderor to such letting by the surrenderee,

and this arrangement, request, or consent is accompanied by an actual shifting of possession, the surrenderor vacating the premises and the new tenant entering, whether such shifting of possession follows upon, or precedes, the arrangement, request, or consent, there results a good surrender by operation of law, involving two sets of reciprocal estoppels, the first of which precludes the surrenderor and the surrenderee from disputing, as against one another, the discontinuance of the old tenancy, and the second of which precludes the surrenderee and the new tenant from disputing, as against one another, the establishment of the new tenancy."

Wilson J. held that in order for this defence to succeed the appellant must establish: "(i) An arrangement between the first and second respondents, or a request by the second respondents to the first respondent, to let the premises to Mr Dallard (or to anyone) *in place of the second respondents*, or a consent by the second respondents to such letting by the first respondent, and (ii) an actual shifting of possession, the second respondents leaving and Mr Dallard entering the premises, which accompanied the arrangement, request or consent."

J. A. B. O'K.

#### De Facto Responsibilities of Recipient of Maintenance and Onus of Proof

In *C. v. C.* (1970) (unreported), the Magistrate's Court was confronted with a wife who was able to work to provide for her own needs and was able and willing to work. Because, however, she was looking after her mother, a terminal cancer patient, she was unable to take up employment. Accordingly, she sought maintenance for herself under s. 27 of the Domestic Proceedings Act 1968.

Reference to subs. (2) of that section will show that the Court, in deciding whether to make a maintenance order in a wife's favour, the duration of such order and the amount to be paid under it, shall have regard to the matters specified in s. 27 (1) (a) and (b) (the wife's needs, in determining which the Court may have regard to the standard of living of the common household and the wife's ability to provide for her needs, having regard to her circumstances and

to her duty of care towards any child of the family) and, *inter alia*, to "(b) the responsibilities of the husband including his responsibilities to any other person whom he has a legal obligation to support and (to such extent, if any, as the Court in all the circumstances, and having regard to the public interest, thinks proper) his responsibilities to any other person whom he is in fact supporting." A corresponding provision is to be found in s. 32 (b) which deals with the situation where it is the husband who is the applicant. Section 35 (1) (b), which relates to maintenance of children by their parents, reads correspondingly. Each of these provisions, however, envisage the Court's taking into account the *de facto* responsibilities of the prospective payer of the maintenance, not those of the prospective payee. The case before the Court, of course, concerned the *de facto* responsibilities of the prospective payee, and there is no provision specifically requiring a Magistrate's Court to take such a matter into account.

Gilliand S.M. held that there was nevertheless no doubt that the wife's *de facto* responsibilities could be taken into account not only under s. 27 (1) (b) ("having regard to her circumstances") but also under s. 27 (e) ("any other circumstances that the Court thinks relevant"). As his Worship remarked, the recognition of either spouse's *de facto* responsibilities in s. 27, 32 and 35 supports this view "and accords with common sense and the realities of family life".

This being the case, the question then arose: upon whom lies the onus of proving the *de facto* responsibilities and of satisfying the Court that it should be considered by the Court? On the facts before him, Gilliland S.M. held that it lay on the applicant wife. He further held that it was insufficient for her to rely on the bare facts that the mother was a terminal cancer case and was living with the applicant wife, but that the Court must be supplied with evidence of the following matters:

- (i) The mother's medical condition, indicating, *inter alia*, the extent to which she needed continuous nursing or care;
- (ii) Whether alternative accommodation was available with other relatives;
- (iii) Whether hospital accommodation was available or necessary;
- (iv) The financial circumstances of the mother and so on.

"Given adequate evidence," concluded his Worship, "the Court might very well take this responsibility into account. I cannot think that

public interest is so far removed from the realities of family life that it could not. The conditions of the qualification in the subsection [i.e. in s. 27 (2) (b), that the Court must have regard to the ability of the wife to provide for her needs, having regard to her circumstances . . .] might be met by evidence establishing a responsibility of necessity. But the matter must be proved and here this is not the case".

The moral of the judgment is clear for future cases of this kind. In the case under review, Gilliland S.M., had regard to the fact that evidence of the kind he indicated might well be available and decided that the justice of the matter required him to direct a rehearing of the application for maintenance. He left the existing interim order to run for a period of two months, no further extension thereof to be made without good cause.

P.R.H.W.

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**Parliamentary Salaries**—Incredulity has been expressed in other places at the action of parliamentarians in giving themselves salary increases massive by any standards. Yet two points seem to have been overlooked.

Some parliamentarians treat their parliamentary role as a part-time job, and by these standards it was already more than handsomely rewarded.

There seems to be no reason why there should not be a means test for a higher salary—in fact this might encourage more parliamentarians to devote themselves full-time to their legislative duties.

To some Members, the dearth of secretarial assistance presented an even greater problem than lack of pay. The spectacle is extraordinary of a parliamentarian seated behind a typewriter, pecking out his own correspondence. By clerical standards, the parliamentarian-typist is grossly overpaid.

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**Discrimination**—"There should be legislation, or discriminatory taxes, heavily favouring the small, quiet, pollution-free vehicle, and heavily penalising the powerful, environmentally aggressive, dangerous juggernaut": LORD CAMPBELL OF ESKAN.

## LAND TRANSFER REGISTRATION—AN ANALYSIS OF BASIC PRINCIPLES

The controversial decision of the Privy Council in *Frazer v. Walker and Others* [1967] N.Z.L.R. 1069; [1967] 1 All E.R. 649; [1967] 1 A.C. 569 produced a veritable spate of learned articles in the JOURNAL on various aspects of indefeasibility, but almost all were concerned with the technical interpretation of the difficult sections of the Act and the still more difficult leading cases. I want to try an entirely different approach of analysing the basic and elementary principles of registration with hardly any reference to specific sections and cases.

The whole purpose of conveyancing is to enable a person to *obtain* and *retain* a secure title to his property in the quickest, cheapest and simplest way possible. From the purchaser's point of view, the title should be immediately secure against defects and adverse claims which are not of his making, but this is not enough; the purchaser has now become an owner who may hold the property for many years, and the title must remain secure for all those years against theft, forgery and other happenings which could deprive him of his property. Any lopsided development of the system in a way that unduly favours purchasers, will correspondingly weaken the security of all other owners, and *vice versa*, of course.

The Land Transfer Act 1952 is too often thought of as a completely new system depending on *registration* rather than on documents, and phrases are loosely used such as:

"Title does not pass by the execution of a document, but by registration".

"Registration is everything."

"Registration is effective to vest and to divest title".

But registration, unlike the smile on Alice's Cheshire cat, cannot exist in the abstract. It must obviously be registration of a document, and it is the aim and responsibility of the Land Transfer Office to ensure that the documents it accepts for registration do in fact form a *chain of valid documents* from vendor to purchaser and so on and on, with just as much exactness as was needed to establish title under the old deeds system.

The similarity between the deeds system and the Land Transfer Act is closer and more subtle than is generally recognised, and this is why it

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*This summary has been prepared by Warrington Taylor from his detailed submissions to the Law Revision Committee, copies of which are in District Law Society libraries.*

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is well to consider the basic principles of land ownership and transfer, and to observe how "registration" fits into the scheme.

### Three Major Hurdles

If registration was "everything", and if anyone could come along to the Land Transfer Office and get himself registered as owner of a property by a sort of *ex parte* application, just like applying for a driver's licence, or for a mining right in a desert land, property ownership would be a farce and a shambles. From the earliest days of documentary titles, ownership depended on proving that you had validly acquired the property from the last of a series of legal owners. To do this, before deeds registration was introduced, the purchaser had to surmount three major hurdles, of which the first two were by far the most formidable:

- (a) Search the vendor's deeds, by perusing his abstract and then examining the deeds themselves, to be sure they were a complete and valid chain.
- (b) Satisfy himself, *if he could*, that there were no undisclosed claims or deeds which could defeat the ones he had searched.
- (c) And then to prepare and obtain signature of a valid conveyance.

With the introduction of deeds registration, the difficulty under (b) was almost entirely removed. If the solicitor searched and dealt with all *registered* deeds and claims, he knew that no unregistered ones could arise to defeat him. This really major reform might involve the deprivation of (say) an unregistered mortgagee, but it was a fair and fully justifiable reform, because the mortgagee had it in his own hands to protect himself by registration.

I said, "If a solicitor searched . . .", but there's the rub. The deeds search was a long and tedious job, as I well remember from my early

law clerk years from 1921, when deeds searches were still very common. A search could take one or two whole days, and even when it was completed there was no guarantee that errors had not been missed, or that defects might not exist which were not discoverable by searching. Worse still, from the community point of view, the whole laborious work had to be repeated again by the solicitor for each subsequent purchaser or mortgagee.

