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INTER ALIA

Taxing the innocent

"There are no losers in this case." Such were the reported comments of Mr Bryan Todd, chairman of Europa Oil (NZ) Ltd, after judgments had been delivered in the Privy Council allowing the company's appeal in a tax case (see (1976) 1 TRNZ 369).

The company had paid the sum of $4 million into the Consolidated Fund over the period 1967 to 1972. Although paid under protest, there was no provision for the payment of interest on the moneys incorrectly assessed as payable. The alternative would have been for the company to have refused to pay and have risked penalties of enormous dimensions should Europa have lost.

So the company is to be repaid its $4 million in greatly depreciated currency.

This is surely to work a manifest injustice, and illustrates for the exchequer a "heads I win, tails you lose" situation that is a blot on our statute book. And when Mr Todd spoke of there being "no losers" he was being diplomatic to the point of generosity.

It would be no great inconvenience to the state should it be required to pay interest. It has, after all, had the use of the money; it has had the benefit of depreciation created by inflation; and – of course – any interest paid would be taxable as income in the year of payment. In fact the exchequer is hardly any worse off at all.

Playing with the press

The controversy surrounding a recent incident in Christchurch, in which a Court sat at an unusal time in an apparent attempt to thwart press coverage of a particular case, should not be confined to its particular facts. Errors of judgment there undoubtedly were in the particular case, but therein lies a lesson for the Bar in general.

First, it should be understood that this was by no means the first time similar irregularities have occurred. Probably all practitioners in main centres can think of at least one if not more. Newpaper editiors, too, tell of incorrect hearing dates and other manoeuvres invoked to frustrate their reporters.

There has developed on the part of counsel a tendency, when it suits them to play ducks and drakes with the fourth Estate. In Wellington, for example, there is the ploy known euphemistically (if accurately) as having a case "sent upstairs". The initial indication is given that the case is to be defended, it is then sent to another Courtroom, and there a dramatic change of heart takes place and a plea of guilty is entered. As the reporters almost invariably do not follow these cases up the stairs, the object of the exercise is achieved – and it is something more than a mere de facto suppression of name, as even the facts escape publication.

Such gerrymandering has been accepted as "part of the game" – but whether the "game" actually promotes the public interest and is in the best traditions of the Bar is quite another question. The resources of the press are finite, and there cannot be a reporter in every Courtroom – is it legitimate for counsel deliberately to exploit this?

Nor can the Magistracy's role be overlooked. They are aware that such practices are indulged in, and by going along with them do, in fact, condone them.

The Christchurch incident reveals a state of mind both widespread and of long standing.

If we accept that the press plays an important role in our system of justice (as indeed was shown

by its revelation of what took place in Christchurch) then there are lessons for many of us in what happened, and these could properly be spelled out in unambiguous terms by the Ethics Committee of the New Zealand Law Society.

JEREMY POPE

THE MOST GENEROUS OF MEN, BAR NONE

BERNARD LEVIN *writing in The Times of 6 January 1976, drew this reply from a Queen's Counsel: "It is fervently to be hoped that Mr Levin will allow any bitterness to depart from his soul before it becomes corroded, and that the gentler and more endearing side of his nature hitherto reserved mainly for such subjects as Wagner, Russian dissidents and the late Dr Otto Klemperer may in charity extend to embrace even the Bar, and so after the chastening experience of this article it may with new humility (or renewed arrogance as Mr Levin would doubtless say) attempt to survive".*

Mr Michael Zander, a person of loathsome aspect and dubious character who spends much of his time annoying barristers, has just done it again. This time, in an article in *The Criminal Law Review*, he has produced a survey of fees paid to counsel out of legal aid funds, and come to the mischievous, subversive and laughably incorrect conclusion that some of them have been getting their bread rather too deep in the public gravy. When I tell you that his vile allegations are based on nothing more substantial than a detailed study, from only 12 Courts, of a mere 1,775 cases involving but 2,849 defendants, it will be seen that they are hardly worth discussing, let alone answering, and should be treated with what I believe is known in such matters as the contempt they deserve. But the trouble with that approach is that, although it is appropriately dignified – and had the additional merit of rendering unnecessary any explanation of the facts adduced – it does permit, if not indeed encourage, the circulation of garbled rumours. On balance, therefore, I am sure that Sir Peter Rawlinson QC was right to say, with all that cogency and eloquence that has earned him his fully justified reputation as one of the finest Attorneys-General since Mr Sam Silkin, that the Bar, contemplating Mr Zander's attack, was "outraged".

That, as will readily be agreed by all right-thinking people and even some of the less hopelessly depraved wrong-thinking ones, is a conclusive reply. But Sir Peter, mindful of his responsibilities as the spokesman of a body of men who for selflessness, public spirit and the modesty of their material demands put the Salvation Army, and indeed St Francis of Assisi, to shame, then went into details.

Mr Zander, he declares, has ignored, in calculating barristers' fees, the overhead payments for which they are liable, and which may amount to 50 percent of their incomes. As you would expect of Sir Peter, he has erred on the side of moderation. My own researches show beyond argument that the average amount of a barrister's income that goes on overheads is well over 98 percent, a circumstance which has made a visit to the Law Courts so embarrassing, not to say harrowing, an experience for laymen, faced as they are at the entrance with a jostling crowd of barristers begging for a bit of bread, preferably lightly toasted, spread with unsalted Normandy butter and piled high with scrambled plovers' eggs and truffles, accompanied by a bottle of 1962 Chateau Gruaud Larose, decanted at the bin.

Preparing for Court

Furthermore, said Sir Peter, the time spent in Court (on which the odious Zander based his calculations) was only one part of a barrister's life, hours of pre-trial preparation being essential for a case of any weight. Here again, the impartial bystander can only murmer, with Jeeves, "Rem acu tetigisti": I have myself, more than once, seen a barrister come into Court so well prepared that he even knew the names of both parties to the action, and had to be prompted with whispers, in the course of the proceedings, only on such matters as what the case was about and whether his client was plaintiff or defendant.

But it was the revelation with which Sir Peter followed his masterly deployment of these crushing facts that he did most to silence the ignorant critics of his profession. For he disclosed that the Bar Council was already at work "gathering its own statistics of income and expenditure", which Sir Peter believed would demonstrate that barristers were not paid excessively for legally aided cases. Now an investigation of barristers' fees by barristers will

clearly have to be accepted as impartial and objective even by a wretch like Zander; as it happens however, I am in a position to make him eat his words immediately. For I have managed to get hold of the report in which the Bar Council embodies the fruits of its researches, and can now reveal its conclusions.

The investigation was undertaken by a Bar Council sub-committee, consisting of Sir Whacking Refresher QC, Sir Grasping Bloodsucker QC, Sir Insatiable Profiteer QC, Mr Hopelessly Bent QC, Mr Manifestly Incapable QC and Mr Ratlike Mainchance QC; the chairman was Sir Hopefully Seeking Judgeship QC. After reading their report, I can set Sir Peter Rawlinson's mind at rest without further delay; when he expressed his belief that the study would show that counsel's fees were not excessive, he was being unnecessarily tentative. It does indeed show that their fees are not excessive, in fact that their fees are quite exceptionally – if not ridiculously, absurdly and wildly – low, and that in many cases, or even most, if not practically all – well, absolutely all, actually – no fees what ever are charged, but on the contrary the client is given enormous sums of money by the barrister.

Nor is this all. I suggested that Sir Peter's estimate of 50 percent of income for a barrister's overheads was far too low, but the Bar Council made it clear that even my figure – 98 percent – was hopelessly inadequate. The average proportion of a barrister's income that is committed in advance on essential professional expenditure is, they reveal, well over 240 percent. This of course means that all barristers operate at a substantial loss, and the Bar Council report is at pains to stress that they continue in so deplorably unremunerative a profession only out of a sense of public duty.

Some more than others

On the other points of criticism raised by the servile and toad-like Zander, the Bar Council report is no less devastatingly effective. His offensive suggestion that QCs not only received disproportionately more than other barristers but sometimes didn't earn it described as an "offensive suggestion" – a sufficiently conclusive disproof of the charge, I should think, to satisfy even the most biased. And his call for an independent inquiry into whether the hundreds of millions of pounds spent in legal aid has given value either to the country or to the litigants on whose behalf it was spent is rightly said to be unnecessary in view of the Bar Council's own investigation and its conclusion that the taxpayers and the lawyers' clients alike had got a bargain. ("Hurry, hurry, hurry", they add, "while stocks last".)

Finally, to the claim – made not by Zander but by critics even more extreme, malevolent and unbalanced than he – that barristers are, on the whole, "a pack of grossly overpaid, underworked, lazy, breathtakingly inefficient layabouts, some of them crooked and all of them surrounded by restrictive practices that would make the dockers' section of the Transport and General Workers' Union ashamed of itself, indifferent to the public weal, considerations of justice or indeed anything at all but their incomes, status and privileges, protected from the consequences of their incompetence and rapacity by a series of protective devices that would be the envy of a drunken surgeon who cuts both legs off a patient suffering from nothing but a sore thumb and goes scotfree because no other doctor will give evidence against him, and on top of all that, and a lot more besides, ready to spend weeks whining, screaming and parroting oddles of hypocritical twaddle about the sanctity of their calling whenever anybody is so foolhardy as to offer the smallest criticism of their outrageous goings-on", the Bar Council replies that the record of its profession speaks for itself – a judgment with which, oddly enough, many of the most extreme, malevolent and unbalanced critics aforesaid find themselves in complete agreement.

[Reproduced from The Times *by permission]*

The future . . . – If the law is to stand for the future as it has stood for the past, as a sustaining pillar of society, it must find some point of reference more universal than its own internal logic. Lord Radcliffe in *The Law and its Compass*

In mitigation – A defendant recently used the standard form to advise a North Kowloon (Hong Kong) Magistrate, by post, that he was pleading guilty. In the space reserved on the form for "Mitigating circumstances" the defendant then went on to write as follows:

"Dear Your Majesty's

"This is three official proclamant, person himself recognition, but plaintiff plaint dimension fact to much, I think possible is to misunderstood, therefore I hope so to claim judge to reduce the pirse to punish give than something meet the case to punish thank you judge.

Your abedently,
L..... Y....."

The North Kowloon Magistracy would appreciate the efforts of any bold soul who may feel disposed to attempt to summarise, in different words, the no doubt very relevant points this defendant was urging upon the Court. . .

CONDITIONS IN CUSTODY AT COURT

This report has brought prompt action, is published for its broader implications – namely that such a situation should ever exist, and given that it does, that practitioners should be unable to tackle it successfully.

Steps are being taken to up-grade facilities in the cells at the Auckland Magistrate's Court, the Minister of Justice, MR D S THOMSON *has said. The report, by the Auckland Committee on Racism and Discrimination* (ACORD) *which studied the conditions under which defendants are held in custody at the Court, had been seen by Mr Thomson and officers of his department. The Minister has directed that appropriate action be taken where possible to upgrade the facilities. It was acknowledged there was overcrowding in the cells at times and the department intended discussing the feasibility of extending present cell accommodation with the Ministry of Works and Development soon.*

Action is also being taken to improve existing facilities in the cells and consideration is being given to other matters mentioned in the ACORD *report.*

Introduction

Defendants who are held in custody in the cells at the Auckland Magistrate's Court fall into two main categories. Firstly, there are those who have been arrested the afternoon or night before and have been held in the cells at Auckland Central Police Station. Secondly, there are those who have been remanded in police custody by a Magistrate. The latter are detained at Mt Eden prison or at a psychiatric hospital. Most are adults, but the practice of remanding children (under 17 years) to Mt Eden prison persists. Some children are also held in custody at Auckland Central Police Station following arrest. In both cases they are brought to Court with adult prisoners and spend some time in the cell with them.

