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CONVICTING THE GUILTY

The lament at Hamilton of a Crown Prosecutor, Mr V R Jamieson, and of Mr Justice McMullin over problems of proof in excess blood-alcohol prosecutions recently received widespread publicity. His Honour was reported as saying: "This area of legislation sought to overcome the difficulties in proving a charge of whether the person was unfit to drive . . . It may be desirous to enjoin the Legislature to sound its trumpet." Mr Jamieson was reported as claiming that the present legislation was causing "the whole course of justice to grind to a halt. A whole chain of evidence is now required to prove a charge."

At issue in the appeals before the Court were the admissibility of a doctor's certificate, whether an analyst's certificate complied with statutory requirements, and the labelling of sample bottles.

There can be little sympathy with the substance of the complaint. What the State has chosen to make a circumstantial offence surely must be properly proven. After all, the liberty of defendants is in jeopardy. (Incidentally, too, the charge in Britain carries with it a right of trial by jury.)

The prosecution of such cases is a relatively simple matter, and one well within the capacity of a competent traffic officer. Surely it is an overreach of sympathy to extend it to those who come to Court with cases ill-prepared and papers out of order. Counsel expect no such indulgence; why should traffic officers?

Yet having said as much, there are reasons why the Legislature should examine the way in which the blood-alcohol laws are working.

Figures provided by the DSIR show that of 100 persons given a first breathtest:

91 failed it;
84 failed a second test;
5½ either refused a bloodtest or there was no doctor available;
78½ gave blood which was tested;
72½ exceeded 80mg of alcohol per 100ml of blood, the breakdown being:
6 were below 80
6 were from 80-100
31.5 were from 101-175
35 were 176 or above.

From this it emerges that 9 out of 10 fail a breathtest, 7 out of 10 have levels of 80mg/100ml or higher, and nearly 4 out of 10 a blood/alcohol level as high as 176 or over.

It also emerges that breathtests are probably being administered too restrictively, and research on an area basis reveals that in some regions tests are conducted (with the same degree of success) at a much higher per capita rate. This in turn suggests a lack of enforcement in some areas and the very real possibility that the number of blood samples tested by the DSIR could shortly soar to perhaps over 20,000 annually.

When we consider the wider implications of this we must take into account the position of the medical practitioners and seriously ask if there is any way of relieving them of at least a part of this load. For most blood samples are taken in the evening and every night doctors are dragged from their beds to conduct them —doubtless with some effect on their ability to perform their functions on the morrow.

The solution would lie in two "high test tubes" set at perhaps 175 and administered in the presence of two officers after two of the standard 80 tubes have given positive results. The "high test tubes" would be optional, and

even their result would not be binding on the suspect. He could still insist on a blood-sample being taken. Should he survive the "high test tubes", a doctor would be summoned in the usual way.

Once he had taken both, and failed both, then and only then a suspect would be invited to formally admit for the purpose of a prosecution that his blood-alcohol level was in excess of 100mg per 100ml—not, it must be emphasised, in excess of 175.

There is little doubt that after four positive tests (two at 80 and two at 175) a goodly number of suspects would co-operate in this way. The savings would be considerable. In perhaps a third of all cases:

(a) no doctor need be called;
(b) the suspect could leave at once (but not, of course, drive a car);
(c) no blood-sample need be transmitted to the DSIR;
(d) the DSIR need not test a sample;
(e) formal proof would be facilitated in the event of prosecutions being defended.

Further, there would be an opportunity to restore a logical basis to sentencing by amending all certificates from the DSIR to a simple statement of whether their result was over or under the maximum permissible figure. The actual figure could be provided privately to the defence and would only come in as evidence where it was disputed.

At present sentencing has been taking place on a scale which slides with the blood-alcohol result—a state of affairs which concerns scientists in the field who consider this an abuse of their technology. Drivers should be judged on their reaction to alcohol, not their mere consumption of it. To do otherwise is to be unrealistically lenient on the driver with little tolerance to alcohol, and to be needlessly harsh on those with a high tolerance to it.

Such a scheme, it must be stressed, would be entirely voluntary. A suspect could fail the "high test tubes" and still insist on his right to a blood-test.

However the gains would be considerable and the Legislature should be invited to consider the proposal at an early date.

JEREMY POPE

EDICT OF THE PREFECT OF EGYPT

A precedent blessed by time (from AD 89) has been submitted for the rectification of the Land Transfer System. It comes from Oxyrhynchus Papyrus No 237, col 8, lines 27-43 (= *Select Papyri*, No 219); AD 89.

Marcus Mettius Rufus, prefect of Egypt, declares: Claudius Arius the strategus of the Oxyrhynchite nome has informed me that neither private nor public business is receiving proper treatment owing to the fact that for many years the abstracts in the property record office have not been kept in the manner required, although the prefects before me have often ordered that they should undergo the necessary revision, which is not really practicable unless copies are made from the beginning. Therefore I command all owners to register their property at the property record office within six months, and all lenders the mortgages which they hold, and all other persons the claims which they possess. In making the return they shall declare the source from which in each case the possession of the property devolved upon them. Wives also, if on the strength of some native law they have a lien on the property, shall add an annotation to the property statements of their husbands, and likewise children to those of their parents, if the enjoyment of the property has been secured to the latter by public instruments and the possession of it after their death has been settled on their children, in order that those who make agreements with them may not be defrauded through ignorance. I also command the scribes and recorders of contracts to execute no deed without an authorization of the record office, being warned that such a transaction has no validity and that they themselves will suffer the due penalty for disregarding orders. If the record office contains any property returns of earlier date, let them be preserved with the utmost care, and likewise the abstracts of them, in order that if afterwards an inquiry should be held concerning persons who have made false returns they may be convicted therefrom. In order, then, that the use of the abstracts may become secure and permanent, so that another [general] registration shall not be required, I command the keepers of the record office to revise the abstracts every five years, transferring to the new lists the most recent property statement of each person, arranged under villages and kinds. Year 9 of Domitian, Domitianus the 4th.

SUMMARY OF RECENT LAW

ADMINISTRATIVE LAW

Consent under Capital Issues Regulations—Capital Issues (Overseas) Regulations 1965 and Exchange Control Regulations 1965 directed to the control of overseas exchange transactions and their effect on New Zealand's overseas resources—Reserve Bank of New Zealand Act 1964, s 28 (1)—Ownership of New Zealand land by overseas persons not a matter which the Minister could properly take into account when deciding whether consent under the Capital Issues Regulations should be granted to the issue of company shares to an overseas corporation—Reserve Bank's refusal under Exchange Control Regulations made so as to conform with Minister's decision—Both refusals invalid—Judicature Amendment Act 1972, s 4. *Takaro Properties Ltd v Rowling and Anor.* (Supreme Court, (Administrative Division), Wellington. 22 August 1974 (A 186/74). Wild CJ).

ALIENS

Recommendation for deportation order—When a Magistrate's Court is considering making a recommendation for deportation after a conviction, the defendant should be given notice of that possibility so that submissions or evidence can be heard upon the question. *R v Elliott* [1964] NZLR 158 applied—Immigration Act 1964, s 22. *Alford v Police* (Supreme Court, Auckland. 14 August 1974 (M 710/74). Cooke J).

BANKRUPTCY

Personal injuries damages not after-acquired property—Damages for personal injuries recovered by undischarged bankrupt and invested in motorcars—Official Assignee held not entitled to such an investment as after-acquired property—Dictum in *Ex parte Vine* (1878) 8 Ch D 364, 366, not followed. *In re Leach* (Supreme Court, Auckland. 19 August 1974 (B 214/73). Cooke J).

Procedure on nulla bona return petition—Insolvency Act 1967, s 19 (1) (i)—A petition based on a nulla bona return should state what was the process of execution and out of which Court it issued—A verifying affidavit by the creditor in form 18 in the first schedule to the Insolvency Rules 1970 is sufficient to launch the summons—Unnecessary for that purpose to file also an affidavit by the Registrar as to the unsatisfied execution—But the filing of such an affidavit may facilitate proof at the hearing. *In re Williams* (Supreme Court, Napier. Ruling 28 August 1974 (B 11/74). Cooke J).

BUILDING CONTRACTS

Prime cost sum implies term—Prime cost sum—When a subcontractor is asked to suggest or confirm a prime cost sum to be inserted in the head contract and, having done so, is engaged to carry out the work on an hourly rate or charge-up basis, it is an implied term of the subcontract that his total charge will be reasonably close to the sum suggested or confirmed by him—*Trollope & Colls Ltd v NW Hospital Board* [1973] 2 All ER 260, 268, applied. Doctrine in *Hedley Byrne* case held inapplicable as between parties to contract. *Capes v Hoskins* (Supreme Court, Wellington. 26 July 1974 (A 407/73). Cooke J).

COMPANY

Winding-up and late salary payment—Salary payment of all profits made to director of one-man company entered in minute book outside statutory time period and shortly before winding-up—Held no fraud but director had acted in a culpable manner in ignoring company's indebtedness—Order made under Companies Act 1955, s 320—Section 468 may be invoked in proceedings brought under ss 320 and 321—Breach not excused. *Re Day-Nite Carriers Ltd (In Liquidation)* (Supreme Court, Wellington. 28 August 1974 (M 297/73). White J).

CRIMINAL LAW

Entrapment—Agent provocateur—Whether defence of entrapment available in New Zealand. *Held,* No defence of entrapment exists in this country, but a discretion is vested in the trial Judge to exclude the evidence of police agents who have encouraged or stimulated offences which would not otherwise have been committed as distinct from the evidence of those agents who have presented the opportunity to commit offences to those disposed to such activity. (*R v O'Shannessy* (CA 78/73, 8 October 1973), *R v Birtles* [1969] 2 All ER 1131 referred to.) *R v Capner* (Supreme Court, Auckland. 9 August 1974 (T 120/74). McMullin J).

Sentence in drug case—Appeal against sentence—Bad case of trafficking in cannabis—Effective sentence of six years held excessive—Distinction made, as was made in *R v Moore* [1974] 1 NZLR 417, 424, between cannabis and more addictive drugs—Court of Appeal imposed cumulative sentences of three years for importing cannabis and 18 months for possession of cannabis for supply—Narcotics Act 1965, s 5 (1) (a). *R v Inight* (Court of Appeal, Wellington. 9 August 1974 (CA 35/74). Judgment of the Court (Richmond, Woodhouse and Moller JJ) delivered by Richmond J).

CUSTOMS

Erroneous declaration—Customs Act 1960, s 245—Customs declaration—Whether the making of one declaration, which is erroneous in two particulars, will support two informations laid under s 245. *Held,* There being but one declaration, appellant should not have been convicted on two charges; the fact that the declaration was erroneous in more than one particular affected penalty only. *Smith v Collector of Customs* (Supreme Court, Auckland. 16 August 1974 (M 639/74). McMullin J).

