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"FUTURE SHOCK" AND "D" BLOCK

The latest rumblings from Paremoremo have caused our penal institutions to come, yet again, under scrutiny. Once again, however, it seems unlikely that anything much will be accomplished. The most violent thing society can do to a person is to deprive him of his freedom; a close second is to strip him of his self-respect. Viewed generally it is a cause for wonder that there are as few disturbances as there have been. Left as it is, the position can only deteriorate.

> "It has been observed that if the past 50,000 years of man's existence were divided into life-times of approximately 62 years each, there have been about 800 such life-times. Of these 800, fully 650 were spent in caves. Only during the past 70 life-times has it been possible to communicate from one life-time to another—writing made it possible to do. Only during the past six life-times have masses of men ever seen a printed word. Only during the past four has it been possible to measure time with any precision. Only in the past two has anyone anywhere used an electric motor. And the overwhelming majority of all material goods that we use in daily life have been developed within the present, the 800th life-time".

So writes Alvin Toffler, originator of the term "Future Shock"—"the dizzying disorientation of the individual brought on by the premature arrival of his future".

He writes: "Future shock is a time phenomenon, a product of the greatly accelerated rate of change in society. It arises from a superimposition of a new culture on an old one. It is culture shock in one's own society, but its impact is far worse . . . Most travellers have the comforting knowledge that the culture they left behind will be there to return to. The victim of future shock does not."

The same conflict was described by Dr Frederick S. Perls, founder of Gestalt Therapy, when he said: "Anxiety is the gap between the now and the later".

The psychologist Abe Maslow was also describing victims of future shock when he commented that it must be hell to be a Victorian-educated person in the seventies: "Its as if the only tool they have is a hammer and they treat everything as if it were a nail".

Are we, with our Victorian penal system designed and built by Victorian-educated people treating our prisoners as if they were nails? Not so much because we confine them under conditions both primitive and unrelated to their former external environment but because of the difficulties we create for them when they emerge. Many ex-inmates when asked which was the worse—going to prison for the first time or coming out of prison upon release—have commented that it was the latter. The experience of future shock.

There is no doubt that members of society *outside* prison are suffering from "future shock", for mild future shock occurs to an individual "when what is relevant to him is threatened by the irrelevant. His psychological predicament, however, is made the more acute by his own non-awareness and/or non-acceptance that what is relevant to him is, in reality irrelevant and he is being threatened by what is relevant." (Indeed, one is tempted to toy with the proposition that those conservatives among us may in fact be the graver victims of "future shock" and as such would be seen by Alvin Toffler as being outside the mainstream of anthropological development.)

This can be demonstrated within the penal system by the prison employee who was worried that he might lose his job because Pierre Trudeau (as the then-potential next Prime Minister of Canada) was likely as such to drastically revise the Canadian prison system. The same symptoms were perhaps being displayed by some of the practitioners who opposed the introduction of the Woodhouse Report—a fear that what they were doing as a job was generally irrelevant, and a fear that relevancy might snuff them out.

These examples are of mild forms of future shock, but severe future shock can require medical or psychiatric treatment where a person's traditional environment is suddenly eliminated. Where he loses his routines, habits and relationships in a single instant—e.g. an employee of thirty years standing who suddenly loses his irrelevant job due to technological advancement, change in management, bankruptcy or the like, or, of course, a prisoner suddenly discharged from gaol.

G. C. Allison has suggested that "much of what we are doing in our prison system is irrelevant. For me, it is relevant to keep a man out of jail."

Few would differ from his statement: "How can we expect a man who has served five or more years in isolation and alienation, loneliness and hopelessness and frustration to come back in society "rehabilitated"? What a Victorian term! Surely, we need to continue people in the prisons offering music classes, art classes et cetera, but these are not real contacts—solid contacts—they are fleeting encounters with people who dare not to be too personal with the men for fear the prison administrators will fire them. The doors that lock men in prison are the same doors that lock out people who care about men in prison. I'm not speaking about do-gooders. The history of our [Canadian] penal system is filled with the names of competent people who became disenchanted with prison administration and the system and left."

Indeed the monotony and sensory deprivation of prison life can even be permanently damaging to an inmate, as has been described by Woodburn Heron, a Magill psychologist: "A changing environment seems essential for human beings. Without it the brain ceases to function in an adequate way and abnormalities of behaviour develop. In fact, as Christopher Burney observed in his remarkable account of his stay in solitary confinement, 'Variety is not the spice of life; it is the very stuff of it.'"

Indeed, some prison reformers do not consider that a man is responsible for his actions after his release from prison, as he is in a state of shock.

To them recidivism may be seen, not as a failure of the individual to be rehabilitated but a failure of the individual to recover from the shock. Instead he simply returns to prison.

Today with the world changing more rapidly now than at any other time in history it seems that prison sentences are becoming progressively less and less a deterrent to crime but are probably having the reverse effect. The very concept of Paremoremo may be seen as a monument to Victoriana. As G. C. Allison has also said: "It is irrelevant to spend millions and millions of dollars on a prison system that doesn't work. If we are going to make changes in the prison system and keep men out of jail, we need to change the employees by replacing the present ones with those who believe in redundancy, and we need to hire architects who have never seen a prison before, and build the prisons near where people live and not in the bush."

It must be just as irrelevant to teach a person a trade while in prison while providing little or nothing by way of a human relations course to enable him to not only understand himself but how to get along with other people. Once released, it must also be unrealistic to expect him not to mix with other former prisoners when he has been confined within a system which encourages the development of deep and lasting loyalties among inmates and minimises almost to the point of extinction any opportunity for the inmate to form new relationships with those outside the institution.

The late Dr Frederick S. Perls commented that: "Maturing is the transcendance from environmental support to self-support. And it is maturity which most of the inmates of our penal institutions lack."

That our penal system may be working to undermine rather to reinforce our society is summarised by G. C. Allison: "It is irrelevant to design, build and administer prisons to provide super-womb-like environmental support for the inmate . . . and thereby diminish opportunities for him to transcend the environment to achieve the one essential attribute he will need to cope upon release in the seventies and beyond: self-support".

JEREMY POPE.

PRACTICE NOTE

Divorce—Discretion Statements

Their Honours the Judges have resolved that the requirement of discretion statements on undefended petitions for divorce be abolished.

SUMMARY OF RECENT LAW

CONTRACT—OFFER AND ACCEPTANCE

Identity of party—Deception as to identity—Oral offer of car for sale—Purchaser present in person—Payment by cheque—Mistaken belief by seller that purchaser was another person of standing—Belief fraudulently induced by purchaser—Cheque accepted on basis of mistake—Whether mistake rendering contract void or voidable—Whether seller offering to sell car to purchaser present before him. L. was the owner of a car which he wanted to sell. He advertised it in a newspaper. In reply a man rang up; he gave no name but said that he was interested in buying the car at the price advertised. Arrangements were made for him to come to L.'s flat that evening. He was there shown the car which was parked outside. The man, who turned out to be a rogue, tested the car and said that he liked it. L. and the rogue then went to the flat of L.'s fiancee, Miss K. There the rogue introduced himself as "Richard Green" and made L. and Miss K. believe that he was a well-known film actor of that name. He said that he would like to buy the car and they agreed a price of £450. The rogue wrote out a cheque for that amount, signing it "R. A. Green". He wanted to take the car at once. L. was hesitant and asked for proof of identity. He was shown a special pass of admission to Pinewood Studios with an official stamp on it. It bore the name "Richard A. Green", an address, and a photograph which was plainly that of the rogue. On seeing this L. was satisfied and let the rogue have the car and log book. A few days later the bank told L. that the cheque was worthless. Meanwhile the rogue had sold the car to A. who bought it in good faith and without knowledge of the fraud. In an action by L. against A. for conversion of the car. *Held*, (1) The fraud perpetrated by the rogue rendered the contract between L. and the rogue voidable and not void because—(a) (per Lord Denning M.R. and Phillimore L.J.) where a transaction had taken place between a seller and a person physically present before him there was a presumption that the seller was dealing with that person even though, because of the latter's fraud, the seller thought that he was dealing with another individual whom he believed to be the person physically present; in the present case there was nothing to rebut the presumption that L. was dealing with the person present before him, i.e. the rogue (b) (per Megaw L.J.) L. had failed to show that, at the time of offering to sell his car to the rogue, he regarded his identity as a matter of vital importance; it was merely a mistake as to the attributes of the rogue, i.e. his creditworthiness (ii) Accordingly, since L. had failed to avoid the contract before the rogue parted with the property in the car to A., the latter, having bought the car *bona fide* and without notice of the fraud, had acquired a good title thereto and the action failed. *Phillips* v. *Brooks Ltd.* [1917-19] All E.R. Rep. 246, followed. *Ingram* v. *Little* [1960] 3 All E.R. 332, distinguished and doubted. Per Lord Denning M.R. The title of the ultimate purchaser should not depend on such refinements as whether the original seller was mistaken as to the rogue's identity or merely as to his attributes, for in either case it is the seller who has let the rogue have the goods and thus enabled him to commit the fraud, whereas the ultimate purchaser has acted with complete circumspection and in entire good faith. Accordingly a mistake as to identity does not mean that there is no contract or that the contract is a nullity and void from the beginning; it only means that the contract is voidable. *Lewis* v. *Averay* [1971] 3 All E.R. 907 (C.A.).

PRACTICE—APPEALS FROM SUPREME COURT ON DETERMINATION OF APPEALS FROM MAGISTRATE'S COURT

Application refused by Supreme Court—Appeal to Court—Appeal from Supreme Court refused—Motion to strike out appeal granted. This was a motion to strike out a notice of motion to appeal from a decision of the Supreme Court refusing leave to appeal to the Court of Appeal from a judgment of the Supreme Court on appeal from the judgment of the Magistrate's Court. *Held*, 1. Section 66 must be read with s. 67 of the Judicature Act 1908. An order of the Supreme Court refusing leave to appeal to the Court of Appeal from a decision of the Supreme Court on appeal from an inferior Court is final and no appeal lies to the Court of Appeal from such an order. (*C. Dickinson & Co. Ltd.* v. *Herdman* [1929] N.Z.L.R. 793 and *Hardy* v. *Tennent* [1958] N.Z.L.R. 700, followed. *The Amstel* (1877) 2 P.D. 186; *Kay* v. *Briggs* (1889) 22 Q.B.D. 343 and *Lane* v. *Esdaile* [1891] A.C. 210, referred to.) 2 Motion to strike out the motion for leave to appeal granted. *McCosh and Others* v. *Waiapu County* (Court of Appeal. Wellington. 9 July; 6 August 1971. North P., Turner and Haslam JJ.).

PRACTICE—JOINDER OF PARTIES

Third party joined by defendant—Application by plaintiff to join third party as defendant—No privity of contract between plaintiff and third party—Allegation third party owed duty to plaintiff—joinder granted—Code of Civil Procedure, RR. 61, 90. This was an application by the plaintiff to join the third party as a defendant. The plaintiff commenced an action against B. an architect for damages for defective plans and specifications prepared by B. for the construction of a recreation centre. B. applied for and was granted an order joining S. as a third party on the grounds that B. had appointed S. to act as a structural engineer in connection with the erection of the recreation centre that any defects in the plans and specifications were due to S.'s lack of skill and care. The plaintiff then filed an amended statement of claim but this was still solely directed at B. The plaintiff filed a second amended statement of claim alleging liability against both the defendant B. and the third party S. The plaintiff then made this present application to join S. as a defendant which was opposed by S. who alleged (a) that no cause of action was disclosed against him and (b) that no order was necessary within the meaning of R. 90 of the Code of Civil Procedure to enable the Court effectually and completely to adjudicate upon and settle all the matters in issue, as this could be done on the basis of the third party notice. *Held*, 1. If a plaintiff has a direct claim against a third party his proper course, as soon as that is known, is to amend his statement of claim and join the third party as a defendant. (*Edison & Swan United Electric Light Co.* v. *Holland* (1889) 41 Ch. 28, 30, applied; *Leaver* v. *Transport (Nelson) Ltd.* [1960] N.Z.L.R. 44, distinguished.) 2. It is not, of course, necessary to show that the cause of action alleged will certainly be shown to exist. It is sufficient for such a cause to be alleged. 3. Although

there was no privity of contract between the plaintiff and the third party, the plaintiff was entitled to set out to prove the existence of a duty by third party to him on the *Donoghue* v. *Stevenson* [1932] A.C. 562 principle. 4. The plaintiff had raised an allegation of negligence by the third party requiring that the third party be joined as a defendant in order to insure that the whole matter was properly before the Court. 5. By adding the third party as a defendant no new cause of action would be introduced. An order was made joining the third party as a defendant. *Bevan Investments Limited* v. *Blackhall and Struthers* (Supreme Court. Wellington. 4, 12 August 1971. Quilliam J.).

