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ASSES, WIGS AND GOWNS

The law is an ass. Actually, Mr Bumble who first uttered the sentiment in Dickens's Oliver Twist said the law was "a' ass", but *an* ass is easier to say and it has been said quite frequently in recent days. This dim view of the law has been nourished in some people's minds by what has been happening in cases brought before the newest of our Courts of Law—the Industrial Relations Court set up by the new Industrial Relations Act. A month or so ago the Industrial Relations Court—the IRC as we've taken to calling it—imposed a fine of £55,000 on Britain's biggest union, the Transport and General Workers' Union, for failing to curb the activities of some of its dockworker shop stewards. The shop stewards with the backing of the dockers had, as the saying goes, "blacked" the big container trucks operated by some firms —had refused to give them entry to the docks for loading or unloading. The firms complained to the Industrial Relations Court, which declared the "blacking" an unfair practice under the Industrial Relations Act and ordered the Union to call it off. The Union leaders did their best but the dockers refused to play, and when the ban on the container trucks continued the Union was fined £55,000 and given to understand that they could be fined again and again if the ban was not lifted. The Transport and General Workers' Union appealed against the judgment of the IRC and the Court of Appeal quashed the fine, ruling that the Union had no power to control its shop stewards, though it might attempt to persuade them—the shop stewards being democratically elected by their workmates and entitled to the freedom and independence of all democratically elected representatives. In giving judgment, Lord Denning the President of the Appeal Court added some remarks about the dockers' justifiable anxiety about the security of their employment—a security that they had reason to see threatened by the operations of container firms which employed workers outside the docks industry.

This attitude of the Court of Appeal towards Union activities makes a striking contrast to the attitude taken by a British High Court in the early years of the last century when a Judge condemned the action of a handful of humble printers of the *Times* newspaper, who had not formed what we would call a Union today—that was still illegal under the Combination Acts —but had met quietly and privately to agree on an application to their employers for an improvement in pay and conditions. An "evil conspiracy" was how the Judge described the men's action, and they were sent to prison. But leaving Union law out of it, many people who disagreed with the ruling of the Appeal Court applauded the spirit of it. It should be the function of our Courts, they said, not only to protect the public against evildoers but to protect it against its rulers—it is the function of the judiciary to curb the executive when curbing is desirable. All commentators were agreed that the result of the Union's appeal came as a shock to the Government—the Industrial Relations Act being, so to speak, one of its blue-eyed babies.

But it was not because of the Appeal Court's action that talk about the law being an ass was bandied around. This happened over a more recent case when three dockworker shop stewards were in peril of imprisonment for contempt of Court. This trio of shop stewards were summoned to appear before the Industrial Relations Court to give an account of their action in blacking container traffic in the London docks area. They refused to appear, saying they did not

acknowledge the Court. Now no-one defended this attitude. There are such things as bad laws, we say in Britain and most other democracies, but even bad laws have to be obeyed—the right action is to agitate for their amendment or repeal. The Industrial Relations Court is the creation of an Act of Parliament, and when a minority ignores or defies Acts of Parliament it's a prescription for anarchy. Anyway, as I say, the three men were liable to imprisonment for contempt of Court and an ugly situation could have arisen if police had gone to arrest them and they had resisted arrest with the support, as seemed likely, of their fellow-dockers. Then out of a sky that was charged with thunderclouds there stepped a Good Fairy in the unlikely guise of a legal functionary called the Official Solicitor. It's part of the Official Solicitor's job it seems—few people seemed to have heard of him before . . . it's part of his job to act as what we might call a "poor man's lawyer". He appeared suddenly before the Industrial Relations Court and argued that the men's action was not the sort of contempt of Court that could be held to justify the harsh penalty of imprisonment. And the three intransigent shop stewards, who were already, with some pleasure and pride, trying on their martyrs' crowns, were shocked to learn that they would not after all go to jail. And I mean "shocked"—one of them described the intervention of the Official Solicitor, and the Court's action in rescinding the imprisonment order, as a "diabolical liberty". Which tells us something about the twists that can be given to our languge. People not only talked about the law being an ass because of this incident—more than one commentator described it as worthy of Gilbert and Sullivan. But then it was the rigid stuffiness of lawyers that Gilbert satirised in "Trial by Jury". Myself I think that these happenings suggest that modern law in Britain —and modern lawyers—can wear a human face for all their wigs and gowns.

But the lawyers' wigs and gowns—and their other archaic features and practices, as they've been called—have come in for some knocking lately. Writing about a case now before the House of Lords and concerned with corruption of morals, Mr Bernard Levin in *The Times* newspaper has been taking some hard swipes at some of the archaic formalism of the legal dialogue going on in the Lords—all that talk about the "Queen's lieges" for instance when they mean you and me—and has hinted that the wigs and the gowns and the judicial robes and other outdated trappings and trimmings, as he thinks them, are partly responsible for the refusal of our Courts of law, as he sees it, to drag themselves screaming into the twentieth century and away from the twelfth. And I noticed in one of our popular papers not long ago a letter from a reader who asked why we couldn't in Britain take a leaf out of Perry Mason's book. He meant "out of Raymond Burr's book," of course, it being Mr Burr who played Perry Mason in the television series before he became the chair-bound Robert Ironside. For years in Britain—and I suppose all over the world—we've watched Perry Mason, dressed in a simple business suit, win Courtroom laurels that have seldom been attained by the most brilliant of British advocates for all his forensic wig and, if a Q.C., silk gown. Why should not the dress of Perry Mason be good enough for barristers in Britain—and for that matter why should not the simple gown of the Judges before whom Mason appeared be good enough for our Courts, instead of the scarlet and ermine and full-bottomed wig that clothe the majesty of the law in Britain. I'm trying to imagine Perry Mason operating in an appeal before our House of Lords. Before their Lordships had the chance to pronounce judgment it would probably end—taking a line through the normal Mason endings—with some noble and hereto before blameless Duke springing to his feet to confess, with sobs, that he and he only was the Guilty Man.

SAM POLLOCK.

Advertising precedent—With the scale fee up seemingly doomed in Britain, may we suggest that for their advertisements British legal firms go to Hong Kong for a precedent. The *China Post* recently carried the following advertisement under the classified column headed "LEGAL SERVICE"—"LEGAL MATTERS—RELIABLE & QUICK SERVICE: Marriage, Divorce, Adoption, Passport, Contract, Claims, Translation, etc. Sincere Law Firm, 4th Fl. 675 Lin Shen North Road Tel: 570011"
The *China Post* offers the following as being "available for the first time—Lake and Beach Front Property in New NEW ZEALAND!"—"SPORTS: Fishing for the LARGEST TROUT in the World; Hunting Abundant DEER and FOWL, Horse backriding; Hi King; Swimming; Waterskiing; Sailing; and many NATURAL-WONDERS to Explore;" coupled with "THE BEST FOOD IN THE WORLD: Plentiful Fresh Fruit and Vegetables and the Tastiest but Cheapest Beef and Fish in the World!" As it has "ALL THE MODERN CONVIENCES" who would not rush to "LAKE TAUPO" where "the Cost is unbelievably inexpensive!" Please address your enquiries to the General Investment Corp., of Taipei, Taiwan!!

SUMMARY OF RECENT LAW

HUSBAND AND WIFE—DOMESTIC PROCEEDINGS

Orders for maintenance—Separation agreement—Wife covenanting not to apply for maintenance—Provisional maintenance order in England—Application for confirmation in New Zealand by English Commission—Court's discretion restricted—Matters to be considered in respect of amount—Domestic Proceedings Act 1968, s. 64. The respondent was paying the appellant's wife in England a benefit under the Ministry of Social Security Act 1966 (U.K.) and made a complaint under s. 23 of that Act and under s. 3 of the Maintenance Orders (Facilities for Enforcement) Act 1920 (U.K.). The appellant's wife had taken no steps herself. The appellant and his wife had come to New Zealand in November 1966. On 1 December 1969 they entered into a separation agreement under which the appellant agreed that the wife should have custody of the child and take her to England and the wife undertook that she would not herself nor suffer any other person to ask for maintenance for herself or the child. Under s. 64 of the Domestic Proceedings Act 1968 it is provided that on the hearing for confirmation of provisional orders made in the Commonwealth any defence may be raised which a husband might have raised in the original proceedings and the statement of the Court making the original order as to the grounds upon which the husband might have opposed shall be conclusive evidence of those grounds, but no other defence may be raised. The grounds that might have been raised were (a) that the child was illegitimate (b) no benefit had been paid for the child and (c) the husband's resources were insufficient. The provisional order was for $5, $3 to cover the amount paid to the wife and $2 for the child. The Magistrate confirmed the order after hearing extensive evidence from the appellant of the history of the matter. *Held*, 1. The Magistrate was right in holding that the discretion vested in him to confirm an order was restricted on the grounds on which he could refuse to confirm the order. (*Peagram* v. *Peagram* [1926] 2 K.B. 165, referred to.) 2. An agreement releasing a father from liability to maintain his child is contrary to public policy. (*Duncan* v. *Somlai* [1962] N.Z.L.R. 849, applied. *Bennett* v. *Bennett* [1952] 1 K.B. 249; [1952] 1 All E.R. 413, referred to.) 3. The wife may bargain away her right to maintenance. 4. The position of the respondent appeared to be different from that of the wife herself. (*National Assistance Board* v. *Mitchell* [1956] 1 Q.B. 53, 58; [1955] 3 All E.R. 291, 293 and *Din* v. *National Assistance Board* [1967] 1 All E.R. 750, 754, referred to.) 5. In confirming a provisional order the amount is at large and the broad dictates of justice in all the circumstances should be followed. 6. Since the wife had not sought a greater benefit than $3 per week the order was confirmed for that amount only. *Deans* v. *Supplementary Benefits Commission* (Supreme Court, Gisborne. 15 February; 21 April 1972. McMullin J.).

TRANSPORT AND TRANSPORT LICENSING—OFFENCES

Driving while under the influence of drink or drug—Request by traffic officer for blood test to be taken refused—Refusal sufficient to create offence notwithstanding no subsequent request by medical practitioner—Transport Act 1962, ss. 58B 1 (b), 58C (1) (Transport Amendment Act 1970, s. 5). The traffic officer stopped the appellant who was driving a car at 40 m.p.h. in a 30 m.p.h. area, and two breath tests were taken, both of which gave positive readings. When asked by the officer to give a specimen of blood the appellant refused. It was contended that as no registered medical practitioner had requested the appellant to permit a blood test to be taken no offence had been committed because in s. 58B (1) (b) of the Transport Act 1962 the word "and" was conjunctive and accordingly the person had to refuse the request of a traffic officer *and* refuse the request of a registered medical practitioner for a blood test to be taken. *Held*, 1. Section 58B 1 (b) contains two steps to be followed and such division harmonises with s. 58C (1) which creates two offences corresponding with the two steps. 2. Failure to observe either of the two steps creates an offence. *Dyer* v. *Ministry of Transport* (Supreme Court, Wellington. 24, 26 November 1971. Beattie J.). [NOTE: On 10 April 1972 at Wellington the Court of Appeal consisting of Turner P, Richmond and Mcarthur JJ. orally dismissed an appeal against this decision.]

CATCHLINES OF RECENT JUDGEMENTS

Transport—Failing to accompany traffic officer under s. 58A (2) of the Transport Act—Whether conviction carries power of disqualification—s. 30 (4). *Williams* v. *M.O.T.* (Supreme Court, Wellington. 24 July 1972, Quilllam J.).

