The New Zealand
LAW JOURNAL

24 OCTOBER 1972 No. 19

JUSTICE ON THE CHEAP—PART TWO

"Justice on the cheap" was how Mr D. G. P. Russell described our "offenders" Legal Aid system at [1971] N.Z.L.J. 1. His general thesis is as applicable in the Privy Council as it is in Magistrates' Courts, albeit for different reasons.

As was noted in [1972] N.Z.L.J. 326, the Chief Justice, Sir Richard Wild, recently returned to New Zealand at the end of his sabbatical leave having spent the Trinity term sitting on the Privy Council.

If the past is anything to go by (and there is no reason to suspect a change in Governmental thinking) the Chief Justice would have received no encouragement or assistance in this undertaking from the New Zealand Government.

All in all, during the Trinity term that Sir Richard spent on the Privy Council some ten cases were heard; two from Hong Kong, one from Guyana, two from Australia, two from Malaysia, and three from New Zealand. Of these ten, Sir Richard took part in eight.

When asked why it was that he had spent no less than two of his five months sabbatical leave in this arduous occupation, Sir Richard replied: "Because while the Privy Council remains our ultimate Court, I think we should do our share in manning the Board."

There is, of course, very much more to the argument than simply doing "our share" of staffing the Court. Participating Judges both from Australia and New Zealand must gain a considerable insight into current legal thinking in Britain, and, for their own part, help to acquaint the permanent members of the Council with the social, cultural, economic and legal climate in a part of the world to which they have rarely, if ever, come.

It is hardly unusual for the Privy Council to be invited to adjudicate definitively on matters of statutory interpretation. And with the utmost respect, one has to observe that it is well nigh impossible for an assembly of English and Scottish Law Lords, devoid of New Zealand experience and largely ignorant of New Zealand conditions, to fortuitously breathe into our legislation the spirit that properly belongs there. There are, after all, many matters in which this country leads Britain. It is also true that there are a number of other fields in which Britain leads New Zealand. Regular New Zealand participation on the Privy Council could only result in the Privy Council gaining the benefit of the peculiarly New Zealand experience of our Judges, and our own Judges bringing back valuable insights into current British legal thinking. This country is the poorer for the lack of regular representation. At the same time the Judicial Committee is also the poorer.

The position here must be contrasted with that of Australia. Indeed, at the time when the Chief Justice was sitting on the Privy Council there was demonstrable proof of the differences between the practices of our two countries. For not only were there two Australian Judges (Sir Victor Windeyer and Sir Edward McTiernan) sitting with Sir Richard as members of the Privy Council, but this was the first occasion on which New Zealand and Australian Judges had *ever* sat together on the Privy Council—a situation made the more remarkable by the fact that Australian Judges of requisite standing sit regularly on the Privy Council as part of their judicial duties.

A very great opportunity was lost at the end of the 1939-45 War, when our politicians decided against regular New Zealand involvement in the deliberations of the Privy Council. Indeed, had there been regular Commonwealth participation

it is possible that many of those Commonwealth countries who have shed their affiliation to the Privy Council would still have had the Privy Council as its ultimate appellate Court.

And the question of whether or not the Privy Council should be our ultimate appellate Court is quite a separate question, and its role is to be discussed at Christchurch.

The plain and simple fact of the matter is that the Privy Council *is* our ultimate appellate Court. And the equally plain and equally simple fact is that our Judges are given no encouragement and no assistance by our politicians to engage themselves in that Court's deliberations. This is not to suggest that there should at all times be a New Zealand representative on the Privy Council. But it is to say that there not only should but *must* be regular New Zealand involvement, albeit for perhaps only one term in each alternate year. The expenses involved would be minimal, and the benefits no less substantial by reason of their being intangible.

Further, in the event of there being established some form of Pacific Regional Appellate Court, it would ensure that those of our Judges who hold the rank of Privy Councillor would have had practical experience of appellate work in a Court which handles appeals from a variety of different countries with varying heritages and Legislatures independently following dissimilar paths.

There may have been a contrary argument in times when travel was arduous and time consuming, but that argument has evaporated with the jet era. Further, it is not as if the New Zealand taxpayer would be saddled with anything approaching the total cost of such a proposal, as the British Government meets the day-to-day expenses of Commonwealth Judges during the time when they are sitting on the Board.

It is also undesirable that our Judges during their sabbatical leave should feel compelled to engage in arduous work of this nature at the expense of the respite their very entitlement to sabbatical leave shows them to have earned—to have knocked off work to carry (more judicially—weighty) bricks.

