The New Zealand
LAW JOURNAL

23 MAY 1972 No. 9

# DUTY SOLICITORS

The case of the 16 year old who found himself in the Children's Court at Nelson without counsel, notwithstanding his wish to plead not guilty and have the benefit of a full defence to a serious charge, has ramifications far beyond its own particular facts.

Dr O. R. Sutherland, Secretary of the Nelson Maori Committee, fortuitously learned of the boy's plight, arranged last-minute representation and the charge was dismissed after the defence had produced not only six witnesses but also the person who actually did commit the offence in question. The profession is indebted to Dr Sutherland for taking the matter up with the Minister of Justice, Sir Roy Jack, and for ascertaining the clear concession that, in Sir Roy's own words, "There is no direct responsibility resting on the Magistrate, the Police or a Child Welfare Officer to obtain legal representation for persons appearing before Children's Courts"—although in trying to explain the situation away, Sir Roy reveals a surprising lack of appreciation not only of day-to-day realities but also of the whole basis on which our laws of evidence rest.

In a statement Sir Roy also claimed that "Children's Courts are conducted on a less formal basis than Magistrate's Courts and this often enables the Magistrate, even where the defendant is unrepresented, to obtain a fuller appreciation of the circumstances than would otherwise be possible if he were subject to the more stringent rules of procedure of a Magistrate's Court."

It should hardly need repeating that the laws of evidence exist to exclude unsatisfactory, unsafe, and unreliable evidence; *not* to impede the Court in its fact-finding endeavours.

Dr Sutherland claims Sir Roy has said the onus is on a child to arrange his own defence.

The problem of which Dr Sutherland has complained is clearly at its most acute in Children's Courts, where the very great majority appear without the benefit of legal advice or representation. It is highlighted by the Nelson case, where the boy concerned has claimed that he was actually urged by a Child Welfare Officer to admit the allegation made against him. But the problem is a very much wider one.

Every day, as the profession well knows, defendants plead guilty to offences which they did not commit. This can happen for any of a number of reasons—lack of knowledge, lack of money, lack of education, a feeling that the charge is a minor one and that the loss of wages entailed (and thereby the possible loss of job) does not warrant disputing the facts alleged. The forgetful housewife, pleading guilty to shoplifting, explains "I took it without paying, didn't I?"

The problem of the innocent who plead guilty, or who are convicted after defending charges in person (and a disproportionate number are), is a real one, and it should be taken seriously by any society which cares for the well-being of its individual members. It is also a real one for any system of justice if it is to live up to pretensions of all men being equal before the law.

There is a simple solution, and it was recently proposed for England and Wales by a Committee of *Justice*, the British branch of the International Commission of Jurists, chaired by Mr Alec Samuels. It has also been advanced here, by the Labour parliamentary candidate for Miramar, Dr Brian Edwards. It has successfully operated for years in Scotland.

The scheme would see a "duty solicitor" appointed for each criminal and traffic court day. It would be his duty to make contact with or be available to at least every defendant who

faced a charge carrying with it the theoretical possibility of imprisonment. If the defendant already had a solicitor, the matter would end there. If he had not, the duty solicitor would advise him on such matters as legal aid, plea, remand and bail, and would, where necessary, appear to ask for legal aid, remands, adjournments and bail. The duty solicitor would also where appropriate make submissions in mitigation of penalty, and would be available in Court throughout the day to assist the Bench.

This does not envisage the appointment of a full-time duty solicitor, but sees private practitioners of requisite experience serving on a roster basis and paid a full fee by the Justice Department.

The cost incurred would be but a fraction of the fines levied on each police court day; the gains would be enormous, including, as they would, the restoration of a degree of public confidence in a criminal legal system. Confidence which is being steadily eroded by an abysmally inadequate "Offenders" legal aid scheme.

JEREMY POPE.

# SUMMARY OF RECENT LAW

## BANKRUPTCY AND INSOLVENCY—OFFENCES

*Undischarged bankrupt obtaining credit for more than $40 without disclosing status—Offence deemed to be a crime under the Bankruptcy Act 1908 but an offence under the Insolvency Act 1967—Offence committed before repeal of 1908 Act but information laid after repeal—Bankruptcy Act 1908, s. 138—Insolvency Act 1967, ss. 128, 171 (2). Statutes—Repeal—Effect—Offence committed before Act was repealed—Information laid after repeal—Indictment quashed—New act manifested that a different construction was intended—Acts Interpretation Act 1924 s. 20 (g) (h).* The appellant was charged with three offences under s. 138 (1) (v) of the Bankruptcy Act 1908. The three offences were alleged to have been committed respectively the first in December 1967, the second between June 1968 and April 1969 and the third between the 15 August 1967 and the 3 September 1967. The Insolvency Act 1967 came into force on 1 January 1971. Section 171 (1) of that Act repealed the Bankruptcy Act 1908. The informations were not laid until August 1971. Under s. 138 of the Bankruptcy Act 1908 an undischarged bankrupt was deemed to have committed a crime if he obtained credit for $40 or more from any person without informing such person that he was an undischarged bankrupt. Under s. 128 of the Insolvency Act 1967 an undischarged bankrupt commits an offence if he obtains credit to the extent of $100 or more unless he proves that before obtaining credit he informed the person giving him credit that he was an undischarged bankrupt. The appellant applied to quash the indictment on the ground that in none of the three charges appearing therein did it "state in substance a crime". *Held*, 1. Since the proceedings had not been commenced before 1 January 1971 neither the provisions of s. 171 (2) of the Insolvency Act 1967 nor the provisions of s. 20 (g) of the Acts Interpretation Act 1924 applied. 2. The new approach to questions of bankruptcy and insolvency demonstrates in the Insolvency Act 1967 and particularly in s. 128 (g) (i) "manifested that a different construction was intended" so that the indictment was not saved by the provisions of s. 20 (h) of the Acts Interpretation Act 1924. *Mackay* v. *The Queen* (Supreme Court. Hamilton. 2 December 1971. Moller J.).

## BROADCASTING AUTHORITY ACT 1968—CONDITIONAL GRANT OF WARRANT

*Condition requiring successful applicant to purchase or lease existing N.Z.B.C. station and if fulfilled N.Z.B.C. to lose existing warrant—If applicant unwilling to negotiate with N.Z.B.C. grant lapsed—If N.Z.B.C. refused to negotiate grant took effect—Jurisdiction to make grant—Broadcasting Authority Act 1968, ss. 9 (1) (2), 20, 27, 28.* The plaintiff sought a writ of prohibition and *certiorari* in respect of a decision of the New Zealand Broadcasting Authority granting a sound radio warrant for a private commercial broadcasting station to the second defendants "Avon". The plaintiff after opposition by the second and third defendants had been granted leave to appear on the ground that it had been carrying on negotiations with the fourth defendant for the purchase or leasing of the latter's broadcsating station 3ZM. The grant of a warrant to Avon was conditional and in essence was that Avon got a warrant if it purchased or leased station 3ZM in which case N.Z.B.C. the fourth defendant would lose its existing warrant. If Avon would not negotiate or would not accept reasonable terms for the acquisition of station 3ZM Avon would not get a warrant and if N.Z.B.C. would not negotiate then Avon would get a warrant. It was contended that the grant was in excess of the jurisdiction of the Authority. *Held*, Although the decision contained a strong element of persuasion on both Avon and N.Z.B.C. the conditions did not oblige either of them to do anything and the decision was within the Authority's jurisdiction. *Commercial Broadcasting Services Limited* v. *New Zealand Broadcasting Authority and Others* (Supreme Court (Administrative Division). Christchurch. 22, 30 November 1971. Wild C.J.).

## BROADCASTING AUTHORITY ACT 1968—MATTERS WHICH AUTHORITY MAY TAKE INTO ACCOUNT IN GRANTING A LICENCE

*Rearranging of control of stations taken into account—Wrongful exercise of Authority's discretion—Broadcasting Authority Act 1968, ss. 9 (1) (a), 10, 20 (9), 21, 28, 30. Practice—Appeals to Supreme Court—From Tribunals Commissions—Appeal from Broadcasting Authority's decision—Admission of further evidence of fact on appeal—Court's power to reverse a decision made in exercise of a discretion—Broadcasting Authority Act 1968, s. 23 (7) (8).* This was an appeal by the N.Z.B.C. against the Broadcasting Authority's decision to grant a sound radio warrant for a private commercial broadcasting station to Avon upon conditions. The conditions imposed are to be found in *Commercial Broadcasting Services Ltd.* v. *N.Z.B.C. and Others.* This case considers the scope of the Authority's functions under the Broad-

casting Authority Act 1968. *Held*, 1. The Court's discretion to receive further evidence in questions of fact on appeal under s. 23 (8) of the Broadcasting Authority Act 1968 is exercisable in accordance with practice established in respect of s. 230 (6) of the Sale of Liquor Act 1962. (*Clark* v. *Licensing Control Commission* [1971] N.Z.L.R. 678, 679-680, referred to.) 2. In reviewing a decision made by the Authority in exercise of its discretion the Court may not merely substitute its own opinion for that of the Authority. The Court may only reverse the Authority's decision if there has been a wrongful exercise by the Authority of its discretion. (*N.Z.B.C.* v. *Independent Broadcasting Co. Ltd.* (unreported, Wellington, 24 July 1970), followed.) 3. In determining an application for a grant of a warrant the desirability of rearranging the control of stations in the area is not among the list of matters to be taken into consideration as provided by s. 21 of the Broadcasting Authority Act 1968. 4. In seeking to grant a warrant to Avon by taking away a warrant from N.Z.B.C. the Authority had exercised its discretion on a wrong principle. 5. Any advantage that the Authority may consider a private station might have in the circumstances of any case should properly be considered under the provisions of s. 21. Appeal allowed. *New Zealand Broadcasting Corporation* v. *Stewart and Others* (*Avon Broadcasting Company Limited*) (Supreme Court (Administrative Division). Wellington. 23, 30 November 1971. Wild C.J.).

## COMPANIES—COMPANIES UNDER THE COMPANIES ACT

*Regulation and management—Under articles of association—Provision for distribuion of surplus assets pro rata on nominal value of shares—Holders of parcels of shares right to occupy specific areas in building—Some areas more valuable than others—Shares purchased above par for such areas—"Oppression" of minority—Companies Act 1955, s. 209.* Empire Building Ltd., incorporated in 1954, was the owner of premises on the site of the former Empire Hotel in Wellington. The capital of the company was $300,000 divided into 30,000 shares of $10 each and it carried on the business of a land owning company. Originally the entire shareholding was held by New Zealand Breweries, which divided the building into offices and sold off the greater portion of the shares at varying prices. The petitioners were minority shareholders. The shares were divided into classes designated by the letters A to E. The lettering ran from A on the third floor to E in the basement. On each floor one share was calculated on the basis of one square foot of accommodation, so that the registered holder of a parcel of shares was entitled to occupy space corresponding to his holding on a particular floor. Article 121 provided that on a winding up, if there were to a be surplus, the excess should be distributed pro rata among the shareholders in accordance with their respective holdings of paid up share capital. Likewise if there were to be a deficit it would be borne pro rata among the shareholders on the same basis. The cause of the dispute was that accommodation on the different floors differed in value and that article 121 took no cognisance of this factor. For example a basement shareholder purchased his shares at half par value, whereas the petitioners on the ground floor had purchased their shares at more than five times par value. Article 20 provided that the rights of occupation would determine on 14 days' notice in certain events, including, *inter alia*, the passing of a special resolution resolving that the undertaking be sold. Offers for purchase of the building had been made, and in conjunction with such offers it had been proposed to alter article 121, but the offers were all rejected by the shareholders. In October 1970 the Wellington City Corporation informed the directors that it favoured amalgamation in the central city area to facilitate redevelopment and that it would be reluctant to exercise its powers and hoped that a private sale would be negotiated. In March 1971 the shareholders passed a resolution to accept an offer of purchase and article 121 was not amended. In June 1971 the shareholders were advised that if any of them were to vacate his suite forthwith he would obtain an advance payment on account of his share of the purchase price. The petitioners submitted that the affairs of the company had been and were being conducted in a manner oppressive to them pursuant to s. 209 of the Companies Act 1955. *Held*, 1. "Oppression" in its context means lack of confidence springing from an oppression of a minority exerted by those in control of the management of the company's affairs. (*Elder* v. *Elder & Watson Ltd.* [1952] S.C. 49, 60 and *Re Associated Tool Industries Ltd.* [1964] A.L.R. 73, 82, applied.) 2. The mere use of voting power at board meetings or in general meeting to secure the passing of a resolution which other members oppose does not in general constitute oppression and to succeed under s. 209 it must be shown that there has been real oppression. (*H. R. Harmer Ltd.* [1959] 1 W.L.R. 62, 87; [1958] 3 All E.R. 689, 706, applied.) 3. "Oppression" occurs when shareholders having a dominant power in a company either use that power to procure that something is done or not done, or, procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs where such conduct is unfair or burdensome, harsh and wrongful to the other members or some of them. (*Re Jermyn Street Turkish Baths Ltd.* [1971] 1 W.L.R. 1042, 1059; [1971] 3 All E.R. 184; 199 applied.) 4. There was not an abuse of rights by insisting upon the fulfilment of the original terms of the articles of association. *Re Empire Building Limited* (Supreme Court. Wellington. 8, 9, 10 November; 14 December 1971. Haslam J.).