Correction—In "The Policeman's Lot" [1972] N.Z.L.J. 49 it was noted in connection with the Agnew demonstration, that, "both the Minister of Police, Hon. D. Thomson and Commissioner Sharp made premature denials of misconduct with the result that they were subsequently trapped by their public utterences." This is incorrect. The statement referred to was made by a senior police officer other than Commissioner Sharp who in any event did not achieve his present rank until after the Agnew Demonstration had taken place but before the Ombudsman had reported on it.

BILLS BEFORE PARLIAMENT

Appropriation
Carter Observatory Amendment
Children's Health Camps
Clean Air
Clean Air (No. 2)
Coal Mines Amendment
Customs Amendment
Electoral Amendment
Finance
Fire Services
Fire Services Amendment
(Flat and Office Ownership) Unit Titles
Hydatids Amendment (No. 2)
Indecent Publications Amendment
Land and Income Tax Amendment (No. 2)
Land and Income Tax (Annual)
Marlborough Sounds Maritime Park
Mental Health Amendment
Ministry of Energy Resources
Minister of Local Government
National Art Gallery, Museum, and War Memorial
Occupational Therapy Amendment
Preservation of Privacy
Public Revenues Amendment
Republic of Bangladesh
Republic of Sri Lanka
Shipping and Seamen Amendment
Soil Conservation and Rivers Control Amendment
Stamp and Cheque Duties Amendmeut.
Tobacco Growing Industry Amendment
University of Albany
Wool Marketing Corporation

STATUTES ENACTED

Imprest Supply
Land and Income Tax Amendment
Ministry of Agriculture and Fisheries Amendment
Ministry of Transport Amendment

REGULATIONS

Regulations Gazetted 17 August 1972 are as follows:

British Nationality and New Zealand Citizenship Order 1972 (S.R. 1972/171)
Civil Aviation Regulations 1953, Amendment No. 17 (S.R. 1972/172)
Coinage Regulations 1967, Amendment No. 3 (S.R. 1972/173)
Education (Salaries and Staffing) Regulations 1957, Amendment No. 11 (S.R. 1972/175)
Education (School Committees Incidental Expenses) Regulations 1956, Amendment No. 4 (S.R. 1972/174)
Offenders Legal Aid Regulations 1972 (S.R. 1972/176)
Otago Inland Harbours Regulations 1969, Amendment No. 1 (S.R. 1972/177)
School Boarding Bursaries Regulations 1972 (S.R. 1972/179)
Toheroa Regulations 1955, Amendment No. 11 (S.R. 1972/178)

LAW REPORT REPRINT

It was learned from an authoritative source at Butterworths that the Reprint of the whole of The Law Reports, proposed last January, will now definitely be undertaken. There will be 565 volumes, the first of which will appear early next year—publication will be spread over two years.

When the Incorporated Council of Law Reporting approached Butterworths, it was agreed that the decision to go ahead with the Reprint must be dependent on there being enough support from the legal profession and law libraries to make the project economically viable. There may not have been any serious doubt about the matter, but the amount of capital investment involved in such a mammoth publishing effort dictated caution.

During the last few weeks the value of orders received for the Reprint has climbed steeply. Until printing actually begins, Butterworths are accepting orders for broken runs and even single volumes. After that, however, it is extremely unlikely that they will break into complete sets of the newly reprinted volumes. Hence the rush to place orders while there is still time. Orders placed before 30 September are sure of execution —and carry a rebate of $2 per volume. The pre-publication price of a complete set is $4,520, saving of $1,214.

It is interesting to learn that the demand for this great accumulation of English case law is not by any means confined to the United Kingdom or even to the Commonwealth. We understand that about half of the orders have come from Africa and the Far East. If that is so, English lawyers owe a debt of gratitude to their overseas colleagues whose support has helped to make the Reprint possible.

Further information from:

Mr D. R. CHRISTIE,
BUTTERWORTHS OF NEW ZEALAND LTD.,
26-28 WARING TAYLOR STREET,
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Tel: 41-276.

CASE AND COMMENT

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

Company Law—Financial Assistance to Purchase Shares

The decision of Quilliam J. in relation to the application for a declaratory order by the Wellington Publishing Co. (Judgments 8 and 12 June 1972) is of considerable interest to those involved in take-over offers. Though the facts of the case were such that few, if any, other companies could use the decision as a precedent, it does establish the proposition that monies received by way of dividend from the company being taken over may be used to meet a liability of the take-over company.

The facts were these. The Wellington Publishing Co., Ltd. made a take-over offer for the acquisition of 3,060,000 fully paid ordinary $1 shares of Blundell Brothers Ltd. Payment was to be made by the allocation of 3 shares in the Wellington company for every 5 shares in Blundell Brothers and a cash payment of 95 cents cash per share. The offer was accepted by all the shareholders and a cash payment of $2,991,788 was due to them. This sum was to become available from a dividend of approximately $3,000,000 declared by Blundell Brothers which was to be paid to those shareholders who had not accepted the offer from the Wellington company and to the Wellington company in respect of those shares it had acquired. All of the shareholders accepted the offer. The $3,000,000 appeared in the accounts of Blundell as revenue reserves and was to come from the realisation of investments and a loan on the security of the company's assets. Effectively, the source of the funds to finance the take-over was the assets of the company being taken over.

It was argued that this was a breach of the Companies Act 1955, s. 62 (1) which provides:

> "Subject as provided in this section, it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security, or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company. . . ."

There has been a number of cases recently on the scope of s. 62, including a decision of Woodhouse J. in *Skelton* v. *South Auckland Blue Metals Ltd.* [1969] N.Z.L.R. 955, all of which have tended to extend the operation of the provision, but none involved a situation comparable to that in the *Wellington Publishing Co.* case. But because none of the shareholders of the company taken over were seen to have been harmed (they had all accepted the offer), because the monies to be distributed were available for payment of dividends, and because it could not be shown that any creditor would be prejudiced, the transactions were not seen to fall within s. 62. This conclusion is consistent with the Report and recommendations of the Jenkins Committee Cmnd. 1749 (1962) paras. 170-187 and especially paras. 175 and 187 recommendation (d) (vi).

It may be idle to speculate on the reasons for the shareholders preferring to become members of the take-over company and receiving from it a payment that might have been made to them by the company being taken over; possibly tax considerations, an issue raised in the proceedings, played some part.

Those involved in take-over schemes will find the decision of Quilliam J. entirely satisfactory; it shows that certain transactions are not within the ambit of s. 62. The question whether s. 62 should be amended to cover cases such as this will doubtless attract the attention of the Company Law Advisory Committee whose final report is awaited. That Committee may recommend that there should be restriction on the declaration and payment of substantial dividends within a stated period after take-over.

J. F. N.

Defamation—Defence of Qualified Privilege—Effect of Malice.

The defamation action between *Brooks* v. *Muldoon*, involving as it did two well-known personages, will, no doubt, pass into history as a *cause celebre*. From a purely legal point of view the decision is of interest since it involved a wide ranging discussion of the situations in which, where a subject is *of public interest*, the common law defence of qualified privilege can be successfully pleaded. (The judgment of Haslam J. was delivered on 17 May, 1972).

The facts in issue in this case were well-known at the time of the hearing. The plaintiff at the material time was industrial relations manager for a well-known industrial undertaking, and he

had also held positions as a school teacher and a university lecturer in law. By virtue of an amendment in 1970 to the Industrial Conciliation and Arbitration Act 1954 a post of Chief Mediator was created. Accordingly the Minister of Labour set up a committee composed of the Secretary of Labour, the President of the Federation of Labour and the Executive Director of the New Zealand Employers' Federation to recommend a suitable appointee for this newly created post. The committee being somewhat disappointed with the applicants, the plaintiff was invited to apply, and was subsequently recommended for the post.

Nevertheless, both Cabinet and Government Caucus decided that the plaintiff was not suitable. The matter was, however, raised in the House during a debate. The defendant as Minister of Finance replied on behalf of the Government.

A few days later, however, the defendant was questioned about the matter outside the House, and he uttered certain words about the plaintiff, all of which gave rise to causes of action in defamation, on four separate occasions, three of these were published in the press, and the other arose from a "Gallery" programme recorded and published on television.

The defendant pleaded that qualified privilege applied in respect of all the statements, whilst the plaintiff filed particulars alleging "malice", which if proved would defeat the defence.

The jury found two out of the three newspaper publications, and the Gallery programme defamatory of the plaintiff, and in answer to the issues put to them found that the defendant was actuated by malice in respect of the "Gallery" programme.

After the trial the learned Judge heard legal argument on the question of the extent of the defence of qualified privilege, and he then had to decide whether the defendant had successfully established the plea in this case (the onus being on the defendant to do so).

There are, of course, a number of situations, many of which were not relevant, in which the plea of qualified privilege can be raised. Here the legal issue involved was the extent to which qualified privilege is available when the subject-matter is of public interest, as it undoubtedly was in this case. The learned Judge made a careful review of the relevant case law on the subject, and concluded that whilst a Minister might have a duty to acquaint the public of certain relevant information, there were no grounds to support the release of the words to the public at large, and that none of these passages complained of and found by the jury to be defamatory, were published on a privileged occasion. In this view he found support in a judgment of the Canadian Supreme Court delivered by Cartwright J. in which he rejected as "untenable" the "proposition":

> "That given proof of the existence of a subject-matter of wide public interest throughout (the country), without proof of any other special circumstances, . . . any individual (who) sees fit to publish to the public at large statements of fact relevant to that subject-matter is to be held to be doing so on occasion of qualified privilege". (*Banka* v. *Globe and Mail* [1961] Canada L.R. 474 at 484).

The learned Judge then turned to consider the question of malice. This was of course not strictly necessary since it would only have required to be considered, if the defence of qualified privilege had been successfully pleaded, and then a finding of malice could have defeated the defence. In this sense malice carries the meaning of "improper motive" rather than "spite or ill-will". Whilst there may have been some evidence of negligence or recklessness on the part of the defendant, there was nothing to suggest that he had been actuated by improper motive so as to defeat qualified privilege had it been successfully pleaded.

The main interest in this case lies in the light it casts on the extent to which statements on questions of public interest may or may not be situations in which a plea of qualified privilege will be successful.

M.A.V.

MAGISTRATES APPOINTED

William John Martin Treadwell Esq. S.M.—appointed a Stipendiary Magistrate to exercise civil and criminal jurisdiction within New Zealand on and from 23 June 1972. Appointed a member and Chairman of the Special Town and Country Planning Board on and from 1 August 1972.

John Elderson Miller Esq., S.M.—appointed a Stipendiary Magistrate to exercise civil and criminal jurisdiction within New Zealand and to exercise jurisdiction in the Children's Court established at Hamilton on and from 27 June 1972.

Expedite that letter—For a small additional fee, the Post Office will include your box number in your entry in the telephone directory, and this should help to speed letters to you.

