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THE PENALTY FOR BEING UNDER SUSPICION

The adversary system on which for the most part our Court proceedings are based is often defended by the trotting out of familiar homilies about the testing of evidence by careful, considered and if necessary rigorous cross-examination. Though the system makes no claim to perfection—supporters of Arthur Allan Thomas can be comforted by the thought that not for the first time and certainly not for the last has a convicted accused been taken from our Courts protesting his innocence—it is nonetheless the fairest system yet devised.

However, there have been a number of recent occurrences that highlight certain unsatisfactory aspects, only a part of which is the unrepresented defendant who, figures now clearly show, is not only more likely to be convicted (indeed, if he was not, defence counsel could retire) but is also more likely to be imprisoned when he is. Even in a country such as Spain, whose politics are plainly fascist, Courts have no competence to even hear a case where an unrepresented defendant faces more than a *month* and one day in prison.

Never has the clumsiness of the system been more graphically illustrated than during the recent hearing by the Cinematograph Appeals Board of the distributor's appeal against the total ban imposed on *Last Tango in Paris*. In that case the censor for some undisclosed reason elected not to contest the appeal. Instead we saw a remarkable appearance by the Solicitor-General, Mr R. C. Savage, Q.C., in the role of *amicus curiae*, expressly stating that he appeared for neither the Government nor the censor, and proceeding to strenuously defend the censor's ruling. Bizarre to members of the public, the performance was to the profession a dramatic illustration of the way in which our whole system collapses when only one side is heard. An appearance by counsel to defend the censor's ruling (whatever one's views may be of that ruling) was essential if the balance was to be produced that the system is designed to give.

It was proper for senior counsel to be provided in such a case, though there is room for the view that the political aspect could have been somewhat defused had the case been briefed out by the Crown Law Office. We should contrast proceedings in *Tango* with the *Listener* inquiry of last year.

The *Listener* inquiry was instigated by the Government of the day to determine whether there was evidence of improper activity on the part of one of its appointed boards, the board of the N.Z.B.C. That the inquiry was plainly necessary for reasons of Government incompetence was plainly shown by the disclosure on "Gallery" of the political nature of most of the appointments to the board, and of its consequent lop-sidedness. Whether any tangible evidence of political intrigue could ever have been adduced through admissible evidence is quite another story.

The inquiry dragged on over 29 days. The N.Z.B.C. retained Mr R. B. Cooke, Q.C., since elevated to the Judiciary, and the *Listener's* former editor, Mr Alexander McLeod, was represented by Mr P. J. Downey. Having run its altogether predictable course, the expected findings were made.

But the matter did not end there, for the question of Mr McLeod's legal costs remained. The question was not resolved by the National Government before it was removed from office, and the in-coming Government made a modest payment towards the expenses of the out-of-work journalist Mr McLeod had become. It

should be made plain that the Government's contribution amounted to less than one-half of Mr McLeod's expenses—expenses, one would add, that were computed at a modest daily rate and one well below the sum that would have been allowed on a taxation of the account.

Mr McLeod, therefore, is left to face an account of about $2,500—a contribution he is apparently required to make to subsidise a Governmental inquiry into the activities of one of its branches—while opposing counsel was paid (and doubtless at a very much higher rate) out of public funds. It is surely illogical that the taxpayer should stop short of meeting all of Mr McLeod's expenses, given that the case was a proper one for a payment to be made at all.

To return to Thomas. There was the disclosure in the Court of Appeal that Thomas's assets were by then exhausted. His application for legal aid was granted, but no less than in the *Listener* inquiry one may pause to ponder whether justice requires the bankruptcy of the parties involved. Or does society as a whole smugly regard this as the penalty for being under suspicion?

The fundamental fact remains. Without proper legal representation the system collapses. One can imagine, for example, the field day witnesses could have enjoyed in the *Listener* inquiry had Mr McLeod not been represented. Secure in the knowledge that he is not to be subjected to the scrutiny of informed cross-examination, the partisan witness is a frightening prospect.

If the very system depends on proper representation, is there any valid reason why, in criminal cases at least, the individuals involved ought almost invariably to have to pay for their part in it? In the field of criminal law we have the taxpayers' money being used to finance a prosecution, but the single taxpayer is compelled to marshal his assets to match the costs of counsel.

It is not enough to point to the Courts' power to award costs in favour of successful defendants in criminal cases. For the Courts have manifestly failed to exercise their discretion in the individual's favour, only doing so (where they have deigned to do so) as a mark of censure against the prosecution.

A similar position prevailed in Britain until a few weeks ago, when the Lord Chief Justice simply issued a practice note stating that costs in criminal cases would as a matter of course be awarded to successful defendants unless there were compelling reasons why they should not be. This aboutface has taken place, we should note, without legislation and without a case-law interpretation of the corresponding section. It has been made simply on the grounds of policy. It is a move in the right direction.

It could be and should be followed by the Judiciary here. And not simply by awards of lump sums, but by the taxing of counsel's bills and the meeting of them in full by the State.

The provision of legal aid may be seen as a small first step, not as an end in itself. The provision of duty solicitors will alert the ignorant to their rights. But for the articulate, the educated and the not wholly impoverished, the State continues to require that if they want justice they must pay for it, if necessary with their life's savings. But *is* this justice? From a legal viewpoint it is quite unnecessary for this situation to be perpetuated on quite such a scale while legislative action is awaited. Or do we need a counterpart of the Gerald Nabarro affair to embarrass the Judiciary into change?

JEREMY POPE

SUMMARY OF RECENT LAW

AGENCY—LAND AGENTS

Authority to sell—Commission—Agent failing to collect deposit—Contract conditional on finance—Vendor rescinding sale for non-payment of deposit—Agent substantially performing his duties. The respondent, a real estate agent, claimed commission from the appellant for effectuating the sale of the latter's property. The appellant changed his mind after an agreement for sale, wherein the sale was conditional on the purchaser raising finance, had been signed and purported to rescind the agreement on the ground that the deposit had not been paid. The appellant had not signed a written authority to sell when he listed the property for sale with the respondent, but a clause in the agreement for sale and purchase acknowledged that the sale had been made through the respondent, "whom the vendor has appointed and doth hereby appoint as his agent to effectuate such sale". *Held,* 1. There is no real distinction between authority to sell and authority to effectuate a sale. 2. An agent is *prima facie* entitled to his commission, provided he is not in breach of his duty, when he has procured a person approved by the vendor to enter into a binding contract of purchase upon the terms of his authority, whether the purchase is completed or not. (*Latter* v. *Parsons* (1906) 26 N.Z.L.R. 645; 8 G.L.R. 596, followed, and *Dustin* v. *Pember* (1970) 13 M.C.D. 207, approved.) 3. As the con-

tract which the agent had invited the vendor to sign acknowledged receipt of a sum of money as a deposit it was the agent's duty to collect the deposit, or to see that it was paid, or to inform the vendor that he had not done so and to seek instructions. 4. A deposit is a guarantee for the performance of the contract by the purchaser, and the fact that the contract is subject to finance does not usually affect the importance of payment of the deposit. (*Progressive Agency* v. *Bennett* [1928] N.Z.L.R. 100, 103; [1928] G.L.R. 111, 113, referred to.) 5. Commission is payable to the agent if, on a reasonable interpretation of the agency contract, after procuring a binding contract of sale the agent has substantially performed his contract. (*Hoenig* v. *Isaacs* [1952] 2 All E.R. 176, and *Latter* v. *Parsons* (*supra*), referred to.) *McLennan* v. *Wolfsohn* (Supreme Court, Wellington. 5 February; 12 April 1973. Cooke J.).

BUILDING CONTRACTS — ENGINEERS AND ARCHITECTS

Architects' and engineers' duties and liabilities to contractors, subcontractors and others—Unpaid subcontractor ceasing work, architect persuading him to recommence on assurance that finance was available —Subcontractor not paid for work after recommencement—Measure of damages—Damages—Measure of damages in tort—Architect's breach of duty to take care towards subcontractor. The plaintiff was a blocklaying and plastering subcontractor and the defendant was the architect employed by the owners. The plaintiff's tender was accepted and he started work but stopped because he received no payments. The defendant requested the plaintiff to resume work and assured him that he would receive the progress payment of $1,000 and that ample funds were available to cover the balance of his price. The plaintiff on the faith of this assurance completed the work but received only the progress payment of $1,000 and his share of lien moneys. The defendant was aware of the financial position under the contract at the time he gave the assurance. The plaintiff claimed damages for negligence on the basis of the *Hedley Byrne* doctrine. The defendant did not appear in person or by counsel. *Held,* 1. The plaintiff established that the defendant had a duty of care. (*Mutual Life and Citizens' Assurance Co. Ltd.* v. *Evatt* [1971] A.C. 793; [1971] 1 All E.R. 150, applied; *Hedley Byrne & Co. Ltd.* v. *Hellier & Partners Ltd.* [1964] A.C. 465; [1963] 2 All E.R. 575, and *Dimond Manufacturing Co. Ltd.* v. *Hamilton* [1969] N.Z.L.R. 609, referred to.) 2. A duty of care of an adviser will be more readily established when he has a financial interest. (*Mutual Life and Citizens' Assurance Co. Ltd.* v. *Evatt* [1971] A.C. 793, 809; [1971] 1 All E.R. 150, 161, referred to.) 3. The measure of damages for breach of the duty of care was the loss suffered by the plaintiff after recommencing the work. (*W. B. Anderson & Sons Ltd.* v. *Rhodes (Liverpool) Ltd.* [1967] 2 All E.R. 850, followed). *Day* v. *Ost* (Supreme Court, Wellington. 14, 16 March 1973. Cooke J.).

INFANTS AND CHILDREN—CARE AND CUSTODY

Jurisdiction of the Court—No jurisdiction to make order for access in favour of stepfather—Guardianship Act 1968, ss. 11, 15, 33 (3)—Statutes—Rules of interpretation — Code — Construction uninfluenced by consideration of previous law. A stepfather applied for access to his stepdaughter, then in the custody of her natural mother, the statutory guardian. *Held,* 1. The scheme of the Guardianship Act 1968 is that the statutory jurisdiction of the Courts in respect of infants and guardians is wholly within that Act and all other statutory jurisdiction has been revoked. 2. The proper method of construing a statutory code is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by considerations of the previous state of the law. (*Bank of England* v. *Vagliano Bros.* [1891] A.C. 107, 144-145, followed. *Robinson* v. *Canadian Pacific Railway Co.* [1892] A.C. 481, 487, referred to.) 3. The term "parent" in s. 15 of the Guardianship Act 1968 does *not* include a step-parent. 4. The terms "custody" and "access" are two clear and distinct terms and the term "custody" in s. 11 of the said Act does not confer jurisdiction to grant an order for "access". 5. "Custody" and "access" are clearly provided for in the Act in deliberate language and s. 33 (3) does not enable the Supreme Court to include other persons for whom access is not provided for in the Act. *Miller* v. *Miller* (Supreme Court, Auckland. 7, 15 March 1973. Henry J.).

EVIDENCE—AFFAIRS OF STATE

Superintendent of Labour Department—Subpoena duces tecum—Not prohibited from giving evidence—Labour Department Act 1954, s. 13 (1). In an action for damages brought by an employee against an employer the Assistant District Superintendent of the Department of Labour had been served with a subpoena duces tecum to produce certain documents. The purpose of the subpoena was to obtain evidence relevant to damages on such matters as whether the plaintiff had applied to the department for placement of work. The question was whether s. 13 (1) of the Labour Department Act 1954 prevented the giving of such evidence. *Held,* 1. The obligation of witnesses to give evidence in Court in the absence of privilege is not to be overriden except by clear statutory language. (*R.* v. *Beynon* [1963] N.Z.L.R. 635, 638-639, followed.) 2. A prohibition against the giving of "information" will not readily be construed as extending to testimony. (*R.* v. *Beynon* [1963] N.Z.L.R. 635, 635, 638-640, followed.) 3. The subpoena should stand and the evidence would not be restricted by s. 13 (1) of the said Act. (*R.* v. *Beynon* (*supra*), applied. *Auckland Hotel and Restaurant Employees' Industrial Union of Workers* v. *Pagni* (1915) 17 G.L.R. 311, *Hiroa Mariu* v. *Hutt Timber and Hardware Co. Ltd.* [1950] N.Z.L.R. 458; [1950] G.L.R. 171, and *Eggers* v. *E. D. Wilson Construction (Nelson) Ltd.* [1964] N.Z.L.R. 901, distinguished.) *Bonner* v. *Karamea Shipping Co. Ltd.* (Supreme Court, Wellington. 12, 13 March 1973. Cooke J.).