SOLICITOR—LIEN

Title deeds—Preservation of lien after voluntary parting with possession of deeds—Deeds originally deposited with solicitors instructed by vendor to act in sale of property—Vendor changing solicitors—New solicitors asking original solicitors for deeds—Original solicitors' charges unpaid—Original solicitors handing over deeds subject to reservation that deeds held to their order pending payment of the outstanding charges—New solicitors refusing to accept reservation—Whether unilateral reservation sufficient to preserve original solicitors' lien. The plaintiff proposed to sell her house in Brighton. She instructed the defendants, a firm of solicitors, to act for her. She left the title deeds with them for the purpose of the sale. The sale was delayed owing to difficulties in obtaining vacant possession. The plaintiff subsequently instructed another firm of solicitors to conduct the sale in place of the defendants. The plaintiff's new solicitors pressed the defendants on her behalf for the title deeds but the defendants claimed a solicitors' lien on them. Eventually, after the plaintiff had issued a writ claiming, *inter alia*, the deeds and damages for their detention, the deeds were sent to the plaintiff's solicitors with a covering note stating that the deeds were being sent "on the understanding that you will hold them to our order, pending the payment of our fees and your Undertaking to honour those Undertakings which we have given on behalf of [the plaintiff], on her instructions, and the payment of fees, etc., of other professional firms who have acted on [the plaintiff's] instructions and have not yet been paid by her." The plaintiff's solicitors replied promptly saying that they were unable to accede to the defendants' request. On the question whether the words of reservation in the defendants' letter were in the circumstances sufficient to preserve the defendants' lien. *Held*, (1) Where a solicitor voluntarily parted with possession of title deeds or other documents and the loss of possession was not brought about by any trickery or other wrongdoing, the solicitor's lien over such documents was destroyed unless the parting was accompanied by some effective arrangement which preserved possession for the solicitor, such as an agreement by the recipient that he should hold them on behalf of the solicitor. (ii) In the present case the unilateral reservation in the defendants' letter was not sufficient to maintain the lien. For the lien to have continued to be effective the reservation would have to have been accepted by the plaintiff's solicitors either expressly or tacitly. The plaintiff's solicitors were entitled to reject, as they did, the defendants' reservation, for there was no legal obligation on them to agree to it and in a conflict between their obligation to fellow solicitors and their client, their primary duty, subject to the law and to the Court, was to their client. *Caldwell* v. *Sumpters (a firm) et anor.* [1971] 3 All E.R. 892.

TRANSPORT AND TRANSPORT LICENSING—DRIVING WHILE ALCOHOL IN BLOOD EXCEEDED STATUTORY LIMIT

Traffic officer's powers—Not confined to exercise "on a road"—Transport Act 1962 (Reprint 1967) ss. 68B, 68C, 68D. This was an appeal by leave from the Supreme Court from a decision of the Supreme Court dismissing an appeal from the Magistrate's Court convicting the appellant. The appellant was convicted of refusing to accompany a traffic officer to the police station when required to do so, and of driving a motor van when the proportion of alcohol in his blood exceeded the statutory limit. A traffic officer employed by the Lower Hutt City Corporation saw the appellant driving erratically and pursued him and he eventually stopped in a service lane. Whilst the traffic officer was explaining to him that a breath specimen was required, the appellant walked off to the back door of his shop premises. The appellant then invited the traffic officer into his premises. The latter again asked for a breath test explaining the consequences of refusal. The appellant ordered the traffic officer to leave. The traffic officer went but returned ten minutes later with another traffic officer and were invited in by the appellant. Again the appellant refused to give a breath specimen. The appellant was requested to accompany the traffic officer to the police station and again refused. A constable was called and the appellant was arrested. The blood specimen showed the appellant had 230 milligrams of alcohol per 100 millilitres of blood. The appeal was based on the contention that a traffic officer's powers were exercisable only on a road. *Held*, 1. Sections 59A *et seq* enacted in December 1968 expressly provided that some at least of the powers conferred on traffic officers were exercisable otherwise than on a road. 2. Where a special section is subsequently passed expressly or impliedly derogating from a more general provision in the same statute, it has to be determined in all the circumstances which is the leading provision and which is the subordinate provision. (Per Turner J.). 3. Although the Legislature had originally restricted local body traffic officers as regards the generality of their powers to their exercise in a road controlled by the local authority which appoints them, the Legislature had later passed into law a code applicable to breath tests and blood tests, in which some of the powers must be exercised otherwise than on a road. 4. Upon the facts of this case the traffic officer was entitled to exercise his powers on private property having been invited on to the premises. Appeal from the judgment of Roper J. [1971] N.Z.L.R. 422, dismissed. *Kelly* v. *Lower Hutt City* (Court of Appeal. Wellington. 7 July; 8 August, 1971. North P. Turner and Haslam JJ.).

Pornography Posturing as Art—The Courts liberalised the more absurd excesses of the common law before the Obscene Publications Act, 1959. Stable J., summing up in *R.* v. *Martin Secker Warburg* [1954] 2 All E.R. 683, had:

". . . Sought to mitigate some of the rigours of the common law as laid down in the mid-Victorian era, when apparently even the 'Venus' in the Dulwich Gallery was regarded as obscene": *per* Salmon LJ., in *Calder's* case [1968] 3 All E.R. 644.

SESSIONAL LEGISLATION

Public and General Acts passed in 1971 are as follows:

74 Agricultural Pests Destruction Amendment
54 Agriculture (Emergency Regulations Confirmation)
5 Aircrew Industrial Tribunal
81 Animal Remedies Amendment
48 Animals Protection Amendment
82 Apiaries Amendment
33 Apple and Pear Marketing
66 Appropriation
156 Appropriation (No. 2)
157 Appropriation (No. 3)
53 Armed Forces Discipline
46 Arms Amendment
83 Auckland Harbour Bridge Amendment
12 Bank of New Zealand
21 Bills of Exchange Amendment
84 Boilers, Lifts and Cranes Amendment
18 Broadcasting Authority Amendment
19 Broadcasting Corporation Amendment
22 Civil Aviation Amendment
85 Civil Aviation Amendment (No. 2)
86 Civil Defence Amendment
87 Civil List Amendment
88 Coal Mines Amendment
20 Companies Amendment
89 Companies Amendment (No. 2)
90 Construction Amendment
11 Consular Privileges and Immunities
16 Control of Prices Amendment
91 Copyright Amendment
63 Counties Amendment
92 Criminal Injuries Compensation Amendment
42 Customs Amendment
61 Customs Orders Confirmation
93 Dairy Board Amendment
94 Defamation Amendment
52 Defence
32 Dental Amendment
60 Department of Social Welfare
95 Development Finance Corporation Amendment
96 Diplomatic Privileges and Immunities Amendment
38 Distillation
59 Domestic Proceedings Amendment
145 Education Amendment
67 Electoral Amendment
97 Emergency Forces Rehabilitation Amendment
26 Estate and Gift Duties Amendment
45 Factories Amendment
55 Finance
98 Fire Services Amendment
72 Fisheries Amendment
148 Fisheries Amendment (No. 2)
99 Forests Amendment
39 Franklin-Manukau Pests Destruction
70 Gaming Amendment
34 Gaming Duties
13 Government Railways Amendment
41 Government Railways Amendment (No. 2)
149 Guardianship Amendment
7 Harbours Amendment
58 Harbours Amendment (No. 2)
100 Health Amendment
147 Hire Purchase
31 Hospitals Amendment
49 Hospitals Amendment (No. 2)
101 Housing Amendment
17 Hovercraft
64 Hydatids Amendment
4 Imprest Supply
6 Imprest Supply (No. 2)
47 Imprest Supply (No. 3)
43 Incorporated Societies Amendment
102 Insurance Companies' Deposits Amendment
103 Invercargill Licensing Trust
104 Joint Family Homes Amendment
152 Lake Waikaremoana
105 Land Amendment
146 Land and Income Tax Amendment
10 Land and Income Tax (Annual)
106 Land Drainage Amendment
80 Layby Sales
73 Legal Aid Amendment
107 Licensing Trusts Amendment
108 Life Insurance Amendment
27 Local Authorities Loans Amendment
40 Local Authorities (Members' Interests) Amendment
50 Local Legislation
109 Machinery Amendment
56 Magistrates' Courts Amendment
151 Maori Purposes
29 Marine Farming
15 Marine Reserves
110 Masterton Licensing Trust Amendment
37 Meat Export Control Amendment
75 Milk Amendment
25 Mining
65 Ministry of Transport Amendment
111 Minors' Contracts Amendment
112 Moneylenders Amendment
62 Municipal Corporations Amendment
113 Mutual Insurance Amendment
114 National Library Amendment
115 National Parks Amendment
116 National Provident Fund Amendment
117 Nature Conservation Council Amendment
118 New Zealand Society of Accountants Amendment
143 Niue Amendment
119 Noxious Weeds Amendment
78 Nurses
120 Post Office Amendment
76 Primary Products Marketing Regulations Confirmation
3 Primary Products Marketing Regulations Validation and Confirmation
121 Property Law Amendment
122 Public Bodies Leases Amendment
123 Public Revenues Amendment
14 Public Trust Office Amendment
124 Public Works Amendment
150 Race Relations
155 Racing
30 Republic of Sierra Leone
125 Reserve Bank of New Zealand Amendment
144 Reserves and Domains Amendment
141 Reserves and Other Lands Disposal
126 River Boards Amendment
2 Sale of Liquor Amendment
77 Sale of Liquor Amendment (No. 2)

71 Seamen's Union Funds
79 Shipping and Seamen Amendment
127 Shops and Offices Amendment
8 Social Security Amendment
128 Social Security Amendment (No. 2)
129 Soil Conservation and Rivers Control Amendment
130 Southland Boys' and Girls' High Schools Amendment
1 Stabilisation of Remuneration
69 Stabilisation of Remuneration Amendment
51 Stamp and Cheque Duties
131 State Services Remuneration and Conditions of Employment Amendment
132 Status of Children Amendment
133 Statutory Land Charges Registration Amendment
134 Superannuation Amendment
135 Surveyors Amendment
136 Tariff and Development Board Amendment
142 Tokelau Islands Amendment
35 Tourist Hotel Corporation Amendment
36 Town and Country Planning Amendment
153 Town and Country Planning Amendment (No. 2)
23 Trade Practices Amendment
57 Transport Amendment
68 Transport Amendment (No. 2)
28 Unclaimed Money
137 Universities Amendment
138 Valuation of Land Amendment
9 War Pensions Amendment
24 Water and Soil Conservation Amendment
154 Water and Soil Conservation Amendment (No. 2)
139 Weights and Measures Amendment
140 Wildlife Amendment
44 Workers Compensation Amendment

REGULATIONS

Regulations Gazetted from 2 to 23 December 1971 are as follows:

Agricultural Chemicals (Parathion and Parathion-Methyl) Notice 1971 (S.R. 1971/271)
Agricultural Workers (Market Gardens) Order 1971 (S.R. 1971/251)
Antarctica (Fauna and Flora) Regulations 1971 (S.R. 1971/278)
Antarctica (Specially Protected Areas) Order 1971 (S.R. 1971/279)
Armed Forces Establishments Road Traffic Bylaws 1970, Amendment No. 2 (S.R. 1971/248)
Broadcasting Authority (Fees) Regulations 1969, Amendment No. 1 (S.R. 1971/280)
Civil Aviation Charges Regulations 1965, Amendment No. 7 (S.R. 1971/281)
Collision Regulations Order 1965, Amendment No. 1 (S.R. 1971/252)
Cook Islands and Nieue Regulations Revocation Order 1971 (S.R. 1971/257)
Customs Regulations 1968, Amendment No. 5 (S.R. 1971/258)
Customs Tariff Amendment Order (No. 14) 1971 (S.R. 1971/273)
Developing Countries Tariff Order 1971 (S.R. 1971/249)
Exchange Control Suspension Regulations 1971 (S.R. 1971/272)
Fisheries (General) Regulations 1950, Amendment No. 17 (S.R. 1971/282)
Fishing Boat Radio Rules 1971 (S.R. 1971/283)
Food Additives Notice (No. 2) 1971 (S.R. 1971/276)
Motor Drivers (Standard Driving Tests) Notice 1965, Amendment No. 3 (S.R. 1971/277)
Motor Spirits Prices Regulations 1970, Amendment No. 2 (S.R. 1971/259)
Municipal Corporations (Earthquake Dangers) Order 1971 (S.R. 1971/260)
New Zealand—Australia Free Trade Agreement Order (No. 7) (S.R. 1971/261)
Periodic Detention Order 1971 (S.R. 1971/253)
Pharmacy Registration Regulations 1955, Amendment No. 2 (S.R. 1971/262)
Pharmacy Regulations 1944, Amendment No. 19 (S.R. 1971/263)
Revocation of Exchange Control Suspension Regulations (S.R. 1971/287)
Revocation of the Customs Export Prohibition (Animal Livers) Order 1957 (S.R. 1971/264)
Rotorua Trout Fishing Regulations 1971, Amendment No. 1 (S.R. 1971/265)
Shipping (Certificate of Service for Naval Officers) Regulations 1971 (S.R. 1971/284)
Social Security (Higher General Medical Services Benefit) Notice 1971 (S.R. 1971/275)
Social Security (Hospital Benefits) Regulations 1964, Amendment No. 4 (S.R. 1971/266)
Social Security (Maternity Benefits) Regulations 1939, Amendment No. 13 (S.R. 1971/267)
Social Security (Rural Area) Notice 1969, Amendment No. 3 (S.R. 1971/274)
Summary Instalment Orders (Magistrates' Courts) Rules 1970, Amendment No. 1 (S.R. 1971/285)
Supreme Court Amendment Rules 1971 (S.R. 1971/254)
Telephone Regulations 1968, Amendment No. 3 (S.R. 1971/250)
Tokelau Islands Administration Regulations 1971 (S.R. 1971/268)
Transport Licensing Regulations 1963, Amendment No. 16 (S.R. 1971/255)
Trustee Savings Banks (Remuneration) Regulations 1965, Amendment No. 1 (S.R. 1971/269)
University Bursaries Regulations 1971 (S.R. 1971/256)
Wheat Research Regulations 1966, Amendment No. 3 (S.R. 1971/286)
Wildlife Regulations 1955, Amendment No. 5 (S.R. 1971/270)

Censoring Shakespeare—In the recent prosecution of the *Oz* publishers (*The Times*, June-July 1971); counsel's closing speech observed:

"It is perhaps fortunate that Shakespeare is no longer with us. He does not have to stand the criticism of having his works circulating among schoolchildren."

CASE AND COMMENT

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

Sale of Goods

Hot-foot on the decision in *Ashington Piggeries* v. *Christopher Hill* [1971] 1 All E.R. 847 (H/L) comes the important judgment of McMullin J. in *Utility Castings Ltd.* v. *Kidd Garrett Ltd.* (Auckland, 27 May, 1971).

The plaintiff had purchased from the defendant, a company dealing in industrial machinery, a furnace to be used in the melting of metal. The plaintiff hoped that it would be able to melt 2,000 lbs. in 90 minutes. Unfortunately, the machine proved incapable of such a performance; it also revealed several mechanical defects. At the time of this action, for loss of profits and expenses incurred in installation, the furnace was back with the manufacturers, D. G. & G. L. Ward Ltd.

The initial problem was whether the plaintiff had sufficiently stressed his desire as to the performance of the machine such that its capacity to melt 2,000 lbs. in 90 minutes had become a term of the contract. McMullin J. thought that it had. It had been clear to the defendant that such a capacity was vital to the plaintiff. Furthermore, the plaintiff had referred to its expected capacity in the very letter ordering the machine.

His Honour was not prepared to find it inimical to the plaintiff's case that the letter had referred simply to an "understanding" as to the furnace's capacity. He recognised that such a term can import less than a condition or warranty, but it was, he said, (referring to Lord Upjohn in *Campbell* v. *I.R.C.* [1968] 3 All E.R. 588, 610) entirely dependent on the circumstances of the case. Here, the circumstances were such as to make it plain that an "understanding" denoted a term of the contract.

McMullin J., however, was prepared to sustain, if partially, the defendant's argument as to the import of the word "prototype". In a letter, the plaintiff had recognised that the machine could accurately be so described. The effect of this, his Honour believed, was a concession that "teething" troubles could be expected with the furnace; and that it could not be expected to achieve a 90-minute melting time immediately. Thus there would, said McMullin J., be a 6-week period of grace granted to the defendant, during which time no breach would be committed if the machine failed to perform as required.

Next, his Honour turned to s. 16 (b) of the Sale of Goods Act, 1908. Where goods are sold by description, by a seller who deals in goods of that description, this sub-section requires the goods to be of merchantable quality.

Was this, then, a sale by description? McMullin J. held that it was: the letter ordering the goods had referred to a " 'Rotomelt' Oil-Fired Furnace"; the plaintiff had, perhaps, seen some of the component parts of the machine, but there was still a good deal of construction work remaining to be done. Accordingly, it could not be said that the plaintiff "was buying a particular furnace by inspection and in reliance on its own inspection and judgment."

The learned Judge also held that the seller dealt in goods of "that description." This case involved the first time that the sale of such a furnace had been made; but the defendant, a company which dealt in industrial machinery, discovered as part of its business that a market existed in Auckland for furnaces of this kind and "a person can be regarded as a dealer in goods even on the strength of offering one particular article for sale." The learned Judge could have fortified his decision had he referred to the *Ashington Piggeries* case (*supra*) where "of that description" was interpreted to mean "of that kind."

Next, the learned Judge had to define the precise meaning of "merchantable quality". He alighted on Lord Reid's definition that the phrase means "that the goods in the form in which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under that description." (This, McMullin J. said, was a reference to *Hardwick* v. *S.A.P.P.A.* [1969] 2 A.C. 31, 77; he did not mention that Lord Reid had repeated this definition in *Brown* v. *Craiks* [1970] 1 All E.R. 823, 826). Pointing to the numerous breakdowns of the furnace, his Honour had no difficulty in finding that it was not of merchantable quality.

But, once more, McMullin J. found that this breach was partially negatived by the plaintiff's use of the word "prototype." (Such negation

being permitted by s. 55 of the Sale of Goods Act). Six weeks could again be allowed, he said, since that would be a reasonable time for the elimination of "mechanical teething troubles". At the end of that period, such faults should all have been repaired.

The plaintiff, therefore, had an action in damages. It was conceded by himself that, assuming that the term as to the capacity of the furnace had been a condition, he had lost his right to rescind, presumably by having effectively accepted the furnace. Nevertheless, he argued that the defendant did in fact accept rejection of the goods by taking it back through the manufacturer who here was acting as its agent. But the goods had been taken back in an endeavour to correct its deficiences, and this being so, the learned Judge held that there could have been no acceptance of any rejection.

McMullin J. declined to assess the damages no the information before him, and accordingly adjourned the action for further evidence. But a warning note ought to be sounded: as put in the judgment, the claim encompassed both the installation costs of the furnace and loss of profits. It would, it is submitted, be wrong to allow both heads since it would be equivalent to allowing the plaintiff to receive the benefit of the contract, yet free him from the expense of earning it: *Cullinane* v. *British "Rema" Manufacturing Co.* [1954] 1 Q.B. 292 (C.A.).

R.G.L.

Exception Clauses Retrospectively rescinded

The decision of Wilson J. in *Auckland Gas Co. Ltd.* v. *Farnsworth Galvanisers Ltd.* (Supreme Court, Auckland, 27 November 1970) is in effect a direct application of the law as stated in *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447 (C.A.). It also neatly illustrates the straits to which the law of discharge by breach has been reduced by the approach adopted in that unfortunate Court of Appeal decision.

The plaintiff had contracted to supply and install a gas heating and insulation system for the defendant's galvanising bath. Because of a basic design fault, the plant never worked satisfactorily and was eventually removed and replaced by a different plant. After some modifications had been made, this latter plant functioned satisfactorily.

In the present action the defendant counterclaimed for damages for breach of contract under two heads: (1) Certain costs of excavation incurred in preparation for the original plant and (2) Loss of profits resulting from defects in both installations. The plaintiff's defence was based on the following conditions of the contract between them:

"Conditions of Sale"

"1. Any agreement or statement contained herein is contingent upon our ability to secure the goods and/or material for the manufacture of the goods offered . . .

2. In the event of this quotation being accepted by you all conditions or warranties whatsoever, whether statutory or otherwise, are hereby expressly excluded.

3. Material or workmanship of the Company's manufacture which is proved defective with fair usage within six months of the date of sale will be replaced at the place of original delivery but our liability is in all respects limited to replacements only and we will not otherwise be responsible for any expense, loss or damage howsoever arising.

4. Equipment supplied to us by another manufacturer is only covered by the guarantee of that manufacturer.

5. . . . heat resisting steel components are excluded from this warranty."

The plaintiff relied on paras. 1, 4 and 5 so far as the counterclaim was based on failure in the first plant to provide certain fans of heat resisting steel. The learned Judge held that this defence must fail because the basic complaint was not of the unsuitability of the material of which the fans were made, but against the defective design of the whole installation. As to para. 3, read as a whole it purported to limit liability only in respect of loss flowing from defective material or workmanship and again could have no application to loss deriving from the defective design of the first installation.

This left para. 2 still to be applied and it also left for decision the question of loss caused by the second installation. The learned Judge disposed of both these remaining items by holding that there had been two contracts. When the first installation was found unsatisfactory, the initial contract had, he said, been rescinded for breach and a new contract for a fresh installation been entered into. The termination of the first contract for breach had meant that the exception clauses had ceased to exist in respect of that contract. There was no reason to imply them into the second contract. In consequence, the plaintiff was liable on all counts:

In holding that, on the discharge of the first contract for breach, the exception clauses had ceased to exist. Wilson J. was in effect applying the *Harbutt's "Plasticine"* approach, though in the event he cited not that case but an earlier

dictum by Lord Reid in *Suisse Atlantique Societe d' Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] A.C. 361 (H.L.) 398 where it was said:

> "If fundamental breach is established the next question is what effect, if any, that has on the applicability of other terms of the contract. This question has often arisen with regard to clauses excluding liability, in whole or in part, of the party in breach. I do not think that there is generally much difficulty where the innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages. Then the whole contract has ceased to exist including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term."

The adoption of the interpretation of that dictum was propounded by the English Court of Appeal in the *Harbutt's "Plasticine"* case. Even so, it is still worth emphasising that when Lord Reid said that "the whole contract ceased to exist including the exclusion clause" he added the essential qualification "and I do not see how that clause can then be used to exclude an action for loss which *will be* suffered by the innocent party *after it has ceased to exist.*" What Lord Reid obviously was being at pains to emphasise was that so far as discharge by breach works a termination of the contract, it is a termination for the future and that the exception clauses cease to apply only to losses incurred after the termination. That being so, the exception clauses in the instant case would certainly have applied to losses sustained down to the point of termination. In other words, until that point, the relation of the parties would have been governed by their contract in the terms in which they had agreed. This would mean for example that consequential loss flowing from defective work or materials would be governed down to that point by para. 3 of the Conditions. In parenthesis one might well add "and what could possibly be wrong with that?" There is surely no injustice in two commercial firms agreeing that while the one will make good defective materials or workmanship it will not be liable for consequential loss. In a situation where a local engineering firm has to design as well as make an untried machine it would be surprising if the contract were otherwise. If the contract had required the plaintiff to carry liability for consequential loss in such a case one would expect that fact to have affected the costing of the contract quite materially.

As another consequence of a prospective rather than a retrospective termination for breach para. 2 would also have governed the relations of the parties down to the point of termination. That being so the real question for the Court should have been the interpretation and application of para. 2. Did it in terms cover faulty design? One has only to ask that question to see that para. 2 falls within that category of clauses to which Lord Wilberforce referred in the *Suisse Atlantique* case when he said at p. 431:

> "An act which, apart from the exceptions clause, might be a breach sufficiently serious to justify refusal of further performance, may be reduced in effect, or made not a breach at all, by the terms of the clause."

Potentially at least, para. 2, by excluding "all conditions or warranties whatsoever" might well have had the effect of so reducing the plaintiff's obligations is respect of design that breach could not form the subject of a discharge of the contract. Here again the problem would be one of interpretation, not to be resolved simply by a finding that the contract had in fact been terminated for breach.