PRIVATE TRUSTS AND THE TORRENS SYSTEM

One of the cardinal principals of the Land Transfer System, as developed by Torrens, is that registration confers indefeasibility of title. Another objective is that the system should operate with the maximum of simplicity. It is often said that the Register is everything, i.e. in other words a searcher need not go behind the Register to satisfy himself as to the validity of the registered proprietor's title. Since the introduction of the system into New Zealand the principle of indefeasibility has remained intact while the "simplicity" of the system has suffered at the hands of the Legislature. The purpose of this article is to examine the ways in which private trusts can be noted on the Register for here we have, by its very nature, a conflict between the objectives of indefeasibility and simplicity on the one hand and the desirability of protecting the equitable rights of *cestuis que trust* on the other. Leaving aside trusts of a public nature, which are outside the scope of this article, we start with the rule that no notice of trusts may be entered on the Register (*a*). The registered proprietor is deemed to be the owner for all purposes. He may deal with the land as he chooses and a *bona fide* purchaser for value from him obtains a State-guaranteed title. The depositing of a Trust Deed with the Registrar, as permitted by s. 128 of the Land Transfer Act 1952, seems quite ineffectual as it is not *registered*, its deposit not therefore noted on any title and its presence remains quite unknown to any searcher. The commonest type of situation akin to the private trust is, of course, the vesting of land in executors and trustees by registration of transmission. The transmission document usually contains a copy of Probate and Will. If Testator Thomas devises his Aro Street house to nephew Nolan, and executor Edwards (having declared in his application for transmission that "no person . . . other than the beneficiaries under the Will is entitled to any interest at law or in equity . . .") proceeds to sell the Aro Street property to his friend Findlay who registers a transfer, Nolan can sue for breach of trust but Findlay remains owner. What is the position if Nolan cries "fraud" and challenges Findlay's title? The term "Register" includes all instruments filed at the Registry. The transmission document with its copy Will, is part of the Register and the trusts imposed on Edwards by the Will are part of the public record and "notice" to the world. How far can the District Land Registrar go to police such trusts? The transfer to Findlay may have been registered five, ten or twenty years after the transmission. To put the matter beyond doubt, Findlay may have transferred to a stranger, Mrs X. Y. Smith, whose title is quite unimpeachable.

It is true that under s. 124 the Registrar is specifically empowered to register a *caveat* to protect the interests of persons "appearing by that Will . . . to be beneficially interested in the estate or interest the subject of the transmission", but how often is this done in practice? The writer doubts whether any District Land Registrar has time to engage himself in such pursuits.

Most conveyancers will have had experienced of registering instruments in which the registered proprietors hold as trustees. No difficulty is encountered where the trust is protected by its own Statute. Examples of these are the Methodist Church Trustees Act 1887 and the Presbyterian Church Trustees Act 1885, the Provincial Grand Lodge of New Zealand (Irish Constitution) Trustees Act 1946, the Masonic Property Trusts Act 1956 and the like. Similarly, no difficulty arises where the Society has been incorporated under the Incorporated Societies Act 1908, and the society can take title in its own name (*b*). It is still open to the society to provide in its rules that property including land, shall be held by trustees on behalf of the society, or vested in its committee, or held in the names of all members for the time being, for s. 14, which provides that members shall have "no right title or interest either legal or equitable in the property of the Society" also provides that this is "except when otherwise expressly provided . . . by the rules of a Society".

There is no reason, however, why a society should make such provision in its rules when it has the advantage of incorporation and of taking title to land in the corporate name.

It is relevant at this point to examine the provisions of the Friendly Societies Act 1908 in so far as they affect land. The classes of society

(*a*) s. 128, Land Transfer Act 1952.

(*b*) s. 10, Incorporated Societies Act 1908. "Upon the issue of the certificate of Incorporation the subscribers . . . shall . . . be a body corporate . . . capable . . . of holding land."

that are eligible to register as a friendly society under the Act are extraordinarily wide and include societies established for the "relief or maintenance of the members of . . . their nephews or niece or wards (being orphans)" or old folk (i.e. over fifty years) or members "travelling in search of employment" or for "ensuring money to be paid . . . during the period of confined mourning" (Jews only) or for "insuring the tools of trade of members (for not more than £15.") Then again, it includes societies established "for any benevolent or charitable purpose" or for "purposes of mutual helpfulness, mental and moral improvement and rational recreation" (hereinafter called working men's clubs.) Unlike societies registered under the Incorporated Societies Act, friendly societies are obliged (*c*) to appoint one or more trustees and all property belonging to the society, or acquired after registration, vests in the Trustees for the use and benefit of the Society and its members (*d*).

On the death resignation or removal of a trustee the property vested in that trustee shall vest "without conveyance transfer or assignment" in the succeeding trustees or in the executor or administrator of the last surviving or continuing trustee. When we come to the case of land we find one of the statutory exceptions to the "no trusts on the Register" rule for s. 46 provides that leases, transfers, or mortgages of land to a registered society or branch must be taken in the names of the trustees "denoted by their official titles and not by their own proper names". Such trustees are, by the Act, "deemed to be the registered proprietors of the Land so transferred or of such lease or mortgage" (*e*) in exactly the same way as executors registered by transmission are deemed to be "the absolute proprietors thereof" under the Land Transfer Act 1952 (*f*). If the rules of the society, or its branch, specify a multiplicity of trustees and allow execution of instruments by a majority the District Land Registrar's duty is to check the Rules and list of Trustees which must be deposited with him (*g*) and thus ensure that the document is executed in accordance with the rules.

The indefeasibility rule again comes into play as the Act goes on to provide that no person claiming under any instrument so registered "shall be affected by notice direct or constructive that the property of the Society or branch was not vested in the persons executing the same or that the instrument was executed in contravention of the rules of the Society or branch. . . ." (*h*) The Act itself permits investment of the funds of a Society in the purchase of land "if the rules so provide" (*i*) but the situation that could arise if an over-enthusiastic trustee launches out on a campaign of property speculation, without having noticed the absence of any power to buy land in his rule book, is full of interesting possibilities, all of which are outside the scope of this article (except perhaps for the brief and obvious comment that the District Land Registrar's duty is to check mode of execution of instrument rather than questions of domestic *ultra vires*). A rather odd discriminatory provision appears in the Act prohibiting the class of "benevolent society" from holding land exceeding one acre in extent (*j*) while "Working Men's Clubs", all "specially authorised Societies" established by Order in Council, carpenters' thirty-dollar tool insurance groups, Jewish confined mourning associations and travelling unemployed workmen's relief clubs (all grouped together under the heading of true "friendly societies") are permitted to buy up land to their heart's content. Thus the Waipipi Community Service and Glee Club, having registered itself under the Friendly Societies Act 1908 as an undoubted "benevolent society" is precluded from buying up the long-defunct Waipipi Town Hall on its two-acre section. If the transfer should happen to get past the eagle eye of the Hokitika District Land Registrar, and an aggrieved member then attempts to have the transfer cancelled as being contrary to a statutory provision, he may well succeed. As the learned author of *Land Transfer Act* observes at p. 19: "if the instrument appears to be in contravention of Statute Law he should not register it. The Registrar is supposed to know the Statute Law. . . ." But then again, the District Land Registrar may not face embarrassment. After all, the Act only says "Nothing herein shall authorise a benevolent Society to hold land exceeding one acre in extent". The reference, made earlier, to the vesting of property in new trustees "without conveyance transfer or assignment" has a strange ring to the real property conveyancer. Herein lies the essential difference between the "transfer" and the "transmission". In the former case, registration of the instrument itself converts an equitable interest to a legal estate. The equitable interest

(*c*) s. 43, Friendly Societies Act 1908.
(*d*) ibid., s. 44.
(*e*) s. 46 (1).
(*f*) s. 123 (2).
(*g*) s. 45.
(*h*) s. 46 (3).
(*i*) s. 48 (b).
(*j*) s. 50 (2).

may be founded in contract or otherwise but the *act* of registering a transfer is necessary. In the latter case, registration has the effect of *recording* on the register a legal estate in the land that has already arisen by operation of law. "Transmission" has been defined as "the devolution of property upon some person by operation of law, unconnected with any direct act of the party to whom the property is transmitted, as by death . . . *or Statute*" (Adams *Land Transfer Act* 2nd ed. 311; *Woolston* v. *Registrar-General of Land* (*N.S.W.*) (1934) 51 C.L.R. 300).

Throughout this article we shall be examining and comparing various types of Statutory vesting of title to land in persons or organisations holding title in trust for others. Some, by their "parent" Statute, are specifically linked to the Land Transfer Act while others appear to operate in magnificent independence of it. We have seen that, in the case of friendly societies, there is no problem in the case of land as the trustees hold title by office instead of by name. Like the Public Trustee, the Provincial Grand Master never dies. If we turn to religious, educational and charitable trusts we find a similar expression contained in the Charitable Trusts Act 1957 where "any real or personal property has been or is hereafter acquired by or on behalf of any religious denomination, congregation or society or any body of persons associated for any charitable purpose (*k*) and the conveyance or other assurance of that property has been is or taken to or in favour of trustees to be from time to time appointed or any parties named in the conveyance or other assurance or subject to any trust . . . the conveyance or other assurance shall not only vest the property thereby conveyed or otherwise assured in the parties named therein but shall also effectually vest the same in their successors in office for the time being and the continuing trustee (if any) jointly or if there are no such continuing trustees then their successors in office for the time being chosen and appointed in the manner provided or referred to in the conveyance or other assurance or in any separate deed or instrument declaring the trusts thereof or if no mode of appointment is therein provided or referred to, or if the power of appointment has lapsed then in such manner as may be agreed upon by such denomination or. . . . The said property shall be so vested without any conveyance or other assurance whatsoever upon the same trusts" (*l*).

If we distill the essence of this mass of verbiage we find that the title to property (including land) held under charitable trusts can pass in strange and unaccustomed ways. Transfers and transmissions are unnecessary. Unlike friendly societies, charitable trusts do not hold title to land in the names of their representative designated by office, rather than name. The vote of the back-room committee can be the act upon which title passes. If the Register is, indeed, the "mirror" of title it would appear that the glass is in this instance, showing signs of cracking. Fortunately, the law draftsman has taken the matter a stage further. As he says: "*For the purpose of preserving evidence* of every appointment of new trustees . . . and of the persons in whom any estate or interest in property from time to time becomes legally vested every such appointment shall be made to appear by Memorandum under the hand of the Chairman. . . ." Mode and form of Memorandum are then specified (*m*). As a final concession to Torrens the Statute goes on to provide that "Every memorandum made under this section of an appointment of new trustees shall if it affects land under the Land Transfer Act 1952 be filed in a Land Registry Office and . . . the appointment shall not have any operative effect until after the filing in the Land Registry Office . . . of the Memorandum or a copy thereof certified by the District Land Registrar. . . ." (*n*)

On the face of it, there is a curious distinction between the relevant parts of the Friendly Societies Act and the Charitable Trusts Act for whereas the former clearly lays down that *all* property held by friendly societies must immediately vest in the duly appointed trustees, the latter seems to envisage property being held either by trustees or by "any parties named in the conveyance or other assurance". The subsection dealing with registration of a memorandum in the Land Transfer Office specifically refers to an "appointment of new trustees" only so that the situation where a property owning non-trustee, (whom we might term a "nominee") is left in limbo. We have seen that on death or resignation of a "nominee" who had been named in a conveyance the property is effectually vested in his successor or successors in office *without* conveyance or other assurance. The distinction made in section 3 between trustees and "nominees" is preserved in section 4 so that on a strict interpretation of s. 4 (3) it is arguable that

(*k*) The term "charitable purpose" being defined as "every purpose which in accordance with the law of N.Z. is charitable . . . includes every purpose that is religious or educational whether or not it is charitable . . ."