Vans and cars with the prisoners arrive at the Court each day at about 8.30 am. The Court sits at 10 am (weekdays) and 9.30 am (Saturdays and holidays). During the one and half hours before hearings commence, duty solicitors interview and advise the prisoners. We have been for some time concerned about the facilities for prisoners at the Court and arranged to inspect them in the company of a Justice of the Peace on 15 January 1976. This is a report of our enquiry.

Men and women prisoners arrive at a common entrance beneath the Courtrooms. There are two cells, one for women and one (larger) for men. A janitor's room adjoins the cells and is used for interviews by the duty solicitors. A four-flight staircase leads from a lobby outside these cells to a small vestibule on a landing between Courts 1 and 2. This measures about 5m long x 2m wide. The inner, blind, end of this vestibule is reserved for women prisoners. It is partially separated from the men's area by a chest-high dividing wall. It can only be entered or left by the men's section. This small women's cubicle measures 1m long x 2m wide and has a single narrow wooden bench on which possibly 4 people could squeeze. A graffiti-covered plaster wall confronts any woman sitting there about 0.5m from her face. Men can and do look over into the women's section. Men have direct access to the doors leading to the Courts, whereas women prisoners must squeeze past the crowded benches in the men's area to get out into the Court when their case is called.

Police officers and police matrons control the movements of prisoners in these areas. They usher most of the prisoners into the upper vestibule and stairs prior to the sitting of the Court at 10 am. On a busy day, we were told, there may be as many as 60 people in custody. There is certainly not sufficient seating in the cells or upstairs vestibule for this number, so it is common for men to sit all the way up the stairs.

Atmosphere

The cells, staircase and vestibule at the top are dingy, dimly lit, and dirty. All wall space is bare and covered with graffiti. The paint work is old and in many places the plaster is missing from the walls. The only windows are in the cells where they are covered with three layers of bars and grills. There is virtually no ventilation and the whole area smells unpleasant.

Toilet facilities

As there are no toilet facilities in the cramped upstairs vestibule, any prisoner who wishes to go to the lavatory must go down four flights of stairs to the cells. Each of the cells has a small compartment with a single lavatory bowl and

hand-basin with only cold water. Soap is provided, but no form of towel. In both cells the lavatory compartment *opens directly off the main cell and has no door of any kind.* The sounds, smells and activities of anyone in the lavatory are therefore apparent to people in the cell and it is possible to see into the lavatory from some positions in each cell. In the women's cell, one of the two benches for sitting terminates within a few inches of the open lavatory doorway.

There is no rubbish receptacle of any kind and no receptacle for sanitary napkins in the women's lavatory. There is nowhere in the cell or elsewhere for a woman to sit privately and nowhere but the floor for her to lie down. The Court sits from 10 am until the last case is heard and quite commonly this takes until the afternoon. On a recent day the Court sat until 4.30 pm (see appendix) and a deputy registrar stated that he had known it to sit after 5 pm. This means that some prisoners may spend eight hours or more in these conditions at the Court.

Lunch

Those whose cases have not been heard before lunch are provided with a lunch by the police. This meal is served in the downstairs cells. As there are no tables or chairs, prisoners must sit on the two wooden benches in each cell with their plate on their knees. They are provided with plastic cutlery. Because the lavatory in each cell has no door prisoners are forced to eat their lunch in the same room as an open lavatory which other prisoners may be using. In the women's cell, one bench used for sitting to eat lunch lies along the wall of the lavatory and terminates within a few inches of its open doorway.

Hygiene regulations

The facilities provided for prisoners at the Auckland Magistrate's Court would seriously contravene numerous hygiene regulations if these applied to the Crown, which they do not. eg:

Drainage and Plumbing Regulations 1959 – Regulation 44 states that there must be an isolating compartment with two closable doors between a lavatory and any place where food is served and consumed. Both cells at the Court, which do not have even a single door on the lavatory, grossly contravene this regulation. Regulation 41 states that for facilities used by men, if there are more than 10 men there must be at least one urinal. This is sufficient for up to 50 men. In addition, there must be one lavatory for the first 20 men and another for the next 30. There can be as many as 60 people in custody at once of whom perhaps 50-55 would be men. Since there is no urinal and only a single lavatory bowl, the facilities for men contravene this regulation.

One lavatory bowl is sufficient under these regulations for the first 15 women, but for 15-35 women a second lavatory is required.

Factories Act 1949 – If the facilities under consideration were for factory workers, then a suitable restroom for women would be required. It should be provided with a couch, blanket, pillow and a receptacle for the disposal of sanitary napkins. Although women may spend up to eight hours in custody at Court, there is no such rest area provided. In fact, there is absolutely nothing.

Fire regulations

There can be little doubt that the overcrowded conditions for prisoners at the Court constitute a serious fire hazard. Fire safety officers state that no situation should be permitted where the only stairs to the outside have people sitting and standing on them. And we wonder what contingency planning the police have for the emergency evacuation of prisoners from the Court building. Again, those in the worst position are the women, trapped in their tiny cubicle at the blind end of the upstairs vestibule.

Police matrons

Two police matrons are on duty in Courtrooms 1 and 2 each day. Their main tasks are to supervise the women prisoners in the cells and waiting cubicle, and to accompany each woman into the Courtroom during her hearing. Because Courts 1 and 2 operate simultaneously and largely independently with women appearing in each, both police matrons are sometimes fully engaged within the Courtrooms. Obviously, they cannot be everywhere at once and are not always available to escort women downstairs through the crowd of male prisoners to the lavatory. Nor are they always able to supervise fully the vestibule area where women are open to access by male prisoners and male police officers. We understand that the matrons often offer advice and help to girls and women in trouble and commend this. But we note that it further reduces the amount of time they have to look after the needs of the other women in custody.

Discrimination against women

The facilities for prisoners at the Auckland Magistrate's Court are in every way worse for women than for men. There is no provision whatsoever for the special needs of women, some of whom will be having a menstrual period, others of whom will be pregnant, or perhaps breast-feeding and suffering from being separated from a baby. Some women are forced to spend up to eight hours in this area until their cases are called.

Where is a woman to put a used sanitary napkin? Where is she to obtain another? Where can she go to lie down? None of these needs has been provided for. Even to go to the lavatory she must go down four flights of stairs. Moreover, unsupervised male prisoners and male constables can, through the door of the women's cell, partially see into the women's lavatory compartment because it has no door.

The distressed condition of some women can easily be imagined. Yet we point out that once their name is called they must walk into the dock, stand up straight, and do their best to look after their own interests speaking as confidently as possible on their own behalf. As they may be called to give evidence, they must be able to think clearly and logically. We do not believe that several hours spent in the conditions we saw are conducive to this – quite the reverse in fact. Some women suffer physically and mentally in this situation and we report one such case (see appendix).

Conclusion

The conditions under which men and particularly women are detained at the Auckland Magistrate's Court are extraordinarily cramped and grossly unhygienic. Such conditions would be condemned as illegal in any premises not belonging to the Crown. The facilities are degrading and dehumanising to men and women. They are apparently designed to strip away human dignity and are a disgrace to our system of justice. We cannot understand how they have remained in daily use by so many people for so long without vigorous and effective protest from Justice, Welfare and Police Department staff and from the legal profession. It is our opinion that defendants held for up to eight hours in these conditions will not be able adequately to present their case to the Court and that they will not receive the justice which is their right.

We emphasise that the Magistrate's Court is not a prison. Most of those held there are innocent until proven guilty, and some will be not guilty. We can see no justification, therefore, for inflicting the punishment of detention under these conditions upon them prior to their Court hearing. We call for an urgent ministerial enquiry into the matter and demand immediate change to protect the health and welfare of the prisoners. *It is our belief that if the system of justice does not respect them as human beings, they will have no respect for that system.*

Recommendations

General – These facilities should be upgraded immediately to a standard which is appropriate for human habitation. They must be better lit, better ventilated and cleaned and painted. New floors should be laid throughout. Women prisoners should be kept totally segregated from men.

Specific

- doors should be fitted to both lavatories
- hot water should be provided for each handbasin
- a receptacle for used sanitary napkins should be provided
- a urinal and and additional lavatory should be provided for male prisoners
- a new waiting area should be provided for women. It should have toilet facilities, not just access to those four flights of stairs below
- a proper area outside the cells should be provided for lunch to be served and consumed. Tables and chairs should be provided
- a room should be specifically set aside for women to rest. It should adjoin the Courts. It should have a couch and first-aid and sanitary provisions. It should have a basin with running hot and cold water
- two more police matrons should be employed
- notices explaining Court procedure and the likely conduct of different sorts of hearings should be given to all those held in custody. It should include advice as to their rights while in the Court environs. These should be printed in all Pacific languages as well as Maori and English.

Acknowledgements

The inspection upon which this report is based was made on 15 January 1976, in the company of a Justice of the Peace. The Registrar of the Court kindly allowed the inspection. We are most grateful to Mr Wallace, Deputy Registrar, for his courtesy and help. We also thank Police Matron Radonich for her friendly assistance.

Appendix – Case history

Two young women were arrested outside a dancehall at 2 am on 12 December 1976. They were charged with obscene language and were held in police custody overnight. They got little sleep after being "processed" and were woken for breakfast at 6 am. At about 8.30 am they were taken to the Auckland Magistrate's Court. The two women then spent the entire day at Court in the stuffy, cramped, women's cubicle outside the Courtroom waiting for their cases to be heard. For one, this was about 3.30 pm and for the other it was at about 4.30 pm. *Neither woman was given*

any lunch, and the last sustenance either received was breakfast at 6 am. They were, therefore, held in these conditions at the Court for 7 and 8 hours respectively, and were without food for about 10 hours.

The woman whose case came up last had been badly affected by her tiredness, hunger and period of waiting. She broke down in the dock and had difficulty in standing. She said later "I felt that the walls were closing in around me".

A VANDAL'S CHARTER

I G EAGLES, *lecturer in commercial law at Auckland University's Department of Accountancy examines the new s 129C of the Property Law Act 1952.*

It seems that the old adage that every New Zealander is born with an axe in his mouth has received legislative confirmation with the enactment of s 129C of the Property Law Act 1952, inserted by s 12 of the Property Law Amendment Act 1975. An innocent might imagine that in a country whose native flora has been well nigh eliminated and whose cities are barren and treeless by world standards, Parliament should perhaps be more concerned with the preservation and planting of trees than with adding to the tree feller's already formidable legal arsenal. To be sure, the section does make the now customary obeisance towards "the environment" but the whole thrust of its provisions is in the opposite direction. All right thinking New Zealanders may now rejoice. The order which they have striven to impose on their quarter acre sections where every plant and shrub knows its place will no longer be threatened by the whimsical tastes of an absurd minority. Nor need their peace of mind any longer be disturbed by having to look at other people's trees, an ever constant reminder of the onslaught of greenery to be expected if trees are allowed to "get out of hand." (ie, exceed a height of three feet).