EVIDENCE

Oral evidence contradicting written agreement—Hire Purchase and Credit Sales Stabilisation Regulations 1937—Whether oral evidence could be admitted even though it contradicted the terms of a written agreement of lease. *Held,* Although normally such

oral evidence could not be admitted to contradict a written document, extrinsic evidence contradicting a written agreement could be admitted in proceedings under the above regulations as evidence of a "transaction". (*Robert Northe Carriers Ltd v Cord Motors Ltd* (A 193/72, Auckland, 8 February 1973); *Credit Services Investments Ltd v Evans* (CA 7/74, 8 July 1974) followed.) *Regan v Ngaio Finance Co Ltd* (Supreme Court, Auckland. 24 July 1974 (M 763/73). McMullin J).

HUSBAND AND WIFE

Husband's interest in jointly-owned property assigned to creditor—Order for sale—Assignment of husband's half share in motorcar and matrimonial home to plaintiffs by way of restitution—Sale of chattel ordered although no express power of sale in s 143 of the Property Law Act 1952—Car valued at date of assignment—Court not empowered to order the wife to pay half the chattel's value as a condition of retaining the car—Plaintiffs entitled to apply for sale of land under s 140. *Hargreaves & Anor v Fleming* (Supreme Court, Christchurch. 13 August 1974 (A 135/73). Casey J).

Registration of maintenance agreement—Domestic Proceedings Act 1968, s 55—Registration agreement for maintenance of wife—Agreement remained in force contractually despite decree absolute—Held that the former wife was entitled to register the agreement notwithstanding that she could not apply for a maintenance order under the 1968 Act—Observations on *Hendry v Hendry* (1963) 10 MCD 422. *Cameron v Cameron* (Supreme Court, Auckland. 15 August 1974 (M 676/74). Cooke J).

INCOME TAX

Onus of proof—Taxpayer both a dealer and an investor in property when properties in dispute purchased—Test in *Hazeldine v CIR* [1968] NZLR 747, 749 held applicable—Heavy onus on taxpayer not discharged—Inland Revenue Department Amendment Act 1960, s 28—Land and Income Tax Act 1954, s 88 (c). *Cashmere Properties Ltd v CIR* (Supreme Court, Christchurch. 26 July 1974 (M 162/73). Casey J).

INSURANCE

Knowledge of vehicle's "unsafe condition" not required—Car involved in accident when brakes failed—Insurers successfully denied liability on grounds that vehicle was being driven in an unsafe condition in breach of terms of policy—Words of exception clause clear and unambiguous—*Trickett v Queensland Insurance Co Ltd* [1936] NZLR 116 applied—Knowledge on part of driver that vehicle was unsafe not required—Defect not "latent" as that word used in *Trickett's* case where it meant a condition which had merely a potentiality to become unsafe and not a condition which was actually unsafe—No conflict in clauses of policy. *Taylor v Victoria Insurance Co Ltd* (Court of Appeal, Wellington. 9 August 1974 (CA 20/72). Judgment of the Court (McCarthy P, Richmond and Woodhouse JJ) delivered by McCarthy P).

LIMITATIONS

Mistake of law—Application for leave to sue a deceased employer out of time must be made under s 3 of the Law Reform Act 1936 and not the Limitation Act 1950—*McKenzie v Booth* [1967] NZLR 1017, 1022, referred to—Intending plaintiff erroneously believed he had no claim—No amendment to Law Reform Act extending meaning of "mistake" similar to 1962 amendment to s 4 (7) of the Limitation Act—"Mistake" in s 3 (3A) means a mistake of fact not law—*Wilson v Cannaway & Co Ltd.* [1932] NZLR 843 (CA) applied. *Campbell v Public Trustee* (Supreme Court, Dunedin. August 1974 (A 130/73). White J).

MASTER AND SERVANT

Vicarious liability—Detour from authorised route—Driver returning vehicle to employer's depot shortly after end of day's work, with fellow employee as passenger—Deviated by driving a few hundred yards in direction away from depot to make private purchase—Collision with plaintiff's van caused by driver's negligence—*Held,* Not a new journey entirely unconnected with employer's business—Employer liable—*Hemphill v Williams* [1966] 2 Lloyd's Rep 101 (HL) applied. *C E Alley Ltd v Maple Furnishing Co Ltd* (Supreme Court, Wellington. 30 July 1974 (M 107/74). Cooke J).

MATRIMONIAL PROPERTY

Deed governing possession not an expression of common intention re ownership—Husband sole registered proprietor of matrimonial home—Deed of separation gave wife possession reserving to the husband the right "to dispose of such property should he deem that necessary upon providing the wife with a reasonable replacement . . ." *Held,* That an order awarding the wife a half share in the property did not contravene s 6 (2) of the Matrimonial Property Act 1963—Deed related only to possession and expressed no common intention on the ownership of the property. *Mason v Mason* (Supreme Court, Auckland. 5 August 1974 (M 234/73). O'Regan J).

MUNICIPAL CORPORATIONS

Right to drainage without connection fee—Drainage—Municipal Corporations Act 1954, s 224—Whether lateral drain a public or private drain—Whether ratepayer can compel a local authority to connect his property to a public drain without payment of a connection charge. *Held,* Plaintiff could not connect unless he accepted defendant's charge. *Dominion of Canada v City of Levis* [1919] AC 505 distinguished.) *Stubbs v Taumarunui Borough* (Supreme Court, Hamilton. August 1974 (A 102/73). McMullin J).

NATURAL JUSTICE

Predetermination of sentence by Magistrate—Bias arising from predetermination on Magistrate's part alleged—Remarks on sentencing and term of imprisonment imposed read by Magistrate from a statement prepared and typed before counsel for the accused had been heard—Magistrate had presided at defended hearing, adjourned case, read probation officer's report—No real likelihood or reasonable suspicion of bias—Judicature Amendment Act 1972, s 2. *Rowney v Police* (Supreme Court, Christchurch. 9 August 1974. Macarthur J).

PRACTICE

Right of appeal against interlocutory order not retrospective — Magistrates' Courts — Magistrates'

Courts Amendment Act 1974, s 5 inserting s 71A in principal Act, providing for appeals with leave from interlocutory orders—Amendment Act came into force on 29 June 1974 and held not to authorise retrospectively an appeal against an order made on 25 March 1974—Rule 162 of Magistrates' Courts Rules —Order by one Magistrate debarring a party from defending on the ground of failure to comply with order for discovery may be set aside by another Magistrate under r 127—*Haridas v Khan* [1971] 1 All ER 947 distinguished. *Storey v Langwell* (Supreme Court, Auckland. 16 August 1974 (342/74). Cooke J).

SALE OF LAND

Non-payment of deposit not fatal—Non-payment of deposit held not to terminate contract automatically —Vendor may waive requirement, as by settlement statement treating deposit simply as part of total purchase price—In that event failure of purchaser to pay any part of price on settlement date mentioned in contract is not fatal when time is not of the essence—*Watson v Healy Lands Ltd* [1965] NZLR 511 and *Myton Ltd v Schwab-Morris* [1974] 1 All ER 326 distinguished. *Jackson v Lock* (Supreme Court, Wellington. 2 August 1974 (A 329/73). Cooke J).

Legal aid at a premium—Lloyd's have introduced a legal costs and expenses insurance, giving cover for costs and disbursements up to £10,000 for an annual premium of £14, or lesser cover for lower premiums. Particulars are now being circulated to solicitors by Colchester brokers, Strover & Co Ltd, who say that the Law Society has confirmed that it has no objections. Cover falls into three categories: *taking proceedings,* arising from death or injury, loss or damage to goods, defective goods or services and any employment contract; *defending proceedings,* where they derive from death or injury to a third party or loss or damage to his goods, or any employment contract; *defending criminal charges,* although in this case costs awarded against the insured are not included. Care has been taken to give the insured a free choice of solicitors, while the underwriters still retain ultimate control. Also the insurers have protection against being called upon to finance hopeless cases, but the insured has a form of appeal to independent solicitors to adjudicate if there is a dispute. When the detailed exceptions and exclusions from liability are considered, the cover is not quite so straightforward as it at first seems. This is of importance to the solicitors who are being encouraged to be agents to sell this scheme. For example, there is no cover if the vehicle that happens to knock down your garden wall is owned by a local authority, if you are injured in an accident at a motor racing meeting or if you are sued for dismissing your daily help without the notice to which she turns out to be entitled. There are two points of general concern about the scheme. It is based on annual insurance contracts, but major actions last much longer: should there not be a guarantee of renewal for matters already undertaken, so that someone who has had insurance is not stranded in the middle of an action? Secondly, solicitors often, reasonably enough, ask for money on account in this type of work. In legal aid this is not necessary because the fund pays solicitors direct; here, however, the underwriters merely indemnify the assured, and then only if the conditions of the insurance are satisfied. This could be a practical impediment. —From *The Solicitor's Journal.*

Life sentence—"I can only say that from a personal point of view, Supreme Court Judges spend too much time on criminal jury trials of minor importance. Here again, one has to be very conscious of the rights of the defendant. A man with no previous convictions who finds himself charged with a minor theft stands, in my opinion, in a very dangerous position. If he is convicted of that crime, or of any crime involving dishonesty, the conviction haunts him for the rest of his life. The most assiduous rehabilitation procedures of the Department of Justice can do nothing to obliterate that conviction, and for that reason I would myself be reluctant to place any further limit on the character of those offences involving dishonesty which entitle the defendant to trial by jury. It is fundamental to our system of criminal justice that an accused person has a right, in any case of substance, to seek the determination of twelve of his fellow citizens and to be accorded that merciful liberation from technical transgression which a Stipendiary Magistrate, in the exercise of his statutory duty, is powerless to grant. So as in all things, the rights of the litigant must be considered as paramount. The due despatch of Court business is part of the process of securing the right of litigants but it must not, in my view, be allowed to outweigh individual rights." — MR JUSTICE MAHON, speaking to the Wellington District Law Society Seminar at Masterton.