## COPYRIGHT—FAIR DEALING

*Literary, dramatic and musical works—Fair dealing for purposes of criticism or review—Scope of defence—Not limited to criticism of literary style—Defence extending to criticism of doctrine or philosophy expounded in work—Work not published to world at large—Defence available where unpublished work has had wide circulation—Copyright Act 1956, s. 6 (2). Equity—Confidence—Breach of confidence—Defence—Public interest in publication—Scientology—Courses of instruction in cult of Scientology—Undertaking not to impart information acquired on course—Courses containing material of such a nature that desirable in public interest that information should be made public. Injunction—Interlocutory—Principle governing grant—Copyright—Claim for infringement—Defence of fair dealing—Plaintiff having arguable case not sufficient to justify grant where defence of fair dealing raised.* H. was the founder of the Church of Scientology of California and was the author of a number of books which expounded the doctrines of the cult of Scientology. He had also written numerous bulletins and letters on the subject which had been circulated to members of the cult. V., who had been a member of the Church of Scientology for many years, enrolled for an advanced course on Scientology which the cult's authorities regarded as confidential. They required V. to sign an undertaking (a) to use the knowledge acquired on the course for Scientology purposes only, and (b) to refrain from divulging information

received to those not entitled to receive it. V. did not, however, complete the course. He became disillusioned with Scientology. The cult's authorities thought that he was actively seeking to suppress or damage Scientology, and so, in accordance with the cult's practice, they declared him to be a "suppressive person" and to be in a condition of "enemy". The effect of this was that in the eyes of Scientologists V. had no right to "self, possessions or position" and any Scientologist could take any action against him with impunity. V. left the organisation and wrote a book about Scientology, which was stated on the jacket to be "The first ever investigation into the cult of Scientology by an ex-Scientilogist of 14 years' service". The book was highly critical of Scientology and contained many extracts from the books and other writings of H. H. and the Church of Scientology brought an action against V. claiming infringement of copyright and breach of confidence and sought an interlocutory injunction restraining publication. *Held*, The plaintiffs were not entitled to an interlocutory injunction for the following reasons: (i) V. had shown that he might have a good defence of "fair dealing" under s. 6 (2) of the Copyright Act 1956; whether the use of extensive quotations from H's works constituted "fair dealing" was a question to be decided by the tribunal of fact, and there was material on which the tribunal of fact could find that there was "fair dealing"; further the defence of fair dealing covered criticism not only of a plaintiff's literary style but also of the doctrine or philosophy expounded in his works and extended not only to those of the plaintiff's works which had been published to the world at large but also to those which had been so widely circulated that it would be fair to subject them to public criticism, *dictum* of Romer J. in *British Oxygen Co. Ltd.* v. *Liquid Air Ltd.* [1925] Ch. at 393, disapproved; (ii) Although V. may have made use of information which he knew that the plaintiffs claimed to be confidential, there were, nevertheless, grounds for thinking that the courses of the Church of Scientology contained such dangerous material that it was in the public interest that it should be made known; furthermore (per Megaw L.J.) there was evidence that the plaintiffs had been protecting their secrets by deplorable means, such as was evidenced by their code of ethics, and therefore did not come to the Court with clean hands in seeking to protect those secrets by the equitable remedy of an injunction, *dictum* of Lord Denning M.R. in *Fraser* v. *Evans* [1969] 1 All E.R. at 11, applied; (iii) The defences raised by V. to the claims for breach of copyright and breach of confidence were such that V. should be permitted to go ahead with publication; to justify the grant of an interlocutory injunction it was not sufficient that, having established a strong *prima facie* case that he owned the copyright, a plaintiff need only show that he had an arguable case that the defendant had infringed it or was about to infringe it; each case was to be decided on a basis of fairness, justice and common sense in relation to the whole of the issues of fact and law relevant to the particular case; V. had reasonable defences to the plaintiff's claims; if those defences were valid he was entitled to publish his book and the law would not intervene to suppress freedom of speech except where it was abused, *Donmar Productions Ltd* v. *Bart* [1967] 2 All E.R. 338 and *Harman Pictures NV* v. *Osborne* [1967] 2 All E.R. 324, disapproved. Per Megaw L.J. The fact that a quotation contains every single word of the work criticised or reviewed does not necessarily preclude a defendant from relying on the defence of fair dealing under s. 6 (2) of the Copyright Act 1956. *Hubbard* v. *Vosper* [1972] 1 All E.R. 1023 (C.A.)

**CRIMINAL LAW—SENTENCE**

*Evidence of other similar offences—Plea of guilty to charge in respect of single incident—Evidence of other similar incidents forming course of conduct—Incest—Admission of single act of incest with daughter—Allegations by daughter of regular intercourse over long period—Denial of other acts of incest by accused—Judge hearing evidence of accused and daughter before passing sentence—Judge not believing accused and sentencing him on basis that incest committed by accused as regular course of conduct—Effect to deprive accused of right to trial by jury—Propriety of course followed by Judge.* The appellant pleaded guilty to a single count of incest with his daughter, who was under 16 at the time. He claimed that only one act of intercourse had taken place, but in her depositions the daughter had stated that there had been regular intercourse over a long period. The Judge formed the view that he could not sentence the appellant until he had decided which version was correct, so he adjourned the case to hear evidence both from the appellant and his daughter, the complainant. After hearing that evidence, the Judge decided that the appellant was not to be believed, and sentenced him to four years' imprisonment on the basis that the incest committed by the appellant had taken place as a regular course of conduct. On appeal. *Held*, The course followed by the trial Judge had been wrong, for if he thought that he could not do justice in the case by adopting the appellant's admission of one incident and one incident only he ought either to have allowed the prosecution to prefer a voluntary bill charging the other instances as stated by the daughter, or to have allowed the indictment to be amended and then dealt with the whole matter at a later date; accordingly, as the appellant had in effect been deprived of his right to trial by jury in respect of the other alleged offences, the Court would allow the appeal to the extent that the sentence would be reduced to one of two years' imprisonment. *R.* v. *Huchison* [1972] 1 All E.R. 936.

**DEFAMATION—MEANING OF THE STATEMENT**

*Words used in their ordinary sense—Words used extravagantly not conveying imputation upon character—Pleading practice and evidence—New trial—Verdict against weight of evidence—Strong grounds required before new trial ordered. Practice—New trial—Defamation—Verdict against weight of evidence—Strong grounds required before new trial ordered.* These were two identical motions for a new trial upon the sole ground that the verdicts in the libel actions, which were tried together by consent, were against the weight of evidence. The alleged libels were contained in newspaper articles concerning a dispute which arose at the Batavian Rubber Company, Featherston, concerning wages and a subsequent protest march by the workers through Featherston. The march was conducted in an orderly manner after the requisite permissions had been obtained for the holding thereof. The words alleged to have been used with reference to the plaintiffs were "Hitler's Fascist people" or "Hitler's puppets". The plaintiffs relied on the ordinary and natural meaning of the words used without recourse to innuendo. *Held*, 1. The Court in an action of defamation will only grant a new trial on the ground that the verdict is against the weight of evidence if there are very strong grounds. (*Metropolitan Railway Co.* v. *Wright* (1886) 11 A.C. 152, 156; *Mechanical & General Investments Co. Ltd. and Lehwess* v. *Austin and Austin Motor Co. Ltd.* [1935] A.C. 346, 375; *Broome* v. *Agar* (1928) 138 L.T. 698, 702 and *Massey* v. *New Zealand Times Co. Ltd.* (1911) 30 N.Z.L.R. 929, 951, applied.) 2. If the result of a new trial would clearly be an award of merely

nominal damages no new trial would be ordered. (*Doyle* v. *McIntosh; Mutch* v. *McIntosh* (1917) 17 (S.R.) N.S.W. 402, followed.) 3. Where words are obviously incapable of any but a defamatory meaning and there is no doubt that they were published of the plaintiff, the Court will set aside the verdict for the defendant as perverse and unreasonable. (*Kelly* v. *Daily Telegraph Newspaper Co.* (1897) 18 N.S.W.L.R. 358; *Doyle* v. *McIntosh* (supra); *Ryan* v. *Ross* (1916) 22 C.L.R. 1 and *McInerney* v. *Clareman Printing and Publishing Co.* [1903] 2 I.R. 347. 4. People not infrequently use and are understood to use words, not in their natural sense, but extravagantly in a manner which would be understood by those who hear or read them as not conveying the grave imputation suggested by a mere consideration of the words themselves. Whether the words in any particular case are used and would be understood as being used for the purpose of conveying an imputation upon character must be a question for the jury to decide. (*Australian Newspaper Co. Ltd.* v. *Bennett* [1894] A.C. 284, 287, applied.) The motions were dismissed. *Gwynne and Small* v. *Wairarapa Times-Age Company Limited* (Supreme Court. Masterton. 9, 10, 11 August; 28 September; 17 December 1971. Roper J.).

## INCOME TAX—INCOME TAX PAYABLE

*Assessable income—General—Sale of goodwill and lease of motel business—Grant of lease by vendor—Vendor assessable for purchase price for goodwill and lease—Land and Income Tax Act 1954, s. 88 (1) (d).* The objector had operated motels since 1961 and was the owner of the land upon which they were built. In July 1966 by an agreement for sale and purchase the objector sold the goodwill and lease and the furniture and fittings of the motels. The objector granted a lease for the motels at a rental of £10,000 per annum for five years with a right of renewal for a further five years. The agreement in cl. 1 provided that the purchaser should purchase the goodwill and lease for £5,000. The furniture and fittings were sold for £12,000 and the objector agreed to repurchase the same at a valuation at the end of the lease provided the purchaser had maintained the quality of the furniture and fittings. The objector in its income returns for the year ended 31 March 1965 did not show the £5,000 received under cl. 1 as part of its income. The Commissioner subsequently issued an amended assessment to include the £5,000 as income. *Held*, 1. The right of occupancy which was contained in the lease was the thing for which the goodwill was paid since the licence to run the motel was restricted to the property leased and to the specialised type of buildings erected thereon. 2. The payment of the £5,000 was caught by s. 88 (1) (d) either on the basis that it was for the lease or for the goodwill or partly for the one and partly for the other. *Romanos Motels Limited* v. *Commissioner of Inland Revenue* (Supreme Court. Wellington. 16 November; 10 December 1971. Quilliam J.).

## INTOXICATING LIQUORS—APPLICATION FOR NEW LICENCES

*Application on behalf of local trust—Approval of application within 6 months of election of trust members—Different site plan submitted after 6 months expired—Commission power to extend time—Local Licensing Trus Regulations 1966, Reg. 4 (1), (2). Time—Extension of time—Statutory power to extend time—Application for extension after time expired—Further extension of time—Local Licensing Trust Regulations 1966, Reg. 4 (2).* In June 1969 the Wellington City Council applied on behalf of a local trust to be formed for an authorisation for an hotel licence and a tavern licence on specified sites, and submitted plans. The Licensing Control Commission granted the authorisation on 12 September 1969. On 12 March 1970 the result of the poll for the election of the members of the local trust was declared. On 26 June 1970 the secretary of the local trust wrote to the secretary of the Commission confirming that the trust intended to proceed with the original plans for the erection of the tavern in Johnsonville "on the Broderick Road site plus an adjoining area of land". The secretary of the Commission interpreted this letter as a notice in writing approving of the proposed site and plan for the purpose of Reg. 4 (1) of the Local Licensing Trust Regulations 1969. In fact the site mentioned in the letter of 26 June 1970 was not the site approved on 12 September 1969. Under Reg. 4 (2) if a local trust wishes to submit a further plan in amendment of or in substitution for the plan originally submitted it shall within six months after the election of the first members of the trust or "within such further period as the Commission may from time to time allow" submit particulars to the Commission for approval. On 26 April 1971 the trust submitted to the Commission an amended site plan. The Commission stated a case for the opinion of the Supreme Court asking (a) whether the Commission had power to extend the period of six months after that period had expired, and (b) if so had it power to extend an extended period of time after that extended period of time had expired. *Held*, 1. There are at least three classes of legislative provisions which require an act to be done within a stated period but which also authorise the extension of that period, namely: (a) A provision that allows an application for extension of time to be made only within the period fixed for the doing of the Act or within a stated time thereafter, (b) A provision that provides expressly that an application for extension may be made after the expiration of the time allowed for the doing of the Act. (c) A provision that is silent on the question whether an extension of time may be made after the expiration of the initial time. 2. The Court will not exercise a general procedural power to extend time where the effect would be to revive a right which has expired. (*Commercial Agency Ltd.* v. *Adams* (1901) 19 N.Z.L.R. 578 and *Re Gorham's Charity Gift* [1939] Ch. 410; [1939] 1 All E.R. 600, referred to.) 3. Reg. 4 (2) of the Local Licensing Trust Regulations 1966 is procedural in character. No limit of time is given within which the time may be extended. The failure to act within the initial period did not result in anything already done being nullified nor did it adversely affect any other party. The Commission on application could extend the time after the expiration of the initial period. (*Lord* v. *Lee* (1868) L.R. 3 Q.B. 404, referred to.) 4. Similarly the Commission could on application extend the time after the expiration of the extended period. *Johnsonville Licensing Trust* v. *Johnsonville Gospel Hall Trust Board and Others* (Supreme Court (Administrative Division) Wellington. 9, 15 December 1971. Wild C.J.).

