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INDUSTRIAL RELATIONS AND THE NEED FOR CHANGE

The end of the Second World War heralded a period of unknown prosperity all over the Western World. Sophisticated communications brought the entire globe within easy reach. Not only do we hear about something at the very moment that it happens, but also we can see it wherever we may be. We see and hear foreign Heads of State make declarations of war and peace, of social justice. We watch men walk on the moon at the very instant it takes place; we get excited about sporting events taking place thousands of miles away. We talk to people on the telephone no matter how far away they are. We judge for ourselves about all those things; we see, we hear, we compare.

Another field in which we have made great advances is education. Before the Second World War it was in many countries unthinkable that the children of ordinary workers could go to universities. Today, everybody has got the opportunity to learn and study. Often these opportunities are not used to the utmost, but more and more young people have started to think for themselves and to question things their parents had accepted without asking. Young people wonder why they are compelled to do certain things. They do not blindly accept the values of their parents. Unlike their parents they judge for themselves, they put the reality of their daily lives in beside their ideals; they compare them.

The broadening of communications and of education have combined to create a revolution within society. The generation born after 1945 has been subject to influences hitherto unknown. Newspapers, radio and T.V. have brought all shades of opinion in their homes, and education has taught them how to receive them.

In politics in the Western world everybody is asked—forced almost—to participate. Elections are open to everybody and everybody is encouraged to have opinions about everything. Governments must measure their every action against public opinion as a whole. Voters become participants. Nothing goes unnoticed.

This participation has been facilitated both by wider education and by new means of communication. All three have a mutually beneficial impact. There is, however, one aspect of our daily lives where the influence of these three features of the post-war era have not been felt as yet: our industrial environment. The economy is the one field where authoritarianism has kept its place; it has not yet been drawn within the reach of the new society.

To characterise today's economic relations we have to make a short historical diversion. At the beginning of the industrial revolution, the economy was organised within the framework of the legal system. This system knew contracts of various kinds, all of them between people and with property as subject-matter. Some people worked for others but always with the aim of becoming masters for themselves later. They sold the produce they had made themselves. With the introduction of large scale technology this relationship had to change. Mass-production needed mass-employment. People had nothing to sell anymore but their labour. Labour became another raw material.

The industrial revolution was accompanied by a deterioration of the position of the workers. They were just another production factor alongside capital. Their value was expressed in terms of money.

Trade unions came into being to defend the interests of the workers. The workers even formed their own political parties. The ideology, therefore, was provided by the thoughts of

Marx and Engels: Socialism became the ultimate aim of many workers.

The trade unions scored many great successes; social measures were introduced, the workers obtained higher wages. Yet their position was still entirely dependent on their employers. Some unions also fought for better education but not much improved in this respect until after 1945.

Despite some improvements, the situation of the worker remained a very fragile one. Economic theory had accepted regularly returning recessions as a necessary evil, as a preparation for the boom to come.

The economic game was played by the employers and the government—the workers had no say at all. So long as they received their ever-growing wages they were supposed to be content. Nobody asked their opinions; they were allowed to sell their labour and nothing more.

In economic theory the worker was just another cost, to be kept as low as possible; there was not much that the unions could do about this. Perhaps they did not even want to.

Since the last war, however, we have known continuous prosperity with only slight recessions to disturb the pattern. Reconstruction, the "cold war", the moon race kept us busy. Wages have doubled in that period if not tripled or better. The unions got used to asking, they mostly got their way. But what about economic theory? How long could the recession be postponed. We had gone too long without one.

The start of the present decade saw the turning point. Unemployment grew throughout the Western world. Under the accepted theory, prices should go down in such a situation but the contrary proved true. The unions, used as they were to asking more and more, are now pricing themselves out of the market. In consequence we see all other prices rising, demand diminishing, less work being available. No union will accept a fall in wages. Therefore, productivity must rise, but this seems only possible at higher cost. The inflationary spiral is inevitable. Yet economists demand economic growth and employers want no better. This theory has become the major influence within our economic life. No company can survive without such growth. We have got used to it and so have the unions. Both employers and employees make their incompatible demands.

Common sense tells us that the growth of certain items must be at the expense of others, if only of its environment. This is consistently disregarded in modern economics: we must keep growing in order to survive but by doing so we put at risk that same survival. The theory provides as a solution to this problem the ups and downs in our economy. Politically a recession is unacceptable but it is essential to economic theory.

This simplistic theory has been complicated by the factors described. Together with a system of democracy, education and communications they may change the economic pattern.

In industry few make decisions; the majority is never consulted. No company could afford to waste its time by a democratic process of decision-making. Efficiency and speed are prerequisites of success—democracy is too slow.

Today the worker still accepts this, but for how long . . .?

With critical thought on the part of the younger generation and the exchange of ideas with other parts of the world, it seems unlikely that this form of paternalism can remain.

We have to choose between efficiency and economic growth on the one hand, and democracy and shared responsibility on the other. The second choice may force us into many abdications but it would take away much of the bipolarism within society.

In a system where financial relations are predominant this will be very difficult to establish; ownership of capital gives the right to manage, and this is the system recognised by law. But why not change the law? Today's industrial relations are dominated by values of the past. Even if those values are still acceptable for many, the trend is irreversible. More education leads to more participation, and communication leads to comparison. We have accepted a system of democracy in politics: can we deny it the same voters in other spheres?

If the workers identify themselves more with their place of work and the employers accept the workers more as part of their company, and not just tools for profit-making, they might find a common identity. Yet we do not have to fight to accomplish something—we could co-operate.

If we accept that a company is formed by its servants (with management included) and not by capital alone, and if we accept that its shareholders are just other creditors, not the "owners" of the company, would it not be possible, then, for employers and employees to find a denominator in common?

The workers would be asked to share the responsibilities they have until today been denied. The managers would primarily have to think about the well-being of their employees, not simply how to buy them off with higher wages.

But how could all this work in practice? Trade unions in their present form would lose

their reason for existence, investors would lose their interest (not in money terms, however).

The answer lies in the organisational, the legal field. Today's companies are based on ownership of capital alone. We should instead base them on the co-operating group. The necessary money could be borrowed and the creditors could still get their interest, but its name would not be "dividend".

The younger generation is ridiculed when it rejects economic incentives but as it ages some of their youth-ideals will remain. Some years from today they will be in charge.

The French King, Louis XIV, once said: "*Gouverner c'est prevoir*", and if we do not look ahead, how will we govern? For this we have to change our value system as new values are being forced upon us by communications, education and democracy in non-economic fields. We have passed the point of no return but while we still have the time to act, we cannot wait much longer. Today we can still choose our line of action, tomorrow we might be forced into a new direction. We of the Western world have one advantage; we have developed a democratic way to handle matters and we only have to use them to adapt to the new trends within society.

In non-democratic states the same process has started; their task is much more difficult than ours. The people in those countries are trained to think but not allowed to use this capacity. Through a minimum of communication their governors try to reverse the trend: they even use violence now and then. But they, also, must solve this problem.

The ideals of socialism cannot be reached in a dualistic way. They demand a joint effort, an active participation of everyone.

We cannot deny for the sake of efficiency and economic growth the majority of the people the active participation in this process.

We must go in the direction that education, communication and democracy are leading us.

N. J. C. FRANCKEN.

LAW PRACTITIONERS' CO-OP DEVELOPING RAPIDLY

Since the Co-operative was first introduced to practitioners in the Auckland district by circular in early March 1971, its membership has quickly grown and with endorsement by the N.Z. Law Society and other district societies, its activities have spread throughout New Zealand. Recently, the name was altered in annual meeting and the young Co-operative has emerged in a very short space of time as a national organisation with a substantial potential.

In launching the Co-op, the board offered superannuation and a group medical scheme. A well drawn up superannuation scheme had long been discussed for lawyers, and the special benefits of a group medical scheme with the Southern Cross Medical Care Society would appeal to many. The response to these initial schemes was so encouraging that the board obtained the services of a Mr J. M. Foster to act as manager and secretary of the society.

Subsequently, two further schemes were introduced, a group life assurance scheme and a long-term disability insurance scheme. Both the new schemes have been negotiated to give the best terms to the profession and both are leaders in their own right. They have appealed to many lawyers since they were announced.

Currently, the Co-op is finalising a staff superannuation scheme, as it is the intention of the Co-op, in keeping with Law Society thinking, that legal firms should have access to a superannuation plan for employees.

With the response and interest in the Co-operative coming from many sources, it is fair to assume that the outlook for the new venture is bright as it offers a vehicle to assist the profession in a variety of ways. Whilst it is still very early to forecast the ultimate size of the Co-op, the present membership and interest shows a likelihood of impressive growth in the next few years.

Progress Geometrical:

No hunter of the age of fable
Had need to buckle in his belt—
More game than he was ever able
To take ran wild upon the veldt.
Each night with roast he stocked his table
Then procreated on the pelt.
And that is how, of course, there came
At last to be more men than game.

A. D. HOPE in the *Texas Quarterly*

SUMMARY OF RECENT LAW

HUSBAND AND WIFE—DISPOSITION OF PROPERTY

Family benefit capitalised—Amount of contribution by former wife—Matrimonial Property Act 1963 ss. 5, 6 (1). This was an appeal from the order of the learned Magistrate fixing the value of the interest of the respondent, the former wife of the appellant in the matrimonial home under the Matrimonial Property Act 1963. In fixing the value the respondent was credited with the total sum for which the family benefit of one child had been capitalised. *Held*, 1. The proper assessment of the contribution of a wife to the matrimonial home in respect of a capitalised family benefit is the amount of the family benefit that she has to do without. 2. If the amount is not made up to the wife by an increased contribution by the husband for housekeeping purposes the wife should be credited with $1.50 per week for each child's family benefit that she is made to do without by the capitalisation. 3. The period from the capitalisation of the family benefit until the wife left the matrimonial home was approximately four years and she was entitled to be credited with $312. *Alexander* v. *McCallum* (Supreme Court Christchurch. 26 October 1971. Wilson J.).

MASTER AND SERVANT—RIGHTS OF MASTER AGAINST THIRD PERSONS

Personal injury to servant—Action per quod servitium amisit—*Proof of loss sustained—Measure of damages.* This was an action *per quod servitium amisit*. An employee of the Railways Department had been injured by the negligent act of the defendant. The Department had paid to its employee a "make up payment" of $733 being the difference between the employee's full pay and the amount payable under weekly worker's compensation payments. This payment was in the discretion of the Department and the employee had no legal right to enforce payment thereof. No evidence was tendered as to the costs incurred by the Department as a result of the employee's services being unavailable to it. The Department sought to recover the sum of $733 from the defendant. *Held*, 1. The measure of damages is the amount represented by the loss of services suffered by the employer. Damages are not at large. 2. There can be no justification for saying that the measure of damages is the amount of wages paid to the servant during incapacity even if paid pursuant to a legal obligation. (*Attorney-General for N.S.W.* v. *Perpetual Trustee Co. Ltd.* (1952) 85 C.L.R. 237, 289, applied.) 3. The plaintiff must prove the loss suffered as a result of being deprived of its employee's serviees. 4. The only evidence of loss appeared to be some unknown payments for overtime. 5. The action failed for lack of proof of the loss sustained and the sum claimed was not a head of damage for which an action would lie. *Attorney-General* v. *Wilson and Horton Limited* (Supreme Court Auckland. 22 September; 28 October 1971. Henry J.).