Why, one might ask, should tree elimination and control require immediate legislative intervention while tree preservation and encouragement are left in the hands of local and regional authorities? Were the existing legal controls so inadequate as to require the enactment of a provision as drastic as s 129C? Far from it, in fact the existing law more than adequately protects one person from the adverse effects of trees on another's property.

A Tree at Common Law

Judges have long recognised that private law rights and liabilities must be limited in scope if they are to be the subject of a civil action. Adversary proceedings are ill adapted to solving complex problems and should be confined to conflicts where the legal issues are precise and clear. For this reason, the Courts would interfere with a person's right to have what trees he chose on his land only where it could be shown that the trees had or were likely to damage another's person or property or where they interfered with that other's right to possess (not enjoy) his own land.

(1) Encroachment – While the intrusion of boughs or roots of trees onto a person's land does not in itself amount to a trespass *(a)*, it does constitute a nuisance and may be restrained by injunction *(b)*. Moreover the law confers upon the owner of the affected property a limited right of self help in that he may remove the offending branches etc without himself incurring any liability *(c)*, irrespective of the age of the tree or the duration of the encroachment. Nor need notice be given unless entry on the neighbour's land is necessary to effect the removal. Even where a man enters what he knows to be his neighbour's property and fells trees on that property, while he may be liable for trespass he commits no criminal offence provided he honestly believes that he has the right to do so *(d)*.

(2) Falling timber and debris – Where a tree or branch falls and injures another's person or property the occupier of the property on which it stands will only be liable if such an occurrence is reasonably foreseeable *(e)* eg where a tree is rotten and this state of affairs is visible on reasonable examination or is in fact known to the occupier. The rule in *Rylands v Fletcher* does not apply unless the tree is of a type which is notoriously

(a) Lemmon v Webb [1894] 3 Ch 1
(b) Butler v Standard Telephones and Cables [1940] 1 KB 399
(c) Lemmon v Webb
(d) Flamank v Read [1917] GLR 622
(e) Either in nuisance or for negligence

brittle or unstable *(f)* and even then it must have been planted by someone *(g)*.

(3) Self sowing plants and trees – Where a person plants self sowing trees on his own land which then spread to his neighbour's land, then he is liable whether or not such spread was foreseeable *(h)*.

(4) Casting of shade – No tort is committed by planting trees which cast shade upon your neighbour's land, however cold or unpleasant this may make life for him *(i)*.

(5) Obstruction of views – Here the Courts quite sensibly took the view that in the absence of agreement (express or implied) or valid prescriptive right *(j)* no man could prevent his neighbour from obstructing his view *(k)*. A view, it was held, was such a vague and nebulous concept as to be incapable of regulation except where the parties themselves (or their predecessors in title) have precisely defined its extent and nature.

B Fencing Act 1908

Many of the early settlers in this country, not content with scraping their own land bare, itched to repeat the process with that of their neighbours, and it was not long before they obtained legislative assistance to this end. As early as 1881 it was enacted that where a fence is driven through native bush the person who erected the fence was entitled to clear the busy for six feet on either side of the fence *(l)*. By 1895 *(m)* the distance had been increased to 33 feet and under s 21 of the Fencing Act 1908, which is still in force, it has become 66 feet *(n)*. Fortunately the provison appears to have been little used in urban areas but while it remains on the statute book it could wreak havoc in bush clad suburbs such as Auckland's Titirangi.

Nor was the hostility of the pioneers confined to native flora. They also keep a watchful eye on any exotic trees which might be planted by some of their number. Thus in s 24 of the Fencing Act 1895 *(o)* it was enacted that no person could plant trees "on or alongside" any fence or boundary without the consent of the owner of the adjoining property, a provision which still persists as s 26 of the Fencing Act 1908. Section 26 extends the common law by enabling the adjoining occupier to enter and "cut down, uproot, or destroy" the offending trees. The Courts have interpreted s 26 narrowly thereby limiting its potentially destructive effect on the environment. In *Gilbert v Samspon* [1934] NZLR 137, for example, it was held that trees planted between two to four feet from a boundary were not "on or alongside" that boundary. Again, the right is not strictly one of self help, since it must be preceded by conviction (although the proceedings need not have been initiated by the person entering) *(p)*.

So things remained until 1955 when s 26A was enacted. This went much further, conferring upon Magistrates a summary jurisdiction to order the lopping or felling of trees at the behest of any occupier of land on which a building was erected for residential purposes if it could be shown that this was necessary to remove or prevent the recurrence of any undue interference with the reasonable enjoyment of the applicant's land. The tree in question need not have been anywhere near the applicant's boundary nor need his land have adjoined that of the respondent. Nor was it necessary to show that the presence of the tree would have amounted to a nuisance at common law. Despite the wide terms in which s 26A was framed, it was held in *Williams v Murdoch* [1968] NZLR 1191 that it conferred no right to maintain a view or prospect through another's trees, while in *Thompson v Louis* (unreported, Supreme Court Auckland; 7 October 1974, M 161/72). Perry J stated that the discretion conferred by this section was to be exercised with caution so as to avoid unnecessary interference with the "fundamental right of people to develop their land as they see fit."

One salutary feature of the Fencing Act is the provision in section 6 which permitted occupiers to protect themselves against the full operation of s 26A by entering into agreements with their neighbours for the safeguarding of their trees. Moreover, under s 7, such covenants ran with the

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(f) See *Noble v Harrison* [1926] 2 KB 32, although the distinction made there between endemic and exotic trees in misleading.

(g) Crowhurst v Amersham Burial Board (1878) 4 Ex D 5, *Giles v Walker* [1890] 24 QBD 656.

(h) Giles v Walker, ibid.

(i) Tapling v Jones (1865) 11 HL Cas 290; 11 ER 1344.

(j) An easement or restrictive covenant can no longer be created by prescription in New Zealand except as provided by statute, see s 124 of the Property Law Act itself.

(k) Attorney-General v Doughty (1752) 2 Ves Sen 452; *Knowles v Richardson* (1670) 1 Mod Rep 55; *Fishmongers Co v East India Co* (1752) 1 Dich 163.

(l) Fencing Act 1881, s 19.

(m) Fencing Act 1895, s 19.

(n) Although a lesser area may be set by a Magistrate where there is a dispute.

(o) The legislative history of this section is interesting. Earlier enactments (eg Fencing Act 1881, Fencing Act 1974 (Auckland Province) prohibited only the planting of potential pests such as gorse, sweetbriar, bramble and blackberry. In the 1895 Act these prohibitions are repeated but the words "any tree" are added almost as an afterthought.

(p) Spargo v Levesque [1922] NZLR 122.

land and could be registered under the Land Transfer Act 1952. Although these provisions appear to have been under utilised (at least as regards trees) they did provide a means whereby conflicts could be adjusted without recourse to the Court. More than this, they could have been used as a framework whereby a group of residents (or even a developer) could protect and preserve trees in a given locality should this have been what they preferred.

C Section 129C itself

Apparently however our legislators feel that the cautious approach adopted by the Courts is unnecessarily timid and have decided to strengthen the tree feller's hand by enacting a section in which magisterial soft heartedness will give little scope or so it appears from a perusal of the Property Law Amendment Bill as it first came before the House.

While it must be conceded that s 129C as enacted is not nearly as savage, it is still far from satisfactory. Moreover the extensive amendments, introduced to meet public criticisms of the original, have not improved the clarity of a section which was complex enough to begin with.

One can only sympathise with the draftsman in his attempt to embody in concrete form the conflicting social policies inherent in any attempt to find a balance between people and trees in a crowded urban environment. And yet one wonders whether it was not a mistake to attempt to solve these problems by tinkering with s 26A, a provision which itself was far from satisfactory. Might it not have been better to confer upon local authorities the power to embody tree preservation and control in their district schemes *(q)* leaving only actual or potential danger to life, health or property to be dealt with by way of summary application before a Magistrate.

Instead, the draftsman has chosen to graft onto a very wide general discretion a large number of overlapping and conflicting limitations and prohibitions, none of which offer any real guide to the unfortunate Magistrate called upon to interpret it. True, not all of the problems arising out of s 129C are new, some lay dormant in s 26A of the Fencing Act and are merely perpetuated by the new provision. Among the areas in which s 129C is defective:

(1) The right to a view – For the first time the Court is empowered to lop or fell trees for no better reason than that they diminish a view that the applicant might otherwise have had. This amounts to what is virtually a new form of property, unknown at common law, a quasi-easement created by magisterial fiat. This right appears on no title and is given gratis to the applicant at the expense of the respondent. (True, the applicant may have paid for his view but he has not paid the respondent.)

What constitutes a view? The section makes no distinction between pleasant and unpleasant view. A respondent might reasonably argue that his trees have enhanced the applicant's view. When is interference with a view "undue"? How can the Court resolve conflicts of this nature except by applying impressionistic and subjective tests? Why single out trees as obstacles to the fair prospect? Views are lost daily through the erection of office blocks and flats and yet no one would suggest that the appropriate remedy is by way of application to a Magistrate to have a storey or two lopped off? It is recognised that this problem is best dealt with by way of town planning procedures. The same surely applies to trees. (The apparent even handedness of s 129C is deceptive. True, it applies to "structures" such as buildings, walls or fences, as well as trees, but only where planning permission has not been obtained for their erection *(r)*).

The section is one sided moreover, since it confers no corresponding right to require one's neighbour to plant trees on his land to protect one's privacy, to hide what one considers to be his bad taste or simply to improve one's own view. Once the Legislature embarked on the dangerous journey of imposing aesthetic controls by statute then it should have done so consistently and fairly. Better still, not to have embarked upon it at all.

(2) Balancing the respective hardships – It is true that in subs (8) it is provided that no order shall be made unless the Court is satisfied that: "... the hardship that would be caused to the applicant or to any other person residing with the applicant is greater than the hardship that would be caused to the defendant by the making of the orders" *(s)*.

While this proviso appears to protect the defendant, it in fact places him at a distinct disadvantage. Except where damage to health or property is concerned how can the relative hardships be rationally assessed. What is likely to happen is that a Magistrate faced with this difficult choice is likely to give the greatest weight to that hardship which is the most easily measured. Sunlight lost and the number of leaves dropped are things that are easily quantified. The satisfaction

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(q) Such a power already exists of course but s 129C makes its exercise pointless in many cases.

(r) Or in the case of "structures" erected by the Crown, where planning permission would have been necessary had they been erected by anyone else.

(s) Section 26A of the Fencing Act contains a similar proviso.

or pleasure to be derived from looking at a beautiful tree or even from knowing that it is there is not. And yet who can say which of the two is more important. Thus the balancing of hardships seems likely to be weighted permanently against the defendant.

(3) Trees in existence prior to purchase by the applicant – Under subs (11) the Court is empowered to make an order "... notwithstanding that the applicant became the occupier of the land after the wrong commenced" *(t)*. (Although the subsection does seem to indicate that such an order will not be made as a matter of course.) It may be that this provision is directed at the sort of situtation which arose in *Thompson v Louis* where the applicant, while fully aware of the existence of the offending trees when he bought his property, was able to show that although the trees caused no obstruction at that time they deprived him of sunlight and blocked his gutters as they grew older *(u)* which the Court felt was sufficient to justify their being trimmed.