## MASTER AND SERVANT—INDUSTRIAL INJURIES AND WORKMEN'S COMPENSATION

*Declaration of liability and suspensory award—Judgment though not sealed bar to common law claim for damages—Workers' Compensation Act 1956, s. 124 (4). Practice—Judgment and Orders—Judgment—Judgment of Compensation Court delivered but not sealed a judgment within meaning of Workers' Compensation Act 1956, 124 (4).* The defendant employer had paid weekly compensation to the plaintiff worker for some months in respect of an injury and then ceased payments. In

March 1969 the plaintiff issued a writ in the Compensation Court for weekly payments of compensation from the date of stoppage until judgment or until he was fit to work and a declaration that he was entitled to future payments of compensation and judgment for a lump sum payment if at the time of hearing the plaintiff desired. The matter came before A. P. Blair J. who delivered what was headed "a judgment" in which he said there would be judgment for the plaintiff for the amount of weekly payments of compensation from the date of stoppage until resumption and pursuant to s. 54 of the Workers' Compensation Act 1956 and because of a pending operation made a declaration of liability for the purposes of the plaintiff's final compensation. The defendant complied with the judgment and paid weekly compensation although there remained to assess the permanent disability of the plaintiff. A formal judgment had not been sealed by the Registrar of the Compensation Court. The plaintiff on 13 February 1970 issued a writ in the Supreme Court for damages in respect of the same injury and alleging negligence and breach of statutory duty on the part of the defendant. The defendant pleaded that the plaintiff having recovered judgment for compensation and the judgment having been satisfied, he was barred from bringing the action by virtue of s. 124 (4) of the Workers' Compensation Act 1956. *Held*, 1. Recovery of a judgment in the Compensation Court for compensation becomes a bar to a claim for damages in respect of the same accident by virtue of the provisions of s. 124 (4) of the Workers' Compensation Act 1956. (*Bowley* v. *W. Booth & Co. Ltd.* [1948] N.Z.L.R. 77; *Westport-Stockton Coal Co. Ltd.* v. *Watterson* [1918] N.Z.L.R. 177; *Speed* v. *Horne* [1944] N.Z.L.R. 678 and *Logie* v. *Union Steam Ship Co. of N.Z. Ltd.* [1945] N.Z.L.R. 388, considered.) 2. Rule 187 of the Compensation Court Rules 1959 postulates the existence of a judgment which has been given by a Judge prior to the procedural steps contained therein. (*Westfield Freezing Co. Ltd.* v. *Steel Construction Co. Ltd.* [1968] N.Z.L.R. 680, 687, applied.) 3. The pronouncement of Blair J. Was a "judgment" of the Compensation Court. 4. The plaintiff was precluded by s. 124 (4) of the Workers' Compensation Act 1956 from maintaining an action for damages in the Supreme Court. *Stewart* v. *John R. Hunter Limited* (Supreme Court. Hamilton. 9, 29 November 1971. Perry J.).

## NEGLIGENCE—IN REGARD TO PROPERTY

*Liability of owner of land in respect of damage to adjacent land where no grant of right of support exists—Excavation on boundary without reasonable care—Collapse of adjacent land. Courts—Effect of decision in matters of law—Court of Appeal technically not bound by decision of House of Lords.* The appellant, the owner of a service station, had unsuccessfully sued the defendant for damaging the wall of his srevice station by excavating alongside the boundary on the adjoining property. It was contended the excavation had been done negligently causing the appellant's land to collapse. The evidence showed that the appellant's land would not have collapsed except for the pressure of the wall. As the appellant had no easement of lateral right of support Quilliam J. held himself bound by the decision in *Dalton v Angus* (1881) 6 A.C. 740 that as the appellant has no right of support no action would lie and that in order to found a successful claim for negligence there had to be a breach of duty by the respondent and as the respondent owed no duty to the appellant this claim also failed. In both Courts the position of the respondent as a contractor was treated as though the contractor were in the same position as the adjoining owner. *Held*, 1. The decision in *Dalton* v. *Angus* was founded upon the acquisition by prescription of a lateral right of support for a building from the adjoining land. No right can now be acquired by prescription in New Zealand under the Land Transfer Acts. (*Dalton* v. *Angus* (1881) 6 A.C. 740, not followed.) 2. In cases where negligence is alleged it is no longer necessary to ask whether the case is covered by authority but only whether recognised principles apply to it. (*Dorset Yacht Co. Ltd.* v. *Home Office* [1970] A.C. 1004, 1026; [1970] 2 All E.R. 294, 297, applied.) 3. The principle *sic utere tuo ut alienum non laedas* applies to adjoining neighbours by virtue of the principle laid down by Lord Atkins in *Donoghue* v. *Stevenson* [1932] A.C. 562, 580. 4. The respondent owed a duty to exercise reasonable care for the protection of the appellant's wall as he proceeded to exercise his property right to excavate the soil adjacent to the building. (*Walker* v. *Strosnider* (1910) 67 S.E. Rep. 1087, 1090, adopted.) 5. The decisions of the House of Lords are entitled to the greatest respect but technically the New Zealand Court is not bound by those decisions. *Bognuda* v. *Upton and Shearer Limited* (Court of Appeal. Wellington. 22, 23 September; 16 December 1971. North P. Turner and Woodhouse JJ.).

## ROAD TRAFFIC—DANGEROUS DRIVING

*Causing death by dangerous driving—Evidence of alcohol consumed by driver—Admissibility—Evidence of blood-alcohol concentration exceeding prescribed limit under the Road Safety Act 1967—Road Traffic Act 1960, s. 1.* The appellant was charged on two counts of an indictment with (1) Causing death by dangerous driving contrary to s. 1 of the Road Traffic Act 1960, and (2) Driving with a blood-alcohol proportion exceeding the prescribed limit contrary to s. 1 (1) of the Road Safety Act 1967. He pleaded guilty to count 2 and not guilty to count 1. At this trial the Judge ruled that the appellant's plea of guilty on count 2 and the alleged proportion of alcohol in his blood (130 milligrammes per 100 millilitres) could be disclosed to the jury. There was evidence from which the jury could have inferred that the car was being driven at an excessive speed at the relevant time. He was convicted on count 1 and appealed on the ground that the alleged proportion of alcohol in his blood should not have been disclosed. *Held*, Evidence that a driver charged with causing death by dangerous driving had, prior to the accident, been drinking was admissible provided that it went far enough to show that the quantity of alcohol consumed was such that it might adversely affect a person driving; proof that the alcohol content of the blood of a person driving exceeded 80 milligrammes per 100 millilitres (the prescribed limit) was sufficient to show that the quantity of alcohol consumed was such that it might adversely affect a person driving, and was therefore admissible, whether or not, in the case of a particular person driving, the quantity of alcohol might or might not have affected him. Accordingly the evidence had been properly admitted and the appeal would be dismissed. *R.* v. *McBride* [1961] 3 All E.R. 6, applied, *R.* v. *Thorpe* [1972] 1 All E.R. 929 (C.A.).

## SPECIFIC PERFORMANCE—CONTRACT TO EXECUTE SERVICE AGREEMENT

*Service agreement not specifically enforceable—Contract containing provision requiring defendants to appoint third party managing director of company for five years—Contract requiring only the performance of single act, i.e. execution of service agreement—Contract specifically*

*enforceable—Immaterial that service agreement as a contract for personal services not specifically enforceable.* By a contract dated 6 November 1970, I.P. Ltd., a firm of insurance brokers, whose shares were all owned by the defendants, agreed with G. and G.'s company, G. Ltd. (the plaintiffs) to adopt new articles of association, to reorganise its share capital and to sell certain shares to the plaintiff company. The contract contained a variety of other provisions, one of which was that the defendants would procure that G. should be appointed by a service agreement as managing director of I.P. Ltd. for five years. Completion of the contract did not take place owing to disagreement among the defendants and on 22 June 1971 the plaintiff company issued a writ claiming specific performance of the contract. The application was heard before a master on 8 September when all the defendants, after taking legal advice, consented to the master making an order for specific performance by 4 October. The order was for the defendants to procure, *inter alia*, the execution by I.P. Ltd. of the service agreement with G. The board of I.P. Ltd. met on 4 October but refused to appoint G. as managing director on the ground that he had not appropriate insurance experience. By a motion the plaintiffs sought committal of three of the nine personal defendants who had refused to take the necessary steps to procure G.'s appointment as managing director in accordance with the consent order, and for leave to sue out a writ of sequestration in respect of the tenth defendant, a limited company. It was contended on behalf of the defendants that they had been wrongly advised to give their consent to the order of 8 September and that the Court should not use the remedies of committal and sequestration to secure the appointment of G. to a position under a service agreement from which he would be promptly excluded in breach of contract, thus giving rise to a claim for damages. *Held*, The defendants were in contempt of Court for their disobedience to the order for specific performance of 8 September and there was no defence to the plaintiffs' motion. Although the Court would not usually decree specific performance of a contract for personal services, all that the decree required in the present case was the procuring of a single act, i.e. the execution of the service agreement. The mere fact that the contract to be made was one of which the Court would not decree specific performance was not a ground for refusing to decree that the contract be entered into. Furthermore the obligation to enter into a service agreement was merely one part of a contract that dealt with many other matters; it did not follow that, because a contract contained one provision which by itself would not be specifically enforceable, the contract as a whole could not be specifically enforced. Per Megarry J. It should not be assumed that as soon as any element of personal service or continuous services can be discerned in a contract the Court will, without more, refuse specific performance. *C. H. Giles & Co. Ltd.* v. *Morris* [1972] 1 All E.R. 960.

## TOWN AND COUNTRY PLANNING—DISTRICT SCHEME

*Objections to district scheme—Split zoning of property—Appeal to Town and Country Planning Appeal Board—No statutory presumption in favour of Council's planning policies on proposed zoning—Town and Country Planning Act 1953, ss. 40, 42.* The plaintiffs the trustees of the Wellington Club, sought a writ of *certiorari* to quash a decision of the Special Town and Country Planning Appeal Board relating to the Club's property situated on The Terrace. The second defendants had zoned the property as to the portion fronting The Terrace for office purposes and the balance of the property as residential C. The greater part of the land zoned residential was designated as a proposed motorway. The plaintiffs sought to quash the split zoning of the Club property. *Held*, 1, The jurisdiction of the Appeal Board on an appeal is outlined in ss. 40 and 42 of the Town and Country Planning Act 1953 and clearly contemplates a hearing *de novo*. 2. There is no statutory presumption in favour of either the policies or the announced planning or the detailed zoning or the subsequent decisions upon objections of a council during the progress of its proposed district scheme towards the point at which it will become operative. (*Straven Services Ltd.* v. *Waimairi County* [1966] N.Z.L.R. 996, considered.) 3. Different considerations may well apply to a belated attempt to upset a broad zoning proposal already approved by a Town Planning Appeal Board in earlier appeals. 4. An appeal relating to the application of an operative scheme will involve a different approach. 5. The Appeal Board had in fact heard and determined the issue on the basis that the onus was on the plaintiffs to show that notwithstanding the Council's policy, the zoning for office purposes should extend to the whole of the Club's land. 6. The appeal Board had regarded the Council's policy statement as a matter of almost decisive importance and other matters regarded by the parties as the essential subject-matter of the argument were subordinated to that particular issue. An order was made for the issue of a writ of *certiorari*. *Wellington Club Incorporated* v. *Carson, Wellington City and Others* (Supreme Court (Administrative Division). Wellington. 2, 3, 22 December 1971. Woodhouse J.).

## TRANSPORT AND TRANSPORT LICENSING—DRIVING WHILE ALCOHOL IN BLOOD EXCEEDED PRESCRIBED LIMIT

*Analyst's certificate signed but not expressly stated to be signed as authorised by s. 58B (10)—Transport Act 1962, ss. 58 (2), 58B (9) (10) (Transport Amendment Act 1970, s. 5).* This was an appeal by way of a case stated from the Magistrate's Court as to the validity of the analyst's certificate under the provisions of subss. (9) and (10) of s. 58B of the Transport Act 1962 as amended by s. 5 of the 1970 Amendment Act. The analyst's certificate was signed "H. M. Stone". Authorised officer of the Department of Scientific and Industrial Research". The contention was that it was not clear whether he was an officer authorised within the provisions of subs. (10). *Held*, That the certificate was valid. *Ministry of Transport* v. *Carstens* (Supreme Court. Wellington. 17, 19 November 1971. Roper J.).

## TRANSPORT AND TRANSPORT LICENSING—ROAD TRAFFIC INTERPRETATIONS

*Give way signs—Offences—Failure to comply with "give way" sign—Entering roundabout—Traffic Regulations 1956, Reg. 12A (1).* The appellant appealed against conviction on a charge, pursuant to Reg. 12A (1) of the Traffic Regulations 1956, of failing to yield the right of way at a "give way" sign. The appellant entered an elongated roundabout and about eleven feet from the point of entrance collided with the left rear of a car already travelling on the roundabout and proceeding across the mouth of the road upon which the appellant had entered. The driver of the car using the roundabout had given no signal as to intention of crossing in front of the appellant. *Held*, 1. Regulation 12A (1) imposes strict liability. (*Police* v. *Adams* [1971] N.Z.L.R. 695 and *Burns* v. *Bidder* [1967] 2 Q.B. 227; [1966] 3 All E.R. 29, followed. *Ashley* v. *Schonberger*

[1968] V.R. 22, referred to. *Green* v. *Police* [1964] N.Z.L.R. 1011 and *Foley* v. *Transport Dept.* [1969] N.Z.L.R. 5, not followed.) 2. The prosecution need only prove a "statutory situation" namely that the driver charged was approaching a "give way" sign and failed to give way to a vehicle crossing the intersection. (*Sharkey* v. *Owen* [1961] V.R. 65, referred to.) *Wilson* v. *Ministry of Transport* (Supreme Court. Christchurch. 7, 8 October; 15 December 1971. Roper J.).