It is ironical how expedient it is for our transitory politicians to travel the globe—for "experience" and to "study ideas in other places"—even if some of those same politicians have been within a matter of months of their retirement. How much more so runs the argument in favour of our permanent judicial officers.

JEREMY POPE.

SUMMARY OF RECENT LAW

CRIMINAL LAW—PLEA OF AUTREFOIS ACQUIT AND AUTREFOIS CONVICT

Crimes Act 1961, s. 359 (1). Statutes—Interpretation—Construction with reference to other parts of Statute—Other sections—"Intention" and "purpose"—Narcotics Act 1965, ss. 5 (1) (e), 6 (1). This was a case stated from the Supreme Court. The respondent had been found in possession of tablets containing the prohibited drug lysergide and also of a pipe suitable for smoking cannabis. The respondent had given inconsistent explanations. The respondent was charged in the Magistrate's Court (a) that he had in his possession lysergide for the purpose of selling it to other persons (s. 5 (1) (e) of the Narcotics Act 1965) (b) that he had in his possession lysergide (s. 6 (1) of the Narcotics Act 1965) and (c) that he had in his possession a pipe for the purpose of using cannabis (s. 7 (1) (b) of the Nacotics Act 1965). The respondent pleaded guilty to the charges in (b) and (c) but elected trial by jury upon the charge in (a). The respondent was sentenced on the charge in (b) by the Magistrate to three months' imprisonment. Subsequently he stood trial on the charge in (a) and was found guilty by the jury. Before the respondent was sentenced pursuant to the jury's verdict the point was raised that as he had been convicted under (b) he was entitled to be discharged under s. 359 (1) of the Crimes Act 1961. The questions raised in the case stated were: (1) Was the conviction of being in possession of the narcotic contrary to s. 6 (1) of the Narcotics Act 1965 a bar under s. 359 (1) of the Crimes Act to the indictment presented against him thereafter in the Supreme Court for being in possession of the same tablets on the same occasion for the purpose of selling them contrary to s. 5 (1) (e) of the Narcotics Act? (2) If the answer was "yes", could the respondent, having been found guilty of the charge under s. 5 (1) (e) be discharged under s. 347 (3) of the Crimes Act 1961? *Held*, 1. There was no relevant distinction between the meaning and effect of the word "intention" used in s. 359 (1) of the Crimes Act 1961 and that of "purpose" used in s. 5 (1) of the Narcotics Act 1965. 2. Section 359 (1) of the Crimes Act 1961 refers to circumstances in which an accused has been formerly charged and convicted or acquitted on the first charge before the presentation of an indictment on a second charge which is substantially the same offence as the first charge, no more being added than a statement of intention or circumstances of aggravation. 3. The words in s. 359 (1) must be read in their ordinary and literal meaning and where the crime charged in the second place is no more than that charged in the first place with an allegation of intention or of circumstances of aggravation added, a conviction in the first case is a bar to an indictment in the second case. 4. The words in s. 6 (2) of the Narcotics Act 1965—"without prejudice to any liability under s. 5 of this

Act" mean that a person's acts may amount to an offence against s. 6 for which he may be charged summarily and do not prejudice his being charged also under s. 5, but if he is *prosecuted to conviction* under either charge he cannot *later* be convicted upon the other charge upon the same facts. 5. Where it is desired to proceed on two charges one under s. 5 and the other under s. 6 on the same facts, no summary conviction should be entered, notwithstanding a plea of guilty, while the charge on indictment is pending. If the accused is acquitted on indictment it will not be a bar to the outstanding summary proceedings. 6. The Court had power to direct a discharge under s. 347 (2) of the Crimes Act 1961 in respect of the charge under s. 5 (1) (e) notwithstanding the jury's verdict of guilt. *The Queen* v. *Lee* (Court of Appeal, Wellington. 2, 19 May 1972. Turner P., Richmond and Macarthur JJ.)