BILLS BEFORE PARLIAMENT

Agricultural Workers Amendment
Annual Holidays Amendment
Antiquities
Appropriation
Arms Amendment
Broadcasting Amendment
Chattels Transfer Amendment
Cinematograph Films Amendment
Commerce
Crimes Amendment
Drugs (Prevention of Misuse)
Education Amendment (No 2)
Finance (No 2)
Government Railways Amendment
Hospitals Amendment
Inland Revenue Department
Insurance Companies' Deposits Amendment
Investment Bonds
Joint Consultation in Industry
Joint Family Homes Amendment
Joint Family Homes Amendment No 2
Judicature Amendment
Land and Income Tax Amendment (No 2)
Land and Income Tax (Annual)
Legal Aid Amendment
Life Insurance Amendment
Local Government
Magistrates' Courts Amendment
Maori Affairs Amendment
Marine and Power Engineers' Institute Industrial Disputes
Moneylenders Amendment
Municipal Corporations Amendment No 2
National Parks Amendment
Neighbourhood Noise Control
Pork Industry
Post Office Amendment
Property Law Amendment
Public Works Amendment (No 2)
Queen Elizabeth The Second Arts Council of New Zealand
Soil Conservation and Rivers Control Amendment
Transport Amendment
Trustee Savings Banks Amendment
Waitaki Lakes Recreation Area
Women's Rights of Employment

STATUTES ENACTED

Animals Amendment
Building Societies Amendment
Commonwealth Games Symbol Protection
Cornish Companies Management
Counties Amendment
Customs Acts Amendment
Dangerous Goods
Defence Amendment
Education Amendment
Estate and Gift Duties Amendment
Estate and Gift Duties Amendment (No. 2)
Farm Ownership Savings
Fire Services Amendment
Government Railways Amendment
Harbour Pilotage Emergency
Harbours Amendment
Hire Purchase Amendment
Home Ownership Savings
Housing Corporation
Imprest Supply
Land and Income Tax Amendment
Licensing Amendment
Licensing Trusts Amendment
Local Elections and Polls Amendment
Marine Pollution
Municipal Corporations Amendment
New Zealand Export-Import Corporation
New Zealand Superannuation
Ngarimu V.C. and 28th (Maori) Battalion Memorial Scholarship Fund Amendment
Niue Amendment
Niue Constitution
Perpetuities Amendment
Physiotherapy Amendment
Private Investigators and Security Guards
Public Works Amendment
Rates Rebate Amendment
Royal Titles
Rural Banking and Finance Corporation
Sale of Liquor Amendment
Sales Tax
Sales Tax Amendment
Scientific and Industrial Research
Social Security Amendment
Stamp and Cheque Duties Amendment
Time
Tobacco Growing Industry
Trustee Amendment
Unit Trusts Amendment
War Pensions Amendment
Wheat Research Levy

REGULATIONS

Regulations Gazetted 5 September 1974 are as follows:

Economic Stabilisation (Motorcar Hiring) Regulations 1971, Amendment No 2 (SR 1974/229)
Hire Purchase and Credit Sales Stabilisation Regulations 1957, Amendment No 27 (SR 1974/230)
Income Tax (Non-Resident Investment Companies) Order (No 2) 1974 (SR 1974/227)
New Zealand Superannuation Regulations 1974 (SR 1974/228)

Discrimination—A correspondent's claim that solicitors are being discriminated against by the Department of Justice has been substantiated. On asking at the Registrar-General's office for forms RG 120 and 119, our enquirer was blandly told: "I'm sorry, we don't supply them to solicitors. They charge for filling them in." The printed forms of Deed Poll and supporting Statutory Declaration, it seems, are only provided for those who want a do-it-yourself change of name.

Next, the Small Claims Court. After that the Divorce Court?

DIRECT ACTION

An extract from an address to the New Zealand Psychological Society, given by the HON DR A M FINLAY, QC.

The aspect of direct action that has captured public attention occurs in the industrial arena and indeed is not so much direct action itself as its consequences. Specifically I refer to the legal remedy of injunction. It is not commonly encountered in an industrial setting and the instances of this kind to be found in the law reports consist more of one of an employer attacking a competitor rather than an employer seeking recourse against employees. There is in New Zealand, however, nothing to prevent either employer or employee or groups of either seeking redress against the other. In England, and I will develop this later, the situation is different and in all countries there is a feeling that the rigid and formalised procedure of the Courts is inappropriate to the emotionally charged atmosphere of an industrial dispute and tends to inflame rather than resolve the issue—if indeed it is sufficiently flexible—perhaps devious is the word—to get to the heart of the real facts of the issue. It is, of course, a truism that what lies on the surface and is the ostensible cause of an industrial dispute often serves to conceal much more deeply seated grievances. This aspect of the matter is catered for by one recognised characteristic of injunctions, namely, that they are a discretionary remedy and will not be given by the Courts if any other remedy such as an award of damages is a sufficient remedy.

The form of direct action upon which public attention has been focussed is the concerted withdrawal of labour—the strike—and it is an odd circumstance that this attention should have been aroused at the very time when the strike as such ceased to be illegal. For many years, ever since the Industrial Conciliation and Arbitration Act entered our law in 1894 (and then widely and properly regarded as a milestone in labour law) until it was repealed in 1974 by our present Industrial Relations Act of 1973, strikes were forbidden. The principle of the law was that if parties could not reach agreement in conciliation, all disputes were resolved and the resolution required to be accepted by the edict of the Arbitration Court. Any strike was illegal and could in theory have been the subject of an injunction to prevent it. Throughout this long period, however, good sense prevailed and the notion that the law was too clumsy an instrument dissuaded employers from seeking to resort to it. I should add, too, that the law itself recognises its own limitations and it is settled that an injunction will not issue to compel performance of personal services. The only instance I can recall approaching such an attempt was when the coalition war cabinet prosecuted a large number of Waikato miners for their defiance of war-time working regulations. The result was to clog up the small Huntly Courthouse and bring the law into contempt.

As I mentioned, the situation in Britain is different. In 1905 the Taff Vale case resulted in a huge award of damages against a railway union in favour of employers and in the following year the Trade Disputes Act removed from civil process any act done "in furtherance of a trade dispute". There is some small doubt whether this extends to injunctions, but the consensus is that a trade union is totally exempt from any liability for actions under this head. Be it noted, however, that it is confined to a dispute in their own industry and the protection does not apply to a boycott undertaken by a union in order to influence a dispute in another industry. There, as here, moves have recently been made to transfer industrial issues to a special tribunal which in England was invested with the power to enforce compliance by fines and imprisonment. In practice this has not proved to be a conspicuous success and hardly encourages us to emulate them. Nonetheless, it is fitting that tactics and procedure adopted elsewhere should be analysed and debated and it is not without significance that for nigh-on 70 years Liberal, Conservative and Labour administrations in the United Kingdom have accepted the principles of the law enacted in 1906. If it were concluded that some specialised tribunal were better fitted to deal with material of this kind than the traditional Courts of law, this would not be to set such a group apart from and above the law. Many occupational groups by the very nature of their trade or profession are authorised to act in a way forbidden to the ordinary citizen, and their actions judged by different standards and controlled by different sanctions. Doctors, for in-

stance, may take liberties with the body that would constitute offences for other folk. Customs and Health officials have powers of entry denied to others and so on, but in exercising them they do not operate outside the law. It is conceivable that the specially sensitive area of industrial relations may also call for its own special code of behaviour and control, including penalties, and perhaps their converse, rewards.

On one point I am utterly firm—the same rules of law enforcement must apply equally to all, and even to assert the right of one affected party to decide for himself or itself which laws are approved and will be obeyed is to call in question our whole legal and constitutional heritage.

Before I leave the subject, I would like to add one thought on the law as it now operates. I have mentioned that the grant of an injunction is discretionary, and in order to exercise its discretion properly a Court needs to be in possession of *all* relevant facts. However it can act only on the evidence before it and it is for the parties to the litigation in question to determine what that evidence will be and normally each will call only the evidence that suits his case. The result may well be, and I suggest often is, that the Court is seized with a limited vision of the situation and the public interest inadequately put before it. There is much merit, I believe, in a suggestion that in cases of this kind the Courts be given power on their own initiative to appoint counsel to represent the public interest and see that the sectional evidence presented by directly interested parties is supplemented by evidence as to how the public might be affected by different propositions put forward and different courses open to the Court.

THE USE OF INJUNCTIONS IN INDUSTRIAL LAW

By I. T. SMITH, *Lecturer in Industrial Law, University of Canterbury.*

Considerable controversy was created recently by the granting of an injunction against a union in a dispute in Auckland. Demands have been made in several quarters for the restriction or abolition of the injunction in industrial matters, but unfortunately there has been very little clarity, and even less rational thought, in most of the controversy. The aim of this paper is quite simply to consider how an injunction can be granted in the industrial context, and how any possible reforms could be made. No views are expressed on the essentially political question of whether any reform is necessary.

The subject will be considered in three parts —first, the substantive bases for an injunction; second, certain rules relating to an injunction; third, possible ways of restricting the use of injunctions.

(1) Substantive bases for an injunction

(i) *The industrial torts*—This term covers the three independent torts of intimidation, inducement to breach of contract (or, on Lord Denning MR's wider view in *Torquay Hotels v Cousins* [1969] 2 Ch 106, simple "interference with contract") and conspiracy; the essentials of these torts will now be considered briefly.

Intimidation consists of a threat of an unlawful act causing either the plaintiff to act to his own detriment, or a third party to act to the detriment of the plaintiff. Notice that the threatened act must be in some sense "unlawful".

Inducement to breach of contract may be either indirect or direct. Indirect inducement arises where the defendant acts indirectly, through a third party, to disable another from performing his contract with the plaintiff. This form of the tort requires the use of unlawful means (see *Thomson v Deakin* [1952] Ch 646), for otherwise it could prejudice almost all strike action (per Lord Denning in the *Torquay Hotel* case). Direct inducement arises where the defendant directly approaches another and persuades him (with or without the use of threats) to break a contract with the plaintiff. Here, the means can be lawful and the tort still arises. However, this is subject to the defence of justification. With regard to inducement, this defence is badly defined—it would seem that self interest and legitimate trade desires are not necessarily per se justification, though the exercise of some form of "duty" may be. This latter idea was probably extended by Speight J in the leading New Zealand case on the industrial torts, *Pete's Towing v NIUW*

[1970] NZLR 32, to cover the union official's "duty" to intervene on behalf of his members and to attempt to avoid industrial strife, thus giving him a defence to the tort of direct inducement.

Conspiracy can be by unlawful or lawful means. Where it is by unlawful means (which may include calling an unlawful strike), justification probably is no defence. Far wider than this, however, is a conspiracy to injure the plaintiff by lawful means. Here, an action which would be lawful if done by an individual may become unlawful when done by a group, through the so-called "magic of plurality". However, this form of the tort is probably of waning importance because of the generally liberal approach taken towards the very essence of this tort, the defence of justification. This defence is considerably wider than it is with regard to inducement, and it will generally cover any acts done by the defendant for a "legitimate purpose", which covers acts of economic or commercial self-interest, and, of importance here, a union acting in the interests of its members. Unless, therefore, the defendant was motivated by spite, vindictiveness or malice, this form of liability might not arise, particularly as the burden of proof throughout normally rests with the plaintiff (see the *Crofters'* case [1942] AC 435; *Brown v Rolls-Royce Ltd* [1960] 1 WLR 210). The defence is therefore wide, and, as Speight J said in *Pete's Towing*, if you have a defence to inducement you will a fortiori have a defence to conspiracy.

The importance should be noticed generally of the "unlawful means". If they are present, the case is taken out of the realms of justification, and there is the additional possibility of the tort of intimidation. Before *Pete's Towing* the prevailing view was that all strikes in New Zealand were unlawful under the Industrial Conciliation and Arbitration Act 1954. In that case, however, Speight J strained the wording of that Act to hold that strikes were not necessarily unlawful, which effectively knocked the bottom out of the plaintiff's case, particularly by disallowing intimidation and making it a conspiracy by lawful means with the consequential wide defence, and he thereby found for the union. The position now is that the Industrial Relations Act 1973 does not impose any blanket illegality on strikes (only on strikes over a dispute of right), so that reinforces Speight J's judgment with regard to other kinds of strikes. There is thus less possibility that simple strike action will provide an unlawful element and this makes the plaintiff employer's case more difficult to establish, thereby enhancing the position of the defendant union.

The above is only a very brief discussion of the industrial torts; they are important because they are the prime area where an employer may seek an injunction against a union—injunctions are not granted in gross on the grounds of general inequity; they must be linked to a substantive cause of action, and the employer's action here would seem to have been weakened by *Pete's Towing* and the Industrial Relations Act 1973.