TRANSPORT AND TRANSPORT LICENSING—NEGLIGENCE ON THE HIGHWAY

Leave to bring action against nominal defendant—"Other reasonable cause" for delay in giving notice in time—Transport Act 1962, s. 90E (2) (3). Limitation of actions—Special periods of limitation—Transport Act—Action against nominal defendant—Failure to give notice in time—Leave to bring action—"Other reasonable cause" for delay in giving notice—Mistake of law or fact—Transport Act 1962, s. 90 (E). This was an application for leave to bring an action against the nominal defendant after failure to give notice within the 42 days prescribed. The intended plaintiff was aged 16 years at the time of the accident and was returning to his secondary school in Hamilton at 9 p.m. on 22 June 1968 when he was struck by a motor car driven by an unknown driver. The plaintiff had no memory of the accident was unconscious for 12 days and released from hospital after 22 days. He suffered severe head injuries and subsequently suffered from fits which could only be controlled by drugs. He returned to school as a boarder after the accident but his mental performance was impaired. During 1969 the headmaster advised that he should leave school and since then he has been employed as a labourer. No one talked to him about having a right to bring an action and the police department had been unable to ascertain the identity of the driver. In April 1970 he was advised for the first time that he could bring an action and went to see a solicitor. By a letter dated 29 April 1970 the manager of the State Insurance office at Hamilton was advised that damages would be sought and on 29 May 1970 the necessary statutory declaration was sent by registered post to the manager. *Held*, 1. The mistake of fact or law or other reasonable cause which occasioned the failure to give notice must relate to the period of 42 days prescribed by the statute. Delay after the expiration of the 42 days is irrelevant for that purpose although it may be relevant in respect of prejudice or the exercise of the Court's discretion. (*Black* v. *City of South Melbourne* [1963] V.R. 34, 36, applied.) 2. Ignorance of a right to claim damages is not a mistake of law. (*Tipene* v. *Winstone Ltd.* (unreported, Auckland, 1969, Moller J.); *Black* v. *City of South Melbourne* (*supra*), followed. *White* v. *Arthur Nicol Ltd.* [1966] N.Z.L.R. 645, not followed. *Wilson* v. *Gannaway & Co. Ltd.* [1932] N.Z.L.R. 843; *Spain* v. *D. C. Street Construction Co. Ltd.* [1958] N.Z.L.R. 1063 and *Caldow* v. *Wall* [1964] N.Z.L.R. 65, referred to.) 3. The medical discharge and return to school and the absence of physical damage constituted "other reasonable cause" within the meaning of s. 90E (3) for failure to give notice. It was not a case where the plaintiff with full knowledge of his injury was ignorant of his legal rights. (*Auckland Harbour Board* v. *Cooke* [1960] N.Z.L.R. 94, 98, followed.) 4. Since the police had been notified and had been unsuccessful in their inquiries the nominal defendant had not been prejudiced by the delay. 5. Since medical notes were available and the plaintiff's school career could be checked the nominal defendant had not been prejudiced by the delay. Leave was granted. *Gifford* v. *Nominal Defendant* (Supreme Court Hamilton. 17 May, 10 September; 15 October 1971. Perry J.).

TRANSPORT AND TRANSPORT LICENSING—OFFENCES

Operating a vehicle so as to cause annoyance by noise—Traffic Regulations 1956 (Reprint SR 1968/32), Reg. 22. Statutes—Statutory rules and orders and statutory instruments—Validity—Reasonableness of regulation not a

ground of invalidity. These two cases were heard together being appeals from the Magistrate's Court against conviction for the offence of being in breach of Reg. 22 of the Traffic Regulations 1956 (Reprint SR 1968/32) the relevant parts of which are as follows: 22. "No person shall operate a vehicle in such condition or in such manner or so loaded as to cause or be liable to cause . . . annoyance (by reason of noise or other cause) to any person . . ." The evidence in both cases was given to the effect that each truck was heavily laden and that the muffler was operating and that the noise was caused by driving and that the driving was normal for the class of vehicle. No complaints had been received from residents in the neighbourhood. There were two witnesses for the prosecution a motel proprietor and a traffic officer. *Held*, 1. Regulation 22 was within the intention of Parliament as expressed in s. 77 of the Transport Act 1962 and could not be attacked on the grounds of unreasonableness. (*Carroll* v. *Attorney-General* [1933] N.Z.L.R. 1461, 1478 and *F. E. Jackson & Co. Ltd.* v. *Collector of Customs* [1939] N.Z.L.R. 682, 720, applied.) 2. In order to establish a breach of Reg. 22 the Court must be satisfied that the noise is or would be an annoyance to a reasonable sensible person. (*Tod-Heatly* v. *Benham* (1888) 40 Ch. D. 80, 93, 98, applied. *Raymond* v. *Cook* [1958] 1 W.L.R. 1098, 1103; [1958] 3 All E.R. 407, 410, referred to.) The Court was not satisfied and the convictions were quashed. *Philpott* v. *Murdoch: Middleton* v. *Murdoch* (Supreme Court Hamilton. 23 August; 8 October 1971. Perry J.).

TRANSPORT AND TRANSPORT LICENSING
AIR TRANSPORT

Offence—Altering course below 500 feet after take-off—Emergency—Civil Aviation Regulations 1953 (Reprint SR 1970/173), Regs. 35, 59 (4), 69. The appellant a pilot was convicted of the charge of altering course after take-off when a height of less than 500 feet had been attained infringing Reg. 69 of the Civil Aviation Regulations 1953. This occurred at Nelson at an air pageant after a suspected May Day call had been received at Air Control. It was conceded that the appellant had in fact infringed the regulation but the appeal was based on other regulations and that an emergency existed. *Held*, 1. Regulation 35 applies only when an emergency necessitates the urgent transportation of persons or medical or other supplies for the protection of life or property and even if there were such an emergency it does not absolve a pilot from the requirements of all the regulations but only those dealing with the matters specified therein. 2. Regulation 59 (4) which enables the pilot to follow any course of action he considers necessary in emergency situations refers to an emergency confronting a pilot in flight. 3. The words "so far as practicable" in Reg. 69 are to cover difficulties of terrain affecting the aerodrome or landing ground from which the aircraft is operating. Appeal dismissed. *Arkley* v. *McNeill* (Supreme Court Wellington. 29 October 1971. Wild C.J.).

REGULATIONS

Regulations Gazetted 16 to 23 March 1972 are as follows:

Animals Protection (Docking of Tails) Regulations 1972 (S.R. 1972/45)
Coal Mines Amendment Act Commencement Order 1972 (S.R. 1972/46)
Companies (Winding Up) Rules 1956, Amendment No. 1 (S.R. 1972/33)
Customs Tariff Amendment Order (No. 4) 1972 (S.R. 1972/34)
Customs Tariff Amendment Order (No. 5) 1972 (S.R. 1972/47)
Dangerous Goods (Licensing Authorities) Regulations 1958, Amendment No. 13 (S.R. 1972/35)
Dangerous Goods Order 1972 (S.R. 1972/36)
Department of Social Welfare Act Commencement Order 1972 (S.R. 1972/37)
Domestic Proceedings (Marriage Guidance Organisasions) Order 1969, Amendment No. 1 (S.R. 1972/48)
Employers Liability Insurance Regulations 1968, Amendment No. 2 (S.R. 1972/49)
Exchange Control Exemption Notice 1965 Amendment No. 11 (S.R. 1972/50)
Hospitals Amendment Act (No. 2) Commencement Order 1972 (S.R. 1972/38)
Hospital Boards Appointments Regulations 1972 (S.R. 1972/39)
Hospital Boards (Staff Amenities) Regulations 1970, Amendment No. 1 (S.R. 1972/40)
Judicial and Other Statutory Salaries Order 1972 (S.R. 1972/51)
Niue Land Registration Regulations 1969, Amendment No. 1 (S.R. 1972/52)
Periodic Detention Order 1972 (S.R. 1972/41)
Poisons Regulations 1964, Amendment No. 6 (S.R. 1972/53)
Smoke Restriction Regulations Application Notice 1972 (S.R. 1972/57)
State Services Salary Order (No. 2) 1972 (S.R. 1972/42)
State Services Salary Order (No. 3) 1972 (S.R. 1972/43)
Supreme Court Amendment Rules 1972 (S.R. 1972/44)
Valuation of Land Regulations 1949, Amendment No. 1 (S.R. 1972/54)
Waitomo County Council Harbour Board (Mokau Harbour Board) Order 1972 (S.R. 1972/55)
Workers' Compensation Order 1969, Amendment No. 3 (S.R. 1972/56)

CATCHLINES OF RECENT JUDGMENTS

Procedure—Plaintiff's application after order for new trial had been made for leave to increase claim—Whether leave required and whether, if required, it should be granted. *Stephenson* v. *Waite Tileman Ltd.* (Supreme Court, Auckland. 1971. 23 November. McMullin, J.)

Powers of local authority to provide regional bus service—General power authorising Local Authority to acquire real and personal property held insufficient to authorise it to acquire shares in bus company operating in region—Statutory powers of corporate bodies discussed. *Takapuna City Council* and *Waitemata County Council* v. *Auckland Regional Authority.* (Supreme Court, Auckland. 1971. 21 December. McMullin J.)

CASE AND COMMENT

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

Husband and Wife—Estoppel Per Rem Judicatam

Jenkins v. *Jenkins* (the judgment of Speight J., was delivered on 3 December 1971.) concerned a divorce petition on the ground of the desertion by the respondent wife, who, by her answer, denied desertion and, in the alternative, pleaded just cause. His Honour in fact granted a decree *nisi* to the husband petitioner, but this note is confined to one particularly interesting point. In September 1968, the wife had issued a complaint under the 1910 Act seeking separation and maintenance orders. A separation order was refused, but the learned Magistrate, considering that there was reasonable cause, under s. 17 (7) of that Act, for the wife to live apart made a maintenance order in the wife's favour. He did so because she was in a highly nervous state because of turmoil in the marriage, expressly saying that this was not necessarily because of blame attributable to the husband. His Honour had to decide whether the finding of the Magistrate constituted an estoppel *per rem judicatam* on the question whether the wife's departure from the matrimonial home was "for just cause" for the purposes of s. 21 (1) (b) of the Matrimonial Proceedings Act 1963. His Honour considered it important to observe that there was a distinction between the provisions under review; he pointed out that under s. 17 (7) the Magistrate had been concerned with the question "whether or not disharmony, unhappiness or distress existed, not necessarily for reasons attributable to the husband's conduct, which made it permissible, albeit temporarily, for the wife to live apart. "This", continued his Honour, "is far removed from a finding of just cause for desertion which must amount to expulsive conduct—'grave and weighty matters' from which it can be inferred that there was an intention of the offending party to bring consortium to an end: *Grundy* v. *Grundy* [1949] G.L.R. 279." His Honour concludes that, at most, the finding of the Magistrate's Court was evidentiary and thus of use to him in that it provided some evidence of matrimonial disharmony. Since it was not an estoppel, he held himself bound to look at the evidence given before him in the Supreme Court. This conclusion is in line with the authorities cited by his Honour, viz., *Mitchell* v. *Mitchell* [1968] N.Z.L.R. 1002; *Blyth* v. *Blyth* [1952] N.Z.L.R. 127 and *Keast* v. *Keast* [1934] N.Z.L.R. 316.

Clearly this decision will be of great assistance even though s. 17 (7) of 1910 Act has now given way to ss. 29 and 34 of the Domestic Proceedings Act 1968.

P.R.H.W.

Breach of Contract—Damages—Expenditure

In an earlier judgment between the parties McMullin J. had held that the plaintiff had made out his claim that a furnace purchased from the defendant was not of merchantable quality. The issue in *Utility Castings Limited* v. *Kidd Garrett Limited* (the judgment of McMullin J. was delivered on the 30 November 1971) was as to the damages to which such a breach entitled the plaintiff.

McMullin J. adjusted the figures put forward by the plaintiff, but allowed recovery under three heads: (i) the capital cost wasted when installing the furnace; (ii) the diminution in value of the furnace by reason of its not being of merchantable quality; (iii) loss of profit up to the time when the plaintiff ceased using the furnace.