DAMAGES—AGGRAVATION AND MITIGATION

Aggravation in tort—Damages obtained on two separate causes against each of two defendants—Acts by second defendant in course of his employment—Employer and employee liable for punitive damages—Punitive damages excessive—Damages not required to be separately assessed in respect of each defendant. Master and servant—Liability of master to third persons—In tort—Acts within scope of authority and course of employment—Detective sergeant wrongfully arrested plaintiff and subsequently assaulted him. This was a motion by the first defendant for a new trial of an action in which the plaintiff had obtained damages on two separate causes of action against each of the defendants, on the grounds that the damages ought to have been separately assessed against each defendant and that the punitive damages were too high. The plaintiff sought re-assessment of the compensatory damages if the punitive damages were too high. The second defendant, a detective sergeant, had wrongfully arrested and subsequently wrongfully detained the plaintiff. On arrival at the police station the second defendant had seriously assaulted the plaintiff. During the trial the plaintiff had been cross-examined concerning previous convictions. The jury had awarded $9,000 punitive damages on the first cause of action and $1,000 compensatory damages on the second cause of action. *Held*, 1. All the acts upon which liability was assessed were done by the second defendant while acting in the course of his duty as a member of the police force. 2. The first defendant as the second defendant's superior was responsible for the mode of the exercise of the power conferred by the first defendant on the second defendant. (*Lloyd* v. *Grace Smith & Co.* [1912] A.C. 716, 733, 735, referred to.) 3. It was the second defendant's acts and position which had to be assessed and unless there was some conduct of the superior relevant to the award of punitive damages the means of the superior were irrelevant. 4. The award of punitive damages was excessive. (*Broome* v. *Cassell & Co. Ltd.* [1972] 1 All E.R. 801 818, referred to.) 5. The award of compensatory damages (including aggravation) was reasonable and would not be set aside. *Carrington* v. *Attorney-General and Murray* (Supreme Court, Auckland. 24, 28 April 1972. Henry J.).

DEFAMATION—DEFENCES

Qualified privilege—Statements in answer to common interest—Functions of Judge and jury—Judge—Express malice—As avoiding qualified privilege—Proof of malice—Negligence not malice. This case arose out of the findings of the jury in an action for libel that the defendant had uttered defamatory remarks about the plaintiff on three occasions and that on one of those occasions the defendant had been actuated by malice against the plaintiff. The defendant moved for judgment on the grounds that the three occasions were occasions of qualified privilege and that there was no evidence or insufficient evidence to support the finding of malice on the part of the defendant. A committee of three persons had been set up to recommend to the Government a suitable appointee for the post of chief mediator in industrial disputes. There were some 115 applicants but the committee being disappointed with the suitability of the majority of them invited the plaintiff to apply and after interviewing the "short list" the committee unanimously recommended the plaintiff for the post. Both the Cabinet and the Government Caucus decided that the plaintiff was not suitable. In interviews with members of the press and on television the defendant in discussing the reasons for the plaintiff not being appointed uttered the remarks which were the subject-matter of the libel action. *Held* 1. The onus is on the defendant to establish the circumstances which will support a plea of qualified privilege and the Judge must determine whether the occasion is privileged. 2. The relevant factors which the Judge must consider with regard to the alleged libel are—by whom and to whom when why and in what circumstances it was published and whether these things establish a relation between the parties which gives rise to a social or moral right or duty and the consideration of these things may involve the consideration of questions of public policy. (*James* v. *Baird* 1916 S.C. (H.L.) 158, 164, applied.) 3. The appointment of a chief mediator was a matter of national importance and there was a "corresponding interest" on the part of the public. (*Adam* v. *Ward* [1917] A.C. 309 334 applied.) 4. It does not follow that publication of all matters of public interest is in *the* public interest. 5. The public had no interest apart from perhaps curiosity in learning why the plaintiff had not been appointed. There were no special legal social or moral factors that made it desirable in the public interest that the grounds thereof should be published for the information of the community. (*Allbutt* v. *General Council of Medical Education & Registration* (1889) 23 Q.B.D. 400 distinguished.) 6. In this case while the selection committee might have had an interest in supplementary information and the Minister might have had a duty to impart it there were no grounds to release the words complained of to the public. (*Banks* v. *Globe & Mail* [1961] Canada L.R. 474 484 referred to.) 7. A statement is malicious when it is made for a purpose other than the purpose for which the law confers the privilege of making it. The law requires that a privilege shall be used honestly but not that it shall be used carefully. 8. The defendant's misquotation of the plaintiff's words was accidental and negligence in this field is not malice. *Brooks* v. *Muldoon* (Supreme Court Wellington. 27 28 April; May 1972. Haslam J.).