And yet it is difficult to see why it is only when trees are involved that the law should protect prospective purchasers from their folly. After all a man who buys a house in the path of a motorway or in an industrial zone receives scant consideration from the law. Surely nothing is more predictable than that small trees will grow into large trees and this is something the applicant should take into account when purchasing. Again, it is odd that the law should deny to the purchaser any redress where structural defects surface after purchase and yet confer extensive rights against his new neighbours in respect of trees in existence and visible to him at the time of purchase. Where the applicant complains of an obstruction to his view subs (11) has even less relevance. It would be harsh indeed to punish a person for his neighbour's lack of eye for topography.

(4) Nature of the order to be made – While the section may bestow upon the Court the power to make such order as it thinks fit, this power is limited in a very important way. All orders made must be directed to "removing, preventing or preventing the recurrence" of the obstruction caused by the tree or trees in question. This would seem to preclude any monetary adjustment. No doubt the applicant would in most cases prefer an order for lopping or trimming the tree to any monetary compensation, but the latter may, in some cases, be fairer. Thus if the applicant complains that the tree litters his lawn with leaves then it would seem equitable that the neighbour pay the cost of their removal rather than to order the mutilation of the tree.

Conversely where a tree is felled to enhance or provide a view, justice would seem to require that any consequent fall in the value of the respondent's property should be borne by the applicant. Those who wish to carve a view through other people's trees should perhaps pay for the privilege.

(5) Environmental protection – Subsection (6) was inserted during the committee stages of the original Bill as the result of submissions made by environmentalists, public bodies and others. It certainly represents a new departure for this type of legislation by providing that:

> "... where the applicant alleges that a tree is obstructing his view or is otherwise causing injury or loss to him the Court, in considering whether to make an order under this section, shall have regard to the following matters:
> (a) The interests of the public in the maintenance of an aesthetically pleasing environment:
> (b) The desirability of protecting public reserves containing trees:
> (c) The value of the tree as a public amenity:
> (d) The historical, cultural, or scientific significance (if any) of the tree:
> (e) The likely effect (if any) of the removal or trimming of the tree on ground stability, the water table, or run-off".

While the aims of the subsection are commendable enough these may be negated by the adversary nature of the proceedings. Applications can only be brought by an occupier against an occupier, there being no provision whereby the Crown, Domain Boards, Park Authorities, regional and local bodies *(v)* or groups of concerned citizens can intervene to assert the public interest for which subs (6) attempts to provide.

(6) Consent precluded – One unfortunate omission in s 129C is that it contains no provision whereby a property owner can protect his trees by coming to an agreement with his neighbours. This result appears to have been an unintentional drafting error. Section 26A of the Fencing Act has been repealed, but there have been no consequential amendments of ss 6 or 7 of that Act *(w)* and these sections therefore have no application to s 129C.

(7) Tree protection by local bodies – Section 129C (5) excludes from its operation:

(t) An identical proviso is contained in s 26A (7) of the Fencing Act.

(u) So far as the blocked gutters are concerned the applicant was surely sufficiently protected by the law of nuisance.

(v) Unless they themselves are the occupiers in question since the section applies to Crown land and public reserves.

(w) See Property Law Amendment Act 1975, s 14.

"*any tree*, the preservation of which is the subject of a requirement *lawfully* made by a local authority under any of the provisions of the Town and Country Planning Act 1953; the Municipal Corporations Act 1954 or the Counties Act 1956."

Tree preservation by local bodies can be effected in three ways. The first is by a general bylaw prohibiting the cutting of any tree over a certain height without the consent of the council concerned. Such a requirement is too general to attract the protection of the proviso to subs (5) since it would include most trees within the local authority's jurisdiction and each tree would not be sufficiently particularised. The second method is to attach conditions relating to the preservation of existing trees either when land is subdivided *(x)* or where the density of existing residential areas is sought to be increased by way of conditional use or specified departure. This, while it may come within subs (5), is too haphazard a form of tree protection to be of much general use especially in established residential areas. The third method is to incorporate the trees sought to be protected in the district scheme *(y)*. In order to take such trees outside s 129C however, it may be necessary to separately list each tree entitled to protection, or at least to show them accurately on a map incorporated in the Scheme. This is of course an inefficient, costly and time consuming exercise possibly beyond the resources of many councils. It would be far simpler to allow the creation of tree protection zones in which s 129C did not operate except as regards life, health or property, and the section should be amended to permit this. Such a procedure would go a long way to restoring that element of free choice which s 129C presently ignores. Those who disliked or feared trees could then avoid them. Instead, the present law allows one determined tree hater to impose his views of the aesthetic over a wide area.

(x) See Municipal Corporations Act, s 351A. A bond may also be required, see s 351CA.

(y) See Town and Country Planning Act 1953, s 21, Second Schedule, para 2.

LAND TRANSFER: MORE ABOUT VOID INSTRUMENTS

B H DAVIS *Senior Lecturer in Law at Victoria University, probes the limits of indefeasibility.*

"[A]n instrument which is null and void before registration remains equally null and void inter partes notwithstanding such registration, . . ." So stated Salmond J in *Boyd v Mayor of Wellington* [1924] NZLR 1174, delivering a minority judgment against immediate indefeasibility of title. However, this view was not favoured by the Privy Council in *Frazer v Walker* [1967] NZLR 1069 where the majority view in *Boyd's* case was expressly approved. That decision of the Privy Council was a landmark. The spectre of the previous controversy surrounding indefeasibility was liad. The registration of a void instrument was held to confer an indefeasible title, and ipso facto it came to be believed that registration validated the void instrument, whether it was void for forgery or for other reasons. However, perhaps the ghost is beginning to walk again in a new direction. In 1974, seven years after *Frazer v Walker*, Wilson J in the Auckland Supreme Court felt able to say, in words reminiscent of Salmond J: "Nothing in the Land Transfer Act 1952 gives registration the effect of validating a void transaction" *(a)*, and similar conclusions have been reached in Australia *(b)*.

Since *Frazer v Walker*, which was concerned with the narrow issue of the effect of registration of a void instrument upon the title of the person registering that instrument, new circumstances have arisen which have necessitated a wider examination of void instruments and their registration under the Torrens System.

Before considering these recent decisions, and their impact upon what since 1967 has seemed like settled law, it might be pertinent to restate briefly the history of the concept of indefeasibility of title and its recognised exceptions.

(a) Green and McCahill Contractors Ltd v Minister of Works [1974] 1 NZLR 251

(b) Travinto Nominess v Vlattas and Eliadis [1972-3] ALR 1153

Indefeasibility of title

Indefeasibility of title is an abstract concept, ostensibly derived from the Torrens system

legislation, but which is perhaps little more in fact than a judicially begotten creature brought into being to explain concisely certain provisions in the legislation, for as the Privy Council observed in *Frazer v Walker,* the term indefeasibility of title is not used in the New Zealand legislation (at p 1074). However, the statutory provisions giving rise to the notion of indefeasibility can perhaps be stated as follows:

(1) The title of the registered proprietor of an interest in land (that is the person whose name appears as such in the Register of titles) derives from the act of registration, and is paramount.

(2) The registered proprietor is bound by no interest in land which does not appear in the register, for it is registration alone which creates a real interest.

(3) The registered proprietor cannot be disseised of his estate or interest, and to support this proposition, the doctrines of adverse possession and prescription were abolished.

(4) The bona fide purchaser for value of an estate or interest in land is not adversely affected by any defect in his vendor's title nor by notice of any unregistered interest, provided that the purchaser himself perfects his own title by registration.

(5) In the event of a proprietor being deprived of his land or any interest in land by operation of the Act, he may be entitled to recover compensation from the Assurance Fund, instead of recovering his land *(c)*.

This simply is the effect of the Act, and from this as Hogg writes, "It has been said that 'an indefeasible title means a complete answer to all adverse claims' on mere production of the register, and that a person acquiring title from a registered owner has, on being himself registered, 'an indefeasible title against all the world' . . . but the indefeasibility of conclusiveness has its limits and exceptions . . ." *(d)*. Indeed, it is in the area of the limits and exceptions in which the Courts have been most active.

The exceptions to an indefeasible title

The exceptions to the concept of the indefeasible title are many and the majority of these derive either from express provision in the Land Transfer Act 1952, or other legislation. Broadly the exceptions may be classified into three categories:

(a) Overt exceptions which in the main preserve prior rights or inherent powers arising from the registered interest itself. Examples of exceptions in this category include: the exclusion from registered titles of public roads *(e)*; the protection of easements omitted from first registration *(f)*; and the preservation of the powers of mortgagees and lessors *(g)*.

(b) Expedient exceptions which derive in most cases from quite recent legislation designed to provide for exceptional circumstances. Such exceptions include: the power of the Court to extinguish registered easements *(h)*; the new adverse possession provisions *(i)*; and the power of the Courts to set aside transactions intended to defraud creditors or the Inland Revenue Department *(j)*.

(c) Fraud, which by repetition in the Land Transfer Act 1952, and its antecedent legislation may appear to be the most significant exception of indefeasibility, and it is from this exception that the judicial interpretation of indefeasibility has been developed.

Fraud defined

The present statute, like its predecessors, makes no attempt to define fraud, and as Kerr writes, in general, the Courts have been careful not to hamper themselves with too careful a definition of fraud *(k)*.

The varieties of fraud are legion, and at Common Law and in Equity, the word has come to embrace not merely actual dishonesty, but constructive fraud, or almost any act which the Court of Chancery would regard as unconscionable. However, within the context of the Land Transfer Acts, the Courts have necessarily set general limits on the word "fraud", although at an early date Williams J suggested that Land Transfer fraud, "must include everything that according to the doctrines of equity would be comprehended under that term *(l)*. Despite the rejection of this view in the *Assets* case, where the word was interpreted as "Actual fraud, ie dishonesty of some sort, not what is called constructive or equitable fraud", and which "is brought home to the person whose registered title is impeached to his agents" *(m)*, the Courts have subsequently relaxed the strict view of fraud, in the circumstance of notice of unregistered or equitable

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(c) This summary represents the combined effects of ss 35, 41, 62, 63, 172, 182 and 183 of the Land Transfer Act 1952.

(d) Hogg *Registration of title to land throughout the Empire* (1920) p 94

(e) Land Transfer Act 1952, s 77

(f) Ibid s 62 (b)

(g) Ibid s 63 (i) (a) and (b)

(h) Property Law Act 1952, s 127

(i) Land Transfer Amendment Act 1963, pt I

(j) eg Property Law Act 1952, s 60

(k) Kerr: *Law of Fraud and Mistake* (7th ed 1952) p 1

(l) Saunders v Cabot (1885) NZLR 4 CA 19, 35.

interests *(n)*, to inlcude not only an intention to defeat such an interest *(o)* but also, "that wilful blindness or voluntary ignorance which ... is equivalent to actual knowledge and therefore amounts to fraud *(p)*. This dictum was recently approved by the Court of Appeal in *Efstration v Glantschnig* [1972] NZLR 594.

Nonetheless, even this extended definition of fraud stresses that the fraud must be that of an active participant. Such emphasis on participator fraud, as the primary force denying indefeasibility of title to a registered proprietor, came too late to prevent the emergence of a complicating side-stream – the problem of third-party fraud. In *Gibbs v Messer* [1891] AC 248 *(q)* third-party fraud, in the form of forgery, had been held by the Privy Council to have the same effect as participator fraud. This contradictory approach was not finally negotiated until 1967 and the decision of the Privy Council in *Frazer v Walker*, when it was shown that only the fraud of the person procuring registration could defeat the title registered under the statute.