In allowing the plaintiff to combine heads (ii) and (iii), McMullin J. appears (albeit inadvertently) to have established an important point of law. In *Cullinane* v. *British "Rema" Mfg. Co.* [1953] 2 All E.R. 1257, the Court of Appeal said that the plaintiff could not combine diminution in value with loss of profit, he must instead, and at his opinion, elect between them. This decision was recently followed by the Court of Appeal in *Anglia Television Ltd.* v. *Reed.* [1971] 3 All E.R. 690.

McMullin J. referred to neither case, but it is still believed that his decision was correct. The writer believes (see too Street, *Principles of the Law of Damages*) that there can be no inconsistency about combining loss of profit within diminution in value of the item purchased. After all, both are losses arising from the breach of contract.

However, McMullin J. may have erred, in computation rather than principle, when allowing the plaintiff to combine head (i) cost of installation—with head (iii) loss of profit. The point is that His Honour does not make it clear whether "profit" is gross revenue, or net profit i.e. gross revenue less expenditure involved in

earning that revenue. If, as is more than likely McMullin J. meant the latter, the decision is right in principle. But if he meant the former with respect, his judgment would be wrong, since it is plainly erroneous to give a claimant his gross revenue and at the same time reimburse him for the expense of earning it.

R.G.L.

Res Ipsa Loquitur

The doctrine of *res ipsa loquitur* although small in scope has exercised the minds of Judges and lawyers to no small extent. In spite of a volume of case law considerable confusion still exists and for that reason the judgment of Beattie J. in the *Hawke's Bay Motor Company Limited* v. *Russell* (judgment delivered 29 November 1971) is to be welcomed since it may well clarify the issues involved.

Lawyers have covered a prodigious amount of paper arguing as to whether *res ipsa loquitur* is a rule of substantive law or merely a rule of evidence, but in reality all *res ipsa loquitur* is, is a particular circumstance of an accident which raises an inference of negligence against the defendant. For various reasons the plaintiff cannot prove the real cause of the accident, but the very fact of the accident having happened points to the defendant having been negligent and his negligence having been the cause of the accident in question.

The facts of the present case were briefly that the appellant's motor coach, while proceeding round a right-hand bend on the top of a hill, was struck on its right front by a motor car driven by the respondent. The appellant's vehicle was completely on its correct side of the roadway, and the accident, apparently had occurred because the respondent failed to negotiate the left-hand bend and had proceeded on to his incorrect side where the collision occurred. There were really two possible explanations for the accident, on the one hand that the defendant (respondent) had through negligence driven on to the wrong side of the road, or alternatively that the defendant had had a seizure so that the cause of the accident was not in fact his negligence.

As the respondent was not able to prove beyond all reasonable doubt that he had suffered a seizure or "turn", the appellant alleged that the doctrine of *res ipsa loquitur* must apply.

The problem before the learned Judge (on appeal from the Magistrate's Court) was really whether the pleading of *res ipsa loquitur* shifted the burden of proof to the defendant to prove that no negligence had occurred, that is that he had exercised all care, and to show that his explanation was the more probable cause of the accident, or whether that apart from the need to prove some sort of possible explanation (inconsistent with negligence) the defendant had discharged his burden. In effect this is a choice between the views held by Gresson J. and those held by Fair J. in *Voice* v. *Union Steam Ship Company* [1953] N.Z.L.R. 176.

The learned Judge carefully traced the history of the doctrine from its earliest exposition in *Scott* v. *The London & St. Katherine Docks Company* (1865) 3 H. & C. 596 through the various New Zealand, Australian and English decisions on the question up to the most recent expositions of the Privy Council in *Swan* v. *Salisbury Construction Co. Ltd.* [1966] 2 All E.R. 136; [1966] 1 W.L.R. 204, and the House of Lords in *Colvilles Ltd.* v. *Devine* [1969] 1 W.L.R. 475. He also considered the views of the various textbook writers on the subject. His judgment provides a useful analysis of the views which have been held in different places at different points of time.

The learned Judge favoured the view of *Fleming* (The Law of Torts) 4th ed. at 259 *et seq* (particularly at 267) "The maxim is based merely on an estimate of logical probability in a particular case, not an overriding legal policy that controls the initial allocation of the burden of proof or, by means of mandatory presumptions, its reallocation regardless of the probabilities of the particular instance." This is the same view as Fair J. held in *Voice's* case, (but not necessarily that of Roper J. in *F. Maeder Pty Ltd.* v. *Wellington City Corporation* [1969] N.Z.L.R. 222), and seems to accord with the House of Lords views in *Colville's* case (a case which Fleming omits to discuss in this context although he discusses it elsewhere).

The doctrine may still require further elucidation, but in the writer's opinion the judgment of Beattie J. goes a long way to providing it.

M.A.V.

Some Light on Common Intention

Dryden v. *Dryden* (the judgment of McMullin J. was delivered in November 1971) is of special importance, not so much for its facts, but for the highly valuable guidance given on the following points of law:

(a) It could not be said that there was no "question" of title to a matrimonial home for the purposes of s. 5 (1) of the Matrimonial Property Act 1963 when it was of the essence of the application that the husband was asserting that the fact that both spouses were registered

proprietors of the matrimonial home (as joint tenants) did not preclude him from showing, if he could, (i) that the real shares were different from those appearing on the title, (ii) that the taking of a transfer as joint tenants was not the expression of a common intention precluding a consideration of (i). "If the position were otherwise", said his Honour, "then the Courts could never entertain an application by a spouse or former spouse under the Matrimonial Property Act in any situation where on a strict application of the principles of the law of real property the registered proprietor had to be treated as the true owner." In so concluding, McMullin J. distinguished *Watson* v. *Watson* [1952] N.Z.L.R. 892 and *Gurney* v. *Gurney* [1967] N.Z.L.R. 388. He applied *Hogben* v. *Hogben* [1964] V.R. 468, at p. 475, per Herring C.J. and noted the similar view taken by Speight J. in *Morris* v. *Miles* [1967] N.Z.L.R. 650, at p. 655. Thus, once the wife refused to accept her husband's assertion that the true ownership was other than as disclosed by the title a "question" as to title arises.

(b) In assessing contributions made towards a previous matrimonial home by the respective spouses, it is interesting to note that his Honour said "From her own moneys [the wife] paid for some work on the roof of that property and to the extent that she had a 24 percent interest in [a construction company] it might be said that she made a contribution of that percentage of the value of the work done by employees of that company when they were diverted from work on [another job] to work on the [home]. The husband likewise made a contribution of [money] towards the cost of the section and, owning the other 76 percent of the shares in the company, made a contribution of a like percentage through the employees of the company working on the house."

(c) In fixing the wife's share in the last home at one-third of the parties' total equity therein, his Honour took into account not only her monetary contributions thereto and services but also the facts that very little of her own money found its way into it and that she had been free to build up her own estate from her own cash resources.

(d) Parliament did not leave it open in the wording of s. 6 (2) of the Matrimonial Property Act 1963 for the Courts of New Zealand to infer a common intention or to impute it to the parties. The subsection, in his Honour's view, did not refer to an intention which the Court was satisfied was expressed or implied, but only to an intention which has been expressed, and there was no need to resort to any judicial fiction. This did not, however, mean that the common intention had to be expressed in writing or orally, for it might be quite possible to express it by conduct. But such conduct would need to be "definite, explicit and unmistakable in its import." On the facts, McMullin J. was not prepared to say that the use of the company's employees in the building of the previous home constituted evidence of an expression of common intention, since, in his view, at the time that that home was built, the husband would, by virtue of the control of the company, have been responsible for directing where the men were to work and the wife would have had no say in the matter—pleased though she may well have been to see them employed on the construction of that home. More important still, his Honour held that the subsequent registration of the last home as a joint family home did not demonstrate a common intention, because the purpose of such registration would be to protect that home from creditors if the husband failed in his business. He also considered that the execution of the mortgages by both the spouses was an incident of joint tenancy and not an expression of common intention.

Accordingly, his Honour concluded that, if an expressed common intention was to be found at all, it must be in the taking of titles to both homes in the names of both parties as joint tenants. He adverted to *Morris* v. *Miles*, *supra*, at p. 657 and *Longstaff* v. *Longstaff* [1971] N.Z.L.R. 1062, at p. 1066, as showing that this was not enough to establish a common intention. "In some circumstances", said his Honour, "I think that the taking of title as joint tenants, accompanied by discussions at the time of taking title, could amount to an expressed common intention, but there is no evidence of anything of that nature here."

(e) His Honour did not feel bound to decide the point whether an expressed common intention must be held to be not relevant unless it can be said to relate to the particular events which had happened (see *West* v. *West* [1966] N.Z.L.R. 247 and *Wacher* v. *Guardian Trust*, [1969] N.Z.L.R. 283, esp. at p. 287). He preferred, in fact, to leave the matter open, as had Wilson J. in *Robinson* v. *Public Trustee* [1966] N.Z.L.R. 748, at p. 751, and to suggest that there was no reason why a common intention should not be expressed at any time from the date of the acquisition of the property onwards. Further, he saw no reason why such "common intention should not be expressed at a time when relationships between the parties did not anticipate any breakdown in the marriage."

Few laymen understand the legal differences between joint tenancy, tenancy in common and a joint family home. From time to time, of course, a husband is found who, like the husband in this case, does appreciate that, if he dies first, property owned by his wife and himself jointly will pass by the right of survivorship to his wife as surviving joint tenant. Consequently, joint tenancy is seen as a convenient way to provide for a surviving spouse and, indirectly, for the family. But such a husband is also, like the present husband, likely vehemently to deny that he meant his wife to be able to assert during the continuance of the joint tenancy that she has a beneficial one-half share in the jointly-owned property. In these days of ever-increasing matrimonial discord, we should ask ourselves, perhaps, whether we do really insure that married clients purchasing a matrimonial home do fully understand the legal implications, both present and future, of the various ways in which title could be taken.

P.R.H.W.

English Cases Contributed by the Faculty of Law, University of Canterbury

Exemplary Damages and the Doctrine of Precedents

Broome v. *Cassell & Co. Ltd. & Another* [1971] 2 All E.R. 187 is a case of prime importance from several points of view. In *Rookes* v. *Barnard* [1964] 1 All E.R. 367 Lord Devlin, in a judgment agreed with by the other members of the House of Lords, laid down what many thought was a new test for the award of exemplary or punitive damages in tort. Whereas before 1964 exemplary damages could be awarded whenever the defendant had acted in contumelious disregard of the plaintiff's rights, Lord Devlin attempted to circumscribe severely the circumstances in which they could be awarded. They would lie, he said, only in three types of case: (1) Where there has been "oppressive arbitrary or unconstitutional action by the servants of the government"; (2) Where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff"; (3) Where exemplary damages are authorised by statute. This statement of the law did not escape without criticism. It was expressly repudiated in both Australia and Canada, and was not treated with wholehearted approval in New Zealand. However, obviously the English Courts felt themselves bound by it, and it was applied a number of times in the High Court and Court of Appeal.

But then came *Broome* v. *Cassell & Co. Ltd.*, which has boldly opened a new chapter in this branch of the law. The plaintiff had been the officer commanding the naval ships escorting a merchant convoy to Russia during the second world war. The convoy was ordered to scatter in the mistaken belief that it was about to be attacked; as a result many ships were lost. The second defendant wrote a book in which he stated that the plaintiff was largely to blame for the whole affair, and had been indifferent to the convoy's fate and cowardly. Despite the threat of a libel action the book was published by the first defendants, who apparently felt, as did the second defendant that the profits from sales would outweigh the damages for libel. The libel action was brought, and succeeded: The jury awarded a total of £40,000 damages, being made up of £15,000 compensatory damages and £25,000 exemplary damages. The defendants appealed. The Court of Appeal dismissed the appeals. As one ground of their decision they stated that in any event what had happened brought the case within Lord Devlin's second category; that category should be construed broadly so as to include all cases where the defendant knew that his words were or might be libellous, but nevertheless took a chance because of the profit he hoped to make from the book.