(*l*) s. 3, Charitable Trusts Act 1957.
(*m*) ibid., s. 4 (1), (2).
(*n*) ibid., s. 4 (3).
(*o*) s. 13, Charitable Trusts Act.

legal title to land held by "nominees" passes even without the necessity to register a Memorandum at the Land Transfer Office. The comment was made earlier, in connection with Societies registered under the Incorporated Societies Act 1908, that there was no earthly reason why, having gone to the trouble of Incorporating, the Society should hold title to real property in any manner other than in the registered name of the Society. The same comment could almost be made in reference to Organisations coming within the ambit of the Charitable Trusts Act, section 7 of which provides for applications by trustees for registration as a Board. Boards registered under that Act are "capable of holding real and personal property . . ." (*o*) and such property "shall immediately upon incorporation of the trustees or society as a Board vest *without transfer conveyance or assignment* in the Board. . . ." (*p*)

That ominous phrase is again tempered by a following subsection which allows a District Land Registrar to register the Board as proprietor of any estate or interest in land, or as mortgagee thereof upon receiving a written application to do so under the common seal of the Board. (*q*)

Under the Act, a Board may sell or exchange its land, notwithstanding the trusts imposed on it, but with the proviso that Supreme Court consent is needed if it is "of the essence of the trust that the particular property should be used for the purpose of the trust". (*r*)

It goes without saying, that if a Board should sell its land in contravention of an essential trust, perhaps in the mistaken view that the trust has lapsed or is too difficult to administer, there is little that can be done to rectify matters once the buyer has taken title. The Court cannot order the buyer to re-sell to the Board, and even if a copy of the original Trust Deed had been lodged with the District Land Registrar, there is little likelihood of that officer using his discretionary powers to *caveat* title under s. 211 (d) unless the instrument of transfer was, on its face, "improper or fraudulent" which is highly unlikely. It would be otherwise, however, if a dissentient member of the Board decided, in good time, to stir up trouble and the *caveat* was thus applied for by an outsider before a transfer could be registered.

Societies which have been granted incorporated status under their own Statutes cannot later register under the Charitable Trusts Act 1957 (*s*). "No such application (i.e. to register under the Charitable Trusts Act 1957) . . . shall be made by any trustees if the trustees are already incorporated under any other Act or otherwise . . ." or by any Society "if the Society is itself incorporated . . . under any other act or otherwise" (*t*).

Organisations which enjoy the privilege of corporate status under the three statutes already discussed ("Charitable" trusts, friendly societies and societies registered under the Incorporated Societies Act) must be essentially non-profit making groups. Societies registered under the Industrial and Provident Societies Act 1908 are in a somewhat different category and are defined as "a Society for carrying on any industry business or trade whether wholesale or retail, specified in or authorised by its rules, including dealings of any description with land, but excepting the business of banking" (*u*).

By way of qualification, however, the Act limits this to "a *bona fide* co-operative society" and (in terms rather reminiscent of the Friendly Societies Act), societies conducted "mainly for the purpose of improving the conditions of living or otherwise promoting the social well-being of members of the working classes or otherwise for the benefit of the community" (*v*).

Whereas the Incorporated Societies Act specifies a minimum of fifteen members, the Industrial and Provident Societies Act requires at least seven members for incorporation (*w*). Registration of a Society under the Industrial and Provident Societies Act "shall render it a body corporate by the name described in the acknowledgment of the Registry . . . and shall vest in the Society all property for the time being vested in any person in trust for the Society. . . ." (*x*)

We do not strike the old familiar reference to vesting of property "without conveyance transfer or other assignment" nor do we find any concessions as to registration of "Memoranda" "application" or other strange documents so it seems that trustees for an un-incorporated association which later decides to register as an Industrial & Provident Society must adopt the more mundane method of registering a transfer

(*p*) ibid., s. 14.
(*q*) ibid., s. 14 (2).
(*r*) ibid., s. 21.
(*s*) Provided that no board incorporated under this part of this Act shall be incorporated under any other Act (s. 22).
(*t*) ibid., s. 7.
(*u*) s. 2, Industrial and Provident Societies Amendment Act 1923.
(*v*) s. 33, Statutes Amendment Act 1939.
(*w*) s. 5, Industrial and Provident Societies Act 1908.
(*x*) ibid., s. 9.

of land into the name of the society before the society can sell or otherwise dispose of the property.

Having incorporated, the society may invest its funds "in the purchase or lease in its own name of any land or buildings and may hold sell exchange mortgage lease or build upon the same . . ." (*y*) so long as its rules do not direct otherwise. By way of reassurance to those who immediately think of the effect on *ultra vires* or unauthorised sale by a society the Act goes on to provide that "no purchaser assignee mortgagee or tenant shall be bound to inquire as to the authority for any sale exchange mortgage or lease by the Society. . . ." (*z*)

One of the minor penalties for the simplicity of the Torrens system, and the Statutory reassurance to purchasers etc. (mentioned above) is that the District Land Registrar is obliged to receive "from time to time" a return of the Committee members of every Industrial & Provident Society registered in his District and notices of deaths, resignations and removals and appointments of new members and secretaries, copies of rules, statutory declarations and the like. Furthermore, when "any instrument is presented for registration affecting any land included in any mortgage or encumbrance registered under the Land Transfer Act 1952" the District Land Registrar is obliged to check that it is signed by four persons, three of whom must appear in his lists as committee men and the fourth as Secretary.

Having safely registered it, "no person claiming under any such instrument shall be effected by notice direct or constructive that the persons signing the same were not such members or secretary respectively nor that such instrument was executed in contravention of the rules of the Society the terms of the mortgage . . ." (*a*).

On a rather more elevated plane we find associations of "persons being not less than fifty" who qualify for statutory incorporation under the Industrial Societies Act 1908 for the purpose of "fostering and encouraging in New Zealand any branch of any manufacturing, mining or productive industry or any act connected therewith . . ." (*b*).

As in the case of Industrial and Provident Societies, all property real and personal "belonging to or held in trust for any Society incorporated under this Act shall on and after the incorporation of such Society vest in and belong to such Society in its corporate style" (*c*).

Again we must assume that in the absence of any special provision to the contrary, the statutory vesting of land would have to be recorded by means of registration of a transfer before the society could sell. The act also provides that Crown Lands may be granted to Industrial Societies by the Governor-General and then leased out by the Society for terms of up to 21 years or such terms and conditions as it thinks fit.

Another type of voluntary association which has not yet been considered in this article is the trade union. Although it has many characteristics in common with other organisations already discussed, such as certain types of friendly societies, we are concerned, here, primarily with questions relating the acquisition of title to land and the more abstruse problems of status and legal personality are outside the scope of this article (*d*). Neither the Friendly Societies Act 1909 nor the Industrial and Provident Societies Act 1908 apply to trade unions (*e*).

Statutory provision is made for registration of a trade union upon "any seven or more members of a trade union . . . subscribing their names to the rules of the union . . ." (*f*) and once having registered under the Act a union may "purchase or take on lease in the names of the Trustees for the time being of such union any land not exceeding one acre and sell exchange mortgage or let the same . . ." (*g*).

The restriction on acquisition of land exceeding one acre is reminiscent of the restriction, mentioned earlier, on benevolent societies registered under the Friendly Societies Act where the latter are, at least, permitted to extend their land-holding beyond one acre if their rules so provide. The wording of the Trade Union Act is very similar to that of the other Statutes where it goes to provide that "no purchaser assignee mortgagee or tenant shall be bound to inquire whether the Trustees have authority for any sale exchange mortgage or letting . . ." (*h*). Once again, it is interesting to speculate on the situation that would arise if a unionist took exception to his Union's purchase of a five-acre section as a site for the local Trades Hall. The

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(*y*) ibid., s. 10 (a).
(*z*) ibid., s. 10 (b).
(*a*) ibid., s. 10 (h).
(*b*) s. 2, Industrial Societies Act 1908.
(*c*) ibid., s. 4.
(*d*) See article by B. T. Brooks "The Legal Status of Private Associations in N.Z." *Modern Law Review* [1969] 119.
(*e*) s. 6, Trade Unions Act 1908.
(*f*) ibid., s. 8.
(*g*) ibid., s. 9.
(*h*) ibid., s. 9.

stipulation of s. 9 as to the holding of land by trustees for the union is repeated in s. 10 where "all real and personal estate whatsoever belonging to any trade union shall be vested in the trustees for the time being of the trade union . . ." while property owned by branches vests either in the trustees for the branch or of the trade union if so provided by the rules.

On the death or removal of the trustees, property, including land, vests in the "succeeding trustees for the same estate and interest as the former trustees had therein and subject to the same trusts *without any conveyance or assignment whatsoever* . . ." (*i*). An exception is made in the case of debentures, bonds and Treasury bills which must be actually transferred into the names of the new trustees. Land is apparently considered of insufficient importance to warrant any recording of the change, for the Trade Union Act, unlike the Charitable Trusts Act, does not provide for the filing of any memorandum or application with the District Land Registrar, nor does it require the lodging with the District Land Registrar of copies of rules, or lists of trustees. The Act is similarly silent on the question of the mode of execution of land transfer documents by the trustees (*j*).

The distinction between friendly societies which hold land in the names of trustees *designated by office* and trade unions is made clear in the Trades Union Act where it provides that "In any actions . . . before any Court . . . touching or concerning any such property the same shall be stated to be the property of the person or persons for the time being holding the said office of trustee *in their proper names* as trustees of such trade union, without any further description" (*k*).

Needless to say, a search of the title to land held by a trade union registered under the Trade Unions Act 1908 will give no indication that the land is held upon trust and in the absence of a District Land Registrar's *caveat* there is no way in which a prospective purchaser can find out the true position. The issue of a "no survivorship" title will give some warning but is hardly an adequate safeguard. The purchaser, of course, is fully protected both by s. 9 of the Trade Unions Act and the indefeasibility provisions of the Land Transfer Act: it is the union membership that requires protection against unauthorised dealings with the land by its trustees. It is almost as if the Legislature has gone out of its way to protect other voluntary associations against breach of trusts affecting land while leaving trade unions to fend for themselves.

By comparison, trade unions which subject themselves to the arbitration and conciliation procedures of the Industrial Conciliation and Arbitration Act 1954 are in a privileged position. Any fifteen persons "lawfully associated for the purpose of protecting or furthering the interests of workers engaged in any specified industry or related industry in New Zealand" may be registered as an "industrial union of workers" (*l*). Unlike the true "trade union", an "industrial union" once registered becomes a body corporate by the registered name (*m*) and thus immediately gains all the advantages of incorporation, including the ability to hold land in its corporate name. Instead of providing that land *shall* be held in the corporate name, however, the Act allows the union to "purchase or take on lease in the name of the Union *or of trustees* for the union any house or building and any land not exceeding five acres and may sell exchange mortgage or let any such house, building or land or any part thereof and no person shall be bound to inquire whether the union or the trustees have authority for such sale . . . (*n*). As in the case of societies incorporated under the Incorporated Societies Act 1908 there would seem to be no real reason while the union should hold title in the names of individuals rather than the society itself.

The distinction between the one-acre land-holding restriction on unions registered under the Trade Unions Act and the five-acre restriction on industrial unions seems rather anomalous but it is in line with the other privileges accorded to the latter class.

Neither Act provides for the filing with the District Land Registrar of copies of rules or lists of trustees but the Industrial Conciliation and Arbitration Act does at least provide that "deeds and instruments" may be executed under seal of the union and by the hands of the president and secretary "or in such other manner as the rules of the union prescribe" (*o*) and also exempts instruments executed by a union from payment of stamp duty (*p*).