EXECUTORS AND ADMINISTRATORS — LETTERS OF ADMINISTRATION

No beneficiary willingly to apply—No provision in Administration Act—Grant to brother under inherent jurisdiction. Administration Act 1969, s. 6—Judicature Act 1908, s. 16. A grant of letters of administration to the estate of the deceased who died intestate was sought by the deceased's brother. The only persons beneficially entitled on the deceased's intestacy were his two sons, neither of whom desired to apply for letters of administration. *Held,* Since s. 6 of the Administration Act 1969 did not make provision for such a case as the present, the Court could exercise its inherent jurisdiction pursuant to s. 16 of the Judicature Act 1908 and make the grant as sought. *Re Jones (deceased)* (Supreme Court, Wellington. 14, 23 March 1973. Quilliam J.).

INSURANCE—GENERAL PRINCIPLES

Policy construed contra proferentes—Loss by water damage—Exclusion of apparatus (other than water pumping apparatus) not normally fitted in buildings—Defect in defrosting apparatus. This was a claim against an insurance company under a policy for loss directly due to water damage. The damage arose due to failure of a valve in the defrosting mechanism which resulted in water ruining part of a stock of frozen oysters. The respondent claimed that the loss was excluded from the policy by a clause which excluded loss due to failure or defect in "any other apparatus used in connection with water and not normally fitted in building(s)". *Held,* 1. The brackets round the "s" in "building(s)" were deleted as being either in the nature of a grammatical error or a pure mistake. (*Glen's Trustees* v. *Lancashire & Yorkshire Accident Insurance Co.* (1906) 8 F. (Ct. of Sess.) 915, referred to.) 2. The language in the exception clause was that of a respondent and must be construed *contra proferentes.* (*Lake* v. *Simmons* [1927] A.C. 487, 509, and *Cornish* v. *Accident Insurance Co. Ltd.* (1889) 23 Q.B.D. 453, 456, applied.) 3. The word "buildings" in the exception clause was not limited as to place or country. *Skeggs Foods Ltd.* v. *General Accident, Fire and Life Assurance Corporation Ltd.* (Supreme Court, Dunedin. 20 March; 2 April 1973. O'Regan J.).

PRACTICE—HEARING IN CAMERA

Injunction to restrain publication of matter prejudicial to fair trial of another action—Onus on applicant to show why case should not be heard in public. An injunction was sought to restrain the publication of certain material claimed to be prejudicial to the fair trial of another action in which the applicant was a defendant. The claim in the other action was for damages only and either party had a right to trial by jury. The applicant applied for an order that the injunction proceedings should take place in camera. *Held,* 1. The onus lies on the applicant to show that the ordinary rule that a case should be heard in public should be displaced on the ground that justice could not be done if it were heard in public. (*Scott* v. *Scott* [1913] A.C. 417, 437-438, followed.) 2. If a public hearing might have the result of rendering futile the relief that was being sought in the action, it would be proper for the case to be heard in camera. (*Mellor* v. *Thompson* (1885) 31 Ch. D. 55, followed. *Re Agricultural Industries Ltd.* [1952] 1 All E.R. 1188, referred to.) *Skope Enterprises Ltd.* v. *Consumer Council* (Supreme Court, Wellington. 19 March 1973. Cooke J.).

PRACTICE—LEGAL AID

Separate application for legal aid in appellate proceedings—Oral decision on appeal proceedings in Supreme Court — Concluded appeal proceedings—Application for legal aid in appeal proceedings after appeal concluded refused—Intitulement of appeals from Legal Aid Committee and Legal Aid Appeal Authority. The appellant applied to a Legal Aid Committee for legal aid in respect of her application to revoke an interim adoption order. Prior to the granting of legal aid the case was heard in the Magistrate's Court. An appeal was filed and judgment was delivered in the Supreme Court dismissing the appeal, but no formal judgment was sealed. Subsequently the appellant's solicitor informed the committee of the outcome of the case and of the appeal therefrom and asked for a determination of the application for legal aid. The solicitor was informed that a separate application was required for legal aid for the appeal proceedings and as the latter were then concluded it was too late and legal aid for the latter proceedings was refused. The appellant contended that a civil appeal from the Magistrate's Court to the Supreme Court was not finally and effectively concluded until the decision of the Supreme Court was perfected by the sealing of an order. On this appeal Quilliam J. specifically limited his judgment to a decision in respect of an application for legal aid; he did not purport to make a decision of general application. *Held,* 1. A Judge has a right to recall a decision after it has been pronounced but before the sealing of an order. (*Horowhenua County* v. *Nash (No. 2)* [1968] N.Z.L.R. 632, and *Re Harrison* [1955] Ch. 260; [1954] 2 All E.R. 453, referred to.) 2. The moment at which a decision of the Supreme Court is given so as to conclude the proceedings may not necessarily be the same in all cases (*Re Harrison* [1955] Ch. 260, 276-277; [1955] 1 All E.R. 185, 188, referred to.) 3. The word "decision" in s. 78 (1) of the Magistrates' Courts Act 1947 does not necessarily refer to a sealed order and there is no requirement in the rules of Court that the decision on a civil appeal is to be sealed. 4. For the purposes of an application for legal aid, proceedings are concluded when the decision is pronounced although subject to a Judge's right to change his mind before an order thereon is sealed. (*Holtby* v. *Hodgson* (1890) 24 Q.B.D. 103, and *Westfield Freezing Co. Ltd.* v. *Steel Construction Co. Ltd.* [1968] N.Z.L.R. 680, 683-684, referred to.) Note: The proper form of intitulement on an appeal is—IN THE MATTER of the Legal Aid Act 1969 AND IN THE MATTER of an Appeal by A.B. from a decision of the ..... Legal Aid Committee (or Legal Aid Appeal Authority, as the case may be). *Re A.'s Application for Legal Aid* (Supreme Court, Wellington. 11, 16 April 1973. Quilliam J.).

PUBLIC SERVICE—SALARIES

State Services Commission entitled to vary or cancel an authorised allowance—Public Service Regulations 1964 (S.R. 1964/115), reg. 57. Work and labour—Wages protection—Deductions to fix the correct entitlement not subject to Act—Wages Protection Act 1964, ss. 4 (1), 7. Estoppel—Matters precluding estoppel—Estoppel can not be raised to hinder statutory duty or discretion. The plaintiff, as a civil servant computer programmer, was paid a special allowance of $200 per annum from December 1965, which amount was subsequently increased to $400 per annum. On 10 August 1970 the State Services Commission made a determination to take effect from 31 March 1970 establishing "Computer Programmers" as an occupational class with scales of pay and allowances. On 10 April 1970 plaintiff had become a planning officer in the same department. On 28 May 1971 he was informed that the State Services Commission had advised that as he was not in the "Computer Programmer" occupational class that the allowance of $400 was no longer justified and that on future salary increases the said allowance would be abated by 50 percent of such salary increase. The plaintiff contended that the abatement was *ultra vires,* an illegal deduction from his salary, and that the Commission was estopped because he had been told by the controlling officer before he accepted the post as planning officer that the allowance would continue. *Held,* 1. Since the State Services Commission could authorise an allowance under reg. 57 of the

Public Service Regulations 1964, although there was no power in express terms to vary or cancel an allowance so authorised, such a power is implicit. 2. Deductions made for the purpose of fixing the employee's correct entitlement are not subject to the provisions of ss. 4 (1) and 7 of the Wages Protection Act 1964. (*Sagar* v. *H. Ridehalgh & Son Ltd.* [1931] 1 Ch. 310, applied. *O'Halloran* v. *Attorney-General* [1968] N.Z.L.R. 472, distinguished.) 3. Estoppel cannot be raised to hinder the exercise of a statutory duty or discretion. (*Maritime Electric Co. Ltd.* v. *General Dairies Ltd.* [1937] A.C. 610; [1937] 1 All E.R. 748, *Southend-on-Sea Corporation* v. *Hodgson (Wickford) Ltd.* [1962] 1 Q.B. 416; [1961] 2 All E.R. 46, and *Europa Oil (N.Z.) Ltd.* v. *Commissioner of Inland Revenue* [1970] N.Z.L.R. 321, 418, followed.) *Smith* v. *Attorney-General* (Supreme Court, Wellington. 26 September 1972; 19 March 1973. Roper J.).

PUBLIC WORKS—ELECTRIC ENERGY

Notice served to lower trees—Magistrate's discretion to set aside notice—Public Works Act 1928, s. 169. Electric lighting and power—Injury to works of board—Notice to remove trees or parts thereof pursuant to the Electricity Act 1968—Section 19 is not confined to cases where trees and power line are situate on land in common ownership—Electricity Act 1968, s. 19. The plaintiff Electric Power Board served notice on the second defendant under s. 169 of the Public Works Act 1928 requiring him to lower 300 gum trees marked with a white cross out of a stand of 800 trees on the grounds that under storm conditions these trees caused interference with its power lines. In the Magistrate's Court the first defendant set aside the notice. On an application for review: *Held,* 1. The Magistrate in deciding whether or not a notice under s. 169 of the Public Works Act 1928 should be set aside has a complete discretion. 2. The Magistrate has not only to examine the *ex facie* validity of the notice but to hear and decide on the facts raised by the parties. 3. The merits of both parties are relevant to the exercise of a Magistrate's decision. 4. The powers conferred by s. 19 of the Electricity Act 1968 are not confined to cases in which the trees and the power line are on land which is in common ownership. 5. The burden was on the plaintiff board to show that the trees specified in the notice were more likely than the other trees to cause interference with the power lines. (*Dowling* v. *South Canterbury Electric Power Board* [1966] N.Z.L.R. 676, 678, applied.) *Marlborough Electric Power Board* v. *Watts and Another* (Supreme Court, Blenheim. 1, 26 March 1973. Beattie J.).

REVENUE—CUSTOMS DUTIES

Liability to duty—Carrier taking delivery of goods entered "for removal for warehousing elsewhere"—Goods pillaged in transit—Carrier liable as "importer" as being "entitled to the possession of" the pillaged goods—Customs Act 1966, ss. 2, 4, 152. The defendant, as a carrier and freight forwarder, uplifted a consignment of whisky which had been entered "for removal for warehousing elsewhere" at Auckland for consignment by rail to Wellington. The goods were pillaged between Auckland and Wellington. The Collector of Customs sued the defendant for customs duty on the pillaged whisky under s. 152 of the Customs Act 1966. Section 2 of the Act defines "importer" to include *inter alia* any person who is "entitled to the possession of" the goods imported, etc. *Held,* The word "importer" as defined in s. 2 of the Customs Act 1966 is not confined to persons having property rights in the goods and the defendant was temporarily "entitled to the possession" of the whisky. *Collector of Customs* v. *Daily Freightways Ltd.* (Supreme Court, Wellington. 14 December 1972; 3 April 1973. White J.).

SHIPPING AND NAVIGATION—HARBOURS

Oil spillage—Agent of charterer not liable—Oil in Navigable Waters Act 1965, s. 2 (1). The appellant was convicted of oil spillage in a harbour as agent of the ship. There was no evidence as to whether the appellant was agent of the owner of the ship or of a charterer. *Held,* Section 2 (1) of the Oil in Navigable Waters Act 1965 includes in the definition of "owner" the agent of the owner and the charterer but not the agent of the charterer. *Russell and Somers Ltd.* v. *Auckland Harbour Board* (Supreme Court, Auckland. 6 March 1973. Wilson J.).