**WORK AND LABOUR—WAGES PROTECTION AND CONTRACTORS' LIENS ACT**

*Time for claim and date of completion—Uncompleted work taken out of contract to be completed in a new contract—Completion certificate for completed work under original contract not binding on sub-contractor—Wages Protection and Contractors' Liens Act 1939, ss. 20 (2), 34 (4), (6).* In 1964 P. Graham & Son Ltd. contracted to erect a multi-storied building for the appellant Bank. The nominated date for completion was 22 February 1967 and by that date most of the work had been done. Under the contract a prime cost sum had been included for the erection of partitions separating the different areas to be occupied by tenants. In addition the Bank had undertaken to certain prospective tenants for the provision of internal partitions of the respective areas intended to be leased to them. These latter partitions were treated as between the Bank and the builder as an extra. The erection of both types of partition were holding up the completion of the contract. On 10 April 1967 the Bank and the builder entered into a "post contract agreement", the effect of which was to provide a separate contract for the internal partitioning undertaken to be provided by the Bank within the individual areas to be leased to prospective tenants, and to withdraw the partitioning which was provided for under the main contract from that contract and provide for the completion thereof under the post contract agreement. On 13 September 1967 the architect by a letter to the builder fixed the completion date of the main contract to be 12 September 1967 for the purposes of s. 20 (2) of the Wages Protection and Contractors' Liens Act 1939. As at that date certain items which originally had been provided for in the main contract had not been completed. Statements of accounts were issued by the arcitect to the builder on 12 October 1967 which showed the uncompleted items in the main contract as having been cancelled. After the completion date the uncompleted work of the main contract proceeded as before and in a few cases only fresh orders relating to the post contract agreement were issued and the respondents were not informed of the changed position. The respondents had served notices of lien under the Act but none of them had commenced an action within sixty days from 12 September 1967 as required by s. 34 (4) of the Act, with the result that under s. 34 (6) if the completion date for the contract for the purposes of s. 20 (2) was 12 September 1967, their liens would be deemed to be extinguished. The date for completion of the post contract agreement was 21 December 1967. Wilson J. in the Court below held that 12 September 1967 was not the date for completion for the purpose of s. 20 (2) and the respondents claims had not been extinguished. *Held*, The statutory charge in favour of workmen and subcontractors could not be defeated by an arrangement between the employer and the head contractor whereby the uncompleted work specified in the original contract was taken out of the contract on the basis that such work would be completed under a new contract and that a completion certificate would be given as regards the work completed under the original contract. Judgment of Wilson J. (unreported, Christchurch, 8 October 1971) affirmed. *Bank of New Zealand and Others* v. *Cemac Modular Industries and Others* (Court of Appeal. Wellington. 15, 16, 17 November; 15 December 1971. North P., Turner and Woodhouse JJ.).

---

**Speeds involved in Accidents.**

There are, of course, three types of lies; lies, damn lies, and statistics. With this in mind the following table is given, being the speeds at which motor vehicles were travelling when involved in accidents during the year 1970, supplied by the Ministry of Transport:

| | |
|---|---|
| Under 5 mph .. | 523 |
| 5 mph-10 mph | 1,279 |
| 10 mph-15 mph | 1,118 |
| 15 mph-20 mph | 1,312 |
| 20 mph-25 mph | 2,242 |
| 25 mph-30 mph | 3,159 |
| 30 mph-40 mph | 3,790 |
| 40 mph-50 mph | 1,498 |
| 50 mph-60 mph | 1,843 |
| Over 60 mph .. | 290 |
| Reversing .. | 168 |
| Unknown .. | 1,521 |
| TOTAL .. .. | 20,765 |

This table must be of some help when arguing the pros and cons of safety belts, and when and where they should be worn.

---

**On Court proceedings**—"The very proceedings in a Court, the Judge and lawyers, with their flowing gowns and sheepskins on their heads, with their esoteric and precious language nearly always unintelligible or inaudible, makes of the total performance one of incongruity, superficiality and ritualistic activity.

"All this is underscored by a visibly impassive, almost bored reaction by the Judge and other members of the Court retinue. The worried client watches the show, with its regulated playacting, with an increasing anxiety which becomes heightened when the Court rises for lunch and he perceives a hearty exchange of pleasantries between the defending and prosecuting lawyers, (laughter) wholly out of context in terms of the supposedly adversary nature of the preceding events. The assumed passion in defence of his client is gone and the lawyers for both sides resume their off-stage relations, chatting amicably and perhaps democratically including the Judge in their restrained banter." E. E. ISBEY M.P., at Waitangi.

# CASE AND COMMENT

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

**Torts—Plea of "Ex Turpi Causa Non Oritur Actio"**

Whether the plea "*ex turpi causa non oritur actio*", which has, in the past, mainly been applied in relation to the enforcement of contractual obligations, is available to defendants in tort actions, is a question which has come before the Courts several times in recent years (e.g. *Smith* v. *Jenkins* (1970) 44 A.L.J.R. 78, especially the judgment of Windeyer J. at p. 81 *et seq* in which the history and effect of the plea is discussed. This decision was the subject of a Case and Comment note entitled *Ex Turpi Causa in the Field of Torts* [1971] N.Z.L.J. 109). A recent judgment of Roper J. in *Harris* v. *Paulin* (judgment delivered on 23 February 1972) in which the plea was accepted as a defence is therefore not without interest.

The facts of this case were somewhat unusual. The plaintiff and a friend, Rongonui, had spent some five hours drinking beer together in an hotel. After they left they went with other friends and consumed one dozen bottles of sherry and one dozen bottles of port. The plaintiff and Rongonui then left to go and get a meal, but on their way converted the defendant's motorcar. After they had driven about 100 yards and were then travelling at a speed of about 40 m.p.h., the plaintiff looked across and noticed that Rongonui, who had been driving, had disappeared. The plaintiff was unable to control the car; it struck a power pole, and as a result of injuries received, the plaintiff's left eye had to be removed.

By virtue of s. 79 (a) of the Transport Act 1962, Rongonui was deemed to be the defendant's agent; for this reason the action was brought against the defendant. There was little evidence as to whether or not negligence was present, and no evidence as to why or how Rongonui had come to leave the vehicle, but the learned Judge, decided to proceed on the basis that negligence was in fact present.

In answer to the allegation of negligence, counsel for the defendant had raised the plea "*ex turpi causa non oritur actio*". He submitted that as the plaintiff and Rongonui were at the time of the accident joint participants in an unlawful undertaking, namely the crime of conversion, no action for negligence would lie.

Although in substance the High Court of Australia in *Smith* v. *Jenkins* appeared to accept that there should be no liability for negligent acts causing injury to a partner in a joint criminal undertaking, they do not appear to have accepted that this was an application of the maxim *ex turpi causa non oritur actio* (Windeyer J. expressly stated that the maxim did not apply to the law of torts (*ibid.*, p. 84). The other members of the Court held somewhat different views about the maxim, but the effect of their views was similar). The learned Judge in *Harris* v. *Paulin* felt himself bound to follow the High Court in *Smith* v. *Jenkins*. It is not clear, however, whether he was in fact applying the maxim *ex turpi causa* to a tortious situation or whether, as the High Court found, he found that a more general principle was applicable to tort cases. The instant case in that it highlights, but does not solve, some of the difficulties in an obscure area of the law, is nevertheless an interesting one.

M.A.V.

**Real Property—Transfer set aside for Fraud**

*Efstratiou* v. *Glantschnig* (the judgment of the Court of Appeal delivered by Turner J., on 5 November 1971) concerned the sale and transfer of a house property in breach of trust. The husband of the respondent had been the sole registered proprietor, but the respondent had paid $500 towards the purchase price of the house so that her husband held his estate on trust for himself and his wife as equitable tenants in common. After returning home on a Sunday from an overseas trip and finding his wife living with a boarder in compromising circumstances, the husband took steps to sell the house which he did rapidly at a gross undervaluation and completed the transaction at a "bewildering" speed so that the transfer was registered by the following Thursday. He then dissipated the proceeds of the sale. The respondent brought the present proceedings against her husband, the land agent and the purchaser, to set aside the transfer and to obtain damages for breach of trust. At first instance before Quilliam J., (judgment 10 August 1970) she was successful on all counts except that no damages were awarded against the purchaser who was considered to have suffered sufficiently by his loss of the land.

In the Court of Appeal the award of damages against the husband and the agent was set aside because the cancellation of transfer, which was affirmed, restored the respondent to her original position. It is therefore with the transfer that the main part of the judgment is concerned. Turner J., made it plain that he was considering the case under the provisions of the Land Transfer Act, not the matrimonial property legislation. The order was made on the ground of fraud and the fraud necessary must be attributable to the person claiming under the registered instrument which is impugned. Thus, though the husband's breach of trust was clear enough, the fraud had to be found in the purchaser.

The evidence was inconclusive as regards any previous acquaintance between the purchaser and the husband but appeared to indicate the contrary. However, he had agreed to pay the asking price within a matter of days and without any inspection of the house. He was clearly aware, therefore, that it was not a normal transaction, but no further knowledge by the purchaser appears to have been established. A purchaser of land under the Land Transfer Act is not obliged to make all of the inquiries which would have been required under the deeds system to insure his own protection; but if his suspicions are aroused, even though he has no definite knowledge, and he does not make inquiries for fear of learning the truth, fraud may properly be ascribed to him. (*Assets Co. Ltd.* v. *Mere Roihi* [1905] A.C. 176, 210.) Similarly, Salmond J., has said that actual knowledge is not necessary, but if the purchaser "knew enough to make it his duty as an honest man to hold his hand . . . [and] . . . he proceeds without further inquiry to purchase an unencumbered title with intent to disregard the claimant's rights . . . he is guilty of that wilful blindness . . . which . . . amounts to fraud." (*Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co. Ltd.* [1923] N.Z.L.R. 1137, 1175.) On these authorities the Court of Appeal in the instant case affirmed the decision of Quilliam J., that the purchaser had been fraudulent and that his transfer should be set aside.

D.McM.

**Mortgagor's Equity of Redemption.**

The judgment of the Court of Appeal (19 Nov. 1971) in *Bannerman* v. *Murray* raised several points, but central to the main issue was the prohibition of clogs on the equity of redemption. In question was an agreement in writing evidencing a loan of £5,000 on the security of a second mortgage on farm property. No formal mortgage was drawn or registered so that the agreement remained an equitable mortgage. The agreement also gave to the mortgagee an option to purchase the land on certain terms, the option being an integral part of the agreement without which the loan would not have been made. The mortgagee had given notice of his intention to exercise the option and the mortgagor now argued that the option was invalid as a clog. The main discussion of this aspect of the case is in the judgment of North P.

After some discussion of the nature of a clog on the equity of redemption, his Honour considered those cases particularly concerned with options to purchase, principally the judgment of the House of Lords in *Samuel* v. *Jarrah Timber & Wood Paving Corpn.* [1904] A.C. 323. Lord Macnaughten saw the line of cases concerning options, and going back to at least the mid-eighteenth century, as distinct from the main branch of the rule that on redemption the mortgagor is entitled to have the security restored to him unaffected by anything in the mortgage transaction. The reason for this separate offshoot was given by Lord Hardwicke L.C., in 1745: "it puts the borrower too much in the power of the lender, who, being distressed at the time, is too inclinable to submit to any terms proposed on the part of the lender." (*Toomes* v. *Conset* (1745) 3 Atk. 261; 26 E.R. 952). However, the rule has always been rigidly applied, presumably to avoid difficult questions of proof of undue influence, so that any option to purchase given at the same time as and as part of a mortgage will be void. Thus, although the parties in *Samuel's* case were negotiating the loan on an equal basis with no suspicion of influence the House of Lords had regretfully to find the option to be void. The same approach had also been adopted by the New Zealand Court of Appeal in *Harper* v. *Joblin* [1916] N.Z.L.R. 895. The Court in the instant case regarded these authorities as conclusive on behalf of the mortgagor.

This is not to say that a mortgagor may never give his mortgagee an option to purchase. The prohibition is on an option which is negotiated and the terms of which are concluded at the same time as the mortgage so that they are part of the same transaction in substance. If the option is given later as a separate and independent transaction, equity will not intervene and the option will be enforceable, as in *Reeve* v. *Lisle* [1902] A.C. 461. But the distinction is one of substance and the operation of the equitable rule cannot be avoided merely by recording the two parts of the transaction separately; they must be separate transactions.

**Door to Door Sales Act—Interpretation**

A case which deserves attention is the recent judgment of Pledger S.M. in *Molloy* v. *Castle Steel Ltd.* (Auckland Magistrate's Court; 42189/71).

A Mr and Mrs Webber had agreed with the defendants for the latter to sell metal wall sheathing to the Webbers and fix it to their home. An agreement was signed at the home of the purchasers and a $50 deposit was made.

Some three weeks after the agreement was signed, the purchasers cancelled the contract under s. 7 (3) of the Door to Door Sales Act, 1967, seeking a refund of the $50 under s. 9 (1) (d) of that Act. No repayment was made, and a private information was laid against the defendants under s. 14 for such failure to repay.

The two main features of the defence were that the sale was not made "otherwise than at appropriate trade premises" as required by the Act; and that the type of agreement involved was not one to which the Act applied.

The first limb of the argument centered on the fact that the defendant company had no trade premises. This being so, it was asked, how could the defendants fulfill the requirements of the Door to Door Sales Act, and sell at other than appropriate trade premises?

The learned Magistrate peremptorily dismissed this argument, seeming to agree with the plaintiff that it does not matter that the vendor has no trade premises.

Yet while a different decision would have torn a gaping hole in the Act, some difficulty must be encountered in agreeing with the decision of the learned Magistrate. The Act does not refer to "sales made at the home of the purchaser", instead, it refers to contracts made otherwise than at "appropriate trade premises". Put this way, it is difficult to resist the argument that the statute contemplates a seller with trade premises, but who sallies forth to the homes of individual purchasers. The key word in this argument is "appropriate". Unless this is held to mean appropriate to that trade generally, there is seen to be considerable force, if perhaps not merit, in the defendants' argument. In any case, such a broad approach to "appropriate" would leave unresolved the issue where the particular trade never operated from trade premises.

The second limb of the defendants' argument revolved around the fact that s. 2 excluded from the ambit of the Door to Door Sales Act two categories of agreement: those where the purchaser himself buys and sells goods of the contract description; and those where the purchaser uses the goods in the exercise of his business or profession.

The point was that the Webbers, in their agreement with the defendants, had agreed to let their house be used as a show house, and to pass on to the defendants the names and addresses of parties who displayed an interest in the metal sheathing. Hence, the defendants argued that this involvement by the Webbers in the metal sheathing business, for which they received a discount on their own purchase, drew them into the exclusions referred to above.

Pledger S.M. once more rejected the defence, in essence, because at the time of entering the contract the Webbers were neither in the business of buying and selling, nor used the sheathing in any trade or profession.