The principal argument for retaining the "fundamental breach" concept, and no doubt the inarticulate major premise of the *Harbutt's "Plasticine"* decision, is that without it the Courts would be powerless to prevent abuse of contractual rights. It is submitted that the facts in *Auckland Gas Co.* v. *Farnsworth Galvanisers* demonstrate that this need not be so at all. At first sight, no doubt para. 2 seems wide enough in all conscience. But like every contractual term, it falls to be interpreted in context and with the aid of guiding principles. It is submitted that a Court so minded need have had no great difficulty in holding that para. 2 of the "Conditions of Sale" did not exclude the plaintiff's liability for serious faults in design.

For one thing, the *Suisse Atlantique* case made it clear that exception clauses will not be interpreted to affect fundamental terms or breaches except in the clearest circumstances. Paragraph 2 purports to affect only "conditions and warranties". On the analogy of cases going at least as far back as *Wallis* v. *Pratt* [1911] A.C. 394 that formula would not be sufficient to cover fundamental terms or breaches. A second point is that if the formula "conditions and warranties" did in fact cover every undertaking by the manufacturer of every kind whatsoever, its result would be to empty the agree-

ment between the parties of all contractual content and reduce it to the status of a mere "honour" agreement. Because in the circumstances it would be unthinkable that the parties should have so intended, it follows necessarily that the paragraph would have to be given only limited effect. A third point is that, taking the "Conditions of Sale" as a whole, there are several indications that the words "conditions and warranties" are intended to have only limited application. Thus, the "Conditions" as a whole are referred to in para. 5 as "this warranty". Apart from para. 2 itself, all the "Conditions" are concerned with the quality or availability of the physical components of the plant. It is at least possible to infer that the over-all intention is to define liability only in respect of those components or in other words to cover only those obligations traditionally thought of as "collateral" to the contract. A final point is that, in the interpretation of contracts, as in the interpretation of statutes general words ordinarily give way to special provisions. The text of the positive parts of the contract is not included in the report but it is a fair assumption that it included express undertakings by the plaintiff to design and supply plant as specified.

In sum it is submitted:

(1) To treat discharge by breach as rescinding exception clauses (though not, be it noted, most other parts of the contract) retrospectively is to misconceive the effect of discharge by breach.

(2) If termination is treated as retrospective the effect is to impose a substantial variation of the contract and to ride roughshod over the declared agreement of the parties. Under such an approach, a party will be stripped of the protection of *all* his exception clauses, however moderate or freely negotiated they may have been.

(3) The retrospective rescission approach of necessity can make no distinction between consumer contracts and commercial contracts. Whatever its attraction in the consumer field, it should surely have no place in large commercial transactions.

(4) The type of approach which gives the Courts the necessary degree of flexibility is that which asks "what did the parties agree?" In the instant case, the answer would have been that while the manufacturer no doubt intended to exclude liability for consequential loss however arising, it failed to use a formula adequate for that purpose.

In the year since Lord Reid, in the *Suisse Atlantique* case ([1967] 1 A.C. 361, 406), drew a distinction between consumer transactions on the one hand and negotiated (ordinarily commercial) agreements on the other, there have been several decisions in England, Australia and here where the difference has been recognised. It has been recognised, too, by the English and Scottish Law Commissions in their *First Report on Exemption Clauses* (July 1969 Law Com. No. 24; Scot. Law Com. No. 12). *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447 and now *Auckland Gas Co. Ltd.* v. *Farnsworth Galvanisers Ltd.* represent a competing judicial approach which not only fails to draw any distinction between the two types of transaction but indeed makes any such distinction virtually impossible.

B.C.

Administrative Law: Breach of Natural Justice

The hearing of *Wislang* v. *Sandston and Others* occupied two days and the judgment delivered by Speight J. on 27 October 1971 contains fifty-seven pages. Only one point of the many raised will be discussed in this note.

Dr Wislang challenged the determinations of the Manawatu Divisional Medical Practitioners Disciplinary Committee, the Disciplinary Committee (to which the Divisional Committee reported) and the Medical Council to which he appealed. For a "wilful breach" of an undertaking in his contract of service (Medical Practitioners Act 1968, s. 44 (3)) the plaintiff was censured and ordered to pay $245 costs. That decision was affirmed by the Medical Council; though there had been procedural irregularities in the proceedings of the disciplinary bodies, including a breach of s. 47 (2), which is discussed *infra*, Speight J. refused in his discretion to issue *certiorari* to quash the determinations made. This involved him in a reconsideration of what he had said in *Denton* v. *Auckland City Council* [1969] N.Z.L.R. 256, which had been taken to establish that a breach of natural justice by an administrative tribunal was not cured by compliance with those principles by an appellate authority.

The plaintiff established that there had not been compliance with s. 47 (2) which calls for the furnishing to the Disciplinary Committee by Divisional Disciplinary Committees of a "full report of the hearing". The learned Judge concluded, moreover, that the Disciplinary Committee had "virtually rubber stamped the recommendations" made by the Divisional Committee. A breach of natural justice was held to have been established. *Jeffs* v. *New Zealand Dairy Board* [1966] N.Z.L.R. 73 (C.A.) and [1967] N.Z.L.R. 1057 (P.C.) was applied.

Did this clear breach invalidate the determination of the Disciplinary Committee and, necessarily, the disposition of the appeal by the Medical Council? In *Denton's* case, *supra*, the decision of the Town Planning Committee which had received and considered a report not disclosed to the applicant, was described as a nullity and the decision of the Appeal Board, taken after compliance with the principles of natural justice, was similarly described. If that case had been followed in those proceedings, *certiorari* would have been issued to quash the determination of the Disciplinary Committee and the Medical Council.

Speight J., after considering *Denton's* case, *Leary* v. *National Union of Vehicle Builders* [1971] 1 Ch. 34; [1970] 2 All E.R. 713 (where Megarry J. had applied *Denton's* case), and *Ridge* v. *Baldwin* [1964] A.C. 40; [1963] 2 All E.R. 66 (H.L.) and *King* v. *University of Saskatchewan* (1969) 6 D.L.R. (3d) 120, which differed from the conclusions reached in the other three decisions, concluded:

> "Having given the matter further consideration, I do not think that a dogmatic view can be held either way. On reflection I think the view I expressed in *Denton's* case was in too general terms and the existence of appeal rights is a matter to be taken into account, along with the 'viciousness' of the breach in deciding whether or not to exercise discretion. Much must depend on the nature of the alternative remedy."

The question whether all breaches of natural justice should have the same effect was discussed by T. A. Gresson J. in *McCarthy* v. *Grant* [1959] N.Z.L.R. 1014, an application to quash a conviction entered in the Magistrates' Court. There the error was described as a "fundamental procedural defect." (p. 1021), as the result of which there had been manifest injustice. Speight J. emphasised that *certiorari* is a "powerful weapon" which is awarded in the discretion of the Court. He indicated that there were three considerations which should be weighed before the discretion was exercised. First, what was the nature and effect of the irregularity? Was it of such a fundamental nature as necessarily to invalidate the decision (*Cf. Leary* v. *National Union of Vehicle Builders*, *supra*.) Would the result of the case have been the same despite the irregularity?

Secondly, does the conduct of the applicant disentitle him to the award of a remedy? (*Cf. R.* v. *Aston University Senate, ex parte Roffey* [1969] 2 Q.B. 538; [1969] 2 All E.R. 964, where the applicant was said to have slept on his rights.)

Thirdly, was there an effective alternative remedy? It is on this point that we have a retreat from the position taken in *Denton's* case. Because in *Wislang's* case there had been a general right of appeal to the Medical Council and a further right to appeal to the Supreme Court under s. 59, which is by way of rehearing, the alternative remedy was seen to be such as to justify the exercise of the Court's discretion against the applicant.

Taking all three of these considerations into account Speight J. refused to quash the determinations of the disciplinary bodies. Though the result will be seen by many to be just, even inevitable, we are left with the uneasy feeling that the void/voidable controversy may be revived by this judgment. In *Denton's* case Speight J. indicated that he regarded those terms as inappropriate in the field of Administrative Law. How does one describe the error in *Wislang's* case, where there had been non-compliance with a statutory requirement? Normally, this would be seen as a "jurisdictional error" in the same sense as the error which lead to the quashing of the conviction by T. A. Gresson J' in *McCarthy* v. *Grant*, *supra*, was described as the non-fulfilment of a condition on which jurisdiction depended. If that is so, we now have a decision where a Court has refused to intervene, admittedly in very special circumstances, to quash a determination affected by a jurisdictional error. This will be difficult to reconcile with the *Anisminic* decision [1969] 2 A.C. 147; [1969] 1 All E.R. 208 where the House of Lords said that a jurisdictional error was not protected by a privative clause and that the jurisdiction of the Court to review remained unaffected. A decision which was void or a nullity, to use the terms adopted in the *Anisminic* case, has been permitted to stand. Because the Court has chosen in its discretion not to invalidate the decision, it appears to be "valid". (*Cf. Contractual Misconceptions in Administrative Law* [1969] Recent Law 224).

J.F.N.

Prosecutors Beware!—The *Daily Nation* (Kenya) notes that a man accused of stealing two tyres and a battery from a pick-up at Kamukunji was acquitted by a Nairobi resident Magistrate who said the case was so badly investigated that if the investigating officer ever brought such a case to Court again "I will fire him".

MEDICO-LEGAL ASPECTS OF ORGAN TRANSPLANTATION IN NEW ZEALAND

An edited version of the Kennedy Elliott Memorial Lecture delivered by Mr Justice Beattie to the Wellington Medico-Legal Society in November 1971.

Although for some centuries man has been searching for a way to transplant body organs or parts from an animal or individual into another animal or person whose organs or parts had been destroyed or damaged by disease or injury, it is only in the last twenty years that attempts to transplant skin, bone, corneas, kidneys and more recently hearts have proved successful. Apart from the Human Tissues Act 1964, lawyers in New Zealand probably gave little thought to many difficult and unresolved issues in this field.

After the first rush of world publicity over heart transplants, many doubts were expressed as to the technical difficulties relating to compatibility and as to rejection or immunological problems. On the ethical, social or indeed emotional side, voices have been raised criticising this blaze of publicity over particular patients as unfortunate and unwise and even premature because of insufficient experimental work.

Longmare ("Spare-Part Surgery", *Aldus*, 1968, p. 169), said:

> "This is a new area of medical endeavour; its consequences are still so speculative that nobody can claim an olympian detachment from them. Those who work outside the field do not yet know enough about it to form rational and objective conclusions. Paradoxically, those who work in the thick of it . . . know too much and are too committed to their own projects to offer impartial counsel to the public, who are the ultimate judges of the value of spare-part surgery."

I will endeavour to examine some of the legal problems and possible solutions. In the long run it will be for society to prescribe what it wants.

I illustrate one of the problems by mentioning that with the kidney and the heart, *time* is all-important because there the position is governed by the "donor" organ in each case. The organs must be received as early as possible after death, which can mean that persons who are dead on arrival at hospital are usually unsuitable donors. Also, there are differences between the kidney and the heart as a kidney may come from a live donor, whereas a heart or liver also may not. The Board on Medicine of the American National Academy of Sciences has said in a public statement in 1968:

> "In the case of a kidney transplant the donation of the organ is not crucial to the donor; in the event of failure, the recipient may be kept alive for extended periods until another attempt is made. In the case of cardiac transplantation, the life of the donor cannot be maintained. Further, the recipient's life cannot be salvaged if the transplanted heart does not function."

The Moment of Death:

Medically, it is important to define the moment of death so that the removal of organs or tissue, when legally permissible, can take plaec as soon as possible.

Section 3 of the Human Tissue Act 1964, has made it legally possible that in certain circumstances the person lawfully in possession of the body is empowered to authorise the removal of parts of the body for therapeutic purposes. The circumstances are first, either the formal request of the deceased has been made in writing at any time or orally in the presence of two or more witnesses during his last illness, or reasonable inquiry has been made without revealing any objection from any person entitled to object; and secondly, the consent of the Coroner has been obtained in appropriate cases. A fully registered medical practitioner will then be permitted to remove whatever part of the body is covered by the authorisation, provided that he has satisfied himself by personal examination that life is extinct. It will be observed that the Act relates to the body itself or any specified part of the body.

I should also mention the Act stipulates that where a person has reason to believe that an inquest may be held or a post-mortem required by the Coroner, he shall not, except with the consent of the Coroner, give an authority in respect of the body or act on someone else's authority.

Dealing first, then, with the position where the deceased has made his formal request either in

writing or orally with the sanctions mentioned, this would mean deceased's relatives have no right in law to forbid the request, unless the relative is lawfully in possession of the body. Once the person lawfully in possession gives consent the other relatives have no legal power to object.