(ii) *Ultra vires*—A union must act intra vires its rules, and those rules must be intra vires the statutory object contained in the Industrial Relations Act 1973, s 163, ie a union must be "lawfully associated for the purpose of protecting or furthering the interests of employers, or, as the case may be, of workers, engaged in any specified industry or related industries in New Zealand . . .". If an action by the union is ultra vires the rules or the Act, a member can challenge that action, and the obvious form of relief is the injunction because the member wishes to actually stop the transaction, not just sue for damages later, which may be more unrealistic. Two examples might be considered. First, the Wellington carpenter who got an injunction to restrain his union from going on strike (at the time of the Auckland troubles, and the jailing of a union secretary) without a secret ballot, which was a requirement under the rules. Second, the case of *McDougall v Wellington Typographical IUW* (1913) 16 GLR 309, where a union in one industry voted funds to help a striking union in another industry, and this was held to be ultra vires as outside the proper scope for an industrial union having regard to the statutory object. On this second basis for an injunction, three points might be made. First, it is an important right for a union member to ensure that his union acts properly. This situation is outside the realms of majority control, as the majority generally cannot ratify an ultra vires act (and so the individual is not ruled out by the rule in *Foss v Harbottle* (1843) 2 Hare 461). The member would be left in a much weaker position if this right were to be taken away.

Second, is this action restricted to members? Who has locus standi? In particular, might an employer have locus standi? In the Auckland case, the Northern Drivers Union was striking to aid people in a different industry, which was arguably ultra vires. If so, could Mr Dromgool have claimed an injunction to restrain this

activity on the grounds that it was ultra vires the union? As usual, we look to company law for guidance on the law relating to unions (particularly as that is where the whole ultra vires doctrine comes from) and that is unhelpful to the employer, as only members and creditors of the company would seem to have locus standi, and this, by analogy, would rule out an employer. However, that is the situation with regard to an ordinary modern commercial company. Unions today are increasingly being viewed as public institutions (see Lord Denning's views on union rules constituting a "legislative code" fully reviewable by the Courts, rather than their older rationalisation as a contract, in cases such as *Edwards v SOGAT* [1971] Ch 354); it is therefore at least arguable that a better analogy would be, not with the modern commercial companies, but rather with the original statutory companies of the early nineteenth century (which played a major role in the formation of the ultra vires doctrine), particularly the railway companies, each of which was established under a separate statute. In a line of old cases on these companies in the eighteen fifties and sixties, statements can be found that one of the reasons for ultra vires being applied was to safeguard the public interest in such important national concerns, not just the shareholders' interests. Unfortunately, there appears to be no case in which a member of the public was suing for relief (all the cases considered by the author being shareholder actions), but if there is this "public interest" in major institutions, it is just possible that an aggrieved member of the public (particularly one with a financial interest, such as an employer being hit by an ultra vires strike) could have locus standi to challenge that ultra vires act.

Third, and possibly more practicable, the ultra vires act in question could provide the unlawful element for the purposes of an action under one of the industrial torts, particularly if the strike was not per se illegal under the Industrial Relations Act.

(iii) *Infringement of a member's rights*—Here, again, the possibility of an injunction is an important remedy for an individual member, particularly when he is threatened with improper expulsion from the union (a "sentence of industrial death" in a country with in name unqualified preference, in fact compulsory unionism). Once again, it is practical relief that is required, not just damages after the event.

To conclude on this first part of the paper, three major bases for an injunction have been mentioned:

(i) an industrial tort—primarily a remedy for an employer (though available to a member being victimised by his union, as was so obviously the case in *Huntley v Thornton* [1957] 1 WLR 321);

(ii) ultra vires—primarily a remedy for a member, but some doubt as to whether it might be available to an employer;

(iii) infringement of a member's rights—obviously a member's remedy.

(2) Rules relating to injunctions

While no comprehensive review of the law relating to injunctions is attempted here, it is suggested that there may be, in that body of law, further scope for a union to argue against the granting of an injunction, even if the employer has shown one of the above substantive bases. Four points in particular will be mentioned.

First, the plaintiff must show that damages would be an unsatisfactory remedy. Second, the plaintiff must establish his claim to a legal action, ie he is put to proof (though it must be admitted that once he can show such a cause of action, the injunction that is granted can be very wide in its effects, particularly a quia timet injunction to restrain a threatened act). Third, the discretionary nature of the remedy should be noticed. Although this discretion is not unfettered and is to be exercised in accordance with decided cases, those cases (if an over-generalisation might be excused) tend to suggest that an injunction should not be granted if it would be in some way an inappropriate remedy. This general principle is capable of being developed into a good argument in favour of a defendant union. Fourth, the Court might look at the conduct of the plaintiff employer. He who comes to equity must come with clean hands; might this be another good argument for a union, ie that the substantial blame for the situation lies with the employer? It is obvious in *Pete's Towing* that Speight J took that view of the employer (though nothing in fact hinged on that in a legal sense). Could the same have been said of Mr Dromgool's conduct in refusing to accept the Shipping Tribunal's decision on the manning of his boat? Unfortunately, such an argument in that particular case must be weakened by the subsequent finding in another case that the tribunal had acted in excess of its jurisdiction.

The basic point from these random observations is that an injunction is not granted automatically and a union may have several lines of defence even though an employer has established a cause of action.

It is true that the requirements for an interlocutory injunction are of necessity less stringent upon the plaintiff employer (see below), but it might be worth noticing that Stamp LJ, in his dissent in *Hill v Parsons* [1971] 3 WLR 995, said that an interlocutory injunction should only be used to uphold the status quo with a view to settlement of the dispute at trial, not with a view to the happening of some other event (in that case the coming into force of the Industrial Relations Act 1971 (UK), which would protect Mr Hill from the union pressure). If this is correct, it again puts the employer back to reliance on his actual cause of action, and it would restrict the use of interlocutory injunctions by employers for ulterior, more practical, and perhaps more Machiavellian reasons.

To sum up the position that has been reached so far in this paper, the following three general points are put forward. First, an injunction must be tied to a definite cause of action. Second, an employer does not necessarily have such a cause of action whenever an industrial dispute arises, and therefore the injunction is not a common weapon for the employer to use whenever he chooses to do so. Third, even if the employer is prima facie entitled to relief, he will not necessarily be granted an injunction.

It is therefore at least questionable whether the injunction is such a drastic and unconscionable legal remedy as some union leaders would suggest. However, as already stated, the political question involved is whether any reform is desirable, and no opinion on that is offered here at all. The purpose of the rest of this paper is simply to point to three possible ways that reform could be made, if it were thought necessary, listing certain points pro and con each possibility.

(3) Possible ways of restricting the use of injunctions

(1) *Remove the substantive basis*—In this context, this would mean removing tort liability from unions, as was done in the United Kingdom by the Trade Disputes Act 1906 (passed in reaction to the *Taff Vale Case* [1901] AC 426, where the House of Lords held that a union could be sued in its own name, and was liable in tort).

Section 4 of the 1906 Act gave complete immunity to a union from all actions in tort howsoever the liability arose. This covered injunctions as well as damages, and was extremely wide. Sections 1 and 3 gave immunity to individuals, acting "in contemplation or furtherance of a trade dispute", from the torts of conspiracy (using lawful means, as in *Quinn v Leatham* [1901] AC 495) and inducement to breach of contract. This immunity was also wide, though the actions in question had to be during a "trade dispute" (which would not cover, for example, a personal quarrel), and there were considerable judicial efforts to evade it, particularly in *Rookes v Barnard* [1964] AC 1129, which revitalised the tort of intimidation and held that it did not come within the wording of either s 1 or s 3. Parliament had to rectify this by passing the Trade Disputes Act 1965, which gave immunity to individuals from the tort of intimidation committed in the course of a trade dispute. In this way fairly full coverage was maintained, but even so it was increasingly attacked. It was avoided by Judges when possible, eg in *Stratford v Lindley* [1965] AC 307 the House of Lords held that a recognition dispute involving a high degree of trade union rivalry was not a trade dispute. Also, the Donovan Report on trade unions thought that the union immunity in s 4 was too wide, and should at least be confined to trade disputes.

The law in the United Kingdom was altered by the Industrial Relations Act 1971, which continued the individual immunities in the 1906 and 1965 Acts, but entirely abandoned the union immunity in the 1906 Act, s 4.

Should this form of legislation be introduced in New Zealand to remove the substantive basis?

Arguments for—(1) It would generally satisfy present union pressure for reform, as it would remove the prime basis for an injunction at the suit of an employer, which is what seems to be worrying the unions.

(2) At the same time, it would not remove the possibility of injunctions at the suit of members for ultra vires or breach of their rights, so their position would not be weakened. (Notice, however, that if this were done, the question of whether an employer could challenge a union action on the basis of ultra vires could become material.)

(3) The limiting concept of "trade dispute" is a good one, as it means that a union official is protected while engaged in bona fide union activities in industrial relations, but still open

to suit if pursuing personal vendettas or otherwise acting capriciously, misusing his position of power.

Arguments against—(1) The first argument against such legislation is invariably that it would be putting the unions above the law, removing from them liability that lies upon other bodies and individuals.

(2) In 1906, United Kingdom unions were in a far weaker position than they are now, and were still in need of legislative protection (just as, at an earlier stage, they had to be protected from criminal conspiracy in the Trade Union Act 1871 and the Conspiracy and Protection of Property Act 1875). Can this argument still apply today, either in the United Kingdom or New Zealand? Do unions still need this special protection because of inherent weakness? In New Zealand, there has never been any such legislation, even when unions were weaker; now, it is arguable that such legislation would only enhance a position in society that some would say is already too strong. This would be particularly so in the light of the recent moves in the United Kingdom away from such protection, at least for unions if not for individuals.

(ii) *Remove the remedy itself*—This would mean simply providing that injunctions shall not be granted against unions. It would have to be considered whether this would be a total ban, or only a ban on injunctions at the suit of an employer (which might be difficult to draft satisfactorily).

Arguments for—(1) This would best appear to give the unions what they are wanting, and remove the actual specific complaint at present being made.

(2) It would limit the possibility of union leaders being jailed.

Arguments against—(1) It would raise a considerable problem with regard to other possible remedies, as an injunction is not the only one possible—there would also be a declaration, a motion by originating summons, or even in certain circumstances specific performance. For example, *McDougall's* case (supra) was not concerned with an injunction, but instead simply with an approach to the Court by way of originating summons to determine whether the donation of funds was ultra vires. Are all of these remedies to be removed too? If so, how far is it to go? It could be argued that the threat of damages could deter a union, so are damages to be entirely banned too? If these other remedies are not removed, there is the further problem that although a declaration, or motion by originating summons, has no actual order attached to it (subject now possibly to the Judicature Amendment Act 1973), it is obviously meant to be complied with, and so is in effect much the same as an injunction.