With respect, this appraoch cannot be supported since it overlooks the fact that every business must have its beginnings somewhere. An analogy can be drawn from the definition of a mercantile agent in s. 2 of the Mercantile Law Act 1908. Such an agent is, in broad terms, someone in the business of buying and selling. But this does not mean that one has to be in the way of such business prior to the relevant transaction. There is nothing, Halse Rogers J. has said, "to prevent a man who has never before carried on business as a mercantile agent becoming *instanter* such an agent . . . [the] business of a mercantile agent, like any other, must have a beginning, and it cannot be that the first transaction in such a business is not within the statute": *Mortgage Loan & Finance Co. of Australia* v. *Richards* (1932) 32 S.R. (N.S.W.) 50, 58.

It would have been better, it is suggested, if Pledger S.M. had argued that the exceptions contained in s. 2 of the Act did not apply where the contract itself, *by its own terms* required the purchasers to bring themselves within what would otherwise be the exceptions contained in the statute. This would, with respect, have been a sounder way of defeating the defendants' arguments.

In the final result the defendants were ordered to repay the $50 and justice was seen to be done. But the cost seems to have been a somewhat strained interpretation of the Act.

R.G.L.

---

**"Interpretation"**

"The definition of 'writing' in section 2 of the 1954 Act has not been re-enacted. 'Writing' is not a technical term and its meaning would be the ordinary dictionary meaning of any method of expressing words and figures." *Inland Revenue Department's December Memorandum on the Stamp and Cheque Duties Act* 1971,

# DEVALUATION— LEGAL EFFECTS ON LIQUIDATED OBLIGATIONS

*With further international currency realignments possible within the near future, this article has been written for the* JOURNAL *by Richard C. Hopkins, an American practitioner presently lecturing in law at Victoria University of Wellington.*

The devaluation of the United States dollar in late 1971, followed by fluctuations in the currency valuations of other nations produces a congeries of problems for the lawyer to untangle.

If a nation pegs or measures its currency value in terms of gold, like the United States, it may devalue its currency by increasing the number of currency units in relation to a given weight of gold. If a country, like New Zealand, pegs its currency to another currency (*a*), it may effect a devaluation by increasing the number of currency units in relation to a given number of currency units of the other country. It may also *depreciate* its currency by fixing its trading rates below parity, that is, below the official exchange rate with the currency to which it is pegged. Since New Zealand is a member country of the International Monetary Fund, its trading rate may fluctuate above or below the United States dollar by no more than 2.25 percent, in accordance with Fund rules. It should be readily apparent that the devaluation or the depreciation of one currency causes a *de facto* revaluation of any unchanged currency.

The process of devaluation of the United States dollar was not a single event, but commenced with *de facto* devaluation in consequence of President Nixon's announcement of 15 August 1971 officially suspending redemption of United States dollars in international currency transactions, thereby permitting the dollar's value to float freely in international money markets. Prior to that announcement, the official exchange rate was $US 1.12 for $NZ 1.00. The trading rate was slightly higher.

The second step in the devaluation process was *de jure* devaluation of 8.6 percent in mid-December, 1971. (*b*) The immediate effect of that devaluation was that $NZ1.00 was worth $US1.2160 officially. Following the lead of Australia, New Zealand elected to soften the effects of the United States dollar devaluation by depreciating its dollar in terms of the United States dollar to the full extent allowed by IMF rules, for trading purposes. For such purposes there is spread between what the trading banks will sell or buy dollars for. The mean between the two is $US1.195, or just 1.72 percent below the United States dollar par value.

For illustrative purposes we will consider the value of the New Zealand dollar before devaluation of the United States dollar as being $US1.12 and after devaluation as being worth $US1.19.

## Measure of the Debt on Due Date

The general question raised by devaluation can be simply stated: where a specified number of dollars (whether United States or New Zealand dollars) is called for by a legal instrument, what number of dollars in which currency will satisfy the obligation on due date after devaluation of one currency? New Zealand law has not developed independently of English law on this subject, and therefore the latter constitutes the *lex causae*. The subject is treated exhaustively elsewhere. (*c*) Our scope of inquiry is to be narrower, focusing on those aspects of the problem of commonest concern to the law practitioner involved in New Zealand-United States transactions.

### *A. Basic Concepts*

Before analysis of particular problems, attention should be given to certain basic concepts involved in foreign currency transactions.

1. *Nominalism*—The extent of foreign monetary obligations cannot be determined otherwise than by resort to the doctrine of nominalism. (*d*)

(*a*) Until December, 1971, New Zealand pegged its currency to the British pound. Since then, it has pegged it to the United States dollar.

(*b*) The irony of the official December devaluation is that thereby the United States announced it would refuse to redeem an ounce of gold for $38 instead of refusing to redeem an ounce for $35, as had been the case since 15 August 1971.

(*c*) Mann, *The Legal Aspect of Money* (2d ed. 1953) [hereinafter cited as "Mann"].

(*d*) Mann, 69, *et seq.*

As a principle. it is deeply rooted in English law (*e*) as well as the law of the United States (*f*) and other western countries. (*g*) "A debt expressed in the currency of any country involves an obligation to pay the nominal amount of the debt in whatever is legal tender at the time of payment according to the law of the country in the currency of which the debt is expressed." (*h*) Thus, when a legal instrument calls for payment of $10,000, the obligation is discharged if the creditor receives what is $10,000 on due date at the place of payment, regardless of any intervening decrease or increase in the value of that money. In consequence, the creditor bears the risk of devaluation and the debtor bears the risk of appreciation of the currency in which the debt is measured.

2. *Money of account and money of payment*—Obligations expressed in a foreign currency are the rule in international transactions for the simple and obvious reason that the currency is foreign to at least one of the parties or points of contact. In such instances the concept of money plays a dual role. The obligation may be expressed or measured in one currency and yet be payable in another. The former is termed "money of account" (*i*) and the latter "money of payment". (*j*)

3. *Proper law*—The governing law of the obligation, i.e. the proper law, is frequently fixed by the parties themselves. (*k*) If not, resort must be had to interpretive rules to ascertain or impute an intent to the parties. (*l*) In general, the proper law determines all questions arising under the legal instrument.

4. *Place of payment* (*m*)—An exception to the foregoing rule arises when the law of the place of payment is not the proper law. (*n*) In that instance "the mode of performance is governed by the law of the place of performance." (*o*) Thus, what is legal tender in the place of payment may be used to discharge the obligation when it is due even though the money of payment is expressed in a different currency (*p*) Consequently, if an obligation is expressed in the currency of the debtor, he has an option to pay either the expressed money of payment on due date, or that which is legal tender in the place of payment. (*q*) But the substance of the debt should not be changed by the law of the place of payment. (*r*) But this can happen if the United States is the place of payment and a gold clause is involved, (*s*) or a multiple currency option, (*t*) because of the Joint Resolution of 1933. (*u*)

5. *Rate of exchange*—The number of units of account (the number of dollars necessary to satisfy the obligation) is determined by reference to the legal instrument; however, if the money of account and the money of payment are different, the creditor must refer to the currency exchange rate in effect at the place of payment to determine how much of his own currency he should receive. The applicable rate of exchange is the one prevailing at the place of payment on due date. (*v*) However, it is not the official exchange rate that applies, but the commercial rate of exchange. (*w*)

(*e*) Dicey & Morris; *The Conflict of Laws* (8th ed. 1967) 859 [hereinafter cited as "Dicey & Morris"].

(*f*) Nussbaum, *Money in the Law* (1950) 173 [hereinafter cited as "Nussbaum"].

(*g*) Mann, 70, *et seq.*

(*h*) Dicey & Morris, 858.

(*i*) For an extended treatment of the determination of the money of account expressed in terms of an ambiguous unit of account, e.g.—"dollars" which is used by distinct monetary systems like the United States and New Zealand, see Mann, 185 *et seq.* Nussbaum, 376-387.

(*j*) For an extended treatment of the determination of the money of payment, see Mann, 271 *et seq.*

(*k*) In English law the parties are given a wide latitude in choice of proper law, even if the contract has no other connection with the law so chosen. *Vita Foods Products, Inc.* v. *Unus Shipping Co.* [1939] A.C 277; but see *Re Claim by Helbert Wagg & Co. Ltd.* [1956] Ch. 323 at 341. According to the American law, however, the law chosen must have a material relation to the contract. *Owens* v. *Hagenbeck-Wallace Shows Co.* 192A, 158 (1937).

(*l*) For the general rules, see Chitty, *Contracts* (22 ed. 1961) 720; Dicey & Morris 691, *et seq.* For an extensive article on judicial selection of the proper law, see Baxter, "Foreign Currency Obligations", 35 Can. Bar Rev. (1957) 697.

(*m*) For the influence of place of payment, see Mann, 176-181.

(*n*) In determining the proper law, the place of payment is the most important factor in the absence of any expressed intent. *Tomkinson* v. *FirstPennsylvania Banking & Trust Co.* [1961] A.C. 1007; Nussbaum, 377.

(*o*) *Auckland Corporation* v. *Alliance Assurance Co. Ltd.* [1937] A.C. 587, 606; *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* [1934] A.C. 122; Restatement, *Conflict of Laws* (1934) s. 358.

(*p*) Dicey & Morris, Rule 153 at p. 884; Nussbaum, 360.

(*q*) Mann, 285; Dicey & Morris, 886.

(*r*) *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Co.* [1938] A.C. 224, 241, 242 (1937).

(*s*) *Compania de Inversiones Industriales* v. *Industrial Mortgage Bank of Finland*, 269 N.Y. 22, 32, 198 N.E. 617, 621 (1935), its significance being illuminated by note in 45 Yale L.J. (1936) 723; but cf. the *Mount Albert Borough* case, *ibid.*, where the court refused to let subsequent legislation at the place of payment impair creditors' contractual rights.

(*t*) As to multiple currency options, see page 207.

(*u*) 31 U.S.C.s. 463 (1964).

*B. Illustrative Situations*

First for consideration are two examples where the money of account, the money of payment, the place of payment and the proper law are all the same, that is, the creditor's place of residence. It must be assumed that there is full compliance with exchange control legislation.

*Example* 1. Assume that a New Zealand breeder of racing stock contracts on 15 July 1971 to sell a racehorse to a United States resident for $NZ10,000, payable in New Zealand on 15 January 1972. What effect, if any, has devaluation of the United States dollar on the creditor's rights? The answer is none, and the debt would be discharged by the debtor tendering $NZ10,000 on 15 January 1972. However, the risk of devaluation of his own currency has fallen on the debtor who must transfer $US11,900 (*x*) rather than $US11,200. (*y*)

*Example* 2. Assume that a United States manufacturer contracted on 15 July 1971 to sell a computer to a New Zealand resident for $US10,000 payable in the United States on 15 January 1972. What effect, if any, has devaluation of the United States dollar on the creditor's rights? The answer again is none, and the debt would be discharged by the debtor tendering $US10,000 in the United States on 15 January 1972. The bonus of revaluation of his own currency (relative to the devalued United States dollar) falls to the debtor who must transfer only $NZ8,400 rather than $NZ8,900. (*z*)

Next for consideration are two examples where the money of account and the money of payment are both expressed in the debtor's currency, while the place of payment and the proper law are fixed by the creditor's residence

*Example* 3. In Example 1, assume the price for the racehorse was expressed "$US10,000 payable in Auckland on 15 January 1972". On due date the debtor could tender payment in the currency expressed or in its New Zealand equivalent: $NZ8,400. (*aa*) Thus the creditor would receive fewer New Zealand dollars than he would have without devaluation.

*Example* 4. In Example 2, assume the price for the computer was expressed "$NZ10,000 payable in Los Angeles on 15 January 1972." On due date the debtor could tender payment in the currency expressed or its United States equivalent: $US11,900. Thus the creditor would receive more United States dollars than he would have without devaluation.

*C. Protective Devices*

Parties to international transactions often try to soften the impact of possible devaluation by inserting a stipulation linking the money of account to some standard less likely (hopefully) to devaluation than the money of account or by expressing the obligation in what is assumed to be the more stable currency. Foreign currency equivalents and multiple currency clauses are not uncommon. Gold clauses should be of no concern in transactions involving United States principals, since the invalidation of such clauses by the far reaching Joint Resolution of 1933. (*bb*) Index clauses are valid in the United States (*cc*) and are commonly used in the British Commonwealth; (*dd*) however, they are designed more to combat the errosive effects of inflation on long-term obligations rather than prospective devaluation and would appear to present only a problem in arithmetic. We shall limit our examination of protective devices to foreign currency equivalents and multiple currency clauses. (*ee*)

1. *Foreign currency equivalents*—Where the money of payment is measured by a different currency than the money of account, the quantum of the obligation is measured by the equivalent currency. An illustration would be if the price in Example 1 were expressed as $NZ10,000 payable at the rate of exchange of $US1.12 to $NZ1.00, or if the price in Example 2 were expressed as $US10,000 payable at the rate of exchange of $NZ0.89 to $US1.00. There is no reason to question the validity of such clauses in English law (*ff*) or in American law. (*gg*) In such cases, by giving effect to the

---

(*v*) *Syndic in Bankruptcy of Khoury* v. *Khayat* [1943] A.C. 507 (P.C.); Mann, 401. For American references see note 15 in 13 Geo. Wash. L. Rev. (1945) 335.

(*w*) *Marrache* v. *Ashton* [1943] A.C. 311 (P.C.); *Barr* v. *United States*, 324 U.S. 83 (1945).

(*x*) For simplicity, exchange charges are ignored.

(*y*) The result would be the same even if the proper law and/or the place of payment were the debtor's residence.

(*z*) *Idem.*

(*aa*) In accordance with the debtor's option to pay the contractual money of payment or legal tender at the place of payment. The result would be the same if the proper law were the debtor's residence.