Void instruments

However, in the 83 years between these two decisions, the problem of forgery became the problem of void instruments generally. Although forgery was a kind of fraud, it was not upon the definition of fraud that the Privy Council in fact decided *Gibbs v Messer*. The decision rested on two related points: (i) that the mortgagee was not dealing with the de jure registered proprietor, and should have checked the identity of the person with whom he was dealing; and (ii) that a forged instrument was a nullity, and registration of a nullity gave nothing, although the statute might create an estate in a subsequent purchase.

Of these it was the second which was subsequently pursued in judicial authority on the indefeasibility or otherwise of title devised from void instruments.

It is true, that when next the Torrens system came before the Privy Council, the Judicial Committee attempted to minimize the effect of *Gibbs v Messer* but their Lordships vacillated, and failed to overrule their previous decision. Thus in *Assets Co v Mere Roihi* [1905] AC 176, 210, Lord Lindley first states: "A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud, if he honestly believes it to be a genuine document which can be properly acted upon." The clear implication here, when the statement is read with the preceding words defining fraud as actual dishonesty, is that the registration of a forged document by an honest purchaser creates an immediately indefeasible title. However, the matter is not left to rest there, for Lord Lindley almost immediately qualifies his statement, by observing a few lines further on, that: "Forgery is more than fraud, and gives rise to considerations peculiar to itself" (at p 211).

This contradiction had the effect of leaving *Gibbs v Messer* almost untouched, and was almost guaranteed to lead to the view that therefore, nullity was possibly in some way the same as fraud in denying immediate indefeasibility. Of void instruments generally, however, it can be said with some certainty, that prior to registration they are nothing and can give nothing *(r)*. Indeed, the District Land Registrar has a duty not to register any void instrument presented for registration *(s)*.

But what of void instruments which do become registered? The word "duty" used by Edwards J in *Findlayson v District Land Registrar* (1904) 24 NZLR 341, 347, is strong and therefore might indicate that the registration has an effect other than merely encumbering the Land Transfer Office with unnecessary paperwork *(t)*. However, the Courts became divided between two views: On the one hand that of immediate indefeasibility – that registration of a void instrument cured the defect in the document; and on the other, that such registration provides merely a good root of

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(m) Assets Co Ltd v Mere Roihi [1905] AC 176, 210 per Lord Lindley See also *Gregory v Alger* (1893) 19 VLR 565, 574, per Williams J. As to fraud by an agent being imputed to the principal, see *Ex parte Batham* (1888) 6 NZLR 342

(n) Such relaxation is perhaps possible in view of the wording of s 182 Land Transfer Act 1952, that "knowledge that any such trust or unregistered interest is in existence *shall not of itself* be imputed as fraud" (Italics mine)

(o) eg *Merrie v Mackay* (1897) 16 NZLR 124 and *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101

(p) Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd [1923] NZLR 1137, 1175 per Salmon J.

(q) This decision was almost exactly foreshadowed by the New Zealand Courts in *Ex parte Davy* (1886) 6 NZLR 760, and has been followed in effect subsequently, not only in Australasia (eg *DLR v Thompson* [1922] NZLR 627; *Clements v Ellis* (1934) 51 CLR 217) but also in some Torrens jurisdictions in the USA – eg *Eliason v Wilborn* 167, NE 101 (1929)

(r) Otago Harbor [sic] Board v Spedding (1885) NZLR 4 SC272

(s) Finlayson v Auckland District Land Registrar (1904) 24 NZLR 341

(t) Confirmation of this, albeit in the context of a void option to renew a lease, might have been seen in the further remarks of Edwards J in *Roberts v District Land Registrar at Gisborne* (1909) 28 NZLR 616, 617

title, bestowing initially on the person registering no title at all.

The conflict came to a head in the case of *Boyd v Mayor of Wellington* in which the Court of Appeal were divided. The majority of the Court, following *Assets v Mere Roihi* held that an ultra vires and therefore void proclamation nonetheless conferred a good title upon the City Council when once it was registered. In the course of his judgment, Stout CJ observed: "There is only left for consideration the case of Mere Roihi and that decision is, to my mind, conclusive that where a person gets a registered title under the Act, he not having been guilty of any fraud, his title is conclusive . . . Here a title has got on the Register in favour of the Corporation. The Proclamation may have been made without jurisdicition; still it is a transfer. There has been no fraudulent transaction, and the registration must, according to the decision of their Lordships of the Privy Council, be deemed conclusive as to the title of the now registered owner – namely, the defendant Corporation." (at pp 1187-88).

On the other hand, the minority of the Court, preferring to see *Gibbs v Messer* as unaffected by the *Assets* decision held that an invalid transaction cannot confer more than deferred indefeasibility, and Salmon J opined that: "Even, however, if it were true that initial registration is in all cases conclusive and unexaminable at the suit of prior owners of unregistered interests, it would not follow that a subsequent erroneous registration is conclusive and unexaminable at the suit of the prior registered proprietor whose title has been wrongly removed or encumbered by the registration of an invalid instrument. As already indicated, *Gibbs v Messer* shows that this is not the case. The registered title of A cannot pass to B except by the registration against A's title of a valid and operative instrument of transfer. It cannot pass by registration alone without a valid instrument, any more than it could pass by a valid instrument alone without registration." (at p 1205, per Salmond J).

However, when an almost identical problem came before the Australian Courts, it was the minority view in *Boyd's* case which prevailed. In *Caldwell v Rural Bank of NSW* (1951) 53 SR (NSW) 415 and ultra vires and void resumption of land, was held to be of no effect to confer an indefeasibility of title, notwithstanding its registration.

Frazer v Walker and after

This division of authority lasted until the Privy Council were again faced with a void instrument, not only void but forged, in *Frazer v Walker*, and decided the dispute in favour of the majority view expressed in *Boyd's* case. "In *Boyd v Mayor of Wellington*, the Court of Appeal in New Zealand held in favour of the former view [immediate indefeasibility], and treated the *Assets Co* case as a decision to that effect . . . Their Lordships are of opinion that this conclusion is in accordance with the interpretation to be placed on those sections of the Land Transfer Act 1952 which they have examined. They consider that *Boyd's* case was rightly decided and that the ratio of the decision applies as regards titles derived from registration of void instruments generally. As regards all such instruments it established that registration is effective to vest and divest title and to protect the registered proprietor against adverse claim" (at p 1078).

Although such a pronouncement was no doubt met with some misgivings, *(u)* and fond backward glances to *Gibbs v Messer* and the minority view in *Boyd's* case, it is an almost inescapable conclusion from the provision of s 41 of the Land Transfer Act 1952, that "upon the registration of any instrument . . . the estate or interest specified in the instrument shall pass." The Torrens system as Windeyer J noted in a recent decision of the High Court of Australia, "is not a system of registration of title but a system of title by registration" *(v)*, an interpretation which apparently accords with the views of Torrens himself.

In *Breskvar v Wall* (1971) 126 CLR 376, there was involved a transfer which was rendered void by a provision in the Queensland Stamp Act 1894, that "No instrument of conveyance or transfer . . . shall be valid either at law or in equity unless the name of the purchaser or transferee is written therein in ink at the time of the execution thereof." In these circumstances, a unanimous High Court held that notwithstanding the statutory invalidity, the act of registration was sufficient to confer a valid title upon the person registering the void instrument.

The decision was a strong affirmation of *Frazer v Walker*, which "is important here in establishing that, if and to the extent that earlier decisions were to the effect that an indefeasible title cannot be acquired by the registration of a void instrument, they have lost their authority. It must now be recognised that, in the absence of fraud on the part of a transferee, or some other statutory ground of exception, an indefeasible title can be acquired by virtue of a void transfer" (at p 397, per Menzies J).

(u) PB Temm: *Mr Bumble Right Again* [1967] NZLJ 129

(v) Breskvar v Wall (1971) 126 CLR 376, 399.

Further, Barwick CJ expressed the view that: "that which the certificate of title describes is not the title which but for registration it would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. *It matters not what the cause or reason for which the instrument is void*" (at pp 385-86).

Another void proclamation

Thus it must be regarded as settled law that unless an instrument is affected by direct participator fraud, it is registration which gives title and an indefeasible title is obtained whether the registered instrument is valid or void. Against this the statement of Wilson J cited at the opening of the article, that "nothing in the Land Transfer Act 1952 gives registration the effect of validating a void instrument", is suprising and, since made after both *Frazer v Walker* and the *Breskvar* case, seems prima facie an attempt to put the clock back.

In *Green and McCahill Contractors Ltd v Minister of Works* [1974] 1 NZLR 251, Wilson J was faced with a problem which perhaps should never have arisen. Land owned by the claimant company had been taken by proclamation pursuant to the Public Works Act 1928, and compensation had been paid. It was subsequently discovered, that both a right of way and a building line restriction were extinguished by the proclamation, although the intention had been to reserve these and to take merely the encumbered land. However, instead of granting these afresh *(w)*, the Crown resorted to the cumbersome procedure of issuing a new proclamation purporting to revoke the first proclamation and then to retake the land subject to the particular encumbrances. In the event, the revocation of the original proclamation was void for being out of time. Nonetheless, the original owner whose land was first taken, then revested and finally taken a second time, made a claim for compensation in respect of the second taking.

In deciding that although title may have changed hands scintilla temporis *(x)* as a result of the void proclamation, this was insufficient to found a claim for further compensation. Wilson J not only made the previously cited observation, but continued: "Section 62 deals only with title. Within its terms registration gives a good legal title to the interest in the land. Such title may be a mere shell, as in the case of a bare trustee, or the proprietor may be subject to rights in personam which deprive him of any real beneficial enjoyment... If follows that the mere fact that the claimant may (for a fraction of time) have been re-registered as proprietor of the fee simple to the land does not require the Court to close its eyes to the fact that the proclamation was void" (at p 255-56).

Thus, rather than attempting to detract from *Frazer v Walker*, Wilson J recognises that registration creates a good, and immediately indefeasible, *legal* title but no more than that. The case may be no more than an example of the circumstances in which the Courts may look behind the curtain of the register, at the legal or equitable realities.

Equities and Registered Titles

In general trusts and other equitable interests cannot be registered or noted on the title register, without express statutory authority, for "the whole policy of the law was to allow the registration of legal interests only" *(y)*.

However, Equity remains as a gloss on the law, or as Maitland has said; the purpose of Equity is "not to destroy the law but to fulfil it", *(z)* by taking cognizance of matters beyond the strict legal position. This would seem to be still the position for, although since the Supreme Court Act 1860, the New Zealand Courts have administered both law and equity, the two may run in the same channel but their waters do not mix *(a)* while the Torrens system is concerned to emphasize legal interests and legal title, "the Courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights the Courts in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts *(b)*.

Thus, notwithstanding registration, equitable principles apply to the legal title acquired by registration, and this possibility has clearly been

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(w) Power for this apparently exists in Public Works Act 1928 s 41.

(x) This seems the essence of the unreported judgment of the Court of Appeal in *Green and McCahill* delivered by McCarthy P on 7 March 1974. [The result of the appeal, affirming Wilson J, is however noted, at [1974] 1 NZLR 661].