The other ground of decision, however, was far more revolutionary. The Court of Appeal unanimously held that *Rookes* v. *Barnard* was wrong on the question of exemplary damages, and should not be followed. This was done openly and directly; there was no resort to the time honoured devices of distinguishing the earlier case, or of explaining the passages in question as being *obiter dicta*. The Court of Appeal simply refused to follow the House of Lords, and held that Judges should in future direct juries in accordance with the law as it was understood before 1964.

Yet, unless the doctrine of "binding" precedent was to be given the go-by altogether, it was

clear that this remarkable proceeding had in some way to be explained as falling within an established exception to that doctrine. The Court managed to find that *Rookes* v. *Barnard* was decided *per incuriam* on the question of exemplary damages. Lord Denning M.R. gave four reasons for so holding: (1) Before 1964 the law as to exemplary damages was so well settled that only the Legislature could overthrow it; it was not open to any Court to do so. (2) The exemplary damages point was not argued by counsel in *Rookes* v. *Barnard*: indeed all counsel seemed to assume that the law on the point was well settled. (3) Lord Devlin had said that "there is not any decision of this House approving an award of exemplary damages"; that was inaccurate for it had done so, particularly in *Ley* v. *Hamilton* (1935) 153 L.T. 384 (4) Finally, "I say that the new doctrine is hopelessly illogical and inconsistent", Without so much as a "with respect", his Lordship then showed that there can be no reason for limiting the category of oppressive, arbitrary or unconstitutional action to servants of the government: other people can be just as oppressive and arbitrary as the servants of the government. Further, there is no reason why one should punish the cold, cynical calculator of profit but not the person who invents calumnies with the malicious purpose of ruining a reputation.

Lord Denning concluded: "All this leads me to the conclusion that, if ever there was a decision of the House of Lords given *per incuriam* this was it." Yet this is to give *per incuriam* an extremely wide meaning. Although there has admittedly been dispute about the exact scope of the phrase for years, the definition normally given of it is "decided in ignorance of some binding authority." If that definition is right, only Lord Denning's third reason seems to be really within it. The mere fact that there has been a lack of argument has not usually been treated as sufficient; and the fact that the rule laid down by the former case is illogical has never been treated as sufficient—were it to become so the doctrine of binding precedent would indeed be in jeopardy. Lord Denning's first reason is in many ways the most interesting (see also Phillimore L.J. at p. 213): while it is commonly admitted that there are limits to how far a Court can go in over-turning established law, no one has ever suggested before that if a superior court oversteps those limits this can be a reason for refusing to follow its decision.

So it is not surprising to find that, while Salmon and Phillimore L.JJ., the other two members of the Court, echoed all of Lord Denning's objections, they seemed to feel that *Rookes* v. *Barnard* was *per incuriam* for only one reason: that Lord Devlin was wrong when he said that the House of Lords had never approved an award of exemplary damages. In 1964 the House was bound by its own decisions (*quaere* what would have been the position if *Rookes* v. *Barnard* had been decided in 1967?) and in *Ley* v. *Hamilton* it had approved such an award. Yet even this is not entirely satisfying For as stated, *per incuriam* is usually taken to mean "decided in *ignorance* of binding authority," and in *Rookes* v. *Barnard* Lord Devlin was not ignorant of *Ley* v. *Hamilton*; in fact he discussed it. The Court of Appeal felt, however, that he had misinterpreted that decision, and that this was enough to brand his judgment *per incuriam*.

Whatever one thinks of the devices used by the Court of Appeal to evade *Rookes* v. *Barnard*, one cannot but be struck by the uncompromising vigour with which they attacked the case. Expressions were used which would never have been found in judgment in the earlier years of this century. Speaking of Lord Devlin's interpretation of *Ley* v. *Hamilton* Phillimore L.J. said (at p. 213): "No one reading *Ley* v. *Hamilton* could doubt that the views of Lord Atkin were poles apart from those of Lord Devlin. Lord Atkin was talking about punitive damages as such and not about 'so-called' punitive damages, whatever they may be". At p. 203 Salmon L.J. said: "As a rule no point . . . is decided by our Courts without counsel on both sides having the fullest opportunity of being heard on it. It seems a pity that this rule was not followed in *Rookes* v. *Barnard*—particularly as Lord Devlin's opinion was open to the devastating criticism to which it was later subjected in the High Court of Australia . . ., and to a good deal of further criticism as I shall attempt to show." Since what matters for the maintenance of a doctrine of binding precedent is the attitude of the Courts rather than the way in which the rule and its exceptions are formulated, this seems to be yet a further signal that the English doctrine of precedent is slackening.

It is only fair to say that both Lord Denning and Salmon L.J. seemed to have misgivings about what they were doing, Lord Denning actually said; "I am conscious that, in all that I have said, I may myself be at fault", (p. 200) and thus proceeded to his alternative ground of decision. Salmon L.J. expressed the hope that the case could proceed to the House of Lords to rescue the lower courts from the invidious position in which they would now find themselves.

One sees his point: what is the present law of England on the topic of exemplary damages?

A further noteworthy feature of the case was the readiness of the Court to look at decisions from other Commonwealth countries. There can be little doubt that the desirability of uniformity throughout the common law countries was one of the factors influencing the Court's decision. Indeed, Phillimore L.J. said that he was not attracted to the idea that the common law can vary from one country to another: "it seems to me that it would cease to qualify for the description 'common'." (at p. 212.)

It is to be hoped that the view of the law of exemplary damages set out in *Broome's* case is upheld. Exemplary damages are most often claimed in defamation cases, and they are our only real means of according different treatment to the malicious scandalmonger and the responsible newspaper which publishes a defamation through an honest and unavoidable mistake. The *Rookes* v. *Barnard* doctrine could only have undesirable side effects. In the first place, it requires a jury to draw a line between an award of damages which is purely compensatory and one which contains a punitive element—a task which, while possible, makes Herculean demands on an untrained jury. Secondly, it is bound to lead (and was beginning to lead) to a reliance on the concept of "aggravated" damages: What you cannot do by punitive damages you do by aggravated damages. (See for example, *Fogg* v. *Mc Knight* [1968] N.Z.L.R. 330). The distinction between these two is a deal too fine for most of us; such hair-splitting does not do the law any good. Thirdly, there is the danger that, even if juries are directed not to award punitive damages, they will occasionally be tempted to insert an unspoken punitive element to swell the amount of the "compensatory" damages, and this could lead to the unfortunate result that it becomes accepted that the sum required to compensate a man for an injury to reputation is an unreasonably high amount. There are many who feel that damages for defamation are already, in many cases, far too high.

J.F.B.

Taxation Cases Contributed by C. N. Irvine

That dominant purpose

When land is purchased for a certain purpose but more land than is actually required for that purpose has to be bought, the rest being sold, the question arises acutely as to whether the dominant purpose of the purchase was the sale or such other purpose. This question arose in *Jansse* v. *Commissioner of Inland Revenue* (1970) 2 A.T.R. 224 but there was a somewhat unusual twist to the facts.

The taxpayer was managing director and a major shareholder in a manufacturing company, the only other shareholder being his wife. The company was extraordinarily successful and by 1964 had outgrown its premises.

There was only one adjoining property which could be used for the expansion of the company's business, and this was one of some five acres belonging to another company. Although this area was far in excess of his company's requirements the taxpayer (and not his company) bought the five acre block and almost immediately subdivided the area into lots and proceeded to sell some of the lots, the first sales taking place in 1964, the year of purchase. Three of the lots were reserved for the use of the company but most of the rest were sold.

Rather naturally the Commissioner became interested in these transactions, assessed the profits on the sales of the sections and added the amount so arrived at on to the taxpayer's assessable income, purporting to act under the second and third limbs of s. 88 (1) of the Land and Income Tax Act 1954. He alleged that the profit resulted from the sale of property bought for the purpose of re-sale or that it was a profit from a profit-making scheme.

Just as naturally the taxpayer objected to the assessment and the case came before Roper J. The evidence and submissions followed the usual form, the taxpayer claiming, of course, that his dominant, and in fact his only purpose was to provide land for the expansion of his company's factory. There was evidence that he made the attempt to buy only sufficient land for this purpose but the vendor would not sell part only of his holding. This, of course, was a strong point in favour of the taxpayer and along with certain other factors it persuaded the Judge to rule in favour of the taxpayer.

However there was what his Honour called the Commissioner's "main submission" which, he said, had some attractiion for him at the time it was made. This submission was that the tax-

payer had bought all the land except that reserved for the company for the purpose of selling it on the open market and that he had bought the land reserved for the company for the purpose of selling or otherwise disposing of it to the company. The profit was therefore plainly caught by s. 88 (1) (c). Since the taxpayer had purchased the land in his own name it was immaterial what the company proposed to do with it.

His Honour could not accept this submission. He said that, for all practical purposes the taxpayer and the company, in which he was a majority shareholder, were one, and he could see little merit in the conclusion that if the land had been purchased by the company with the dominant purpose of providing room for expansion profits would not be taxable but would be if, as had happened, the taxpayer purchased in his own name with that same dominant purpose.

With the greatest respect this is a commonsense and equitable decision on the case, but common sense and equity have little or no place in taxation law. There is a wealth of authority for the proposition that even where a person has practically the whole of the shareholding in a company he and the company are two distinct legal persons. One of the most recent examples is *Lee* v. *Lees Air Farming Ltd.* [1961] N.Z.L.R. 325, where Lee held 2,999 out of 3,000 shares and controlled the operations of the company as governing director but was still held to be a different person from the company itself. Applying this principle I submit that s. 88 (1) (c) should have been held to apply and the profits should have been taxable.

C.N.I.

POWER TO DISCHARGE WITHOUT CONVICTION

A defendant may be discharged even though he or she has pleaded guilty. In *The Functions and Powers of Justices of the Peace and Coroners*, Professor Burns and the writer cited *Cotter* v. *Gilmour* [1950] N.Z.L.R. 80 as authority for this general proposition.

The situation in *Cotter* v. *Gilmour* was that the defendants had auctioned some used galvanised iron and used timber without specifying separately the price demanded in terms of an existing Price Order. The Magistrate, exercising his discretion under s. 92 of the Justices of the Peace Act 1927, discharged the defendant, on payment of costs, on the grounds that there was no moral turpitude, and that the defendant had acted in ignorance of the law.

The Crown in its appeal to the Supreme Court argued that s. 92 did not apply where there had been a plea of guilty. The Supreme Court did not agree with this. The Crown was, however, successful in its argument that the Magistrate had acted upon an incorrect principle and had exercised his discretion wrongly.

On the factor of "moral turpitude" the Supreme Court considered that this

> "can have no mitigating influence in administering legislation such as the Control of Prices Act 1947. It has a special object, which Parliament has considered it necessary to accomplish, and the Courts are bound to give it the same loyal and faithful enforcement as is given to any other Act of Parliament" (p. 84).

As to action "in ignorance of the law", it was observed that this consideration

> "is no doubt relevant in assessing the appropriate penalty, but to admit its validity as practically a defence to prosecutions under the statute would give to ignorance (whether wilful or accidental) an ameliorating quality which the law has always denied" (p. 84).

Section 42 of the Criminal Justice Act 1954 affords Magistrates' Courts a wider discretion than s. 92 of the Justices of the Peace Act 1927. Under s. 92 the offence had to be "of so trifling a nature", and the Court had either to "dismiss the information" or "convict and discharge". Under s. 42 of the Criminal Justice Act 1954 the Court may "discharge without conviction" and such discharge "shall be *deemed* to be an acquittal". The original s. 42 read "a discharge under this section shall have all the effect of an acquittal". However, in 1960, this was repealed and substituted, as above, so that the defendant now walks out of the Court manifestly an innocent man.