(2) If not carefully restricted to a ban on injunctions at the suit of employers, any such move could have a drastic effect on the rights of the members of an industrial union. How are they to enforce those rights? If there were no direct remedy, all they could do would be to accept the transgression by the union and sue for damages, which is often not at all what is required. Two examples might be considered. First, the case of *Prior v Wellington United Warehouse IUW* [1958] NZLR 97. Prior was nominated as a candidate for the position of union secretary. The union executive (which included the only other candidate, one Sweeny by name) met in private before the annual general meeting and decided (as they had no power to do) that Prior was not eligible, so they simply declared Sweeny elected by default. Haslam J held that the executive had no such power to do so. What was to be the remedy? It would have been of little use to Prior simply to grant damages (which anyway would have been difficult to quantify). In fact, the Judge granted a mandatory injunction compelling the union to hold a regular election in which Prior could partake—in the circumstances, the obvious remedy. The second example is quite simply any wrongful expulsion situation, particularly in New Zealand where unqualified preference means that expulsion from a union brings loss of employment and livelihood in that industry. Again, the vital remedy is some form of direct relief reinstating the man in the union, the most obvious form of direct relief being the injunction, as in one of the leading New Zealand industrial law cases, *Gould v Wellington Waterside Workers IUW* [1924] NZLR 1025.

(3) The emotive content of the argument against injunctions is itself an argument against this second solution, for the emphasis on "injunctions" simpliciter ignores the basic legal issues, ie the bases on which they can be granted. In the Auckland dispute, there was little newspaper coverage of the proceedings for the injunction —the great outcry came with the jailing of Mr Andersen, which was quite devoid of any legal interest, being simply one of the ordinary ways in which the in personam remedy of injunction is enforced. The original proceedings were lost sight of, and simply to axe the remedy of injunction would be to continue this oversight.

(4) By ignoring the bases of an injunction, as above, the industrial torts would be left to operate, with the remedy of damages (potentially of very large amounts, especially in actions for inducement to breach of contract). It is arguable, as already stated, that the threat of such damages could be just as much a deterrent on union activity as an injunction, particularly as the principal remedy for non-payment of damages would be attachment of union property and funds, not the creation of trade union martyrs by committal.

(iii) *Leave the substance and remedy as existing, but transfer jurisdiction to the Industrial Court*—This proposition has been mooted as a compromise solution, which would avoid the legal difficulties and dangers inherent in tampering with either the substance of the employer's claim, or with the remedies available. Again, the arguments each way will be considered.

Arguments for—(1) The Industrial Court is a specialist body experienced in industrial matters generally, particularly as it sits with, in effect, assessors from both sides of industry.

(2) Even though substantive tort liability would remain, and injunctions could still be granted, it is arguable that the Industrial Court would give more weight than an ordinary Court to a union's wider arguments against the granting of an injunction. A possible analogy in this respect would be with the experience of the National Industrial Relations Court, set up in the United Kingdom under the Industrial Relations Act 1971 to exercise a general jurisdiction over industrial law matters.

Interlocutory injunctions are of major importance in industrial law because of their speed and effectiveness—if necessary they can be granted ex parte on minimal notice, and if granted they are often so effective in practice that the matter never actually comes to trial. One of the main legal requirements for the granting of such an injunction is the "balance of advantage", ie the plaintiff employer must be able to show that he stands to lose more if the injunction is not granted than the defendant union stands to lose if it is granted. This seems to be often the deciding factor, particularly as the plaintiff employer only has to show prima facie evidence of a cause of action. A two-part article in the *Industrial Law Journal* by S D Anderson and P L Davies ((1973) 2 ILJ 213 and (1974) 3 ILJ 30) compares the approach of the ordinary Courts before the Industrial Relations Act 1971 with that of the NIRC since 1971, coming to the following conclusions.

The ordinary Courts were seen to be quite willing to grant interlocutory injunctions to employers. One of the main reasons for this was that the employer can show a definite prospect of financial loss if the injunction is not granted, whereas normally a union cannot show such tangible prospects if it is granted. Thus, the Courts have tended to ignore the wider, more practical, interests of unions when looking at the balance of advantage. For example, a union may have a great interest in the successful continuation of a strike (eg to force the reinstatement of improperly dismissed members), but the concrete financial loss that the employer faces through the continuation will tend to weigh more heavily with the Court, which will tend to grant the interlocutory injunction. For an example of that in New Zealand, see the judgment of Speight J in *Flett v Northern Drivers' Union* [1970] NZLR 1050.

On the other hand, the NIRC has so far tended to take a considerably wider view in injunction proceedings, being prepared to consider the wider interests of unions, looking more into the underlying dispute itself, rather than the strict legality of granting an injunction. It has been prepared to look more into the conduct of the plaintiff employer to see where the merits lie, and generally has placed more emphasis on finding a practical solution for the actual dispute.

This comparison would lend support for the view that jurisdiction ought to be given to the specialist Industrial Court in this country.

Arguments against—(1) This proposal is based on the unexpressed premise that the ordinary Courts are unsympathetic towards unions, and do not have the necessary expertise for industrial matters. Is this a valid premise? On the question of the procedure for granting interlocutory injunctions, the above article would support it, but in the wider context of the imposition of tort liability it may be more difficult to maintain such an argument. Three examples might be considered. First, the Courts have insisted that the tort of indirect inducement has to be by unlawful means because of the consequences on strike action if it could be committed by simple lawful means. Second, the Courts have given the already-mentioned wide construction of the defence of justification with reference to the tort of conspiracy. For example, in *Scala Ballroom v Ratcliffe* [1958] 1 WLR 1057, a musicians' union was held to be justified in conspiring to force the plaintiff to allow coloured persons into its dance hall. This offended the union's members only in a very

general way, but still justification was allowed and the injunction was refused. Moreover, the decision in *Pete's Towing* shows a more liberal approach to justification in the field of inducement too. Third, there is the overall decision in *Pete's Towing* where the Judge declared strikes to be lawful contrary to the relatively plain wording of the Industrial Conciliation and Arbitration Act 1954, which meant that he could hold for the union and refuse damages.

(2) This proposal would entail putting highly contentious matters into the Industrial Court, whose essential function under the Industrial Relations Act 1973 is more simply the construction and interpretation of awards and collective agreements. It is possible that this could bring the Court into disrepute with the unions if it did grant injunctions; this could undermine union confidence in the Court, as did the now infamous nil general wage order. This is only a possibility, but if it did happen the danger is that it could jeopardise other more important aspects of the conciliation and arbitration system.

Conclusion

This paper has looked at the bases for an injunction in the industrial setting, these being primarily the industrial torts, ultra vires, and breach of members' rights. It is suggested that the first of these may not be as widely applicable as might be thought at first sight, and that the second and third constitute important rights for the individual member of a union who must not be overlooked in the present vague controversy over injunctions. Next, certain rules relating to injunctions were considered, the suggestion here being that even if an employer has a prima facie cause of action the union may still have several lines of argument open as to why an injunction should not be granted. Finally, the above three ways of reform were considered, with the advantages for and against each, as they appear to the author. These possibilities are to remove the substantive basis, to remove the remedy of injunction, or to give jurisdiction to the Industrial Court.

As previously stated, no opinion is given here on the primary political question of whether there is a need for any reforms. What is suggested is that the present general controversy has so far been dangerously irrational, and that if greater thought is not given to this whole problem before any reform is attempted the result could be highly unsatisfactory in a legal sense, particularly if the rights of individual union members continue to be ignored, and if there is a continuation of the present failure to distinguish between simple remedies, such as the injunction, and the far more important question of the substantive bases upon which those remedies can be granted.

NEW JUDGE OF INDUSTRIAL COURT

Mr R D Jamieson, SM, has been appointed Judge of the Industrial Court to succeed Judge Blair, who retired at the end of August.

Mr Jamieson is chairman of the Licensing Control Commission, and the Crime Compensation Tribunal and is also the Maritime Appeal Authority and the Pharmacy Authority.

Mr Jamieson practised law in Ranfurly and New Plymouth before being appointed a Magistrate in 1961. He has had considerable experience as chairman of marine inquiries which include those into the loss of the *Wahine* and the *Kaitawa*. He was also chairman of the Commission of Inquiry into New Zealand Shipping in 1970 and 1971.

Announcing the appointment, the Minister of Labour, the Hon Hugh Watt, said he was pleased a person of Mr Jamieson's calibre and wide experience was assuming the most important post of Judge of the Industrial Court.

The Minister expressed the Government's appreciation of Judge Blair's service to the community. Industrial development in New Zealand had led to new industrial legislation and the creation of new institutions in the Industrial Commission and the Industrial Court. The Judge had carried out the arduous duties of his offices in a transitional era, and had discharged them faithfully and conscientiously.

Fertile fields—"I take it that if rams trespass in a field where there are ewes, it is as much a natural and ordinary consequence of the trespass that they should get the ewes with lamb as that they should trample down and eat the grass." Williams J in *Cargill v Mervyn* (1876) 3 NZ Jur (NS) 51.

THE LAWYER AND THE COMMUNITY

Part III—Community Legal Services in the United Kingdom

ROBERT LUDBROOK *continues his review. He has now been awarded the $1,000 Bruce Elliot Memorial Prize for 1974 for his "outstanding contribution to the law, the legal profession and their clients"—recognition so well deserved as to be widely expected. Previous articles appeared at [1974] NZLJ 374 and 396.*

Toynbee Hall in East London and Cambridge House in Southwark have been offering free legal services to the poor for 75 years and the Edinburgh Legal Dispensary has been operating a free legal advice programme since 1900. These are in the nature of charitable trusts set up by Victorian benefactors with a social conscience.

In the 1930s the concept of a "poor man's lawyer" emerged. Lawyers would go into the poorer parts of the cities and give legal advice. These fulfilled a need but grew up in a haphazard fashion without central direction.

The Second World War saw the emergence of the Citizens' Advice Bureau, which has since become established as a permanent part of the life of the English community. Some Citizens' Advice Bureaux were able to find a sympathetic lawyer to offer a legal advice service, but the legal profession generally showed little interest in the scheme.

There are 550 Citizens' Advice Bureaux in the United Kingdom, but even today only 90 offer free legal advice from a qualified lawyer. A legal adviser visits the Bureau periodically to see a few carefully selected clients. In some areas the local Law Society has prepared a roster of solicitors and the Bureau arranges a convenient time for the lawyer to call at the Bureau to see a particular client. This is a back-up legal service to the general advice service offered by the Citizens' Advice Bureaux.

In 1968 the Society of Labour Lawyers in a booklet, "Justice for All", saw the need to bridge the gulf between lawyers and the people. Since then, there has been a growing recognition of the problems and a variety of attempts made to set up community legal services.

Law centres

The first venture to gain widespread public notice was the North Kensington Law Shop which opened its doors in 1970. Peter Kandler, an articulate and outspoken apologist, explained in a television interview, "We are trying to lose the aura of respectability which surrounds the lawyer's office and keeps many people away". He hoped that people would think of the Law Shop lawyers, not as aloof professional men, but as "friends with particular abilities". He criticised existing legal advice services as "poor man's lawyers providing a poor man's service". The Law Shop aimed to provide a first class service, at least equivalent to that offered by private law firms.

He saw the role of the Law Shop, not only as friends of the poor and underprivileged, but as "ruthless professional commandoes", ready to spring to the defence of the poor and oppressed and having at their command an artillery of legal remedies.