It seems to me that the person lawfully in possession must be careful to frame his authorisation to relate to the specific organ or part of the body the deceased may have chosen. No age limit is prescribed but it would appear that if a child is old enough to understand and make the request it is valid for a formal request. If not old enough, then a child's position may be covered under the next situation envisaged by the Act. That is where the deceased had made no specific request or has made a request outside the terms of the prescribed formal request.

The Act further provides, following the earlier English Statute of 1961, that the person lawfully in possession of the body of a deceased person may authorise the removal of any part of the body for use if having made such reasonable inquiry as may be practicable, he has no reason to believe:

(a) That the deceased person had expressed an objection to his or her body being so dealt with after death, and had not withdrawn it; or

(b) That the surviving spouse or any surviving relative of the deceased person objects to the body being so dealt with.

This, surely, means that the person lawfully in possession has a stronger duty to make reasonable inquiry about objections both by the deceased or his surviving spouse or by his relatives, because an objection from any one of these sources will prevent lawful authorisation. So, if his wife and one relative were consulted and she agreed but the relative did not the removal could not be authorised. The Act is silent as to what constitutes "reasonable inquiries". In a practical way, I would suggest along with Mr David Lanham, that any adult relative present when the decision is to be taken should be asked deceased's views and his own. Also, close relatives reasonably accessible by telephone could be phoned to ascertain their knowledge and feelings. If it proves impossible to locate any person who can validly help, it is thought that the person lawfully in possession will be safe in giving his authority. However, a different view has been taken by Professor Woodruff ("Will you Save a Stranger's Life?" in an issue of *Drive* in 1968). He says that:

> "As the law now stands it is necessary to obtain permission from the next-of-kin of a dead person before his organs are removed for use as grafts unless, before he died, he has expressed a wish that this should be done. As a result, many potentially useful grafts are lost, not because the next-of-kin objects, but because he or she cannot be contacted in time."

This, I submit, does not accord with the intention of our Act which only requires reasonable inquiry to be made and does not assert that the spouse or surviving relative must in fact be found. Nevertheless, I can understand the reluctance of hospitals to authorise the taking of organs without the consent of the wife or near-relative even if reasonable inquiries are made. Consequently, the formal request is of importance but, as mentioned, there is still authorisation required from the person lawfully in possession.

Who is he?

There is no property in or ownership of a dead body. In *Williams* v. *Williams* (1882) 20 Ch. D. 659, Kay J. held that deceased's executors were lawfully entitled to the possession of his body and if he has died intestate his administrators are entitled. This case decided that a man cannot by will dispose of his dead body. In *Ambrose* v. *Kerrison* (1851) 10 C.B. 776, it was held that a husband was under a duty to dispose of the body of his deceased wife even though he was separated from her. The cases lack any statement of general principle, but it would appear that the person who has actual physical custody of the body has lawful possession until someone with a higher right such as an executor or parent claims it.

As a large proportion of deaths in New Zealand occur in hospital, it could be argued that the particular Hospital Board was legally in possession of a body until someone with a better title to possession claims it. Indeed, in Britain there is a section not present in our Act which reads:

> "In the case of a body lying in a hospital, nursing home or other institution, any authority under this section may be given on behalf of the person having the control and management thereof by any officer or person designated for that purpose by the first-mentioned person."

Despite this provision, the Medical Defence Union in Britain has been advised that, save in an exceptional case, the Hospital where a patient died is not lawfully in possession of the body for the purposes of the Act. We are therefore here left with the common law position which could mean that until at least the executors or relatives know about death, the hospital must be

regarded as being lawfully "in possession". This leads to the apparent paradox of the section. The hospital may wish to make immediate use of the body. If deceased's identity is unknown, can the body be used? The only answer must be—has such reasonable inquiry as may be practicable been made? Hospitals would be fearful of irate relatives who later questioned their actions. Perhaps the safe course is to say that hospitals will rarely be in a position to guarantee they have made all reasonable inquiries if the bodies must be used within a few hours of death.

I know little of the way in which our Act has been received by medical practitioners in New Zealand, or whether there is any complaint with its present form. Undoubtedly, the English Act has been criticised and at a conference on transplantation attended by doctors, lawyers, churchmen and laymen, it was decided that:

> "The practitioners engaged in kidney transplantation explained that this work is now being held up by the difficulty of obtaining sufficient cadaver kidneys. This was partly due to the difficulty of making the necessary inquiries of relatives in the time available. They would like the Human Tissue Act to be amended to dispense with the need for inquiries of the relatives, leaving it to objectors to make their views known in advance."

In essence, the main recommendations were: first, a reputable and, in skilled hands, proven technique of saving life should not be held back by obsolete law; secondly, the supply of organs for established forms of transplantation must be increased to serve the dual aims of enabling surgeons to treat more patients and improving the prospects of longer survival of the patient because a good match has been secured; thirdly, the public has the right to safeguards and has a right to know there are safeguards.

More recently in 1970 a Special Committee of Joint Consultants has stated its views. (1970) 1 British Medical Journal, 750. A drastic proposal to circumvent all difficulties is to have a scheme of "contracting out". Under this, surgeons would have power to remove organs from all persons save those who had expressed their unwillingness for their organs to be used after their death in transplant procedures. Relatives would have no legal right to object. Such proposition was rejected in the British Parliament in 1969 as being premature, and on the basis that if pressed it might well jeopardise the future of transplant surgery. As the British Medical Journal article (*supra*) says:

> "Organ transplantation is by no means universally accepted by the public. The circumstances in which a transplant operation is most likely to take place—sudden or accidental death of a young and otherwise healthy person, and the need for an immediate decision if use is to be made of any of his organs —are such as to give rise to a strong emotional reaction. Any attempt by a surgeon to carry out a transplant operation in the face of opposition by bereaved relatives, even with the law on his side, would be likely to provoke a hostile public reaction."

In case some of you consider "contracting out" too novel, legislation along these lines has already been adopted in Denmark, France, Israel and Sweden and our cautious approach has been abandoned in those countries. Nevertheless, the Special Committee has unanimously agreed that the individual's wishes as to disposal of his organs after death should prevail over all others. This would require an amendment to our Human Tissues Act, since the person lawfully in possession can withhold authorisation in the face of an express request from the deceased. Such a provision appears in s. 2 (a) of the American Uniform Anatomical Gift Act. Should we have this amendment or still give weight to the wishes of a close relative? A parliamentary debate on this issue would make interesting listening.

The next suggested reform is that the next-of-kin with a right to be consulted should be precisely defined. The American Act provides that after death (or in some cases immediately prior to death) the next-of-kin may donate the body. Next-of-kin are specified in the following order of priority—the spouse, an adult son or daughter, either parent, an adult brother or sister, a guardian, and last, any person authorised or under obligation to dispose of the body.

If this procedure were introduced into our Act, there would be little problem about hospital authorities, who would bat last. The American Act also spells out in more detail the donees and purposes for which donations can be made. Our words are ". . . for therapeutic purposes or for purposes of medical education or research" whereas under the American Act, donations may be made to any hospital or medical or dental school, surgeon or physician for education, research, advancement of medical or dental science, therapy or transplantation. Donations may also be made to any specified individual for therapy or transplantation needed by him. The Act does not deal with the question of whether it is possible for payment for a donation. I pause to wonder if this was permitted would the amount need to be included in the donor's income tax, or is it a capital gain?

Would it be subject to sales tax or gift duty or form part of the dutiable estate? Would there be an enforceable promise—one is reminded of the old tune, with a bit of poetic licence, "Oh promise me that some day you'll be mine!" South Africa has prohibited the sale of parts of the body.

Another aspect of the matter that this attracted public notice is that of the definition of "death". The 1968 Conference in Britain-:

> "Agreed that no attempt should be made to lay down a legal definition of death or rules which doctors should observe in reaching what must be a clinical decision; but that to allay disquiet, vital organs should not be removed until spontaneous vital functions had ceased and two doctors, each independent of the transplantation team and one of them being at least five years qualified, had certified that this condition was irreversible. It was, moreover, essential that the doctors concerned should explain the matter adequately to the nursing staff concerned, especially in those cases where the patient's vital functions were being maintained by artificial means."

So, the Conference was saying that because the decision is clinical, there should be no legal rules governing it. This, in broad terms, is also the standard American viewpoint. If, therefore, the position is we must trust the judgment of the medical profession, we need mention only one example as illustrative of the tremendous responsibility it bears. If, as I understand it, heart transplant surgeons may wish to take hearts which are at the moment of removal beating in the bodies of the donors, are those donors dead? It is one thing to keep going vital organs of a person irreparably damaged, who is in a vegetable condition and will die without intervention it is another thing to take active steps to keep the organs going, and then at a propitious moment bring the process to a stop and then, with all deliberate speed, remove the needed organ for transplantation. Professor Cowen (in *University of Queensland Law Journal*) [1969] Vol. 6 states that in the Washkansky transplant the moment of death was determined by a flat EEG. The report of the Harvard Medical Committee recommended that the patient be declared dead before any effort be made to take him off a respirator, if he be on a respirator. This avoids the risk of doctors being charged with killing a patient by turning off a respirator on a person who may otherwise, under a restrictive application of the law, be deemed to be alive. I should mention that s. 164 of our Crimes Act provides that every one who by any act or omission causes the death of another person kills that person, although the effect of the bodily injury caused to that person was merely to hasten his death while labouring under some disorder or disease arising from some other cause. At this stage of matters, it is my submission that the decision as to death should be made by a doctor or doctors who are independent of the surgical team. Whether this needs statutory revision is a matter for discussion.

I note from a symposium in which the Bishop of St. Albans took part in March 1971, he considers the defining of the moment of death is not a question for a theologian or a moralist but for a doctor. The report of the Law Reform Committee of the Bar Council (*Law Guardian*, September 1971) submits that doctors should endeavour to agree amongst themselves the criteria by which death can be determined. In agreeing such criteria, doctors should insure that their criteria accord with the concept which the ordinary man has of death. The agreed criteria should then be published to allay public anxiety. Bernard Shaw once said that every profession is but a conspiracy against the laity. That is a view which must be dispelled. Failure to communicate is at the root of many of our professional difficulties. The miracle of speech is the most expressive means of communication, but it is not always effective. Lord Byron said of his mother-in-law: "She has lost the art of conversation but not, alas, the gift of speech".

It is plain that the public must be taken into the confidence of the medical profession and, as the Bishop said, perhaps the answer to bad newspaper publicity is not no newspaper publicity but better publicity. If there is a real probability of benefit to the recipient and the donor (a) is clearly irrecoverable, (b) is not known to have raised any objection beforehand, (c) is not excluded by the wishes of the next-of-kin, and (d) may supply the organs required without prejudice to someone who may be called to account for his death, then there can be no real objection.

My conclusion, therefore, is that while on the one hand rigid and over-conceptualised legal thinking must be adapted to novel conditions, on the other, the problem must arise, exist and be recognised before the law reacts to provide a solution. Perhaps the Americans have advanced ahead of us by providing in their Act, that if the terms of the Act are complied with, a person who acts in good faith is not liable for damages in any civil action or subject to any criminal proceedings for his act. Such a measure would need careful consideration.

Should we have some system of registration of potential donors organised on a national basis? The objectives of our legislation should, in my opinion, pay proper regard to the wishes of a donor and, at the same time, facilitate the function of the surgical team by devising rules that will enable surgeons to operate as soon as a donor becomes available. In my opinion there is a case for the formation of a committee composed of doctors, lawyers, clergymen and laymen, including a journalist, whose function would be to recommend to Parliament changes in the law relating to medicine in a form readily appreciated by one and all, and secondly, to appraise from time to time the effectiveness of the law, having regard to the advancement of medical science and the social objectives of this country.

LORD GARDINER—A REFORMING CHANCELLOR

Gerald Austin Gardiner will go down in legal history. He will not be remembered as a great lawyer, in the way lawyers use that expression. His judicial work was minimal. He will not be remembered as a great advocate, for although a leader of the Bar and possessed of great talent and skill, his style is unlikely to withstand the test of time. True, he appeared in celebrated cases—the *Exodus* libel case, the E.T.U. ballot-rigging case and the *Lady Chatterley's Lover* case, all now the subject of books. What Gardiner Q.C. had in abundant measure was the priceless gift of narration. He could unfold an inordinately lengthy and complex statement of fact or law, to Judge or jury, without notes, simply, in perfect order and unimpeachable syntax. Nor was he a distinguished politician, but went to the Woolsack straight from the Bar, having, it is said, more than once declined offers of a Judgeship.