TRANSPORT AND TRANSPORT LICENSING—OFFENCES

Driving while intoxicated—Traffic officer following offender on to private property and demanding breath test—Circumstances in which traffic officer may lawfully do so—Transport Act 1962 (as amended in 1970 and 1971), ss. 55 (2), 58, 58A. The question in this case was whether a traffic officer could lawfully follow a motorist on to private property and demand that he should take a breath test. The appellant had been driving his car at excessive speed without headlights. The traffic officer pursued him on to a property owned by the driver's father. The appellant maintained the officer had no right to follow him on to private property when asked to go to the patrol car for a breath test. Subsequently a breath test was taken but when asked by the officer to accompany the latter to the police station he refused to go. When the officer purported to arrest him the appellant dashed off and eluded the officer. The appellant was convicted in the Magistrate's Court under s. 120 (1) (c) of the Crimes Act 1961 of escaping from lawful custody. *Held,* An occupier of private property is bound to allow a constable or traffic officer to enter to carry out a breath test (if the breath test is required without unreasonable delay after the driving in question) of a person whom the constable or officer has good cause to suspect of having committed one of the offences specified in s. 58A (1) of the Transport Act 1962. (*R.* v. *Jones* [1970] 1 W.L.R. 211; [1970] 1 All E.R. 209, *Sakhuja* v. *Allen* [1973] A.C. 152; [1972] 2 All E.R. 311, and *Brooks* v. *Ellis* [1972] 2 All E.R. 1204, adopted and applied.) *Police* v. *Ward* (Supreme Court, Invercargill. 1, 26 March 1973. Cooke J.).

Driving while under the influence of alcohol—Analyst's certificate of excess alcohol in blood—No independent proof of delivery of specimen to analyst—Charge dismissed—Transport Act 1962 s. 58B (6) and (9). An analyst's certificate under s. 58B (9) of the Transport Act 1962 which also stated that the specimen of blood had been delivered to the analyst by Traffic Officer B. on a specified date was tendered in evidence as proof of delivery for the purposes of s. 58B (6). *Held,* 1. The requirement of delivery of a specimen of blood under s. 58B (6) of the Transport Act 1962 is mandatory and is one of the facts which had to be proved by an informant in order to secure a conviction. 2. The fact stated in the analyst's certificate that a named traffic officer delivered the sample was hearsay and not admissible as proof of delivery under s. 58B (6). 3. The delivery of the

specimen of blood to the analyst must be independently proved. (*Ministry of Transport* v. *Carstens* [1972] N.Z.L.R. 531, not followed.) *Auckland City Council* v. *Fraser* (Supreme Court, Auckland. 11, 13 April 1973. Mahon J.).

TRANSPORT AND TRANSPORT LICENSING

Goods service licence—Farmer carrying goods not connected with business of farming in own trucks—Offence—Transport Act 1962, ss. 108 (1), 109 (4). The respondent carried on farming in Marlborough and transported large quantities of freshly produced pig meat, sheep meat and some beef in its own trucks to Christchurch for sale to a processing company manufacturing bacon, hams and sausages, etc. The respondent then purchased back from the processing company some processed goods and transported them by its own trucks returning to Blenheim, such goods being resold by the respondent. An information charging the respondent with carrying goods from Christchurch to Blenheim without a goods-service licence in breach of s. 108 (1) of the Transport Act 1962 was dismissed by the Magistrate's Court. On appeal, *Held,* 1. The carriage of its own products to the processing company by the defendant was carriage in connection with its own business as a farmer and exempt from the necessity for a licence by virtue of s. 109 (4) of the Transport Act 1962. 2. The carriage of processed goods on the return journey for resale was of an entirely different character and had nothing to do with farming. (*King* v. *Fox* [1953] N.Z.L.R. 103, distinguished. Appeal allowed. *Transport Ministry* v. *A. E. Sadd & Co. Ltd.* (Supreme Court, Christchurch. 4, 18 April 1973. Wild C.J.).

BILLS BEFORE PARLIAMENT

Accident Compensation Amendment
Admiralty
Air Services Licensing Amendment
Animals Amendment
Animals Protection Amendment
Appropriation
Broadcasting
Broadcasting Authority Amendment
Commonwealth Games Boycott Indemnity
Counties Amendment
Crimes Amendment
Customs Amendment
Dangerous Goods
Department of Social Welfare Amendment
Domestic Purposes Benefit
Door to Door Sales Amendment
Door to Door Sales Amendment (No. 2)
Equal Pay Amendment
Explosives Amendment
Fire Services Amendment
Health Amendment
Hospitals Amendment
Lake Wanaka Preservation
Licensing Amendment
Licensing Trusts Amendment
Local Elections and Polls Amendment
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Motor Vehicle Dealers Amendment
Municipal Corporations Amendment
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New Zealand Constitution Amendment
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Physiotherapy Amendment
Plant Varieties
Public Works Amendment
Recreation and Sport
Rent Appeal
Sale of Liquor Amendment
Sales Tax
Scientific and Industrial Amendment
Shipping Corporation of New Zealand
Social Security Amendment
Soil Conservation and Rivers Control Amendment
Summary Proceedings Amendment
Transport Amendment
Trustee Amendment
Volunteers Employment Protection
Water and Soil Conservation Amendment
Wheat Research Levy
Wool Marketing Corporation Amendment

STATUTES ENACTED

Companies Amendment
Imprest Supply
Imprest Supply (No. 2)
Industrial Relations
Judicature Amendment
Land and Income Tax (Annual)
Maori Purposes
Ministry of Transport Amendment
Moneylenders Amendment
National Roads Amendment
Niue Amendment
Overseas Investment
Payroll Tax Repeal
Post Office Amendment
Property Speculation Tax
Rates Rebate
Reserve Bank of New Zealand Amendment
State Services Amendment
Syndicates
Trade and Industry Amendment
Trustee Savings Banks Amendment
University of Albany Amendment

REGULATIONS

Regulations gazetted 6 to 13 September 1973 are as follows:

Customs Export Prohibition Order (No. 3) 1973 (S.R. 1973/217)

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THE SYSTEM OF INDUSTRIAL RELATIONS IN NEW ZEALAND

The accompanying paper had been prepared by Mr Brian Brooks of Auckland prior to the appearance of Professor J. L. Ryan's article at [1973] N.Z.L.J. 272.

The burden of this paper is an examination of management-worker relations in this country in both theoretical terms and in the light of historical experience. Such an overall view demands and deserves lengthy and detailed argument, well documented and presented in a manner which facilitates discussion and reasoned debate. But within the bounds necessarily imposed by the space of this essay it is possible to develop the argument in outline only.

Fortunately, the brief which I am attempting to discharge is susceptible to analysis on a broad level. Thus, for example, it is a necessary reminder that both the theory and the practice of industrial relations in this country is enshrined in a legal framework set by the Industrial Conciliation and Arbitration Acts, and all the Amendments thereto, whereby the State intended to eliminate industrial conflict and to prevent inflation by wage control. The theory and the practice of this system of industrial relations may be characterised as one of legalism, statism and placidity[a]. But this is only one part of the picture. If you like, the Industrial Conciliation and Arbitration legislation gives us the "external" theory and practice and it tells us nothing of the "internal" system[b]. By this latter term I mean simply the day-to-day industrial relations which occur in factories up and down the country. And while it is easy to characterise the external system in theoretical terms, no such comparable characteristics spring to mind to characterise the internal system. The most that can be said is that the general public, and the State, ask little more of the relations between management and employee than that they be unobtrusive, that, as with other machinery within the factory the internal machinery of industrial relations should function with a minimum of friction and discomfort to the outsider. In this pious hope we find the link between the internal and the external systems which have hitherto prevailed in this country.

Put shortly, therefore, the structure of this paper is an examination of the theory and the practice of the two industrial relations systems, the external and the internal; the interrelationships of the two systems; the role of the law in industrial relations; and some tentative conclusions as to the future. The core of the argument will be that the traditional external system is now outmoded and unsatisfactory and that much of what is unsatisfactory in the internal system stems directly from excessive reliance upon the external system, in particular the peculiar reliance upon the legalism of the external system.

Turning first to the external system we find a framework which has altered little in substance since 1894. At that time the distribution of population was more even and was in every sense of the word parochial. Such unionism as existed was weak in membership, finances and organisation and had been severely affected by an economic depression and unemployment. This background is necessary to an understanding of the 1894 Act which was entitled "An Act to encourage the formation of Industrial Unions and Associations." Read against the times this could only, and quite properly, have been intended to encourage the formation of parochial unions. After all, as few as 15 workers could

(*a*) ". . . the I.C.A. Act gave Government unprecedented control over industrial relations . . .", per E. G. Davey, Secretary of Labour, "The Role of Government in Industrial Relations", in Canterbury Chamber of Commerce *Economic Bulletin* No. 555, November 1971. In terms of stoppages "New Zealand does have a creditable record internationally . . ." per E. G. Davey, Secretary of Labour, "The Role of Government in Industrial Relations", in Canterbury Chamber of Commerce *Economic Bulletin* No. 555, November 1971. "New Zealand has for most of its history been much less troubled by major industrial turbulence than most countries . . .", N. S. Woods, *Needed Reforms in Industrial Conciliation and Arbitration* (1970) p. 18.

(*b*) Following the analysis of the English experience adopted by Allan Flanders in his booklet, *Industrial Relations: What is wrong with the system?* (1965). The distinction is also made by N. S. Ross, *Constructive Conflict* (1969), especially in Chapter 7.

seek registration as an industrial union. But the conditions of 1894 did not persist. Whereas in 1901 14.5 percent of the working population was engaged in primary, rural activities and 11.0 percent only in secondary urban employment, today a mere 11 percent is still "down on the farm" and 89 percent of our working population is urban and industrialised.

With a shift to conscious industrialisation every developing country suffers growing pains. Work habits alter, population distribution changes, the levels of education and skills in the population is redistributed, the demographic pattern alters. In the commonly accepted phrase, there is a "drift to the cities." With this change old institutions are challenged and many are found wanting whether they be laws or school curricula, transport services or libraries. In short, the whole social fabric is put under stress by new values receiving acceptance. These value-changes upset traditional priorities and are met with the structural inertia of existing institutions. Seen at this level the present tensions in the external system of industrial relations is revealed as having deeper causes than is commonly supposed. Indeed it is not hyperbole to assert that the present external industrial tensions are symptoms not causes.

On the broad front of industrial relations the tensions result from the structural inertia of the existing institutions. And the most resistant structure has been that form of institutionalised industrial relations found in the 1894 Act. That the forms of the 1894 Act are no longer appropriate has been belatedly recognised by most of the major interested parties[c]. The most perceptive and consistent view of the inadequacies of the 1894 forms has been that of Mr Noel Woods, who in a number of publications[d] has argued convincingly that the machinery of the I.C. & A. legislation acted as a straightjacket rather than a stimulant to employer and employee organisations. Referring to the legislation in a recent legal publication Mr Woods wrote that the Act's "restrictive influences on the structure and growth of industrial relations organisations derived not so much from any inappropriateness of the registration requirements in relation to the circumstances of 1894 as from the perpetuation of those requirements and of procedures after the circumstances had changed"[e]. Elsewhere Mr Woods has drawn attention to the changes which have occurred and are accelerating in industry resulting from the pace of technological change, the greater scale of modern operations and changes in the patterns of the workforce. Where once secondary industry conformed to a common pattern now there is diversity[f].

The system of external industrial relations must give expression to this diversity and must be so structured as to permit the growth of organisations which represent this diversity. Once this point is made we come immediately to the theme which is under discussion in this paper: the theory underpinning the role of management in industrial relations. Careful research has revealed that employers in 1894 were largely opposed to the new Act[g] and that the use to which the Act was put by employers lay in the creation of organisations to oppose worker organisations. Hence the growth of localised parochial employer groups. If we are searching for a theory to elevate this activity we must conclude that the concepts underlying employer attitudes was negative and defensive. This is true today. Ironically, however, the employers today are looking more and more to some imagined "golden age" when the I.C. & A. Act "worked." The result is that management if it has a theory in the external system gives voice to this theory in legal concepts. Increasingly there are demands for more "teeth" in industrial legislation and a call for effective use of existing penalties or the creation of newer penalties[h]. Put shortly, the employer group looks to the law for a resolution of alleged grievances in the external system. That this is the negative, defensive posture still persisting is clear.

Take for instance the following statement: "The challenge made by organised labour

(c) Evidence for this may be found in the current joint discussions involving the Federation of Labour and the Employers' Federation. This dialogue has been welcomed by N. S. Woods in *1971 Otago Law Review*, p. 272. The present Secretary of Labour has recognised that our present rules and procedures are "a result of a tendency to amend rather than re-think": E. G. Davey (*supra*, note (*a*)).