In comparison with all this, the third task (c) of preparing the conveyance was very little more difficult than a present day transfer, but of course care and skill were required, then as now, to guard against fraud, mistake, forgery, infancy and any other ground of invalidity. After settlement, the careful solicitor quickly sent the deeds for registration so as to secure protection against unregistered interests, but it was made perfectly clear by the words of s. 35 of the Deeds Registration Act 1931 that registration did not cure any defects in the deed itself or confer validity upon it. This was not a weakness or an oversight in the Act, but was part of the logic of the system, as will appear later. Furthermore, the deeds counter clerks made no attempt to check the accuracy or validity of the documents presented for registration; the onus for accuracy was entirely on the solicitor, just as in the days before registration.

### Guaranteed Search

The Deeds Registration Act therefore despite its very substantial advance in protection against unregistered claims, still left the conveyancer with responsibility for the conveyance (a task it was commonly agreed he ought to shoulder) and, as the real cause of complaint, with the major burden of the endless repetition of the long and inconclusive search. Looking back now, I am surprised that someone in New Zealand, say an insurance company or the Law Society, did not start a system of guaranteed searches of title, similar to the insurance schemes in force in the considerable areas of the U.S.A. where they still (believe it or not) adhere to the old deeds system. The fact was that the great majority of titles were reasonably good; the purchaser just needed assurance that his vendor's title was not one of the very few defective ones. The insurers could have charged a fee for a special search of the vendor's title by an expert clerk and if in order they would have guaranteed a "Root of Title", leaving the purchaser to take his conveyance from this point. I invite the reader to put himself in the position of the insurers and think whether he would in addition,

have guaranteed the purchaser's conveyance. The answer would almost certainly be "No," because too many imponderables are involved, arising out of the sale agreement and the other dealings between the parties. These cannot be checked or guarded against by any form of search or inspection of documents and therefore are not suitable for a guarantee.

### Torrens Reconstructed.

As a matter of fact, this hypothetical scheme is very largely what Torrens did, with legislative authority, when he set up the Land Registry Offices in Australia. Let me attempt an imaginary debate, without any pretensions of historical accuracy, but just using Torrens' name to illustrate the problems they had to face. Their first and obvious question was, "Can we give an absolute State guarantee to all existing deeds titles?" They decided definitely against this, because clearly it would be impracticable and undesirable to guarantee every existing title, good, bad or indifferent. Very well, then; require owners to submit stringent proof of their deeds and we will guarantee only those that withstand investigation, including proof of possession. (This is exactly what was done with pre-compulsory applications in New Zealand). What then about future dealings; does each transfer and mortgage have to be strictly proved and be minutely investigated before registration? No, that would involve too much trouble and delay, and it is almost impossible to detect the more subtle errors, such as undue influence, fraud and forgery. All we can do in this respect is to check documents at the counter, and reject obvious defects in names, area and attestation etc. In that case, then, does the State automatically guarantee everything that passes this initial check? The cautious answer was again "No", because some transfers may slip through that are vitiated by fraud or other serious defects, and it seemed logical and proper that the State should *not* guarantee these, nor prevent the immediate parties from litigating any claims involved.

At this point, as I imagine things, some extremists advocated a really sweeping guarantee by which "any person who without fraud succeeds in procuring himself to be registered as proprietor has an indefeasible title, although the documents which formed the basis of his registration were absolutely inoperative in themselves"; while others used equally strong words and proposed that "even in the case of titles derived from registration of void instruments generally, registration should be effective to vest

and to divest title and to protect the registered proprietor against adverse claims."

"Here", they confidently claimed, "is a real registration system that will give maximum security, even against forgery", but had they been able to see into the future they would have realised that such an absolute guarantee was impossible and that three major qualifications were immediately needed:

(1) *In personam* claims between immediate parties must be preserved.

(2) The Registrar must have power to correct errors and to cancel titles fraudulently or wrongfully obtained.

(3) Trusts and claims created by the proprietor must be enforceable against his registered title.

The moderates quickly pointed out that all these indeterminate exceptions vastly exceeded the very few forgery cases that would be protected by the absolute rule. Besides which, they argued, it was clear on basic principles that a good registration system should give maximum protection to the countless thousands of owners whose solicitors have carefully and accurately prepared their deeds and should not be weighted to favour those who carelessly or flagrantly neglect proper conveyancing safeguards, to enable them to hold a defective title at the expense of an innocent previous owner.

### Solving the Deadlock

At this deadlock in my hypothetical debate, Torrens evolved his unique and delicate compromise. Remembering that the major remaining weakness of the old Act was the endless repetition of the long and inconclusive search, he procured legislation which (translated into the simplest words—far simpler than in the Land Transfer Act!) guaranteed a "Root of Title" for each proposed dealing, *instead of guaranteeing the immediate dealing itself*. This compromise really solved the conveyancing dilemma, subject to certain refinements mentioned later. It relieved the purchaser of his two main burdens:

(a) The risk of being defeated by encumbrances claims or interests other than those duly registered on the title. (This continued the existing deeds protection).

(b) The inconclusive deeds search. The purchaser was relieved from searching or inquiring back behind the existing proprietor's name on the title (the guaranteed root) and was not concerned about how this man became proprietor—whether by fraud, error or void document etc. (This overcame the remaining deeds weakness)

but it still left the purchaser responsible, *as he should be*, for the validity of his own transfer, task (c) above.

The beauty of the scheme was that the guaranteed root was not static; it was not confined to the documents in existence at a specified date, as would have been the case with a private guaranteed search. It moved forward automatically, so that the latest document on the title always guaranteed as a root for the next purchaser. In fact, this meant that the Registry sometimes guaranteed as a root a document that was defective, but the purchaser was not concerned to inquire into this, and the Registry took the risk and responsibility as the price of establishing a secure registration system. The risk was far less than an absolute guarantee of the purchaser's own transfer, because it left his own defects to be litigated *inter partes* without responsibility on the Registry. The risk was also kept to a minimum by the careful pre-registration check. Think how many errors would accumulate in a chain of title if it were not for the Registry's constant watchfulness and requisitions.

### A Real Guarantee

The point to note specially is that although the purchaser did *not* get an absolute guarantee, he *did* get the means of obtaining a *really* secure title by two basic steps of simple conveyancing:

(1) Search the title to ascertain the guaranteed root.

(2) Take a *valid* transfer from that root with the help of a careful solicitor.

Torrens' scheme is more difficult to expound than an absolute guarantee, yet it is simple to operate and gives a real guarantee, limited to just the right balance between protection of owners and protection of purchasers, and most important of all, it leaves intact all the well established and vital powers of the Courts to deal with trusts and equitable rights and *in personam* claims between immediate parties, which an *absolute* guarantee of defective documents interferes with. In fact, the system has been so simple to operate that its original basis was gradually forgotten and the titles became generally known as "Fully guaranteed titles," instead of being looked on only as a guaranteed root.

Even this limited guarantee involved the consequence that very occasionally an innocent prior owner could be deprived of his property, and accordingly Torrens provided the Assurance Fund to give compensation. But as the original scheme left the purchaser responsible for the

correctness of his own transfer, it was strictly logical to provide (as the Act did and still does) that a purchaser who innocently took a forged transfer got no compensation when, as in the early cases, the property was restored to its rightful owner. Yet a cleverly devised forgery is difficult to detect even by the utmost care of the purchaser's solicitor, and this risk (infrequent but devastating) is the type that is ideal for insurance protection. Why not, then, bring it within the gambit of the Assurance Fund? This is exactly what was done in England and Victoria by amendments in the 1930's, thus giving the ideal solution that the true owner retained his property but the defrauded purchaser got monetary compensation. In New Zealand and other Torrens jurisdictions, where such an amendment was not made, the *Frazer v. Walker* decision has given the diametrically opposite remedy, and the purchaser, whether careful or flagrantly careless, appears to keep the property by his guaranteed title. I say "appears to keep . . ." because one of the many inconsistencies of the *Frazer v. Walker* position, as pointed out by D. W. McMorland in [1968] N.Z.L.J. 138, is that the original owner, although having no redress by going directly to the Courts even as far as the Privy Council, may if he acts before another dealing is registered, be able to get correction of the title and restoration of his name, by application to the Registrar under s. 81, in which case the purchaser would be left with no property and no compensation.