INFANTS AND CHILDREN—GUARDIANSHIP

Application by parents of girl aged 17 to be placed under guardianship of Court—Exceptional circumstances—Parents to be agents of the Court—Guardianship Act 1968 ss. 9 23. This was an application by the parents of a girl aged 17 years that she should be placed under the guardianship of the Court and that her parents be appointed agents of the Court generally and that she should be directed to live with her parents so long as she remained under the guardianship of the Court. The girl went to act as a baby-sitter at the house of a

married man aged 29 years. He was to drive her home but she disappeared. The man's car was found in the estuary by the police next day but on examination it was their opinion that no one had been in the car when it entered the estuary. The couple were later found living together and on the hearing of a complaint that the girl was not under proper control the Magistrate placed her under the control of the Child Welfare Department until she was seventeen. The girl had indicated that when she was released from the Child Welfare Department she would return to the man. *Held* 1. That on the facts there were exceptional circumstances and the Court directed the girl to live with her parents notwithstanding that she was over 16 years of age. 2. That under s. 23 of the Guardianship Act 1968 the welfare of the child is the first and paramount consideration and the orders sought were in the child's own best interests. *Re A. (An Infant)* (Supreme Court Invercargill. 15 May 1972. Beattie J.).

INSURANCE—PERSONAL INSURANCE

Life insurance—Formation of contract—Existing policy loaded—Further proposal through agent—Medically examined—Proposer admitted to hospital for brain surgery—Duty to disclose facts and all events but not suspicions or opinions—Facts disclosed to agent—Knowledge of agent imputed to principal—Binding contract concluded—Policy not issued—Agency—Relations between principal and third parties—General—Knowledge of agent imputed to principal. This was an appeal from a decision of Richmond J. [1970] N.Z.L.R. 919 wherein it was held that the respondent was not liable under a life insurance policy. Some years before Dr B., the appellant's husband, had taken out a policy on his life which had been loaded because prior to the proposal for insurance he had had a cancerous mole removed from his face. About the middle of 1963 Dr B. approached the respondent's agent K., through whom his existing policy had been effected, for a further policy and K. advised him that if he made application and underwent a medical examination, he might be accepted as a "select" life and the "loading" on his existing policy might be removed. On 30 May 1963 Dr B. signed a new proposal for further insurance and a medical examination by Dr D. was arranged. Dr D. noticed another mole and suggested that Dr B. should have it removed and that it should be submitted for pathological examination. On 5 August 1963 K. received a teleprint that Dr B. had been accepted as a "select" life at a premium of £4 7s. 6d. per month, the first premium to be paid in cash and a bank order made out for monthly payment of premiums before acceptance could be completed. K. treated the matter as urgent and on 7 August 1963 had a letter typed on the respondent's headed paper. In the meantime Dr B. had been admitted to hospital and on 1 August 1963 underwent an operation for removal of a brain tumour. K. was aware of these facts when he called on Mrs B. on 7 August with the letter and a banker's order, and a prepaid envelope addressed to the respondent. Mrs B. on 7 August only knew that the tumour had been successfully removed. Mrs B. gave to K. her own cheque for the first premium and asked whether, if Dr B. was unable to sign the banker's order when she saw him in hospital, it would be in order if she signed it herself, and K. agreed that it would. Dr B. was not well enough when Mrs B. saw him and so she signed the banker's order herself and posted it in the prepaid envelope on 8 August 1963. On 9 August Mrs B. was informed that the tumour removed was malignant and on 13 August Dr B. himself was told. On 15 August Dr D., who had learned of Dr B.'s illness, informed L., the respondent's Auckland branch manager. By a letter dated 23 August 1963 the respondent through its New Zealand manager repudiated liability under the policy in reliance on condition (1) of the proposal form signed by Dr B., which was as follows: "Any circumstances affecting the risk of an Assurance on the Life to be Assured shall be disclosed to the Association in this Proposal or in any Personal Statement made by the Life to be Assured in connection with this Proposal and any other circumstances which may occur before the Policy is issued shall be disclosed to the Association forthwith upon their occurrence." The respondent's cheque for £4 7s. 6d. was enclosed in repayment of Mrs B.'s cheque, which had been cashed, and the bank order was also enclosed. The respondent did not issue a policy. Shortly after receiving the letter Dr B. returned to hospital and died on 5 December 1963. The appellant contended that a concluded contract of life assurance had come into being on 8 August 1963 when the letter was posted. The respondent contended that K. was not its agent to receive disclosures, and that the information received by K. from Mrs B. on 7 August was not information of which it had received notice. *Held*, 1. There was a duty on the part of the assured under condition (1) to disclose *facts* which came to notice and all *events* which had happened but the duty did not include suspicions, or possible conclusions on matters of opinion. 2. The respondent being an artificial person, disclosure to it must be a communication to one of its agents. 3. K. was clothed by the respondent with an ostensible authority to receive such disclosures. 4. The imputation to a principal of the knowledge of an agent when that knowledge has been disclosed to him in reliance upon his ostensible authority to receive it is an application of the principles of estoppel. 5. An exception to the rule in 4 (*supra*) is where the third party actually knew or believed that the disclosures had not in fact been or would not in fact be passed on to the principal by the agent. (*Sharpe* v. *Foy* (1868) L.R. 4 Ch. App. 35, 40; *Re Fitzroy Bessemer Steel Co. Ltd.* (1884) 50 L.T. 144, 147 and *Tanham* v. *Nicholson* (1872) 5 H.L. 561, 568, applied.) 6. Due disclosure to K. was disclosure to the respondent and was not affected either by the fact that he did not pass it on or by any suspicion or possibility, short of actual knowledge or positive belief by Mrs B. that it would not be passed on. 7. A binding contract of insurance had been entered into, notionally incorporating the terms of the respondent's policy. The policy though not issued by 9 August 1963 was already in force. Decision of Richmond J [1970] N.Z.L.R. 919, reversed. *Blackley* v. *National Mutual Life Association of Australasia Limited* (Court of Appeal, Wellington. 2, 3 March; 11 May 1972. Turner P., McCarthy and Macarthur JJ.).