(d) "Needed Reforms in Industrial Conciliation and Arbitration" (1970); "Industrial Relations Legislation Reconstructed" (1971); "Law and Industrial Relations: The Influence of Parliament", *1971 Otago Law Review*, p. 262; "The Future of Industrial Relations in New Zealand" (a paper delivered to an industrial relations seminar at Invercargill on 19 November 1971).

(e) *1971 Otago Law Review*, p. 263.

(f) N. S. Woods, *Industrial Relations and the Enterprise* (1971).

(g) See generally, N. S. Woods, *Industrial Conciliation and Arbitration in New Zealand* (1963).

against the firmly established hegemony of management within industrial society has developed into one of the most momentous and significant power struggles of this century"[i]. One may be forgiven for asking which century is referred to and it may come as a surprise to learn that the passage cited is the opening sentence of an address delivered to the Institute of Management in November 1971. The core of the statement is management under seige and many examples of this sentiment can be found emanating from contemporary New Zealand managers. Generally the statements fall into two categories, both negative and both defensive. One asserts the "right to manage" with varying degrees of hysteria ranging from Divine Right to implied terms in the master-servant relationship[j]. The other category calls for managerial solidarity, for unity and for willingness on the part of management to "fight it out" with the workers[k]. Both share the common theme of authoritarianism.

Given these public expressions it is little wonder that the managerial approach to the Industrial Conciliation and Arbitration Act and the machinery created thereby has been negative and defensive. Thus it is taken as an article of faith that the negotiation of a new Award shall be instigated by the union lodging a log of claims and by the employers responding with an offer to maintain the terms and conditions of the old Award. A negative and defensive posture. Similarly it is the union representatives, in most instances the Federation of Labour, which initiates a motion for a General Wage Order, a motion which is invariably opposed by representatives of the employers. Occasionally, it is true, a major employer will unilaterally offer changes in conditions but this is very rare in the external system. Significantly the most recent famous illustration occurred when the advocacy of the employers had resulted in the refusal of the Arbitration Court to make a General Wage Order.

By way of an interim summation, then, we may conclude that in the external system the employers on the whole wait for the process of conciliation and arbitration to produce an Award to which they try to cleave as closely as possible. With the exception of the Northern Industrial Districts most employees are employed under conditions little better than those established in the Award. Yet it is accepted that the Award lays down the minima[l]. Thus only persuasive union submissions achieve conditions in advance of Award conditions. Put another way we could say that most managers in New Zealand have abdicated their responsibilities towards their workforce and have felt their obligations discharged by being represented by assessors at Conciliation. Whether or not this is a valid thesis can only be tested by examining the internal system, and to this we now turn.

It has been argued above that manager-worker contacts in this country have occurred outside the factory. In other words the important decisions are made for management by other men, often complete strangers and usually at a distance of several hundred miles. If this was correct then we would expect to find the same authoritarian philosophy and similar negative and defensive attitudes in management's approach to its role in the internal system. The evidence is overwhelming that this is the case. Yet here there is a marked contrast to the external system. In the latter management had no overall theory in its approach to the workforce. The nearest we can get to isolating a theory is to say that management's authoritarianism had a legalistic basis. In this sense there is still uniformity in the external system.

The internal system is characterised, however, by diversity. This non-conformity is mani-

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(*h*) At a recent seminar in Whakatane (31 October 1971) the widest division of opinion between union and employer spokesmen was over the question of penalties. A full transcript of the proceedings has been published by the Whakatane Rotary Club.

(*i*) From the text of an address delivered by Dr W. Reindler to the N.Z. Institute of Management, 9 November 1971, entitled "Management in Ferment". By way of contrast see the paper "Productivity Agreements" delivered by Mr D. C. Pool, 15 May 1970, and "Overcoming Resistance to Change" delivered to the Management Services Council Conference, 1969, by Mr Pool.

(*j*) For the "implied term" approach see "The Right to Manage", a paper delivered to the Industrial Relations Centre, Victoria University of Wellington, 16 September 1971, by Mr R. E. Taylor, Director, Research and Information Services Division, N.Z. Employers' Federation (Inc.).

(*k*) *National Trends,* August 1970, has an article entitled "Employers' Organisations Lack Strength". The theme is one of praise for employers who "did not budge and were prepared to fight it out".

(*l*) N. S. Woods, *Industrial Conciliation and Arbitration in New Zealand* (1963), p. 10; D. L. Matheson, *Industrial Law in New Zealand* (1970), p. 241.

fest not only in the scale, type and manner of mechanical operation but more importantly for this paper, in the diversity of theories as to management's role in manager-worker relations. Sadly, the many extant theories are the product of the industrial experience of either the United Kingdom or the United States of America. There does not seem to have developed an indigenous school of managerial theorists[m]. More saddening however, even than that is the fact that the theoretical side of modern management is largely ignored in this country. New Zealand's management tradition rests on two propositions. First, a deep-rooted belief that the worker is not displaying the proper attitude to his job and, second, the smug acceptance of the fallacy that the "self made man" is best fitted to manage an industrial society. Thus still widespread is the belief that management is an art which can be learnt only by doing and that therefore the man who began as a tradesman, built up a prosperous business and thereby graduated to a desk is the only one who can manage men. The syndrome of the "self made man" accepts that while an apprenticeship of some years is needed to acquire the skills necessary to change the shape of wood and metal, or to work on the human body or a motor vehicle, no education or special skills are needed to manage men. While the "self made man" may well understand technology he invariably pays little attention to the care and welfare of his most important resource—his employees. Hence the criticism levelled by a leading management consultant in this country: "Despite the benefits of forty years research on human behaviour at their disposal, the overwhelming majority of companies continue to manage the daylights out of the plant and financial half of their assets while thinking of the people half as a luxury or frill"[n]

It is beyond both the scope of this paper and the wit of the writer to suggest in depth why there is this apparent blindspot in the perception of New Zealand management. But some speculation is warranted. Thus for instance at the beginning of last decade a prominent academic argued that our economy did not call for a managerial class or a technocracy and that consequently it did not call for a highly specialised or selective system of education[o]. Later in the same article he suggested that a transformation of the New Zealand economy would necessitate a highly trained managerial group. That this transformation is upon us is the theme of this paper but for the moment the point to be made is that the absence of a specialised managerial group has left the ladder of managerial promotion to either the "self made man" or the accountant. In neither instance is there a training to enable the manager to thread his way through what one writer has called "the management theory jungle"[p]. In other words the very wealth of theories as to the proper pattern of management has lead to a confusion as to what management is, what management theory is and how management should be both studied and practiced. Little wonder that faced with at least six accepted "schools" of management theory[q] the self made man, the entrepreneur lacking formal or specialised education ignores the "human behaviour school." Tragically, the nearest such a manager comes to a glimmer of the human insight which Mr Marshall urged is when he says, with a bemused and slightly hurt air "Why aren't the workers happy? They're getting plenty of overtime! They can work all weekend!" As though the "worker" would much prefer the factory floor all weekend to a game of golf, the pursuit of a hobby or the company of his wife and family. As though overtime is a great advantage instead of being one of the great inhibitors to the good life.

Given the prevalence of this paternalistic sentiment and given the remoteness of the external system we are faced with two unhappy consequences in the internal system. The first is an absence of communication on the factory floor. Consultative committees or works com-

(*m*) The only indigenous text known to me is *Personnel Management in New Zealand* (editor, G. Hanley, 1966), and this is more by way of a practical manual than a theoretical, conceptual exposition of management.

(*n*) R. H. Borland, Managing Director of Management Resources Limited, Wellington, in an address on 7 April 1970.

(*o*) J. G. A. Pocock in *Comment* No. 2 Summer 1960, "Meritocracy and Mediocracy", pp. 13-17.

(*p*) See Harold Koontz, "The Management Theory Jungle", *Journal of the Academy of Management*, Vol. 4, pp. 174-188.

(*q*) Koontz and O'Donnell, *Principles of Management* (1968), Ch. 2, identifies the following categories: (1) the operational (or management process) school, (2) the empirical (or case) school, (3) the human behaviour school, (4) the social system school, (5) the decision theory school, and (6) the mathematical school. For an anthology of major contributions to management theory, see *Management Thinkers* (ed. Tillet, Kempner and Wills) (1970).

mittees are the exception rather than the rule. Suggestion boxes and house journals are the common device used to fulfil the communication link whereas such devices really denote an absence of communication. Secondly, we find what Mr Woods, then Secretary for Labour, called "one of the most serious weaknesses in industrial relations in New Zealand" and this he identified as being "a pre-disposition to neglect man-power planning in the enterprise, to wait for confrontations with the bitterness and hostilities they bring with them"[r].

Yet positive action not negative reaction distinguishes management from non-management. But the truth in this country is that conservative management passively reacts to factors which it believes or chooses to believe are beyond its control. This lack of positive action is apparent at both the external and internal system. In both systems there is an absence of planning, direction and control. There is completely lacking any theory of management.

What "theory" is best suited to this country? What practice would best marry the theory to the reality? The answer to both is that management more than politics is the art of the possible. And that is the lesson which must be learnt by New Zealand management. It is change which we are discussing today and the most important change sought is a change in attitude. All change is hardwon and the most difficult of all to win is a change in attitudes. And it is hardened conservative attitude to change which is stifling management initiative towards better industrial relations in this country. The assertion of a right to manage and the expression of management being put under a chronic state of seige are Victorian and would be quaint were they not so damaging. At the best this Victorianism is paternalistic manifesting itself in an awkward Xmas party with a packet of cigarettes and a handshake from the boss. At worst it is rigid authoritarianism which treats anv criticism and outspokenness as disloyalty and refuses to acknowledge either trade unions or the system of conciliation and arbitration[s]. Either way the core concept of management under seige needs revision.

Recognition must be given to the facts and if a theory is necessarv it may then be constructed to explain and illuminate the reality. The reality is simply expressed: The age of authoritarian management has gone. The policies of containment and conflict must give way to policies of constructive involvement and co-operation. And to facilitate this change paternalism in management must be replaced by professionalism. Boards of Directors must learn that a professional manager is wedded to a particular and professional manner of discharging his function rather than being married to a particular company. Thus criticism will be raised against policies and practices as measured in professional terms and not in terms of personalities and practices of a paternalistic company. The old Victorian management accepted changes from neither its younger management nor its less statused employees. This blindness arose from the historic evolution of the company best expressed as the "owner-operator syndrome."

In its origin the usual company was owned by the man who operated or managed. The manager who owned was also the one whose financial investment in the company was total. He therefore was the employer, the boss, in every sense. But with the growth of large public companies the link between ownership and control became weaker. Unfortunately we perpetuate the mythology of ownership equating control through our legislation regulating companies. Therefore our management still talks of its obligations to the shareholders and the romanticised figure of the little old lady in Remuera whose sole financial support is her parcel of shares in the company is trotted out to chide irresponsible junior managers. Yet the reality is increasingly distant from this romantic abstraction. How many companies consult with the shareholders in solemn conclave assembled before taking decisions? For how many companies is the Annual General Meeting a solemn farce with a slim attendance doing no more than dutifully rubber-stamping decisions already taken? And, more pertinent, how many contemporary managers see themselves as the owners of the company when the reality is that most managers are also employees of the undertaking? In this latter reality lies the signpost to a more realistic handling of industrial relations in this country. For the truth is that the new pattern of company management is one in which the "boss" is simply another employee drawing a salary and even in the fictitious legal sense is not an owner of the company as he lacks a share-portfolio. When seen in this light the "boss" and the "worker" cease to have meaning as sensible terms of reference as all

(r) In an address to the Master Builders' Federation at Rotorua, 2 March 1970.

(s) An instructive illustration is *Pete's Towing Services Ltd.* v. *Northern Drivers' Union* [1970] N.Z.L.R. 32.

employees are in the same boat. Put another way, we could say that the so-called "sides" in industry must be redefined. It is pointless to talk of lowering the barriers between the two sides of industry when the barriers have been broken by technological and social change.