We have examined a number of Statutes and noted the different ways in which land may be held by the trustees for particular associations

(*i*) s. 10.
(*j*) cf. s. 10 (h), Industrial and Provident Societies Act 1908.
(*k*) s. 10 (3).
(*l*) s. 53, Industrial Conciliation and Arbitration Act 1954.
(*m*) ibid., s. 56.
(*n*) ibid., s. 81.
(*o*) ibid., s. 83.
(*p*) ibid., s. 220.

as well as the various methods by which the changes in title are to be noted on the Land Transfer Register. Apart from these special Statutes, we find that under the Trustee Act 1956 (*q*) a deed appointing a new trustee or trustees shall operate to vest the trust property in the new trustees "without any conveyance or assignment" but the section specifically excludes (*r*) *inter alia*, land under the Land Transfer Act 1952. Thus, in the case of land, the deed itself is ineffective to pass legal title but in ss. 52-62 the Trustee Act provides for the making of vesting orders by the Supreme Court. Even this is insufficient to complete the process for the Land Transfer Act rounds out the picture by providing that upon receiving a duplicate of "any order . . . made by any Court of competent jurisdiction vesting any estate or interest under this Act in any person", the Registrar shall "enter a Memorandum thereof in the Register and on the outstanding instrument of title and until such entry is made the said order shall have no effect in vesting or transferring the said estate or interest" (*s*).

The contrast between s. 47 of the Trustee Act 1956 in so far as it affects land, and the other statutory provisions relating to the vesting of land, dealt with earlier, is obvious. The only provisions of similar effect to s. 99 of the Land Transfer Act is s. 4 (3) of the Charitable Trusts Act 1957 which required the filing of a Memorandum with the Registrar.

Vesting orders of Court are therefore subject to the requirement of s. 99 of the Land Transfer Act while a vesting of property in trustees, new trustees, or some registered association or corporate body, if made directly by Statute, is not so bound.

As the learned author of the *Land Transfer Act* observes "it may be safely said that all jurisdiction in New Zealand for a Court to make a vesting order must have its foundation in the Statute law. A Court of Equity, such as the Supreme Court, has no inherent jurisdiction to make vesting orders. Most vesting orders of the Supreme Court are made under the authority of the Trustee Act 1956". It is often said that Parliament is reluctant to interfere in the internal affairs of private, voluntary associations. This maxim is all very well in so far as it applies to such matters as the admission and expulsion of members and the method of passing resolutions but it is submitted that it should not extend to matters affecting the acquisition and transfer of title to land. If Parliament is prepared to go to the extent of conferring corporate status, or at least acknowledging some form of legal "personality" in voluntary associations, by the registration process, it should in all cases take the matter a step further and provide that the vesting of land, and all changes in ownership should at least be recorded against the land transfer register. The interlocking of the Trustee Act and the Land Transfer Act, with its "vesting order" registered against title, could well be made standard procedure and applied to all types of statutory vesting. This would achieve the two-fold objective of insuring that at any given time the Register would give the searcher a true indication of who was entitled to deal with the land and, even more important, would go some way toward protecting the *cestui que trust* against breach of trust. The numerous statutory references to vesting of property "without conveyance transfer or other assignment" should not, it is suggested, be the end of the story where land is concerned.

N. R. A. NETHERCLIFT.

(*q*) s. 47, Trustee Act 1956.
(*r*) ibid., s. 47 (d).
(*s*) s. 99, Land Transfer Act 1952.

Tree Dwelling—It is scarcely to be supposed that council-controlled building can (apart from a happy accident) be anything but boring and dull, since the standards of councillors and their officials are unlikely to diverge far from the commercial conventional or the arbitrarily regulated "acceptable"—the fruit of intrusive meddling with window or ceiling height measurements and the like, matters which in reason are nobody's legitimate business save that of the occupiers. It is therefore particularly pleasant to find somewhere sometimes that an inspector is a man of independent intelligence and imagination, instead of a local authority's automaton. Such, it would seem, is the chief building inspector of the Cerrito in California, where a young landscape artist spent three months building himself a treetop house 22 feet up an oak. It consisted of a kitchen living room with a meditation room above, and he set a value on it of $25,000. Naturally the city building authority ordered him to pull it down, first, on the ground that it was "unsafe" and, secondly, because, although he called it an "environmental sculpture", he had not obtained a building permit. Nevertheless, when the chief building inspector actually climbed into the tree house, he was so enchanted that he declared it "basically sound, a beautiful job, with a fabulous view of San Francisco Bay", and forthwith suspended the demolition order: Richard Roe in the *Solicitors' Journal*.

A LEGISLATIVE HISTORY OF BROADCASTING

Once upon a time in the South Seas there was a happy land, with white beaches, palm fringed shores, and inhabited, in part, by a dusky race. A veritable paradise. But by the time of which I am writing, the late fifties, this arcadian scene had been spoilt by one small blot, the land was rules by a group of wicked socialists who, some twenty years previously, had brought broadcasting under State control. But all was not lost. The Loyal Opposition, soon to fight an election, promised that they would put an end to this undesirable state of affairs by setting up a broadcasting corporation free of government control and truly independent. Having been returned to power in 1960 this they proceeded to do by means of the Broadcasting Corporation Act 1961. And of course everyone was delighted because an independent broadcasting system is a valuable asset to a community. Consequently, since that time there has been a widespread belief within the community at large that broadcasting is, to all intents and purposes, independent. It is recognised for example in the stated objectives of the NZBC, the first of which reads:

> "The Corporation's principal objective will be to maintain broadcast services in the best public interest and to act without fear or favour to merit confidence as an independent organisation *within its statutory limitations.*"

These are brave words but the acid test lies in the last four. Exactly what are these statutory limitations?

There is no mention of "independence" in the 1961 Act, which is simply an Act to establish the NZBC and to define its functions and powers. Originally, under s. 3 (2) it was ruled by a Board of three members, appointed by the Governor-General for a term of three years and with a possibility of reappointment. The functions of the Corporation are set out in s. 10, and particularly s. 10 (c) of the Act:

> "To exercise supervision and control over programmes broadcast from New Zealand Broadcasting stations."

and the Corporation is further required to comply with the following directions and insure:

(a) That nothing is included in the programmes which offends against good taste, or decency or is likely to incite to crime, or lead to disorder or to be offensive to public feelings.

(b) That the programmes maintain a proper balance in their subject-matter and a high general standard of quality.

(c) That any news given in the programmes (in whatever form) is presented with due accuracy and impartiality and with due regard *to the public interest* (s. 10 (2)).

A careful reading of (a) and (b) reveals that these requirements are capable of a legion of interpretations. The opinion of the Society for the Protection of Community Standards might, for instance, differ markedly in assessing (a), from the opinion of the publisher of *The Little Red Schoolbook*. The interpretation of this portion of the Act has, of course, never been tested in Court. But it is in some measure true that the history of radio and television programme production over the eleven years since the passage of the Act has been a history of an increasingly liberal interpretation of these provisions, not by Board rulings but (in some ways like the common law) by a series of small decisions by producers on the spot which have established what the Corporation will broadcast and what it will not. Anyone who has worked in the production area will confirm the truth of this and examples are legion.

In 1970 the *Insight* radio documentary unit produced a programme which was a sensitive "in depth" discussion with a homosexual concerning his problems. In the course of this discussion the man in question said: "I don't regard myself as immoral. If I attacked little boys then I might regard myself as immoral, but I don't." This raised a minor storm. Under s. 10 (2) (a), should this be broadcast on a Sunday morning, the usual time slot for this programme, and thus perhaps upset religious susceptibilities? Furthermore, what might be its effect on children? Should this passage have been edited out? In the event it was not, and it was thereby established that a subject which had previously been, in some measure, taboo, could be dealt with more openly in future.

Naturally this is not a system designed to improve the ulcers of producers, and many of the resignations of NZBC staff which have been reported over the years through the media have revolved around this very issue. The producer has made a decision, it has not been found acceptable, and the producer has resigned in personal protest.

Under s. 11, the Minister can issue special or general directives in writing to the Corporation, pursuant to the policy of the government or in relation thereto, and under s. 12 (3) all expenditure in excess of $50,000 requires the consent of the Minister, although this has subsequently, under s. 2 of the 1970 amendment, been changed to $100,000. Under s. 16 (2) the Director-General was to be appointed by the Governor-General in Council for a term of five years, although if this post should be vacant or the Director-General absent for any reason the Minister might authorise somebody else to undertake the duties of the position. The Corporation may delegate any of its powers to the Director-General but this may be revoked at any time. The position of the Director-General, as chief executive of the Corporation, can, of course, be crucial to the independence of a broadcasting organisation. In the hands of a Lord Reith such a position can be used to establish a proud tradition of refusal to allow political meddling. Security of tenure is therefore vitally important to a man who seeks to establish such independence. It is worthy of note, therefore, that s. 4 (2) of the 1967 amendment altered the tenure of the Director-General. Whereas previously he held office for five years and could be reappointed, he now holds office for such term, and on such conditions, as the Corporation sees fit. This has seriously weakened the potential independence of action of the Director-General.

There have been a number of other amendments to the Act also. The 1965 Amendment increased the number of Board members to a possible seven, although it is a little difficult to see the reason for this in purely administrative terms unless it be to broaden its necessarily cross-sectional character. A cynic might be constrained to suggest that the government was seeking only to increase the number of possible patronage posts at its disposal. Certainly it has emerged that the government of the day has not hesitated to appoint the party faithful to such posts, and on past form the Opposition of the day would be unlikely to have adopted any different stance.

Section 3 of the 1967 amendment established some protection in that although it restates that in exercising its powers and functions the Corporation shall comply with the general policy of the government, and the Minister may issue instructions, these must be laid upon the table of the House within 28 days, if the House is in session, or within 28 days of its sitting. Until the events of last July this requirement had never been exercised, and it was sometimes said that it was not necessary to exercise such powers, given a compliant Corporation. A private discussion with the Minister might be all that would be required to ensure that the Board acts according to Ministerial wishes without recourse to written instruction. This might seem an unnecessarily cynical view, but it does remain a fact that the political point of view of the Board is close to that of the Minister, at least in formal allegiance. Nor I think is it sufficient to suggest that in exercising its powers the Board is able to ignore its political allegiance. This is to take a purely mechanistic view of political belief, which tends to be rather a function of a world view which permeates the entire personality of any individual. It is quite impossible to ask that a man forget his political leanings for a few hours while he considers certain matters and then put them on again subsequently as one would an overcoat.

I should finally mention, also, the 1971 amendment, s. 3 of which states:

> "The Corporation may from time to time enter into contracts with persons on such terms and conditions as the Corporation thinks fit to provide such services or perform such work as the Corporation may require."

The picture which begins to emerge is, in my view, of legislation which, far from establishing the independence of the NZBC, tends rather in the other direction, that is it carries within itself the possibility of political meddling without let or hindrance. Nor can it be taken in isolation for it must be considered in conjunction with the Broadcasting Authority Act 1968.

The Authority consists of three members appointed by the Governor-General on the recommendation of the Minister, the Chairman to be a barrister or solicitor with a minimum of seven years' experience in the Supreme Court. Like the Board, the term of appointment is three years with the possibility of reappointment.