INTOXICATING LIQUORS—APPLICATION FOR NEW LICENCES

Employee of Airport Authority applying for airport licence—Applicant controlled by Airport Authority—Duties under the Sale of Liqior Act 1962 personal to applicant, responsibility therefor could not be shifted to some other person—Sale of Liquor Act 1962, s. 195B. The appellant had applied for an airport licence pursuant to the Sale of Liquor Act 1962. The Licensing Control Commission found as a fact that the appellant had applied as the employee of the Airport Authority and that the premises were vested in the Airport Authority and all matters relating to the provision of facilities would require to be authorised and paid for by the Airport Authority, which would also provide

the necessary capital and be entitled to the profits or required to bear the loss. Furthermore there was no arrangement whereby the appellant would be free from the control of his employer, the Airport Authority. *Held*, Subsection (1) of s. 195B of the Sale of Liquor Act 1962 imposes a positive duty on the licensee to comply with the provisions of that section, and the legal responsibility for that compliance cannot be shifted to some other person. *Jamieson* v. *Licensing Control Commission* (Supreme Court (Administrative Division) Wellington. 3 May 1972. Wilson J.).

TRUSTS AND TRUSTEES—ADMINISTRATION OF TRUSTS

Applications to and interventions by Court—Variation of trusts—Changing method of operating charity contrary to express provisions of trust—No jurisdiction under Trustee Act—Trustee Act 1956, s. 64. Charities—Charitable trusts—Schemes of administration—Alteration of mode of operating charity contrary to express provisions of instrument—Application to be made under Charitable Trusts Act 1957 not under Trustee Act 1956—Charitable Trusts Act 1957, Part III. This was an application under s. 64 of the Trustee Act 1956 designed to achieve a modification of the powers contained in the trust instrument but the esesntial purpose was to change the method of operating the charity from that of a large institution into a series of smaller family type units. *Held*, 1. Under the provisions of s. 64 of the Trustee Act 1956 there is no jurisdiction to modify a trust instrument if the modification would be contrary to the intention expressed in the instrument. 2. The intention of the donors was that the charitable purpose was to take the form of an orphanage. 3. The new proposals should be put forward by way of a scheme under the Charitable Trusts Act 1957. *Baptist Union of New Zealand* v. *Attorney-General* (Supreme Court. Auckland. 24 May 1972. Woodhouse J.).