### Beware Forgers

As a result of the decision in *Frazer v. Walker* the law of property in New Zealand has now reached the stage that it is easier for an owner to be deprived by a criminal of his freehold property than to be deprived of his furniture or the ownership of a cheque; and a certificate of title has become almost a quasi negotiable document, as the following illustration will show. To make it more vivid, let us assume that the owner exercises every care in the custody of his title, but that the purchaser although honest, is shockingly careless. A clever criminal steals a title from its safe custody, or perhaps produces a forged replica of one of the new Xerox Registry titles, which have remarkably few safeguards against forgery. Then, while the owners are away on holiday, he "sells" the property to a cash buyer, forges the transfer and decamps. The buyer who made no adequate inspection or inquiry, nevertheless registers the transfer in good faith, and the crime is discovered when he tries to take possession. Under the absolute inde-

feasibility rule, the careless purchaser secures a title unchallengeable in Court, but the innocent owner must vacate his home and be satisfied with compensation. Yet, if the forger had "sold" the furniture with the house, and had picked up a cheque from the writing desk and forged an endorsement to the purchaser, the true owner could have recovered both the furniture and the cheque. It seems a strange result that a so-called "guaranteed title" should give less security of ownership to land with its elaborate system of registration than applies to chattels which normally pass by mere delivery. This all derives in my humble opinion, from a gradually increasing misunderstanding by the profession and the Courts of the real fundamentals of a registration system. It can be rectified by the simplest correction as I have indicated above:

- (1) Guaranteed root of title, instead of absolute guaranteed title.
- (2) Leave the purchaser responsible for his transfer (or mortgage or other immediate dealing).
- (3) Extend the compensation provisions so as to cover certain defects which it is very difficult for the purchaser to guard against, particularly forgery.

There is one consequence of this "Guaranteed Root" which has caused confusion in the past, mainly through mistaken terminology. Suppose that a forged transfer is innocently registered and remains undetected for some time. So long as it remains on the Register it is a guaranteed root for any other prospective purchaser who may innocently take and register a valid dealing. This second dealing when registered cannot be challenged by the original owner. This gave rise to the misleading name of "deferred indefeasibility", but the point is that the second purchaser is not given greater protection *as such* there is no magic in being a second or a twenty-second purchaser. The second man obtained a good title by the combined effect of taking a *valid transfer* from a guaranteed root, while the first man's transfer could be upset because it was a *forged transfer*, although taken from a guaranteed root.

### Functions of Registration

This brings me to my final definition of the *function of registration*, and I submit that contrary to general opinion, its fundamentals are the same under the Land Transfer system as under the Deeds Act namely:

- (a) That registration is subsidiary to the documents, and supplements and protects vali-

documents, which constitute the real basis of title.

- (b) That it brings documents out into the open, and records them on a public register for the information and protection of the public and all parties concerned.
- (c) It deprives of protection those documents not registered in favour of those which are registered.
- (d) It establishes the moment of registration as the point of time when a document gets this protection. It is essential that there should be a precise ascertainable and public act, such as registration, to settle a contest and particularly a possible neck and neck contest, between rival claimants.

But the Land Transfer Act then goes much further than the Deeds Act by adding its distinctive additional features to the function of registration:

- (e) It establishes the final registered document for the time being (whether valid or invalid) as a State guaranteed root of title

upon which the next purchaser may safely rely.

- (f) Also, registration act as a means of imposing a compulsory check upon the accuracy of documents which may be registered and thereby admitted on to the chain of title. This check and restraint helps to make possible the guarantee of title which the system provides.
- (g) Finally, a compensation scheme for losses unavoidably caused by the system, including any special types of loss (such as forgery) which merit special protection.

Despite the importance of registration, conveyancing still depends primarily on valid documents, prepared with care and skill by a trained profession, and registration should be a procedure provided by the State to assist that task and to give a means by which valid documents can get the full protection they deserve. It should not be exaggerated or distorted into a device to defeat genuine ownership by validating documents which flagrantly break the proper rules of conveyancing.

## R. C. SAVAGE Q.C.—CALL TO THE INNER BAR

When the new Solicitor-General, Mr R. C. Savage Q.C. was called to the Inner Bar recently the Chief Justice, Sir H. R. C. Wild, said:

"It gives me special pleasure on behalf of the Judges to welcome you as you take your place in this Court as one of Her Majesty's counsel.

"As Solicitor-General you hold an ancient and honourable public office. Nevertheless there are, I think, some misconceptions about it in this country. One is that some people, and even some members of the legal profession, think the Solicitor-General's role should be one of neutrality. But the Solicitor-General is not a neutral when he comes into the Courts. He is as much an advocate as any other member of the Bar. The difference between him and his brethren is that the business of his client—his very distinguished client—is not merely to win the case in hand. It is not just to achieve victory. The Queen's business is to ensure justice in the community and the Queen wins her point when justice is done in the Courts. It is therefore the role of the Solicitor-General, as her chief legal adviser and advocate, always to seek that end.

"Another misconception, which one sometimes encounters in the minds of some public officials, is that because in this country the Solicitor-General is a paid officer of the State he ought always without question to support the Government's position, be it right or wrong. That notion is equally erroneous and I believe it has never been followed by any of your predecessors in office. A practising barrister who is appointed Solicitor-General takes with him into office the spirit of independence of the Bar, and the tradition of the office has therefore been to regard the interests of the Crown as best served by an attitude of fair dealing which will not countenance injustice whether the consequence in the case in point is favourable or unfavourable to the State.

"The sense of absolute fairness that you have always shown in practice gives us all confidence that those traditions will be safe in your hands and that, I believe, is one of the reasons why you have been appointed Her Majesty's Solicitor-General. Holding that office it is entirely right that you should be admitted to the foremost rank of advocates as Queen's Counsel. We congratulate you and wish you well."



if not vital, when sentences were being considered. Thus the bulk of the work still falls on the Judges of the Queen's Bench Division. Whereas every Lord Justice can sit in the Criminal Division, only those do so who have had, either as a puisne Judge or as a Chairman of Quarter Sessions or Recorder, experience of crime. Personally I hope that the time will come when most, if not all, Lords Justices will have had that experience so that they can take their turn in the Criminal Division. It is clearly in their own interests since if and when they are elevated to the House of Lords they will certainly have to deal with criminal matters.

The jurisdiction of the Courts of the Criminal Division is substantially the same as that of the Courts of Criminal Appeal. There are a few salient alterations:

(1) Whereas there used to be power, in theory at any rate, to increase sentences, this power has been taken away. I say "in theory" because the occasions in which the Court could increase a sentence were minimal, and for this reason. Should an application for leave to appeal be granted with a view to increasing the sentence the Court would feel bound in justice to grant legal aid. A competent counsel would at once sense the danger of an increase and would urge the prisoner not to pursue his appeal. Logically, therefore, the old system was indefensible and accordingly the change was really inevitable. At the same time it has had, I believe, a disastrous effect on the work of the Court. Prisoners now know that they can appeal without danger of an increase. In the result I cannot help thinking that the change has partly, at any rate, accounted for the enormous increase in frivolous and hopeless applications for leave to appeal against sentence.

(2) There has always been power to order that a certain number of days during which a prisoner has been in custody after applying for leave to appeal shall, on the refusal of the application, be ordered not to count towards his sentence. Whereas this loss of time used to be automatic unless an order to the contrary was made, the position is now reversed. He will only lose time if a special order to that effect is made. This undoubtedly is a change for the good, since it forces the Court to consider each case individually and only to order a loss of time when the application is devoid of merit.

(3) Power has recently been conferred on the Court to quash a verdict on the ground that it is unsafe and unsatisfactory. Though this ground is new in form, the Court has always found some means to quash a conviction if it really thought

it was unsafe to let the verdict stand. The change, however, has perhaps opened the door slightly wide by expressly enabling the Court to do this. In other words, the verdict of a jury need not be treated as quite so sacrosanct as previously.

(4) The Court now has power to grant a new trial on the ground of fresh evidence. This is a welcome change albeit many of us think that the power should not be thus limited. Limited as it is, however, it is a valuable power. Previously the Court had only two alternatives—either to refuse to interfere if satisfied that the fresh evidence would not have affected the jury's verdict or to quash the conviction if the fresh evidence might have affected the verdict.

The jurisdiction of the Criminal Division differs in two important respects from that of the Civil Division of the Court of Appeal. First, whereas the latter treats itself as bound by its own decisions, the former does not. This stems from the principle that when the liberty of the subject is involved the Court should not be limited by precedent. This does not, of course, mean that the Court can run wild and do what it pleases. The need for certainty above all in the criminal law prevents this, but at the same time there may be cases where it would be wrong to follow some out-of-date decision merely for the purpose of consistency. Secondly (and again this is based on the need for certainty in the criminal law) only one judgment is given—the judgment of the Court—unless the presiding Judge allows otherwise.