(y) Staples v Corby (1900) 19 NZLR 517, 537

(z) Maitland *Equity* (revised ed (Brunyate), 1949) p 17

(a) Cited in Snell: *Principles of Equity* (27th Ed 1973) p 17.

(b) Butler v Fairclough (1917) 23 CLR 78, 91 per Griffith CJ

allowed for the Privy Council in *Frazer v Walker*. Indeed, it has been long for by the Privy Council in *Frazer v Walker*. Indeed, it has been long benefits of his title. Equities are not merely caveatable, but the Courts will give effect to equitable interest which qualify the legal title; whether by holding an intention to defeat an equitable or other unregistered interest to amount to fraud *(c)*; by enforcing express or implied trusts *(d)*, or by regarding a statutory joint tenancy as a tenancy in common *(e)*.

The Vlattas case

An example of this giving effect to general equitable principles, so as to qualify an apparent legal position, arose in the High Court of Australia in *Travinto Nominees Pty Ltd v Vlattas and Eliadis* [1972-73] ALR 1153. This case concerned a lease registered under the Real Property Act 1900 (NSW), which contained an option for renewal. Part of the leased property was used as a hairdressing salon and the Industrial Arbitration Act 1940 (NSW) required that the lease be consented to by the Arbitration Commission or by a committee established for the industry. No such consent had been obtained and as a result the 1940 Act provided that the lease was void and the parties thereto liable to criminal penalties.

Although the decision primarily revolved around the question of misdescription of property in connection with a subsequent option to purchase, it was relevant to decide whether or not the lease and the covenant to renew became indefeasible and valid as a result of registration under the Torrens system in spite of the provisions of the Industrial Arbitration Act 1940. In the event the High Court ruled that both lease and option to renew were void and that the option to renew, at least, was not validated by registration, on the principal ground that Equity would deny a void option a decree of specific performance.

In this respect the decision runs counter to a long line of authority, and casts particular doubt upon the New Zealand Supreme Court decision in *Pearson v Aotea District Maori Land Board* [1945] NZLR 542, although, the High Court felt it unnecessary to consider further whether that decision was correct *(f)*. However, in the final analysis despite the distinguishing features which may be suggested by the other grounds in the Vlattas decision: that there are degrees of voidness especially when coupled with illegality *(g)*; or that where two statutes conflict the latter prevails; the main conflict must nonetheless revolve around the question of specific performance.

The older option cases

The essential principle established at the beginning of the century: "The rights given to lessees under provisions for renewal will, upon registration of the lease, be entitled to the same protection as the term granted by the lease' *(h)*.

However, this dictum of Edwards J did not become the subject of direct litigation until 1945, when Finlay J was required to decide *Pearson's* case. However Finlay J applied the dictum of Edwards J, and held, that where a lease had been granted containing an ultra vires right of renewal the void option being "something which affects and is definitive of the terms of a lease," (at p 550) and there are as registrable as the lease itself, became valid and enforceable by the act of registration.

Previously a similar principle had been applied in the case of void options to purchase contained in leases. In these cases, of which the most significant was *Fels v Knowles*, (1906) 26 NZLR 604 *(i)* however, the Courts were able to find a suggestion of statutory authority for conferring indefeasibility not only upon the lease, but upon the option also. This arises from an interpretation of what is now s 118 of the Land Transfer Act 1952, which provides that where a registered lease contains a covenant or option for purchase, "the lessor shall be bound to execute a memorandum of transfer".

However, the same section also occurs in the Real Property Act 1900 (NSW) *(ii)*, and of this Barwick CJ in *Vlattas* observed: "It may be noted that the Real Property Act recognises that there may be terms and conditions in the memorandum of lease, see the Real Property Act s 53 (3) . . . registration of the memorandum of lease does not ensure the validity of every term and condition of the lease or indeed of the enforceability of every covenant it contains. In my opinion, it must depend on the nature of the covenant and its relation to the limitation of the interest created in the land by the memorandum of lease itself . . . The validity or enforceability of such a covenant will remain a question under the general law" (at p 1162).

(c) Merrie v Mackay (1897) 16 NZLR 124.

(d) Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491; *Taikapu Gold Estates v Prouse* [1916] NZLR 825; *Shepheard v Graham* [1947] NZLR 654.

(e) Re *Foley* [1955] NZLR 702.

(f) [1972-3] ALR 1153, 1163 (per Barwick CJ) and 1175 (per Gibbs J)

(g) As to which see the observations in footnote *(s)*

(h) Roberts v District Land Registrar at Gisborne (1909) 28 NZLR 616, 617 per Edwards J. Similar views were expressed in *Rutu Peehi v Davy* (1890) 9 NZLR 134, 151.

(i) See also *Rotorua Hunt Club v Baker* [1941] NZLR 669.

(ii) Section 53 (3)

Here it seems as if Barwick CJ is saying no more than that s 118 is merely definitive of the general law on the nature of options to purchase. As Adams had pointed out, the Land Transfer Act is "not intended to alter the substantive law more than necessary," *(j)* and it may be that s 118 is a provision where the law might say one thing, and Equity another, as the enforcement of the lessor's statutory duty must rest with Equity, for a lessee with an option to purchase is, when he has exercised his option, as regards specific performance, in the position of an ordinary purchaser *(k)*.

However, it may be that the statute was little more than a pretext of reinforce the principal ratio of *Fels v Knowles* and later cases, the doctrine of indefeasibility itself: "The cardinal principle of the Statute is that the Register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world . . . Everything which can be registered gives in the absence of fraud, an indefeasible title to the estate or interest, or . . . the right registered" *(l)*.

(j) Adams *Land Transfer Act* (1958) p 253.

(k) Burns v Allen (1889) 10 LR (NSW) Eq 218 per Owen CJ and *Cockwell v Romford Sanitary Steam Laundry* [1939] 4 All ER 370

(l) Fels v Knowles (1906) 26 NZLR 604, 620.

(m) Ibid p 614

(n) An option to purchase is held to be a collateral and distinct contract (*Griffith v Pelton* [1958] Ch 205), to which the Rule against perpetuities may apply (*Hutton v Watling* [1948] Ch 26), while a covenant to renew runs with the land (*Muller v Trafford* [1901] 1 Ch 54, 61, per Farwell J: *Rider v Ford* [1923] 1 Ch 541)

(o) See Adams: *Land Transfer Act* (2nd Ed 1971) p 289

(p) An option to purchase at least may be caveatable – see *Merrie v Mackay* (1897) 16 NZLR 124.

(q) [1972-3] ALR 1153, 1171.

(r) eg s 85 Land Transfer Act 1952. The principal correction or cancellation sections are ss 81 and 82 Land Transfer Act 1952, although the Courts have apparently claimed concurrent jurisdiction with the Registrar. *District Land Registrar v Thompson* [1922] NZLR 627 and *Brown v Broughton* [1915] 24 DLR 244, where in the Manitoba Kings Bench, Curran J observed at p 247 that "although prima facie a valid certificate of title . . . it cannot stand, and must be set aside and cancelled, . . ."

(s) In making this distinction, the Court may be implicitly extending to statutory offences, the general public policy of the Common Law, that a person may not benefit from his or her crime, although this is most usually applied to Murder and Manslaughter: *Re Pechar* (deed), *Re Grbic* (deed) [1969] NZLR 574.

(t) See also the dissenting judgment of Edwards J in *Moore v Public Trustee* (1901) 3 GLR 207, 211, and further *Wolters v Riddiford* (1905) 8 GLR 323

If this is indeed the real ratio of the option cases, then it perhaps overlooks the nature of options, and it is necessary to heed the cautionary words of Stout CJ, dissenting in *Fels v Knowles*: "Primarily, the Land Transfer system was only meant to validate completed transactions by registration *(m)*.

An option is an incomplete transaction. Although there may be technical differences between options to renew, and options to purchase when contained in leases *(n)*, they are both equally, in essence, at most contracts for future contracts, or at least, as Adams suggests, "irrevocable offers for future contracts" *(o)*. In either case, no interest in the land passes by the option until the contract is completed by the necessary deed or memorandum, an event which may require the assistance of equity *(p)*.

The effect of Vlattas and conclusion

The judgments in the *Vlattas* case throughout stress that because of the addition of the element of illegality, both the lease *and* the option to renew were void, and indeed Menzie J goes so far as to suggest that the Registrar might have powers of correction in these circumstance *(q)*. Such powers of cancellation are contained equally in the New Zealand Land Transfer Act 1952, and the possibility of an indefeasible title being cancelled, and the register rectified was preserved in *Frazer v Walker*. Therefore, the concept of an indefeasible title must be a legal title which is valid for as long only as it remains on the register. The Registrar alone, to the exclusion of the Courts except in somewhat minor circumstances *(r)*, has jurisdiction to correct the register and may do so principally when a certificate has been "fraudulently or wrongfully obtained" or retained. This seems to impose upon the Registrar a wide quasi-judicial power over otherwise indefeasible titles, although the Vlattas case may be taken as suggesting that wrongful means something more than mere voidness – there must also be a degree of penal illegality or criminality *(s)*.

The case may also, when taken with *Breskvar v Wall*, suggest for the future, despite the concurrent position of the lease in *Vlattas*, that a distinction must be made between a present estate, whether of freehold or leasehold, and a "contract" for a future estate. If the former is acquired by registration of an instrument merely void, and without more, registration may confer a good statutory title *(t)*. In the case of the latter, however, registration confers no more than an apparent power to seek the assistance of equity, which may be denied. Thus any proprietary right purported to be conferred by the option or contract is not a final indefeasible right.

Even in the case of present estates, however, Equity may qualify the beneficial ownership of the legal estate to a bare legality which in proper circumstances denies some or all of the benefits of ownership.

An indefeasible title is a statutory creature, a legal title, which, while in many ways an improved version of former concepts of title, is not a magically sacrosanct institution. It does not confer any fundamental rights in an entrenched constitutional sense, but remains in all respects subject to legal or equitable qualifications, except in so far as these have been expressly removed by statute.

A POLITICAL TRIAL — II

NLA BARLOW *continues his four-part account of the trial of the "San Quentin Six" with an examination of the pre-trial issues. The first part appeared at [1976] NZLJ 86.*

The substantial issues in the San Quentin trial are whether the six defendants were involved in an escape conspiracy with George Jackson and whether they are responsible for the deaths of the three guards and two trusty inmates The pretrial procedures actually commenced in August 1971 some days after the alleged incident happened. A final jury verdict is still not expected until later this year. At one stage it looked doubtful if the grand jury (the body of citizens constituted to decide not the guilt of the defendant but whether the prosecution has sufficient evidence to warrant charging him) would indict any of the inmates. In October 1971 the indictment procedures were suspended when three of the grand jurors resigned. One of them denounced the proceedings as "fallacious and immoral". Another declared that "what this Grand Jury does is not justice but a vendetta". The jurors were simply replaced however and the indictments issued against the San Quentin defendants by a bare minimum jury vote.

In January 1974 a Superior Court Judge, Judge Stoll, acting on a defence motion dismissed the indictment against the six on the grounds that the means by which citizens were selected to serve on the Grand Jury was unconstitutional in that it purposely excluded blacks, non white collar workers, youths, chicanos, and latinos. The jury list had not been taken from the electoral rolls as it should have been (and as it is in New Zealand), but from the membership lists of exclusively white homeowning and business associations, and even a women's bridge club! This form of jury tampering was in clear breach of the constitutional guarantee of a jury of one's equals or peers. In December 1974 the dismissal order was quashed however following an appeal by the prosecution to the San Francisco Court of Appeals. The appellate Court ordered the reinstatement of the indictment and continuation of the proceedings.