BILLS BEFORE PARLIAMENT

Apprentices Amendment
Appropriation
Aviation Crimes
Children's Health Camps
Clean Air
Clean Air (No. 2)
Counties Amendment
Education Amendment
Electoral Amendment
Equal Pay
Estate and Gift Duties Amendment
Factories Amendment
Fire Services
Fire Services Amendment
(Flat and Office Ownership) Unit Titles
Hydatids Amendment (No. 2)
Indecent Publications Amendment
Machinery Amendment
Marlborough Sounds Maritime Park
Mental Health Amendment
Municipal Corporations Amendment
National Housing Commission
New Zealand Council for Educational Research
New Zealand Superannuation
Occupational Therapy Amendment
Police Amendment
Preservation of Privacy
Rent Appeal Boards
Shipping and Seamen Amendment
Shops and Offices Amendment
Soil Conservation and Rivers Control Amendment
Superannuation Amendment
Syndicates
Tobacco Growing Industry Amendment
Town and Country Planning Amendment
Trustee Companies Amendment
University of Albany
Wool Marketing Corporation

STATUTES ENACTED

Carter Observatory Amendment
Coal Mines Amendment
Customs Amendment
Finance
Imprest Supply
Imprest Supply (No. 2)
Land and Income Tax Amendment
Land and Income Tax Amendment (No. 2)
Land and Income Tax (Annual)
Ministry of Agriculture and Fisheries Amendment
Ministry of Energy Resources
Ministry of Transport Amendment
Minister of Local Government
National Art Gallery, Museum, and War Memorial
Public Revenues Amendment
Republic of Bangladesh
Republic of Sri Lanka
Stamp and Cheque Duties Amendment.
Unit Titles

REGULATIONS

Regulations Gazetted 7 to 14 September 1972 are as follows:

Board of Trade (Wool Packing) Regulations 1948, Amendment No. 4 (S.R. 1972/196)

Customs Tariff Amendment Order (No. 11) 1972 (S.R. 1972/197)

Customs Tariff Amendment Order (No. 16) 1972 (S.R 1972/202)

Fisheries (General) Regulations 1950, Amendment No. 19 (S.R. 1972/198)

Hire Purchase and Credit Sales Stabilisation Regulations 1957, Amendment No. 25 (S.R. 1972/201)

Parliamentary Salaries and Allowances Order 1970, Amendment No. 2 (S.R. 1972/199)

State Services Salary Order (No. 5) 1972 (S.R. 1972/203)

State Services Salary Order (No. 6) 1972 (S.R. 1972/204)

Therapeutic Drugs (Permitted Sales) Regulations 1972, Amendment No. 1 (S.R. 1972/205)

Trustee Savings Banks Regulations 1949, Amendment No. 12 (S.R. 1972/200)

CASE AND COMMENT

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

Volenti non fit injuria: Liability for Keeping Dangerous Animals

In *James* v. *Mayor etc. of Wellington* (judgment delivered on 18 April 1972) the Court of Appeal had to consider questions relating to the liability of the keeper of dangerous animals, and whether there are circumstances, (such as the master/servant relationship where although there is no escape, the employee has to work among dangerous animals, and is injured), in which, although the animal has been classified as dangerous, strict liability may not apply or, there is some defence, such as *volenti non fit injuria*, which may be available. In the Supreme Court Quilliam J. had classified the chimpanzee as an animal *ferae naturae* (his judgment reported in [1972] N.Z.L.R. 70 was the subject of a Case and Comment note in [1971] N.Z.L.J. 540) and this classification was held (by the Court of Appeal) to be the correct one. Neither Quilliam J. nor the Court of Appeal were prepared to concede that strict liability might never arise between the keeper of dangerous animals and his servant, but it was agreed that there were circumstances in which it would not. What those circumstances would be would depend on the facts of each particular case.

In considering whether any defence, such as *volenti non fit injuria* would be available or not, different considerations would apply. The defence of *volenti non fit injuria* is too well known to need discussion in this place. The words of Turner J. in *Morrison* v. *Union Steam Ship Co. N.Z. Ltd.* [1964] N.Z.L.R. 468, 475 were quoted by both Quillaim J., in the lower Court and Richmond J. in the Court of Appeal. In the circumstances of this case it may be that the defence of *volenti* would have been available, but the problem which arose was that the defence of *volenti* is by its nature and history an affirmative defence, the onus of proving which lies on the defendant (see *Letang* v. *Ottawa Electric Ry. Co.* [1926] A.C. 725), and it had not been expressly pleaded as required by R. 128 of the Cod of Civil Procedure. Taking the whole surrounding circumstances into account the Court of Appeal did not really think that it would have been just to entertain the plea, particularly as the appellant had not been notified that the defence of *volenti* might apply, nor had his cross-examination been conducted in such a way as would amount to fair notice of such a defence. He had therefore not had an adequate or fair opportunity to meet the allegations. The Court of Appeal therefore concluded that Quilliam J. should not have allowed in the defence of *volenti*, even though it may well have lain. The Court of Appeal concluded that the judgment entered in the Court below should be vacated, although the respondent might renew his application for amendment of the pleadings if he so wished.