The thesis could be advanced by semantic exercises. Thus for instance, we could ask: what is your definition of a "manager" or of a "worker"? The term "worker" presumably distinguishes between those who manage and those who are managed. But where is the distinguishing line drawn in practice? Everybody in an organisation both gives and receives orders. Where in an organisation, therefore, does an employee cease to be a "manager" and become instead a "worker"? Where in the hierarchy of a given company does an employee cease to be a manager and become instead an "operator"? What is the essential difference between an "operator" and a "manager"? Is there any longer any significance in the distinction between being on a salary in the company and being on the payroll of the same company? And what damage is done to the traditional received legal concepts when, say a driver of a forklift, on the payroll also, is also a shareholder in the company yet remains a member of the union? When he goes on strike is he acting against his interests as one of the proprietors of the company? And who is the "boss" against whom he is taking direct action? In strict jurisprudence, as embodied in the Companies Act 1955, he is striking against himself, and he employs an Industrial Relations Manager to get him back to work in order to keep the profits up so that his shares will yield a good dividend.

The semantic exercise contains a real truth and it is this: the received wisdom of legal and economic and managerial theory about the "sides" in industry and their mutually exclusive roles has been irreparably damaged by changes in society. This change amounts to a silent revolution and is seen most clearly in the social transformations wrought by the acceleration in technology and the move to a State policy of full-employment. Today's reality is one demanding not authoritarianism but rather a concept of joint regulation of the industrial society. To say this is not to subscribe to any sectional or doctrinaire political philosophy. Rather it is a report of trends apparent in more developed industrial societies and certain to evolve in this country.

An employer who has been accustomed to keeping order in the plant on a strict master-servant relationship without representation and participation from the employees will find his position more and more difficult. "Management prerogative" is a very strong tradition in New Zealand and has been reinforced by the weakness of unions, the institutionalised external system of industrial relations and the non-recognition in law of collective agreements struck at the factory level(t). The result is that unions spend much of their time picking away at prerogative, so that the plant finishes in the position of having some of the rules established unilaterally by management and some unilaterally by the unions. The result is that custom and practice and whoever has the better memory often determines a good deal of what passes for industrial relations in many undertakings. Behaviour is therefore often unpredictable and unacceptable. Yet the overall requirement of management is that the employees should normally behave in certain broadly predictable and acceptable ways. This can never be more than a probability, of course, but received knowledge indicates strongly that acceptable behaviour is more probable if the rules governing behaviour are clearly explained and jointly agreed.

Ironically in the external system this truth appears to have been absorbed and we see continuing dialogue involving representatives of the employers and the Federation of Labour as they seek jointly to arrive at a satisfactory system of conducting industrial relations. It may well be therefore that the joint regulation from above (i.e. in the external system) is being paralleled by the growth of democracy in the workplace. Put another way we can say that there exists much evidence that the aspirations and expectations of employees are changing and the employee is no longer willing to accept orders in a spirit of blind obedience. Employees are increasingly claiming a greater influence on managerial decisions, particularly in matters that affect their own welfare and status. This development in day-to-day relationships is paralleled by changes in the law governing the contract of employment which has lost its individualistic traditions and, through the

(t) *Ford Motor Co. Ltd.* v. *Amalgamated Union of Engineering and Foundry Workers* [1969] 1 W.L.R. 339; [1969] 2 All E.R. 481. And see R. D. Harrison, "Collective Agreements and the Industrial Conciliation and Arbitration Amendment Act 1970" [1971] N.Z.L.J. 180.

(u) Dr A. Szakats, "Legal and Social Problems of the Employer/Employee Relationship", *1971 Otago Law Review*, p. 314.

evolution of the Industrial Conciliation and Arbitration Act, has become "intermixed, superseded and absorbed by what is known now as the legal framework of industrial relations"[u].

It is in recognition of this general kind of change and with some comprehension of the silent revolution wrought by technology and the move to full employment that other industrialised countries have experimented with what is variously called joint regulation or participative management. The most recent United Kingdom legislation in this field goes a long way to ensuring that employee representation is the expected way to manage and this in turn is a long way short of the European pattern of statutory representative institutions. In this latter pattern West Germany leads the way with worker representation on the Board of each company made mandatory by law[v].

Worker participation in management has been the subject of numerous reflections in literature on industrial relations and industrial law. The range of ideas and solutions is extremely wide extending on one side from the adherent of management prerogatives who denies that employees have anything to contribute to effective management except obedience to orders, to the thesis that the workers should have the predominant voice[w]. Abstract theories add little to the exercise. As has been demonstrated above each of the terms "worker" "participation" and "management" suffers from ambiguity and emotional overtones which tend to be compounded when the three terms are combined into a concept. What distinguishes participative management from authoritarianism is that those managed should have some say in the decisions affecting them. The controversy arises when there is an attempt to specify in what manner and to what degree those being managed should influence the decisions affecting them. What is beyond dispute is that the worker adjusts more rapidly to new situations, his involvement and work satisfaction increases, his alienation to work diminishes all in direct proportion to his participation in bringing about changes. "Surely it is time that management came to realise that hiring men and women to work in complete ignorance of what they are doing, why they are doing it, and for whom they are doing it is a preposterous anachronism, and that, although people may be induced to join a firm by promises of high wages, good working conditions, pension schemes, and all the usual paraphernalia of "welfare", they will only stay with the firm when it is able to satisfy their needs as human beings"[x]. Just as suspicion and ignorance feeds on itself so does trust and interdependence, respect and tolerance.

And this leads us back to the beginning where we discussed the external system and concluded that the theory and the practice of employer role in employer-employee relation was enshrined in legislation. For the external system the issue is still couched in terms of industrial relations, industrial unrest and the law.

The issue is industrial relations, industrial unrest and the law. What is your definition of industrial relations? To me this term is a "catch-all" phrase encompassing far more than union-management relations in a given factory. Wages, salaries, prices, access to consumer goods, the health and stability of our national life, social, political and economic, are all elements of the national system of industrial relations. As Dr Szakats has observed, all these elements are fluid and need a stable container to give them form[y]. This container is the law. But today in New Zealand too much attention is given to the container, and too little attention is paid to the contents.

What we seem to be witnessing is a growing gap between the precepts of the law and industrial reality. In other words, a gap between legal reality and social reality and in a search for the relationship between law and industrial

(*v*) For a comparative treatment of the European situation see K. W. Wedderburn, *The Worker and the Law* (2nd ed.), especially pp. 41-47.

(*w*) An excellent brief survey of the theory and practice of worker participation may be found in the *Labour and Employment Gazette* (Vol. XXI, No. 3) August 1971, pp. 30-32 (reprinted in *Factory Management*, November 1971). For an insight into one trade union view of worker-participation see the *Afro-Asian Labour Bulletin* (Vol. 6), December 1971. See also the exposition of a "fraternal industry" in New Zealand in the address entitled "The Relationship between Union and Management", delivered to the N.Z. Institute of Printing by W. H. Clement, National President, N.Z. Printing and Related Trades Industrial Union, on 29 March 1971. See also the proposals of the then Leader of the Opposition, Mr N. E. Kirk, M.P., in an address to the Wellington Chamber of Commerce, 25 August 1971.

(*x*) Brown, *The Social Psychology of Industry* (1969), p. 218. See also D. C. Pool, "Overcoming Resistance to Change" (*supra*).

(*y*) *Trade Unions and the Law* (1968), p. 3.

relations we are facing the question of the relationship between legal change and social change.

There are some clear areas of tension and areas where we look too hard at the container and not hard enough at the contents. Consider, for example, whether or not our legal definition of a trade union, formulated exactly one hundred years ago, is an accurate reflection of the nature and role of modern unions? Have we too many unions? What is being done by way of union education, for careers, for technological change? What do we mean by worker-participation and profit-sharing? Should we overhaul our Companies Act? Do we subscribe to the class-struggle? Have we enough sociological research?

In short, are we consciously working toward the creation of an industrial democracy in New Zealand? And if so, what is the role of the law in this process?

Whatever the final answer to the role of law in regulating industrial affairs, two points should be made. The employers must understand that the law is not an immediate remedy for real or imagined ills. An Act of Parliament is not a magic wand, one wave of which removes deep and often intractable social problems. And, one century after their legal birth certificate in the Trade Union Act 1871 (U.K.), trade unions should cast aside their suspicion and fear of the law. The law is just another social institution like a church, a hospital, a school, created to serve expressed and felt social needs. But it has one feature of distinction. The kind of society we want is always mirrored in the laws we fashion. This is especially true of industrial law in an industrial society.

The nature and scope of the legal changes relating to industrial affairs which we fashion in the next few years will be a statement of the kind of society we want in the twenty-first century.

In other words an external system is needed to give rational control and direction to the increasing industrialisation of New Zealand. To this extent the future of the external system may depend more on economic and political approaches than on legal changes. Non-attention to macro-economics, the lack of intelligent long-term manpower-planning policies, the absence of a balance in both the product and the labour market may be more conducive to industrial strife than union militancy, as Professor F. L. J. Young has argued[z]. If this is so then we need stability in the national economy as a pre-condition to stability in the individual plant. Seen this way around the interdependence of the two systems is confirmed. More than this, the existence of a complex of "systems" is opened up. After all the search for a tolerable degree of industrial harmony is simply the process of creating the most satisfactory environment possible for the working life of both employer and employee. But the external system of "industrial relations" encompasses a wider range of activity than merely the working life of a man or woman. Hence political, social, economic and legal "systems" are intermeshed in the whole machinery of creating a worthwhile society.

As New Zealand is irrevocably committed to the creation of an industrial society then in all systems of industrial relations, because of the accelerating pressures described above, the challenge is to achieve evolutionary change at a revolutionary pace. In the midst of this technological turmoil we run the danger of forgetting that the crying need is for work to be a way of life in which men and women can find continuing satisfaction. The initiative in meeting this need lies with management which has the prime responsibility for good industrial relations. The first requirement is for management at the highest level to accept the same degree of responsibility for industrial relations as for other essential functions such as finance, marketing and production.

A management's dealings with its employees should emerge naturally from its general management policy. In this sense sound industrial relations is a by-product of a sound management philosophy. You cannot have one without the other. The philosophy with most appeal to me is one of participation; a constructive, motivational philosophy for an industrial society. We should be striving consciously for an industrial democracy, a situation where the relationship between management and the managed is such that they have a continuing joint interest in each others needs and all participate freely in the process of finding ways and means of satisfying those needs.

Only through participatory management, through constructive conflict[aa] in an industrial democracy will all the members of our emerging industrial society derive their greatest longterm benefits.

(z) *The Supply of Labour in New Zealand* (1971).

(aa) N. S. Ross, *Constructive Conflict* (1969). An essay on employer-employee relations in contemporary Britain.

IDENTIFICATION AND DELIVERY OF BLOOD SAMPLES IN EXCESS BLOOD ALCOHOL CHARGES

One might have been forgiven for thinking that it was now of little profit to search for loopholes in the blood alcohol legislation. Three recent (and at present unreported decisions) show, however, that the errant driver may still escape the penalties imposed by s. 30 (3) of the Transport Act 1962 when faced with a charge of excess blood alcohol.

In *White* v. *Auckland City Council* (9 February 1973) Henry J. determined that where, following the taking of a blood specimen, a request was made for the second part of the specimen to be made available for independent analysis the prosecutor must prove such specimen was made available before the certificate of analysis can be properly admitted. The relevant statutory provision is s. 58B of the Act. Subsection (9) permits the use of a certificate to fix the blood alcohol level, and subs. (8) reads in part:

> ". . . where application is made . . . within the time specified . . . to a Government analyst for one part of a specimen of blood . . . to be sent to an analyst, and the part . . . is not sent to the analyst in compliance with that application, any certificate given under subsection 9 in relation to the other part of the specimen . . . shall not be admissible in evidence . . ."

The provision is curiously inadequate and would seem to present three immediate difficulties—first, it has no application where a request is made for independent analysis prior to transmission of the specimen to a Government analyst; secondly, it seems it is unnecessary for there to be proof of delivery of the part of the specimen and it is necessary only to prove despatch; thirdly, the prosecution can still proceed against the defendant but the evidence to sustain the conviction will have to be sufficient without the benefit of the statutory presumptions in subs. (9) (the other statutory presumptions in the legislation will still, however, be available).