Peter Kandler hoped eventually to involve the whole legal profession—he was fully aware of the inadequacy of a few overworked idealists struggling along on a shoestring budget.

Peter Kandler's novel ideas and outspoken opinions succeeded in attracting a great deal of publicity. He convinced many sceptics of the need for some form of community legal service and he criticised the Law Society for their lack of initiative in this field—although the Law Society did, in fact, support the Law Shop.

The North Kensington Law Shop is now the North Kensington Neighbourhood Law Centre and deals with 2,000 cases each year. It employs three qualified solicitors, one articled clerk, a receptionist and a bookkeeper, who are assisted by volunteer helpers. It was the first genuine law centre in England. It offers a full legal service including Court representation.

Since 1970 there has been an explosion of community legal schemes. These go under a variety of names: Legal advice centres, neighbourhood advice centres, community law centres.

In 1971, 19 centres of this type opened in the United Kingdom and by August 1972 a

further 14 were established or about to be established. Various reasons can be seen for this explosion.

- A growing social conscience (some people would say the pangs of guilty conscience) on the part of the legal profession.
- The recognition of the vast unmet community need for legal services. All centres have been overwhelmed with enquiries and the demand for their services appears to be almost limitless.
- The growth of pressure groups both inside and outside the legal profession. The Legal Action Group formed in 1970 has been particularly active in promoting and co-ordinating community-based legal schemes. Many interest groups and community associations are now becoming actively involved in community affairs and are finding that many social problems can be resolved through legal channels.
- Availability of finance—funds are now available from Government through local authorities as part of the urban programme.

A criticism has been levelled at local law societies that they have contributed little to the introduction of community legal services and have tended to be "either indifferent or hostile". Many of the new ventures that have been started have soon become aware of the immense problems involved in setting up and running a law centre, drawing on the services of busy practising lawyers giving voluntarily of their time and skills. Most are trying to work towards a scheme similar to the North Kensington Neighbourhood Law Centre by obtaining sufficient funds to employ a qualified lawyer.

An experiment aimed at providing needy areas with more solicitors is being tried at Southwark. A central London firm has set up a branch office in the area in return for an undertaking by the Southwark Borough Council to guarantee any deficit it may incur in running costs. It is believed that if such guarantees can be given by local authorities socially conscious solicitors will be encouraged to set up offices in areas that lack adequate legal services.

There are in the United Kingdom over 350 lawyers seeing more than 20,000 people a year through these various community legal schemes. The Legal Action Group believes that the experimental ventures that have got under way should be regarded merely as the forerunners of a comprehensive programme, the aim of which is to create a network of salaried lawyers to cover areas where private firms are not accessible and to provide special assistance to deprived areas. The programme would complement, not compete with, private practitioners and would work through neighbourhood law centres and also work through existing community groups on specific projects.

A NEW PENAL POLICY FOR YOUNG OFFENDERS

The Advisory Council on The Penal System's report "Young Adult Offenders" released in London in May has recommended that the present custodial sentences of imprisonment, borstal training and detention centre training for young offenders aged between 17 and 19 years be abolished. In their place the Council has recommended a new form of custodial sentence to be known as a Custody and Control Order. A stricter non-custodial sentence to be called a Supervision and Control Order is also recommended.

The report is undoubtedly an important one. Offenders in the 17 to 21 years age group represent about 25 percent of all those convicted of indictable crimes in Britain and also about 25 percent of those sentenced to prison. Since New Zealand also suffers from the universal problem of increasing juvenile delinquency and since the present avenues available for dealing with young offenders are, by and large, the same as those which presently exist in Britain, the reasoning behind the report and its recommendations is relevant to the consideration which the Justice Department and other bodies in New Zealand are presently giving to reform in this field.

Special custodial sentences for young offenders as such were originally recommended in Britain by a government committee 80 years ago. As in New Zealand, their subsequent operation has not been very successful and they have generally fallen well short of their purpose of being an effective means of treating juvenile offenders. Implicit in the actual operation of the borstal system has been the belief

frequently held by those sitting on the bench that if one period of incarceration has failed then the only answer, indeed the only option, is to impose another. In this regard, the Council clearly accepts the results of most research in this field that in the long term there is a better chance of successfully influencing young offenders to stay on the straight and narrow by supervision in the community than by committing them to custody. Similar sentiments have recently been expressed in the United States where a group of New York Judges has claimed that in many cases custody has proved worse than useless as an answer to the problem of juvenile crime and that the rate of recidivism is so high there that the Courts have become mere "revolving doors" as previously convicted young offenders repeatedly appear to be sentenced to further terms of custody. In Britain the rate of recidivism among young offenders sentenced to prison or borstal is over 50 percent. This no doubt influenced the Council in its general recommendation, unanimously supported by its members, that a new direction in penal policy for young offenders towards rehabilitation within the community be adopted.

In principle, this recommendation is to be lauded. Probably the main objection to it is that it involves the punitive and 'public interest' elements of sentencing being submerged by the rehabilitative element. However, almost certainly the majority of those engaged in the field of dealing with juvenile crime, including the police, social workers, probation officers, lawyers and those on the Bench, take the view that as far as possible the primary consideration when sentencing a young offender (as distinct from an adult) is his personal interest and reformation, rather than the punitive and deterrent interests which society as a whole may have in the matter.

The Council considered that such a switch in direction of current penal policy could be achieved by merging the three present types of custodial sentences in Britain (prison, borstal and detention centre) into a new, single Custody and Control Order. Under such an order the Court could sentence a young offender to imprisonment for a maximum period but the decision as to when in fact he was to be released would be the responsibility of the Home Office, acting on the advice of special advisory committees and parole boards. An offender would, subject to good behaviour, have a statutory right to release on licence after serving two-thirds of the maximum sentence imposed by the Court. However, the intent clearly is that in most cases offenders would be transferred from custody to supervision in the community before this two-thirds period had expired. In all cases release would be followed up by supervision for at least 6 months during which time the offender would be liable to be recalled into custody if, for example, he failed to make a satisfactory effort to stay out of trouble or comply with directions given to him.

The other innovation recommended by the Council is what it termed a Control and Supervision Order. This would provide for a type of intensified probation, including the power vested in probation officers to arrest and detain an offender for up to 72 hours for breach of an order.

As was to be expected, the report has already attracted considerable comment. No fewer than 12 of the 19 members of the Council itself expressed dissent from or reservation on some aspect or other of the proposals. As far as New Zealand is concerned, comment can be made on both the ideals proclaimed in the report and the practical means recommended for achieving them.

The main proposals are more restricted than was perhaps to have been expected. Having expressed serious reservations about the principle of custodial sentences for young offenders, the majority of the Council nevertheless felt obliged to recommend a custodial order as the cornerstone of the so-called "new direction". Several London daily newspapers misleadingly conveyed the impression in headlines after the report was released that the Council had recommended that prison and borstal sentences for young offenders be abolished altogether. This the Council did not, and clearly could not realistically do. The complete abolition of custodial sentences for young offenders, even if such might have logically followed from the Council's reasoning, would never have been acceptable to, for instance, the police nor, probably, the public as a whole. Within weeks of the report's release, Sir Alfred Mark, the Commissioner of Metropolitan Police in London and not unbeknown to lawyers in England, was claiming that a special report prepared by the police in London indicated that in many cases existing penalties for young offenders were too lenient, that this was actually a factor in the increasing juvenile crime rate and the law was breeding a hard core of future criminals. He also claimed that Magistrates were frequently frustrated by the inadequacy of the sentences which they had power to impose.

Clearly, there will always be some young

offenders requiring a custodial sentence either in their own or in the public's interests. However, the Council might have at least concluded that custody ought never be inflicted on young offenders unless absolutely necessary for the protection of the public or for other special circumstances. Furthermore, since the Council was obliged to recommend the retention of custodial sentences it might also be fairly suggested that even if its proposals are accepted in toto things, and in particular the number of young offenders incarcerated, will not in fact change much at all. A possible recommendation the Council could well have made was to provide, by virtue of the Custody and Control Order, the sanction of potential detention but nevertheless maintaining sufficient flexibility of approach to provide for at least an initial trial period of supervision in the community if this was thought warranted. This might establish that no detention was in fact necessary at any stage during the currency of the order. Yet for some reason the majority of the Council could not agree that Custody and Control Orders should be subject to being suspended in this way.

Administratively, the bureaucratic status quo is to be maintained if the report's proposals are accepted although many would no doubt think that it would be preferable for a new authority independent of the Prisons Department to be established to administer the new scheme of things. By keeping the existing administrative set-up, the likelihood that things will not change much is probably increased.

Nor does the report give much guidance as to the desirable types of supervision of young offenders in the community by which the intended goal of non-criminal behaviour would be most likely to be achieved although this aspect is obviously crucial to the practical success of the whole report.

A further objection to the actual implementation of the Council's recommendations can also be made. The proposals call for an increased role by an already overworked, underpaid and under-staffed probation service (and I do not know any probation officer who would say that his profession's lot is much different in New Zealand) and for greater use of already vastly inadequate community facilities in Britain (and again most social workers and probation officers would no doubt say that the situation in New Zealand is not a great deal better). What all this means, put shortly, is simply that the government in both Britain (and New Zealand) is going to have to be prepared to provide the means and money for making any greater emphasis on treatment in the community for young offenders work at the same time as the principle itself is incorporated into any legislation. The folly of doing otherwise is already being demonstrated in an allied context in Scotland. There the Kilbrandon Report in 1961 called for an recommended a completely fresh approach to the problem of dealing with juvenile crime and this was transcribed into the Social Work (Scotland) Act 1968. Under this Act special lay children's panels rather than the Courts deal with the majority of young offenders. But the Scottish Police in particular are now complaining that the Act is not operating successfully because of the serious lack of suitable facilities and trained social workers. The Advisory Council on the Penal System's report is virtually silent on how its recommendations can be made to work or what must be done to ensure that they do. Presumably either present resources are going to have to be switched from prisons and borstals (themselves badly in need of further funds) to non-custodial use or further funds from the public purse are going to be required. This leads to whether a fundamental decision on the whole future of prisons as a desirable part of penal policy is going to have to be made. The report certainly gives no assistance in answering these problems but an answer will surely have to be found before its proposals can be adopted.

Finally, the recommended 72 hours detention power which the Council would have bestowed on probation officers has, perhaps not unexpectedly, already been criticised as amounting to a power of arrest and detention based on opinion and accordingly arbitrary. Libertarians are claiming that something which has been fought against in Britain for centuries is now recommended under the guise of legal reform. However, police officers have for a good many years had the power to arrest "based on opinion" and many may take the view that this aspect of the Council's recommendations is not one which need be the first concern of those responsible for giving consideration as to whether the proposals contained in the report should be adopted.