The case does show without being conclusive that there may be circumstances in which strict liability in respect of damage caused by an animal *ferae naturae* will not apply, but what all these circumstances are will depend on a variety of factors which are yet to be determined.

M.A.Y.

Section 62 (b) of the Land Transfer Act

The scope of s. 62 (b) has long been a matter of some doubt. It provides that:

> ". . . the registered proprietor of land . . . under . . . this Act shall . . . hold the same subject to such encumbrances . . . as may be notified on the . . . register . . . but absolutely free from all other encumbrances . . .
>
> "(b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land."

The subsection raises two main questions: what class of easements comes within its scope and what is its relationship to s. 182 of the Land Transfer Act? Both of these are discussed in the judgment of White J. in *O'Kane* v. *Sutton et anors* (Supreme Court at Dunedin, 22 March 1972).

The facts concern a right of way which, because of oversights on the part of the conveyancers and the staff of the Land Registry Office, was never created in the manner required by the Land Transfer Act for the creation of a legal easement. However, the necessary ingredients were present to enable the Court to find an equitable easement. The servient title, therefore, showed the proposed right of way on the plan and contained a note that the local authority's consent to the subdivision was conditional on the creation of that right of way, but the condition had never been complied with. On the

section itself the right of way had been formed and was in use by the dominant owner. With matters in this state, the servient land was sold to a *bona fide* purchaser for value who believed at the time of purchase that the right of way was legally created over his land. Some time later a dispute arose between the purchaser and the dominant owner as to the use of the right of way, which led the servient owner to have the title searched with regard to the right of way and to discover that it had never been properly created in law. He then proceeded to deny the existence of the easement and the present action ensued.

At common law the standard rule had been that an equitable interest was binding on all persons except a *bona fide* purchaser for value of the legal estate without notice. The Land Transfer Act has weakened the position of an equitable interest by requiring that the purchaser be not only without notice, but without fraud, and notice *per se* is not fraud (s. 182). Accordingly, White J. examined an allegation of fraud but found that as the purchaser had not had full knowledge of the circumstances and the equitable nature of the right until after he had become registered as proprietor, he could not be said to be fraudulent.

The Court then passed on to an argument that the easement came within the scope of and was protected by s. 62 (b). The first issue was whether the easement was in that class of easement within the scope of the section. Until recently it was thought that only easements created before the servient land came under the Land Transfer Act were within the section (*Jobson* v. *Nankervis* (1943), 44 S.R. (N.S.W.) 277), but this view was rejected in *James* v. *Registrar-General* (1967) 69 S.R. (N.S.W.) 361, which concerned a registered easement that had been omitted in error from a new title later issued for the servient tenement. In his judgment White J. devoted the whole of his consideration of the scope of the class of easements within the section to the question of whether it could include easements created after the servient land came under the Land Transfer Act. Because this issue had not been answered before in a New Zealand Court, some discussion of it was proper, and it is respectfully submitted that it was correctly held that *James's* case should apply in New Zealand. However, his Honour then went on to assume that the easement in the instant case must therefore come within the scope of s. 62 (b).

This completely overlooks a major distinction between classes of easements, that between legal and equitable easements. In all of the cases, including *James's* case, which have held that an easement comes within the scope of s. 62 (b), with the one exception of *Crisp* v. *Snowsill* [1917] N.Z.L.R. 252, the easement has been created in a manner recognised at the time of its creation, whether before or after the servient land was brought under the Land Transfer Act, as giving rise to a legal easement. The section has therefore been used to do no more than to preserve legal easements from extinguishment by the indefeasibility provisions of the Act, and, having regard to the considerable difference between legal and equitable interests as regards third parties, it is certainly not sufficient to regard *James's* case as directly applicable to the present facts.

The degree of danger to the indefeasibility of title posed by the finding that an equitable easement comes within the scope of s. 62 (b), depends on the answer to the second question raised by that section, whether it is to be read subject to s. 182 of the Land Transfer Act. If it is read so subject, third parties are still protected from the equitable easement unless they are found to be fraudulent within the meaning of the Act, which makes the mention of s. 62 (b) at all in such circumstances seem superfluous; but if not so read, the equitable easement is binding on all purchasers, with or without fraud, and is thereby effectively converted into a legal easement without the need for registration.