The powers and functions of this body appear to be unclear in the public mind, but not, to the same extent in the mind of the draftsman. It is widely believed that the function of the Authority is to adjudicate in the matter of warrants for broadcasting purposes. Certainly s. 9 of the Act requires the Authority to consider and adjudicate upon applications for warrants to operate broadcasting stations. If this were to be its only function then the need for such an Authority could be called seriously into question. Section 10 (b) of the Broadcasting Authority Act gives as one of the functions of the Corporation the right to consider applications for warrants to establish and operate private broad-

casting stations and other applications relating to warrants, Part III of the Act setting out in some detail the procedures to be followed in such circumstances. Of course, it could be argued that the Corporation was not a proper body to adjudicate in matters affecting itself, but this seems to suggest some confusion of mind. Whereas the same people who saw the need for an Authority felt that the Board members would not be able to leave their prejudices outside on entering the boardroom, also had no such qualms about the ability of the Board members to leave their *political* views outside the same boardroom. I repeat therefore, that the necessity for the Authority as a body adjudicating on warrants could be called into question in the face of existing legislation to deal with that eventuality.

I would submit that the function of the Authority may be seen in a different way. Section 9 of the Act requires the Authority to advise the Minister on questions of broadcasting and to exercise such powers, functions and duties in relation to broadcasting under this Act *or otherwise howsover*—a singularly broad brief. Certainly, further provisions of the Authority's Act give weight to the belief that this part of the functions of the Authority are designed to be taken very seriously. Section 10 (2) (c) permits the Authority to prescribe programme standards and prohibit the broadcast of matters proscribed by the rules that it has power to make. According to its 1969 Report the Authority has already taken the opportunity to do so in relation to sound radio programmes. In doing this the Authority has clearly superseded the powers of the Corporation established under s. 10 of the Broadcasting Corporation Act.

The rules thus establsihed are not widely known to exist because they are published by the Authority rather than by the Government Printer. They are however readily available from the Authority. They make interesting reading and most are straightforward and sensible, although I would say from my own knowledge of broadcasting that some are more honoured in the breach than in the observance because they are simply not practicable in a production situation. This in itself carries a danger. In the same way that the Police Offences Act allows remarkable latitude in allowing police discretion to decide whether or not an offence has occurred in some circumstances, so a ruling which is unenforceable but remains nevertheless a ruling allows those using it to in a sense "choose their victim". I am not suggesting that the Authority would behave in such a manner but it is feasible that a producer who is unpalatable in some way to the Corporation could be dismissed for infringing a rule which is widely infringed because it is impossible to observe but which remains a rule. However, perhaps more important is Rule 16.2 which requires a warrant holder to provide at any time such information about its programmes as the Authority may think fit—a wide ranging power and one open to possible abuse. Indeed, this power is established under s. 10 (2) (f) of the Broadcasting Authority Act and includes the NZBC under s. 17. Section 25 (h) further requires the Authority in the issue of warrants to take into account such matters or conditions as may be prescribed by regulations under the Act or *as the Authority thinks proper*. This sort of blanket section is again subject to misuse in that it allows the Authority to impose any condition it wishes on warrant holders.

Of moment also is s. 10 of the Broadcasting Authority's Act which repeats as part of the functions of the Authority portions of the same section number in the Broadcasting Corporation Act—those portions of the Act dealing with good taste etc., but with one minor change. The expression "with due regard to *the* public interest" becomes "with due regard to public interest". The reason for this change is difficult to fathom, and it may well be that the draftsman blinked at the crucial moment. However, this is unlikely, and a contrary interpretation could be that the exclusion of the definite article represents a considerable weakening of "*the* public interest", which suggests a clearly defined and straightforward public interest, to simply "*public* interest" which suggests a far less clearly defined and definite interest to be taken into account.

Perhaps most interesting of all is the Report of the Authority concerning the extension of television services in New Zealand published in July 1971 and accepted in principle by the Government. Paragraph 3. 109 of this report suggests an amendment to the Broadcasting Act to ensure that s. 10 of the Broadcasting Corporation Act is subordinate to s. 10 of the Broadcasting Authority Act. Para. 3. 110 goes on to say:

> "We consider that this would remove the possibility of the Corporation being able to maintain a claim that it did not come within the jurisdiction of the Authority in relation to its programmes. This would mean that the ultimate responsibility for insuring that news given in programmes is presented with due regard for accuracy and impartiallity and with due regard to the public interest, would rest with the Authority."

Para. 3. 118 continues further:

> ". . . we consider that the Corporation and any other warrant holder could be required to submit their respective programme schedules to the Authority no less than 3 months before such programmes are due to be shown."

The tendency in broadcasting legislation is therefore clear. Over the past eleven years, and more particularly since the establishment of the Broadcasting Authority the control exercised by the Corporation over its programmes has been eroded and has passed in large measure to the Authority, the Board of which is appointed by and responsible to the Minister of Broadcasting and, through him, to Cabinet.

However, it could be said that the force of this legislative tendency is mitigated by a phenomenon I have already mentioned. Because of the very nature of broadcasting, many decisions must be made quickly and without opportunity to refer them to higher authority. They are therefore made by the individual producer on the spot, and within obvious limits this allows the producer a good measure of freedom. The 1971 amendment to the Broadcasting Corporation Act permitting employment on contract becomes of interest in the overall picture. Section 17 of the Broadcasting Corporation Act, while excluding the Corporation and its employees from the provisions of the Industrial Conciliation and Arbitration Act 1954 subss. (2) and (3) that salaries and conditions of employment must be agreed to by the State Services Commission, and this gives a measure of job security to Corporation employees. The 1971 amendment successfully circumvents this provision and seriously erodes the security of employment of any member of the Corporation staff who accepts contract employment. As contractees come up for reconsideration on the expiry of the annual contract prepared by the Corporation it will be easy to remove those who are an embarrassment to the Corporation, particularly in view of a provision of the Staff Manual of the Corporation which specifically excludes contractees from recourse to the Manual, including those parts of it which provide some protection against arbitrary dismissal. This leaves them with little redress unless it be at common law. It is significant that the instruction to managers on the operation of the proposed contract specifies the production area, i.e. the area in which programme decisions are made at lower echelon level, and the penumbra of occupations associated with this area, as the area in which contract employment is desirable.

Finally, I would quote Dr Asa Briggs, a member of the Board of the BBC who, in the course of a visit to New Zealand in 1969, said in a radio talk:

> "An independent Corporation is not created by the proliferation of Boards and committees between itself and the government. It is created rather by a working relationship between the administration and the production side in which both are prepared to trust the other."

This is advice which our legislators should take to heart.

T. SIMPSON.

LEGAL LITERATURE

Sim's Practice and Procedure, 11th edition, by Sir Wilfrid Joseph Sim, K.B.E., M.C., Q.C., LL.B. Butterworths, Wellington. 1972, pp. lxii —1008.

This new edition of the Code has been conveniently published in two volumes. Volume I contains the Codes themselves, while Volume II consists principally of the statutory provisions relating to practice and a series of miscellaneous rules (like the Insolvency and Patents Rules) of a more specialised character. The index to the complete work is printed at the end of each volume—a useful and welcome innovation (even with the defects in execution mentioned later) in a two-volume publication. Of particular value is the analysis of the Code, which appears for the first time.

Because this new edition is naturally indispensable to anyone concerned with Supreme Court and Court of Appeal practice, there is perhaps little a reviewer can usefully say. It is of course the only readily available complete compilation of a body of rules which have been amended and re-amended constantly since 1908, when the last official compilation of the Code appeared. When one considers the maze of *Gazettes*, Orders in Council, and so on, which has had to be threaded through in the period since then, it is easy to see why no further official attempt at compilation has been made.

But because there is no current official compilation, a heavy duty is thrown upon the editor to insure meticulous accuracy. There can be no doubt on this score: this edition fully lives up to the accuracy and usefulness of its predecessors. And it has an advantage which no bald compilation can ever have: a commentary which over the years has taken on an authoritative flavour and which must be relied upon by the majority of practitioners as settling any doubts there might be on a literal reading of some of the rules which are not at all happily phrased. It is a commentary which has some decades of practical experience behind it, and in the field of Practice, practical experience is often worth more than a narrow and literal approach. The commentary supplied, first by the original authors, and later by the present Editor has never pretended to be a treatise on Practice: if it had been, two volumes would have been required long before now; and indeed in this field it is doubtful whether an academic treatment would serve any useful purpose. What is wanted is practical information, and this is what the book gives us.

It would be difficult in a work of this size to avoid some blemishes. It might be pointed out, for instance, that there is no mention of *Rowley* v. *Wilkinson* [1968] N.Z.L.R. 334 (the only reported occasion on which the Court of Appeal has considered whether a plaintiff may set up a new cause of action by amending his pleadings in terms of Rule 144), and that there is no treatment of the increasingly important topic of Legal Aid (although the Act and Regulations are given passing reference in one or two places). But these are comparatively minor flaws, easily cured by annotation, in an otherwise comprehensive revision.

Something has obviously gone wrong with some parts of the Index, since some of the references appear to be to pages in the earlier edition. This may well have been due to particular unavoidable difficulties facing the publishers at around the time of publication, these difficulties being referred to in the Preface. It is understood that a separate and recast Index has been published as a companion volume to the whole work.

This book has served the profession well for over 80 years, and it could have survived as long as it has only by maintaining a high standard of accuracy and comprehensiveness. It is unusual indeed for any New Zealand law book to go through ten earlier editions. The new edition we now have can be used with the same confidence.

B.D.I.

IMMEDIATE INDEFEASIBILITY

In 1967, the Privy Council in *Frazer* v. *Walker* [1967] 1 A.C. 569 finally followed the New Zealand authority of *Boyd* v. *Mayor of Wellington* [1924] N.Z.L.R. 1174 and accepted the principle of the immediate indefeasibility of the Torrens system of title. The case has been commented upon extensively and some academic commentators have argued that the statements regarding immediate indefeasibility were *obiter* only. In Australia however, the High Court in *Breskvar and Anor.* v. *Wall and Ors.* [1972] 46 A.L.J.R. 68 gave its unqualified approval to the principle of immediate indefeasibility. Moreover the High Court went on to consider the position of an unregistered purchaser from a registered proprietor whose registration has been procured by a void instrument.

The facts of *Breskvar's* case were as follows. The plaintiffs, B. and his wife, were registered proprietors of land in Brisbane. As security for a loan made to them by P., the second defendant, they handed P. the duplicate certificate of title and a signed memorandum of transfer in which the name of the transferee had been left blank. Under s. 53 (5) of the Queensland Stamp Act of 1894 no transfer was "valid either at law or in equity" unless the name of the transferee was written therein in ink at the time of execution. A transfer in blank was "absolutely void and inoperative". P. fraudulently completed the transfer by filling in the name of his grandson W., the first defendant, as transferee. On 15 October, 1968, he procured W.'s registration. The trial Judge found that P. had acted as agent for W., whose registration was thus affected by fraud. On 31 October 1968 W. entered into a contract of sale with A., the third defendant and the transaction was settled early in November. A. did not lodge the transfer for registration until January 1969. In the meantime B. and his wife had lodged a *caveat*.

The plaintiffs sought an order cancelling entry of the transfer on the register and other consequential relief. Thus the Court had to deter-

mine the position of A., who held a transfer from a registered proprietor whose title was impeachable. (*a*) The Supreme Court of Queensland held in favour of A. The plaintiffs appealed to the High Court.

Obviously the case of *Frazer* v. *Walker* [1967] 1 A.C. 569 was not directly relevant to A., who had not become registered. At first sight the case appeared to reveal a competition between equities. B. and his wife had an equity or an equitable interest to have the transfer to W. set aside, and A. had an equitable interest arising out of the contract of sale. However this view does not deal with one important element of the case. The plaintiffs argued that either because of s. 53 (5) of the Stamps Act, or because W. was affected by fraud, the registration of W. did not pass to W. the fee simple interest in the land. For these reasons W. was not the registered proprietor, and he was thus unable to pass any interest to A. If the plaintiffs contention was correct, no problem of competition between equities ever arose.