His claim on posterity will be as a great reformer, as no other Chancellor this century has been, whose influence bore fruit in his own day and continued for very many years after. From his earliest days he was a reformer, moved by injustice, as he stressed in a lecture delivered earlier this year at Durham University (reprinted in 87 L.Q.R. 326). He explains it thus: ". . . my own interest in law reform has not at all been that of the academic lawyer. It has simply been an instinctive reaction to injustice. Whenever I saw something in the law which seemed to me to be causing injustice, I always wanted to get it put right". His particularly passionate and persistent efforts against capital punishment will not be quickly forgotten; but it was as Lord Chancellor for six years—longer than all but three of his predecessors this century—that his strenuous agitation reached fruition.

During his term of office, he saw hanging abolished, abortion and homosexuality legalised, divorce reformed—all measures for which he had fought for so many years. It was *Law Reform NOW*, published in 1963, which set out his programme as Labour's leading lawyer, not only on the desirable substance of reform but of special importance, on a whole new machinery for its promotion. "What I had to discover when I became Lord Chancellor", Lord Gardiner told his audience at Durham, "was how large and effective the role of the Lord Chancellor in the field of law reform could be made to be". Hence, the Law Commissions. They were established by statute so that no future Lord Chancellor could liquidate them without legislation. That the existing standing bodies were inadequate is graphically described by Lord Gardiner: "The Law Reform Committee did useful work, but the trouble was that it consisted of busy Judges, barristers and academic lawyers who only met about once a month at 4.30 after a day in Court, and at 6 someone would say: 'I am afraid that I have got to go now,' and I eventually resigned because I came to the conclusion that you simply could not reform the law of England in that way".

Another complaint, still unremedied, is the division of responsibilities between the Lord Chancellor, the Home Secretary and the Board of Trade (now the Department of Trade and Industry) which exacerbates the problems of law reform. The Board of Trade, which claims responsibility for commercial law and its administration, but has so deplorably neglected them, has more lawyers on its staff than the Lord Chancellor's Office and the Law Commission combined. After much doubt, Lord Gardiner left the existing law reform agencies in being, when the Law Commission was set up. They continue to perform useful work; relieving the burden on the Law Commission, but as before the chief complaint is their delay in reporting.

As to the Law Commissions, Lord Gardiner is happy with his creation. "I think everyone would agree", he said, "that the Law Commissions have been an unqualified success. They have won the confidence of the judiciary, the Bar, the Law Society, the academic lawyers and I think, the general public". Without the co-operation of the profession, though, none of it would have worked, added Lord Gardiner. Tribute must also be paid to Mr Justice Scarman and his fellow commissioners for their superlative work.

The innovation of attaching parliamentary counsel to the Commissions so that every report included a draft Bill saves, in Lord Gardiner's estimation, about a year in implementation. During Lord Gardiner's term of office, 17 of a total of 20 Law Commission reports had been or were in the course of being implemented, which is a remarkable figure. Another innovation which was soon abandoned is not mentioned by Lord Gardiner, but an explanation would have been welcome. According to *Law Reform NOW*, the head of the proposed Law Commission was to be a Minister of State, sitting in the Commons, styled Vice-Chancellor. When the Labour Government took office in 1964, three Law Officers were appointed: in addition to the Attorney and Solicitor, Mr Eric Fletcher, M.P., LL.D., a distinguished solicitor, was appointed Minister without Portfolio with special responsibility for law reform, and he was, as is customary for law officers, knighted on appointment. After a while, Lord Fletcher (as he now is) moved on to other duties, but no replacement was named.

Writing soon after Lord Gardiner's elevation to the law's highest office, amidst tremendou excitement and anticipation in the legal profession, Anthony Sampson wondered "how far this dedicated and incisive man can cut through the tangles of tradition and confusion that jam up the English Law. Many lawyers are looking towards him with the fear that, if he cannot do it, nobody can". Well, he did it. His impress will be discernible for generations to come. Few men have the satisfaction of achieving their life-long vision. It is only fair to note, however, that equally radical reform of the legal profession was never one of Lord Gardiner's abiding concerns. On that, like the whole profession, he was incurably conservative. GRAHAM ZELLICK in *The New Law Journal.*

OBLIGATIONS OF A MORTGAGEE IN EXERCISING HIS POWER OF SALE

Francis in his invaluable book, *Mortgages and Securities for the Payment of Money*, at p. 169, sums up a mortgagee's obligations thus:

> "A mortgagee must exercise a power of sale prudently, and with due regard to the interests of the mortgagor, but he is not a trustee. He must not deal with the property recklessly, but should comply with the terms of the power, and act in good faith. A mortgagee's power of sale 'is a power given to him for his own benefit, to enable him the better to realise his debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous, unless, indeed, the price is so low as in itself to be evidence of fraud'.
>
> "Whilst the Courts have constantly emphasised that the mortgagee is not a trustee of his power for the mortgager, they have equally emphasised the necessity for fair dealing towards the mortgagor, and the necessity for taking reasonable precautions to obtain a proper price".

The High Court of Australia has more than once enforced these duties. A typical case is *Barns* v. *Queensland National Bank Ltd.* (1906) 3 C.L.R. 925. A power of sale under a mortgage, like any other power, must be exercised honestly for the purpose of the power, not for the purposes of carrying out some *sinister* object (by "sinister" I mean sinister in the sense of its being beyond the purpose and intent of the power which he may desire to effect in the exercise of the power—per Griffiths C.J. at p. 943). In this case there was evidence that the mortgaged properties were worth considerably more than what they brought at the sale, that the sale was insufficiently advertised, and that the reserve price, at which the properties were knocked down, was disclosed before and at the auction sale.

In this case, too, Griffiths C.J. refers to a not uncommon aspect at sales of this nature. Where

formal demand of payment ,which is a necessary condition precedent to a power of sale, has been made, the mortgagee may, as well after as before the occurrence of actual default, by his conduct in negotiations with the mortgagor estop himself from alleging that the demand has ever been made; in such a case a fresh demand must be made before the mortgagee can be heard to allege that default has been committed.

Barns v. *Queensland National Bank* was followed by the High Court in *Pendlebury* v. *Colonial Mutual Life Assurance Society Ltd.* (1912) 13 C.L.R. 676, following also *Kennedy* v. *De Trafford* [1897] A.C: 180. It was held on the evidence that the mortgagee, who had sold the mortgaged land by auction, had entirely disregarded the interests of the mortgagor, and that he was responsible to the same extent as a party who is liable for wilful default. He was therefore liable to account to the mortgagor for the amount which would have been realised on the sale of the property conducted without such wilful default. Lack of adequate advertising was the main defect.

The power for a mortgagee to buy in at any auction is frequently inserted in a mortgage of land but it would seem that this is not a power for the mortgagee to purchase for himself but merely a right to bid for the purpose of forcing up the price. Should the mortgagee be the highest bidder, this will merely result in an ineffectual attempt to exercise the power, and the power will not thereby be destroyed or exhausted: Francis (*ibid.*, p. 173).

A fairly recent New Zealand case relevant to this topic is *Clark* v. *National Mutual Life Association of Australasia Ltd.* [1966] N.Z.L.R. 196, a judgment of Hardie Boys J. ". . . I am satisfied that the Court has an inherent jurisdiction to restrain both the improper and in certain circumstances any harsh or oppressive exercise of a mortgagee's power of sale": see *Hanbury and Walddoc's Law of Mortgages*, p. 298; and 2 *Coote on Mortgages*, (9th ed.) p. 939 which instance cases where sales have been set aside as oppressive and irregular where they were made for a collateral purpose.

As the headnote in *Clark's* case put it: "Where the relationship of employee and employer also exists between the mortgagor and the mortgagee, the mortgagee reserves the right to call up the mortgage on the mortgagor leaving his service and it is shown that there has been a wrongful dismissal of the mortgagor by the mortgagee effected only to give the mortgagee the right to call up the mortgage and, on default, to exercise the power of sale, the Court would be quite within its inherent jurisdiction to prevent the improper and oppressive exercise of the power of sale. Such jurisdiction will not, however, be used when the power of sale is being exercised because of the mortgagor's default in observing the terms of the mortgage and not on account of the termination of his employment". At p. 199 of his judgment, Hardie Boys J. says: "I am reluctantly driven to the conclusion that nothing I have heretofore said affords proper ground to interfere, for damages will be the remedy for any successful claim for wrongful dismissal and the power of sale has now become excisable not at all on account of any service or like association having ceased but solely through the plaintiff's default in complying with a notice properly given under s. 92 of the Property Law Act."

I may say in conclusion that nothing I have said in the foregoing article has any application to a sale by the mortgagee under conduct of the Registrar of the Supreme Court. Under that procedure a mortgagee is required to state the value of which he estimates the land to be sold. All that is required is his *estimate* of the value. Any conveyancer knows that it is the practice for the mortgagee to estimate his security at the figure which returns him principal and interest owing under the mortgage plus costs of sale (vide *Wellington City Corporation* v. *Government Insurance Commissioner* [1938] N.Z.L.R. 308 (C.A.), the leading case on this topic). For an important modification of the principle of this case with regard to mortgages given to building societies, see s. 50 of the Building Societies Act 1965, which provides that a building society, when exercising power of sale (unless the sale is through the Registrar of the Supreme Court) must take reasonable care to ensure that the price at which the land is sold, is the best price that can reasonably be obtained.

E. C. ADAMS.

These Changing Times—The change, over 55 years, in public attitudes towards "sexy" books, even if written in technical language and with educational motives, is demonstrated vividly in *Sutherland* v. *Stopes* [1925] A.C. 47, where the House of Lords declared the birth-control booklets of Dr Marie Stopes to be obscene.

LOOKING BACK

Two old-established Wanganui law firms recently amalgamated their practices. Thanks to the generosity of one of the principals, Mr Douglas Young, the writer acquired several boxes of New Zealand Law Journals. A Saturday evening at a Paraparaumu Beach cottage, without books, radio or television should have provided the appropriate time and place to polish up the lease of country "pub", a couple of statements of defence and some rather tricky easements. Instead, as the evening turned into morning and the level of tobacco in the humidor dropped to a marked degree, those dusty old pages provided a fascinating excursion back into time. The JOURNALS at the bottom of the box began at 1928—eight years before the writer was born and thirty-two before his admission—but many familiar names appear, even in the earliest volumes. Some of the more senior subscribers to this Journal would have been contemporaries and some active participants in the forensic battles of those times and these random jottings may refresh a few faded memories.

In 1928 Skerrett C.J. figures largely in the reports. Counsel appearing before him and his Courts include Hay (then in partnership with Mazengarb and Macalister), Fell (of the Nelson Bar), Brodie (Wanganui), J. S. Sinclair (Dunedin), P. B. Cooke and Sir John Findlay, Barrowclough, McVeagh (Auckland). Other names much in evidence are G. G. G. Watson, Hislop, C. A. L. Treadwell, Myers KC., Perry and Johnston of Wellington, Wilding, Gresson, Upham and Donnelley of the Christchurch Bar, Hogben, Northcroft and Leary of Auckland, L. A. Taylor and North of Taranaki.

Appointments to Bench and Bar include, in 1928, those of Mr J. H. Luxford to the Magisterial Bench although "it is not known in which district Mr Luxford will be stationed". Reference is made to his only published work—"With Machine Gunners in France and Palestine". If his writing career had finished at that point the profession would be the poorer and our book shelves considerably lighter!

Messrs H. Kennard, J. D. Willis and A. G. Todd joined practices in Wellington. Mr Justice Smith joined the Supreme Court Bench (the start of a long judicial career). Young Mr C. J. O'Regan was admitted to the Bar in Wellington, Mr St. Leger, H. Reeves in New Plymouth, and Mr J. H. Cowdell took up practice in Waverley.

Practitioners who now complain about the filing of Notices of Sale must surely be of the younger generation, for an article by the President of the Canterbury District Law Society outlines a truly formidable list of statistical data required forty-three years ago, including full and detailed reasons for the acquisition of land and for the raising of money on mortgage. The President's complaint apparently bore fruit for a later issue of the Journal records that the relevant Statistic Regulations had been promptly revoked.