My point is, of course, that the Courts thus have a correspondingly added responsibility. Indeed, the Supreme Court emphasised their responsibility under the old law in *Young* v. *Davis* [1954] N.Z.L.R. 269 where it was held that the exercise of a discretion under s. 92 must be with great care. The Supreme Court took the view that "it is very important not to limit the discretion entrusted to Justices . . . the exercise of that discretion will not be reviewed if there is

any substantial ground for its existence" (p. 273).

In *Duddy* v. *Joyce* [1919] N.Z.L.R. 201; G.L.R. 96 it was said "The discretion given to Justices is a wide one: *Salt* v. *Scott Hall* 72 L.J.K.B. 627; and to justify one in interfering with the decision of the Magistrate, to whom the Legislation has *in the first instance* confided this discretionary authority, I ought to be able to say that his conclusion was quite unreasonable" (p. 205). (italics supplied).

Chapman J. concluded by observing that the authority (of s. 92) was "really only capable of being used . . . in very exceptional circumstances". The rationale of this case was adopted in *Young* v. *Davis supra* (p. 276).

In *Gunn* v. *Nicholls* [1949] N.Z.L.R. 56, Gresson J. stated "In my opinion, some *exceptional* or *special circumstances* should have been present . . . before the Magistrate could properly dismiss the information under s. 92 . . ." (italics supplied).

In *Gunn's* case *Duddy's* case was not followed, the learned Judge preferring to follow *McRae* v. *Stephens and Quirk* [1939] N.Z.L.R. 374, where Ostler J. commented "Every Magistrate and every Judge before assuming office takes a judicial oath that he will administer justice in accordance with law, and no Magistrate or Judge is justified (apart from statutory authority) in deliberately ignoring or refusing to follow the law because he thinks that to do so might create a hardship or injustice in a particular case. Such a method would lead to confusion and to uncertainty and a lack of uniformity in the administration of justice."

This was a sale of liquor case (indeed, many of the s. 92 cases appear to have been) and the *dicta* of the learned Judge at p. 376 are very significant today. I make no apology for taking the liberty of importing his thoughts into the context of s. 42 and making him say in our time "I think it especially important that s. 42 should not be used for the purpose of discharging proved offences against the licensing and traffic laws in these days when such an appalling toll of life is being taken on our roads. Nothing should, in my opinion, be done to weaken control by law enforcement officers, for to do so is likely to increase the danger I have referred to."

The above italicised phrases emphasise the responsibility of Magistrate's Courts to insure that they apply penal legislation according to its "true intent, meaning, and spirit" (s. 5 of the Acts Interpretation Act 1924). Whilst it must be in the forefront of Magistrate's minds that the accused must always and always receive the benefit of the slightest shadow of doubt, and, in appropriate cases, even where there is little or no doubt, be discharged without conviction, it must also be remembered that, since the 1960 amendment, a s. 42 discharge appears to be an *outright* acquittal, i.e. the *discharge* is the *same thing* as an *acquittal*.

Higgins v. *Hart* [1955] N.Z.L.R. 1202, which held that the Court when dealing with a subsequent offence, was not precluded from taking into consideration the fact, if it be a fact, that the accused had committed an earlier offence, provided it also took into consideration the former fact that the circumstances of the earlier offence were such as to warrant a discharge without conviction, was decided before the 1960 amendment. As I see it, the "fact of guilt still a fact" alluded to in *Higgins'* case (p. 1203) is now no longer applicable, because whatever *guilt* there may have been in the factual sense the moment before a s. 42 discharge completely disappears as though it never was on the making of the order for the reason that such a discharge is now *deemed* to be an acquittal, presumably for all purposes.

What I am getting at, of course, is that assuming this to be the law, Courts must be that much more aware of their responsibility under the amended section, as, if I am right in this, future Courts can no longer take into consideration in a subsequent and appropriate case the fact that the accused had committed an earlier offence and been discharged without conviction or sentence. Whilst this has the advantage, perhaps, of shutting out a part of an accused's past which might be inconvenient to him in his future progress, and the idea is salutary, nevertheless it might be that use of the expression "deemed" may be interpreted to entitle a Court to ascertain "for what purpose . . . the statutory fiction is to be resorted to": *In re Foley (deceased)* [1955] N.Z.L.R. 702, 704. The Legislature has not said that a discharge under s. 42 *is* an acquittal, but that is is *deemed* to be an acquittal. Referring to the term "deemed", Haslam J. in *Ross* v. *P. J. Herringa Ltd.* [1970] N.Z.L.R. 170, 172 observed "while this term, which is popular with legal draftsmen, is commonly used to create a statutory fiction and to extend a meaning to a subject-matter which the latter does not literally embrace . . . this connotation cannot apply throughout . . . but should be read as . . . or to all intents and purposes . . . . The fictional implication of the word 'deemed' arises more aptly where the plain fictional situation is directed by statute to be ignored for a certain purpose."
Because of the contractual and situational differences in the above cases. I submit that the words "deemed to be an acquittal" in s. 42

mean "*is* acquitted", but that is, of course, only opinion. The *dicta* of Haslam J. "to all intents and purposes" looks like "all the effect of", and, so it may yet be held that Parliament in 1960 did not make its intention abundantly clear. Either way, the amendment points up the nicety of balance to which Magistrates must aspire in the interests of justice to each individual and also to the community.

J. A. B. O'KEEFE.

THE INCORRIGIBLE ROGUE—OR A CASE OF MISTAKEN IDENTITY

All the reported cases in the past concerning unilateral mistake by one contracting party as to the identity of the other have, by and large, had two common features. They have all been English and they have all involved a fraudulent imposter generally described simply, if somewhat blandly, as "a rogue". Unfortunately, apart from these two somewhat irrelevant features, reconciling the cases has been at best difficult and at worst impossible, as any contract student will readily attest. *Lewis* v. *Averay* (1971) 3 W.L.R. 603 runs true to form in that it is an English case and the rogue features again but the decision of the Court of Appeal goes much further than this in providing hope that the tangled skein of cases in the past has at last begun to unravel.

The correct position at common law had always been capable of being stated in a general way. There was a presumption that an offer made by R (rogue) to G (gullible) and accepted by G resulted in a contract between R and G despite the fact that G mistakenly thought the offer was made by W (well-known person) but there was no contract if the identity of W was of fundamental importance or in some other way a material inducement to G to enter into the agreement and G's mistake was known to R. Of course since R was generally an imposter rogue who had deliberately perpetrated a fraud, the question of whether G's mistake was known to him rarely arose as an issue. So in almost all of the cases the crucial question was simply: Did G intend to deal only with W? If the answer was yes, then the presumption that there was a contract between the parties physically present at the time was displaced. The onus of displacing this presumption lay on G.

In deciding whether the presumption had in fact been displaced two main problems arose for consideration by the Courts.

(a) *Factual Problems*

When would the identity of W be regarded as having been of vital importance to G? The answer to this depended very much on the facts of each particular case. The English Courts seemed generally to have preferred the view that G's plea of mistaken identity could only succeed where R and W in fact both existed as separate persons or entities. (*a*) So if R and W were the same person or if W was in fact a fictional person or entity then G's plea usually failed. (*b*)

But even assuming that the "double entity" test was the one usually applied, the result was still not always the same, at least in circumstances where W was not personally known to G. In such a case was G's contention that he had intended to deal only with W to be successful? One would have thought that at the very least this would have made G's task of rebutting the presumption much more difficult and so it was in *Phillips* v. *Brooks* (*c*) where although W in fact existed and had been heard of by G and his name has been checked in a directory by G, he was not personally known to G and therefore G was unable to displace the presumption that he had intended to deal only with R, the person physically present at the time. However even this relatively narrow and, it is submitted, correct approach was not capable of consistent application by the Courts. In *Ingram* v. *Little* (*d*) R falsely alleged he was W, who lived at X. Although W in fact existed and his address at X was verified by G in a directory, he was not personally known to G and indeed had never previously been heard of by G. Despite this, the Court of Appeal held that G had intended to deal only with W and that there was therefore no contract between him and R.

In *Lewis* v. *Averay* the facts were these: L, a chemistry student, advertised his Austin-Cooper "S" car for sale. R (the rogue) called in

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(*a*) See *Hardman* v. *Booth* (1863) 1 W. & C. 803; *Cunday* v. *Lindsay* (1878) 3 App. Cas. 459.

(*b*) See *King's Norton Metal Co. Ltd.* v. *Eldridge, Merret & Co. Ltd.* (1897) 14 T.L.R. 98 but cf. *Sowler* v. *Potter* (1940) 1 K.B. 271 (plea successful despite the fact that R and W were the same person).

(*c*) (1919) 2 K.B. 243.

(*d*) (1961) 1 Q.B. 31.

response to the advertisement. During discussions after he had tested the car, R said he was connected with the film world and led L to believe he was Richard Greene (the star of the "Robin Hood" series). R wanted to buy the car and to pay for it by cheque. L was reluctant but after being shown a special pass of admission to Pinewood Studios which bore the name "Richard A. Greene" on it and a photograph of R, L agreed to let R take the car, thinking the man was the well-known film actor. Of course a few days later the cheque was dishonoured, it having been previously stolen by R. In the meantime R, saying he was L, sold the car to A, a music student and an innocent purchaser for value. L in due course sued A, claiming damages for conversion.

It can be seen that the facts of the case conform exactly to the classical situation. The Court of Appeal, with Lord Denning at the helm, had no difficulty in holding that L's mistake as to identity of R was of fundamental importance and was a material inducement to his agreeing to sell the car. Since Richard Greene existed in fact the "double entity" test pointed to there being no contract between L and R. On the other hand, Richard Greene was not personally known to L and so on the basis of *Phillips* v. *Brooks* there was a contract. Yet again, on the basis of *Ingram* v. *Little*, L had clearly thought he was dealing only with Richard Greene and so there was no contract. Clearly, the facts of the previous cases were not going to be of much assistance to the Court and so it is not surprising that the Master of the Rolls in the leading judgment sought no principles from the past as to the facts. However both Phillimore L.J. and Megaw L.J. were of the opinion that nothing had occurred to displace the presumption that L had intended to deal with R. Phillimore L.J. considered that *Ingram* v. *Little*, also a decision of the Court of Appeal, was a case of "very special and unusual facts". Megaw L.J. was of the view that L was mistaken only as to attributes of R, that is, as to his credit worthiness, but not as to his actual identity. Lord Denning however saw this as a distinction without a difference and it must be admitted that in the vast majority of cases one is concerned with the identity of another prospective contracting party only in so far as it indicates his financial reliability. Therefore, having regard to the facts of the case and Megaw L.J.'s view of them, it would seem that in the future it will be very hard for someone in the position of L to displace the presumption that he intended to deal with the person physically present except perhaps in those cases where the personal skills or attributes of the other party are all-important or where the other party actually disguises himself as another.