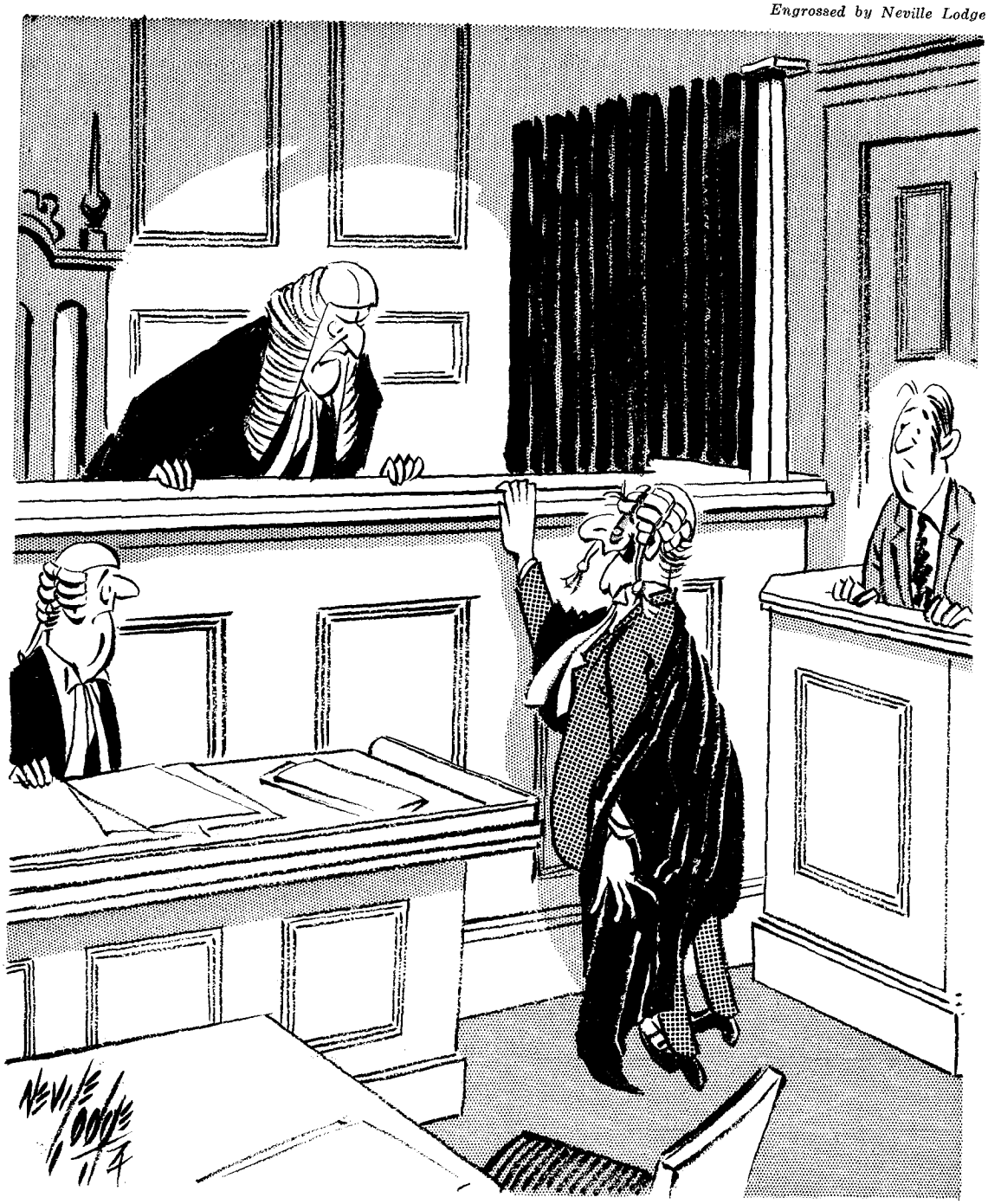
A J FORBES*(a)*

(a) Mr Forbes wrote from London while the holder of the New Zealand Law Society's Centennial Scholarship which he received for the purpose of studying recent developments in children's Courts in other countries.

"A FUNNY THING HAPPENED ON THE WAY TO COURT THIS MORNING . . .": 12

Drafted by Scilicet

Engrossed by Neville Lodge



"I do not see you, Mr Brumble!"
"That makesh two of ush, m'lud. I can't shee you either."

CHECKING LEGISLATION

Perhaps I have not vouchsafed this intelligence to you before, but my home is on the Isle of Wight. The beauty of this place is something very special: it more than compensates for what amounts to four hours' travelling each and every day to the mainland.

The island is divided fairly sharply into east and west, the boundary being the River Medina. To go from East Cowes to West Cowes involves a round trip of 10 miles to accomplish not much more than 50 yards, the distance of the divide between the townships. Alternatively, one can get to East Cowes from West Cowes by the chain ferry, which does the 50 yards direct in some 45 seconds.

Now, a few days ago, industrial action brought the ferry to a halt, and with it, so it appeared, the industrial life of part of the island. A large factory is perched tantalisingly just 100 yards from West Cowes, yet (to many) it was really an unconquerable 12 miles away.

This vital link was ruptured by the action of not more than half-a-dozen people. Whether or not the strike was justified, I do not know. Certainly the monotony of going east and west over the same tiny stretch of water must make the most urbane of men a highly combustible element.

The same excuse cannot, I fear, be made for the printers employed by Her Majesty's Stationery Office. They do work under enormous pressure while Parliament is sitting, having to print the proceedings of one day's session by the following morning, together with all the reams of paper needed for business to continue. These printers have been on strike since the end of June for some £6 a week and a reduction in the working week. Unfortunately, it is impossible (almost) to discover their current earnings since other printers decline to allow space for the information in the newspapers. But it is generally reckoned that their earnings are well in excess of £100 per week, close, indeed, to £200.

Since June, no *Hansards* have been printed, nor any Acts of Parliament. This latter is particularly critical, since as I write no less than 34 Acts have received the Royal Assent, among them the highly important Rent Act, the Trade Union and Labour Relations Act and the Consumer Credit Act.

The first of these is (reputedly) now in force, extending considerable protection to tenants of furnished accommodation. Yet no one, outside Parliamentary draftsmen, know any more than that. The Trade Union and Labour Relations Act does all sorts of things as well as repealing the bitterly disputed Industrial Relations Act; but no one knows much more. The Consumer Credit Act repeals the Pawnbrokers Act, the Moneylenders Act, the Hire Purchase Act and does a whole lot more beside, the details of which are locked in the breast of the draftsmen.

It is perfectly possible that criminal offences are being committed under the terms of any of the 34 Acts now in limbo. If so, it seems to me that the old maxim that "ignorance of the law is no excuse" needs rethinking. If that shibboleth has had any validity, it is because the laws have always been readily available and there for inspection. But, surely, it is very different where the law simply cannot be tracked down.

Yet this does not solve the problem of the creation of private rights. If the Consumer Credit Act stipulates that credit agreements are unenforceable unless in a specified form, it seems wholly wrong that the consumer should be advantaged by the creditor's pardonable ignorance and be allowed to retain the benefits of the contract with none of its burdens. Then again, any prescribed form in the Act is intended for the protection of the consumer.

The solution to me is obvious; all the 34 Acts must have their coming into force delayed until such time as the strike is settled and a reasonable time thereafter has elapsed for the backlog to be cleared up. The only trouble is that no one will know the terms of the Act effecting this solution.

R G LAWSON

RECENT ADMISSION

Mr Anthony John Keenan was admitted as a barrister and a solicitor of the Supreme Court at Christchurch on 22 August last.

LEGAL LITERATURE

A Second Miscellany-at-Law. R E Megarry. Stevens: distributed in New Zealand by Associated Book Publishers (1973); 420 pp.

I must confess that I was a little disappointed when I first read Miscellany-at-Law II, no doubt because I had derived so much pleasure from Miscellany-at-Law I. However, Miscellany-at-Law II is a completely new book—very rarely does it repeat anything contained in Miscellany-at-Law I, and then only for good cause. Though it inevitably will be compared with Miscellany-at-Law I, it covers new ground and really must be judged on its own merits. If judged on those (and not against those of its predecessor), it is an admirable book, particularly if dipped into at leisure and not read as a whole.

In 1951 the NEW ZEALAND LAW JOURNAL reported Megarry was dead(*a*). He is, of course, alive and flourishing, as Miscellany-at-Law II indicates; but whether the above report gives his work any added authority is not clear —though some Judges apparently adhere to the view that no writer is authoritative until he is dead. Perhaps Sir Robert can say he has the best of both worlds.

Some of the quotations in Miscellany-at-Law II are a little long, and I was not particularly interested in examples from the USA, because as we all know, anything can happen there. From an overall point of view, however, the book is witty, learned and informative. Where else, for example, would one find out how to draw up a deed of gift of one's wife? When it is counsel's duty to shed tears as part of his argument? Or how the crew of a ship should decide which of their number should be eaten when their other sustenance is exhausted? Sir Robert deals with such topics as serjeants-at-law in depth, and in his own inimitable way—that particular topic is also a good example of the way the learned author consistently supports all his anecdotes with chapter and verse. Indeed, where there are several variations in some stories he mentions them all and states his preference.

There is one anecdote which Megarry has not included and which surely deserves a place. That concerns a piece of New Zealand legislation which is probably unique—the John Donald Macfarlane Estate Administration Empowering Act 1918. That deemed Macfarlane to be dead as from the date the Act came into operation, though he was in fact alive, and (it should be added) remained alive for many years afterwards. As with any radical legislation, opinions were divided as to its advisability. The Government's legal advisers were strongly against it. ("Such a law would be contrary to all the fundamental ideas of jurisprudence upon which our legal system is based.") Nevertheless, the Act was eventually passed—for its sequel see *Cheerful Yesterdays* (1951 edition) by O T J Alpers at p 121 et seq.

Miscellany-at-Law II is an indispensable and fascinating book to all those interested in the law, its eccentricities and its humour. For those who say the law is dull it should be compulsory reading. It can be read and re-read with enjoyment, and is a worthy successor and companion to Miscellany-at-Law I.

J O U.

The World of the Computer. J Diebold (ed). Random House (1973).

This anthology covers a wide field of computer development, applications and forecasts ranging from Babbage's Analytical Engine to Weiner's God & Golem Inc. It includes Arthur Clarke's delightful comment that if Turing's experiment is never carried out, it will merely be because "the intelligent machines of the future will have better things to do with their time than conduct extended conversations with men. I often talk with my dog, but I don't keep it up for long". The volume presents a useful selection for the layman wishing to enter into the computer world and is particularly deserving of praise for its attempt to avoid the arcane jargon of electronic data processing. Computer privacy is represented by Kaysen's defence of the National Data Centre (1967). One of the more recent lucid expositions of the topic, such as Pyle's articles on CONUS, could have been included. The next edition might add contributions on computer crime (perhaps by Jerry Schneider) on the history and present position of IBM, a discussion of BART, and a contribution by Stafford Beer. Diebold's selection suc-

(*a*) (1951) 27 NZLJ 227.

cessfully introduces the general reader to present applications and alternative futures in a language which he can understand.

F M A.

New Zealand Handbook of Civil Liberties by Tim McBride (Price Milburn for the New Zealand Council for Civil Liberties). xv + 111 pp. $1.50.

The production of this handy-sized handbook is a monument of achievement by its author, Tim McBride, by the New Zealand Council for Civil Liberties, and not least by the publishers for producing the work at such a low price.

It is axiomatic that if ignorance is to be no excuse, the law should be available to all, and now (thanks to Mr McBride's industry) and what Dr Martyn Finlay has described as a "succinct and admirably factual analysis" of the citizen's rights, is in the bookshops.