The subject-matter of the litigation is depressingly familiar but one notable feature, even in 1928 before the full force of the depression had struck, is the number of cases arising out of mortgagee sales. Although one reported decision concerned a roadside fire started by a wanton traction-engine, this was probably becoming almost as rare, in 1928, as litigation over runaway carriages and gigs. More in keeping with the age was the editorial on the question of whether statements taken by Police from parties to a motor accident are admissible in evidence, and their production compellable, in civil litigation. The conflict of opinion on the subject "has not yet been settled by any authoritative and comprehensive decision". The "steady increase in motor traffic" is referred to in the Article. Could anyone in those days have forseen the state of our mid-city streets in 1972?

Another interesting feature of 1928 was the "London Letter" contributed by "Inner Templar" who confessed to a totally illegible handwriting and an apparent inability to cope with the intricacies of his new "typewriting machine" the ribbon of which "suddenly gives out at midnight and disappears into the bowels of the mechanism". His pungent comments on the legal luminaries of his time provide spice to his paragraphs: "The Lord Chief Justice has been indiscreet again . . . he opens his mouth and lets his tongue run as it likes . . ." and speaking of a future Lord Chancellor: "Hogg is almost a stupid man and neither brilliant nor even brilliantly wise. To be Lord Chancellor would be a very great distinction for so average a man and I shall remain convinced that he will have the modesty and moderation not to refuse it, if it be offered to him."

Some of "Inner Templars" comments on the appearance of administrative tribunals in England may be of interest to those who have

studied the growth of this phenomenon. In dealing with landlord and tenant legislation he says (April 1928) "Certainly, as to the character of the Tribunal, there has been a notable triumph of constitutional good sense in the retention of judicial business within the control of authorities trained to be judicial, and in the suppression of the attempt to create a new form of Judge, that is to say, the Expert".

"Forensic Fables" are scattered through the pages, with delightful illustrations, and I hope that the publishers will consider re-printing them for the amusement of future generations of lawyers.

Editorial comment of 1928 sometimes appears mighty strange to the reader of 1972. For example, the issue of April 3rd—"Are trans-ocean flights worth while? The be-all and end-all of these attempts appears to be either a desperate endeavour to achieve notoriety or the desire to experience the last word in thrills" . . . "It is not desired that suicide should become fashionable . . . before further attempts are made to cross the Tasman it is hoped that the Governments of Australia and New Zealand will require that their permission be first obtained." Are we still such a conservative profession? Some of the contributed articles are as vivid and readable today as when they were written; one such being a piece entitled "Statements of Accused Persons" by the (then) Mr W. E. Leicester.

Important issues affecting the profession generally, and which appear in the early pages of the Journal, are often those which still trouble us today. For example forty-three years ago, "Public attention has been directed occasionally to cases of misappropriation by a certain class of solicitor—usually young and inexperienced—of the money entrusted to their care by clients for investment".

The Fidelity Fund was soon to get under way.

Although we now talk in terms of "legal executives" we are not facing any new problem. As the JOURNAL's editor said in 1928 "The Resolution of the Law Conference approving a return to the system of articled clerks is likely to be barren of result unless some steps are taken to set up a Committee to inquire into our present education system and to report as to what should be the relation of the Student's reading, to lectures and to practice".

Fixture lists, for all the Supreme Court centres, were published occasionally as were reports of the activities of the various Law Students Societies and lengthy lists of Public Trust-administered Estates.

A vigorous correspondence column was a feature of the 1928 Journal and the leading instigator was Mr L. A. Taylor of Hawera with his attack on the Justice Department and its attempt to direct service of process by post, rather than by bailiff. Country practitioners in some areas will know, all too well, the truth of his 1928 plea that "you may stake your last shilling too, that the native population in particular, will promptly refuse to accept registered letters". The Minister's reply did not end the correspondence and as Mr Taylor is still very much with us, and still practising after fifty-plus years, we may yet enjoy further letters from Hawera on this, or other matters.

Another correspondent of 1928 who signed himself "Senectus" and who confessed that"I know that monies belonging to clients of mine have been lent to Banks, County Councils and other bodies because I have not been able to find other securities for them . . .", advocated the establishment of a solicitor's investment bureau along the lines of the English "Solicitors Mortgage Society Limited". If "Senectus" is still in the same predicament the writer would be most interested to meet him to discuss a mutually-satisfactory arrangement for his "surplus" investment funds!

The 1928 JOURNAL records both the death of Alpers J. and a review of his book *Cheerful Yesterdays*, written in the shadow of his impending death. The un-named reviewer speculates that:

> "At a time not too far distant it will be prized as a beloved treasure by everyone who owns it".

Everyone who owns or, who has read this wonderful little biography will agree on the truth of this prediction even if (as in my case) the copy happens to be a rather battered and soiled "cheap" edition of 1930. For any collector of legal biography and anecdote *Cheerful Yesterdays* is now, as it was then, an absolute essential.

N.R.A.N.

The Hanging Judge—"The hanging Judge—that evil old man in scarlet robe and horse-hair wig, whom nothing short of dynamite will ever teach what century he is living in, but who will at any rate interpret the law according to the books and will in no circumstances take a money bribe—is one of the symbolic figures of England": George Orwell in *England Your England.*

Christchurch Regional Planning Authority *v.* Eyre County

Before the Number One Town and Country Planning Appeal Board. Christchurch. 1970. 4 November.

Change of use—Proposed motor garage and service station—Isolated non-farming use in a rural area—Necessary commercial enterprises required to service rural community should be grouped—No evidence of unfulfilled need to over-ride general planning considerations.

Appeals under s. 38A (3) of the Act.

Matson, for the first appellant.
Bisphan, for the second appellant.
Milligan, for the respondent.
Brown, for the applicant.

The judgment of the Board was delivered by

TURNER S.M. (Chairman). One A. R. T. Corcoran (hereinafter termed "the applicant") applied to the respondent Council for consent to change the use of one acre of land situated on the northern side of Tram Road east of Island Road (hereinafter termed "the site") to permit the erection of a motor garage and service station thereon. The site is part of an unsubdivided block of land having an area of 8 acres 1 rood 4 perches used for market gardening.

The respondent Council granted consent to the application, subject to conditions. These appellants, who had been objectors, then brought these appeals.

The locality is one of small farms and scattered houses, apparently farmhouses. The regional planning officer expressed the opinion in evidence that the proposal would bring about a material detraction from existing amenities, based on the visual aspect and on traffic considerations. The witness for the respondent Council admitted that "to a degree" there would be some detraction. The Council in its reply, answered the appeals (*inter alia*) as follows:

> "The conditions imposed by the Council in its consent are such as will ensure that there is no more than a minimal detraction from the functions of Tram Road as a major traffic route."

The Board therefore holds that the proposal if consented to even subject to conditions, will detract or is likely to detract from the amenities of the neighbourhood, though the extent of the detraction is likely to be small. In this regard the Board repeats what was said in respect to an isolated non-farming use in a rural area by the Special Town and Country Planning Appeal Board in *Minister of Works* v. *Waikato County* 3 N.Z.T.C.P.A. 60 as follows:

> "In the Board's view, the operation of a commercial, or industrial enterprise in a rural area such as this, by itself deprives the neighbourhood of some of those qualities and conditions which contribute to the pleasantness, harmony and coherence of the environment and therefore detracts from the amenities of the neighbourhood."

The question therefore is whether, notwithstanding the detraction, the proposal should be consented to in the light of wider planning considerations and of any other matters of public interest.

The site is in a rural zone in the draft district scheme and the uses applied for are conditional uses in that zone. But the scheme has not yet been advertised to allow the opportunity for objection. Assuming that these provisions in the draft district scheme are sustained, it is not necessarily in accordance with good planning principles to have a motor garage and service station on any suitable site in a rural zone. The general principle is that the necessary commercial and industrial enterprises required to service rural dwellers and farming activities should be grouped in suitable locations of accessibility, and should not be permitted to develop in isolation from one another, or sporadically along a road. This proposal does not conform to that general principle. On the contrary this proposal has the following planning disadvantages:

(a) It is situated on a road which is proposed to be a limited access road in the draft district scheme. Although the road does not at present carry a high volume of traffic, and the proposal could still be the subject of objection and appeal, it is some indication of the status of the road and its likely importance in the roading network within the planning period.
(b) The proposal, if established, is likely to attract other non-farming uses to the locality. It was not asserted that this would be a suitable location for other uses; on the contrary the respondent Council imposed a condition that the site be not subdivided out of the 8¼ acre block of which it forms part.
(c) The soil is Temuka silt loam, which is of the highest potential for the production of food.

The case for the applicant was presented on the basis that there is a need for a garage and service station in this locality. On this issue the Board finds the facts to be as follows:

Eyre County is a small county, both in area and in population, its population at the 1966 census being 2,240 persons in 552 dwellings. From the overall planning point of view it cannot be considered in isolation from its neighbours. At least for the eastern part of the county, the urban focal point is the Borough of Kaiapoi, which lies on the eastern boundary of the County. The Borough of Rangiora lies approximately three miles beyond its north-eastern boundary. The Main North Road from Christchurch runs along its eastern boundary and through Kaiapoi. The County admitted that extensive servicing facilities are available in Rangiora and Kaiapoi Boroughs and in various locations along the Main North Road. There is a special rural industrial zone in Waimairi County adjacent to the Main North Road and just over the south-eastern boundary of Eyre County. In recent months the Northern Motorway has been opened; this runs through the County just west of the Main North Road and of Kaiapoi. There being a motorway interchange at Tram Road, traffic between the County and Christchurch now has no need to traverse the Main North Road. The site of the application lies about three-quarters of a mile west of the Main North Road and under half a mile west of the Motorway.

The applicant did not tender any positive evidence of an otherwise unfulfillable need for a garage and service station in the district. However, it was argued that because the motorway has been interposed, the County has lost service facilities previously available to it in Kaiapoi and on the Main North Road. The Board rejects that contention.

While it is true that traffic using the motorway will now have to make a detour in order to obtain service, all previously existing facilities are still available. If there is need for service to be made available for through traffic, then the Board expresses the view that properly planned service areas should be established at intervals along the motorway. If the existing service facilities previously mentioned in this decision

do not now meet the needs of the inhabitants of the County, then proper planning steps should be taken to select and identify a suitable location in the County where all service operations may become established.

The Board has come to the conclusion that no need has been established to over-ride general planning considerations and that it would be wrong in principle to permit the proposal to become established as an isolated non-farming activity on this road.

The appeals are therefore allowed and the consent granted by the respondent Council is set aside.

Appeals allowed.

Walter *v.* Mangonui County

Number One Town and Country Planning Appeal Board. Kaitaia. 1970. 7 December.

Subdivision—Rural locality—Conditions as to link strip to segregate highway other than at one point—Where there is a right to subdivide prima facie *in the absence of special limitations each lot is entitled to its own access point notwithstanding increased general (but not specific) traffic danger—Counties Amendment Act 1961, ss. 23, 33, 35—Public Works Amendment Act 1963, s. 24 (1).*

Appeal under s. 33 of the Act.

Bradley, for the appellant.
Rasmussen, for the respondent.
Wilson, for the Minister of Works.

The decision of the Board was delivered by TURNER S.M. (Chairman). This is an appeal under s. 33 of the Counties Amendment Act 1961 against certain conditions imposed on the approval of a scheme plan of subdivision.

The appellant company is the owner of Part OLC 129 and Part Allot. 140 Parish of Mangonui containing 8 acres 2 roods 16 perches situated on State Highway No. 10 near Cooper's Beach. It purchased the property in 1963 and at the time of purchase obtained the consent of the respondent to use part of the property for a workshop and garage for an agricultural contracting business. It then established that use. Although the property is close to Cooper's Beach, the locality is still generally rural.

The scheme plan proposes to divide the property into three lots, lot 1 containing 1 acre 3 roods 16 perches on which stands the workshop and garage, lot 2 containing 6 acres 1 rood 23 perches on which stands a substantial dwelling house and lot 3 containing 0 acres 1 rood 17 perches (being a strip 16′ 6″ wide along the whole frontage) to vest as road. The respondent gave its consent to the scheme plan but at the suggestion of the Minister of Works, imposed the following conditions:

(a) A segregation strip one link wide to be vested in the name of the Crown to segregate the property from the highway other than at a 100 link wide point of entry and exit at the eastern end of lot 1.
(b) Access to lot 2 to be by right of way across lot 1 to the common point of entry and exit.

The present access to the house and to the workshop/garage is by a common access near the eastern boundary of the proposed lot 1. A further access has been established to the west of the workshop/garage building, so that there is now a semi-circular drive giving access to that building, though it was claimed that the construction of this western access had not been authorised by the County or the National Roads Board. Because of the fairly steep undulations of the country and restricted visibility for traffic on the State Highway, "no-passing" lines have been painted on the highway along most of the length of the property. The property is generally slightly below the level of the highway. Speed on the highway is limited only by the general 55 m.p.h. restriction.