As regards procedure, there has always been a need for some filter process which will help to prevent cases devoid of merit from reaching the full Court of three Judges; otherwise the work of the Court would become hopelessly clogged. This is done by what is called the Single Judge system. Under this, applications are referred to a Single Judge of the Queen's Bench Division who has power to refuse or grant leave to appeal, in which latter case he will grant legal aid. If he refuses, however, the applicant is at liberty to renew his application to the Full Court, though, of course, his attention is specifically drawn to the fact that he may be ordered to lose time. Of applications for leave to appeal against sentence in 1968 some 85 percent of those refused by the Single Judge were not renewed, and of applications for leave to appeal against conviction some 70 percent of those refused were carried no further. Thus, the Court is freed of the task of dealing with a high percentage of really hopeless cases since if the Single Judge thinks that some arguable point is involved he will grant leave. The percentages of abandon-

ments are considerably greater of recent years due I believe to a change in procedure. In the old days a prisoner was merely told by the Governor "Your application is refused". Today he gets a copy of a form showing that on a certain date his application was considered by the Judge signing the form and that the Judge had refused the application for the reasons given in his own handwriting.

Not every application is channelled in the first instance to the Single Judge. Sometimes in the interests of expedition a case comes direct to the Full Court. There may be cases in which it is obvious that some arguable point is involved which could make a reference to the Single Judge unnecessary. In some cases leave to appeal has already been given by a certificate from the trial Judge. Finally, there are cases where the prisoner is already represented by solicitor and counsel who desire to be heard. Even, however, allowing for these exceptions, the cases channelled to the Single Judge are enormous in quantity and put an almost insupportable strain on the Judges. Thus, in 1968 no less than 6,743 applications were so referred and the endless task of reading the papers continued both in term time and in vacations. Should an application be renewed to the Full Court after refusal by the Single Judge the papers will in general have been carefully and independently read by no less than four Judges, thus ensuring a thorough sifting of every case. Further, if leave to appeal is finally given it may be impossible for the appeal to be heard by the same Court which gave leave, and then the papers will have been read by seven Judges by the time that the Appeal is heard.

In 1968, no less than 8,700 applications for leave to appeal were received (as against some 500 applications in 1938) and 6,700 applications were channelled to the Single Judge. The work coming forward to the Full Court consisted of 2,346 cases, which occupied 247 Court sittings.

I have often asked myself why there has been this enormous increase in work and I can find no satisfactory answer unless it be the cumulative effect of a number of factors. Amongst these I would mention the following, though not necessarily in order of importance:

(1) The increase in crime generally, resulting in an increased number of potential appellants.

(2) The effect of legislation over the last few years including (a) the additional ground for quashing a conviction that the verdict was unsafe or unsatisfactory, (b) the opportunity for a new trial based on fresh evidence, (c) the provision for appeals against recommendations for deportation of Commonwealth Immigrants, (d)

the provision of appeals against disqualification from driving.

(3) The absence of the power to increase sentences.

(4) The fact that, as a result of the change from automatic loss of time if the application is refused, appellants are less hesitant about putting in applications.

With this great volume of work delays are unfortunately inevitable. At any one moment there are between 1,400 and 1,800 applications awaiting transcripts, and even the "short" transcript, that is, a transcript of the trial other than speeches and evidence, may take up to three to four months or even longer to obtain. With the shortage of shorthand writers these have to be done in a shorthand writer's spare time after a full day in Court. If it should turn out necessary in any case to order a further transcript of the evidence at a later stage the delay may be much more. This, again, is inevitable when one realises that many trials have more than ten days' evidence. Then there are the inevitable delays in obtaining the decisions of the Single Judges. A Judge on circuit may find himself involved in sitting long hours and only be able to tackle the Single Judge work at a weekend. Again, there are delays in the Criminal Appeal Office (itself grossly understaffed) caused in the preparation of summaries of the cases for Judges—which saves the necessity of Judges having to make copious notes when reading the papers. Finally, there are the inevitable delays involved in getting a case ready for appeal—badgering the legal representative for proper grounds of appeal; allotting counsel under legal aid; and listing cases to avoid a clash between counsel's engagements in the House of Lords or important trials. Indeed, I often wonder how the Criminal Appeal Office, the "engine room" of the administrative machine, copes with the work. This is only made possible by long hours of work put in by the extremely conscientious personnel of the Office and by constantly making adjustments to produce greater efficiency.

What is of the utmost importance is to prevent the machine being completely clogged with applications which are devoid of merit. One wants to ensure that those applications which really need consideration can come before the Court expeditiously and not, as at present, have to take their turn in the queue with all the hopeless applications. In 1967, of every 100 applications against conviction, roughly eight resulted in an appeal, mostly by leave of a Judge, and five of the appeals were allowed. For sen-

tence applications the corresponding figures were nine appeals, of which five or six were allowed. Thus less than 10 percent get so far as leave to appeal. It is not unreasonable to suggest that at least 80 percent were hopeless from the start, and should never have been made at all. In a high percentage of cases a defendant is prepared to accept the advice of the Single Judge and this results in many hopeless cases not reaching the Full Court. I am certain that if the defendant directly after his trial can receive the advice of those who have acted for him and that advice is that an appeal would be hopeless, then in most cases he will accept that advice and not apply for leave to appeal at all. Therefore I welcome the new arrangements whereby every prisoner is entitled under legal aid to the advice of solicitor and counsel on the prospects of an appeal and to the settlement of grounds of appeal if an application is advised. I sincerely believe that responsible advice from the legal representatives will result in a lessening of frivolous applications. Of course, some prisoners will put in an application even if told it is hopeless, but these will be few.

I referred to "responsible advice" because that is the crux of the matter. After all, the vital point of time is the trial itself. If there has been a fair trial, if the result is in accordance with the law and is reasonable, if the evidence is sufficient to support the verdict, and if the sentence does not err in principle and is proper in all the circumstances of the case, then for the legal advisers to lend their help to make an application is really an abuse of the right of appeal. Their duty is to say quite frankly that there are no grounds of appeal.

As is well known, both solicitors and counsel owe a duty to the Court as well as to their client. Counsel would not be performing the former duty by settling grounds merely for the purpose of an application regardless of their merit. Indeed, it would be wrong for grounds to be settled which counsel did not feel that he could support before the Full Court should the matter reach that Court. Moreover, I cannot help thinking that under legal aid there is a further duty—a duty to the Exchequer, who provide the money. Is it right to advise a course of action involving expense which has no real prospect of success? Finally, there is the very real consideration that every application which is devoid of merit delays the hearing of the applications of those whose cases merit early consideration and whose chances of success are considerable. I would like to emphasise that what I have just said is in no way intended as a criticism of any branch of the

profession. Every member can be relied on to behave responsibly and I only mention these matters in order to show how by doing so they will assist the work of the Court.

The appellate Court for criminal cases is undoubtedly stronger than it was and for that reason commands the more respect, but that at the same time it is suffering from what I hope are merely teething troubles. In particular something more must be done to eliminate so far as possible hopeless and frivolous applications which are clogging the machine and causing delays. The legal profession, both solicitors, legal executives and barristers, can help to this end firstly by becoming better acquainted with the work of the Court, its practice and procedure, and secondly by assisting the work of the Court in the manner I have already indicated.

**Which way?**—Another dividing line, as yet ill defined but gradually gaining in clarity, separates the unlimited pursuit of "affluence", economic "growth" and easy living through a mass application of technology on strictly economic considerations, and an instinctive repugnance for the impersonal tyranny which accompanies that pursuit. Motorways which slash through homes and well-loved landscapes or make wide belts of cities virtually uninhabitable; airfields which uproot whole communities and destroy the quiet enjoyment of life for miles around them; "urban renewal" projects in which by an unholy alliance between the worst of capitalism and the worst of socialism thousands of householders and small shopkeepers are turned adrift in the midst of a housing famine to fend for themselves as best they can in a world of rocketing rents and land values; the depersonalisation of living represented by tower blocks, housing estates and supermarket-oriented shopping "concourses"—all these have their embittered opponents as well as their enthusiastic advocates. But the fundamental question in which direction should the country face is never debated in Parliament. More money, more luxury or a simpler standard of living, less frenzied locomotion, liberation from the ever present peril of compulsory purchase by a local authority or compulsory eviction by a development company—along what lines would people divide in relation to these alternatives if the choices and the price tickets were clearly put before them? Who can say for certain? The present point is that they represent a dividing chasm which is not remotely visible from the benches at Westminster: RICHARD ROE in the *Solicitors' Journal*.