(b) *Problems as to the Consequences of Mistaken Identity*

The second major problem which faced the Courts was the effect of a mistake by G as to the identity of R. What was the consequence of G successfully rebutting the presumption that he intended to deal with R? The answer to this question was of acute importance in the frequent situation where R had obtained goods from D on credit or by cheque and had sold them to I (innocent purchaser) who had purchased in good faith. Both G and I were the innocent victims of R's fraud. Who has to bear the loss? The answer until 1971 seemed to be that if G had in fact intended to deal only with W (and thus displaced the presumption) then there was no contract *ab initio* between G and R and R was thus incapable of passing title to the goods to I. Consequently I was liable to return the goods to G or to pay damages for conversion. This was a manifestly unjust result since G was clearly more culpable than I, for at least he had had it in his power to check out the identity of R thoroughly first and furthermore had taken the risk of delivering up the goods to R on credit or in return for a cheque pursuant to what had all the appearances of a valid contract. To this extent G was negligent, even if innocent whereas I was made to bear the loss when not only was he an innocent purchaser for value but also was blameless of any negligence. On the other hand, if it was held that G had not displaced the presumption that he had intended to deal with R, the person present at the time, then there was a contract between G and R voidable at G's option because of R's fraud. In this case, unless the contract had previously been avoided by G (and it was never clear exactly how he was to do this) R could pass a good title to the goods to I and as a result G bore the loss of R's fraud.

The somewhat whimsical result of the past cases prompted criticism and various solutions were suggested, perhaps the most cogent being that G should be estopped from denying as against I that the goods were delivered up to R under what appeared to be a valid contract and that I acted reasonably in believing that as a result R was capable of passing good title to the goods to him. (e) However this seemingly obvious solution found no favour with the Courts, it no doubt being seen as the thin end

(e) See *Colonial Bank* v. *Cady and Williams* (1890) 15 App. Cas. 267, 285.

of the wedge that mere possession of goods amounted to ostensible ownership. This was a French principle of contract law which had never been accepted in the common law, the rationale being that otherwise one could never give anything to another without running the risk of losing one's property in it. (*f*) But of course merely giving something to a rogue is not the same as purporting to sell it to him in circumstances where one has been negligent to a greater or less extent and as a result another has acted innocently to his detriment. No doubt largely for this reason the 12th Report of the English Law Reform Committee in 1966 recommended that in cases of mistaken identity a contract should as against an innocent third party, be avoidable and not void. This recommendation had not received statutory recognition in the United Kingdom but if Westminster was prepared to remain inactive, Lord Denning, in *Lewis* v. *Averay*, was not.

The Master of the Rolls was the problem which confronted the Court as being basically one of which of the two innocent parties, L, the chemistry student, or A, the music student, was to be made to suffer as a result of R's roguery. The answer to this depended on whether there was a contract of sale between L and R. If there was, R acquired a voidable title; if not, R acquired no title. Following *Phillips* v. *Brooks* there was a contract and A acquired title to the car as an innocent purchaser from R. But on the basis of *Ingram* v. *Little* and a number of other earlier cases, (*g*) there was no contract and R was incapable of passing title. Lord Denning considered that the facts in *Phillips* v. *Brooks* and *Ingram* v. *Little* and those in the case before him were incapable of relevant distinction but his Lordship would have no truck with the contention that a mistake by a party as to the identity of the other contracting party renders that contract void *ab initio* or renders it impossible for a contract to be concluded at all. In his Lordship's view the justice of the case demanded that there was a contract between L and R and that the contract was voidable and not void and this was the decision he came to, even if at the price of a somewhat cursory dismissal of the earlier cases. So while Lord Denning acknowledged that both L and A were "good and reliable" and he very much regretted that either should suffer, he considered without hesitation that L should do so since it was he who had let the rogue have the goods and thus enabled him to commit the fraud. In his view *Phillips* v. *Brooks* (*h*) *King's Norton Metal Co. Ltd.* case (*i*) and *Ingram* v. *Little* (*j*) correctly stated the law. Implicitly, the decision of the Court of Appeal in *Ingram* v. *Little* was disapproved, since no real attempt was made to distinguish that case and it certainly was not followed by his Lordship or by the other members of the Court. No mention at all was made of a number of the more important earlier cases. (*k*)

Furthermore, while Lord Denning's judgment speaks of a presumption that there is a contract in cases of mistaken identity and a voidable title is thus acquired by the rogue, no indication is given as to how the presumption might be displaced although it can at least be said that in the view of Master of the Rolls and also Megaw L.J. such cases will be rare indeed.

Conclusion

As stated earlier, it is to be hoped that in the future *Lewis* v. *Averay* is accepted by the Courts in New Zealand as a correct statement of the law that there is a strong presumption that an offer made by a rogue to another and accepted results in a contract between the parties, despite the fact that the identity of the rogue may have been an inducement to the innocent party entering into the contract and that therefore the rogue acquires a good title to the goods subject to the contract being avoided by the innocent party. Thus stated the decision achieves substantially the same effect as the solution of estoppel by representation referred to earlier without foregoing that element of flexibility necessary if something approaching justice as between innocent parties is to be achieved. Above all it clarifies the law and infuses some semblance of principle into an area of contract law where it had been regrettably lacking before.

Finally in passing, it is interesting to compare the approach of the Court of Appeal in *Lewis* v. *Averay* with that of the same Court and the House of Lords in *Saunders* v. *Anglia Building Society* (*l*) (sub. nom. *Gallie* v. *Lee*) which restated the law relating to documents mistakenly signed and the availability of the plea of *non est factum*. It is submitted that in each of these decisions there is an implicit, underlying acknow-

(*f*) See *Gabarrow* v. *Kreeft* (1875) L.R. 10 Exch. 274, 281.

(*g*) See *Hardman* v. *Booth; Cunday* v. *Lindsay; Sowler* v. *Potter supra.*

(*h*) *Supra.*

(*i*) *Supra.*

(*j*) *Supra.*

(*k*) See e.g. those cited in footnotes (*a*) and (*b*) ***supra.***

(*l*) (1970) 3 All E.R. 961.

ledgment that the law of contract is to a very large extent an arbitrary creature and that as Ashurst J. said (*m*) 815 years ago "whenever one of two innocent parties must suffer by the act of a third, he who enables such person to occasion the loss must sustain it". As the recognition of the justice of holding liable on a contract he who has been negligent increases, so the line of demarcation between the traditional provinces of the law of contract and the law of tort continues to become less clearly defined.

AUSTIN FORBES.

(*m*) *Lickbarrow* v. *Mason* (1787) 2 Term. Rep. 63, 70.

CORRESPONDENCE

An Open Letter to the President of the New Zealand Law Society

Sir,

In a perennial attempt to restore some order in the chaotic plethora of paper and documents on my desk, there came to light the other day your letter to practitioners of the 18th January 1971. This discovery reminded me that there are few constants remaining in our profession today and one of these would surely be that the work load continues to increase and the returns continue to diminish.

My long-suffering clients are hardly amused at my present explanations that in spite of six weeks having elapsed after Christmas I still have not read all my Christmas mail and neither am I encouraged when I consider that the thoughts expressed in your letter—I quote "In addition to this, there is widespread belief that under present conditions the incomes of our members do not adequately reflect the work that is done by the profession and the responsibility that it undertakes"—are apparently still no more than lip service to a sentiment, twelve months later. Every year I religiously consider the list of candidates seeking election to my local branch of our society blindly believing with the desperation of a born gambler, that the choices who remain uneliminated are those endowed with the wisdom of Solomon, the energy of Hercules and the cunning of Disraeli to re-establish a reasonable and sound economic basis for our profession. This is not intended to be critical of those, who, out of a sense of duty accept an additional work load for the sake of the profession but how we ever manage in this day to maintain our public and recognised image of unscrupulous dishonesty is beyond my comprehension. The facts would be enough to make Charles Dickens turn in his grave.

Looking back over the last decade I am alarmed to measure progress, if this is what it could be called, in statistical terms. The practice of which I am a partner, was founded by my senior partner forty years ago and probably typifies a two-man conveyancing practice in a suburban location. In the year 1960-1961, with two partners and two typists, from 460 transactions our firm grossed approximately $12,500 for a net return (before tax) divisible between the two partners, of $8,660, i.e. approximately 75% of the gross. In 1970-1971, with two partners (now ten years wiser) and four staff members, out of 1,630 transactions our firm grossed $38,500 for a net return (before tax) divisible between the two partners, of $19,430, i.e. approximately 50% of the gross. If this trend continues I confidently expect that in the year 1980-1981 the practice will silently founder and provided we have not experienced the fate of many of our brethren and been disposed of by heart attack, nervous breakdown or otherwise, the overheads in that year will amount to 75% of the gross and the profits 25%, at which stage, whatever else we do, we will morally be obliged to purchase legal practicing certificates for our typists.

Too many statistics are odious but a few which come to mind make interesting comparisons. In 1960 the average price of a man's suit was $30, today the average price, my stockist informs me, is $70. I can still afford to buy a suit—thanks to 1971 credit arrangements—I only have to work three times as hard to pay for it. In 1960 the price of a loaf of bread was four cents and today, averages seventeen cents and upwards. In 1960 we paid our junior typist $11.50 and today we pay our junior typist $32 per week. My old Ferguson Conveyancing Scale, to be observed from 1st August 1950, shows that the scale charged for acting for a purchaser buying a house at $12,000, was $95.85. My present scale shows the fee to be $100, a 4% increase over twenty years. There are, of course, many meritorious arguments as to the effectiveness, or otherwise, of the present conveyancing

scale, but whatever they may be, the scale, and such minor alterations as have been made to it in twenty years, has done little to retrieve the fortunes of my firm in the last decade. Only the acceptance of a vastly increased work load has managed to maintain the status quo if measured in terms of the purchasing power of the dollar today.

Back in 1960 I remember that one read one's mail at the end of the day and signed the same with an organised, if illegible, signature. Fearing incrimination, I can make no direct comment as to whether the mail is read at the end of the day in 1972, except to say that it is signed with a disorganised illegible initial. In 1960 I do not remember being idle, but do remember producing Deeds of Lease meticulously endeavouring to protect the individual interests of my client. The days of printed cyclostyled forms were not even heard of, I can remember a youthful satisfaction in a few transactions miraculously settled with some small skill and a lot of honest endeavour. Lately, I cannot remember feeling satisfied over any transactions, except to the extent of persuading a receiver to delay a Company takeover from Friday to Monday, that we might have a quiet weekend for a change.

Sir, your letter of the 18th January 1971 contained words of hope but even my faith is beginning to fail. Whether the experience of my firm is typical of others in the country I do not know, but if comments made by members of my age group are anything to go by, I expect our problems are very similar. I do not remember meeting a happy lawyer, let alone a relaxed one, for years (although lately I have met a number of happy "wharfies") and as in my opinion so many of our basic problems are economic in origin this is a state of affairs for which we have only ourselves to blame.

It has become self-evident that our profession is grossly overworked and, measured in terms of effort, training and responsibility, grossly underpaid. Only a dramatic alteration in the scale of charges (an immediate 100% increase with annual reviewals would not be untoward) will rectify the situation. The time for action is long overdue.

Yours faithfully,
TREVOR ELCOAT.

LEGAL LITERATURE

The English Judge by HENRY CECIL. Stevens & Sons. $4.70.

One of the most intriguing books in a long time is surely this, "The English Judge" by Henry Cecil, or more properly by his Honour H. C. Leon, now a retired Judge of the County Court.

Henry Cecil is in more sombre mood; indeed I well recall spending a full day in the Willesden County Court, presided over by Leon J., arguing the complexities of a Tenancy Act which had that day come into force and opposed by the tenant in person. With a conspicuous absence of humour but with enormous patience and dedicated diligence Judge Leon probed both law and fact and the defendant though unsuccessful went away well satisfied with British Justice. The same concern for the individual shines through through his 1970 series of Hamlyn Lectures, of which perhaps the most fascinating is that entitled "Background of the Judges" in which are examined the marital status, interests, genealogies and scholastic careers of 117 Judges and Magistrates.

Of the Bench in action, criticism is offered for those who "blacken the witnesses' characters unnecessarily . . . Most losing parties will go away from the Court slighlty happier if they merely lose the case without also being called unmitigated liars"; the comment is also made that "the harm that a Judge can do is not merely in actual injustices . . . but in sending litigants (and advocates) away with the feeling that their cases have not been properly tried." The respect accorded to the Bench, too, is seen as a danger: "(the Judge) is treated in Court with a subservience and flattery which probably attains nowhere else and as he probably gets a similar kind of treatment outside Court, it is not good for some of us."