And so they did in February 1975. From the beginning Judge Broderick ordered that the defendants, with the exception of William Tate, be chained and shackled. Tate was exempted from this order because although he was in prison at the time of the alleged escape, his one to ten year term for assault (he served the full ten), had expired. The Judge released him on bail. The distinction between the treatment of Tate and the other defendants is ironical considering that with one exception, the other five chained defendants were all initially imprisoned for non-violent property offences. The Judge has yet to rule on a six month old defence motion calling for a removal of the chains in which evidence was given by subpoenaed San Quentin guards that the defendants can only eat, drink, and exercise bodily functions with extreme difficulty. Supporting medical evidence was also given by doctors to the effect that the chains which are worn by the defendants for eight to ten hours a day were both painful and damaging to health.

Another complaint was made by one of the defendants, William Tate, about his Court-appointed attorney. For two years he complained, ungratefully one might first think, about the moral and professional calibre of his counsel. His problem was not solved by the Court but by the timely intervention of fate. His Court-appointed attorney was forced out of the case after being charged with fraud and embezzle-

ment. Disbarment proceedings were also brought against him. A well-known left-wing attorney Charles Garry, who has been championing radical causes long before the new breed of hip young lawyers arrived on the scene, was permitted to enter the case although Judge Broderick refused to allow him legal aid payment.

The location of the trial at the scene of the 1970 Marin Court slayings adds to the drama of the case and has led to a number of procedural wrangles. None of the six defendants were in any way implicated in that incident but because of their San Quentin background they are often linked together. For this and a number of other reasons the defence argued that it is not possible to obtain a fair trial in Marin County and filed several motions requesting a change of venue. Both in English and American law the Court has power to order a change of trial venue where there exist local conditions mitigating against a fair and prejudice free trial. The prejudice alleged was threefold.

First, the pre-trial publicity in Marin County (the second wealthiest county in the country) had press-linked the case, which is in fact only concerned with events inside the walls of San Quentin, with the 1970 killing of Judge Haley. The defence claimed that this would diminish the possibility of obtaining unbiased jurors. Copies of local newspapers were presented to the Court. The *Marin Independent Journal* carried editorials suggesting guilt on the part of the still untried defendants, an exercise that would risk contempt charges in New Zealand, and in relation to defendant William Tate where application for bail was being considered, urged, in terms reminiscent of the adage "give him a fair trial then hang him", that the trial be rushed through so that the populace of Marin would be free of this "menace". Finally the defence pointed to the nationwide publicity given to a false and malicious rumour, circulated amongst the press by San Quentin officials, to the effect that defendant Hugo Pinnell had stabbed his attorney in the throat during a pre-trial conference at the prison. Reading of this the next morning, Pinnell's attorney immediately invited reporters to inspect and photograph his unmarked throat, adding that Pinnell had still been in his chains during the conference and that the rumour was typical of the falsehoods the prison put out about incidents there.

The second ground relied upon in support of the change of venue application concerned the fitness of the presiding Judge himself. In American law a defendant has a pre-emptory (without cause) right to challenge the Judge allocated to try the case. When this happens the Judge must automatically withdraw from the case which is assigned to another Judge. This extraordinary procedure is necessary in the United States because its judiciary is not independent as in New Zealand. Judgeships, particularly in State Courts, are elective or, if appointive, are regarded as political prizes to be handed out to the friends and allies of the incumbent government in much the same way as ambassadorships and High Commissions are in New Zealand. The appointment of Judge Broderick, the trial Judge in the San Quentin case, was no exception to this practice. A life long Republican activist, he was appointed by his former client Governor Ronald Reagan, upon whose election finance committee he served. He is in this way linked with the ideology of an ultraconservative politican who regards even President Ford as too far to the left. Added to this is the fact that he was appointed to fill the vacancy created by Judge Haley's slaying and indeed wrote the late Judge's epitaph on behalf of the Marin Judges. While none of these factors could disqualify Judge Broderick from presiding, it is possible to understand the defence's wishes to secure his removal by invoking the pre-emptory challenge.

The Judge refused to deal with the matter however. Recalling that one of the defendants had previously unseated Judge McGuire (the first Judge assigned to the case) with a pre-emptory challenge, his Honour held that he could not entertain a challenge against himself also, for only one may be used in a case.

Defence submissions that there are actually six cases as the defendants were being tried together merely for convience were rejected. This decision may well be appealable as both American and English law leans against accused persons forfeiting either procedural or substantive rights simply because cases are tried collectively rather than individually. In New Zealand in fact, a defendant being tried jointly has the same number of jury challenges as his co-accused so that the number of challenge rights in the case is at least doubled.

The third allegation of prejudice concerned the composition of the trial jury itself. The selection process that in New Zealand may take no more than 20 minutes of Court time extended over four months. Some 1800 prospective jurors were eliminated. Many were challenged because of personal associations with San Quentin guards (the prison is a major employer in the county) or because of preconceived views about the defendants and the trial, subjects counsel in the United States are permitted to cross-examine on in some detail. (Compare this with the fuss in some quarters over the defence committee's pre-trial questioning of potential jurors in the late Dr

Sutch's trial.) As well, each side was able to exercise 50 pre-emptory (without cause) challenges. All of which were used. Impanelled finally were a young suburban, predominantly female, jury including one black and four substitute jurors. It is difficult to understand the defence's dissatisfaction with this jury. True, none would pass for Berkeley University radicals and few would look at home in San Francisco's Third World Haight-Ashbury district. Nevertheless they appeared intelligent and interested in the proceedings (to the point of taking notes, a practice unfortunately often discouraged in New Zealand) and surely meet the broad constitutional requirements for a trial by peers.

So the trial continued at the Marin County Courthouse.

CORRESPONDENCE

Sir,

Barristers' dress

I applaud Donald Dugdale's article on barristers' dress at [1976] NZLJ 23, since he echoes sentiments held by me since I saw my first wig.

I think however he is kidding himself if he feels that the majority of the profession agree with him. I cannot at the moment think of any practising lawyer who has agreed with the scorn I have from time to time heaped on the archaic dress rules. Even the incredible turmoil involved in obtaining a new wig from Ede & Ravenscroft (to say nothing of having collars starched) seems dumbly accepted as just another of the factors which separate us from the lesser professions.

But the dress rules are not embodied in statute, and remain the dictate of the sitting Judges. When on a hot day the Judge permits wigs and gowns to be removed, he is simply relaxing the standard of dress which he requires in his Court at other times. Whether he notices the standard of justice deteriorating while the wigs are off we have never heard.

I therefore support Mr Dugdale in his crusade, and suggest that there is one obvious way to boost the movement along. He should simply appear, on his next Court day, in mufti, with the intention of drawing some helpful comment from the presiding Judge.

I will be interested to hear how he gets on.

Yours etc

John Burn
Christchurch.

Sir,

ACORD needs funds

Over the two and half years ACORD has been in existence we have worked to draw attention to the ways in which members of ethnic minorities in New Zealand are discriminated against. We have sought to bring about changes to relieve the immediate suffering that is the everyday experience particularly of Maoris and other Polynesians as they come into contact with the systems and institutions which operate on a monocultural, monolingual basis – the Courts, police, schools, city councils, land agents etc.

At the same time we have tried to point out how white New Zealanders continue to build these inequities into New Zealand society, and to determine ways in which they can work instead towards a new, dynamic, pluralistic society. All this has required a good deal of research into the factors causing and perpetuating institutional racism. From this research we have written up about 40 bulletins, reports and papers and have made numerous submissions to Government. The costs, mainly for printing and distributing this material, have risen so much that we have simply run out of money. We feel that our efforts are not wasted – the changes we have so far helped to bring about are small, but real. If your readers support what we are doing, we would very much appreciate donations to help us continue.

Thank you,

O R W Sutherland

ACORD
Box 47-155
Ponsonby
Auckland

Be courteous to a witness – Because he was unfortunate enough to be standing on a street corner when a motor accident occurred he is dragged into Court to give evidence in a matter which is of little interest to him. He is kept hanging around all day and then is probably told the case has been adjourned to suit the convenience of counsel. He is called "witness" when he has already given his full name. He is brought to Court in many cases to prove some unchallenged evidence when, with a little thought by counsel he could have been excused. He is entitled to some consideration – Mr D J Sullivan SM to the Wellington Young Lawyers.

THE EKETAHUNA LAW REPORTS

ACTORS EQUITY v BROADCASTING COUNCIL OF NEW ZEALAND

Administrative law – Powers and functions – Jurisdiction of administrative bodies – Industrial Commission – State Services Tribunal – Parties to dispute each bound to apply to different body for determination of dispute – Broadcasting Act 1973, Industrial Relations Act 1973

Crumble J (orally): This case has arrived in this Court by a singularly circuitous route, having stopped at a number of way-stations en route. The plaintiff, an industrial union of workers registered under s 165 of the Industrial Relations Act 1973, seeks a declaratory judgment as to the appropriate form of jurisdiction in a dispute of an industrial nature which has arisen between itself and the defendant.

In pursuit of its objective under Article 30 of its Rules, namely: "To support, protect and further the interests of members in relation to conditions of employment within the industry", the plaintiff sought to negotiate an industrial agreement with the defendant, a statutory body established by the Broadcasting Act 1973. The defendant for its part entered these discussions in a spirit of cooperation having chosen to recognise the plaintiff in terms of s 13 (k) of the same Act. Both defendant and plaintiff met on the appointed date and commenced discussions which ranged over several days and which passed off most amicably until the latter part of the proceedings.

Then a note of lamentable acrimony exhibited itself over the inclusion within the proposed agreements of certain matters previously determined by the Industrial Commission in respect of a number of other employers but excluding the defendant and to be found in a document known as the Actors, Actresses and Related Performers (Live Performances) Award 1975 at clause G 11.

This clause touches in some detail upon the subject of nudity and the circumstances in which it is permissible or otherwise for the workers in question to partially or wholly disrobe. More particularly the parties were in disagreement over that section of the clause which reads: "During the rehearsing of any production involving nudity or sex acts the set shall be closed to all persons other than those who have legitimate business on the set". The defendants have maintained for their part that the presence of cleaning staff with brooms is a legitimate part of the activities envisaged, it being necessary for the smooth operation of mobile motion picture machinery that the floors should be unnaturally clean. The plaintiff, while not denying that this is so have stated that this carries in its train some unfortunate consequences unacceptable to its members.

The plaintiff is apparently led to this view by the behaviour of a certain Hubert Blok, engaged by the defendants as a sweeper, but who does not, in conditions under which nudity takes place, apply himself as assiduously as he might to the duties for which he is engaged.

At this point the hitherto friendly discussions evidently broke up to the accompaniment of strong language, doubtless leaving the workers engaged by the defendant in some confusion as to the circumstances in which they might take off their clothes, or, as it might be, put them back on again. To resolve this embarrassing situation both parties cast about to discover the appropriate forum for the resolution of this thorny problem. It was at this juncture that the train of events began which have led to the present case before this Court.