## THE POLITICAL SCENE

### Manapouri Manoeuvres

Democratic government, like justice, not only needs to be done but also be *seen* to be done.

This is manifestly *not* the case over the proposal to raise Lake Manapouri to generate electricity for Comalco's aluminium smelting operations at Bluff. A harsh judgment perhaps, but one that can be supported on at least two grounds:

First the timing—As the Commission of Inquiry's Report was authorised by the Executive Council it reported to the same body, and the responsibility for tabling it in Parliament was thus the Prime Minister's. He, as Leader of the House, organises its business and so knew very well what was to happen later that day.

In six hours (making no allowance for the two-hour dinner break) there were:

- (a) The tabling of the report;
- (b) Record supplementary estimates of \$115 million;
- (c) Sir Keith Holyoake's casual, but characteristic, announcement that he was to be admitted to hospital that day for a prostate gland operation; and
- (d) Mr Muldoon's Mini-budget.

By any standards it was a very heavy news day and for journalists in the Parliamentary Press Gallery especially. So it was little wonder that Manapouri was low priority in general public interest the next day. All this was known and carefully calculated by the Government, which outflanked a part of government which this writer considers essential in any democracy: The Fourth Estate, the communications media. It can be argued that the report could not be tabled until 2.30 p.m. when the House starts its business, and so this was just another of those in-built disadvantages of evening newspapers. But conversely, it is common practice to release a report or statement well in advance *under embargo* so that more thought can be given to the writing and presentation of news reports.

This of course was not done, as *was* done in the case of the Commission of Inquiry's report on the Kaimai Tunnel disaster. Which leads to the second point.

Without in any way impugning the integrity or impartiality of the three members of the Commission, it can be argued that the professional training of the three men virtually amounted to a "structuring" of the commission. To repeat, this comment is in no way a slight on the com-

mission; but inevitably any man's judgment is formed and conditioned by his training—a lawyer will tend to think in legal terms, an engineer in practical, construction terms, and a biologist in terms of nature and ecology. Thus the appointment of a retired Supreme Court Justice and two retired Stipendary Magistrates inevitably meant a tendency to the legal aspects of the controversy—the aspects on which the Government's case is most strong, although still debatable.

A man with legal experience and skill should be on such a commission but other disciplines should also have been represented.

To return to the same example of the Kaimai Tunnel commission: This did have a man with mining and tunneling experience, Mr F. J. Handcock, a man who had worked on the Snowy Mountain scheme in Australia, Mr K. E. Andrews, and the chariman, Mr A. W. Yortt, a retired Stipendary Magistrate.

Thus it was a well-qualified and well balanced group to investigate such an issue. The resulting report indicting the Ministry of Works must have been a rude shock to the Government, shock which was inappropriately expressed by the Minister of Works, The Hon. P. B. Allen, who retaliated with a personal attack on Mr Handcock.

But there were no such slip-ups over Manapouri; the issues were clearer there. So the result was a foregone conclusion, and democracy has apparently been seen to be done.

Two small qualifications must be appended:

A debate in Parliament has been promised, but the last Labour Government's dealings and agreements over Manapouri put it in a weak and vulnerable debating position. In any case the Government always wins—eventually. And the petition has yet to be heard, but petitions are not notable for their effectiveness, even though a special select committee has been set up for the purpose.

So, bar the shouting, the issue is settled, provided there is no change of Government . . . and a by-election or two puts this not beyond the bounds of being an early possibility. There is also the intriguing fact, hitherto unnoticed, that even if this Government decides to raise the lake's level it is impossible for it to actually do so before the next General Election—which means, like it or not, that Manapouri will be a red-hot election issue come November, 1972.

RUFUS WALLINGFORD

## AUSTRALIAN NEWSLETTER—LEGAL CONSERVATISM

In this bicentenary year of Australian history the impression one forms with regard to the Australian legal profession and the attitude of Australian law makers to the development of this country as an independent nation is that very little change has occurred in the pattern of law making from that which could be traced at, say, the time of federation. It is true that social pressures have never been so significant as they are today; it is also true that the conservatism of the profession remains a very striking highlight. The legislatures move very slowly but surely towards legislative reform, except, for example, where there is an apparent need for some protection to be afforded to a particular sector of the community, or some technical defect is found in tax or other field of public legislation.

Law reform is not in a very favoured position in Australia. It is suggested that, apart from New South Wales, there is no serious attempt being made by the various states nor by the Commonwealth to sustain a programme of research into the problem areas of the law. In 1965 the New South Wales Parliament set up a law reform commission with a permanent staff, headed by a Judge of the Supreme Court of New South Wales and with four other permanent members. This body has carried out a number of significant programmes, and with a guaranteed source of funds it is clear that it will be able to continue to investigate the more troublesome areas of the law. To date, however, its output has been rather modest except in a very special area of "converting" the New South Wales legal system from the pre-Judicature Act system to come into line, at least procedurally, with the remaining states. Reports and draft legislation (some of which has been written into the statute books) have been prepared on infancy, limitation of actions and other areas, all of which will sound familiar to the reader in the United Kingdom. Very little "original" reform has been sparked off in that state. Unfortunately, in the other States law reform is the work of part-time committees—and the result is only as good as the work that goes into it.

Much of the legislation which is introduced, apart from the field of public law where the nature of the Australian federation creates many fascinating and troublesome problems, does not depart significantly from English legislation—

a pattern developed in the 19th century, and one which does not seem to have changed very significantly. Since then it must be remembered that Australia is a federation; there is a Federal Government which has autonomy over certain specified areas (for example, defence, customs and excise, and other fields) and which shares legislative responsibility with the States over a number of them—e.g., taxation is not a field solely in the domain of the Federal Government, for the six State Legislatures may legislate in this area, although since World War II they have until only recently chosen to leave this to the Federal Government. In case of inconsistency in such joint areas, federal law prevails. The remaining areas remain the responsibility of the States, but it is true to say that many of the most important appear to be the subject of both State and Federal power—a phenomenon which can and does lead to rather unfortunate delays and disputes.

One of the more fascinating developments in the last 15 years has been the attempt to reach uniformity in many areas of private law. Matrimonial causes was one area successfully worked on; similarly, hire purchase law is to a large measure uniform; company law is another area which is labelled with the title of "uniform", but as time goes on the lie is given to this more cruelly than one would imagine. There are one or two other areas of uniformity (for example, the recent agreements on penalties for drug peddling and related criminal abuses) but by and large this development has been painfully slow. The inter-state jealousies which so significantly slowed down the moves that finally resulted in Federation have not disappeared. Indeed, whilst their intensity has been in no mean way dissipated, there are now more sophisticated ways of relying on State interests to defeat serious attempts at uniformity.

Australian Courts on the other hand have not displayed so strongly the conservatism which appears to be the trademark of the Legislatures. Certainly the High Court of Australia has made serious, if not always brilliantly successful, attempts at law reform. One immediately recalls the decision in *Coulls v. Bagots Executor and Trustee Co. Ltd.* (1967) 40 A.L.J.R. 471, which was mentioned with some approval by the House of Lords in *Beswick v. Beswick* [1967] 3 W.L.R. 932; and more recently the important decision

in *Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt* (1968) 42 A.L.J.R. 316, which has now gone on appeal to the House of Lords and which it is hoped has helped answer some of the truly prolix questions which came out of the *Hedley Byrne* case ([1964] A.C. 465). The former Chief Justice of our High Court, Sir Owen Dixon, was always regarded as a leading jurist by the English Courts and it is hoped his role will continue to be played by a member of our High Court. There is, unfortunately, no Lord Denning sitting on the Australian High Court, nor on any of the State Supreme Courts, to spark off both academic and judicial controversy which in turn might lead to action by the Legislature. In another sphere, in April 1968, Mr Justice Jacobs of the New South Wales Supreme Court, in commenting on the role of Judges as members of the community, lamented the attitude that Judges should be immune from public criticism. He went on to say that this attitude could be traced through the

“reported cases and that it is a fair inference that its source lies in our colonial origins. For some centuries now the English attitude has been quite different. There, if the need be or if the newspapers or journals feel that the need is there, a Judge is criticised on the worthiness of his appointment and during the course of his judicial life if his judicial behaviour falls short of expectations, and even on his death his obituary never spares him. In the sophistication of a nation grown to

nationhood, I firmly believe the Courts need the full glare of the public spotlight upon them, just as Parliament and the executive need it, and in a vigorous country one should expect vigorous language. I do not suggest for a moment that Judges often fall short of high standards in their judicial conduct, but when they do the health of the body politic requires that those deficiencies be fearlessly exposed. And it must be remembered that the deficiencies will almost certainly be ones which the Court itself cannot recognise.”