(*bb*) 31 U.S.C.s. 463 (1964).

(*cc*) Dach, "Validity of Price Index Clauses Under the Gold Coin Joint Resolution", 13 Geo. Wash. L. Rev. (1945) 328.

(*dd*) Mann, 131; Hirschberg, "Index Value Clauses", 88 Bank. L.J. (1971) 867.

(*ee*) For an extended treatment, see Mann, 158-174.

(*ff*) Dicey & Morris, 874.

(*gg*) Nussbaum, 373.

agreed rate of exchange, the pre-devaluation relationship between the currencies is preserved. Thus, in the first example, $NZ10,000 or $US11,200 would be paid, and in the second example $US10,000 or $NZ8,900 would satisfy the obligation.

2. *Multiple currency clauses*—A monetary obligation may take the form of alternative promises. Which party has the option of selecting the alternative can produce different practical as well as legal results, as we shall see. Where the debt is expressed "$NZ10,000 or $US11,200" it is called an "option of currency" or an "option de change". (*hh*) Such alternative promises are often coupled with an additional option for place of payment. That option is not really a protective device, but rather one of convenience. In English law each promise "is entirely independent. Each provides for the payment of a particular sum in a particular place . . ." (*ii*) Thus under English law, until the party with the option elects among the options, neither the money of payment nor the place of payment is determined. (*jj*) By important contrast, American law treats the separate clauses as part of a single monetary obligation which must be paid in the quantum of the United States dollars expressed. (*kk*) Such clauses can take different forms with varying results:

(a) One money of account, alternative moneys of payment: In Example 1, if the debt were expressed "$NZ10,000 or equivalent United States dollars", because the money of account measuring the obligation is fixed, a devaluation of the alternative foreign money of payment would leave the creditor's rights unaffected. But if the money of account is devalued, the debtor, making payment in the devalued currency, would pay less than he would have, had there been no devaluation. Thus in Example 2 if the debt were expressed "$US10,000 or equivalent New Zealand dollars", the debtor would pay $NZ8,400 rather than $NZ8,900. In the foregoing instances we see a reaffirmation of the rule that the creditor bears the risk of devaluation and the debtor bears the risk of appreciation of the currency in which the debt is expressed.

(b) Alternative moneys of account and payment: In both Examples 1 and 2, if the debt were expressed as "$NZ10,000 or $US11,200," each currency could be demanded or tendered only where it is legal tender or in the place designated for it, since, as a practical matter alternative currencies are not interchangeable. (*ll*) The reason is that payment in a foreign currency cannot be specifically enforced in English or American Courts. (*mm*) In these situations it would seem that the party having the option would select payment in the currency most favourable to him. But it doesn't always work that way because of the difference in the English and American rules previously mentioned. Let us examine the variations where the debt is expressed: "$NZ10,000 or $US11,200":

(i) Under English law as the proper law: Where the creditor has the option of currency, he would not select the United States currency option because he would thereby be limited to $US11,200. Instead he would select the option of New Zealand currency and the provision for payment in United States currency would be ignored. (*nn*)

Where the debtor has the option of currency, he would not select the New Zealand currency option (*oo*) because he would then be required to transfer $US 11,900 to convert to $NZ10,000.

(ii) Under American law as the proper law: Where the creditor has the option of currency: because of the unifying effect of the American law on multiple currency alternatives, (*pp*) the obligation could only be discharged by payment of $US11,200. This result would occur even if suit were brought in New Zealand; (*qq*) however, because only New Zealand dollars are legal tender in New Zealand the equivalent amount of New Zealand currency would be sought, namely, $NZ9,400.

Where the debtor had the option of currency, if he is economically minded, he would select the United States dollar option in order to pay fewer dollars. More generously, he could select the New Zealand currency alternative, the surplus being in the nature of a gift. (*rr*)

---

(*hh*) See generally, Mann, 167.

(*ii*) *International Trustee for the Protection of Bondholders, A.G.* v. *The King* [1936] 3 All E.R. 407, 431.

(*jj*) *Auckland Corporation* v. *Alliance Assurance Co. Ltd.* [1937] A.C. 587.

(*kk*) *Guaranty Trust Co.* v. *Henwood* 307 U.S. 247 (1939). This view has been criticised by Nussbaum, 435 and Mann, 156.

(*ll*) Mann, 168.

(*mm*) Dicey & Morris, 887.

(*nn*) *Supra*, (*jj*).

(*oo*) He could do so, if he wanted to: *supra*, (*jj*).

(*pp*) *Supra*, (*kk*).

(*qq*) *Supra*, (*r*) and see also *The King* v. *International Trustee for the Protection of Bondholders, A.G.* [1937] A.C. 500; but cf. *British and French Trust Corporation* v. *New Brunswick Ry.* [1937] 4 All E.R. 516 (C.A.); [1939] A.C. 1.

(*rr*) *Supra*, (*jj*).

**The Debt after Default**

In foreign currency situations where the debtor defaults on due date and thereafter, but prior to commencement of action an alteration in currency values occurs, the law of the forum determines whether the debt is to be measured by the money of account on due date (the English rule) or on the date of judgment (the rule in the New York Courts and the Federal Courts of the United States). (*ss*)

*A. Additional Concepts*

Before analysis of particular problems we should examine certain additional concepts involved in default situations.

1. *Delayed payment*—Conversion of the amount of the obligation into the *moneta fori* is necessary in English and American Courts, because neither of them can give judgment in terms of a foreign currency, (*tt*) but such conversion occurs only upon order of Court. Consequently, after default and prior to judgment, the debtor may effectively pay into a foreign court the depreciated currency in discharge of the debt under American law. (*uu*) But he will have lost his option to tender the foreign currency in the United States in discharge of the debt. (*vv*) He may also discharge the debt with the foreign money of contract under English law, but only prior to the issuing of the writ. (*ww*) Nonetheless, he preserves the right to discharge a debt payable abroad by paying it in the place of payment in the devalued currency, even after the issue of the writ. (*xx*).

2. *Breach-day rule*—English and New York law apply the breach-day rule which provides that in judicial proceedings in those jurisdictions, a liquidated debt, regardless of place of payment, shall be converted into the *moneta fori* at the rate of exchange prevailing on due date, (*yy*) although the Courts will give effect to an agreed rate of exchange. In a default situation, the due date and breach date are usually the same, and this rule has been given the latter designation.

3. *Judgment-day rule*—In general, the United States Courts follow the breach-day rule. (*zz*) The exception arises when the debt is payable outside the United States and is governed by foreign law. (*a*) A foreign currency debt payable in the United States is subjected to American law on due date. On the other hand, where the debt is payable outside the United States, American law applies at the time of adjudication, not before, hence the judgment-day rule. (*b*)

4. *Damages*—Damages occasioned by the depreciation of money during a period of delayed payment are not generally awarded under American law (*c*), nor under English law, the award of interest during the delay deemed sufficient, unless such damages were within the contemplation of the parties. (*d*)

*B. Illustrative Situations*

Let us modify the contracts in Examples 1, 2, 3 and 4 by having the purchase prices due and payable on the contracting date, namely 15 July 1971. Assume further that the contracts have been fully performed except for payment of the purchase prices, which are in default prior to devaluation of the United States dollar, and that the vendor is prepared to sue for the debt.

*Example* 5. In Example 1, if the debt were payable in New Zealand, but suit were brought in a United States Federal Court, judgment would be for $US11,900, since the debt would be a foreign currency obligation payable outside the United States and the judgment-day rule would apply. On the other hand, judgment would be for $US11,400 where the breach-day rule applies, i.e. New York, or if the debt were payable within the United States. (*e*) However, because under English law a cause of action does not merge with a foreign judgment (*f*), the creditor could still sue on the debt in New Zealand to get judgment for $NZ10,000. But he could not thereafter enforce that judgment in the United States. (*g*)

*Example* 6. In Example 2, should the American creditor sue in a United States Federal Court,

---

(*ss*) Nussbaum, 366, *et seq.*

(*tt*) Dicey & Morris, 889, n. 91.

(*uu*) *Zimmerman* v. *Sutherland*, 274 U.S. 253 (1926).

(*vv*) *Hicks* v. *Guinness* 269 U.S. 71 (1925).

(*ww*) *Madeleine Vionnet et Cie* v. *Wells* [1940] K.B. 72 (C.A. 1939).

(*xx*) *Societe des Hotels Le Touquet* v. *Cummings* [1922] 1 K.B. 451 (C.A.).

(*yy*) *Supra*, (*n*).

(*zz*) *Supra*, (*vv*).

(*a*) *Die Deutsche Bank Filiale Nurnberg* v. *Humphreys*, 272 U.S. 517 (1926).

(*b*) Which rule the Courts of States other than New York would follow is uncertain; however, the State of Texas long ago fell into the breach-day camp. *Butler* v. *Merchant*, 27 S.W. 193 (Texas, 1894) [regarding depreciated Mexican currency]. Nussbaum, 360 *et seq.* persuasively argues in favour of the judgment-day rule.

(*c*) Nussbaum, 191.

(*d*) Mann, 87.

(*e*) *Supra*, (*vv*).

(*f*) Dicey & Morris, 1002-1004.

(*g*) It would be contrary to public policy according to Nussbaum, "Gold Clause Abrogation", 44 Yale L.J. (1934) 83.

he would get judgment for $US10,000. If that judgment should thereafter be sued upon, the date of conversion to New Zealand currency would be the date of the United States judgment. Since that date would be subsequent to devaluation, it would be worth only $NZ8,400. By contrast, if suit were brought in New Zealand, judgment would be for $NZ8,900, being the local currency equivalent on breach-day of the $US10,000 purchase price, which would be worth $US10,600 after devaluation. Obviously, the American creditor would be dollars ahead if he could bring suit in New Zealand as the proper forum.

*Example* 7. In Example 3, the racehorse price was "$US10,000 payable in Auckland". If suit were brought in New Zealand, the breach-day rule would produce judgment for $NZ8,900. If suit were brought anywhere in the United States, there would be no problem of foreign currency conversion and judgment would be for $US10,000 which, however, would be worth only $NZ8,400.

*Example* 8. In Example 4, the computer price was "$NZ10,000 payable in Los Angeles". If suit were brought in New Zealand, application of the breach-day rule would produce a $NZ10,000 judgment worth $US11,200. To the same effect, if suit were brought in a United States Federal Court, because the breach or wrong occurred in the United States, and the award would be measured in United States dollars at the rate of exchange on due date. What conversion rate should be used is yet uncertain where the place of payment and the proper law are different. It has been suggested as a satisfactory solution, that if the obligation "arises" in a certain country, it is subject to the laws of and payable in the money of that country. (*h*)

(*h*) Mann, 312.

**Conclusion**

It would be foolhardy to conclude from the foregoing that precise rules have been formulated by the Courts within each of the two juridical systems considered. At best, the cases provide guidelines which should be carefully applied in the light of the factual basis of a particular problem. And caution should be exercised in the extrapolation of the case law developed in controversies involving liquidated obligations to those arising in tort claims and even unliquidated obligations of a contractual nature.

# MEETINGS, PROCESSIONS, SYMBOLIC SPEECH AND THE LAW

*A revised version of an address delivered by Mr Roger Clark to the Annual Meeting of the New Zealand Council for Civil Liberties.*

It is trite to say that under English and New Zealand law anything is permissible that is not specifically prohibited. Put in the context of freedom of assembly and association this means that New Zealand law does not recognise any general principle along the lines of Article 20 of the Universal Declaration of Human Rights: "Everyone has the right to freedom of peaceful assembly and association." The rights every New Zealander has are what is left after a miscellaneous collection of prohibitions have been taken into account individually and collectively.

For clarity of analysis the narrative is broken into three main sections corresponding to three different types of activity—meetings, processions and symbolic speech. Semantic niceties are of no particular concern in distinguishing these three categories. The term "demonstration" might properly be used for all or any of them. All are types of activity designed to put across a point of view. A "meeting" is a static gathering at which someone speaks. A "procession" is a moving gathering, usually with banners and placards. "Symbolic speech" includes such things as sit-ins, burning flags, effigies, or draft cards and laying wreaths. The categories overlap. For example, symbolic speech often occurs at a meeting or procession. But each rough category has legal problems which are sufficiently distinct to merit separate examination.

**Meetings**

The legal issues here vary depending upon which of three possible venues are selected: a street or reserve; a public hall or ground (i.e., one under the jurisdiction of a local body or the central government, such as a town hall or a municipal sports ground); a privately owned hall or ground.

(a) *A street or reserve*

In this situation, to be completely on the side of the law, you need the consent or at least the acquiescence of both the local body which administers the street or reserve (in the case of Parliament Grounds the Speaker of the House) and of the police.

First, the local body. Most New Zealand roads and streets are vested in a local body. It is clear enough in law that the only right which a citizen has in relation to a road or street is one to "pass and repass . . . for the purpsoe of legitimate travel" (a). Any other use of the roadway such as the holding of a meeting amounts to a trespass against the owner of the road. The owner may, however, if he or it wishes, consent to such a use. The same principle was extended by the English Courts to the case of a clergyman holding Bible meetings on a part of the foreshore which was under the jurisdiction of an Urban District Council (b) and presumably applies to reserves in general.

A local body objecting to the use of its streets and reserves for meetings without its consent could no doubt sue in tort for damages, declaration or an injunction. It could perhaps take criminal proceedings under s. 3 of the Trespass Act 1968 which I shall be discussing in the part on symbolic speech. But the tort action is cumbersome and criminal proceedings are defeated if the meeters move on when warned to do so.

Most local bodies in fact regulate meetings in streets and reserves by means of bylaws, breach of which is punishable by fine. Typical is the Wellington City bylaw (c) which provides that anyone commits an offence who:

> Organises, holds, or conducts or attempts to hold or conduct any public meeting, gathering or demonstration or makes any public address or attempts to collect a crowd in along or upon any street, private street, public place or public reserve in the City except with the prior written authority of the Town Clerk.