White's solicitor had called for the second part of the blood specimen to be sent to an independent analyst and gave notice prior to the hearing that he required the prosecutor to prove that the specimen had been sent. The prosecutor elected not to call such evidence and contended that the burden of proof rested upon the defendant to establish that the specimen had not been received. There are, of course, logical difficulties in such an approach, for it might result in the certificate first being admitted in evidence and then subsequently if evidence of non-delivery of the second part of the specimen were given the certificate would be withdrawn. The learned Judge held that subs. (8) imposed a statutory condition which must be complied with before the certificate was admissible in evidence, so the prosecution must show that the condition has been complied with if it wished to have the certificate admitted in evidence.

The *White* decision was to be followed by *Auckland City Council* v. *Fraser* (13 April 1973), where the prosecutor appealed by way of case stated against the dismissal of an excess blood alcohol information on the ground that there had been no direct proof that the specimen of blood had been delivered by the informant to a Government analyst. Roper J. in *Ministry of Transport v. Carstens* [1972] N.Z.L.R. 531 had been of the view that the presumption raised by s. 58B (9) (c) rendered unnecessary the leading of such evidence by the prosecution. Section 58B (9) (c) reads:

> "Where the certificate refers to the specimen of blood analysed as being a specimen that had been taken from a person having the same name, address, and occupation as the defendant, it shall be presumed, until the contrary is proved, that the specimen of blood was taken from the defendant."

The appellant argued that the clear wording of the presumption made proof of delivery unnecessary because such certificate could be issued only where delivery had been effected. Mahon J. was prepared to go beyond the issues submitted by the parties for determination and considered the effect of s. 58B (6). That subsection directs that:

> "A constable or traffic officer shall forthwith deliver or cause to be delivered either personally or by registered post . . ."

both parts of the specimen of blood to a Government analyst.

At first sight the wording of the subsection would seem to permit a traffic officer to direct

a person in the employ of the prosecuting authority to deliver the specimen to a Government analyst, but the learned Judge held that the subsection was to be interpreted as if it said

> "A constable or traffic officer shall forthwith deliver personally, or forthwith cause to be delivered by registered post . . ."

It does seem that where a sample is posted from an outlying area for analysis the posting must be done by an appointed traffic officer or constable. The learned Judge held that whilst the certificate was evidence of delivery it was not evidence that the specimen was delivered "forthwith" and the appeal was dismissed.

From the standpoint of prosecuting authorities the two decisions were probably only of moment where counsel for the defendant required the prosecution to be strictly proved and was not prepared to concede the sending of the sample for independent analysis (where this had been called for) and the sending of the sample from the place where it had been taken from the defendant to a Government analyst. In such circumstances evidence would have to be led in that regard.

That concessions have their dangers, however, was to be well illustrated in *Haenga* v. *Auckland City Council.* Prior to the hearing of the information in the lower Court it emerged that the appellant's true name was Tawhai Mason Haenga, whereas the analyst's certificate and the blood specimen medical certificate were in the name of George Haenga. Apparently at the hearing the solicitor for the appellant had conceded that the appellant was the same person as the person described as George Haenga but there was some doubt on the appeal as to whether that concession had extended to the analyst's certificate. If it did not, then the prosecution was clearly in some difficulty in proving the identity of the specimen, for s. 58B (9) (c) has application only where the certificate refers to the specimen of blood analysed as being a specimen taken from a person having the same name as the defendant. The Court was not prepared to accept that the concession made by the solicitor in the lower Court was in the limited form as was contended on the appeal, with the result that for a number of reasons the appeal was dismissed.

The last decision leaves open the problem which arises where the true name of the defendant is not recorded on the analyst's certificate with the consequence that s. 58B (9) (c) can not be relied upon. The prosecution will invariably be in some difficulty in proving to the satisfaction of the Court that the specimen of blood taken from the defendant is the same specimen of blood referred to in the analyst's certificate. Faced with the possible consequence of a penalty under s. 30 (3) of a term of imprisonment not exceeding three months as against a prosecution for supplying false information with a penalty of $200, there must be some temptation for the errant driver to have his name incorrectly recorded by the enforcement authority.

RICHARD WORTH

REFORMING PUBLIC AND ADMINISTRATIVE LAW

"The rights of the individual in his dealings with the State would at least be clarified and indeed advanced by the proposals of the Public and Administrative Law Reform Committee in its latest report," the Minister of Justice, Dr Martyn Finlay, said when releasing the Sixth Report of the Committee.

The Public and Administrative Law Reform Committee was constituted in July 1966 and its present membership is the Chairman, Dr J. L. Robson, C.B.E., Director of Criminological Studies of Victoria University of Wellington, Mr A. C. Brassington, barrister and solicitor of Christchurch, Mr E. L. Greensmith, C.M.G., a former Secretary to the Treasury, Mr K. J. Keith, Reader in Law at Victoria University of Wellington, Dr R. G. McElroy, C.M.G., barrister and solicitor of Auckland, Mr R. G. Montagu, Senior Legal Adviser, Department of Justice, Professor J. F. Northey, Dean of the Faculty of Law at the University of Auckland, Mr G. S. Orr, Deputy Chairman of the State Services Commission, and Mr D. A. S. Ward, C.M.G., Counsel to the Law Drafting Office. Mr R. M. Barlow, of the Department of Justice, is the Secretary.

The Minister noted that since the Committee was established it had been critically examining the jurisdiction and procedure of administrative tribunals and the rights of ap-

peal from their decisions. It was also concerned with the way such decisions could affect the rights, liberties and welfare of the citizen.

"The recent report," said Dr Finlay, "concentrated on how to ensure that all relevant material was considered by the tribunal, and that those concerned were given an opportunity to be heard.

"Individuals should be fully informed and given the opportunity to present evidence—and some measure of flexibility and informality was desirable," said Dr Finlay.

The Committee was also critical of legislative provisions framed to prevent the Supreme Court from exercising its supervisory powers of review of a tribunal's decision. Such exclusionary provisions were in general undesirable and the Minister said he would support the Committee's conclusion that the existence of such provisions could not be justified other than in an exceptional case.

In some countries there is general legislation which sets out the procedure to be followed by administrative tribunals. The Committee will consider at a later stage whether legislation of this kind is appropriate for New Zealand. In the meantime, the Committee has formulated a set of principles, and the Minister commends these principles for study by all those who are interested or involved in the working of administrative tribunals. The Minister concluded that the principles would be kept in mind when legislation was being formulated for the establishment of new tribunals.

Eternal vigilance—The radical recommendations contained in the Eleventh Report of the Criminal Law Revision Committee entitled "Evidence (General)" (Cmnd. 4991) must receive full and careful consideration before there is a decision to introduce this or any other draft Criminal Evidence Bill on the subject. The recommendations include restricting the accused's right to stay silent by permitting the Court or jury to draw inferences from this, and allowing the failure to mention a fact to corroborate any relevant evidence against him; abolishing the police caution as it is inconsistent with the proposal on the "right of silence"; the Judges' Rules should be replaced by administrative directions to the police by the Home Office; abolition of the right to make an unsworn statement with the Court or jury entitled to draw inferences from the accused's refusal to give evidence on oath after formally being called on to do so; modifying the rules as to confessions and as to putting in evidence the accused's record; relaxing requirements as to proving certain specific defences such as insanity, making the burden on the accused that of adducing enough evidence to raise a real issue on the matter, when the prosecution will have to prove the matter beyond reasonable doubt; a spouse should be competent for the prosecution in all cases and compellable in cases of violence not only against the spouse, as now, but also in cases of violence or sexual offences against a person under 16 in the same household as the accused; modification of the rules governing corroboration, children's evidence and hearsay evidence, some of the changes being in the accused's favour; and removing any restriction preventing an expert witness from giving his opinion on the ultimate issue in the case. Considering that the period of gestation in producing this large report of 258 pages was nearly eight years, it is a great pity that draft working papers on the various proposals were not periodically released for general digestion and discussion before the making of firm recommendations. The subject-matter under consideration is emphatically not lawyers' law but the stuff of which our cherished freedoms are made. Although the real villains, those with criminal intent and malice very much aforethought, must be combated, in doing this let us not lose sight of the humble, pliable, passive person who all too easily can be persuaded to admit unjustified guilt. The police have able advocates for a change in the law, on one of whose speeches we comment next, but it is the general public who must decide just where the line is to be drawn between effective crime prevention and safeguarding the liberty of the subject. *The Solicitors' Journal.*

The Morning After—Sir Alfred North, in response to a request for extracts from an after-dinner speech for publication in the *Journal*: "To re-hash an after-dinner speech is very much like trying to eat a stale sandwich . . ."

White man's burden—In Johannesburg, South Africa, five black thieves are reported to have escaped with $700 by dashing through the "Whites Only" entrance of a railroad station. Six black pursuers, employed by the robbed firm, were stopped at the same entrance—by a white railroad official.

LIGHT AND SOME SHADE CAST ON THE FRAUD AND OMITTED EASEMENTS EXCEPTIONS IN THE TORRENS SYSTEM STATUTES

The recent Court of Appeal decision in *Sutton* v. *O'Kane* (Court of Appeal, 30 March 1973, Wild C.J. and Richmond J., Turner P. dissenting) which reversed the judgment of White J. (Supreme Court at Dunedin, 22 March 1972) merits comment on at least four counts, any one of which could be the subject of a full article. Perhaps in inverse order of importance they are:

1. The fact that Turner P., in his dissenting judgment, found fraud where the trial Judge did not;
2. The formal requirements needed for the proper creation of a registrable easement;
3. The meaning of fraud under the Land Transfer Act 1952; and
4. The ambit of the "omitted easement" exception to indefeasability contained in s. 62 (b) of the Land Transfer Act 1952.

Abbreviated Facts and Supreme Court Decision

More facts will appear as the arguments develop, but the basic facts are these:

A subdivisional plan dividing a parcel of land into Lots 1 and 2 was consented to by the Dunedin City Council (subject to conditions) and deposited in the Land Registry Office. It showed a right of way over Lot 2 in favour of Lot 1. A transfer of Lot 1 to Mr O'Kane was registered. A transfer of Lot 2 to Mr and Mrs Dalton was registered and contained these words: "Subject to . . . right of way shown by deposited plan 11192 and the Dunedin City Council's conditions of consent thereto endorsed on the said plan . . ." .Lot 2 was resold to Mr and Mrs Sutton and neither the agreement for sale nor the consummating memorandum of transfer contained any mention of the right of way, but the transfer did contain the following memorial which had previously been entered on the certificate of title to Lot 2: "Subject to the Dunedin City Council's conditions of consent to the granting or reserving of a right of way as are endorsed on DP 11192."

A dispute arose between O'Kane and the Suttons as to the existence of the right of way.

White J. held that, although no legal easement had been created, an equitable easement had been. He further held that the Suttons did have some knowledge that O'Kane claimed a right of way, but that their conduct was not within the "fraud" exception to indefeasibility of title contained in ss. 62 and 182 of the Land Transfer Act 1952. However, he did find that the equitable easement of right of way came within the scope of the "omitted easements" exception to indefeasibility contained in s. 62 (b) of the Land Transfer Act 1952. In the result White J. held O'Kane entitled to a declaration that the Suttons held Lot 2 subject to the right of way and to an injunction restraining the Suttons from interfering with the use and enjoyment of the right of way. The Suttons appealed.

Finding of Fraud on Appeal Contrary to Lower Court Finding

In his dissenting judgment Turner P. was prepared to hold that the evidence given in the Court below disclosed circumstances[a] from which he could infer "fraud" (in the Torrens sense of that word) on the part of the Suttons, notwithstanding that the trial Judge, White J., specifically held that the Suttons had not been "fraudulent". Although this is not unprecedented, it is so unusual as to merit attention being drawn to it.

Like the situation where an appellate Court is called upon to review the exercise of a discretion vested in an inferior tribunal, there is a marked reluctance to override the findings of a lower Court on questions such as this. For, however full the records of evidence may be in any particular case, there is always the feeling that the person who has had the opportunity to observe and assess the witnesses instead of their evidence recorded in cold print does have a tremendous advantage. Perhaps the substitution would be easier if the higher Court were reviewing evidence given before lay Justices, as is the case in some reported decisions, instead of evidence, if I may respectfully say so, given before a most experienced Judge.