His comments reveal not only the attitude complained of but also a lack of sustained critical examination of the decisions of Judges by the profession.

In this initial comment the aim has been to paint a broad picture. It will be clear to the reader that the impression which it has been intended to give is one of complacent Legislature (or set of Legislatures), not attempting to depart too vigorously from the well-worn path of their English counterpart (except in special areas); a rather uninspired but careful judiciary which continues to observe the well-honoured doctrine of precedent but which does occasionally spark off a truly memorable and important decision.

In future newsletters it is intended to deal with specific developments in legislation, the Courts and the professions, both on a Federal and State level: R. T. BAXT, Monash University, Vic. In the *Justice of the Peace and Local Government Review*.

## ESTOPPEL AND THE COMMISSIONER OF INLAND REVENUE

It is not proposed to deal in one article with *Europa Oil (N.Z.) Ltd. v. Commissioner of Inland Revenue* [1970] N.Z.L.R. 321 because of the complicated nature of the facts and of the issues involved. Moreover the text of the recent decision of the Judicial Committee is not yet available. However, the one matter which can be discussed at the present stage is whether the Commissioner, by accepting what he understands to be a certain set of facts and assessing tax accordingly, is estopped from later questioning those facts and assessing tax on a different basis.

In the *Europa* case, the question arose because in 1963 the then Commissioner wrote to the company a letter the effect of which was that he agreed that the income arising out of

certain contracts with an overseas company did not “directly or indirectly constitute assessable income in New Zealand.” However in 1965 the Commissioner reversed this decision and issued amended assessments bringing into the assessable income part of the income under the overseas contracts by disallowing part of the purchase price of oil, etc.

For the appellant it was submitted that the 1963 letter from the Commissioner evidenced the exercise of a discretion conferred on the Commissioner by s. 111 of the *Land and Income Tax Act 1954* and could not be reversed. Alternatively, it was submitted that the letter acted as an estoppel because the appellant company had acted to its detriment on the assurance given.

In the Supreme Court McGregor J. dismissed both these submissions. He took the view that liability to tax was imposed by the Act itself, and the Commissioner's duty was one of quantification. The Commissioner could not, therefore, waive in any case liability for payment of tax, and could not bind himself in regard to his future actions. His Honour referred to *Maritime Electric Co. Ltd. v. General Dairies Ltd.* [1937] A.C. 610, 619; [1937] 1 All E.R. 748, 753, where it was held that an estoppel could not be set up to release a person from a statutory obligation or liability. In the instant case the Judge's decision was reinforced by the fact that, when the 1963 letter was written, the Commissioner was not aware of the full facts.

The case went on to the Court of Appeal where, as it developed, the question of estoppel became irrelevant. However, North P. and Turner J. both felt impelled to comment on this question of estoppel as it affected the Commissioner of Inland Revenue.

North P. dealt with the matter very shortly. He referred to the fact that on the view he took, it was unnecessary to deal with the question of estoppel. He pointed out that the 1963 letter was written on incomplete information but, apart from this, the Commissioner made the new assessments in reliance on s. 22 of the Act which, although his Honour did not specifically mention it, gives the Commissioner an unrestricted right to amend assessments subject only to the restrictions as to time imposed by s. 24.

Turner J., also, did not find it necessary to decide the case on the issue of estoppel. However he expressed the opinion, in case the matter went further, that McGregor J.'s judgment was correct. He, also, referred to *Maritime Electric Co. Ltd. v. General Dairies Ltd.* (*supra*) and added that "he who invokes such doctrines will himself be precluded from relying upon them if his own acts or omissions have resulted in him who is set up as having elected being less than fully informed on the facts upon which an election is submitted."

It is a little unfortunate that, in this case, it appeared certain that when the Commissioner wrote his letter in 1963 he was not fully apprised as to the facts. This means that the case against estoppel was founded on the particular facts of the case. Disregarding this, however, it seems clear from the *dicta* of McGregor J., of North P. and of Turner J. that, if the Commissioner—being fully apprised of the facts in the case before him—decides a question of liability to income tax in a particular way, he cannot thereby be estopped from changing his opinion and re-

assessing the tax, subject only to the limitations as to time imposed by s. 24.

As I said earlier, the judgment of the Judicial Committee has not yet been received. It would be surprising if it overruled the Supreme Court and the Court of Appeal on this particular point. If it did, the matter will be promptly reported in these pages.

This question of estoppel is one which must have exercised the minds of those involved with income tax law from time to time. Can the Commissioner reverse a decision which he has reached after a *full* consideration of the facts in a particular case? The Supreme Court and the Court of Appeal say, in the *Europa* case, that he can.

C. N. IRVINE.

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## OBITUARY

### Mr S. L. Henry

Mr Henry, who died at Oamaru recently, was born at Lawrence and received his secondary education at Waitaki Boys' High School after which he served with the Bank of New Zealand at several Otago branches. He became a clerk to Messrs Hislop Creagh & Main in Oamaru in the late thirties, where he qualified an extra mural student—no mean achievement away from a University town. In 1952 he became a partner and was in active practice until illness overtook him late in 1969. Mr Henry's outside activities included tennis and bridge, and in latter years he was a keen contestant at many bridge tournaments.

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## PERSONAL

Mr Claude Marshall Arthur was admitted as a Barrister and Solicitor of the Supreme Court by the Honourable Mr Justice Perry in the Supreme Court at Auckland on 2 October last.

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**Drink Deep, or Taste Not . . .**—"The Bill proposes that where . . . a negative breath test is given, and the suspect is obviously incapable of driving, a doctor will be asked to examine him . . ." Hon. J. B. Gordon, speaking to the Transport Amendment Bill 1970. The Bill says no such thing.

**Seaspray Store Limited v. Waimea County**

Special Town and Country Planning Appeal Board.  
Richmond. 1970. 12 March.

*Zoning—Reviewed District Scheme—Objection by owner of tea-rooms to rural zoning—Spot commercial zone in otherwise rural area fronting busy main road—Town and Country Planning Act 1953, s. 26 (1).*

Appeal under s. 26 (1) of the Act.

Beatson, for the appellant.  
Fitchett, for the respondent.  
H. G. Fauchelle, for self and J. B. Fauchelle  
D. B. Taylor, for M. J. Taylor.  
Jorgensen, for C. E. Henderson.

The judgment of the Board was delivered by CARSON S.M. (Chairman). The appellant, Seaspray Store Ltd., appealed under s. 26 (1) of the Town and Country Planning Act 1953 against a decision wherein the respondent allowed an objection made by Marie June Taylor as lessee to the zoning as rural in the respondent's reviewed district scheme of premises known as the Blue Horizon tearooms and being more particularly described as part of Lot 3 Deposited Plan No. 33554 and being the whole of the land comprised and described in Certificate of Title entered in Register Book Volume 98 folio 213 Nelson Registry. As a result of the objection so made the land in question was zoned commercial B.

Upon the circumstances giving rise to this appeal being traversed before the Board it became apparent that the situation which had arisen was attributable principally to the circumstance that the appellant company and Mrs Taylor carry on their respective businesses in premises located upon adjoining lands. Apart from one subdivision for residential purposes of an area containing approximately 100 lots, the land in the vicinity of those premises is, for the most part, zoned rural. The respondent's decision to accord a commercial B zoning to the land occupied by Mrs Taylor (and owned by Mr and Mrs Fauchelle) had the effect, therefore, of creating a spot commercial zone in an otherwise rurally zoned area fronting upon what the Board understands to be a comparatively busy main road.

The evidence adduced was noteworthy for the fact that Mr B. W. B. Cooper, town planning consultant to the respondent Council, in appearing upon subpoena to tender evidence at the instigation of the appellant, acknowledged not only that he was responsible, with others, for the preparation of the plan wherein Mr and Mrs Fauchelle's land was zoned rural for the purposes of the respondent's reviewed district scheme but also that his original opinion had been and still was that that zoning should be adhered to.

The Board has considered carefully all that was said before it in relation to this appeal and is of the opinion that the according of a commercial B. zoning to the land in question was not warranted. The Board therefore holds that the respondent Council's decision allowing Mrs Taylor's objection and zoning such land commercial B should be cancelled and that the land in question should again be zoned rural and the respondent's reviewed district scheme amended accordingly.

*Appeal allowed.*

**Robinson and Baillie Realty v. Waitemata County**

Number Two Town and Country Planning Appeal Board, Auckland. 1970, 15 May.