The bylaw is made pursuant to a provision in the Municipal Corporations Act 1954 which gives local bodies power to make bylaws "regulating the use of any reserve, cemetery, recreation ground or other land . . ." It is possible to attack the validity of bylaws made under such delegated authority on various grounds coming under the general heading of *ultra vires*. A number of arguments of this nature were made against the Wellington law in *Hazeldon* v. *Mc Ara* (d), a case involving a meeting held by Christian Pacifists without a permit in "Pigeon Park" (the Dixon Street Reserve). A full Court of three Supreme Court Judges upheld the validity of the bylaw on the basis that the power to "regulate" in the Municipal Corporations Act entitled the local authority to ban completely one type of activity in reserves and that the delegation to the Town Clerk of the power to grant a permit was not unreasonable and was, indeed, envisaged by the Act. A commentator (e) has suggested that *Hazeldon* v. *Mc Ara* is no longer good law. My own view is that it is unlikely that the decision could be upset on the grounds on which it was decided but that it is still open to attack the validity of the Wellington and similar bylaws on the basis of what the lawyers call "unreasonableness". This is a more general line of attack than that made in *Hazeldon* on the reasonableness of the role of the Town Clerk in the process. "Unreasonableness" in the context of the validity of bylaws comes fairly close to its meaning in normal, non-legal, language (f). A good case can be put for the proposition that, given the importance of public meetings in a contemporary democracy, it is completely unreasonable to require permits for meetings in *all* public places at *all* times. A local body could be reasonably required today to set aside one or more places in respect of which a permit is not required.

The objectionable thing about such bylaws is not perhaps so much that they may limit the times and places available to protestors but that they may be used to discriminate against particular groups. They were so used against the Salvation Army and the Communist Party in the past. A number of local bodies have put themselves in the strange position of neither enforcing nor repealing their meeting bylaws (perhaps thereby acknowledging that they are unreasonable) and the police have indicated that they will not enforce them either. A disused bylaw which remains on the books may be resurrected selectively as occasion demands (g). It should be repealed. Many are not.

---

(a) *Harrison* v. *Duke of Rutland* [1893] 1 Q.B. 142, 154 per Lopes L.J. and see *R.* v. *Cunninghame Graham and Burns* (1888) 16 Cox C.C. 420 (no right to hold a meeting in Trafalgar Square).

(b) *Llandudno M.D.C.* v. *Woods* [1899] 2 Ch. 705.

(c) Wellington City Consolidated Bylaw No. 1, Part I, clause 62a (enacted in 1940).

(d) [1948] N.Z.L.R. 1086.

(e) Palmer, "Freedom of Peaceful Assembly and Association" [1969] *Recent Law* 113, 114 n.

(f) *McCarthy* v. *Madden* (1914) 33 N.Z.L.R. 1251.

(g) E.g. the Wellington Council's decision, following a request from the R.S.A. to enforce the bylaw by preventing "political demonstrations" at the Cenotaph: *Evening Post*, 15 September 1966.

Earlier, I mentioned Parliament Grounds. This is a unique plot of public ground upon which meetings are held that is not under the jurisdiction of any local authority. Apparently no one has ever been arrested merely for holding a meeting in Parliament Grounds although people have been arrested there for disorderly behaviour and for obstructing a constable in the execution of his duty. The view is generally held, though not laid down in any legislation or decided case, that the consent of the Speaker of the House is necessary before a meeting may be held there. It is usual for meeting organisers to negotiate beforehand with the Clerk of the House, the Speaker's right hand man. The standing of these officials in relation to the grounds is recognised in regulations of dubious validity dealing with traffic in the grounds which define the "Controlling Authority" of the Grounds for traffic purposes as "the Speaker of the House of Representatives, or, when there is no Speaker or the Speaker is absent from New Zealand, the Clerk of the House of Representatives." (*h*) If it came to a crunch I expect that they would endeavour to assert their authority through the trespass laws (*i*). In the hey-day of C.N.D. and the Committee on Vietnam there was never any difficulty about negotiating arrangements for meetings in the Grounds. During 1970 a change of attitude appears to have occurred and speakers have been prevented from going beyond the second row of the steps up to the House. No explanation was given for this and the Speaker did not deign to reply to an inquiry from the N.Z. Council for Civil Liberties. At all events you are safe to assume that the consent of the Speaker or the Clerk of the House is the equivalent for Parliament Grounds of the consent of the local authority.

So much for the local body and the Speaker. What of the police? Traditionally, police control over the holding of meetings was exercised through the law relating to unlawful assembly. An "unlawful assembly" is defined in s. 86 of the Crimes Act 1961 as:

> . . . an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that the persons so assembled—
>
> (a) Will disturb the peace tumultuously; or
>
> (b) Will, by that assembly, needlessly and without reasonable cause, provoke other persons to disturb the peace tumultuously.

Where a meeting organiser has held a gathering which became "unlawful" as defined in the past a "binding over" order may be obtained under ss. 186-188 of the Summary Proceedings Act 1956 which effectively prevents him from holding further meetings. But the procedure is obsolete and the last important use of it in New Zealand was against Te Kooti in 1890 when he was on his way to visit his relatives in Gisborne accompanied by a large entourage (*j*). Equally moribund are the provisions in the Crimes Act 1961 (*k*) for "reading the Riot Act" to twelve or more persons "unlawfully, riotously, and tumultuously assembled together in any place to the disturbance of the public peace." As a practical matter the police exercise their main supervision over the holding of meetings, and indeed processions, through the provisions in the Police Offences Act 1927 dealing with the obstruction of footpaths and other public places and with the obstruction of constables in the execution of their duty.

Section 3 (eee) of the Police Offences Act provides that "Every person is liable to a fine not exceeding fifty dollars who without lawful authority or reasonable excuse obstructs any footpath or footway or carriageway." Section 4 (1) (p) provides that "Every person is liable to a fine not exceeding twenty dollars who, in or upon any public place— . . . wilfully or negligently encumbers or obstructs a public place in any manner not before specially described." Richmond J. has accepted a definition of "obstruction" in relation to s. 3 (eee) as "a continuous physical occupation of a portion of the footpath which appreciably diminished the space available to the public in passing or repassing along the footpath. . . . (*l*) He also held that it is immaterial whether or not any person was in fact affected by the obstruction and that the burden of proving lawful authority or reasonable excuse lies on the defence. The same principles seem to apply to s. 4 (1) (p) except that the way it is worded the burden of proof of all the elements of the offence appears to lie with the prosecution.

(*h*) Traffic (Parliament Grounds) Regulations 1958, S.R. 1958/113.

(*i*) The Grounds are by Proclamation in [1932] *N.Z. Gazette* 1394 "set apart for Parliamentary Buildings purposes". I suspect that the Courts would construe this on the basis of the trespass cases to exclude meetings without the consent of the Speaker.

(*j*) *Goodall* v. *Te Kooti* (1890) 9 N.Z.L.R. 26; Roth, "Te Kooti's Friend Desmond", *N.Z. Monthly Review*, August 1960 at 10. Unlawful assembly prosecutions have been brought in recent years in Northern Ireland and Canada.

(*k*) Sections 88-89 and 43-46.

(*l*) *Stewart* v. *Police* [1961] N.Z.L R. 680, 682.

The wide scope of "obstruction" caught by these two sections seems to give the police power to move on any meeting, even a one-man one, on the ground that it is "a continuous physical occupation". Section 315 (2) (d) of the Crimes Act bolsters up s. 3 (eee) by permitting a constable to arrest without warrant "Any person who within his view commits an offence against paragraph (eee) of s. 3 of the Police Offences Act 1927 . . . and, after being warned by him to desist, persists in committing that offence" (*m*). I have never known the section to be used to break up a meeting entirely. However, it is often used to keep demonstrators back against the edge of the footpath and even to keep stationary demonstrators moving. There is some suggestion in the authorities that a moving meeting, or procession, is less likely to contravene such obstruction provisions (*n*) but there are no clear New Zealand decisions in point.

Section 77 of the Police Offences Act reads:

> If any person resists or assaults or wilfully obstructs, or incites or encourages any person to resist, assault or obstruct, any constable in the execution of his duty or any person acting in aid of such constable, such person may be taken into custody without warrant by any constable, and on conviction shall be liable to a fine not exceeding two hundred dollars or to imprisonment for a term not exceeding three months.

"Obstruction" in this context has been held to mean "making it more difficult for the police to carry out their duties" (*o*). This allows a very broad ambit for the section, especially if wide scope is given to the notion of the policeman's "duty". In relation to policemen and meetings (*p*) the Courts have built on the notion of duty contained in the oath which a policeman makes on taking up office:

> I . . . do swear . . . that I will see and cause Her Majesty's peace to be kept and preserved; that I will prevent to the best of my power all offences against the peace. . . . (*q*)

When may a policeman intervene and prevent a meeting in order to preserve the peace? The leading New Zealand case is *Burton* v. *Power* (*r*). The Reverend Burton was about to address a street meeting of the Christian Pacifists. The Wellington bylaw on meetings in public places had not been made and the local body did not attempt to prevent his meetings. But at previous meetings opponents had attacked his passive supporters. A policeman ordered him not to speak. He refused to stop and was arrested. He was convicted by a Magistrate under s. 77. It was accepted that Burton himself had not deliberately caused or provoked the breaches of the peace in the past but Myers C.J. upheld the conviction on appeal. A constable who reasonably believes that a breach of the peace may occur—from whatever source—may order the speaker to stop and will be acting in the course of his duty in so doing. In his judgment the Chief Justice made the remarkable comment that "This is not a charge against the appellant for being a pacifist or for holding opinions of any particular subject, nor does the case involve the law of unlawful assembly or any question of freedom of speech in any fair sense of the term." The American Courts have generally taken the position that in a situation like this a "question of freedom of speech" is very much involved and that the duty of the police is to protect this freedom by arresting the hostile members of the audience (*s*). It may be possible to argue on this basis in the Court of Appeal that *Burton* v. *Power* was wrongly decided and should be overruled. The present Chief Justice, Sir Richard Wild, seems to have felt some disquiet about it in the more recent case of *Wainwright and Butler* v. *Police* (*t*). He quashed a conviction under s. 77 on the ground that *Burton* v. *Power* applied only to the situation where "the obstruction lay in . . . proceeding to do that which for good reason the police had expressly forbidden" (*u*). It did not extend to the situation where the policeman gave a choice. In *Wainwright's* case the appellants had endeavoured to lay a wreath at the Wellington Cenotaph on Anzac Day notwithstanding the hostility of members of the R.S.A. The wreath bore the inscription: "To the dead and dying of all sides in Vietnam. Must *their* blood pay the price of *our* mistakes?"

---

(*m*) Curiously, there is no similar power in relation to s. 4 (1) (p) and the course of action open to the constable in the face of a continued contravention of that section is not clear.

(*n*) See note (*g*) *post*.

(*o*) McGregor J. in *Steele* v. *Kingsbeer* [1957] N.Z.L.R. 552.

(*p*) For a discussion of the policeman's duty in some other context see "A Little Help From my Friends", 41 *Comment*, July 1970 at 26; "Police Power to Arrest Without Warrant", [1970] N.Z.L.J. 176.

(*q*) Police Act 1958, s. 37.

(*r*) [1940] N.Z.L.R. 305. See also *Duncan* v. *Jones* [1936] 1 K.B. 218.

(*s*) See e.g. *Gregory* v. *Chicago* (1969) 394 U.S. 111 and cases there cited. But cf. the strange decision in *Feiner* v. *New York* (1951) 340 U.S. 315 where a conviction was upheld on facts which were on all fours with *Burton* v. *Power*.

(*t*) [1968] N.Z.L.R. 101.

(*u*) Ibid., 103.

A police sergeant gave them three choices (*v*):

> . . . that they could either get into the car, go to the Central Police Station with Mr Austin and myself, and discuss the matter; or go on their way and not lay the wreath; or that if they did return to the Memorial and lay the wreath that I would arrest them because I felt that there would be a breach of the peace. I then left it for the defendants to decide on what action they wished to take.

When asked by Wainwright, the sergeant added that the charge justifying arrest would be disorderly behaviour. The Chief Justice said that the defendants could not properly be convicted of obstructing the constable although he upheld a conviction for disorderly behaviour (*w*). In his words: (*x*)

> I cannot see how the appellants in this case can be held to have obstructed the police in doing something that the sergeant plainly left open to them, even though it carried the consequence of arrest on a different charge. I therefore think that, on the facts, the conviction of the appellants on the charge of obstruction is unsustainable. . . .

I find it very difficult to distinguish the facts in *Burton* and *Wainwright* in the manner espoused by the Chief Justice. Surely Burton was, in effect, given a choice too—he could go ahead and be arrested, or he could go home. Is there any real difference? Does it lie in the presence of a third choice in *Wainwright*? Does it lie in the reference to disorderly behaviour? Perhaps, as I have suggested, his Honour felt some doubts about *Burton* v. *Power* but was not prepared to dissent from such a long-standing ruling. He therefore distinguished it as best he could.

It may be then, that *Burton* v. *Power* is open to attack in the Court of Appeal. But until this is done the holder of a meeting that is likely to be disrupted is very much at the mercy of the police. He runs the risk that he will be arrested rather than protected. Some token control over the police has been retained by the Courts in their insistence that the officer must have a *reasonable* fear of a breach of the peace before he suppresses the speaker. But in judging reasonableness the Courts place great weight on the views of the experienced man on the spot—the officer.

In addition to these powers which can be spelt out of statute the police exercise some ill-defined common law powers in respect of meetings. For example, they place crowd control barriers or otherwise keep crowds within a more or less defined area; they break up gatherings which look like "getting out of hand" without necessarily making any arrests. In his special report on complaints against police conduct in Auckland during the visit of Vice-President Agnew of the United States in January 1970 (*y*), the Ombudsman stated that he had no reason to believe that New Zealand police instructions in this area "depart from the relevant principles of the common law".