Constructive suggestions are that "no one should be appointed to a Judgeship or Magistracy until he has shown that he is fit for the appointment . . . a barrister who is under consideration for a Judgeship should have to undergo a probationary period before he is finally appointed." Again: "In no circumstances should the Lord Chief Justice be appointed except from

among the Judges. The position is obviously an extremely important one and it is vital that before his appointment the Lord Chief Justice should be known to be a Judge of great ability and good manners." He also opines that "Judges ought (not) to sentence offenders for serious crimes at all. I think this should be done by a special panel." Support is given to the inquisition of suspects by police in front of Justices with the suspect legally represented. "Everything said by the accused before the Justice including any admissions, should be admissible at his trial, but no other statements of the accused should be admissible, unless they took place as part of or during the commission of the crime or during the 'hue and cry'. The solicitor present for the benefit of the accused should only be there in order to see that there is no improper pressure brought to bear on the accused. He should not be entitled to advise the accused, for example not to answer any questions."

Judge Leon's humanity is shown by his concern for debtors imprisoned for non-payment; with another Judge and his Registrar he toured Brixton Prison and interviewed debtors to find that the majority of those incarcerated had not been aware that they could have had the Order suspended had they applied to the Court; they went to prison simply through ignorance. This led to amendments to the form served on debtors so that some 2,000 people less were sent to prison each year thereafter.

On the question of dress in Court, the author recounts the occasion when pop singer "Screaming Lord Sutch" came to his Court dressed only in a tiger skin and accompanied by two reporters to see the fun. The situation was dealt with in a manner which should commend itself to the Magistracy: "I asked him if those were the clothes he usually wore and he said they were. So we got on with the case and there was no fun to report. It seemed to me that it was not my business to dictate to people what they should wear in my Court, provided their dress was decent and not intended to bring the Court into contempt. If Mr Sutch usually wore a tiger skin why should I object to his clothes any more than I should object to those of a nun or an Arab? In fact Mr Sutch turned out to be a very sensible young man, who conducted his case with courtesy and ability."

The lecture has more unconscious than deliberate humour: "Judges plainly must not visit disorderly houses or striptease shows or entertainment of that kind". Judges "would be ill advised to go into a West End public house at night." And of the Welshmen who invaded an open Court and received at first prison terms and then suspended sentences, Judge Leon manages to say that "I think that both the Court (of Appeal) and Mr Justice Lawton were right, the Judge in imprisoning some of the offenders in default of undertakings as to their future conduct, and the Court of Appeal in showing mercy and preventing martyrdom, while indicating that future offenders would not be so tenderly treated."

The book, though written in simplistic terms and for a lay as much as a legal audience, is required reading for all who daily appear in the Courts in whatever role.

J.D.P.

DUTIES OF A MORTGAGEE IN EXERCISING POWER OF SALE OTHER THAN THROUGH THE REGISTRAR

In *Garrow's Law of Real Property*, 5th ed., p. 573, the position of a mortgagee selling (other than under conduct of the Registrar of the Supreme Court) is put as follows:

> "A mortgagee selling under his power of sale is not a trustee of the power of sale for the mortgagor, but he must act *bona fide* in the exercise of his power and must not recklessly or fraudulently sacrifice the mortgaged property. If he acts *bona fide* and in a reasonable manner his exercise of the power cannot be impeached."

One of the cases cited by *Garrow* in support of that opinion is *Kennedy* v. *De Trafford* [1897] A.C. 180, which has been recently explained at great length by the English Court of Appeal in *Cuckmere Brick Co.* v. *Mutual Finance Ltd.* [1971] 2 W.L.R. 1207; [1971] 2 All E.R. 633 (C.A.).

The relevant facts in the *Cuckmere Brick Co.* case were that Cuckmere Brick Co. Ltd. (the first plaintiff and mortgagor) and Mr Leslie Arthur Fawke (the second plaintiff and a surety) claimed that the defendants, Mutual Finance Ltd. (the mortgagees) had failed in a duty of care, when exercising their statutory power of sale, in putting the mortgaged property, some 2.6 acres of land on the outskirts of Maidstone,

up for sale with planning permission for 33 houses *but without advertising the fact that there also existed planning permission for 100 flats*; and in failing to postpone the sale when that was pointed out to them. The land was mortgaged in 1961-62 for £50,000 and other money and was sold in June 1967 for £40,000.

The Judge of first instance on 31 July 1969 found on the evidence, that there was in June 1967 a market for the sale of land *with planning permission for flats* which would have been reached if the site had been advertised with both planning provisions, that if the market had been reached the site would probably have been sold at a considerably higher price; and, having been asked by both parties to quantify that on the evidence, found that £65,000 was a fair and conservative quantification. The Judge held that, in *ignoring planning permission for flats* and in refusing to postpone the sale, the defendants had been negligent. He ordered accounts and inquiries on the basis of selling price of £65,000.

In the Court of Appeal Salmon L.J. said: "Since, for the reasons I have indicated, I am against the defendants on the law and consider the Judge's findings of fact and assessment of value to be altogehter unassailable, I would dismiss the appeal." But Cross L.J. said: "In these circumstances I think that justice between the parties could best be achieved by remitting the case for an inquiry as to damages, at which further evidence—in particular the evidence of the purchaser—can be adduced." Cairns L.J. said: "In these circumstances I consider that the course which is fairest to both parties is that there should be an inquiry as to damages on the footing that the price at which the land could probably have been sold is at large. I would so direct." Accordingly the appeal by a majority verdict was allowed in part.

Although the mortgagees were held liable in damages, they had gone a long way in advertising the property for sale. "Advertisements appeared in the national and local press, posters were published and particulars of sale sent to land developers all over the country advertising the sale of this building site comprising 2.65 acres with planning consent for the erection of 33 detached houses. The cover and the first seven pages of the particulars of sale prominently featured this planning consent. The last three pages of the particulars set out merely the conditions of sale, the memorandum and a plan of the site. Nowhere in any of the literature in connection with the sale was any mention made of the existence of the planning consent for 100 flats." In the course of his judgment Salmon L.J. said: "Whether a site may be attractive for flat development is of course, a matter of opinion. In some cases this may be a difficult and nicely balanced question. If, however, it is or ought to be obvious that a site may well be attractive to flat developers and it has planning permission for flats it would clearly be most imprudent to advertise the site for sale without mentioning this planning permission. The valuation of a plot of land depends upon the knowledge, experience, expertise and ability of the valuer. Valuation is not an exact science. Equally careful and competent valuers may differ within fairly wide limits about the value of any piece of land."

The sale in the *Cockmere Brick Co.* case was by public auction, which in the circumstances must have assisted the mortgagees, although that point is not mentioned in the judgments.

The decision relies in the main on the case of *Tomlin* v. *Luce* (1889) 43 Ch. D. 191 (C.A.). The matter can be summed up by stating that a mortgagee, when exercising his power of sale otherwise than through the Registrar, owes a duty to the mortgagor to take reasonable care to obtain a reasonable price or the true market value. The passage from 27 *Halsbury*, 3rd ed., p. 302, that a mortgagee is entitled to sell at a price just sufficient to cover the amount due to him, provided the amount is fixed with due regard to the value of the property, to be found in 8 *The N.Z. Encyclopaedia of Forms and Precedents* p. 65 note 214, requires modification accordingly. The Government valuation of the property has little or no relevance in a sale by the mortgagee.

All the foregoing goes to show that as a general rule a mortgagee should exercise his power of sale through the Registrar of the Supreme Court. This is clearly shown by *Wellington City Corporation* v. *Government Insurance Commissioner* [1938] N.Z.L.R. 308 (C.A.).

E. C. ADAMS.

Tradition and Dignity—Against the trend away from pomp and circumstance comes news that the new Labour Mayor of Christchurch, Mr N. G. Pickering, has invested in a "fore and aft" cocked hat which, added to his robes, chain of office, lace cuffs and jabot, he proposes to wear at all future monthly meetings of Council. The Town Clerk, Mr M. B. Hayes is to wear his wig and gown. Explains Mr Pickering: "I am all in favour of upholding the dignity of the office, particularly in view of the tendency to decry anything traditional."

ON VIEWING THE JUDICIAL BODY

The recent dispute over the "leaked" report by *Justice* on the judiciary should not be permitted to obscure the fact that the report (still unpublished) itself deals with an important subject of general social concern, hitherto scandalously neglected. It contains proposals for rationalising the machinery of judicial appointments; for widening the intellectual horizons of Judges through training programmes centred on a new judicial staff college and by enabling them to lead a more normal social and family life; and by making better provisions both for dealing with complaints against Judges and for removing those who, for one reason or another, have become incapable of discharging their heavy responsibilities (though this problem has been in part mitigated by imposing compulsory retirement ages.) It also reiterates the long-familiar argument that solicitors should be eligible for high judicial office.

Criticisms of, for example, the social isolation and elitism of Judges are far from new (and witness the Lord Chancellor's recent counter-blast to the "jibes" of such critics); and criticisms of the judiciary (uttered for the most part in private) and of judicial decisions have always formed part of the day to day conversation of both academic and practising lawyers. But, apart from, for example, propaganda exercises by the Law Society intended to press the case for the inclusion of solicitors among the ranks of the higher judiciary, this seems to be the first occasion in living memory that a distinguished group of lawyers and laymen has gathered around a table and tried to distil the amorphous mixture of professional grumbles, litigants' dissatisfaction and social data into a coherently reasoned critique and a blueprint for reform.

Hitherto any public debate in the media about the quality of senior Judges has proceeded upon the tacit assumption that it is faintly unseemly to draw too much attention to their more human frailties, though this applies with less force as one descends the rungs of the judicial ladder. One can of course recall numerous exceptions; the more spectacularly atavistic homilies delivered from the bench about long hair and trouser-suits are always grist to the journalists' mill. There was much pointed criticism in the press when Lord Avonside was invited to join a Conservative Party policy committee in 1968 (he later withdrew) and when Sir Henry Fisher resigned after only two years on the High Court Bench to join a firm of merchant bankers. From time to time eminent Judges fall foul of the Road Traffic Acts and the proceedings are prominently recorded in the press.

But this kind of thing is very small beer. Judges enjoy no constitutional immunity analogous to the doctrine of ministerial responsibility which shields senior civil servants (though there is the limited shield provided by the rules of contempt of Court) yet, as men, they are virtually closeted from the public gaze. Significantly, that very efficient prober of British institutions, Mr Anthony Sampson, in seeking for inclusion in *A New Anatomy of Britain*, an example of a Judge presenting his non-judicial aspect to the world, could find nothing more remarkable than Lord Wilberforce reading *Sporting Life* in a cafe in Chancrey Lane. And it was surely far more than a sense of respect for the departed that prompted the outcry against Bernard Levin's highly critical "Judgment on Lord Goddard", in *The Times* in June of last year.

The Lord Avonside affair (*supra*) highlights one factor in the apparent conspiracy of silence: if the higher judiciary cannot escape accusations of social isolation and conservatism, it can at least claim to have wriggled free of the taint of party politics. Things were once very different; in the era of Lord Halsbury, for example, the legal press subjected new judicial appointees to rigorous scrutiny. In 1897 the *Law Journal* wrote that the appointment of Ridley J. "can be defended on no ground whatsoever. It would be easy to name fifty members of the Bar with a better claim". And in the same decade, the appointments of Lawrance, Bruce and Darling JJ. had met with damning disapproval. (It should be noted that Victorian journalists were not slow to criticise all manner of public dignitaries—not least the Queen herself).