*Reserve Contribution—Respondent County given election to require cash payment or vesting of land by s. 40 of the Counties Amendment Act 1968—Whether barred from requiring cash payment by vesting of land pursuant to prior subdivision.*

*Jurisdiction—Offer by appellant to vest Lot in respondent to give access to scenic reserve by way of gift—Failure by respondent to make gift a condition—Not a matter to which s. 33 of the Act applies—Town and Country Planning Act 1953 s. 33.*

Appeal under s. 33 of the Counties Amendment Act 1961.

Berman, for the appellant.  
Hamer and Clark, for the respondent.

The judgment of the Board was delivered by LUXFORD S.M. (Chairman). This is an appeal under s. 33 of the Counties Amendment Act 1961 against the decision of the respondent on an application for approval of a scheme plan of subdivision known as Plan No. 10328 of the Town of Glenfield Extension No. W368 (hereafter referred to as "Plan No. 10328"). The appeal is against that portion of the decision that imposes the conditions hereafter referred to, to which the approval of Plan No. 10328 is subject. The conditions are:

- (a) That the appellant pay \$13,523.04 in lieu of making reserves of land for public purposes. (This represents the sum assessed pursuant to s. 28 *ibid.*, as amended by s. 40 of the Counties Amendment Act 1968, namely the sum of \$15,940.17, after deducting therefrom the sum of \$2,417.13, being the value of an excess area of land given to the respondent in a previous subdivision of land adjacent or near to the land referred to in Plan No. 10328).
- (b) That the appellant purchase at valuation from the respondent the road to be stopped and the road reserve to be revoked. This road and road reserve is included as part of some of the lots shown on Plan No. 10328.

The appellant also appeals against the failure of the respondent to include a condition requiring the appellant to vest Lot 102 on Plan No. 10328 by way of gift. This unusual ground of appeal is based on an offer the appellant has made to the respondent to vest Lot 102 in the respondent by way of gift in order to provide access to the scenic reserve already vested in the respondent by the appellant by way of reserve contribution with respect to a subdivision of nearby or adjacent land, in 1964. The subject-matter of this ground of appeal, in the opinion of the Board, is not one to which s. 33 of the 1961 Act applies, and consequently the Board has no jurisdiction to adjudicate upon it. Jurisdiction is declined accordingly.

It is necessary, in the first place, to refer to matters antecedent to the application, relevant to this appeal. The appellant as owner of a large block of land decided to develop it in three stages to produce 256 lots suitable for dwellinghouse sites. A licensed surveyor was

instructed to investigate the area and prepare a draft plan for informal consideration by the respondent's technical officers with a view to ascertaining whether any amendments would be required to comply with bylaws and town planning ordinances. The plan was prepared and discussed with the County Surveyor, and these discussions included the appellant's liability to make provision for reserves for public purposes.

At that time (1964) a land owner who subdivided his land in a county, could elect to discharge his obligation to provide reserves by setting aside part of the land not exceeding an area equal to three perches for every allotment which was less than two acres in size (or four perches for every such allotment with a frontage to an existing road) or he could elect to pay a sum to be assessed in accordance with the provisions of s. 28 (3) and (5) of the 1961 Act. The appellant elected to set aside part of the land.

The appellant decided that the first stage of the subdivision would produce 119 lots, and the plan in accordance with that decision was submitted to the respondent for approval. Approval was given in terms of the County Surveyor's recommendation which was adopted by formal resolution on 26 November 1964. The recommendation included *inter alia* a condition to which the approval should be subject, relating to the reserve contribution to be made by the appellant. This phase of the recommendation was in accord with the informal arrangements agreed upon between the County Surveyor and the appellant's surveyor, and is as follows:

"The appropriate area for reserves amounting to 2 acres 0 roods 37 perches shall be satisfied by the vesting in the Council of Lot 120 as a scenic reserve . . . and such portion of any excess area so to vest above the appropriate area as the Council thinks fit shall be credited towards the reserve requirements of subsequent stages of development of this estate. . . . The scenic reserve proposed . . . is suitable for preservation but the proposed reserve is much below the value of the remainder of the property. Recommendation: It is recommended that the amended excess area of the scenic reserve to vest, be assessed as one half the area so set aside for the purposes of s. 28 of the Act."

The last six lines of the recommendation were omitted from the copy of the resolution sent by the County Clerk to the appellant's surveyor, who, on reading it considered that the resolution did not properly express the arrangement he had made with the County Surveyor. On being informed of the lines that had been omitted, and hearing the County Surveyor's explanation, the appellant's surveyor was satisfied that the scenic reserve was accepted in full discharge of the reserve contribution for the 256 lots to be produced in the stages of development.

The evidence shows that the total maximum area required to satisfy the requirements of s. 28 in respect of 256 lots would be 4 acres 3 roods 2 perches.

The area of Lot 120 which was vested in the respondent as a scenic reserve is 7 acres 2 roods 15 perches. The evidence also shows that the Council interpreted the resolution to mean that the appropriate area for first stage subdivision would be a portionate part of the scenic reserve, and that balance would be credited to the appropriate areas required to meet the reserve contributions to be made when the plans for the second and third stages of development were submitted for approval. In 1966, the plan for the second stage was submitted and approved in accordance with the 1964 resolution as so interpreted, and the plan for

the third stage would have been approved in the same way if the provisions of subsections (s) of s. 28 of the 1961 Act had not been repealed and new provisions substituted therefor, by s. 40 of the Counties Amendment Act 1968, which came into force on 17 December 1968, which is prior to Plan No. 10328 being submitted for approval.

The new subsection confers on the county council the right to elect whether the reserve contribution is to be made by a cash payment or by the vesting of land. The respondent, therefore, elected to require the appellant to make a cash payment in respect of the 105 lots shown on Plan No. 10328.

In opening the case for the appellant, counsel described the respondent's demand as a breach of faith and dishonest conduct. Indeed, evidence was given in support of the appeal by the Chairman of the Auckland Branch of the Institute of Surveyors who said:

"From information supplied to the branch it appears that the appellant alleges that the respondent has arbitrarily reversed a previous decision given to the appellant's surveyor, resulting from preliminary negotiations with regard to the setting aside of a scenic reserve as a reserve contribution for the subdivision of the whole of the appellant's land. If this fact is established the Auckland Branch would share the concern (of the appellant's surveyor)".

At the close of the appellant's case, the Board stated that there was no evidence of any improper conduct on the part of the respondent, and that the allegations should never have been raised. The appellant acted under legal advice which in the opinion of the Board was correctly given.

The resolution of 26 November 1964 should not in the opinion of the Board be interpreted to mean that the scenic reserve is to be treated as a full discharge of the reserve contributions required to be made in respect of the 256 lots to be produced in the three stages of development. Indeed, as will be seen from the decision of the Board in *Beazley Properties Ltd. v. Napier City* presently referred to, neither a borough nor a county has power to impose a condition when approving a subdivisional plan for a reserve contribution for any lot on a subdivisional plan other than the lots included in the portion of the plan that is provisionally approved.

The resolution, however, does not, in the opinion of the Board, mean that the respondent did any more than undertake to give credit to the appellant, when assessing the reserve contributions to be made in respect of stages 2 and 3 of the development, for the excess reserve contribution made in respect of stage 1.

The surrounding circumstances of the present appeal are similar to those considered by the Board in *Beazley Properties Ltd. v. Napier City* (Appeal No. 50/69) p. 5845 in the official volume of appeal decisions, but not yet reported). In that case the appellant appealed against the respondent's requirement that \$1,760 be paid in lieu of land reserves on the approval of a scheme plan of subdivision. The land in question was situated in the Borough of Taradale when a plan of subdivision to produce 31 lots was prepared and submitted to the Borough Council for approval as to 9 lots. These were the lots with frontages to an existing street; the remaining 22 lots would have no street frontages until the streets shown on the plan were formed and dedicated. The plan was approved as to the 9 lots subject to the condition that the usual contribution in cash be made. At that time, the Borough, in order to encourage subdivision of land suitable for residential purposes,

limited the cash contribution to 5 percent of the unimproved value of the area to be subdivided. The Town Clerk accordingly assessed the contribution on the unimproved value of the whole block. The appellant paid the amount, but the plan was not endorsed with the approval of the Council or the seal of the Council when the Borough ceased to exist on its becoming part of the City of Napier. The appellant then submitted the plan to the respondent for endorsement of approval. It was duly endorsed by the respondent. At a later date the appellant submitted the plan for approval as to the remaining 22 lots. The respondent treated the plan as a new subdivision and required a cash payment of \$80 for each lot to be made by way of reserve contribution. The Board held that the Taradale Borough Council had no power to require payment for lots which were excluded from those to which the approval related, and upheld the assessment for the amount claimed, less the amount of excess paid when the Borough approved the plan so far as it related to the 9 lots.