The Board finds that the purpose of the conditions is:

(a) To limit the access from both lots 1 and 2 to one point on the State Highway, and
(b) To ensure that on any further subdivision of the lots that no additional access points are created on to the State Highway.

Both purposes are for the safety of traffic using the State Highway and of traffic coming on to the highway from the property being subdivided. These are laudable objectives as the greater number of access points, the greater the general danger to traffic. But the question is whether the conditions are properly imposed as conditions of approval of the scheme plan.

It was claimed by both the respondent and the Minister that the conditions were validly imposed pursuant to s. 23 (2) (f) of the Counties Amendment Act 1961 which empowers a council to approve a scheme plan "subject to such other fair and reasonable conditions of any kind whatsoever as the Council thinks fit". It appears to the Board that the power of the respondent to impose the conditions must also be considered in the light of the respondent's powers under s. 23 (2) (a) and s. 23 (2) (b) (i).

It is desirable to recall the words of McGregor J. in *Jones* v. *Lower Hutt City* [1966] N.Z.L.R. 879. That case involved a subdivision to which the provisions of the Municipal Corporations Act 1954 applied. But the following observation at p. 882 applies equally to subdivisions to which the Counties Amendment Act 1961 applies:

> "At common law an owner of land was entitled to dispose of it as he thought fit. The provisions of the Municipal Corporations legislation empowering the local authority to impose restrictions or conditions in regard to subdivision derogate from the existing rights of the owner to dispose of his land, and impose burdens on the land owner. The powers must be construed strictly."

And with reference to a submission that the parallel provision to s. 23 (2) (f) virtually gives the Council a blank cheque, the learned Judge said—at p. 884 line 24:

> "I do not think this is entirely so. It is necessary to consider the scheme of the Act in reference to subdivisions, together with the allied provisions of the Public Works Act. The whole of s. 351A is related to approval of the plan and conditions which may be imposed affecting the plan. If there is any genus, and the words "fair and reasonable" should be construed *ejusdem generis* or *noscitur a sociis*, the only common denominator which I can find is the plan."

This decision was considered by Wilson J. in *Blogg Property Development Ltd.* v. *Waimairi County* [1968] N.Z.L.R. 454, who said at page 460:

> "Having carefully read the whole of McGregor J.'s judgment in this case I am of the opinion that it supports my tentative view that s. 23 (2) (f) of the Counties Amendment Act 1961 is applicable only to matters germane to the scheme plan submitted under s. 22, that is, to matters of layout, amenities and dimensions."

As to the general question of access points to property from the highway it appears that the Minister and the respondent have power to direct where any new access point shall be created by a property owner and that it has been accepted that each separate property is entitled to at least one access point to the highway. Although it is in accordance with Town and Country Planning principles that the number of access points on to highways in rural areas should be limited, this Board will not go so far as to hold that on a subdivision of land fronting such a highway no new access points should be created. There is power in particular cases to take special steps, either by declaring the highway a limited access road, pursuant to s. 4 (1) of the Public Works Amendment Act 1963 or by writing provisions into the district scheme regulating subdivision on to the highway. In the absence of any such special limitations, the Board holds that where there is a right to subdivide, each lot in the subdivision is *prima facie* entitled to its own access point, notwithstanding that the efficiency of the highway may thereby be reduced or that the general traffic danger may be thereby increased by the additional access points. This general rule will not apply to any lot where the only possible access point would create a specific traffic hazard; in such a case it might be necessary to prevent the creation of such as a separate lot or to require that lot to take its access over other land.

In this case there is an existing authorised access point which after the subdivision will continue to serve Lot 1. What will become lot 2 does not as yet have a separate point of access. But on the evidence the Board finds that an access point can be provided on the frontage of lot 2 at the crest of a rise, without in itself creating any special danger.

The Board holds that at least in this case it would not be reasonable as a condition of subdivision, to require that an existing authorised access point be closed.

What the Board has said concerning the right to subdivide and the right to new access points to the highway not only disposes of the condition that the two lots in the subdivision have a common point of entry and exit but also disposes of the condition requiring the vesting of a "segregation strip". However, in relation to the latter condition it is desirable for the Board to say that in its view the respondent had no power to impose it. The segregation strip is not a "reserve" which the County had power to require pursuant to s. 23 (2) (b) of the Counties Amendment Act 1961, because the condition purported to require the strip to vest in the Crown. Reserves required pursuant to s. 23 (2) (b) vest in accordance with s. 35 (3) and (4) of that Act and the only such reserves which vest in the Crown are reserves for roads, access ways or service lanes. Nor is the requirement for the vesting of a segregation strip a "fair and reasonable" condition under s. 23 (2) (f). Wilson J.'s *dictum* requires that conditions imposed under that subsection be in respect of matters germane to the scheme plan. This condition is not directed to those matters but is directed to control future subdivision and the efficiency of the highway.

For the foregoing reasons the appeal is allowed and the conditions appealed against are set aside.

Appeal allowed.

Onehunga Timber *v.* Rotorua City

Number One Town and Country Planning Appeal Board. Rotorua. 1971. 22 February.

Conditional use—Operative district scheme—Wood-waste burner ("incinerator") designed "to preclude every element of noxiousness or danger"—Might cause some detraction from amenities of neighbourhood but would tend to improve overall amenities—Town and Country Planning Act 1953, s. 34A (2); Smoke Restrictive Regulations 1964.

Appeal under s. 28D of the Act.

Joyce, for the appellant.
Palmer, for the respondent.

The decision of the Board was delivered by TURNER S.M. (Chairman). The appellants are the owner of Lot 1 D.P. S8901 situated off McGloskey Road, Rotorua. This land is part of an area of approximately 40 acres lying between Clayton, Old Taupo and View Roads, in the ownership and/or occupation of the appellants and subsidiary or associated companies. The whole is zoned Industrial C in the operative district scheme and the following buildings and/or uses exist thereon:

Sawmills	Boiler House
Timber Treatment Premises	Box Factory
Planing Factory	Drying Kilns
Wood Products Factory	Mechanical Workshop
Pre-Cutting Factory	Offices
Incinerator	Storage Buildings

The predominant uses permitted in the zone include:

> "Any industry *except* those falling within Appendices A and B hereto"

The conditional uses permitted in the zone include:

> "Any industry falling *within* Appendix A or B hereto if the process or operation is so modified as to preclude every element of noxiousness or danger in relation to adjacent properties and undertakings."

The appellants applied to the respondent for consent (as a conditional use) to the erection and operation of a wood-waste burner on Lot 1 D.P. S8901. The respondent considered that a wood-waste burner is an "incinerator", and the latter is one of the industries listed in Appendix A. The respondent refused its consent and this appeal followed. The grounds of refusal were:

> "(i) That the site is unsuitable, having regard to location and size.
> "(ii) That the likely effect of the granting of this application from a planning viewpoint on the existing and foreseeable future amenities of the neighbourhood, and on the health, safety, convenience and the economic and general welfare of the inhabitants of the district is deterimental."

The appellant's proposal is to erect an incinerator of the kind known as a "Phoenix burner" in such a position on its land that this incinerator will dispose of the entire wood-waste caused in the box factory and the planing factory. The incinerator is one designed to dispose of 3,000 lbs. of waste material per hour. (The waste from the two factories was stated in evidence to amount to about 100 cubic yards per day).

The "Phoenix burner" is a relatively new type of incinerator designed by Patrick Potter Esq., consulting engineer, to comply with the provisions of the Smoke Restriction Regulations 1964. A considerable volume of evidence was adduced on the efficiency of this type of burner. On the evidence the Board is satisfied that the basic design does comply with the requirements of the Smoke Restriction Regulations 1964, and that if the burner is operated and maintained correctly and if it is operated within the manufacturer's design figures, it is unlikely to create any nuisance or to be offensive or to be injurious to health. The two drincipal features of the design are:

(a) That a controlled amount of fuel is fed continuously into a constant supply of pre-heated air to maintain the necessary air/fuel ratio.

(b) That soot emission is reduced by the collection and refiring of heavier particles.

The Board viewed a "Phoenix burner" of smaller capacity, in operation and inspected the site upon which the appellants propose to construct their burner.

On the evidence the Board is satisfied that the design of the burner is such "as to preclude every element of noxiousness or danger in relation to adjacent properties and undertakings" and that it qualifies to come within the category of conditional uses in the zone. The design appears to be a very distinct technical advance on the design of the burners currently in use.

As mentioned above, the incinerator is intended to be ancillary to the operations of the existing box and planing factories. Therefore the application and this appeal must be judged in the light of that fact and the "status" of these factories under the operative district scheme is a relevant consideration.

The permit for the box factory was taken out in June 1966, that for the planing factory in March 1968. Both events occurred after the district scheme had been proposed but before it became operative. Thus both uses were established in quite recent times with the express or tacit consent of the respondent.

"Wood box manufacture" is one of the industries specifically mentioned in Appendix B. The activities of the planing factory are not specifically mentioned in either Appendix, but if they are not a predominant use in the zone, then they are like wood box manufacture, a conditional use if the operations are so modified as to meet the performance standards specified in the Ordinances.

At the hearing of this appeal it was suggested to the Board that the appellants and/or their subsidiary and associate companies have "existing non-conforming use rights". It may be that it would not in the circumstances of the present time be in accordance with planning principles to permit one or other of the uses already being carried on by the companies within the 40 acres to become established there if planning consent were being sought *de novo*, or to permit one or other of the uses already being carried on to be increased in scale of operations; and it may be that the conditions under which one or other of the uses are being carried on do not meet the standards which would be specified for them if planning consent for them as conditional uses were being given *de novo*. But the fact remains that they are uses permitted in the zone by the provisions of the district scheme; although, to the extent that conditions under which they shall operate have not or could not be, laid down, or in so far as any express conditions are insufficient, then the provisions of s. 34A (2) apply.

It was given in evidence for the appellant that it has for some considerable time been concerned to find a satisfactory method of smokeless burning of wood-waste. The Town Planning Officer for the respondent stated in evidence that a satisfactory method of burning wood-waste is preferable to dumping it and the Board agrees with that statement. (The difficulties associated with dumping wood-waste are referred to in the Board's decision in *Martin* v. *Rotorua County* dated 8 September 1970).

The Board is satisfied on the evidence that taking into account:

(i) The location and size of the Industrial C zone in which the appellant's land stands,

(ii) The nature of the uses permitted therein,

(iii) The proposed location for the burner in relation to the boundaries of the zone and in relation to the uses to which it will be ancillary, and

(iv) The other relevant provisions of the district scheme,

the site proposed is suitable for the incinerator.

The Board is further satisfied on the evidence that although an incinerator, standing alone, might cause some detraction from the existing and foreseeable future amenities of a neighbourhood, its use in the circumstances proposed by the appellants will tend to improve the overall amenities of that particular neighbourhood.

Having regard to all the foregoing and to the other matters which by statute the Board is required to take into account, the Board is of the opinion that the appeal should be allowed and that the consent sought by the appellants should be given, subject to conditions.

Consent is therefore given in the following terms:

Consent is given to the erection and operation of a "Phoenix" wood-waste burner, with a capacity to consume 3,000 lbs. of waste an hour, on the property the subject of the application, in the position on that property defined in the plans lodged with the Board, subject to the following conditions:

(a) The design and the construction of the burner and of all silos, extraction and conveyor systems ancillary thereto is to be to the approval of the City Engineer and of Patrick Potter, Esq., Consulting Engineer, and a written certificate of approval signed by Mr Potter is to be lodged with the respondent before the use commences.

(b) The use of the burner is limited to the destruction of untreated wood-waste from the existing box factory and planing factory on the property the subject of the application. No waste from treated timber shall be destroyed therein unless and until a further consent has been given.

(c) The design of the burner and its silos shall be such that there is the ability to store pending destruction, the quantity of waste which the burner is designed to consume in one normal working week.

(d) All fans incorporated in the burner, silos and extraction and conveyor systems shall be silenced or muffled to the satisfaction of the City Engineer.

(e) The burner shall at all times be operated and maintained in a manner complying with the manufacturer's specifications and a copy of those specifications shall be lodged with the respondent before the use commences.

(f) The operation and maintenance of the burner shall at all times comply with the provisions of the Smoke Restriction Regulations 1964 and any other provision for the time being in force relating to the control of air pollution.

Appeal allowed.