White J., having failed to take note of the distinction between legal and equitable easements at the earlier stage, did not realise its significance when he came to consider the relationship between s. 62 (b) and s. 182, even though the earlier New Zealand cases give a pointer in the right direction. The final position reached in these cases was stated in *Carpet Import Co. Ltd.* v. *Beath & Co. Ltd.* [1927] N.Z.L.R. 37, 59-60, when it was said that s. 62 (b) is to be read subject to s. 182 if the easement is registrable, but not if it is incapable of registration. Although there may be much debate as to what are registrable and unregistrable instruments, that in *Crips* v. *Snowsill* (*supra*), an implied and therefore equitable easement under the Land Transfer Act, was seen as coming into the former category. The equitable status of the easement was thereby preserved even though the reference to s. 62 (b) may have been totally unnecessary. In *O'Kane* v. *Sutton*, however, White J. regarded this reasoning as superseded by the finding in *James's* case that the equivalent of s. 62 (b) was an absolute exception to indefeasibility of title, not

to be read as subject to s. 182 at any time. The maximum damage has therefore been wrought by this decision on the indefeasibility of title accorded by the Act.

It is respectfully submitted that this decision is contrary to s. 90 of the Land Transfer Act, to the spirit of the Act as a whole, and to the spirit of the immediate indefeasibility accorded to purchasers and sanctified by *Frazer* v. *Walker* [1967] 1 A.C. 569; [1967] N.Z.L.R. 1069. It is further submitted that s. 62 (b), which must of necessity create an exception to indefeasibility to some extent, would perform a useful purpose and do least damage to the ideal of indefeasibility if it were limited to easements created in a manner recognised as giving rise to a legal easement at the time of their creation, excluding equitable easements totally, and read as an absolute provision not subject to s. 182 at any time.

D.W.McM.

THF ANTHROPOLOGICAL PROBLEM OF ABORTION—II

According to Haeckel's fundamental biogenetic law ontogenesis is a shortened repetition of phylogeny or in other words: in the course of its individual development every animal has the tendency to repeat the development of its kind.

Especially the term "fundamental law" in Haeckel's opinion is disputable.

It is not so much a law as an historical phylogenical principle that has in the meantime become recognised by practically everyone.

It may be possible, as Mr Mooney states, that in New Zealand students of anthropology hoot in derision at this, as they may do at my "folly". In Europe, however, they do not.

An excellent contribution for the clarifying of our problem is provided by modern philosophy. The philosopher Samuel Alexander (1859-1938) and Nicolai Hartmann (1882-1950) have, broadly speaking, about the same ideas, which in general are characteristic of present-day metaphysics. However, here we will only concern ourselves with Hartmann. (*a*)

Hartmann's philosophy leaves no doubt as to how one should regard the foetus, i.e. as organic life. Every human being starts as pure organic life and only at this level of existence has he a direct link with his origin. What has come about in the development of the organisms in geological tempo, repeats itself here in miniature, in accordance with the biological law of ontogenesis, which is a shortened repetition of the course of phylogenesis.

The human being is part of the organic life, because without it he cannot exist. But the spirit, the "categorical novum" which is the typical characteristic of the higher level, makes him a human being. All this according to Hartmann.

The foetus lacks the typical characteristic of the higher level—the spirit, which is the essence by which it is distinguished from the lower level of existence.

It is of no use to discuss this any further with Mr Mooney a non-anthropologist, as he can know little of biology. Enough to say that my manuscript was reviewed by two leading Dutch professors of anthropology as well as by a professor of legal science, now Attorney-General to the Dutch Supreme Court of Judicature.

Concerning the law: Mr Mooney in his argument refers among other things to the English law. If the foetus is in fact a human being as he says, how then is it possible that in England many foetus are killed on many grounds and certainly not only to save the woman's life? If the foetus is a human being, it would not be allowed to be killed for whatever reason, not even to save the woman's life. We are not allowed to kill one person to save the life of another. Reasons such as self-defence emergencies, etc., are dragged into it to give the doctor a leg to stand on.

COEN VAN TRICTH.

(*a*) Nicolai Hartmann: *Neue Wege der Ontologie*, 1949.

Notice—Fluttering around the streets of that Oriental paradise, our Hong Kong correspondent discovered hundreds of cyclostyled notices, each reading "NOTICE—A new colourless liquid is now being used by H.K. Secret Police. The liquid is British made which when applied will enable transmitting and receaving voice within approximately 20 feet. This news is revealed for special reasons. Please help to get it spread. Thankyou."

Who can say we have not done our bit?