In that case the contribution for reserves was governed by the provisions of the Municipal Corporations Act 1954, which had no provisions similar to those in the proviso to s. 28 (2) of the Counties Amendment Act 1961, which limit the credit to be given to cases where land in excess of requirements has been given in a prior subdivision and land is again to be given for the reserve contribution in a subsequent subdivision.

The respondent does not dispute the appellant's contention that credit should, when assessing the cash payment to be made in respect of the 105 lots, be given of an amount equal to the value of that part of the scenic reserve which has not been credited against the area of land set aside in respect of the lots produced in Stage 1 and Stage 2 of the development.

A credit of \$2,417.13 has already been given. It is a sum which represents the value, based on Government valuation, of the portion of the scenic reserve that would have been available to satisfy the reserve contributions in respect of the 105 lots, if land, instead of cash, were acceptable. The appellant contends that the scenic reserve as a whole has a value so high on account of the amenity it provides that it cannot be assessed on a commercial basis; therefore, its value should be assessed at an amount equal to the cash payment required to be paid by the respondent, and credit given accordingly. The contention seems to the Board to be as disingenuous as it is novel; it is therefore untenable, and must be rejected.

The final ground of appeal relates to the condition which stipulates that:

"The owners shall purchase at valuation from the Council the road to be stopped and the road reserve to be revoked".

The appeal, however, is not an objection to what the condition requires the appellant to do, but the failure of the respondent to give credit to the appellant for the value of the road dedicated by the appellant in substitution for the existing road and road reserve, which are to be transferred to the appellant.

The procedure for assessing the value of a stopped road which is to be transferred to the landowner whose land had frontage to the road is prescribed by s. 150 of the Public Works Act 1928, and is not a subject-matter that can be dealt with under the wide powers given a county council by s. 23 (3) (f) of the Counties Amendment Act 1961. The conditions imposed by the respondent is in a form which is, in the opinion of the

Board, "fair and reasonable" within the meaning of para. (f) *ibid*.

For these reasons the appeal is disallowed *in toto*. Leave is reserved to the respondent to apply for costs.

*Appeal disallowed.*

### Minister of Works v. Paparua County

Number Two Town and Country Planning Appeal Board, Christchurch. 1970. 21 April.

*District scheme—Classification of streets—Standards defined in scheme statement—Should be similar in regional areas—Not varied on appeal unless manifestly excessive—Additional cost of upgrading proposed streets to serve outside areas should be settled by negotiation—Town and Country Planning Regulations 1960, Reg. 15 (1).*

Appeal under s. 26 of the Act.

Anderson, for the appellant.  
Milligan, for the respondent.

The judgment of the Board was delivered by LUXFORD S.M. (Chairman). This is an appeal by the Minister of Works against the refusal of the respondent to uphold his objections to certain parts of the scheme statement explaining the proposals in the district scheme of the county relating to the width of the carriageways of the streets to be formed to serve allotments produced by the subdivision of land in residential areas or zones in the local authority district.

The Minister's objections are:

- (a) That the respondent has classified the streets under various designations but has omitted to define the meaning of any designation;
- (b) That the standards of each of the designated streets (except a cul-de-sac) are excessive in so far as the width of their carriageways are concerned;
- (c) That the statement does not make provision for the respondent to pay towards the cost of forming a street of higher standard than is normally required in a residential subdivision, the amount of the excess caused to enable the street to serve areas outside the boundaries of the subdivision.

In considering an appeal of this nature regard should be had to the purpose of a scheme statement, namely to set forth the description of the district scheme and other particulars necessary for the proper explanation of the scheme and (*inter alia*) any other particulars or material which the Council thinks is necessary for the proper explanation of the scheme—see Town and Country Planning Regulations 1960, Regulation 15 (1) (a) and (d).

The Third Schedule to the Regulations sets out a model form of scheme statement including provision relating to the standards of roads to be formed. The respondent has followed substantially the model form in the preparation of the scheme statement the subject-matter of this appeal, in the preparation of the following table which is set out in Part XII (c) of that statement:

Type of Street	Reserve width not less than	Carriageway between kerbs	Foot-paths
Cul-de-sac not more than 300 feet long	40 ft.	24 ft.	8 ft.
Minor residential street	50 ft.	30 ft. reducible to 28 ft. Local Authority approval	10 ft.
Major residential, loop or connecting streets	66 ft.	46 ft.	10 ft.
District Arterial Routes	99 ft.	30 ft; 19 ft. median	10 ft.

The Minister's first contention is well founded, and the proposed amendments set out in prayer of his notice of appeal have been adopted by the Board with certain amendments. The Minister, however, seeks a decision by the Board that will set a standard width of carriageway for each class of street to be formed in a subdivision of land in a residential area or zone in New Zealand subject only to variations to meet special circumstances. With this end in view evidence was called by city engineers from Wellington and Lower Hutt, as well qualified members experienced in land subdivision necessary for housing projects undertaken by the Housing Division of the Ministry of Works.

In the opinion of the Board it would be contrary to the public interest to deprive a local authority of its rights to insert in the scheme statement the standards required for streets to be formed to serve the allotments produced by the subdivision of land in a residential area or zone in its district. If the standard exceeds what is reasonably required under normal circumstances, it may be down-graded on appeal. What is a reasonable standard is a question of fact dependent on the circumstances relevant to the particular district. Evidence of standards adopted in other local authority districts may be relevant, but the weight to be given to that evidence depends not only on the similarity of the circumstances, but also whether the advantages of the higher standard outweigh the higher cost of construction and subsequent maintenance.

In the present appeal the evidence shows that the Paparua County is one of the several local authorities which constitute the Christchurch Regional Authority, and that all those local authorities have adopted similar standards for subdivisional streets. The Board agrees that it is in the public interest that standards of this nature should be similar throughout regional areas and should not be varied on appeal unless they are manifestly excessive.

Be that as it may, the Board considers that the table of standards set out in Part XII (c) of the scheme statement is substantially a fair and reasonable ex-

planation of what will be required in all normal subdivisions of land in residential areas or zones. Being explanatory and not legislative, the respondent is entitled to vary the standards where justified by the special circumstances of any particular subdivision.

The provisions of cl. (c) of Part XII of the scheme statement should therefore be amended along the following lines:

*First:* By inserting at the beginning of para. (c) the following:

"In this paragraph, unless the context otherwise requires, 'Minor residential street' means a street to be formed or used to serve allotments in a subdivision of land in a residential area or zone by providing access to the abutting allotments; and includes a cul-de-sac where its length exceeds 300 feet.

"Major residential street' means a street to serve more than 700 allotments in a subdivision of land in a residential area or in a suburb or locality by connecting a minor residential street with an arterial route or a street having or likely to have operating on it at least eight buses a day."

*Secondly:* By deleting from the first column of the table of standards the words "loop or connecting street."

*Thirdly:* By deleting the figures "46" from the third column of the said table of standards and substituting therefor "42 ft. to 46 ft."

*Fourthly:* By deleting all reference in the said table of standards to the district arterial routes.

The provisions of cl. (d) of Part XII should be amended along the following lines:

*First:* By inserting at the beginning of the clause:

"In this clause, unless the context otherwise requires, 'district arterial route' means a road with a reserve width of not less than 99 feet with carriageway between kerbs of 30 feet with median of 19 feet and footpaths of 10 feet.

*Secondly:* By adding after the word 'network' in the first line of the clause "(which includes district arterial routes)".

The Board has considered the third ground of the appellant's appeal and has come to the conclusion that its subject-matter is not appropriate for inclusion in a scheme statement. If the respondent requires a street in a proposed subdivision to be upgraded to make it suitable to serve areas outside the subdivisional allotments, the extra cost of so doing should be settled by negotiation. If approval of a scheme plan of subdivision were made subject to one or more streets being of a standard in excess of that required to service the abutting allotments the extra cost necessarily falls on the local authority. The assessment is a question of fact which is dependent upon various circumstances which in the event of dispute can properly be settled on appeal. For this reason the third ground of appeal is overruled.

Final judgment is, however, deferred for 30 days from the date of this decision to enable either party to apply to the Board to review the form of the suggested amendments. If no application is made within that period, final decision shall be deemed to have been given directing the respondent to amend the scheme statement in accordance with the foregoing suggested amendments.

*Appeal allowed in part.*