While one would hardly welcome a reversion either to politically motivated judicial appointments or to the robust sensationalism of the Victorian press a serious issue is at stake. Judicial anonymity can be defended up to a point and certainly the legalistic ethos hardly encourages Judges to present a more "human" face to the world. There may even be some truth in the argument that esoterism enhances respect for the law, though the converse is much more

plausible. And it seems unhealthy that lawyers in general have earned a reputation for remoteness from everyday social problems and for an unwillingness to acknowledge the existence of dirty linen, still less to allow any of it to be washed in public. (Perhaps one argument against fusing the two branches of the profession is that at least the resultant demarcation disputes bring issues to light which would otherwise remain undebated?)

Now when even Judges freely acknowledge their creative role in the development of the law, the argument that it is of no benefit to discover much about the Judges themselves ceases to have any force. We are a long way from the situation in the United States and elsewhere where different legal and constitutional philosophies have long held sway and where Judges sometimes expose themselves with gusto to sociological and psychological research projects. But the sociology of law in Britain is a major academic growth industry and it will be interesting to see how the legal profession in general, and the Judges in particular, react to increasing attempts by outsiders to probe their innermost mysteries.

At any rate it should be recognised that public knowledge of the *Justice* report creates a precedent, and one which may be a small step towards a more meaningful and less inhibited debate between professional and academic lawyers and social scientists. The system loses far more than it gains by continuing to shield the judiciary from public scrutiny, and the public can only gain from the exposure of possible defects in the system: GAVIN DREWRY in the *New Law Journal*.

COVENANTS NOT RUNNING WITH THE LAND

Austerberry v. *Oldham Corporation*, considered.

The rule in *Austerberry* v. *The Corporation of Oldham* is dealt with in *The Modern Law of Real Property*, 10th ed., by *Cheshire* at p. 535, as follows: "In *Austerberry* v. *The Corporation of Oldham* (1885), 29 Ch. D. 750, some seventy years ago, the view was expressed by two Lords Justices that the burden of a covenant made between a vendor and a purchaser does not run with the fee simple at common law."

In that case the facts were:

> A conveyed part of his land to trustees with a view to their forming it into a road, which was to pass across his own land and that of adjacent owners. The trustees for themselves, their heirs and assigns covenanted with A, his heirs and assigns that they would form this strip of land into a road and would ever afterwards keep it in repair. The road was duly made, and later A sold to the plaintiff the part of his land which ran along both sides of the road. The Corporation of Oldham then took the road over from the trustee and sought to make the plaintiff bear a share of the cost of its maintenance, but he resisted this claim on the ground that the benefit of the original covenant had passed from A to himself, and the burden of it from the trustees to the Corporation.

"It will be noticed that the plaintiff was obliged to prove two things, namely, that the benefit of the covenant had passed to him and that the burden of the covenant had passed to the Corporation. In neither case did he succeed. As regards his right to take the benefit, it was held that no such right was acquired by him, because the covenant, since it did not pointedly refer to the covenantee's land, but was meant to confer the boon of a road on the public, lacked the primary essential of being one which touched and concerned the land. Then Lindley and Fry LJJ., expressed their strong opinion that, apart from the case of landlord and tenant, the burden of a covenant can never run with the land of the covenantor at law."

The passage which I have extracted from *Cheshire* deals only with the topic of the extent to which covenants made on the occasion of a sale in fee simple run at *common law*. In subsequent pages the learned author deals with the topic of the extent to which covenants made between lessor and lessee, or between the vendor and the purchaser of a fee simple, run with the land *in equity* the doctrine of *Tulk* v. *Moxhay*.

The conditions which are necessary for the application of the equitable doctrine are thus classified by *Cheshire*:

(1) The covenant should be negative in substance. It must not be a positive one requiring the expenditure of money for its performance. Examples of negative covenants are the owner of land undertakes to use the premises for private residence only or to use the ground only as an ornamental garden. Again, a covenant to

give the first refusal of land is regarded as negative in substance, since in effect it is a promise not to sell without giving the covenantee an option to buy: *Manchester Ship Canal Co* v. *Manchester Racecourse Co.* [1902] 2 Ch. 37:

(2) It must be the common intention of the parties that the covenant shall enure for the benefit of land retained by the covenantee. Therefore, if the covenantee retains no adjacent land or owns no land capable of deriving profit from the covenant, its benefit cannot avail other persons. Equity, acting on the analogy of a *negative easement*, will not regard a restrictive covenant as other than personal, unless there is the relation of dominancy and serviency between the respective properties.

There are two further conditions required to satisfy the doctrine of *Tulk* v. *Moxhay*. First the exact land to which the parties intend to annex the benefit of the covenant must be ascertainable. Secondly, the covenant must be capable of benefiting the dominant land in the sense that it must be one which touches and concerns that land. A restrictive covenant, no less than a negative easement, must have some natural connection with the dominant tenement if it is to run with the land:

(3) An assignee of the dominant land must prove that the benefit of the covenant has passed to him. Suppose that on the sale of Whiteacre to X, a restrictive covenant has been taken from him for the protection of Blackacre still retained by the vendor, A; and suppose further that A has subsequently sold Blackacre, the dominant land, to the plaintiff. Can the plaintiff enforce the covenant against X or against an assignee of X's land? The answer is that enforcement is not a certainty merely because the dominant land has come into the hands of the plaintiff. The plaintiff must go further. He must prove not only that he has acquired the land, but also that he has acquired the benefit of the covenant itself. There are only three ways in which he can do this, namely by proving:

(a) that the benefit of the covenant has been effectively annexed to the dominant land, and that he has acquired the whole of that land, or the part of it to which the covenant was annexed; or,

(b) that the benefit of the covenant was separately and expressly assigned to him at the time of the sale; or,

(c) that both the dominant and servient lands are subject to a building scheme.

As virtually the whole of the privately owned land in New Zealand has now been brought under the Land Transfer Act it ought not to be difficult to prove (a) (b) or (c) above. See also the very wide definition of "land" in s. 2 of the Land Transfer Act. ("Land" includes messuages, tenements, hereditaments, corporeal and incorporeal, of every kind, and description, and every estate or interest therein, together with all paths, passages, ways, waters, watercourses, liberties, easements, and privileges thereunto appertaining, plantations, gardens, mines, minerals, and quarries, and all trees and timber thereon or thereunder lying or being, unless specially excepted.) See also s. 239 of the Land Transfer Act. (In any form under this Act the description of any person as proprietor, transferor, transferee, mortgagor, mortgagee, lessor, or lessee, or as trustee, or as seised of, having, or taking any estate or interest in any land, shall be deemed to include the heirs, executors, administrators, and assigns of that person). But this section does not enlarge the class of covenants which run with the land at law and in equity.

Austerberry v. *Oldham Corporation* was mentioned in *Whitham* v. *Bullock* [1939] 2 K.B. 81, 55 T.L.R. 617 (C.A.) at p. 618. "That section places the burden of a covenant on the successors in title of the covenantor only if the covenant is one of which the burden, whether at law or in equity, passes to the successors in title of the covenantor, and there can be no doubt, *this being a positive covenant*, that the burden of it does not so pass."

A recent case where *Austerberry* v. *Oldham Corporation* was referred to by all three members of the English Court of Appeal was *Jones* v. *Price* [1965] 3 W.L.R. 296 [1965] 2 All E.R. 625 (C.A.). Per Wilmer L.J. "It is clear that a right to require the owner of adjoining land to keep the boundary fence in repair is a right which the law will recognise as a quasi-easement. There is nothing, for instance, to prevent adjoining owners from making an agreement between themselves that one or other shall keep the boundary fence in repair. Such an agreement, however, binds only the parties to it, for a covenant to perform positive covenants, such as would be involved in the maintenance of a fence, is not one the burden of which runs with the land so as to bind the successors in title of the covenantors: see *Austerberry* v. *Oldham Corporation*."

But in the cases of boundary fences the New Zealand Legislature has passed special legislation to deal with this type of problem, the Fencing Act 1908 (presently the subject of review). Until the legislation was passed it was

not possible to register these agreements under the Land Transfer Act. Section 7 of the Fencing Act, so far as it is relevant, reads as follows:

> **7. Fencing covenants to run with land**—Every covenant or agreement made or entered into between owners of adjoining lands for the purpose of modifying or varying the rights and liabilities conferred or imposed on them by this Act
>
> (a) Shall run with the land, whether assigns be named therein or not; and
>
> (b) Where the land affected, or any part thereof, is subject to the Land Transfer, 1952, shall be deemed to create an interest in land within the meaning of that Act, and shall be registrable accordingly:
>
> Provided, however, that the assigns shall not be bound unless the covenant or agreement is registered.

It is apprehended, however, that registration under the Land Transfer Act does not alter the rule in *Austerberry* v. *Oldham Corporation* distinguishing the effect between negative and positive covenants.

Section 7 of the Fencing Act 1908 was referred to by the various Judges in the leading case of *Nunn* v. *McGowan* [1931] N.Z.L.R. 47, [1930] G.L.R. 501 (Full Court) but that case did not deal with this particular point.

Exceptions to the rule in *Austerberry* v. *Oldham Corporation*. There are at least two exceptions. First, it has been stated in The Solicitors Journal (19 March 1971) that the conclusion from *Crow* v. *Wood* [1970] 3 W.L.R. 516; [1970] 3 All E.R. 425 (C.A.) must be that by a properly worded conveyance the duty to fence can be created *de novo* by express grant where there has been no hint of such a duty before the date of the conveyance. Thus there is now a clear exception to the rule in *Austerberry* v. *Oldham Corporation*. Secondly, there is what has been termed the *isolated* decision in *Halsall* v. *Brizell* [1957] Ch. 169, [1957] 1 All E.R. 371.

In *Halsall* v. *Brizell* the vendors and all the purchasers of plots in a new estate had executed a separate deed, apart from their conveyances, by which *inter alia* the roads on the estate were vested in the vendors on trust for the purchasers who covenanted to contribute for repairs, i.e., a positive covenant. The successors of an original covenantor now refused to contribute. Upjohn J., having first stated that the burden of such a covenant does *not* run with land, went on to hold that:

> "the defendants here cannot, if they desire to use their house, as they do, take advantage of the trusts concerning the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations thereunder."

Halsall v. *Brizell* was followed in *Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379; [1967] 1 All E.R. 504 (C.A.) per Lord Denning M.R.:

> "When adjoining owners of land make an agreement to secure continuing rights and benefits for each of them in or over the land of the other, neither of them can take the benefit of the agreement and throw over the burden of it. This applies not only to the original parties, but also to their successors. The successor who takes the continuing benefit must take it subject to the continuing burden."

E. C. ADAMS.

OBITUARY

Mr A. G. van Asch

The death occurred at Christchurch on 27 December 1971 after a long illness of Mr Arthur Gerrit van Asch. He was educated at the Napier Boys' High School and later at Canterbury College. He was admitted as a solicitor in 1935 and later as a barrister in 1948. For many years he practised at Rangiora, North Canterbury, where he joined the old established law firm (of which his late uncle H. C. D. van Asch was an early principal) of Helmore van Asch & Walton. When that firm was dissolved he and the other Rangiora resident partners associated themselves together in the new firm of Helmore Smith van Asch & Bowron from which he retired in June 1971. During World War II he was commissioned and served with the New Zealand Division in Italy where he was wounded at the Battle of Cassino. He made a name for himself in the field of farming law to which he devoted most of his professional life. Mr van Asch was a past president of the Rangiora Lions Club and gave valuable service to the Rangiora Businessmen's Association; but he will best be remembered for his many years of work (with which his wife, Mrs Cynthia van Asch, fully associated herself) for intellectually handicapped children. He was a Trustee of the N.Z. Trust Board for Home Schools for Curative Education and was one of those who helped to establish the Hohepa Home at Cashmere. He is survived by his wife and four daughters.