This precise issue had not arisen previously. Earlier cases tended to divide themselves into two streams. In cases such as *Gibbs* v. *Messer* [1891] A.C. 248; *Clements* v. *Ellis* (1934) 51 C.L.R. 217 and *Frazer* v. *Walker* [1967] 1 A.C. 569 the question was whether registration of a void instrument under the Torrens system conferred immediate indefeasibility of title. Although *Frazer* v. *Walker* [1967] 1 A.C. 569 settled this controversy, in the instant case A. could not claim the benefits of registration. On the other hand, in cases such as *Abigail* v. *Lapin* [1934] A.C. 491 and *Latec Investments Ltd.* v. *Hotel Terrigal Pty. Ltd.* (*In Liq.*) (1965) 113 C.L.R. 265 the issue was treated by the Court as one of competition between unregistered interests. For example in the *Latec* case the question was whether the equity or equitable interest of a mortgagor to have a mortgagee's sale set aside for fraud should prevail over a subsequent equitable mortgage. The question whether a registered proprietor whose title was impeachable for fraud was capable of creating equitable interests in third parties was not raised in either of these cases. It is true that in both *Abigail* v. *Lapin* and the *Latec* case the title of the registered proprietor could have been set aside by a Court of equity as against the holder of the prior equity or equitable interest. However no provision similar to that in s. 53 (5) of the Stamp Act was involved, and thus registration was not procured by a void instrument. Thus it was assumed almost without question (but see Kitto J. at p. 275) that the registered proprietor was capable of creating equitable interests in third parties. It was this assumption that was challenged by the plaintiffs in *Breskvar's* case.

The High Court unanimously rejected the arguments that W. was not the registered proprietor of the land. All members of the Court except Menzies J. took the view that although B. had a right enforceable in equity to have the transfer set aside for fraud, the registration of W. as a proprietor passed the legal fee simple interest to him, and enabled him to create equitable interests in third parties. The fact that the transfer to W. was void under the Stamp Act did not alter this conclusion. This result was seen as a necessary consequence of the decision of the Privy Council in *Frazer* v. *Walker* [1967] 1 A.C. 569.

Barwick C.J. said: "The Torrens system of registered titles . . . is not a system of registration of titles but a system of titles by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void," (1972) 46 A.L.J.R. 68, 70.

Most members of the Court referred to the view of Dixon J. in *Clements* v. *Ellis* (1934) 51 C.L.R. 217, 237 as incorrect. Thus *Breskvar's* case endorses the New South Wales decisions of *Mayer* v. *Coe* [1968] 2 N.S.W.R. 747, *Ratcliffe* v. *Watters* [1969] 2 N.S.W.R. 146 and *Schultz* v. *Corwill Properties Pty. Ltd.* [1969] 2 N.S.W.R. 576. Only Menzies J. mentioned the case which enshrined the doctrine of deferred indefeasibility of registered titles *Gibbs* v. *Messer* [1891] A.C. 248. Menzies J. distinguished it on the ground that it turned registration of a fictitious person as proprietor .This was the distinction also made in *Frazer* v. *Walker* [1967] 1 A.C. 569, 584. It is demonstrably false, as the Privy Council in

(*a*) It will be recalled that in *Frazer* v. *Walker* [1967] 1 A.C. 569 the Privy Council left open the extent of the Registrar's power to rectify the Register under the New Zealand Land Transfer Act 1952, s. 81. The issue in *Breskvar's* case did not arise in the context of rectification by the Registrar. In any case the powers of the Queensland Registrar are much more limited than his New Zealand counterpart, see Real Property Acts, 1861 to 1963 (Qld.) s. 11.

Gibbs v. *Messer* [1891] A.C. 248, 257 made it quite clear that the result of the case did not depend on the non-existence of the registered proprietor.

The decision of the majority is a rational extension of the principle of immediate indefeasibility. However, analysis of the case is made more difficult because only Walsh J. clearly differentiated between the grounds on which the plaintiffs attacked A.'s interest. The main difficulty arose because of s. 53 (5) of the Stamp Act. If the provision were disregarded, A. would almost certainly have succeeded, even if the land were not under the Torrens system. B.'s right to have the transaction set aside against W. was an equitable right. If B. had armed W. with the means of dealing with the fee simple estate in the land as the absolute legal and equitable owner, free from any prior equitable interest, his interest would have been postponed to that of the holder of a later equitable interest created by W. In this respect the Torrens system did not change the position of A. However, in the instant case the plaintiffs attempted to avoid this conclusion by arguing that despite registration of W. the legal fee simple estate never passed from B. to W. because the transfer was void. If this argument were successful, no problem of competition between equitable interests ever arose. It is at this point that *Frazer* v. *Walker* [1967] 1 A.C. 535 became A.'s mainstay. For if that case is correct it should make no difference whether or not A. is registered in considering whether A. has acquired any interest from W. If A. has dealt with the registered proprietor A. should be able to rely on this registration as a source of an equitable interest. This conclusion should not be affected by the fact that W.'s registration could be set aside as against B., or by the fact that W. became registered by virtue of a void instrument. Perhaps this is what McTiernan J. meant when he said ". . . the decision of the Privy Council in *Frazer* v. *Walker* requires the conclusion in that Wall's certificate of title was good against all the world except of course the defrauded Breskvars" (1972) 46 A.L.J.R. 68, 72.

Although Menzies J. reached the same result as the other members of the Court, his reasoning was different. He conceded that *Frazer* v. *Walker* held that the registration of a void instrument conferred an indefeasible title on a registered proprietor who had not been fraudulent. However, in the instant case W. was affected by fraud and his title was defeasible. Could he then be described as "registered proprietor"? At this point Menzies J. appeared to take a limited view of the effect of *Frazer* v. *Walker*. That decision at least meant that in this case W. could be described as registered proprietor, and B. and his wife ceased to be registered proprietors. However, on the analysis of Menzies J. this did not necessarily mean that W. could create proprietary interests in third parties. In other words W. might be registered proprietor only in a descriptive sense, without the important consequences of registration following. Menzies J. sets out the problem as follows:

"What Alban Pty. Ltd. holds, however, is a transfer from the registered proprietor, albeit a registered proprietor with a defeasible title, and it is necessary to determine what rights it has solely as such transferee.

"*Whatever may be the position in other cases*, it seems to me that in this case the question is to be resolved by a particular enactment which is not to be found generally in a state legislation establishing the Torrens system." (1972) 46 A.L.J.R. 68, 75.

He then referred to s. 48 of the Queensland Real Property Act of 1877 which conferred on the holder of an instrument signed by a registered proprietor the right to registration. Since W. was to be described as a registered proprietor, Alban had a right to registration by virtue of this section. Again his approach differed from the rest of the Court. The other members of the Court held that A. had an equitable interest in the land which arose from his contract of sale (or at least his transfer) from W. In so doing, they were applying the principles expressed in *Barry* v. *Heider* (1914) 19 C.L.R. 197. Whilst some Judges referred to s. 48, they saw it as an embodiment of the principles laid down in *Barry* v. *Heider* (1914) 19 C.L.R. 197 and in no way improving the position of A.

The view of Menzies J. on the effect of *Frazer* v. *Walker* is peculiarly limited and could cause serious difficulties in the other Australian States where no equivalent to s. 48 exists. Similarly no equivalent provision appears in the New Zealand legislation. If Menzies' view were correct even an extremely negligent holder of a prior equitable interest might be able to prevail over a purchaser from a fraudulent registered proprietor on the basis that that proprietor's title was defeasible and he could thus not pass as an interest to a third party. If this is the view which Menzies J. is propounding it is inconsistent with the approach taken in cases such as *Abigail* v. *Lapin* [1934] A.C. 491 and *Latec Investments Ltd.* v. *Hotel Terrigal Pty. Ltd.* (*In Liq.*) (1965) 113 C.L.R. 265. Moreover it would mean that A. might be in a worse position as

the purchaser of Torrens system land, than he would be at general law.

All members of the Court went on to hold that in a conflict between B.'s right to have the transfer set aside and A.'s later right (however that right should be described), A.'s interest shall prevail. In so doing they were applying the normal equitable principles as to priorities, though adapting them to the mechanics of the Torrens system. All Judges except Menzies J. relied on the decision in *Abigail* v. *Lapin* to support this conclusion. By handing P. the blank memorandum of transfer and the duplicate certificate of title, B. had armed P. with the power of placing himself or his nominee on the register. Thus, because of the conduct of the plaintiffs, their interest could be postponed to that of W. Most members of the Court did not concern themselves with the failure of the plaintiffs to lodge a *caveat*, although Walsh J. did make brief mention of this fact: (1972) 46 A.L.J.R. 68, 80. In the *Latec* case Kitto J. and Taylor J. differed on the nature of a mortgagor's right to have a fraudulent conveyance set aside. Kitto J. took the view that in those circumstances the mortgagor had an equity which was "logically antecedent" to the mortgagor's equity of redemption which would arise when the Court set the sale aside. Taylor J. preferred to describe the mortgagor's right as an equitable interest. The High Court in *Breskvar's* case did not attempt to characterise the right of B. as an equity or an equitable interest, taking the view that in any case A.'s subsequent equitable interest would be preferred.

Menzies J. again reached the same conclusion in a slightly different manner. Menzies J. characterised A.'s interest as a right to be registered rather than an equitable interest. Moreover he did not rely on *Abigail* v. *Lapin* to establish A.'s priority. He pointed out that the plaintiff did not put P. in a position to have W. *lawfully* registered as proprietor by handing him the blank transfer. Nevertheless in executing the transfer in blank the plaintiffs were in breach of the Stamps Act, and it was this illegal act which enabled W. to become registered. For this reason the interest of B. and his wife should be postponed to that of W. (*a*)

M. NEAVE.

CORRESPONDENCE

The Rule of Law

Sir,

With all the recent talk of the importance of maintaining the Rule of Law it might be as well to remind ourselves what this expression means. It has a very special meaning, of profound importance in the study of constitutional law. It denotes in the first place the absolute supremacy of regular law instead of arbitrary power; secondly it stands for equality before the law—the recognition that the law governs, or should govern, everyone impartially, of whatsoever class, be they ordinary citizens, rich or poor, police or officials.

In a democracy it is impossible to exaggerate the importance of maintaining these principles, which were defined by A. V. Dicey in 1885 and have been accepted by jurists ever since as a yardstick by which to measure whether the constitutional safeguards of whatever country happens to be under discussion measure up to the high standard which he laid down.

From the reports of recent speeches dealing with the Rule of Law, the first by Sir Hamilton Mitchell and the second by Sir Alfred North, the unhappy impression is created that this vital doctrine signifies no more than the maintenance of public order—"law and order" in its crudest sense. The impression is also given that it is the protesters who are imperilling the Rule of Law. This is not so. On the contrary, the protesters are themselves probably more aware than most that the problem of the erosion of the Rule of Law starts not with them but within the system itself.

For example. In a country governed according to the Rule of Law, a system of "regular law instead of arbitrary power" would mean that if 10,000 people demonstrating for Jesus are not prosecuted for obstruction, then neither are 200 people demonstrating for peace in Indo-China. "Equality before the law" would mean that a policeman whose dog bites a demonstrator on the penis (as happened recently at Mt. John) is dealt with at least as severely as a demonstrator who knocks off a policeman's hat; or that a company director who by a multi-million-dollar swindle defrauds thousands of people of their hard-earned savings gets at least as much punishment as the petty thief who sneaks $5 from the till. These are only a few of countless examples by which it can be easily shown that the Rule of Law is not strictly applied in New Zealand.