One can echo the sentiments expressed in the introduction—that the police will gain far more by the willing co-operation of an informed public—yet one is left to wonder if an increased awareness of an individual's rights will, in fact, lead to an increased awareness of an individual's duties. Rather the opposite—the greater the awareness the greater the insistence.

However, as John Curran proclaimed in 1790, "The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime, and the punishment of his guilt."

And if this should seem at times to benefit the malevolent, Mr Justice Frankfurter reassures that: "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people" (see *United States v Rabinowitz* 339 US 56, 69).

J D P.

Drivers After Sentence, by T. C. Willett (Heinemann Educational for the Institute of Criminology, Cambridge) vi + 182 pp. £S3.25.

—The serious motoring offender, unlike others convicted of criminal offences, is a respectable citizen whose behaviour otherwise accords with the law:

—The majority of serious motoring offences derive from accidents, and there is nothing in the offender's personality or background that predisposes him to break the law.

These two comfortable hypotheses, widely held and generally subscribed to by Magistrate and man-in-the-street alike, are shattered by the findings of Dr Terrence Willett in his latest book, a sequel of sorts to his *Criminal On The Road* (1965).

For far too long Courts have been lulled into accepting the notion that offences can be divided into two broad categories—the motoring and the non-motoring—and have been prescribing fines, disqualification and at times imprisonment for the erring driver but almost never imposing any supervisory order, such as probation.

Yet Dr Willett's research in Britain makes out a clear case for the rethinking of our entire approach to the serious motoring offender (ie those whose driving kills, maims, is dangerous, is careless, is affected by alcohol, is in defiance of disqualification orders, and those who fail to stop after accidents).

When researching individual offenders in these categories, Dr Willett became aware that many of those who had offended in these ways were in need of help. Most conspicuous is the drinking driver. He is male, some years older than the norm, and generally married—and the evidence suggests that his offending frequently has its genesis in the stresses within his marriage. Simply to fine him and banish him from the road in a ritualistic manner is for the courts to behave in a destructive manner and to totally ignore the needs of the offender.

Imprisonment emerges as both ineffective and unnecessarily expensive. It may be a deterrent to the basically law-abiding driver (for whom it isn't needed, anyway) but in Sweden, where motoring offenders form some 40 percent of the prison population, imprisonment has become a mere ritual with no effect on either the attitudes or the psychopathological problems of the offenders. Familiarity breeds contempt.

Dr Willett's findings on disqualification orders, too, are significant. He found a "fade out" effect after about six months, so that lengthy disqualification orders were almost invariably disobeyed. Paradoxically, too, those most hurt by disqualification orders were in the category of usually law-abiding individuals, because they obeyed them. Experienced lawbreakers are able to ignore the orders with relative impunity.

Even with fines an "irritant" and disqualification orders ineffective, it is still alarming to see what punishment by the Courts manages

to achieve. For of the sample, only 11 percent were prepared to express any feelings of guilt or contrition, and nearly 40 percent (notwithstanding conviction and with little justification) still rated their driving ability as "better than most". The errant driver is also conceited.

Over all one can conclude not only that research on such topics should be broadened, but that it is quite ludicrous for the Courts to continue to deal with serious motoring offenders (in the main, at least) without any pre-sentence inquiries in the form of probation reports. Nearly half of the sample either had records for non-motoring offences, or acquired them in the course of the survey. With time still running, the group of "other offenders" can only continue to get larger.

Where, then, does that leave us? Assuredly we must immediately and consciously begin to think of the serious motoring offender as a criminal, and on conviction his sins should be regarded by all as being far removed from the category of "There but for the grace of God go I". The figures show such a high correlation between such offenders and the commonly-accepted definition of "crime" that the serious motoring offender can and should, for reason, be regarded as a criminal.

For their part, the courts must treat serious motoring offenders at least as potential offenders in other spheres. Past records of misdemeanours that do not seem to relate to driving must be taken into account when sentencing (they are generally ignored), probation reports should be called for much more often, and probation itself should be imposed with much greater frequency.

Dr Willett has illustrated the problem. If we are to make this country a safer place in which to live, we must respond to his challenge.

JDP

CORRESPONDENCE

Sir,

Circular morality

At the American Bar Association Conference in Honolulu between the 12th and the 17th August, delegates to the Association voted in favour of a partial amnesty for draft dodgers in America from the Vietnam war, but did not express the same sentiment towards the former US President, Richard M Nixon.

A resolution adopting partial amnesty for those who evaded military service during the Vietnam fighting passed the House of Delegates by a narrow margin after a lengthy debate about forgiveness and justice. The other resolution, which observers considered to be aimed at Nixon, saw no debate and passed with virtually no opposition.

The former President was not mentioned by name, but the delegates adopted a resolution stating that the Association "continues its dedication to the principles of fair, just and impartial application and enforcement of the law regardless of the position or status of any individual alleged to have violated the law". Coming as it did a week after Nixon's resignation, the resolution was seen as supporting the theory that the former President should be prosecuted if authorities believe he is guilty of obstructing justice or of other crimes. Both at the conference and at the present moment, it seems doubtful what "crime" could be charged against Nixon other than possibly contempt of Court.

Delegates to the American Bar Association voted to support a Bill before the American Senate called the "Earned Immunity Act" which would permit those who evaded the draft during the Vietnam war to earn immunity from prosecution provided they spent up to two years in the peacetime armed forces of the United States "or in public or private service contributing to the national health safety or welfare".

A retired Judge Advocate of the Army, Kenneth J Hodson, spoke up against the resolution, saying that for draft dodgers to serve two years in the armed forces would degrade the military services. He drew applause from anti-amnesty forces in his audience when he said that allowing people to choose which laws they would obey would lead to anarchy.

He also spoke briefly on civil disobedience. He did not condemn those who revolt against laws they feel are unjust, but he said advocates of civil disobedience such as Thoreau, Gandhi and the Rev Martin Luther King Jr realised that they were breaking the law in protest movements and were willing to accept punishment for their acts.

The margin in favour of the proposed Bill (as distinct from the resolution mentioned in the third paragraph above) before the Senate was narrow, and the voting was 117 to 110 in favour of the Bill.

It is, however, the remarks of Mr Hodson which merit particular attention verging as they do on moral theology. This may not be immediately apparent, but was the subject of a lengthy and learned article by P J Fitzgerald in an inaugural lecture at Leeds University in 1962 called "Crime, Sin and Negligence" and reprinted at (1963) 79 LQR 351. Professor Fitzgerald in the opening sentence of his

address said "the title of this lecture might seem to open up an area of formidable dimensions", and in this remark he was patently correct.

Once it is left to the citizen to choose which laws he will obey, and which he will disobey, we meet not only what Fitzgerald calls the intersecting circles of natural wrongs and moral wrongs, but a further intersecting circle which can only be characterised as sin. The concept is similar to the long standing argument with the penal reformers who insist on dividing Sir John Salmond's classification of punishment into watertight compartments. It will be recalled that Salmond classified punishment as deterrent, retributive, reformative or preventive, but when these concepts are examined, it will be found that each shades into the other. Similar considerations apply when one gets into the realm of whether laws are malum in se, malum prohibitum, or sins (one is tempted to say "merely sins", but as can be demonstrated the adjective is not warranted).

As was pointed out by Fitzgerald, the differentiation between offences malum in se and malum prohibitum seemed to emerge at the end of the fifteenth century and was accepted by the great legal writers Coke, Hale and Hawkins, and finally approved by Blackstone. Fitzgerald points out that reaction soon set in and Bentham heaped such scorn on the ancient doctrine that in 1822 Best J was heard to declare that the distinction was exploded.

We now come to the third intersecting circle, the moral theology approach, and I embark on this rather thin ice with some trepidation. I fear the subject would be better and more thoroughly treated by such a writer as Mr A P Molloy. I was fortified in this opinion by reading his half forgotten "Augustine" in [1973] NZLJ 298. The curious point seems to emerge (will some seminarian correct me if I am wrong?) that all the theologians from Aristotle through Saint Augustine, Saint Thomas Aquinas up to the Abbe de Chardin have refused to recognise any shade of moral obloquy between an act malum in se, one malum prohibitum, and one shall I say, classified as a sin. I recall reading in the *Law Journal* a quote from Teilhard de Chardin (I cannot locate it now) to the general effect that "there will be no true justice until the magistracy is merged in the priesthood and the priesthood has become universal".

It will be recalled that in ancient Sparta, sickly babies were exposed to die. In much more recent times, it was considered a duty of the tribe to kill off aged and unproductive members of the Eskimo community. At the other end of the scale of moral values can be seen the Victorian attitude in covering up the legs of tables, or the retort to the ambassador who attempted to present to the Court of Spain a pair of stockings for the Queen, and was answered, "Take thy present, foolish man, and know that the Queen of Spain has no legs."

To sum up this rather rambling discourse, it seems to me that in modern society we have swung back almost to the viewpoint of Blackstone. I suggest, as was done some three centuries ago, that this trend has increased, is increasing, and ought to be diminished. In the span of my own working life, I have seen the transition in the attitude of society to the man who was charged with evading payment of income tax. Thirty or 40 years ago the offence was almost equated with that of burglary. Now it is greeted with a slap on the back and a cry of, "Sorry to hear of that, George. How did they catch you?"

W H BLYTH,
Auckland.

Sir,

Petty cash

Whenever an affidavit is prepared in a solicitor's office there is a somewhat suppressed air of excitement concerning the ultimate destiny of the affidavit, but more particularly the burning but nevertheless unanswered question on the face of which fortunate clerk will the gods smile while he takes the unsuspecting deponent into another solicitor's office for the purpose of swearing the affidavit.

We recently had a newcomer to the staff who of course, must needs be initiated to the secrets of how to make a little untaxed cash. The clerk was instructed to take the deponent with the affidavit to the neighbouring solicitor's office for the purpose of administering the oath. Her instructions had not gone as far as paying a visit to the petty cash tin before the deponent was taken away with the affidavit, She returned, therefore, with the sworn affidavit but, of course, without the deponent. Nothing further was said for a day or two until we received the enclosed account which, of course, bears out the corresponding air of excitement when a clerk arrives at the counter of an office with an obvious affidavit in one hand and deponent in the other. The affidavit, needless to say, was "folded lengthwise down the middle".

Yours faithfully,
M G L LOUGHNAN,
Christchurch.

Re Affidavit

To our costs of attending to this matter: Being awakened from deep sleep by raucous noise from phone; being informed that your clerk desired client's affidavit to be taken; stubbing toe on desk in haste to reach counter before client escaped; fending off partner down wind from counter who had smelt the affidavit; bribing junior to institute search for office Bible; administering oath to your respondent client whose unpronounceable name escapes us; waiting with thinly disguised but unrequited excitement for clerk to produce fee; returning to office and collapsing with effort and strain.

Our fee:	$100.00
say, in the circumstances	0.50

NOTE: A discount of 50 percent will be allowed if fee paid by 20th of month following oath.

Examined, etc.
Christchurch.

On polygamy—

"If the plural of 'mouse' be 'mice',
Then the plural of 'spouse' must be 'spice'."

Anon.