> The clear and certain application of these principles to New Zealand awaits the decisions of our own Courts, but it is reasonable to assume that they do apply here. They rest upon the common law powers of a constable to prevent a breach of the peace. These may be stated in this way—a constable is justified in using such force as is reasonably necessary to prevent an apprehended breach of the peace, if believed upon reasonable grounds to be imminent or a real possibility. Where dispersal of a crowd is involved, there must exist no reasonable alternative to dispersal, and a warning to disperse voluntarily must first be given and time allowed for the warning to be heeded (*z*).

The effect of all this, to recapitulate, is that the holder of a meeting in a street or reserve needs the consent or acquiescence of the police as well as of the local body. (By "acquiescence" I mean an express or tacit decision not to enforce relevant bylaws or provisions of the Police Offences Act.)

*(b) Public halls and grounds*

The main issue which arises in relation to public halls and grounds is whether the body administering the place (a city council for example) may decline to allow it to be used by a

---

(*v*) Ibid., 103-104.

(*w*) See below.

(*x*) [1968] N.Z.L.R. at 104.

(*y*) A.J.H.R., Paper A. 6A of 1970.

(*z*) Ibid., 21, ss. 42-47 of the Crimes Act 1961 justify the use of force in cases of an *actual* breach of the peace or a riot. It may be possible to argue on the bases of the *expressio unius est exclusio alterius* rule of construction that the common law powers which extend to an *apprehended* breach do not survive in New Zealand. On the other hand, the oath of office ("see and cause Her Majesty's peace to be kept and preserved") may be construed as implicit recognition of some common law power. The whole position is murky. In *Blundell* v. *Attorney-General* [1967] N.Z.L.R. 492, 508 Hardie Boys J. used the common law powers in respect of crowds as an analogy to support his decision that the police have a power to detain a person without arresting him. The Court of Appeal [1968] N.Z.L.R. 341 emphatically rejected his decision but did not refer to the common law point.

particular political or religious group. One might have thought that it is implicit in the nature of a "public" utility that anyone prepared to pay any usual fee may use it, subject of course to its being available for booking on the normal first come first served basis. But the only legislation specifically conferring on any group the right to use a public facility for meetings is s. 90 (1) of the Electoral Act 1956:

> Any candidate at an election may, for the purpose of holding public meetings of electors for electoral purposes during the period of an election use, free of charge other than the cost of lighting, and cleaning after use, and of repairing any damage done, any suitable room of any public primary school, after the ordinary school hours. . . .

While there are no similar enactments relating to the use of any other facilities one Supreme Court decision suggests that the Courts are inclined to prevent discrimination in some cases at least. In *Watch Tower Bible and Tract Society* v. *Mt. Roskill Borough* (*a*) Gresson J. considered whether the Jehovah's Witnesses could insist on holding meetings in the local war memorial hall. The hall had been built on land vested in the Borough Council under the Reserves and Domains Act 1953. A Government subsidy had been obtained on the basis "That the project be vested in the territorial local authority to insure that the Memorial Hall will always be available for the use of all sections of the community." Section 33 of the Reserves and Domains Act affords the public a right of free access to reserves and domains which are subject to the Act although certain restrictions may be made on their use. His Honour granted a declaration that the Witnesses were entitled to use the hall on the basis that the combined effect of the terms of the subsidy and the provisions of the Reserves and Domains Act gave the Council no power to discriminate. Whether the *Watch Tower* case can be extended to other halls and grounds will depend in each instance on the precise terms of the legal instrument or instruments vesting the land in the relevant authority, but the line of reasoning used by Gresson J. probably applies to a large number of such instruments (*b*).

So far as the police are concerned, *Burton* v. *Power* must apply to meetings in public halls or grounds as well as to those in streets and reserves although there are no cases in point (*c*). Bringing *Burton* v. *Power* into play in such a context presupposes that the police may lawfully gain access to the meeting. It is clear enough that if you hire a hall for a public meeting you may prevent particular members of the public from entering, just as the operators of a picture theatre or coffee bar do not have to let all and sundry in. But just how far you can go in treating the police like any other member of the public is not clear. At the least they may enter pursuant to s. 317 (2) of the Crimes Act:

> Any constable, and all persons whom he calls to his assistance, may enter on any premises, by force if necessary, to prevent the commission of any offence that would be likely to cause immediate and serious injury to any person or property, if he believes, on reasonable and probable grounds, that any such offence is about to be committed.

In *Thomas* v. *Sawkins* (*d*) the English Divisional Court held that a constable may insist upon attending a meeting where he reasonably expects that a breach of the peace may occur, where he reasonably expects that seditios utterances may be made and possibly if he reasonably suspects that *any* offence will take place. I have argued elsewhere (*e*) that *Thomas* v. *Sawkins* is not law in New Zealand. The police operate on the assumption that it is. Most meeting organisers do not object to the presence of police at their meetings—they may of course help in quelling a disturbance made by those out of sympathy with the organisers of the meeting (*f*).

You should realise, therefore, that in refusing the police entry to a meeting you run the risk of being convicted of obstructing a constable in the execution of his duty.

---

(*a*) [1959] N.Z.L.R. 1236.

(*b*) E.g. the Wellington Town Hall is vested "for the purposes of public utility". If "public" is to be given full force it must mean that there is no power to discriminate and of course the local body does not. The R.S.A. was quick to see the point and in a press release shortly after the *Watch Tower* case was decided announced that ". . . the majority of exservicemen regard the Jehovah's Witnesses as persons unsuitable to be on or in a memorial and the N.Z.R.S.A. is therefore making representations to the Government to amend the regulations governing the use of public utilities dedicated as memorials to enable the controlling authorities to refuse the use of the memorial to any such organisation."

(*c*) The classic example of the police preventing a meeting occurred with the aid of emergency regulations made under the Public Safety Conservation Act 1932 —the refusal to allow the Leader of the Opposition to speak in Auckland during the 1951 waterfront strike.

(*d*) [1935] 2 K.B. 249.

(*e*) [1970] N.Z.L.J. at 178.

(*f*) For some indications of when they may intervene see *Brown* v. *Harding* (1951) 7 M.C.D. 310—basically to prevent a breach of the peace.

(c) *Privately owned halls or grounds*

It is clear enough that hall or ground owners which are not public bodies, such as a theatre operator, a lodge, a church, or the Rugby Union, can let or refuse to let their property for a meeting to whoever they choose. Apart from this, the only obvious legal restriction on the right of meeting in such places is one which applies to meeting organisers who own or rent their own premises. Part XII of the Municipal Corporations Act 1954 and Part XXIII of the Counties Act 1956 deal with the licensing of halls, among other things, for "public meetings or as assembly rooms". These provisions are designed mainly to enforce fire precautions. However s. 317 of the Municipal Corporations Act and s. 334 of the Counties Act permit the refusal of licences to persons whom the council is satisfied are not of "good character and reputation". Licences already granted may be revoked on similar grounds. There is a somewhat ineffective provision for an appeal to a Magistrate against a council decision. Obviously these sections may be misused on political grounds, although I am aware of no evidence that they have in fact. They constitute a potential power which in my opinion should not be left in the hands of local bodies.

The same comments on *Burton* v. *Power* and *Thomas* v. *Sawkins* apply to meetings in private halls and grounds as to meetings in public ones.

**Processions**

It is sometimes suggested that a moving meeting gains more protection from the law than a stationary one on the basis that a procession is simply the aggregate of all the individual members' rights to pass and repass (*g*). This point of view is reflected in the way the police are more sparing in the use of ss. 3 (eee) and 4 (1) (p) of the Police Offences Act against members of a procession as opposed to people staying put. But they are used on occasions—for example in Wellington during the June 1970 demonstrations against the All Black Tour of South Africa.

So far as the validity of local bylaws dealing with processions are concerned the aggregate of rights to pass and repass argument got off to a bad start in New Zealand in the early case of *McGill* v. *Garbutt* (*h*). Richmond J. said:

> The supposed right in any body of persons to pass in procession through the streets of a town is something entirely different from the separate and individual right of passage of the same persons as private citizens without preconceived arrangement and mutual understanding.

Most local bodies now have bylaws regulating routes for processions (sometimes excepting from their scope school "crocodiles" and the military) often forbidding them without the permission of the Town Clerk or a Council committee. Some of them are undoubtedly open to attack on the ground of unreasonableness although the Courts recognise a legitimate interest in some regulation of processions (*i*). My earlier comments about the non-enforcement of bylaws against meetings apply equally to those against processions.

Again, to hold a procession you need the consent or acquiescence of both the local body and the police. Even if you are not applying for a permit, tell them about your procession—they will help by directing the traffic around you.

[Symbolic Speech will be dealt with in the second part of this address, to appear in a subsequent issue of the JOURNAL—Ed.]

(*g*) See e.g. *Melbourne Corporation* v. *Barry* (1922) 31 C.L.R. 174, 196; *Police* v. *Anderson* (1934) 29 M.C.R. 76; *Police* v. *Smith* (1947) 5 M.C.D. 358.

(*h*) (1886) N.Z.L.R. 5 S.C. 73, 75 *Police* v. *Smith*, note (*g*) *supra*, which relied on the aggregate argument without citing *McGill* v. *Garbutt* is probably wrongly decided but the bylaw was almost certainly invalid for unreasonableness in any event.

(*i*) A carefully worded Wellington bylaw was upheld in *Anderson* v. *Hare* (1954) 8 M.C.D. 335.

---

**Go north, young man**—Those recently admitted to the Bar and bereft of legal experience can take comfort in a recent incident, recorded in the *Northern Newsletter*, of the Auckland practitioner who had a discharge of mortgage rejected by the Land Transfer Office "because the title wasn't produced, it wasn't signed correctly, it hadn't been stamped, there were insufficient fees and the mortgage had never been registered"

**Crash**

A Wellington stockbroker was taking his lunch time constitutional in the Botanic Gardens when a lovely young girl, completely naked, ran towards him screaming "I'm free, I'm free". With an admirable admixture of professional diplomacy and fatherly concern, the stockbroker seized the girl by the shoulders, looked her straight in the eyes and advised: "Young lady, no matter how bad the market is—*never* panic!"

# SEPARATION AGREEMENTS AS GROUNDS FOR DIVORCE

Section 21 (1) (m) of the Matrimonial Proceedings Act 1963 states that it is a ground of divorce that "the petitioner and the respondent are parties to an agreement for separation, whether made by deed or other writing or orally, and that the agreement is in full force and has been in full force for not less than two years." In *Smalley* v. *Smalley* (the judgment of Wilson J. was given on 15 February last) the Court was confronted with these facts: early in 1969, the respondent wife commanded the petitioning husband to get out of the house and stop out, as he was not wanted any more; the husband acquiesced without further parleying and neither spouse made any subsequent attempt to resume cohabitation. In these circumstances, counsel for the husband contended that the words of the respondent wife constituted an offer to separate which the husband had, by his acquiescence, duly accepted.

Wilson J. carefully examined the wording of s. 21 (1) (m) and compared it with its immediate forerunner s. 10 (i) of the Divorce and Matrimonial Causes Act 1928. He noted that both of these required that every agreement for separation intended to be relied on as a ground for divorce should be expressed in words, either written or spoken. As his Honour observed, this was not the case under s. 4 of the Divorce and Matrimonial Causes Amendment Act 1920, the forerunner to s. 10 (i) of the 1928 Act.

It will be appreciated from the above that, if the husband was ultimately to succeed, he would have first to succeed in inviting the Court to infer an agreement from conduct alone, the very question which was left open in *Ducker* v. *Ducker* [1961] N.Z.L.R. 583 (C.A.). His Honour thought that "an agreement which is not expressed in words but must be inferred from the conduct of the parties is no longer a ground for divorce. I can draw no other conclusion from the change in wording of the provision which was made in 1928 and which deliberately . . . restricted the agreements upon which reliance might be placed to those expressed in written or spoken words." He did, however, proceed to say that, "In construing words written or spoken which are alleged to express an agreement to separate the Court, will of course, in any doubtful case, have regard to the conduct of the parties, but conduct alone will not suffice, however strongly it points to a mutual agreement to separate."

The husband therefore had to fail; there was no offer to separate emanating from the wife, since her words were not, and were not intended to be, such—they were expressed as a command. Even if they were an offer, as his Honour observed, "nothing was said by the petitioner in reply, so there was no oral acceptance."

It is clear that care is needed in considering upon what ground to proceed in cases such as these. It is true that expulsive words of this kind have been held to constitute constructive desertion on the part of the speaker, as his Honour pointed out, but that ground had not been pleaded.

P.R.H.W.

---

**On the role of lawyers**: "Lawyers should use their talents to help a wider community, as well as their fairly limited range of clients," said Mr Isbey.

"One wants lawyers to get into all sorts of human situations—to help consumers; to help legitimate protesters; to help tenants; to help the aged; the sick; the poor and the needy.

"One wants lawyers to smash the concept that generally they play it safe. They are mentally and eloquently equipped, with their practical and philosophical knowledge and experience to come out on the great moral and social issues today. The legal and ethical rights or wrongs of Vietnam; the inhuman prejudices in racialism; the granting of full equality to the fairer sex in all fields of human endeavour.

"How many women lawyers have you got here tonight? [There were two]. Not one woman Judge in New Zealand. In my view women are natural Judges. My wife's daily judgments of my activities are incisive, salutory and final.

"There are the current worrying problems of drugs, abortion, homosexuality, and the more permissive society generally—and Frank Gill is going to deal with all that." (Laughter).

"In all these areas, help us define that which is criminal activity and that which is a social illness." E. E. ISBEY M.P. at Waitangi.

---

**ODE TO EFFLUENCE**

Mr. Polluter
They ought to take you out and shoot you
Instead a Knighthood is a certainty
"For services to Industry".