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[a] Incidentally, one aspect of the facts that the learned President relied upon was that "on the Deposited Plan the exact area over which the right of way had been granted was shown, accurately surveyed". I would respectfully submit that, as the Suttons knew *nothing* of this, this fact is quite irrelevant on the question of fraud.

But the learned President, having adverted to, and commented upon, the unusual position in which he found himself, argues most cogently for his changed finding.

I shall return to this question of "fraud" or "no fraud" later.

Formal Requirements for Creation of Registrable Easement

One method of creating a valid registered easement over Land Transfer land is by executing and registering an easement certificate under s. 90A of the Land Transfer Act 1952. As White and Richmond JJ. point out in their judgments, this method could have been, but was not, used in the present case.

The second method is described by Richmond J.:

> "It has long been established that nothing can be registered under the Land Transfer Act the registration of which is not expressly authorised by the statute[b]. In the case of an easement (prior to the introduction of the present provisions contained in s. 90A as to easement certificates) it was well settled that the only way in which an easement could be created in terms of the Act was by a memorandum of transfer."

The statutory provision is s. 90 (1) of the Land Transfer Act, and under it the memorandum of transfer can be used either to grant or reserve an easement including an easement of right of way. In a subdivision situation where s. 90A is not resorted to, it is usual for the transfer and reservation to be contained in the same memorandum of transfer[c]. The usual practice is for both the vendor and purchaser to execute the memorandum on the basis of (in Turner P.'s words in the present case) "the memorandum of transfer being regarded as a mutual grant". The present case makes it clear that this practice is also good law and, because there was no signature by any transferees, no registrable or legal easement had been created. Of course, the trial Judge and all three Judges on appeal agreed that in the circumstances an equitable easement had been created, but differed as to its binding effect on the Suttons, the ultimate transferees of the alleged servient tenement.

Furthermore, all four Judges were agreed that the words "Subject to . . . right of way shown on deposited plan 11192 . . ." in the transfer of Lot 2 from the subdivider to the Daltons were ineffective to create a legal easement.

The Meaning of Fraud

Although Starke J. said in *Stuart* v. *Kingston* (1923) 32 C.L.R. 309, 359, that no definition of fraud can be attempted, so various are its forms and methods, it is submitted that, since the Privy Council's decision in *Assets Company Ltd.* v. *Mere Roihi* [1905] A.C. 176, in Turner P.'s words in the prsent case, it "is plain from the authorities that *fraud* under the Land Transfer Act is *sui generis* . . .". It is clear that it is limited to fraud in connection with the current state of the title and to acts of the current registered proprietor or his agents. Thus neither fraud some steps back in the chain of title nor even immediate fraud (unless the person whose title is attacked or his agent was guilty of fraud) can affect the registered proprietorship; the guillotine of registration cuts off all fraud which is not either that of the present registered proprietor or his agent. Furthermore, the effect of the interpretation of the statutory provisions has been to shear off much of the old legal learning about the meaning of fraud. Indeed, the description in *Assets Company Ltd.* v. *Mere Roihi* (at p. 210) "that by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud . . ." perhaps comes fairly close to what a layman rather than a lawyer might designate as fraud.

It follows from the fact that the "fraud" is limited to the acts of the current registered proprietor or his agents that such "fraud" can be against the previous registered proprietor, which aspect has received little consideration by the Courts[d], or against the holder of an unregistered interest, which has been the case in most of the decisions including *Sutton* v. *O'Kane*.

All four Judges in *Sutton* v. *O'Kane* appear to support the conventional *Merrie* v. *McKay* (1897) 16 N.Z.L.R. 124 view that there are two "legs" to the fraud exception. They are, that a registered proprietor who acquires the requisite amount of information[e] may be held

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[b] Or, it is respectfully submitted, authorised by another statute: see s. 42 of the Land Transfer Act 1952.

[c] For a precedent see *Goodall and Brookfield* (3rd ed.), 170.

[d] In *Campbell* v. *Jarett* (1881) 7 V.L.R. (E.) 137 fraud was argued, although the specific provisions of the Torrents Act were not invoked, and a retransfer of Torrens land was ordered in circumstances that amounted to undue influence.

[e] I deliberately do not use the word "knowledge" but a neutral word that does not appear in s. 182 of the Land Transfer Act 1952.

to be fraudulent either if he proceeds to registration with the avowed aim of depriving the other person of his rights or, alternatively, he becomes registered intending to recognise the rights about which he has information, but afterwards changes his mind and purports to hold the land free from those rights. It was the second leg that was alleged in *Sutton* v. *O'Kane*.

There was also unanimity in *Sutton* v. *O'Kane* that the crucial date for acquiring the information is the date of registration[f] and that the question of "fraud" or "no fraud" must be a question of fact to be decided on the particular facts of the given case.

But there are three aspects upon which I comment.

Turner P. in his dissenting judgment makes a very interesting analysis of the concept of fraud which, if developed in later cases, may well reopen some aspects of the meaning of fraud in the Torrens system statutes. The analysis is developed at some length and, in summarising within strict space limitations, it is quite impossible to do it justice. If I read the learned President correctly, he says that fraud in the Land Transfer Act "means dishonesty, no more and no less", that dishonesty does not necessarily connote illegality[g], and that "the test of dishonesty is a moral test".

In his most persuasive argument, the learned President marshals an imposing array of supporting authorities. But, if the analysis were adopted in its entirely, I would respectfully submit that, just as the more extreme of the Australian decisions go far in the other direction towards negating the effectiveness of the fraud exception in these circumstances[h], the New Zealand Courts could possibly be in some danger of reintroducing into our law under the fraud exception some of the learning of the equity Courts which the Torrens system was probably intended to eliminate.

Both Turner P. and Richmond J. advert to the fact that the Australian Courts have tended not to find fraud in fact situations where a New Zealand Court might well do so. On occasions the Courts have tended to explain the difference on the basis that the statutory provisions are different. It is true that there *are* differences in the indefeasibility provisions in the various jurisdictions, but the differences are undoubtedly greater, say, between those in the New South Wales and Queensland Acts than they are between the New South Wales and New Zealand statutes. Yet the New South Wales and Queensland decisions on the fraud exception follow a fairly consistent pattern.

The short facts of one Queensland decision may serve to illustrate the Australian approach as opposed to the New Zealand attitude. In *Friedman* v. *Barrett* [1962] Qd.R. 498:

> ". . . there was an unregistered lease for three years which contained an option for renewal for two years with further options for three and two years. The lessee entered into possession and duly observed the covenants in the lease. The lessor sold and his purchaser became registered as proprietor. Mansfield C.J. said that at 'the time of his purchase the . . . [purchaser] knew that the . . . [lessee] was in possession of the land under a lease which had been granted by . . . [the vendor] and he was aware of the options of renewal contained in the said unregistered lease'." (at p. 500)

The Queensland Full Court[i] held that the purchaser was not guilty of fraud. In so holding, Mansfield C.J. said[j]:

> "Such actual notice would be sufficient to impute fraud in equity, but if actual notice or knowledge of the unregistered interest of a third party is held to be fraud within the meaning of the section, the express provisions of the section that the transferee is not to be affected by direct notice of any unregistered interest would be of no force or effect. . . . In all the circumstances I consider that there is no evidence on which the . . . [purchaser] could be found guilty of fraud against the . . . [lessee] and therefore he is, in my view, entitled to the protection of s. 109. . . ."

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[f] Although it is respectfully agreed that, as the statute is at present, this is a proper reading, it does raise at least two sets of well-known problems. First, the date of registration in the present busy registries may be very long delayed after the date of *lodgement for registration*—a delay about which the individual seeking registration can do nothing. Secondly, there is the "area of risk" between settlement of the transaction and lodgement of the documents for registration—here the Torrens system, with its insistence upon actual registration for passing the title, is inferior to the Deeds system. For one discussion of the problems and suggested solutions thereto, see Douglas J. Whalan. "The Position of Purchasers Pending Registration" in *The Torrens System Centennial Essays* (1971) 120-137.

[g] The learned President's actual words were "whether it is dishonest does not always depend upon whether it is made legitimate by the law".

[h] See, for example, *Oertel* v. *Hordern* (1902) 2 S.R.N.S.W. (Eq.) 37.

[i] Mansfield C.J., Stanley and Gibbs JJ.

Gibbs J. said (at p. 513):

"There is no evidence whatever that the . . . [purchaser] was guilty of any dishonesty, contrivance, or conduct warranting grave moral blame, and the facts fall very far short of establishing actual fraud."

Yet, as both Mansfield C.J. (at p. 503) and Gibbs J. (at p. 512) noted, s. 109 of the Queensland Real Property Act 1861—the provision most nearly equivalent to s. 182 of the Land Transfer Act 1952—does not include the provision that is included at the end of s. 182, that "the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud".

One would think that the inclusion of such a passage would tend to increase rather than reduce the exonerative effect of the section and decrease the likelihood of a New Zealand Court finding fraud, but this patently has not been so.

The third comment concerns a most interesting passage in the judgment of Richmond J. After saying that in the particular circumstances of this case the fraud exception "is limited to cases of actual dishonesty by the registered proprietor up to the time of registration", he went on to say:

"I go no further than that; in particular I do not suggest that a registered proprietor may not in different circumstances be guilty of relevant fraud at some time after registration, *as, for example, by dishonestly preventing the registration of an interest created by himself.*" (Emphasis added.)

From early times in the interpretation of the Torrens statutes the Courts have permitted the enforcement of contracts, trusts or other equities against a registered proprietor. They have done this by holding that such rights are outside the ambit of protection afforded by the Acts; in fact, as the following passage from *Frazer* v. *Walker*[k] suggests, such rights are regarded as quite *dehors* the system. It was said there that under ss. 62 and 63 a registered proprietor:

". . . is immune from adverse claims, other than those specifically excepted . . . [In so holding they wished] to make it clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam,* founded in law or in equity, for such relief as a Court acting *in personam* may grant."

Again space limitations preclude full development of my "heresy" here, but the passage that I have emphasised in the citation from Richmond J. leads me to suggest that, perhaps instead of leaving those interests outside the Act's ambit, they could have been brought within its ambit through the operation of the fraud exception. In summary the submission would be this: The Act is concerned to protect innocent dealers with interests in land; registration gives this protection; but there are certain exceptions to the absolute nature of this protection; one of these exceptions is fraud; and part of fraud is dishonesty by the registered proprietor in not recognising interests such as binding contracts into which he enters or fiduciary obligations that he owes. If this interpretation had been adopted, the Torrens statutes would have been interpreted to bring these various interests within the umbrella of the statutes. This would have given the Acts a totality and a concinnity that does not exist at present where these interests are ignored by the terms of the statute, but recognised as a necessary exception to them.

However, up to now, the Courts have not adopted this analysis but, in laying down different guidelines, the Privy Council has abjured inferior Courts not to be "too much swayed by the doctrines of English equity"[l]. Within these guidelines "the issue of fraud or not is a pure question of fact, the answer to which must depend upon the particular circumstances of the individual case"[m].

In the result in the present case the majority in the Court of Appeal, Wild C.J. and Richmond J.[n], upheld the decision of White J. that the Suttons were not guilty of fraud, but Turner P. held that they were fraudulent.

The Omitted Easement Exception in s. 62 (b) of the Land Transfer Act 1952

The specific exception to the principle of indefeasibility in s. 62 (b) of the Land Transfer Act 1952 is that the title of the registered proprietor is not absolute "so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land".

This exception has always been applied to

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[j] *Friedman* v. *Barrett* (*supra*), 504-505.

[k] [1967] 1 A.C. 569, 585; [1967] N.Z.L.R. 1078 per Lord Wilberforce delivering the judgment of the Privy Council.

[l] *Haji Abdul Rahman* v. *Mahomed Hassan* [1917] A.C. 209, 216.

[m] *Harris* v. *Fitzmaurice (Gruar, Third Party)* [1956] N.Z.L.R. 975, 978, per Cooke J.

[n] Richmond J. said he reached "this view with no little hesitation".

protect easements subsisting at the time land is brought under the Land Transfer Act[o], but discussion occurred as to its application to easements created subsequent to the bringing of the land under the Act. It was argued that, although on a literal reading of s. 62 (b) it seems to impose such a burden, to do so would be to consider the provision in isolation from other provisions in the Land Transfer Act such as s. 41 (the "no interest passes unless instrument registered" section), s. 90 (the section which provides, *inter alia,* for the creation of an easement by memorandum of transfer) and s. 182 (the "no notice unless fraudulent" section).