Early in the proceedings it was pointed out to both parties that the Broadcasting Act seemed to have framed a procedure for just this sort of eventuality in s 98. However counsel for both parties were able to assist this Court by drawing attention to a number of considerations. In the first place the circumstances under which s 98 of the Act might operate depends upon the co-operation of the New Zealand Public Service Association, an incorporated Society with no interest whatsoever in the present proceedings, its members being public servants who do not, under any circumstances, take off their clothes in the course of their employment. In the second place, no such disputes authority as envisaged by this and previous legislation has ever been established nor is one likely to be because of other acrimonious disputes equally of little relevance to the present proceeding. In the third place, there is the question, thoughtfully drawn to my notice by counsel for the defendant, of the Wage Adjustment Regulations 1974 and subsequent Amendments.

The regulations in question were invoked in a spirit of optimism which rapidly gave way to a mood of dark despair. It appears on close perusal

that the Amendments have been prepared by a person or persons who did not know the intention of the framer of the original Regulations, or, if they did know, had quite forgotten by the time a very few of numerous amendments had been promulgated.

As far as I am able to ascertain, the operation of these Regulations take precedence over the operation of s 98 of the Broadcasting Act 1973. I also find that the plaintiff, being an industrial union of workers in terms of the Industrial Relations Act 1973, is governed by Regulations 3 to 15 – in which circumstance the appropriate form for the resolution of the dispute in question is the Industrial Commission.

On the other hand the defendant is governed by Regulations 32 to 45, in so far as it can be described as a "state related" body in terms of Amendment No 4, and, excluded as it is from the jurisdiction of the Industrial Commission by s 98 of its own Act, it may only resolve the dispute before the State Services Tribunal.

The parties are thus confronted with a situation in which the plaintiff may only state its case before one tribunal, and the defendant may only reply before another. An attempt to follow this course has led to considerable puzzlement on the part of both tribunals which are not provided, at law, with any opportunity to recognise one another.

The plaintiff seeks resolution of the deadlock. In reaching a decision this Court has taken the only step open to it. The case is adjourned sine die and in so doing may I express the pious hope that those workers who are accordingly caught with their pants down do not suffer unduly from the indignities consequent upon remaining in such a posture for an indefinite period.

Adjourned accordingly

[Reported by Agricola.]

LEGAL LITERATURE

Tax Havens Encyclopaedia (Spitz, Butterworths, London 1975. $75. Reviewed by Anthony Molloy.

Duty, tax, and surtax rates in many parts of the world reaching very high levels, there are many persons of wealth, and with high incomes, who are attracted to New Zealand not only for its more leisured way of life but also for its tax rates, which, if they peak early, at least peak at a level which, by the standards of many countries, is relatively modest. Consequently, it is becoming much more common for New Zealand counsel, solicitors, and accountants to be required to advise wealthy immigrants, with considerable overseas assets, on the deployment of those assets to the best fiscal advantage. Again, many international businesses having some connection with New Zealand require information and advice on the most appropriate international placement of assets, and arrangement of income, to produce the best tax advantages available for each given form of a proposed commercial arrangement.

For these, and, no doubt, for other, reasons, the use of tax havens in various parts of the world is becoming a science in which New Zealand practitioners are more and more required to be versed. Doctor Spitz, with his qualifications in French, South African, and English legal systems, is known already for his 1972 Butterworths' publication *International Tax Planning*, chapter 4 of which gave a brief introduction to the use of tax havens, to the matters to be considered when appraising a tax haven, and to a very brief indication of the virtues and vices of a number of specific territories.

The present publication is a loose leaf publication comprising a very brief introduction, which, more or less repeats, in a summary form, what Dr Spitz had written earlier; and two parts. The first of these parts is of limited use to the New Zealand practitioner, comprising essays on the law and practice in the United Kingdom, the United States, and France, so far as it affects the use of tax havens. However the second part of the book, which consists of detailed essays on a number of territories, will be very useful indeed for those who have to consider the merits and demerits of various havens; those who wish to find a haven which satisfies certain particular criteria, or who are obliged to communicate with counsel in another territory with a view to settling an international tax or commercial arrangement which satisfies, and takes the maximum advantage of, the laws of all the countries which possibly could affect the plan or any part of it.

Of particular interest to the New Zealand reader are the entries on Nauru and the New

Hebrides, two of the more 'local' havens. One most useful facet of the Nauru situation, for example, is the *Foreign Trusts Estates and Wills Act 1972* which modifies the general English law incorporated into Nauru, so far as trusts are concerned, by abolishing the rules against perpetuities, accumulations, and trusts of perpetual duration. So far as the New Hebrides are concerned, there is an article which is not mentioned in the text, but which provides valuable background to the legal system there. It is by Dr D P O'Connell, and appears in (1968-1969) 43 British Yearbook of International Law under the title *The Condominium of the New Hebrides*.

Each of the entries in the second part has been written after a similar plan, by an expert having local knowledge. The introductory parts of each entry generally deal with the type of government, the location of the haven, the type of legal system, the language, the political and economic stability of the area, the currency used, the attitude of the government to tax haven activities, questions of secrecy, machinery for conducting business, patent, trade mark and tax matters, information on immigration and ship registration, and information on government securities and investment, and on Euro Bonds. After this background material, the various legal entities available are considered, with the methods of formation, costs of local administration, and the like. The tax system, if there is one, is then dealt with, and, finally, the very important question of exchange control is discussed. In some of the entries there follow forms for use with the various entities and with the various government departments, together with a bibliography of further reading.

Some of the entries are a little on the scanty side. For example, the discussion on the Isle of Man gives less than a page to trusts, and the rule against perpetuities is not even mentioned.

While the more or less common form of the various territorial entries is a useful tool of comparison, an index of all the various headings would be a distinct improvement to the encyclopaedia. It would enable one, when searching for a tax haven with, for example, a particular attitude to the rule against perpetuities, to find an appropriate territory or territories at glance, instead of having to read through each entry in order to discover the situation in the country covered by it.

The territories covered in the second part of the encyclopaedia are the Bahamas, Bermuda, the Cayman Islands, Gibraltar, Hong Kong, the Isle of Man, Jersey, Liberia, Luxembourg, Nauru, the Netherlands Antilles, the New Hebrides, and Panama. Articles on Guernesy, Liechtenstein, and Switzerland are in preparation and, presumably, are included in the basic price.

The encyclopaedia is to be updated on an annual subscription basis.

Together with Grundy's *Tax Havens* (1972), and the British Board of Inland Revenue's essential *Income Taxes Outside the United Kingdom*, Spitz, *Tax Havens Encyclopaedia*, is an essential tool of the advisor on international tax matters. Larger firms, in particular, would find it a very good investment.

ACC Report (23 pp; January, 1976). Reviewed by Jeremy Pope.

The first issue of ACC Report, published by the Accident Compensation Commission and to appear five times a year, has recently been distributed. It is available free of charge to those interested in the activities of the Commission, and any practitioner who has not received it could do worse than to send his name and address in to the editor, Accident Compensation Commission, Private Bag, Wellington. It will appeal, too, to overseas readers.

The maiden issue contains news of the Commission itself, but more importantly it sets out review decisions, the appeal authority decision concerning the tangihanga claim for funeral expenses, and synopses of rulings, concerning private hospital fees, a farmer's dentures, and the standard of proof under the Act where a nurse had contracted glandular fever.

The policy behind the Act and its administration is also touched on, with a note on a family whose breadwinner had been killed in New Zealand in an accident involving an American-made aircraft. If the next-of-kin were awarded damages in their US suit against the plane's manufacturers, would the ACC require a refund of payments it had made under the Act? No, replied the Commission, but noted that these payments might well mitigate damages when they are computed.

ACC Report bridges a gap. Obviously, as well as hopefully, there will not be sufficient appeal hearings to justify a separate series of reports, and so a handful of significant decisions have been looking for a forum for publication. The next step, it would seem, is the provision of a permanent binder.

The healing medicine – "I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs." Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 711.

EXERCISING RIGHTS

Dr RICHARD LAWSON *continues his Occasional Notes from Britain*

When I paid the gas bill the other day, I fell to examining the small print under the details of how to pay. There was a reference to the Gas Act, which turned out not to be a Gas Bill – which has been duly paid. Instead, it was a reference to a splendid piece of legislation, enacted in 1972, giving consumers the right to a copy of gas tests for their own area. I have no idea what this test is, nor am I, now I have my statutory copy, any the wiser. But at least I have exercised a splendid democratic right.

Doing such things has become a principal joy of mine. I had a colleague in Auckland, now departed (horizontally, not vertically) who discovered that, read literally, the Egg Marketing Regulations required his (indeed everybody's) 'fridge to be licensed before he could store more than six eggs within. His correspondence with the appropriate officer was a joy to read. It was inconclusive, but at least he had found a little piece of unsuspected law which occupied his leisure hours.

I have had a slavish admiration for such people ever since an event during my days in Canberra. There was no gaol in the city, so all undesirables were carted over the border to the wild, uncharted wastes of Goulburn, NSW. This had been going on since the foundation of Canberra in 1927. Then someone discovered that convicts could only be dragged over the state border on the order of the Administrator of the Commonwealth, and no such official had ever been appointed, never mind made an order. That Wesleyan hymn about "the prisoner leaps to lose his chains" never had so vivid a demonstration. Writs of habeas corpus darkened the skies and those lately liberated were banging in writs for false imprisonment like lightning. The inevitable happened, and validating legislation went through.

Something like this happened in South Australia when it was discovered that no divorce granted since 1967 had been validly given. Again, the Legislature quickly repaired the damage. This is just the kind of loophole I would give my right arm to discover. Instead, I am presently reduced to exercising statutory rights to gas tests, local planning documents and bylaws.

Thwarted thus, I have lately decided to arrange a scenario whereunder I illustrate certain of my rights under the Sale of Goods Act, if only to show that I suspect the law in theory differs from its practice.

I would, for example, love to be a seller in possession under s 27 (2) and thus be able to pass a valid title to a bona fide second buyer. But what would happen when the *first* buyer turns up for his goods? I would stand there squeaking about s 27 (2) and he would ram the Sale of Goods Act down my throat and then rush off to thump the bona fide purchaser for value. I have, incidentally, got a photo of a seller in possession, and quite normal he looks.

Then there's that marvellous right given by the Act to unpaid sellers when the buyer has become insolvent. He is allowed to stop the goods in transitu, while they are being carried, that is, to the buyer. There I would go, leaping up and down in front of a British Road Services lorry, yelling: "Stop, I'm exercising my right of stoppage in transitu. You see, the buyer has become insolvent, which means that he has ceased to pay his bills as they fall due in the ordinary course of business." Out would come a burly driver: "Eff orf", he would say, and that would be that. But at least I would have tried.

Yet there *is* something waiting for me. Quite soon, the register of prospective creditor grantors will open for public inspection under the Consumer Credit Act. I am going to be the first person in the whole universe ever to demand his right to inspect. I shall be outside the Office of Fair Trading all night with my flask and camp bed. London buskers will be entertaining me. My wife will be there to take my picture as I make the historic First Inspection. It will be the apothesis of my academic career.

Unstable argument – The Court of Appeal heard an appeal against conviction on 2 September, which included an application for leave to call further evidence. In the course of his argument, counsel for the Crown was suggesting that the appellant's mother was not mistaken in the evidence she gave before the jury, and that the application to call further evidence (to counteract what she had said) was simply a case of trying to shut the stable door after the horse had bolted. Countered Richmond J, "Isn't it rather a case where *'la mere'* has bolted?"