Sir Alfred added a comment to the effect that in recent demonstrations the police, with whom he sympathised, had acted with undue restraint. Unfortunately, the publication of this remark may well have the opposite effect to what was intended, and lead to greater antagonisms rather than less.

Yours faithfully,
BARRY LITTLEWOOD.
Auckland.

O'Neil *v.* Mathieson

Sir,

Mr J. S. O'Neil wrote in [1972] N.Z.L.J. 241 on why the law relating to homosexuals must not be changed. His strong stand does him credit as being a man of principle, but his reasoning fails to grasp the cold hard facts of life.

His statement "If the law is repealed I am not in any doubt that there will be an increase in homosexual behaviour", ignores the fact that homosexuals do exist and in some sectors blatantly in large numbers.

It is a little late at this stage to lay morals down by legislation, but this would appear to be the only way Mr O'Neil feels protected. Legal sanctions do not stop someone becoming a homosexual; it just adds to his frustration. Mr O'Neil's acceptance of lesbianism, shows the forethought of Queen Victoria.

Police reluctance to prosecute homosexuals reflects growing public understanding towards them. The publication of an offender's name causes hardship more to his parents and friends. Publicly declaring that a homosexual *is* a homosexual, is nothing new to the person himself; in fact in the case of the "extrovert gay" such a release may be welcomed publicity. The homosexual it *would* hurt, would be the one trying to fit within the "norm" of society by not being obviously "gay."

The implementing of legal sanctions does not assist the homosexual or help where assistance is required—where the problem should be able to be freely discussed.

Mr O'Neil's vision of the terrible "wave" of undesirable homosexual immigrants reinforces the view that in God's own country imperfections are imported.

The reality of the situation is that homosexuality does exist. This cannot be ignored and Mr Mathieson's article [1972] N.Z.L.J. 1 accepts that challenge.

Yours faithfully,
G. C. GOTLIEB.

Free Speech and Public Men

Sir,

As a layman, I presume to write to your good self on an issue which I think has long been of considerable public interest and which, in my opinion, is long overdue for a searching examination and a drastic recommendation from members of your profession.

The consideration of free speech is, of course, the paramount issue at all times, and with that thought in mind may I move immediately to the deviates which every now and again are labelled and alleged to constitute defamation.

A decade ago, the late W. S. Goosman sued a political newspaper, and in the process the editor and a trustee were charged with criminal libel. This was not a civil action, but the element and principle of the political jury mentality remained exactly the same. In a very different position from the editor, the second party became involved only in his incidental capacity as a trustee or some other non-active role. In the course of his evidence he told the Court how he was "shocked" when he first read the article, at the language which had been used. The word "murder" was the central theme and Mr Goosman was publicly accused, by administrative acts of either omission or commission, of being responsible for the deaths of men. The two defendants pleaded justification, and that plea was finally upheld by the jury.

May we now proceed to the scene of local politics to consider an Auckland case from the late forties, and concerning two well-known local personalities. This was a civil case, and the expression "wicked men" was the bone of contention. Libel was alleged, and although the plaintiff's name was never mentioned, it was accepted by all parties at the commencement of the hearing, that he was the only person to whom the reference could possibly have been made. Mr Justice Northcroft, in the course of his summing-up, used these words: "One man attacked a system, the other a person." When a verdict was returned in favour of the defendants, people were left to decide for themselves whether that jury virtually thumbed its nose at the presiding Judge. As in the Goosman case, readers must decide for themselves whether this was high libel, did we witness a gross miscarriage of justice and should there have been any possible means of escape?

Let us ponder the quite vicarious attitudes which a jury might take in a "political" libel case. Mr A., who may be anybody at all from the hurly burly of political life to a thin-skinned trade union secretary, is suing Mr B., and a

newspaper. Does he not go far beyond the primary principle of clearing his name, and in moving into a handsome money spinning exercise, does he not impugn his own sincerity? I feel that when people move into actions of this type they are doing so in something of a Golden Kiwi frame of mind, paying a little more for a ticket, and taking the calculated and quite reasonable gamble on the proposition and the prospect of a "political" verdict.

When Labour Party spokesman for Justice, Dr Finlay, reminded us in a recent newspaper article of a well defined rule of procedure which requires a jury to be kept well clear of any information on the position of libel insurance, I suggest he was addressing an almost non-existent audience. A jury will always include sophisticated members who are well aware of the position of newspapers and of people such as cabinet ministers, but what can the effect be when the jury may readily assume that the jointly concerned private person would almost certainly *not* be covered? Although emphasis is often laid on the expansion of an alleged libel, the author must always remain the primary culprit. The newspaper emerges as a secondary agent, and surely there is a hopeless conflict of reasoning when that secondary agency becomes the well to which the pitcher may be taken.

In many respects it seems to be something of the romanticism, of the cash and glamour of days long gone which still appears to permeate this law as we see it today. Amidst the ever present great bottle-neck of administrative justice and the ever increasing mountains of law, it is surely patent to all that we can tolerate no reform which could have the possible effect of further encouraging people to come to the Courts at all. Is not the converse just as logical, and should we not be doing a little more thinking from the discouragement angle? Should we not be giving more thought to the much more fundamental right of free speech, and in the process relating it to the cut and thrust of life and to the right of reply?

Perhaps you will agree with me, Sir, when I suggest that the time has arrived for the Bench to have authority to reduce a case to secondary libel during the hearing, dismiss the jury and proceed as judge alone. A drastic extension of judicial authority is the obvious way to rationalise the whole business, and I see no reason why a Judge himself should not have a discretion to clear a man's name without further ado, perhaps call for apologies in settlement or mitigation, and proceed to costs and damages if necessary.

It is a sad commentary upon law, logic and life when we observe on the one hand the most outrageous of claims being filed, and on the other we see litigants coming into Court as either plaintiff or defendant and right at the commencement of the action having every reason to feel very apprehensive as to whether they are going to get justice at all.

Yours faithfully,

OWEN WATT.

Dutch Testators in New Zealand

Sir,

It is with some trepidation that I enter upon the discussion initiated by Mr N. J. C. Francken at page 281 of the JOURNAL regarding Dutch Law. My trepidation is increased when I observe the number of practitioners in this country who having attained a Doctorate of Laws in Holland, have then started again on the bottom rung of the ladder and obtained a degree in New Zealand. There is one angle however, of Dutch Law which is, I feel, frequently overlooked and which should be brought to the notice of New Zealand practitioners. This is the subject of Wills.

Netherlands Law provides that a valid Will can only be made with the formalities required by that Law. Consequently a Will made by a Dutchman in New Zealand must be made with the formalities required by Dutch Law if it is to operate to pass property situated in Holland, to amend a marriage contract, or to deal with goods subject to community of property. It follows that a young Dutchman resident in this country cannot make a Will effectively disposing of e.g. land which he may later inherit from his parents. Extend the argument and it will be seen that a Dutchman who has made a Will in Holland cannot make a Will in New Zealand in English form revoking his Dutch Will. If therefore a Dutchman or indeed any European to whom the Code Napoleon applies wishes to make a Will in New Zealand it becomes necessary to cross-examine him as to any property he may own in Holland or elsewhere, any rights acquired by him under any marriage contract entered into overseas, and even any rights he may acquire in the future under a spes successionis.

If therefore a Dutchman wishes to make a Will validly disposing of Dutch property or validly revoking a Will made in Holland before his emigration to New Zealand, he can only do this before a Dutch Notary. I thought at one time that a simple solution to this would be to suggest to a Dutch born New Zealander that he should apply for an *ex officio* appointment as a

Dutch Notary and was rather curiously met with the retort that nobody to whom I spoke cared about the idea of having Dutch Nationals beating a pathway to their back door at all hours of the day. The not quite so obvious trap in this suggestion occurred to me later. An English Notary has, of course, like an Engiish Solicitor, to take an oath of allegiance. A Dutch Notary, even *ex officio*, would presumably have to take an oath of allegiance to the Dutch Crown and there is an obvious conflict of interest there. The New Zealand resident Dutchman is therefor driven into the position where, if he wants to make a Will disposing of Dutch property or revoking a Dutch Will, he must present himself before the only person in New Zealand having Notarial powers under Netherlands Law, and that is the Dutch Ambassador in Wellington.

The requirement of authentication by the Dutch Embassy extends not only to Wills but to many other types of "Authentic instruments" required by Dutch Law, the most important of which to my mind are as follows:

Power of Attorney to acknowledge a natural child when its birth is entered in the Civic records.

Marriage consent, marriage proxy or contract.

Donations by third parties to future husband or wife not made in the marriage contract.

Separation of matrimonial property.

Appointment of guardian by parents in the event of minor children surviving at the time of their death.

Appointment of administrators or executors.

Mortgages or other dealings with Real Estate.

The above instruments and any others in Netherlands Law in order to be "authentic" must be passed before a Public Officer who under that Law is a Notary, an officer appointed by the Queen for life. In a number of countries the office of Notary corresponds to that of the Dutch Notary. These are the countries where the Code Napoleon is in force. It is sometimes assumed that the Notary Public as known in Anglo-Saxon Law is the equivalent of the Netherlands Notary but this is not so. The Netherlands Notary corresponds more to the French Notary and in turn to the Imperial Notary of the Middle Ages. Traces of this higher status can be seen in the old Scots Law.

In a country where the exact equivalent of the Netherlands Notary does not exist as in Australia and New Zealand it goes without say- that Netherlands subjects cannot enter into transactions requiring an "authentic instrument". It is therefore provided under Netherlands Law that Consuls may be specially authorised to perform all or certain functions entrusted to Notaries under Netherlands Law provided that Consul is a Netherlands subject.

The strict requirements of Netherlands Law regarding documents dealing in Real Estate have been relaxed somewhat to the degree that where a document was executed in a foreign country e.g. America or South Africa the document has been held in effect (and I paraphrase the effect of the judgment) to create an "agreement to mortgage" or an "equitable mortgage" which was enforced by the Dutch Courts. I do not however venture an opinion as to whether equity or the rules of equity are applicable to the Dutch Courts and leave that problem for Mr Francken to answer.

Yours faithfully,

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One-Way Street—The *Sheffield Morning Telegraph* reports the sad case of a customer who accepted the notice appearing on the walls of his bookmaker's office at its face value. It said: "Derek Mayfield's luck was in when Polly The First won. His 10s. each-way bet had come up, a Court heard yesterday. But when bookmaker, David Briggs paid out, he made a mistake. Instead of paying Mayfield £3 8s. 0d. he handed over £52 10s. 0d. It was then, defending solicitor Mr Kenneth Mitchell told Sheffield Magistrates, that Mayfield saw the large notice in front of him. 'No mistakes will be rectified', it read, so Mayfield walked off with the money. But this was one mistake bookmaker Briggs wanted to rectify and he told the police."

Mayfield pleaded guilty to stealing but we cannot do better than repeat the words of his solicitor who said:

"If anyone is paid less he cannot ask for more
But if he gets too much the police are knocking
at his door".

Our sympathies are certainly not with the bookmaker.

Lending library?—Now we know what happens to copies of books presented to the Indecent Publications Tribunal for consideration. A circular to tribunal members contains this note: "Would the member with the copy of 'Love Love Love in Action' please bring it to the meeting. The police wish to borrow it."