The view that s. 62 (b) did not operate to protect post-immatriculation easements but that compliance with these other provisions of the Act was necessary, gained support in several New Zealand cases[p] and in *Jobson* v. *Nankervis* (1943) 48 S.R. (N.S.W.) 277 in New South Wales.

But the opposite conclusion, that s. 62 (b) *can* operate to impose the burden of easements acquired or created after land has been brought under the Act, has been reached in Victoria[q] and Tasmania[r] in relation to prescriptive easements, under statutes which permit prescription to apply to the fullest extent, and in New South Wales[s] in circumstances where the equivalents to ss. 41 and 90 had been complied with but the easement had subsequently been accidentally omitted from the certificate of title. It has not yet been applied in Australia in circumstances which would amount to a complete circumvention of ss. 41 and 90.

As mentioned eariler, White J. in the Supreme Court applied s. 62 (b) and the Australian cases to the circumstances in *Sutton* v. *O'Kane.* That is, the learned Judge applied it where ss. 41 and 90 had not been complied with, he extended it to give protection to an equitable easement, and held that s. 62 overrode the *bona fide* purchaser for value protection provisions of s. 182. With respect, it is submitted that, if this were to be the correct interpretation, the way would be opened up for the creation of yet another class of rights affecting Land Transfer land "off the register". All that would be necessary to gain s. 62 (b) protection would be for the parties to sign an informal agreement, permit the holder of the dominant tenement to exercise the right, file the informal document away in a strongroom to be brought out perhaps several registered transfers of the servient tenement later to affect the now registered proprietor who could perhaps have no knowledge at all of the existence of the right. If this is correct one poses the question, why would anyone ever bother to go to the expense of creating and registering an easement in the formal legal manner?

Indeed, in the Court of Appeal all three Judges agreed that s. 62 (b) did not apply to an equitable easement of the kind under consideration.

Wild C.J. believed that the exceptional protection,

> ". . . in the case of rights of way or other easements arising since the land affected was brought under the Act, include[s] only those which have been registered or are capable of being notified on the register . . . [and that in the present case] if the easement had been put into registrable form there was machinery available for its registration."

This had not been done, the exception in s. 62 (b) did not apply, and the protection afforded to a registered proprietor in the main body of s. 62 was maintained.

Richmond J. (with whose reasoning and decision on this point Turner P. agreed) considered the authorities and held that s. 62—

> ". . . clearly applied to all certificates of title whether issued when land is brought under the Act or to some subsequent registered proprietor . . . [and that in s. 62 (b) he could] only give to the words in question

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[o] *Anderson* v. *Maori Hill Borough Council* (1885) N.Z.L.R. 3 S.C. 364; *Lean* v. *Maurice* (1874) 8 S.A.L.R. 119; *New Zealand Loan and Mercantile Agency Co. Ltd.* v. *Corporation of Wellington* (1890) 9 N.Z.L.R. 10; *James* v. *Stevenson* [1893] A.C. 162; *Smith* v. *Christie* (1904) 24 N.Z.L.R. 561; same case, *Christie* v. *Lee Smith* 7 G.L.R. 369; *Stevens* v. *National Mutual Life Association of Australasia Ltd.* (1913) 32 N.Z.L.R. 1140; 16 G.L.R. 19; *Carpet Import Co. Ltd.* v. *Beath and Co. Ltd.* [1927] N.Z.L.R. 37; [1926] G.L.R. 425.

F. M. Brookfield, "Prescription and Adverse Possession" in *The New Zealand Torrens System Centennial Essays* (1971) 162, 172-174, raises doubts that s. 62 (b) protects all easements for which the prescriptive period has elapsed.

[p] *Mackenzie* v. *The Waimumu Queen Gold Dredging Co. Ltd.* (1901) 21 N.Z.L.R. 231; *Mackechnie* v. *Bell* (1909) 28 N.Z.L.R. 348; *Strang* v. *Russell* (1905) 24 N.Z.L.R. 916; *Barber* v. *Mayor of Petone* (1908) 28 N.Z.L.R. 609; 11 G.L.R. 148; *McCrae* v. *Wheeler* [1969] N.Z.L.R. 333.

[q] *Nelson* v. *Hughes* [1947] V.L.R. 227.

[r] *Wilkinson* v. *Spooner* [1957] Tas. S.R. 121.

[s] *James* v. *The Registrar-General* (1967) 87 W.N. (Pt. II) (N.S.W.) 239; (1967) 69 S.R. (N.S.W.) 361; *Berger Bros. Trading Co. Pty. Ltd.* v. *Bursill Enterprises Pty. Ltd.* [1970] 1 N.S.W.R. 137; (1971) 45 A.L.J.R. 203; *Maurice Toltz Pty. Ltd.* v. *Macy's Emporium Pty. Ltd.* [1970] 1 N.S.W.R. 474.

the ordinary natural meaning which they seem to . . . [him] to require in their context."

But, even so, he said that—

". . . it would be a strange consequence if an Act which in s. 90 prescribes a particular method of creating an easement should at the same time give effect to all manner of informal easements created in circumstances where the parties could have created a registrable interest. Having reached this conclusion . . . [he was] not prepared to give the words [in s. 62 (b)] presently in question, namely, 'existing upon', such a wide meaning as to bring within s. 62 (b) equitable easements which could have been made the subject of registration if created in proper form."

Having found as he did, Richmond J. had no need to express an opinion upon, and expressly left open, both the question of primacy between ss. 62 and 182 and the question whether the New South Wales decision in *James* v. *The Registrar-General*[t], where the exception had been applied where the statutory provisions for creation and registration had been complied with but the easement had been accidentally omitted from a subsequent certificate of title, would be decided in the same way in New Zealand.

Thus, although it seems clear from *Sutton* v. *O'Kane* that the argument that the exception in s. 62 (b) only applies to pre-existing easements is no longer maintainable, the full ambit of the exception is not yet finally delineated.

Because of the doubts that remain about s. 62 (b), the other doubts in interpretation of the exceptions in s. 62 (a) and s. 62 (c) that exist, and the doubts that continue as to the relationship between s. 62 and the Registrar's powers of correction of the register[u], it is suggested that there should be a reconsideration of all of these questions in the course of a full reconsideration of the terms of the Land Transfer Act 1952. I state shortly my view as to the form that this redraft should take.

The exceptions in s. 62 (a), s. 62 (b) and s. 62 (c) would be omitted and a new exception inserted, clearly making the protection in s. 62 subject to the Registrar's corrective powers. But there *must* be a correlative change to make it quite clear that, if the Registrar *does* exercise his powers, then, in the absence of fraud, any person whose interest is affected must receive full compensation. This may seem radical surgery, but the suggestions are based on the following reasoning[v]: First, there is considerable doubt and controversy, and whenever there are known problems in legislation, they should, in my view, be put right by the Legislature rather than at the expense of litigants. Secondly, where there are conflicting certificates of title, or boundaries, or estates, or interests, manifestly harmony must be restored to the register. Finally, at present, if the exceptions in s. 62 are held applicable in this restoration process, then a *bona fide* for value loses his interest without compensation. It is submitted that the suggestions that are made here would, with more careful drafting than occurred in the original Torrens statute, remove the difficulties and prevent further losses to innocent individuals and thus further one of the chief objects that the draftsmen of that original Torrens statute set out to achieve.

DOUGLAS J. WHALAN

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[t] (1967) 87 W.N. (Pt. II) (N.S.W.) 239; (1967) 69 S.R. (N.S.W.) 361.

[u] The problems associated with s. 62 (a) and s. 62 (c) and those concerning the Registrar's powers of correction were not in issue in *Sutton* v. *O'Kane* but they are considered respectively by Douglas J. Whalan "The Torrens System in New Zealand—Present Problems and Future Possibilities" in *The New Zealand Torrens System Centennial Essays* (1971), 258, 272-279, and G. W. Hinde "Indefeasibility of Title since *Frazer* v. *Walker*", *op cit.* 33, 51-70.

[v] Such provisions do occur in the Singapore Land Titles Ordinance 1956, ss. 28 (1) (c) and 131. Furthermore, the suggestion merely adapts to the Torrens system in a limited form the provisions of ss 82-85 of the English Land Registration Act 1925.

CORRESPONDENCE

Sir,

Malapropisms

When I was a registration clerk in Auckland (quite some time ago) a country practitioner sent for registration a transfer containing mineral rights and "the full, free and uninterrupted right of ingress, egness and negress," which evoked from the District Land Registrar a requisition that "the bizarre and novel mineral easement requires some explanation and, perhaps, a period of detention".

Yours faithfully,

I. M. PETERSEN,
Matamata.

MEDIA MASSACRE

Dr R. G. Lawson writes again from Britain

When Lord Justice Lawton was being driven to Court in the traditional Rolls Royce a few weeks ago, a gentleman (for want of a better word) howled a choice obscenity at him and topped it off with what is known to some as an "international gesture of contempt". Hauled before the learned Judge, he explained that, in error, he had supposed Lawton L.J. to be his local mayor, against whose supposed ineptitudes he had ample cause to rail. "Well, that's all right, then," said a relieved Lawton L.J. "Go away and be more careful next time."

The perceptive will notice that, either way, the disgruntled ratepayer had no time for authority and *was prepared to say so.* Here is very much the spirit of the times. Depending on your point of view, it reached its zenith or nadir in the second test against the West Indies when umpire Fagg refused to come out at the start of play. Angered he was at the reaction of the West Indians when he declined to give out Geoff Boycott. The rest of the game was sheer carnage: Boycott himself had to retire hurt twice.

Now, when an umpire refuses to stand in a test match, the fibre of Empire has unarguably gone. On the brink of a new football season, this contempt for officialdom bodes little but ill. Consider the record of the "friendly" games of the weeks leading up to the first matches of the season: 80 hooligans arrested for wrecking a train carriage; neighbouring teams refusing ever to meet each other again; and a manager bringing off his team in protest against a referee's decision. If you go to a game sporting team colours, heaven help you. Quite frankly, I think that, about Christmas, the football season will be suspended or even terminated. A lot of the blame must fall squarely on the media. Hooligans are given saturation coverage, just what they want, it seems. But the trouble lies rather, or so it seems to me, in the treatment of individual games. Saturday nights, for those who hate football, must be hell. Players and commentators pick over the bones of a game until nothing is left: there are slow-motion replays of every conceivable incident from every conceivable angle. On and on it goes, culminating in the lunatic selection of a "goal of the month" or "save of the year". (How about a foul of the week as well?)

I hate it, and I've been a football addict from the moment that I could shake a grown-up's rattle. But when I was about 13, I went to a supporters' club "do" to meet the players. I remember now the shattering loss of illusion when I heard and saw them at close quarters. They had uncouth accents, pimples, body odour, scant regard for grammar, and all the other foibles possessed by you and me, the ordinary mortal. From then on, I resolved that my idols must be kept distant, kept away so that I would not see their feet of clay.

Modern youth is deprived of this election, for the television screens blaze forth their heroes in an endless stream of "in-depth" interviews which have no equal in their banality and superficiality. When idols and idolaters are then seen to be on a par, but treated so very differently, who is to wonder that a mindless hitting-out is the result?

The answer must be to restrict the coverage of sports events simply to featuring the game and leaving it at that. The Courts of Law are open to us all and we can read of their doings, but the cameras are forbidden. So it should be, for the dignity of the law, and the respect which follows, are thus spared their ruination through the media.

REGULATIONS GAZETTED

(Continued from page 406)

Hutt Valley Drainage Board Notice 1973 (S.R. 1973/220)

Income Tax (Withholding Payments) Regulations 1967, Amendment No. 6 (S.R. 1973/218)

Motor Spirits Prices Regulations 1970, Amendment No. 6 (S.R. 1973/221)

Niue Amendment Act Commencement Order 1973 (S.R. 1973/215)

Racing (Revocation of Approved Scheme) Notice 1973 (S.R. 1973/219)

Rotorua Trout Fishing Regulations 1971, Amendment No. 3 (S.R. 1973/216)